

STATUTORY PROTECTIONS AGAINST INFRINGEMENT OF ABORIGINAL AND TREATY RIGHTS

Kent McNeil*

*Parliament and three provincial legislatures have added non-derogation clauses to their interpretation statutes. These clauses are intended to protect Aboriginal and treaty rights from abrogation or derogation by other legislation. This article argues that the recent Supreme Court decision in *Dickson v Vuntut Gwitchin First Nation* has clarified the effect of these clauses. In that case, a majority decided that section 25 of the Canadian Charter of Rights and Freedoms prevents the Charter's individual rights provisions from abrogating or derogating from the Aboriginal, treaty or other rights or freedoms of the Aboriginal peoples. If there is an irreconcilable conflict between a Charter right, such as a section 15(1) equality right, and a section 25 right, the section 25 right prevails.*

The non-derogation clauses in the interpretation statutes mirror the language of section 25. It is therefore appropriate to apply the Supreme Court's interpretation of section 25 to those provisions. Consequently, the laws of Canada, Saskatchewan, Manitoba and British Columbia must respect the Aboriginal and treaty rights recognized and affirmed by section 35 of the Constitution Act, 1982. If possible, those laws should be read as not abrogating or derogating from those rights, but if this is not possible because there is an irreconcilable conflict between them, the Aboriginal peoples' rights should prevail. This means that, absent a clear, constitutionally-valid legislative intention that the relevant non-derogation clause does not apply to the law in question, it is no longer possible for governments in these jurisdictions to justify infringements of these rights.

*Le Parlement et trois assemblées législatives provinciales ont ajouté des dispositions de non-dérogação à leurs lois d'interprétation. Ces dispositions visent à protéger les droits autochtones et issus de traités contre toute abrogation ou dérogação par d'autres lois. L'auteur soutient que la récente décision de la Cour suprême dans l'arrêt *Dickson c. Vuntut Gwitchin First Nation* a précisé la portée de ces dispositions. En l'espèce, une majorité de juges a conclu que l'article 25 de la Charte canadienne des droits et libertés interdit que les dispositions relatives aux droits individuels de la Charte*

* Emeritus Distinguished Research Professor, Osgoode Hall Law School, Toronto. In writing this article, I benefitted immensely from Kerry Wilkins' generous feedback on a draft. I would also like to thank the two anonymous reviewers for their helpful comments. I am, of course, solely responsible for any errors and omissions.

aient pour effet d’abroger les droits, les droits issus de traités ou les libertés des peuples autochtones ou d’en déroger. En cas de conflit irréconciliable entre un droit garanti par la Charte, comme le droit à l’égalité prévu au paragraphe 15(1), et un droit prévu à l’article 25, ce dernier prévaut.

Les dispositions de non-dérogação prévues dans les lois d’interprétation reprennent le libellé de l’article 25. Il convient donc d’appliquer à ces dispositions l’interprétation que la Cour suprême a donnée de cet article. Par conséquent, les lois du Canada, de la Saskatchewan, du Manitoba et de la Colombie-Britannique doivent respecter les droits autochtones et issus des traités garantis par l’article 35 de la Loi constitutionnelle de 1982. Dans la mesure du possible, ces lois devraient être interprétées de manière à ne pas abroger ces droits ni à y déroger, mais si cela s’avère impossible en raison d’un conflit irréconciliable, les droits autochtones devraient prévaloir. Il en découle qu’en l’absence d’une intention législative claire et constitutionnellement valide d’écarter l’application de la disposition de non-dérogação en cause à la loi en question, les gouvernements du Canada et de ces provinces ne peuvent plus justifier une atteinte à ces droits.

Contents

1. Effect of Section 8.3(1) of the Federal **Interpretation Act**. 351

 A) Non-derogation in Section 25 of the **Charter**: The **Dickson** Decision 352

 B) Application of **Dickson** to Federal Non-Derogation from Aboriginal and Treaty Rights. 355

2. Non-Derogation Provisions in Provincial Interpretation Statutes 363

 A) Saskatchewan 364

 B) Manitoba 367

 C) British Columbia. 367

3. Conclusion 371

Prior to the recognition and affirmation of existing Aboriginal and treaty rights by section 35(1) of the *Constitution Act, 1982*,¹ these rights were subject to extinguishment by the Parliament of Canada,² provided the legislative intent to extinguish was clear and plain.³ That changed with the enactment of section 35(1), which the Supreme Court has held prevents even Parliament from unilaterally extinguishing these rights.⁴ Provincial legislation, on the other hand, has never been able to extinguish Aboriginal and treaty rights because these rights are within Parliament's exclusive legislative authority over "Indians, and Lands reserved for the Indians," as provided by section 91(24) of the *Constitution Act, 1867*.⁵

The Supreme Court of Canada has nonetheless distinguished between extinguishment and infringement of Aboriginal and treaty rights. Although Parliament has always had the authority to infringe these rights, prior to a change in the law by the Supreme Court in *Tsilhqot'in Nation v British Columbia*⁶ and *Grassy Narrows First Nation v Ontario (Natural Resources)*,⁷ provincial legislatures apparently lacked the authority to do so because these rights were understood to be within the core of section 91(24) and so protected by the doctrine of interjurisdictional immunity.⁸ In *Tsilhqot'in Nation*, the Court decided that this doctrine no longer applies to provide division-of-powers protection to Aboriginal and treaty rights, as, in the Court's opinion, these rights are now sufficiently protected by section 35(1).⁹ Consequently, provincial as well as federal legislation can

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

² See *R v Sikyea*, [1964] SCR 642, 1964 CanLII 62 (SCC); *The Queen v George*, [1966] SCR 267, 1966 CanLII 2 (SCC); *R v Van der Peet*, 1996 CanLII 216 (SCC) at para 28 [*Van der Peet*].

³ *R v Sparrow*, [1990] 1 SCR 1075 at 1099, 1990 CanLII 104 (SCC) [*Sparrow*].

⁴ *Van der Peet*, *supra* note 2 at para 28; *Mitchell v MNR*, 2001 SCC 33 at para 11 [*Mitchell*]; *Shot Both Sides v Canada*, 2024 SCC 12.

⁵ 30 & 31 Vict, c 3 (UK) [*Constitution Act, 1867*]. See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at paras 179–80 [*Delgamuukw*].

⁶ 2014 SCC 44 at para 131–52 [*Tsilhqot'in Nation*].

⁷ 2014 SCC 48 at para 53.

⁸ *Dick v The Queen*, 1985 CanLII 80 (SCC); *Delgamuukw*, *supra* note 5 at para 181; *R v Morris*, 2006 SCC 59 [*Morris*]. Compare the Court's *obiter dicta* in *R v Marshall [No 2]*, 1999 CanLII 666 (SCC) at para 24 [*Marshall [No 2]*]. See Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32:2 *UBC L Rev* 317; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22:1 *Dal LJ* 185; Kent McNeil, "*Tsilhqot'in Nation* and Interjurisdictional Immunity: When Are Judicial Decisions Involving Indigenous Claims Retroactive?" (2023) 56:1 *UBC L Rev* 161, especially 186–96 [McNeil, "*Tsilhqot'in Nation*"].

