Section 12 — Cruel and Unusual Treatment or Punishment

Section 12 of the *Canadian Charter of Rights and Freedoms* states: "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."[1]

The purpose of section 12 has been defined by the Supreme Court of Canada (SCC) as: "prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals."[2] It does not protect other entities such as corporations.[3]

For the section to be engaged, the state must be responsible for the *punishment* or *treatment*.[4]

For section 12 purposes, punishment has been defined simply as a penalty imposed by the state (most often in the sentencing context).

While treatment has not been clearly defined in law, the SCC has opined that it includes conduct by the state that is not of a penal or quasi-penal nature.[5] For instance, in Ontario, the unnecessary use of a taser after arrest was held to be cruel and unusual treatment.[6]

Crucially, the words "cruel and unusual" do not mean that the treatment or punishment must be both cruel *and* unusual. Rather, these words have been interpreted broadly to cover any treatment or punishment that "outrages the standards of decency."[7]

The Two Prongs of Section 12

Section 12 has been interpreted as containing two prongs. The first prong protects against punishment that is so excessive that it offends human dignity. The second protects against punishment that, by its very nature, is incompatible with human dignity.[8]

The first prong is made out when a punishment is *grossly disproportionate*. This occurs when the method of punishment is acceptable (i.e. prison time) but its effects are more than "merely excessive."[9] In undertaking an analysis under this prong, a court will consider the specific contexts of a case and the individual involved to determine whether the sentence imposed was appropriate.[10] However, the Supreme Court has made an exception to this approach when dealing with mandatory minimum sentences: in those instances, a court may consider whether a minimum sentence could *hypothetically* be grossly disproportionate.[11]

The second prong of the right is satisfied where the method or mode of punishment itself is "degrading and dehumanizing."[12] These punishments are always grossly disproportionate.[13] Examples of such punishments include corporal punishment, lobotomy, castration, and torture.[14] More recently, a provision allowing for the imposition

of consecutive 25-year periods of parole ineligibility was found to violate section 12 under this prong.[15] When a punishment falls into this category it can never be imposed or even remain as a possibility.[16]

Section 12 Rights Are Not Absolute

As with all rights under the *Charter*, a person's section 12 rights are subject to limitation under section 1.[17] However, the Supreme Court has opined that it is unlikely that any punishment that is cruel and unusual by nature (under the second prong described above) could be justified under section 1.[18]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12 [*Charter*].

[2] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32, para 51 [*Quebec*].

[3] *Ibid*.

[4] *Rodriguez v British Columbia (Attorney General)*, [1993] SCJ No 94, 3 SCR 519, at para 177.

[5] *Ibid* at para 182.

[6] *R v Walcott*, [2008] OJ No 1050, 57 CR (6th) 223.

[7] *R v Smith*, [1987] SCJ No 36, 1 SCR 1045 at paras 52-53.

[8] *R v Bissonnette*, 2022 SCC 23 at para 60 [*Bissonnette*].

[9] *Ibid* at para 61.

[10] *Ibid* at para 62.

[11] *R v Nur*, 2015 SCC 15 at para 46.

[12] *Quebec*, *supra* note 2.

[13] *Bissonnette*, *supra* note 8 at para 64.

[14] *Ibid* at para 66.

[15] *Ibid*.

[16] *Ibid* at para 68.

[17] *Charter*, *supra* note 1, s 1.

[18] *Bissonnette*, *supra* note 8 at para 121.

Section 28: Gender Equality

What is Section 28?

Section 28 of the *Charter of Rights and Freedoms* is a special provision of the *Charter* that prioritizes gender equality. The exact words of section 28 are: "Notwithstanding anything else in this *Charter*, the rights and freedoms in it are guaranteed equally to male and female persons."[1]

While section 28 doesn't create a distinct, standalone right to gender equality, it guarantees that all of the rights in the *Charter* are granted equally to men and women. It can be cited along with section 15 (the general equality rights section of the *Charter*) in cases where gender discrimination is at play.[2]

Section 28 and Section 1

Section 28 interacts with section 1 of the *Charter* in a unique way. Section 1 outlines the idea that our rights and freedoms can be justifiably infringed by the state.[3] The *Oakes* test, devised by the Supreme Court in *R v Oakes*,[4] set out a general framework for assessing whether a law or government action that violates a *Charter* right can be justified under section 1.

According to Beverley Baines, the activists who argued (successfully) for the inclusion of section 28 in the *Charter* in the early 80s did so "in order to exempt the right to sex equality from the reach of the section 1 limitations provision."[5] The aim, in other words, was to ensure that gender equality rights could not be justifiably infringed the way that other *Charter* rights could.

However, in practice, section 28 has not protected gender equality rights from infringement but has merely been factored into the courts' section 1 analyses. For example, while the Supreme Court has held that criminal offences that only apply to one sex – like the criminalization "a female person" who commits infanticide[6] — can be justified under section 1, section 28 means that someone accused of such an offence cannot be denied the *Charter* rights and freedoms that are guaranteed to all persons.

On the other hand, the sex of people other than the accused can be a valid justification for infringing *Charter* rights. This was the case in *R v Osolin*, which concerned fair trial rights in the context of a sexual assault trial. There, Justice Cory wrote that "[t]he provisions of section 15 and section 28 of the *Charter* guaranteeing equality to men and women … should be taken into account in determining the reasonable limits that should be placed on the

cross-examination of a complainant" in a sexual assault trial.[7] Recognizing that sexual assault is a predominantly gender-based crime that disproportionately victimizes women, Justice Cory held that "[c]ross-examination … which relies upon groundless rape myths and fantasized stereotypes is improper and should not be permitted,"[8] regardless of the impact that this has on an accused's right to a fair trial.

