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.