⁹ *Tsilhqot'in Nation*, *supra* note 6 at paras 139–42. For criticism, see Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*" (2017) 55:1 *Alta L Rev* 91; McNeil, "*Tsilhqot'in Nation*", *supra* note 8.

infringe Aboriginal and treaty rights if the infringement can be justified by application of the test for justifiable infringement created by the Court in 1990 in *R v Sparrow*.¹⁰

Although Parliament and now the provincial legislatures have the power to infringe Aboriginal and treaty rights, these legislative bodies can always refrain from exercising this power. Moreover, they can express their general intention in legislation not to infringe these rights. Examples of this intention can be found in non-derogation clauses in the interpretation statutes enacted by Parliament and the legislatures of Saskatchewan, Manitoba and British Columbia.

Interpretation statutes are intended to govern how all other statutes enacted by the same legislature are to be construed. The federal *Interpretation Act*, for example, provides in section 3(1): “Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.”¹¹ Interpretation statutes are thus retroactive and can affect the meaning, absent a contrary intention, of every other statute enacted in the same jurisdiction.

The purpose of this article is to assess the impact of the non-derogation provisions relating to Aboriginal and treaty rights in the federal and relevant provincial interpretation statutes, starting with the recent federal provision, which came into force on November 27, 2024.¹² Like the provincial provisions, it mirrors the non-derogation wording of section 25 of the *Canadian Charter of Rights and Freedoms*¹³ that was authoritatively interpreted for the first time by the Supreme Court in *Dickson v Vuntut Gwitchin First Nation*,¹⁴ just eight months earlier.¹⁵

¹⁰ *Sparrow*, *supra* note 3 at 1112–19. Briefly, to justify an infringement, the Crown has to prove, first, a valid legislative objective, and second, respect for the fiduciary obligations the Crown owes to Indigenous peoples. These obligations require the Crown to meet the legislative objective by infringing the rights as little as possible, consulting with the Indigenous people concerned, and paying compensation.

¹¹ RSC 1985, c I-21, s 3(1) [*Interpretation Act*]. There is an equivalent provision in the provincial interpretation statutes discussed in this article: see *Interpretation Act*, RSBC 1996, c 238, s 2(1); *Interpretation Act*, CCSM, c I80 (2000), s 2; *The Legislation Act*, SS 2019, c L-10.2, s 2-2.

¹² Date of royal assent to *An Act to amend the Interpretation Act and to make related amendments to other Acts*, SC 2024, c 30, s 1.

¹³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, s 25, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹⁴ 2024 SCC 10 [*Dickson*].

¹⁵ Justice Bastarache, concurring in result, interpreted and would have applied s 25 in *R v Kapp*, 2008 SCC 41, but he was alone. The other eight judges avoided s 25 (see paras

1. Effect of Section 8.3(1) of the Federal *Interpretation Act*

The English version of the federal *Interpretation Act*,¹⁶ in section 8.3(1), provides:

Every enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act*, 1982, and not as abrogating or derogating from them.¹⁷

The equally authoritative¹⁸ French version provides:

Tout texte maintient les droits—ancestraux ou issus de traités—des peuples autochtones reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*; il n'y porte pas atteinte.

“Indigenous peoples” is defined in subsection (2) in the English version, and equivalently in the French version, as having “the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act*, 1982,” namely as including the “Indian, Inuit and Métis peoples of Canada.”

We have already seen that, since the enactment of section 35 in 1982, Parliament has lacked the constitutional authority to extinguish Aboriginal and treaty rights. In *Mitchell v MNR*, Chief Justice McLachlin put it this way:

The common law status of aboriginal rights rendered them vulnerable to *unilateral extinguishment* The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be *unilaterally abrogated* by the government.¹⁹

Chief Justice McLachlin then noted that these principles had been affirmed in *Van der Peet*, where Chief Justice Lamer stated: “Subsequent

62-65), relying instead on s 15(2) of the *Charter* to uphold the preferential commercial fishing rights of three First Nations in British Columbia.

¹⁶ *Interpretation Act*, *supra* note 11, s 8.3(1).

¹⁷ *Ibid.* Note that “enactment” is defined in s 2(1) as “an Act or regulation or any portion of an Act or regulation.” For background, see “[S-13 Royal Assent: Upholding Section 35 rights through a non-derogation clause in the federal Interpretation Act](https://tinyurl.com/466sc7wc)”: <tinyurl.com/466sc7wc>.

¹⁸ This is mandated by the *Constitution Act*, 1867, *supra* note 1, s 133: see *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC).

¹⁹ *Mitchell*, *supra* note 4 at para 11 (emphasis added).

to s. 35(1) aboriginal rights cannot be extinguished.”²⁰ The Court has thus used the terms “extinguished” and “abrogated” interchangeably in this context.

Given that Parliament, since 1982, has been unable to unilaterally extinguish section 35 rights, inclusion in section 8.3(1) of a requirement that federal statutes be construed as not *abrogating* these rights was probably unnecessary. It simply acknowledged an aspect of existing Canadian constitutional law. However, inclusion of a requirement that federal statutes be construed as not *derogating* from these rights is a different matter, given that the Supreme Court has held that Parliament and provincial legislatures can infringe Aboriginal and treaty rights if the infringement can be justified by application of the *Sparrow* test.

A) Non-derogation in Section 25 of the *Charter*: The *Dickson* Decision

As the term “derogating” is not defined in the federal *Interpretation Act*, we need to get guidance on its meaning from other sources. For starters, the *Canadian Oxford Dictionary* defines “derogate” in part as “take away a part from; detract from (a merit, a right, etc.).”²¹ More importantly and relevantly, we are fortunate to have a recent, authoritative interpretation of “derogate” in a constitutional context involving Indigenous rights, provided by the Supreme Court. In *Dickson v Vuntut Gwitchin First Nation*,²² the Court had to decide whether Cindy Dickson’s equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms*²³ were violated by a provision in the constitution of the Vuntut Gwitchin First Nation, of which she is a member, requiring that the elected chief and councillors reside on the First Nation’s settlement land in the Yukon. Among other things, the Court had to decide whether this residency requirement, if in violation of section 15(1) of the *Charter*, was protected by section 25, which provides in part in English and French:

²⁰ *Van der Peet*, *supra* note 2 at para 28.

²¹ Katherine Barber, ed, *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998), 378.

²² *Dickson*, *supra* note 14. For commentary, see Nigel Banks & Jennifer Koshan, “[The Dickson Decision, UNDRIP, and the Federal UNDRIP Act](#)” (18 April 2024), online: ABlawg: <tinyurl.com/3p7ck6c6> [perma.cc/8NSH-PT8H]; Robert Hamilton, Jennifer Koshan, & Jonnette Watson Hamilton, “[Teaching Dickson v Vuntut Gwitchin First Nation](#)” (13 March 2025), online: ABlawg, <tinyurl.com/y9vk9d5p> [perma.cc/A98D-EYHA] (both accessed on April 13, 2025).

²³ *Charter*, *supra* note 13.

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada

Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés—ancestraux, issus de traités ou autres—des peuples autochtones du Canada²⁴

In their majority judgment, Justices Kasirer and Jamal concluded that the *Charter* applies to the government of the Vuntut Gwitchin First Nation and that the residency provision violated Ms Dickson's equality rights.²⁵ However, they went on to decide that this provision is nonetheless valid because it is protected by section 25, as application of section 15(1) would abrogate or derogate from the Vuntut Gwitchin's right to govern themselves.²⁶ To reach this conclusion, Justices Kasirer and Jamal had to determine the meaning of "abrogate or derogate" in section 25.