Section 28 and Section 33

Section 28 is sometimes regarded as the "notwithstanding" clause to the section 33 "notwithstanding clause."[9] Section 33(1) reads as follows: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*."[10]

Provincial and federal governments can use this "notwithstanding clause" to protect a law from *Charter* challenges under section 2 and sections 7 to 15. Notably, section 28 is not mentioned in section 33, suggesting that it is immune to the section 33 notwithstanding clause. Thus, while the notwithstanding clause can be used to override section 15 equality rights, it can't override the requirement under section 28 that the rights and freedoms found in the *Charter* must be guaranteed equally to men and women.

This situation has recently given rise to controversy. In 2019, the Quebec government used the section 33 notwithstanding clause to pass Bill 21, a law that banned certain public sector workers from wearing religious symbols at work. To the extent that Bill 21 disparately impacts Muslim women — if they wish to wear a hijab at work, for example — some scholars have argued that the use of section 33 doesn't shield it from invalidation by the courts.[11] Instead, these scholars claim that section 28 is a shield against section 33.[12] They assert that Bill 21 results in the unequal protection of *Charter* rights for men and women in Quebec, which would be a violation of section 28. Since section 28 can't be overridden by section 33, Bill 21 may accordingly be vulnerable to judicial invalidation.[13]

[1] *Canadian Charter of Rights and Freedoms*, s 28, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] *R v Park*, [1995] 2 SCR 836, 99 CCC (3d) 1.

[3] *Charter, supra* note 1, s 1.

[4] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[5] Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17 Canadian J of Women & L 45 at 55.

[6] *Criminal Code*, RSC 1985, c C-46, s 233.

[7] *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478.

[8] *Ibid*.

[9] Kerri Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum Const 19-22 [Froc].

[10] *Charter, supra* note 1, s 33(1).

[11] See Froc, *supra* note 9.

[12] *Ibid*.

[13] *Ibid*.

Emergencies Act

What is the *Emergencies Act*?

The *Emergencies Act* is a piece of legislation that gives Canada's federal government power to take "special temporary measures to ensure safety and security during national emergencies."[1] The key requirement to invoke this *Act* is a national emergency — the "special temporary measures"[2] can only be taken when there is a transient emergency that "seriously endangers the health, lives or safety of Canadians" or seriously threatens the government's "ability … to preserve the sovereignty" of Canada.[3]

The History of the *Act*

The *Emergencies Act* replaced its predecessor, the *War Measures Act*, in 1988. The *War Measures Act* was created during World War I to give Parliament broad powers to ensure national security in war times.[4] It allowed the government to severely restrict civil liberties, including by censoring communications, and by arresting, detaining, and deporting people without trial.[5] During the Second World War, for example, over 20,000 Japanese Canadians were interned and stripped of their property under the authority of the *War Measures Act* (many of these people were also deported).[6]

The *War Measures Act* was then invoked again during the October Crisis, when the Front de Libération du Québec (FLQ) kidnapped the British trade commissioner James Cross and Quebec's labour minister, Pierre Laporte.[7] Invoking the *Act* allowed the government to criminalize membership in the FLQ, and allowed police to detain people without charge.[8]

Although many Canadians agreed with this invocation of the *Act*, some believed the suspension of civil liberties was excessive.[9] As a result of these concerns, the *War Measures Act* was repealed in 1988 and the *Emergencies Act* was passed as a replacement.[10] Crucially, under the *Emergencies Act*, the Cabinet could no longer make decisions on its own, but would need to have its orders reviewed by Parliament.[11] Furthermore, government actions taken under the *Act* must still comply with the *Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.[12]

What Triggers the *Emergencies Act*?

According to the *Emergencies Act,* there are four types of emergency that can constitute a "national emergency" sufficient to invoke the *Act*.[13] They are:

1. A public welfare emergency
2. A public order emergency
3. An international emergency
4. A war emergency

Under the *Act*, a "national emergency" is defined as follows:

For the purposes of this Act, a national emergency is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security, and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.[14]

Section 3 of the *Emergencies Act* makes it clear that a national emergency can only be declared when regular, existing laws are insufficient for addressing the crisis at hand.[15]

Types of Emergency

Type 1: Public Welfare Emergencies

Public welfare emergencies can be caused by natural disasters, such as floods, drought, and earthquakes.[16] They can also be caused by diseases — whether in humans, animals, or plants[17] — and by accidents or pollution.[18] To constitute such an emergency, the situation must pose a danger to life or property, or cause "social disruption or a breakdown in the flow of essential goods, services or resources."[19]

A public welfare emergency declaration ends after 90 days.[20] However, the declaration can be revoked before the end of this time limit, or it can be extended if the government "believes, on reasonable grounds, that the emergency will continue to exist" beyond the 90-

day limit.[21] These rules on revocation and extension also apply to the other types of emergency listed under the *Act*.