They began by observing that

... the text of s. 25 plainly suggests the protective purpose of the provision. Two aspects of the wording are significant. The first is the operative terms used in the English and French texts—"shall not be construed so as to abrogate or derogate" from certain Indigenous rights in English, and "*ne porte pas atteinte*" to those rights in French—which signal that s. 25 protects against an inappropriate impairment of the collective Indigenous right that would flow from applying the conflicting individual *Charter* right or freedom.²⁷

They noted that "the French and English texts are, of course, equally authoritative as expressions of the intent reflected in s. 25" and that "the exercise of discerning legislative intent can properly include the search for a shared meaning between the two linguistic texts, typically identified by reading both versions together."²⁸ "[I]t is important", they said, "to examine these two indicia carefully and to dispel any sense that the French and English versions of the provision diverge from a shared meaning around a single purpose of protecting collective Indigenous interests from being diminished by individual *Charter* rights."²⁹ They found that the shared meaning was to create a "non-derogation" clause "or a provision that 'shields' Aboriginal rights from being abrogated or derogated from The chosen phrases both signal that s. 25 may act as a bar against

²⁴ *Ibid*, s 25.

²⁵ *Dickson*, *supra* note 14. Justice Rowe dissented on this issue.

²⁶ *Ibid*. Justices Martin and O'Bonsawin dissented on this issue.

²⁷ *Ibid* at para 119 (original underlining and italics).

²⁸ *Ibid* at para 121.

²⁹ *Ibid* at para 120.

the abrogation of or derogation from Indigenous collective interests by conflicting individual *Charter* rights.”³⁰

Justices Kasirer and Jamal observed that section 25 has both interpretive and shielding protective purposes.³¹ The English text includes the words, “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate,” whereas the French text omits this mandatory direction not to construe and uses language that is more declaratory, namely “ne porte pas atteinte”. However, before deciding whether an individual *Charter* right might “porte atteinte” to a collective Indigenous right, Justices Kasirer and Jamal pointed out that a court must construe both these rights. Consequently, an interpretive exercise is implicit in the French version of section 25. Moreover, the English direction not to abrogate or derogate is equivalent to the French declaratory text. Consequently, the interpretive function of a court “is limited and, in both texts, any judicial discretion in interpreting the competing individual and collective interests is constrained by the direction that the construction of the individual right cannot extend beyond the point of conflict with the protected minority interest.”³²

When an Aboriginal, treaty or other Indigenous right, or its exercise, is challenged as being in violation of a *Charter* right, a court must determine whether there is an irreconcilable conflict between these rights. A court should do its best to interpret the *Charter* right and the section 25 rights so that both can operate. If they cannot, the rights in section 25 have priority:

The key question, then, is what kind of conflict must be shown between the collective and individual rights concerned for the s. 25 shield to operate. Standards ranging from “potential” to “true” conflict have been suggested. In our view, the conflict between the rights must be real and irreconcilable, such that there is no way to give effect to the individual *Charter* right without abrogating or derogating from the right within the scope of s. 25. To adopt a lesser standard, such as the mere possibility of a conflict, would detract from the seriousness of compromising an individual *Charter* right. Section 25 protects the collective Indigenous interest when the conflict is not hypothetical and cannot be avoided.³³

³⁰ *Ibid* at para 123.

³¹ *Ibid* at para 124. Justices Martin and O’Bonsawin, dissenting on the appeal, agreed with this at para 291. Divergent opinions on the effect of section 25 had been expressed in the academic literature referred to in the judgments.

³² *Ibid* at para 125.

³³ *Ibid* at para 161. Compare Justices Martin and O’Bonsawin’s dissenting opinion at para 343. For the majority, the degree of conflict appears similar to the operational conflict required for a provincial law to be invalid to the extent it is inconsistent with a paramount federal law: see *Multiple Access Ltd v McCutcheon*, 1982 CanLII 55 (SCC);

Throughout their judgment, Justices Kasirer and Jamal relied on the combined words “abrogate or derogate” in section 25 to decide that *Charter* rights cannot prevail if they are in irreconcilable conflict with the rights protected by section 25.³⁴ They did not generally distinguish between these words, other than by providing these definitions: “to ‘abrogate’ (i.e., nullify or repeal), or to ‘derogate’ from (i.e., detract or depart from).”³⁵ However, they did agree with the Court of Appeal of Yukon’s decision that “to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin’s rights to govern themselves in accordance with their own particular values and traditions *and* in accordance with the ‘self-government’ arrangements entered into in 1993 with Canada and Yukon.”³⁶ The majority’s decision on the application of section 25 therefore relied on non-derogation rather than non-abrogation.³⁷

B) Application of *Dickson* to Federal Non-Derogation from Aboriginal and Treaty Rights

Although we do not know for certain whether the terms “abrogating or derogating” in section 8.3(1) of the federal *Interpretation Act* were intended to have the same meaning as “abrogate or derogate” in section 25 of the *Charter*, the two provisions are remarkably similar. Both are non-derogation clauses intended to achieve the same purpose, namely to shield Aboriginal and treaty rights from either the *Charter* or, in the case of section 8.3(1), from statutes enacted by Parliament. Moreover, it is reasonable to assume that Parliament was aware of section 25 when it enacted section 8.3(1) and deliberately chose equivalent wording.³⁸ Furthermore, given that *Dickson* was decided eight months before section 8.3(1) was enacted, the Department of Justice lawyers who advise the federal government would have been aware of the majority’s interpretation of section 25 of the *Charter* in that case. It is therefore appropriate to apply the majority’s interpretation of “abrogate” in the *Dickson* case to “abrogating” in section 8.3(1).

Alberta (Attorney General) v Moloney, 2015 SCC 51; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53.

³⁴ E.g. see *Dickson*, *supra* note 14 at para 6.

³⁵ *Ibid* at para 124.

³⁶ *Ibid* at para 224 (original italics). Compare Justices Martin and O’Bonsawin, dissenting, at para 415.

³⁷ This should be obvious because application of s 15(1) would have limited, but not abrogated, the Vuntut Gwitchin’s self-government rights.

³⁸ Members of Parliament, after all, should be familiar with the Constitution because the laws they enact must abide by it.

Statutory provisions are presumed to have remedial effect.³⁹ In other words, they are usually enacted, not just to declare existing law, but to change or add to the law.⁴⁰ We have seen that the insertion of the term “abrogating” in section 8.3(1) was unnecessary because the Supreme Court had already told us that Parliament cannot extinguish (abrogate) constitutionally-protected Aboriginal and treaty rights. To that extent, section 8.3(1) is declaratory. However, derogating from these rights is another matter, as the Supreme Court has decided that Parliament does have the authority to infringe them if the *Sparrow* justifiable infringement test can be met.

Applying the majority’s interpretation of section 25 to section 8.3(1), it should protect Aboriginal and treaty rights against impairment by any federal statute that could have the effect of abrogating or derogating from them or, in the French version, that could “porte atteinte” to them (“impairs, or harms,” them).⁴¹ Given Parliament’s power to infringe these rights if that is justifiable, we need to know whether “derogate” in section 8.3(1) means the same thing as “infringe” in the case law relating to section 35 of the *Constitution Act, 1982*.