During a public welfare emergency, the government can make orders and regulations related to travel, evacuation, removal of personal property, the use of property, distribution of goods and essential services, and more.[22]

Type 2: Public Order Emergencies

A public order emergency is defined as "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency."[23] The *Emergencies Act* points to the definition of "threats to the security of Canada" found in the *Canadian Security Intelligence Service Act*. In this *Act*, these threats include espionage; activities with foreign influence that involve threats to people; activities involving the threat or use of violence to achieve a political, religious, or ideological goal within Canada or a foreign state; and illegal activity intended to overthrow Canada's government.[24]

A declaration of public order emergency automatically ends after 30 days unless it is revoked early or extended (see above).[25] During a public order emergency, the government can regulate or prohibit 1) public assemblies that can be expected to "breach the peace," 2) travel within any specified area, and 3) the use of specified property.[26] It can also assume control of public utilities and services, and can impose fines or prison sentences for breaching any order or regulation made under the powers granted by the *Act*.[27]

Type 3: International Emergencies

The *Emergencies Act* defines an "international emergency" as "an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency."[28]

By default, a declaration of an international emergency expires after 60 days (unless revoked early or extended).[29] An international emergency gives the government broad authority to make orders and regulations. These can involve the regulation of industries, control of property and services, authorization of searches and seizures, and the direction of people to provide essential services.[30] The government can also order the deportation of people who are not Canadian citizens, permanent residents, or protected persons under subsection 95(2) of the *Immigration and Refugee Protection Act*.[31]

Type 4: War Emergencies

A war emergency, finally, is defined by the *Emergencies Act* as a situation in which a "war or armed conflict, real or imminent, involving Canada or any of its allies … is so serious as to be a national emergency."[32] A war emergency lasts the longest out of the four types of national emergency, ending in 120 days (although the declaration can once again be revoked early or extended).[33] A war emergency gives the government power to make any

orders and regulations that are necessary for dealing with the emergency.[34] An exception is that the government cannot make an order conscripting people to serve in the Canadian Armed Forces.[35]

[1] *Emergencies Act*, RSC 1985, c 22, (4th Supp) [*Emergencies Act*].

[2] *Ibid* at s 6.

[3] *Ibid* at s 3.

[4] Denis Smith, *War Measures Act* (July 25, 2013), online: *Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/war-measures-act>.

[5] *Ibid*.

[6] *Ibid*.

[7] *Ibid*.

[8] Andrew McIntosh & Celine Cooper, *October Crisis* (August 13, 2013), online: *Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/october-crisis>.

[9] *Ibid.*

[10] Denis Smith, Richard Foot, Eli Yarhi & Andrew McIntosh, *Emergencies Act* (March 18, 2020), online: *Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/emergencies-act>.

[11] *Ibid.*

[12] *Ibid.*

[13] *Emergencies Act*, *supra* note 1.

[14] *Ibid*, s 3.

[15] *Ibid*, s 3.

[16] *Ibid*, s 5(a).

[17] *Ibid*, s 5(b).

[18] *Ibid*, s 5(c).

[19] *Ibid*, s 5.

[20] *Ibid*, s 7(2).

[21] *Ibid*, ss 10-12.

[22] *Ibid*, s 8(1).

[23] *Ibid*, s 16.

[24] *Canadian Security Intelligence Service Act*, RSC 1985 c C-23, s 2.

[25] *Emergencies Act*, *supra* note 1, s 18(2).

[26] *Ibid*, s 19(1)(a).

[27] *Ibid*, ss 19(1)(b)-(e).

[28] *Ibid*, s 27.

[29] *Ibid*, s 29(2).

[30] *Ibid*, ss 30(1)(a), 30(1)(b), 30(1)(e).

[31] *Ibid*, ss 30(1)(d), 30(1)(g), 30(1)(h).

[32] *Ibid*, s 37.

[33] *Ibid*, s 39(2).

[34] *Ibid*, s 40(1).

[35] *Ibid*, s 40(2).

Section 9 – Detention or Imprisonment

Section 9 of the *Canadian Charter of Rights and Freedoms* (*Charter*) states that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[1] According to the Supreme Court of Canada, the purpose of this provision is to "protect individual liberty against unlawful state interference."[2] To assess whether the provision has been violated, a court will ask two questions:

1. Was the individual detained or imprisoned by the state?

2. Was the detention or imprisonment arbitrary?[3]

Question 1: Was the Individual Detained or Imprisoned by the State?

Detention occurs when a person "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[4]

There are two types of detention: *physical* and *psychological*.

Physical detention or imprisonment is typically clear and includes things like being handcuffed, placed in a police car, or put in a prison cell.

Psychological detention occurs in two scenarios:

1. "[W]here [a person] is legally required to comply with a direction or demand."

2. "[W]here there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the [individual's] position would feel so obligated."[5] In other words, a person feels like they have no choice even though, legally, they do. Courts look at many factors to decide if someone was psychologically detained in this way, including the circumstances leading up to the potential detention, the nature of police conduct, and the characteristics and circumstances of the individual.[6]

An example of the first scenario of psychological detention would be when a person is pulled over by the police while driving. In *R v Grant*, the second scenario occurred when three police officers cornered and questioned an individual walking down a street.[7]

Question 2: Was the Detention or Imprisonment Arbitrary?

If a court finds that a person was detained or imprisoned, the next question it will ask is whether the detention or imprisonment was arbitrary. Arbitrariness will *not* exist if three criteria are satisfied:

1. The detention must be authorized by law.

2. The authorizing law must not be arbitrary.

3. The manner in which the detention is carried out must be reasonable.[8]

If the detention or imprisonment fails to satisfy any one of these criteria, then the court will find the detention to be arbitrary.

Detention Triggers Section 10

Once a person is subject to an arrest or detention under the above test, that person's section 10 rights under the *Charter* become engaged. These rights include (among others): the right to reasons for detention or imprisonment, and the right to counsel.[9]

Section 9 Rights Are Limited

As with all rights under the *Charter*, a person's section 9 rights are subject to limitation under section 1. Section 1 of the *Charter* states that the government can legally impose "reasonable limits" on an individual's *Charter* rights, provided that those limits are "prescribed by law" and can be "demonstrably justified in a free and democratic society."[10]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] *R v Grant*, 2009 SCC 32 at para 54 [*Grant*].

[3] *R v Hufsky*, [1988] SCJ No 30, 1 SCR 621 at paras 12-13.