The term “derogate” was not used in the English version of the *Sparrow* decision. However, the French version employs the terms “porte atteinte” and “atteinte” on numerous occasions in place of the English terms “infringe” and “infringement.” The same usage appears in other Supreme Court judgments that consider the application of the *Sparrow* justifiable infringement test.⁴² The Court therefore regards these French and English terms as synonymous. The majority in *Dickson* also regarded “porte atteinte” as equivalent to “abrogate or derogate” in section 25 of the *Charter*. It therefore seems that, for the Court, “infringe” and “derogate” are interchangeable terms because they both mean the same thing as “porte atteinte.” Applying this interpretation to section 8.3(1), “derogating” must have the same meaning as “infringing” in the jurisprudence. In legislating

³⁹ Section 12 of the federal *Interpretation Act*, *supra* note 11, provides: “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” There is an equivalent provision in the provincial interpretation statutes discussed in this article: see *Interpretation Act*, RSC 1996, c 238, s 8; *Interpretation Act*, CCSM c I80 (2000), s 6; *The Legislation Act*, SS 2019, c L-10.2, s 2–10(2).

⁴⁰ See *R v Gladue*, 1999 CanLII 679 (SCC), especially paras 31–34.

⁴¹ Justices Kasirer and Jamal’s translation, *Dickson*, *supra* note 14 at para 123. The *Petit Larousse* (Paris: Librairie Larousse, 1964), 78, defines “atteinte” as “dommage, préjudice” (damage, prejudice).

⁴² E.g. see *R v Gladstone*, 1996 CanLII 160 [Gladstone]; *R v Adams*, 1996 CanLII 169 [Adams]; *R v Côté*, 1996 CanLII 170 [Côté]; *Delgamuukw*, *supra* note 5; *Tsilhqot’in Nation*, *supra* note 6.

that federal statutes are to be construed as not *derogating* from Aboriginal and treaty rights, Parliament must have intended for its enactments to be interpreted as not *infringing* those rights.⁴³

The case law provides considerable insight into the meaning of infringement in the context of Aboriginal and treaty rights. In *Sparrow*, Chief Justice Dickson and Justice La Forest said this:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1) ...

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food [T]he test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch [proof of an infringement] of the s. 35(1) analysis would be met.⁴⁴

As the Court found that there was insufficient evidence to decide whether the net-length restriction in question infringed the Musqueam's Aboriginal right to fish for food, societal and social purposes, the matter was sent back to trial (but was never retried) to determine whether an infringement had occurred, and if so whether the Crown could prove it was justified.⁴⁵

Commenting on *Sparrow* in *R v Gladstone*, Chief Justice Lamer observed:

⁴³ Because s 8.3(1), unlike s 25 of the *Charter*, *supra* note 13, is not constitutional, Parliament is not bound by this interpretive provision: see note 60 and accompanying text below.

⁴⁴ *Sparrow*, *supra* note 3 at 1111–13. Note that, in this passage, the justices also use the terms “interfering with,” “interference,” and “adverse restriction” in reference to “infringe.”

⁴⁵ *Ibid* at 1120–21. Once an infringement has been proven, the burden shifts to the Crown, if it so chooses, to try to justify the infringement.

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.⁴⁶

In *Gladstone*, the Heiltsuk Nation established a commercial Aboriginal right to harvest herring spawn on kelp. Because government regulations limited the amount of herring spawn they could take, Chief Justice Lamer, adopting Justice Cory's language in *R v Nikal*,⁴⁷ decided that "the government's regulatory scheme 'clearly impinge[s]' upon the rights of the appellant and, as such, must be held to constitute a *prima facie* infringement of those rights."⁴⁸

In *Nikal*, the Supreme Court decided that a requirement for a freely and readily obtainable food fishing licence did not infringe the Aboriginal right to fish that was established in that case. Justice Cory, for the majority, rejected the argument that, once the accused's "rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement."⁴⁹ He explained:

Here, the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant [sic] on the continued existence of the resource. The very right to fish would in time become meaningless if the

⁴⁶ *Gladstone*, *supra* note 42 at para 43. See also *Côté*, *supra* note 42 at para 75.

⁴⁷ 1996 CanLII 245 (SCC) [*Nikal*].

⁴⁸ *Gladstone*, *supra* note 42 at para 53.

⁴⁹ *Nikal*, *supra* note 47 at para 91.

government could not enact a licensing scheme which could form the essential foundation of a conservation program.⁵⁰

However, while the requirement for a licence was not an infringement, Justice Cory decided that the conditions included in the required licence were *prima facie* infringements that would have to be justified to be valid.⁵¹ The inclusion of these conditions made the requirement for the licence itself inapplicable.

In *R v Adams*, the Supreme Court decided that a requirement for a licence, issuance of which was at the unlimited discretion of a government minister, was an infringement of an Aboriginal fishing right. Chief Justice Lamer observed that

... the scheme both imposes undue hardship on the appellant and interferes with his preferred means of exercising his rights

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.⁵²

So, adoption of an “unstructured discretionary administrative regime” that “may carry significant consequences for the exercise of an aboriginal right” will amount to an infringement.

⁵⁰ *Ibid* at para 94. Compare *Sparrow*, *supra* note 3, where conservation was considered to apply at the justification rather than at the infringement stage of the test the Court created.

⁵¹ These included “the restriction of fishing to fishing for food only; ... the restriction to fishing for the fisher and his family only; the restriction to fishing for salmon only;” etc: *Nikal*, *supra* note 47 at para 103. The Crown did not prove justification of the conditions.

⁵² *Adams*, *supra* note 42 at paras 52, 54. In *Marshall [No. 2]*, *supra* note 8 at para 33, the Court quoted this passage from *Adams* and stated that “the same principle applies to treaty rights.”

The Supreme Court applied *Adams* in *R v Côté*, a case involving the licence requirement in the same federal fisheries regulations.⁵³ Chief Justice Lamer decided that the requirement infringed the appellant's Aboriginal fishing right because it "impose[d] undue hardship on the appellant Côté and interfere[d] with his preferred mode of exercising his rights."⁵⁴ However, a Quebec requirement for a fee to be paid for motor vehicles to use a road to access the lake where the fishing took place did not infringe the Aboriginal right. The fee was used to maintain the road and facilitated the exercise of the right rather than interfering with it.

In *R v Marshall* [No. 1], the Supreme Court applied the reasoning in *Adams* to a treaty right to fish for a moderate livelihood.⁵⁵ Justice Binnie, for the majority, held that this right was infringed by federal fisheries regulations that required the Mi'kmaq to obtain a licence to fish for and sell eels and that restricted the use of certain nets. He found:

There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed.⁵⁶

Sparrow, *Nikal*, *Gladstone*, *Adams*, *Côté* and *Marshall* all involved charges brought under federal fisheries regulations against First Nations persons who were exercising their Aboriginal or treaty rights to fish. Apart from *Sparrow*, where the issue was sent back to trial, in each case the Court decided that the regulations infringed the rights to fish.

We concluded earlier that "derogating" in section 8.3(1) of the *Canada Interpretation Act* has the same meaning as "infringing" in the Supreme Court's jurisprudence. We have also seen that the Court has used several other terms to describe what it means by "infringe": e.g., "interfering with" (*Sparrow*); placing "an adverse restriction on" (*Sparrow*); imposing "undue hardship" (*Sparrow*, *Gladstone*, *Adams*); denying Aboriginal rightsholders "their preferred means of exercising that right" (*Sparrow*, *Gladstone*, *Adams*); "clearly impinge" (*Nikal*, *Adams*). We also have examples of government measures that do infringe on Aboriginal fishing rights: restrictions on catch limits (*Gladstone*, *Marshall*); requiring a

⁵³ *Côté*, *supra* note 42.

⁵⁴ *Ibid* at para 76.

⁵⁵ 1999 CanLII 665 [*Marshall* [No. 1]].

⁵⁶ *Ibid* at para 64.

licence (*Adams, Côté, Marshall*); conditions in a licence (*Nikal*); limiting use of nets (*Marshall*); adoption of an “unstructured discretionary administrative regime” that “may carry significant consequences for the exercise of an aboriginal right” (*Adams*,⁵⁷ applied in *Côté* and *Marshall*).⁵⁸ On the other hand, in *Nikal* the Court rejected the argument that “anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement.”⁵⁹

Returning to our comparison of section 25 of the *Charter*, as interpreted in *Dickson*, and section 8.3(1) of the federal *Interpretation Act*, an important distinction is that the former is constitutional whereas the latter is not. This means that section 8.3(1) can be amended or repealed by Parliament, whereas section 25 can only be amended or repealed by constitutional amendment.⁶⁰ In *Dickson*, Justices Martin and O’Bonsawin (dissenting on other issues) noted that the Supreme Court has “consistently affirmed that all parts of the Constitution must be read together and that there is no hierarchy among its various provisions.”⁶¹ However, the majority in *Dickson* nonetheless held that in the case of an irreconcilable conflict between an individual *Charter* right and an Aboriginal, treaty or other right protected by section 25, the latter right prevails. The interpretive exercise therefore involves defining and comparing these rights; if “there is no way to give effect to the individual *Charter* right without abrogating or derogating from the right within the scope of s. 25,” the latter right prevails.⁶² The paramountcy of the section 25 right is mandated by the words, “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate” from section 25 rights (“ne porte pas atteinte” in the French version).⁶³

While not constitutional, the same logic nonetheless applies to section 8.3(1). Like the other provisions of the *Interpretation Act*, it is meant to govern the interpretation of every other federal statute. So, in providing

⁵⁷ *Adams*, *supra* note 42 at para 54.

⁵⁸ See also *Morris*, *supra* note 8, a case involving provincial infringement of a treaty right to hunt, in which the majority held at para 53 that “a *prima facie* infringement requires a ‘meaningful diminution’ of a treaty right. This includes anything but an insignificant interference with that right.”

⁵⁹ *Nikal*, *supra* note 47 at para 91.

⁶⁰ Pursuant to Part V of the *Constitution Act*, 1982, *supra* note 1, after the matter has been discussed at a constitutional conference to which representatives of the Aboriginal peoples of Canada are invited to participate: *ibid*, s 35.1.

⁶¹ *Dickson*, *supra* note 14 at para 309. They cited *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 2; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 50; *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC) at 877.

⁶² *Dickson*, *supra* note 14 at para 161.

⁶³ *Ibid* at para 119.

that “[e]very enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them,” Parliament must have intended that its statutes be interpreted, if at all possible, as upholding and not derogating from those rights, which is the way the majority in *Dickson* interpreted section 25 of the *Charter*. However, if that is not possible—that is, if there is an irreconcilable conflict between a statutory provision and a section 35 right—then, in the absence of a clear statutory intention that section 8.3(1) does not apply, the right should prevail in the same way a section 25 right would prevail over a *Charter* right. The majority’s interpretation of the effect of section 25 and the similarity of language in both the English and French versions of section 8.3(1) and of section 25 lead inevitably to this result.

We have seen that the effect of the federal *Interpretation Act*, including section 8.3(1), can be avoided by statutes in which “a contrary intention appears.”⁶⁴ A contrary intention would no doubt exist in a statute that provides a definition of a term that is different from its definition in the *Interpretation Act*. Otherwise, determining whether a contrary intention exists depends very much on the context. In *R v Copley*, Justice Grange, citing section 3(1) of the Act, relied on the effect of a contrary interpretation to find that no clear intention appeared in an amendment to the *Criminal Code* to remove a presumption relating to blood alcohol content at the time an offence allegedly occurred, and the time the breath sample was analyzed.⁶⁵ In *Baker Petrolite Corp v Canwell Enviro-Industries Ltd*, Justice Rothstein stated, in reference to section 3(1), that the presumption that the *Interpretation Act* applies could be rebutted “by express language in a statute, or by necessary implication.”⁶⁶

Given that the rights protected by s 8.3(1) are constitutional, the bar should be high for them to be overridden by necessary implication. In *Bristol-Myers Squibb Co v Canada (Attorney General)*,⁶⁷ Justice Bastarache (dissenting on other grounds), in reference to section 3(1) and principles of statutory interpretation, stated that “the courts’ role will greatly differ when dealing with a legislative rather than a constitutional context.”⁶⁸ There can be little doubt that laws of general application that would infringe Aboriginal or treaty rights would not exhibit a clear intention to exclude

⁶⁴ RSC 1985, c I-21, s 3(1), quoted in text accompanying note 11 above.

⁶⁵ 43 CCC (3d) 396, 1988 CanLII 7068 (ON CA) at 400, followed in *R v Sivalingam*, 2019 ONCJ 239 at para 104.

⁶⁶ 2002 FCA 158 at para 23.

⁶⁷ 2005 SCC 26 at para 101–02.

⁶⁸ An analogy could be drawn with the notwithstanding clause in s 33 of the *Charter*, *supra* note 13, requiring the override of certain *Charter* rights to be express. Notably, s. 25 rights are not subject to that override power.

the application of s 8.3(1). In *Delgamuukw*, Chief Justice Lamer held that, for legislation to extinguish (abrogate) Aboriginal title, the intention to do so would have to be “clear and plain.” While this requirement, he said, “does not, perhaps, require that the Crown ‘use language which refers expressly to its extinguishment of aboriginal rights’ (*Gladstone*, *supra* [note 42], at para. 34), the standard is still quite high.”⁶⁹ Respecting section 8.3(1), there is no reason why derogation (infringement) should be treated differently from abrogation (extinguishment), as the section protects Aboriginal and treaty rights equally from both.

It can therefore be concluded that section 8.3(1) of the federal *Interpretation Act* has substantially altered the law of Canada. As long as that section is in force, then absent an overriding contrary intention, federal laws cannot derogate from, and thus cannot infringe, section 35 Aboriginal and treaty rights. If federal laws are in irreconcilable conflict with those rights, the rights prevail. So, to use as examples the federal fisheries regulations considered in the Supreme Court cases discussed earlier, the analysis has been altered significantly by section 8.3(1). The onus is still on the Indigenous parties who are charged with violation of a federal law to prove an Aboriginal or treaty right and that the law would potentially derogate from (infringe) the right.⁷⁰ If they can so prove, then, pursuant to section 8.3(1), the law should be construed as not derogating from the right. If that is not possible, i.e. if there is an irreconcilable conflict between them, the right prevails and the law is inapplicable. Unlike before section 8.3(1) came into force on November 27, 2024, the federal government does not have the option of proving that the law is justifiable because the remedial effect of the section (like that of section 25 of the *Charter* in relation to *Charter* rights) is to render the law of no force and effect to the extent of its conflict with the Aboriginal or treaty right. Because section 8.3(1) prevents any derogation from taking place, in the absence of a clear indication in the legislation that section 8.3(1) does not apply, there can be no infringement for the government to justify.

2. Non-Derogation Provisions in Provincial Interpretation Statutes

Our analysis of the non-derogation provisions relating to Aboriginal and treaty rights in the Saskatchewan and Manitoba interpretation statutes can be brief because it follows the same reasoning as our analysis of

⁶⁹ *Delgamuukw*, *supra* note 5 at para 180.