[4] *R v Therens*, [1985] SCJ No 30, 1 SCR 613 at para 53.

[5] *Grant, supra* note 2 at para 30.

[6] *Ibid* at para 44.

[7] *Ibid*.

[8] *R v Le*, 2019 SCC 34 at para 124.

[9] *Charter*, *supra* note 1 s 10.

[10] *Ibid*, s 1.

Remedies

What is a Remedy?

A remedy, in the constitutional context, is an action that a court can order to rectify a constitutional violation. As former Chief Justice McLachlin put it, "remedies make things better. They heal wounds. They put things right. Remedies allow us to mend our wounds as we carry on — as individuals and as a society."[1]

There are three sections of the *Constitution Act, 1982* that empower courts to grant remedies for constitutional violations:

1. Section 24(1) empowers courts to grant remedies for government action that violates the *Canadian Charter of Rights and Freedoms* (sections 1-34 of the *Constitution Act, 1982*).[2]

2. Section 24(2) empowers courts to exclude evidence from legal proceedings if it was obtained by violating the *Charter*.

3. Section 52(1) specifically addresses laws, rather than government actions, that violate *any* section of the Constitution (not just the *Charter*). Under this section, courts can declare laws that violate the Constitution invalid, or "of no force or effect."[3]

Although these three sections generally address different situations, they can still work together to remedy a constitutional problem. For example, a court may issue a suspended declaration of invalidity under section 52(1) *and* award a 24(1) remedy to the individual whose rights were infringed.[4] In this case, the individual who brought the action challenging the law could receive an exemption from the law until the declaration of invalidity comes into effect.

Section 24(1)

Section 24(1) of the Constitution states that, "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[5] Thus, section 24(1) remedies are specifically for cases where government action has infringed upon someone's *Charter* rights.

Various civil and criminal remedies are available under section 24(1). A common type of remedy in civil proceedings is damages, which compensates a claimant for any personal loss they suffered as a result of a *Charter* violation. In criminal proceedings, potential remedies include disclosure orders, calling additional witnesses, and declarations of mistrial.

Anyone can apply for a remedy under section 24(1) if their *Charter* rights have been violated, or if it is likely that their *Charter* rights will be violated in the future.[6] To receive a section 24(1) remedy, the claimant will need to show, on a balance of probabilities, that their *Charter* rights have been, or will be, violated.[7]

Section 24(2)

Section 24(2) of the *Constitution Act, 1982* states that, "[w]here, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[8]

This section aims to remedy situations where law enforcement has obtained evidence in a way that unjustifiably infringes an accused person's *Charter* rights. However, a section 24(2) remedy will not be applied automatically. Rather, the accused must submit an application to the court and must show, on a balance of probabilities, that one of their

Charter rights was violated.

If a court concludes that evidence *was* obtained in a way that violated the *Charter*, the final test for determining whether the evidence should be excluded under section 24(2) involves asking whether the admission of the evidence would "bring the administration of justice into disrepute."[10] In *R v Grant*, three factors were considered to make this determination:

1. The seriousness of the *Charter*-infringing state conduct.

2. The impact of the breach on the *Charter*-protected interests of the accused.

3. Society's interest in the adjudication of the case on its merits.[11]

Section 52(1)

Section 52(1) of the *Constitution Act, 1982* is also known as the "supremacy clause." It states that, "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This means that all legislation must be consistent with the Constitution — not just the *Charter* or the *Constitution Act, 1982*, which are only parts of Canada's Constitution. If a law is found to be inconsistent with any section of the Constitution, a court can remedy the inconsistency by striking down the law (as in *Big M Drug Mart*, for example[12]). Alternatively, a court can respond to the inconsistency by:

Reading Down: When a law is ambiguous enough to allow for constitutional and unconstitutional interpretations, courts can stipulate that the constitutionally permissible interpretation should be adopted.[13] This allows the law to remain valid while ensuring that it isn't applied in a way that violates the Constitution.

Reading In: This involves adding new words to the law to make it compliant with the Constitution. This is typically used where a law has an unjustifiably discriminatory or exclusionary effect. For example, in *Schachter v Canada*, the law was underinclusive. Mothers and adoptive parents could take parental leave from work, but biological fathers were unable to take paternity leave. Although the Supreme Court of Canada ultimately chose a different remedy, it considered "reading in" as a possible remedy, which would have meant recognizing the right of biological fathers to obtain the same benefits as adoptive parents and biological mothers.[14]

Severance: This occurs when a court finds only certain words of a law to be of no force of effect. In such cases, the court "severs" the unconstitutional words and removes them from the law.

Suspending a Section 52(1) Remedy

Typically, a section 52(1) remedy applies immediately because there is public interest in protecting *Charter* rights and constitutional values. However, a court can delay declaring a law unconstitutional if there are compelling reasons for doing so. For example, a court may

suspend a declaration of invalidity if an immediate declaration would pose a danger to public safety,[15] or deprive people of the benefits intended by the law.[16]

[1] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Thomson Reuters, 2013) (loose-leaf updated 2021, release 2), ch 3 at 3:1.

[2] *R v 974649 Ontario Inc*, 2001 SCC 81.

[3] *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter*].

[4] *Ontario (AG) v G*, 2020 SCC 38 at paras 145-152.

[5] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(1) (*Constitution Act, 1982*).

[6] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 51, 177 DLR (4th) 124.

[7] *R v Collins*, [1987] 1 SCR 265 at page 277, 38 DLR (4th) 508 [*Collins*].

[8] *Constitution Act, 1982*, *supra* note 5, s 24(2).

[9] *Collins*, *supra* note 8.

[10] *R v Grant*, 2009 SCC 32.

[11] *Ibid* at para 71.