⁷⁰ Likewise, the onus is on parties claiming protection of s 25 of the *Charter* to prove a s 25 right and an irreconcilable conflict between it and the *Charter* right allegedly derogating from it: *Dickson*, *supra* note 14 at paras 180–81.

the equivalent provision in the federal *Interpretation Act*.⁷¹ However, the British Columbia statute requires more attention, in part because there are Aboriginal title claims over much of the province. Although the BC statute, unlike the federal, Saskatchewan and Manitoba statutes, provides that provincial Acts and regulations “must be construed as being consistent with” the UN Declaration on the Rights of Indigenous Peoples, consideration of this provision is beyond the scope of this article.⁷²

A) Saskatchewan

In 1996, Saskatchewan became the first province to include a non-derogation from Aboriginal and treaty rights provision in its interpretation statute.⁷³ This provision, which is now section 2-43 of the *Saskatchewan Legislation Act*,⁷⁴ provides under the heading “Treaty rights”:⁷⁵

No enactment abrogates or derogates from the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.⁷⁶

The French version, which is equally authoritative,⁷⁷ reads:

⁷¹ Saskatchewan, Manitoba and British Columbia are the only provinces where I have found non-derogation clauses in their interpretation statutes. Although the other provinces have not enacted such clauses, there may be equivalent provisions in specific statutes that govern their interpretation. Also, a non-derogation clause is included in the *Nunavut Legislation Act*, SNU 2020, c 15, s 23.

⁷² *Interpretation Act*, RSBC 1996, c 238, s 8.1(3), consideration of which would also require examining the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44. See *Kits Point Residents Association v Vancouver (City)*, 2023 BCSC 1706 at para 170–72 [*Kits Point*]; *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 at paras 88–100 [*Gitxaala*]; Nigel Banks, “*Gitxaala and the Conundrum of UNDRIP Implementing Legislation: The Sky Has Not Fallen In*” (22 December 2025), online: ABLawg, <tinyurl.com/y7shz462> [perma.cc/PLN8-N3TD].

⁷³ By *The Interpretation Amendment Act*, 1996, SS 1996, c 48, s 2, adding s 14.1 to *The Interpretation Act*, 1995, SS 1995, c I-11.2.

⁷⁴ SS 2019, c L-10.2, s 2-43, replicating s 14.1 of the earlier statute, *ibid*.

⁷⁵ The original heading, “Existing Aboriginal and treaty rights,” was replaced in 2019 by “Treaty rights”, *ibid*, possibly to imply that there are no Aboriginal rights in Saskatchewan. However, as those rights are constitutional, that is a matter for courts, not legislatures, to determine: see *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at paras 9, 60.

⁷⁶ Section 2-29 of *The Legislation Act*, *supra* note 74, defines “enactment” as “an Act or a statutory instrument or a portion of an Act or a statutory instrument.” Although regulations are not expressly included, if Acts cannot abrogate or derogate from Aboriginal or treaty rights, regulations made under statutory authority cannot do so either.

⁷⁷ *The Language Act*, SS 1988-89, c L-6.1, s 10; *The Legislation Act*, *supra* note 74, s 2-18(1). Note that, in Saskatchewan, unlike in Manitoba and federally, these are statutory,

Aucun texte n'a pour effet d'abroger ou de diminuer les droits existants—ancestraux ou issus de traités—des peuples autochtones du Canada que reconnaît et confirme l'article 35 de la Loi constitutionnelle de 1982.

The English version differs from the equivalent federal non-derogation provision in that it omits the words “is to be construed.” Nonetheless, recall that the majority in *Dickson* decided that, even though equivalent words are omitted from the French version of section 25 of the *Charter*, an interpretive purpose is implied. Regarding the words “abrogate or derogate” in section 25, the majority decided that they have the same meaning as “n'y porte pas atteinte” in the French version.⁷⁸ In other words, they are mandatory.

The Saskatchewan French text also differs from the federal text because the former replicates the English text by employing the words, “n'a pour effet d'abroger ou de diminuer,” rather than “n'y porte pas atteinte.” However, given that the Court in *Dickson* concluded that the words “abrogate or derogate” and “n'y porte pas atteinte” in section 25 have the same effect, this difference is inconsequential.

A section identical to section 2-43—section 14.1 of Saskatchewan's *Interpretation Act*, 1996⁷⁹—was considered in *Peter Ballantyne Cree Nation v Canada (Attorney General)*.⁸⁰ On an application for summary judgment, Justice Smith held that this section did not prevent a limitation statute from applying to bar claims by a First Nation for breach of fiduciary obligations and trespass to reserve land in the context of construction of a hydroelectric dam completed in 1931.⁸¹ He regarded section 14.1 as a procedural aid to interpretation of statutes rather than as a substantive protection of Aboriginal and treaty rights. He also rejected an alleged analogy between section 14.1 and section 25 of the *Charter*. With respect, given the similarity in wording between those sections and the Supreme Court's interpretation of section 25 in *Dickson* (decided later), Justice Smith's view that section 14.1 is merely a guide to construction and his rejection of a section 25 analogy are misplaced. Courts should always interpret statutes as being consistent with Indigenous peoples'

rather than constitutional, provisions.

⁷⁸ *Dickson*, *supra* note 14 at para 124: see the text accompanying notes 28–30 above.

⁷⁹ See notes 73–74 above.

⁸⁰ 2014 SKQB 327, affirmed 2016 SKCA 124, leave to appeal dismissed, 2017 CanLII 38581 (SCC) [*Peter Ballantyne*].

⁸¹ For criticism of Justice Smith's application of the limitations statute, see Kent McNeil & Thomas Enns, “[Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches](#)”, February 2022, at 29–31, accessed April 21, 2025: <tinyurl.com/mchk9m27> [perma.cc/SUV7-HR75].

constitutional rights, if at all possible, as there is a strong common law presumption that legislatures do not intend to interfere with rights.⁸² Justice Smith's interpretation of s 14.1 would thus mean that it had no remedial effect, contrary to s 10 (now s 2-10(2)), which requires that "[e]very enactment shall be interpreted as being remedial." Moreover, while agreeing with Justice Smith, the Court of Appeal also decided that limitation statutes in force *before* s 14.1 was enacted had already barred the plaintiffs' claims.⁸³ Given that s 14.1 did not revive previously barred claims, the appeal court's affirmation of other aspects of Justice Smith's section 14.1 analysis was unnecessary.

Like the federal *Interpretation Act*, the Saskatchewan *Legislation Act* contains an exception to its application where "a contrary intention appears."⁸⁴ To our discussion of that federal qualification, we need to add a division-of-powers analysis in the provincial context. In *Delgamuukw*, Chief Justice Lamer pointed out that, for a provincial law to be clear and plain enough to extinguish Aboriginal rights, it would need to single them out, and so would be constitutionally invalid because it would cross the line into exclusive federal jurisdiction under section 91(24) of the *Constitution Act, 1867*.⁸⁵ Applying that reasoning to the *Legislation Act*, for an intention contrary to the application of section 2-43 to be clear and plain, the legislation might need to single out the rights in question. If so, such an intention, as Chief Justice Lamer stated, "would take the law outside provincial jurisdiction."⁸⁶

In conclusion, section 2-43 of the Saskatchewan *Legislation Act* has the same meaning as the equivalent provision in the federal *Interpretation Act*. It shields Aboriginal and treaty rights from provincial legislation that would abrogate or derogate from them by creating irreconcilable conflicts. Because the section prevents derogation from those rights, there can be no infringement for the government to justify in the absence of a clear legislative intention that section 2-43 does not apply to the law in question. However, unlike in the federal context, for such a provincial intention to be clear and plain enough, it might need to single Aboriginal or treaty

⁸² See Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022), §15.047.