[12] *R v Big M Drug Mart*, [1985] 1 SCR 295 at 355-356, 18 DLR (4th) 321.

[13] *R v Smith*, 2015 SCC 34 at para 31.

[14] *Schachter*, *supra* note 3.

[15] *R v Swain*, [1991] 1 SCR 933, 125 NR 1.

[16] *Schachter*, *supra* note 3.

Aboriginal Title

The Court has described Aboriginal title as a right to occupy and possess land.[1] However, the Crown retains underlying title to the land[2] and Aboriginal title land can only be sold to the Crown.[3] According to the *Royal Proclamation of 1763*, these restrictions on title were created so that the Crown could act as a as an interlocutor between Indigenous groups and settlers and so that the Indigenous groups could not be exploited by settlers.[4]

The definition of Aboriginal title has evolved since its recognition. In the case of *Calder v British Columbia* (1973), the Supreme Court described the nature of Aboriginal title as being based on the historic occupation and possession of the land by Indigenous people.[5] After Aboriginal and treaty rights were enshrined in the *Constitution*, the Supreme Court further elaborated on the features of Aboriginal title in the case *Delgamuukw v British Columbia* (1997). Chief Justice Lamer, writing for the majority of the Justices, described Aboriginal title as having the following features:

- Aboriginal title land is held communally;[6] and
- the land is subject to a limit. Aboriginal title land cannot be used in a manner that is irreconcilable with the nature of the Aboriginal group's attachment to the land (ie one cannot strip mine in a hunting area),[7] but can otherwise use the land for whatever purpose the group chooses.[8]

In the *Delgamuukw* case (1997), the Supreme Court also articulated the test for establishing Aboriginal title. To prove that an Aboriginal group has a title claim to land, the group must show that occupation of that land was exclusive at the time of sovereignty (1867, when Canada became a country).[9] Exclusive occupation does not mean that land cannot have been shared. Indigenous groups can make joint claims if they occupied the land together and excluded all others. Or, if a group historically permitted another to share their resources, this could be evidence that the group considered itself to have the right to decide who could come on to the land.[10]

The first and only successful Aboriginal title claim was made by the Tsilhqot'in First Nation, a group of six semi-nomadic bands that claimed title over 4400 square kilometers of land to the south-west of Williams Lake in British Columbia (the area over which Aboriginal title was successfully made out is about 1,700 square kilometres). The Supreme Court clarified in this case in 2014 what factors need to be in place to establish title.

The Supreme Court decided that traveling and living in multiple locations at different points in the year could satisfy the "exclusive occupation" requirement for making an Aboriginal title claim. To found a claim, the Court ruled there must be an historical intention to occupy the land, communicated to other groups through action or law/custom,[11] combined with actual regular use.[12] The Court said that In determining whether occupation is sufficiently intense, courts should take into account the uses to which the relevant land can be put, as well as the technological capacity and mode of life of the group historically.[13] In this case,

the land was quite barren and could not have easily supported a larger population.

Aboriginal title is the most well-developed right recognized in section 35 as an Aboriginal right.

[1] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 ; *Guerin v The Queen*, [1984] 2 SCR 335 at 378, 382, 13 DLR (4th) 321 . See also *St Catharine's Milling and Lumber Co v R (1887), [1887] 13 SCR 577, [1888]* 14 AC 46 (PC) .

[2] *Guerin*, *supra* note 1 at 379; see also *St Catharine's*, *supra* note 1.

[3] *Guerin*, *supra* note 1 at 365.

[4] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No I; Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law Inc, 2017) at 475.

The Royal Proclamation is a document issued by King George III after the Seven Years War to proclaim ownership over the territory in North America. The Royal Proclamation also includes statements governing the relationship between settlers and Indigenous peoples.

[5] *Calder*, *supra* note 1 at 376; *Guerin, supra* note 1 at 399; *R v Van der Peet,* [1996] 2 SCR 507 at 538, 137 DLR (4th) 289 at 540, 577.

[6] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 180, 153 DLR (4th) 193 . at para 115.

[7] *Delgamuukw*, *supra* note 6 at 124.

[8] *Ibid* at para 117.

[9] *Ibid* at para 142.

[10] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 48, [2014] 2 SCR 257 .

[11] *Ibid* at para 38.

[12] *Ibid* at para 42.

[13] *Ibid* at para 33-44.

Section 35 Aboriginal and Treaty Rights

Section 35 of the *Constitution Act, 1982* steers the relationship between the Crown and the "Aboriginal peoples of Canada"[1] in Canadian constitutional law. It is about "[A]boriginal people and their rights in relation to Canadian society as a whole,"[2] and about the "bridging of [A]boriginal and non-[A]boriginal cultures."[3]

Section 35(1) reads:

> *The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.[4]*

The Aboriginal and treaty rights protected by this provision fall into four distinct categories:

- Aboriginal rights, which are the inherent rights belonging to the Aboriginal peoples of Canada by virtue of their historic occupation and use of the land we now call Canada before European contact.[5]
- Aboriginal title, which is an Aboriginal right to land that derives from an Aboriginal people's historic occupation and control of a particular territory.[6]
- Métis rights, which are Aboriginal rights that address the unique history of the Métis peoples as first peoples of Canada.[7]
- Treaty rights, which are rights that arise from the solemn promises between the Crown and Aboriginal peoples of Canada.[8]

What is the Purpose of Section 35?