⁸³ 2016 SKCA 124 at para 197.

⁸⁴ *Supra* note 74, s 2-2. Interestingly, neither court in *Peter Ballantyne*, *supra* note 80, referred to this exception (then s 3(1)). For a case where a contrary intention appeared in another context, see *Thompson v Claude Resources Inc*, 2006 SKCA 116 at para 6.

⁸⁵ *Delgamuukw*, *supra* note 5 at para 180, relying on *R v Sutherland*, 1980 CanLII 18 (SCC). Note that singling out and interjurisdictional immunity are distinct constitutional concepts: compare *Delgamuukw*, paras 179–80 and para 181. In *Tsilhqot'in Nation*, *supra* note 6, the Court rejected application of the latter, but not the former, to Aboriginal rights.

⁸⁶ *Delgamuukw*, *supra* note 5 at para 180.

rights out and thus cross the line into federal jurisdiction, rendering the non-application of section 2-43 constitutionally invalid.

B) Manitoba

Manitoba proceeded to include a non-derogation from Aboriginal and treaty rights provision in its *Interpretation Act* in 2000.⁸⁷ Section 8 provides:

No Act or regulation is to be interpreted so as to abrogate or derogate from the aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.⁸⁸

The French version, which is as authoritative,⁸⁹ provides:

Aucune loi et aucun règlement n'ont pour effet de porter atteinte aux droits—ancestraux ou issus de traités—des peuples autochtones du Canada que reconnaît et que confirme l'article 35 de la *Loi constitutionnelle de 1982*.

Both the English and the French versions contain language protective of section 35 Aboriginal and treaty rights that is very similar to the wording of section 8.3(1) of the federal statute. Applying the same reasoning to both, the Manitoba provision must prevent any infringement of these rights. If an Act or regulation cannot be interpreted without derogating from these rights, then, in the absence of a clear, constitutionally-valid legislative intention that section 8 does not apply to the law in question,⁹⁰ it will be in irreconcilable conflict with the right and must be of no force and effect to that extent. Given that the derogation would be invalid, there would be no infringement for the Manitoba government to justify.

C) British Columbia

The British Columbia *Interpretation Act*⁹¹ provides in section 8.1(2):

⁸⁷ CCSM, c I80, enacted as the *Interpretation and Consequential Amendments Act*, SM 2000, c 26.

⁸⁸ I have not found any cases discussing or applying this provision.

⁸⁹ This is mandated by *The Manitoba Act, 1870*, 33 Vict (Canada) c 3, s 23, made constitutional by the *Constitution Act, 1871*, 34-35 Vict, c 28 (UK): see *Re Manitoba Language Rights*, *supra* note 18.

⁹⁰ This qualification is due to the *Interpretation Act*, CCSM, c 180, s 2: "This Act applies to the interpretation of every Act and regulation – whether enacted or made before or after this Act comes into force – unless a contrary intention appears in the other Act or regulation." On the constitutional-validity requirement, see notes 84–86 and accompanying text above.

⁹¹ RSBC 1996, c 238.

For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act 1982*.⁹²

The language of this section is very similar to that of the federal *Interpretation Act*, though arguably it is stronger because it uses the words “must be construed,” rather than “is to be construed,” the words in the federal statute.⁹³ It is therefore safe to conclude that the BC statute should be interpreted as having at least as much effect as the federal statute. Consequently, provincial laws must be construed, if possible, as upholding and not derogating from section 35 rights. If that is not possible because there is an irreconcilable conflict between them, then the Aboriginal and treaty rights must prevail. As a result, absent a clear, constitutionally-valid legislative intention that section 8.1(2) does not apply to the law in question,⁹⁴ there can be no derogation from (infringement of) those rights by the provincial law in question and so no resort by the provincial government to the *Sparrow* justification test.

⁹² Section 2, *ibid*, defines “enactment” as “an Act or a regulation or a portion of an Act or regulation.” [Section 8.1 was added by Interpretation Amendment Act, 2021](#), SBC 2021, c 36, which came into force on November 25, 2021: <tinyurl.com/au4yxx7p> [perma.cc/ST3U-R4JU], accessed April 10, 2025. Although the application of s 8.1 was discussed in *Kits Point and Gitxaala*, *supra* note 72, those cases focussed on s 8.1(3) (the UN Declaration provision) rather than s 8.1(2): see Bankes, *supra* note 72. See also *K.K.M. v T.J.S.*, 2021 BCPC 316 at para 76–77, approved in *L.L. v A.I.*, 2023 BCSC 1503 at paras 36–38; *Skii km Lax Ha v British Columbia (Chief Executive Assessment Officer)*, 2024 BCSC 1687; *Saanich (District) (Re)*, 2026 BCIPC 3. In *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490 at paras 2257–58, Justice Young decided that s 8.1 provided an additional reason why the indefeasibility provisions in the *Land Titles Act*, RSBC 1996, c 250, could not apply to derogate from Aboriginal title.

⁹³ The words “For certainty” at the beginning of the BC provision might suggest an intention for it to be declaratory. However, because existing law permits provincial infringement of (derogation from) Aboriginal and treaty rights if justifiable (see notes 9–10 and accompanying text above), for the provision to have the remedial effect required by the BC *Interpretation Act*, *supra* note 91, s 8, it must change the law.

⁹⁴ The BC *Interpretation Act*, *ibid*, s 2(1), provides: “Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.” On the constitutional-validity requirement, see notes 84–86 and accompanying text above. Referring to s 2(1) in *Bank of Montreal v Graton*, 1987 CanLII 2436 (BC CA) at para 11, Justice Esson stated: “The contrary intention need not be found in express words, but may be inferred from the scheme of the enactment, its legislative history and other circumstances which surround the use of the word in question.” For a case where a contrary intention was found, see *Pacific Simpson Lumber Ltd v Kaisha*, 1981 CanLII 245 (BC CA). See also *International Association of Firefighters, Local 209 v Edmonton (City)*, 1979 ALTASCAD 74 (CanLII).

Unlike Manitoba and Saskatchewan, most of British Columbia is not covered by treaties. Most Aboriginal title claims in the province have yet to be resolved. However, in *Tsilhqot'in Nation*,⁹⁵ the Supreme Court declared Aboriginal title to exist over part of that nation's territory, and more recently British Columbia and Canada have acknowledged the Haida Nation's title to Haida Gwaii.⁹⁶ Accordingly, to the extent provincial laws are in irreconcilable conflict with the Tsilhqot'in Nation's Aboriginal title, and arguably the Haida Nation's title,⁹⁷ those laws should be of no force and effect, nor can their application to those title lands be justified.

This conclusion requires further consideration. In *Delgamuukw v British Columbia*, Chief Justice Lamer wrote that

... the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.⁹⁸

Elaborating, he concluded that natural resources such as minerals, oil and gas are included in Aboriginal title.⁹⁹ In *Tsilhqot'in Nation*, Chief Justice McLachlin went further: "Aboriginal title confers ownership rights similar

⁹⁵ *Tsilhqot'in Nation*, *supra* note 6.