Section 35(1) has two purposes: "[T]o recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[9] These purposes reflect an underlying tension in Indigenous-Crown relations, a tension that stems from the recognition of two seemingly incompatible truths: (1) the Crown imposed its sovereignty and continues to assert its sovereignty over what is now Canada; and (2) the lands over which sovereignty was asserted were already occupied and remain occupied by Indigenous societies with their own laws, cultures, and traditions.[10]

In this context, the term "reconcile" has two meanings: (1) to make consistent these two seemingly incompatible legal realities; and (2) to acknowledge and address the historic impact of the imposition of Crown sovereignty while also looking "forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, mutually respectful long-term

relationship."[11]

According to the Supreme Court of Canada, section 35 must be interpreted "purposively," which means that the courts must take "a generous, liberal interpretation" [12] of the words in section 35 and "other statutory and constitutional provisions protecting the interests of [A]boriginal peoples."[13] Further, any "doubt or ambiguity [in these provisions] must be resolved in favour of [A]boriginal peoples,"[14] and Indigenous legal traditions must inform our understanding of the provisions and the rights they protect. As the Supreme Court put it in *Van der Peet*, "a morally and politically defensible conception of [A]boriginal rights will incorporate both [European and Indigenous] legal perspectives."[15]

Who Are the "Aboriginal Peoples of Canada?"

In the 2021 case of *R v Desautel*, the Supreme Court stated that the Aboriginal peoples of Canada "are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact."[16] This includes the Indian, Inuit and Métis peoples,[17] (as per section 35(2) of the *Constitution Act, 1982*), and may include Indigenous groups that are neither citizens nor residents of Canada.[18]

What Does "Existing" Mean?

The word "existing" means that section 35 only applies to Aboriginal and treaty rights that were not extinguished when the *Constitution Act, 1982* came into effect.[19] Before section 35 recognized and affirmed Aboriginal and treaty rights, those rights could have been "extinguished" by either: (1) "surrender to the Crown"[20]; or (2) "a clear and plain intention" by the Crown to extinguish that right[21] through legislation or treaty. However, mere regulation of an Aboriginal right is *not* sufficient to extinguish that right.[22] Now that section 35 provides constitutional protection to Aboriginal and treaty rights, the Crown may no longer unilaterally extinguish them.[23] But if a right was previously extinguished, neither section 35 nor any other provision of the *Constitution Act, 1982* can revive it.[24]

Crucially, the word "existing" does not freeze Aboriginal rights as they existed at the time the *Constitution Act, 1982* entered into force. Rather, it recognizes that these rights may evolve over time and so should be interpreted flexibly and "in a contemporary form."[25]

What Does "Recognized and Affirmed" Mean?

Section 35 does not absolutely "guarantee" Aboriginal and treaty rights, but rather recognizes and affirms them. While section 35 affords constitutional protection to Aboriginal and treaty rights, the Crown may be justified in interfering with these rights.[26] However, justifying an infringement of an Aboriginal or treaty right is a high threshold to meet, since protecting section 35 rights "reflects an important underlying constitutional value."[27] To determine if an infringement of a section 35 right is legally justifiable, the courts apply a test that was developed by the Supreme Court in *R v Sparrow*.

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).

[2] *R v Van der Peet*, 1996 CanLII 216 (SCC) at para 21 .

[3] *Ibid* at para 42.

[4] *Constitution Act, 1982*, *supra* note 1.

[5] *Van der Peet*, supra note 2 at paras 112-14.

[6] *Ibid* at paras 115 and 119-20. See also *R v Adams*, 1996 CanLII 169 (SCC) at paras 26 and 64-65. The Supreme Court of Canada made its first declaration of Aboriginal title in *Tsilhqot-in Nation v British Columbia*, 2014 SCC 44 (CanLII).

[7] *Van der Peet*, *supra* note 2 at para 67; and *R v Powley*, 2003 SCC 43 (CanLII) at para 17.

[8] *Van der Peet*, *supra* note 2 at para 120; and *R v Badger*, 1996 CanLII 236 (SCC) at para 41.

[9] *R v Desautel*, 2021 SCC 17 (CanLII) at para 22 .

[10] *Ibid* at paras 22 and 26. See also Ryan Beaton, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Constitutional Forum 25, online: *CanLIIDocs* <https://canlii.ca/t/t017>.

[11] See *Desautel*, *supra* note 9 at para 30 (citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII) at para 10, internal quotations removed). See also Elizabeth England, "*R v Desautel*: Who are the 'Aboriginal Peoples of Canada'?" (23 June 2021), online: *Centre for Constitutional Studies* <https://www.constitutionalstudies.ca/2021/06/r-v-desautel-who-are-the-aboriginal-peoples-of-canada/>.

[12] *R v Sparrow*, 1990 CanLII 104 (SCC) at 1106 . See also *Van der Peet*, *supra* note 2 at paras 23-24.

[13] *Van der Peet*, *supra* note 2 at para 24.

[14] *Ibid* at para 25. But cf *R v Marshall*, 1999 CanLII 665 (SCC) at para 14 (in the context of treaty interpretation, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse") .

[15] *Van der Peet*, *supra* note 2 at para 42. But see also para 49 (the Aboriginal perspective "must be framed in terms cognizable to the Canadain legal and constitutional structure").

[16] *Desautel*, *supra* note 9 at para 31.

[17] *Constitution Act, 1982*, *supra* note 1 at s 35(2).

[18] See *Desautel*, *supra* note 9 at para 23.

[19] See *Sparrow*, *supra* note 12 at 1091. See also Peter W Hogg, "The Constitutional Basis

of Aboriginal Rights" (2010) 15:1 Lex Electronica 179, online: *CanLIIDocs* <https://canlii.ca/t/t1d5> at 185-86.

[20] *Ibid*.

[21] See *Sparrow*, *supra* note 12 at 1099. Regulation of an Aboriginal or treaty right is not sufficient to extinguish that right. For example, the passage of laws regulating hunting and fishing is not sufficient to extinguish the Aboriginal right to hunt and fish.