⁹⁶ By the Gaayhlxid · Gihlagalgang "[Rising Tide](#)" Haida Title Lands Agreement, April 14, 2024 [Haida Agreement], accessed April 12, 2025: <tinyurl.com/5jn6rn6m> [perma.cc/9KPG-5NP4], and the Chiixuujin/Chaaw Kaawgaa "[Big Tide \(Low Water\)](#)" Haida Title Lands Agreement, December 4, 2024, accessed April 12, 2025: <tinyurl.com/2k74tswf> [perma.cc/3E4X-G6CT]. The BC agreement was implemented by *Haida Nation Recognition Amendment Act*, SBC 2024, c 23 and *Haida Nation Recognition Act*, SC 2024, c 29. See also *The Council of the Haida Nation v British Columbia*, 2025 BCSC 1806 [*Haida Nation*], in which Justice Giaschi issued a consent order that was agreed to by the Haida Nation, Canada, and British Columbia, declaring "Aboriginal title to the terrestrial areas of Haida Gwaii".

⁹⁷ Although the Haida Agreement, in clause 2.1, recognizes and affirms the Haida Nation's Aboriginal title as protected by s 35 of the *Constitution Act, 1982*, the agreement is not a treaty (clause 8.8) and so does not create s 35 treaty rights. Moreover, it provides for continuation of the exercise of provincial jurisdiction in accordance with provincial laws, while committing to a process of reconciliation of this jurisdiction with Haida jurisdiction (clause 3). Arguably, however, the consent order issued in *Haida Nation*, *supra* note 96, has provided Haida Aboriginal title with section 35(1) constitutional status. The impact of this, and the interaction between the BC statute implementing the agreement (*supra* note 96) and s 8.1(2) of the *BC Interpretation Act*, *supra* note 91, raise complex questions that cannot be addressed here.

⁹⁸ *Delgamuukw*, *supra* note 5 at para 117.

⁹⁹ *Ibid* at para 122.

to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”¹⁰⁰ Consequently, she decided that the provincial Crown’s underlying title to Aboriginal title land has no beneficial content.¹⁰¹

Regarding justifiable infringement, in *Delgamuukw* Chief Justice Lamer offered this description of the kinds of activities that could qualify as valid legislative objectives, the first requirement in the *Sparrow* justification test:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.¹⁰²

These objectives need to be broken down and categorized.¹⁰³ In Canada, governments do not usually engage in agriculture, forestry or mining, as these activities are generally left to the private sector. So Chief Justice Lamer must have envisaged government grants of interests in Aboriginal title land to individuals and corporations to pursue these activities. These interests would clearly be in irreconcilable conflict with the Aboriginal titleholders’ rights to exclusive possession and use of their lands.¹⁰⁴ Applying section 8.1(2) of the BC *Interpretation Act*, any provincial statutes authorizing such grants would therefore be inapplicable and incapable of justification.

A second class of activities Chief Justice Lamer envisaged was hydroelectric development and the building of infrastructure, which are often undertaken by governments. Included would be highways, dams, and electricity transmission lines. These too would be in irreconcilable conflict with the Aboriginal titleholders’ rights of exclusive use and occupation and so should also be impermissible and incapable of justification.

¹⁰⁰ *Tsilhqot’in Nation*, *supra* note 6 at para 73.

¹⁰¹ *Ibid* at para 70. See Kent McNeil, “The Source, Nature, and Content of the Crown’s Underlying Title to Aboriginal Title Lands” (2018) 96:2 *CBR* 275.

¹⁰² *Delgamuukw*, *supra* note 5 at para 165. This passage was quoted with apparent approval by Chief Justice McLachlin in *Tsilhqot’in Nation*, *supra* note 6 at para 83.

¹⁰³ For critical assessment, see Kent McNeil, “The Vulnerability of Indigenous Land Rights in Australia and Canada” (2004) 42 *Osgoode Hall LJ* 271 at 292–97.

¹⁰⁴ See *Tsilhqot’in Nation*, *supra* note 6 at para 127, Chief Justice McLachlin: “Granting rights to third parties to harvest timber on Tsilhqot’in land is a serious infringement that will not lightly be justified.”

Chief Justice Lamer also included protection of the environment or endangered species. Unlike the first two categories, these objectives would not normally involve land development. More commonly, they would involve regulations designed to protect the natural environment and habitat. As such, they might involve prohibitions of activities that are inconsistent with the goal of protection. Consequently, they might or might not be in irreconcilable conflict with Aboriginal title.

In *Delgamuukw*, Chief Justice Lamer placed an inherent limit on Aboriginal title, namely that “lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group’s claim to aboriginal title.”¹⁰⁵ In *Tsilhqot’in Nation*, Chief Justice McLachlin emphasized that the purpose of this limitation is to preserve the land, so it cannot “be developed or misused in a way that would substantially deprive future generations of the benefit of the land.”¹⁰⁶ If provincial environmental regulations preserved the land for succeeding generations, they might be construed as not in irreconcilable conflict with Aboriginal title and so not in derogation of it. Chief Justice McLachlin envisaged this:

It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group’s preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both.¹⁰⁷

The hope she expressed suggests that Indigenous governments, and hence Indigenous law, have a role in ensuring the environmental protection that will sustain Aboriginal title lands for future generations.

3. Conclusion

Inclusion of non-derogation provisions regarding Aboriginal and treaty rights in interpretation statutes is a significant development in Canada.¹⁰⁸

¹⁰⁵ *Delgamuukw*, *supra* note 5, heading before para 125 (italics and capitalization removed).

¹⁰⁶ *Tsilhqot’in Nation*, *supra* note 6 at para 74.

¹⁰⁷ *Ibid* at para 105. Chief Justice McLachlin nonetheless acknowledged: “Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises”: *ibid* at para 74.

¹⁰⁸ Specific statutes sometimes contain such provisions, but interpretation Acts apply broadly to all legislation in the jurisdiction in which they are enacted. For an example of a specific statute, see the *Mackenzie Valley Resource Management Act*, SC 1998,

Saskatchewan, Manitoba and British Columbia acted first, followed by Parliament in November 2024. This article argues that the effect of these provisions has been clarified by the Supreme Court's decision in *Dickson v Vuntut Gwitchin First Nation* in March 2024. A majority of the Court decided that section 25 of the *Canadian Charter of Rights and Freedoms* prevents the *Charter's* individual rights provisions from abrogating or derogating from the Aboriginal, treaty or other rights or freedoms of the Aboriginal peoples of Canada. If there is an irreconcilable conflict between an individual *Charter* right, such as a section 15(1) equality right, and a section 25 right, the section 25 right prevails.

With slight variations, the provisions for non-derogation from Aboriginal and treaty rights mirror the language of section 25 of the *Charter*. It is therefore appropriate to apply the majority's interpretation of section 25 to those provisions. The resulting conclusion is that, in general, federal, Saskatchewan, Manitoba and British Columbia laws must respect the Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. If possible, those laws should be read as not abrogating or derogating from those rights, but if this is not possible because there is an irreconcilable conflict between them, the Aboriginal and treaty rights should prevail. This means that, while these non-derogation provisions are in effect and absent a clear, constitutionally-valid legislative intention that the relevant non-derogation clause does not apply to the law in question, it is no longer possible for the governments in these jurisdictions to justify infringements of these rights.

c 25, s 5(2): "This Act is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them."