[22] *Ibid* at 1097.

[23] *Mitchell v MNR*, 2001 SCC 33 (CanLII) at para 11.

[24] See *Sparrow*, *supra* note 12 at 1091.

[25] *Ibid* at 1093. See also *Van der Peet*, *supra* note 2 at para 42.

[26] See *Sparrow*, *supra* note 12 at 1109.

[27] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 82.

Métis Rights

Section 35(2) of the *Constitution Act, 1982* includes Métis people in its definition of the "[A]boriginal peoples of Canada."[1] In 2003, the Supreme Court of Canada defined the "Métis" as "distinctive peoples who, in addition to their mixed [Aboriginal and European] ancestry, developed their own customs, way of life, and recognizable group identity."[2]

However, the test for identifying Aboriginal rights under section 35 — the *Van der Peet* test — looks to practices, customs, or traditions that existed *before European contact*. The Métis would therefore fail to meet the *Van der Peet* test for an Aboriginal right because they only came into existence after European contact. For this reason, the Supreme Court of Canada in *R v Powley* modified the *Van der Peet* test to account for the unique nature of the Métis peoples.

The *Powley* Test for Métis Rights

Like the *Van der Peet* test for identifying Aboriginal rights, the test for Métis rights focuses "on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land."[3] The test has eight steps:

- Characterize the nature of the claimed right. This is no different from the

Van der Peet test, which identifies the nature of the right being claimed by considering the nature of the complainant's action, the nature of the impugned Crown action, and the practice, custom, or tradition that gives rise to the right being claimed.[4]

- An identifiable Métis community must exist and must have "shared customs, traditions and a collective identity" which are tied to a specific site.[5]
- The present-day Métis community must perpetuate their ancestral community's distinctive practices.[6]
- The claimant must show that they are part of the contemporary Métis community that holds the claimed right.[7] This is a three-part test: (a) they must self-identify as a member of the Métis community; (b) there must be evidence of an ancestral connection to the historic Métis community (by birth, adoption, or otherwise); and (c) they must be accepted by the modern Métis community.[8]
- The practice, custom, or tradition that gives rise to the claimed right must have arisen before the community "came under the effective control of European laws and customs."[9] The relevant time period is thus "post-contact but pre-control."[10]
- The practice, custom, or tradition must have been "integral" to the "distinctive culture" of the Métis community.[11]
- There must be "[c]ontinuity [b]etween the [h]istoric [p]ractice and the [c]ontemporary [r]ight [a]sserted,"[12] although there is flexibility to allow for the evolution of that Aboriginal practice over time.[13]
- The right must be an "existing" right and cannot have been extinguished.[14]

Once a Métis right is established, the court must determine whether that right was infringed, and, if so, the Crown may attempt to justify the infringement according to the test set out in the Supreme Court's *Sparrow* judgment.[15]

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(2).

[2] *R v Powley*, 2003 SCC 42 (CanLII) at para 10 .

[3] *Ibid* at para 37.

[4] *Ibid* at para 19 (citing *R v Van der Peet*, 1996 CanLII 216 (SCC) at para 53).

[5] *Ibid* at para 23.

[6] *Ibid* at paras 24 and 27.

[7] *Ibid* at para 29.

[8] *Ibid* at paras 31-33.

[9] *Ibid* at para 37.

[10] *Ibid*.

[11] *Ibid* at paras 41 and 44.

[12] *Ibid* at para 45.

[13] *Ibid*.

[14] *Ibid* at para 46.

[15] *Ibid* at para 10.

The Sparrow Test: Justifying Infringements of Aboriginal or Treaty Rights

Section 35 Aboriginal and treaty rights[1] are not part of the *Charter of Rights and Freedoms*, so they are "not subject to [section] 1 of the nor to legislative override under [section] 33."[2] Section 1 of the *Charter* allows governments to justifiably limit a *Charter* right, and section 33 establishes the notwithstanding clause, which allows governments to pass laws "notwithstanding" their impact on certain *Charter* rights.

Although neither section 1 nor section 33 may be invoked to override or diminish Aboriginal or treaty rights, Aboriginal and treaty rights are not absolute. Under certain circumstances, the Crown may limit or infringe Aboriginal or treaty rights. In *R v Sparrow*, the Supreme Court of Canada established a two-step test — the *Sparrow* test — for justifying an infringement of an Aboriginal right.[3] The test is highly contextual,[4] which means that the standard of justification varies with the facts of each case.[5]

The *Sparrow* test comprises two steps:

1. The complainant must establish that the impugned law "has the effect of

interfering with an existing [A]boriginal right."[6] Here, the courts ask a series of questions to understand the characteristics and scope of the right at stake, and in what manner the law might have infringed that right.[7] The courts seek to determine whether "the purpose or effect" of the impugned law "unnecessarily infringes" the claimant's ability to exercise their section 35 right.[8] If so, the court will find a *prima facie* infringement of that right and the Crown will bear the burden of justifying that infringement.[9]

2. The Crown must then justify the infringement by showing that:
    1. The law has a valid objective. Here, the Court held that valid objectives are "compelling and substantial."[10] For example, conservation and natural resource management, as well as public safety, are valid objectives. [11] However, the "public interest" is not sufficient because it is too vague and broad a concept to justify limiting a constitutional right.[12]
    2. The limit is justified in light of the principle of the honour of the Crown and the Crown's fiduciary duty to Aboriginal peoples.[13] This analysis attracts questions like whether the infringement is necessary to achieve the Crown's purpose,[14] whether the law is minimally impairing on the protected right, whether fair compensation was made available for an expropriation of land, or whether the Aboriginal group was consulted with respect to the regulatory measures.[15]

If a court finds that the infringement is justified, the law remains valid and applicable to that Aboriginal group. If not, the impugned law would be found to be contrary to section 35(1) of the *Constitution Act, 1982* and of no force and effect as it relates to the Aboriginal group whose rights were infringed.

The courts have applied the *Sparrow* test to justify infringing Métis rights[16] and treaty rights,[17] and as the basis of the test for infringing Aboriginal title.[18] In *R v Côté*, the Supreme Court of Canada confirmed that the *Sparrow* test applies equally to federal and provincial laws.[19]

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).

[2] See *R v Sparrow*, 1990 CanLII 104 (SCC) at 1106 .

[3] *Ibid.*

[4] See eg *R v Gladstone*, 1996 CanLII 160 (SCC) at paras 57-68 .

[5] *Sparrow*, *supra* note 2 at 1110-11.

[6] *Ibid* at 1111 (emphasis added).

[7] *Ibid* at 1111-12.

[8] *Ibid* at 1112.

[9] *Ibid* at 1112-13. See also *Gladstone*, *supra* note 4 at para 43.

[10] *Sparrow*, *supra* note 2 at 1113.

[11] *Ibid*. See also *Gladstone*, *supra* note 4 at para 72. The Court clarifies that objectives which are "compelling and substantial" are "those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or … at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown" (para 72). The pursuit of economic and regional fairness may satisfy this standard under the right circumstances (para 75).

[12] *Ibid*.

[13] *Ibid* at 1114. See also *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC) at paras 161-164 . Courts must consider what form the Crown's fiduciary duty takes, and what the Crown must do in its fiduciary capacity to justify infringing the protected right. The degree of scrutiny required must vary according to the nature of the Aboriginal right at issue and the form that the Crown's fiduciary duty takes.

[14] *Ibid* at 1121.

[15] *Ibid* at 1119.

[16] *R v Powley*, 2003 SCC 43 at para 48.

[17] See *R v Badger*, 1996 CanLII 236 (SCC) at para 79.

[18] See *Delgamuukw*, supra note 13 at para 165.

[19] See R v *Côté*, 1996 CanLII 170 (SCC) at para 74.

Treaty Rights

The Concept of Treaty

Different legal orders — from the Canadian one to the many distinct Indigenous legal orders in Canada — give rise to different understandings of the concept of "treaty."[1] This key term focuses on the way in which "treaty" is understood in Canadian constitutional law. The Supreme Court of Canada says that a treaty between the Crown and one or several Aboriginal peoples of Canada "represents an exchange of solemn promises." [2] Treaty rights arise from these promises and are "recognized and affirmed" by section 35 of the *Constitution Act, 1982*.[3]

Rights that Arise from Treaty

Identifying treaty rights requires the courts to engage in treaty interpretation, with the goal of "choos[ing] from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[4] This is not an easy task, because the treaty text is often not determinative. Sometimes promises were made orally,[5] or the historical context requires the recognition of an implied treaty right.[6] Further, due to "significant differences in the signatories' languages, concepts, cultures and world views," Crown and Aboriginal actors will often have had "fundamentally different understandings of the exact nature of their agreements."[7] For these reasons, it is important for courts to look beyond treaty texts, to extra-textual information and context that can shed light on how different parties would have understood their rights and obligations under the treaty.[8]

To assist courts with navigating the difficult task of treaty interpretation, the Supreme Court of Canada in *Marshall* set out the following principles of treaty interpretation (quoted in full, with in text citations removed):

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the [A]boriginal signatories.
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.

- The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
- A technical or contractual interpretation of treaty wording should be avoided;
- While construing the language generously, the court cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
- Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[9]

Based on these principles, the Supreme Court of Canada in *Marshall* set out a two-step approach to establishing a treaty right. First, the courts must examine the treaty text, which may reveal "ambiguities and misunderstandings [that] may have arisen from [the parties'] linguistic and cultural differences."[10] The court must then consider the possible meanings of the text in light of the historical and cultural context.[11] Based on these two steps, the court determines which interpretation best reflects the parties' common intention.

[1] See eg Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 13, 90-92; and Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research J 145 at 147-49.

[2] *R v Badger*, 1996 CanLII 236 (SCC) at para 41 .

[3] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).

[4] *R v Marshall*, 1999 CanLII 665 (SCC) at para 78 (citing *R v Sioui*, 1990 CanLII 103 (SCC) at pp. 1068-69) .

[5] See *Badger*, *supra* note 2 at para 52.

[6] See *Marshall*, *supra* note 4 at para 44.

[7] *Quebec (Attorney General) v Moses*, 2010 SCC 17 (CanLII) at para 108.

[8] See *Badger*, *supra* note 2 at para 52.

[9] See *Marshall*, *supra* note 4 at para 78 (internal citations removed). See also James (Sákéj) Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36:1 Alta L Rev 46, online: <https://www.albertalawreview.com/index.php/ALR/article/view/1019/1009>; and Aaron James Mills (Waabishki Ma'iingan), Miinigowiziwin: *All That Has Been Given for*

Living Well Together: One Vision of Anishinaabe Constitutionalism (PhD Dissertation, University of Victoria, 2019) [unpublished] at 23-24, 38-39, and 267, online: <http://mars.library.uvic.ca/bitstream/handle/1828/10985/Mills_Aaron_PhD_2019.pdf?sequence=1&isAllowed=y>. Indigenous worldviews are often so different from Canadian legal traditions that to define them with certainty imposes an unreasonable risk of drawing improper inferences from misunderstood concepts or oversimplified generalizations.

[10] *Marshall*, *supra* note 4 at para 82.

[11] *Ibid* at para 83.