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## The Constitution Act, 1982, Sections 25 and 35

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THE CONSTITUTION ACT, 1982, SECTIONS 25 AND 35\*

by

Kent McNeil\*\*

The Constitution Act, 1982, proclaimed in force as of April 17, 1982, supplements the other Acts and Orders which already made up the Constitution of Canada. It does not detract from any of the rights of the aboriginal peoples of Canada guaranteed by earlier constitutional instruments. Section 91(24) of the 1867 Constitution Act, the Rupert's Land Order, and the Natural Resources Transfer Agreements, which have been discussed earlier this week, all continue to apply. In fact, they are specifically included in the new Act's definition of the Constitution of Canada.

However, the 1982 Constitution Act goes further than previous constitutional instruments by providing additional guarantees for the rights of aboriginal peoples.

Section 25

As everyone knows, the 1982 Act gave Canada a Charter of Rights and Freedoms. Section 15 of the Charter, which came into force on April 17, 1985, provides that everyone is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, particularly discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It might be said that the special status and rights which Canada's aboriginal peoples have are inconsistent with this equality provision.

To avoid this result, a saving provision was included within the Charter itself. This is section 25, which provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any

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aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The language of this section is very broad. It refers specifically to treaty and aboriginal rights, but also mentions other rights and freedoms, including those recognized by the Royal Proclamation of 1763, and any rights or freedoms that now exist or may be acquired by land claims agreements.

A question I have asked myself is whether section 25 protects rights which status Indians have under the Indian Act from Charter challenges. I think it does. These are rights which no other Canadians have, and which may offend the equality rights provision. Parliament nonetheless has the authority under section 91(24) of the 1867 Constitution Act to make laws for Indians and lands reserved for the Indians. The Indian Act was passed to fulfil this legislative mandate. So even without section 25, the Indian Act, or at least any provisions in it which have a legitimate federal purpose, may have continued to be valid, even though discriminating on the basis of race. But the inclusion of section 25 in the Charter fortifies this conclusion, and in my view protects the Indian Act generally from the Charter. Provisions of the Indian Act which discriminate on the basis of sex, however, should have been invalidated by section 28 of the Charter, which provides that, notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. This would seem to apply to section 25, placing a restriction on the rights and freedoms of aboriginal peoples referred to there. So as far as the Indian Act is concerned, the provisions of that Act which discriminated on the basis of sex may have been void as of April 17, 1982, three years before the Act was amended to remove those discriminatory provisions.

So what is the effect of section 25? It seems fairly certain that section 25 is merely a saving provision--it is not in itself a source of rights. On this, the case law decided since the Charter came into force has been quite consistent.

In Steinhauer v. R., [1985] 3 C.N.L.R. 187, Madame Justice Veit of the Alberta Court of Queen's Bench said (at p.191) that section 25 "is a shield and does not add to aboriginal rights". She accordingly held that section 25 provided no protection against

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the federal Fisheries Act to a status Indian who was allegedly exercising his treaty right to fish.

In Augustine and Augustine v. R.; Barlow v. R., [1987] 1 C.N.L.R. 20 (N.B.C.A.), Stratton, Chief Justice of New Brunswick, agreed (at p.44) with Peter Hogg when he wrote in the second edition of his text, Constitutional Law of Canada, that s.25 "does not create any new rights, or even fortify existing rights. It is simply a saving provision, included to make clear that the Charter is not to be construed as derogating from 'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'." The Chief Justice held that section 25 provided no protection against the provincial Fish and Wildlife Act to Micmac Indians who were hunting at night.

### Section 35

I would now like to move on to section 35 of the 1982 Constitution Act, which is the more important provision relating to aboriginal peoples' rights. It reads like this:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

As originally enacted, section 35 contained only subsections (1) and (2). The provision specifying that "treaty rights" include rights acquired by existing and future land claims agreements was added in 1984 after being agreed to at the March 1983 constitutional conference. This is an important provision, for it gives constitutional protection to the James Bay Agreement (see Eastmain Band v. Gilpin, [1987] 3 C.N.L.R. 54 (Que.Prov.Ct.)), and ensures that aboriginal peoples will not be giving up constitutionally protected rights for unprotected rights in any future land claims settlements. The provision that aboriginal and treaty rights are guaranteed equally to male and female persons was also added in 1984, as a result of the 1983 accord.

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The first thing to note is that, unlike section 25, section 35 is not in the Charter. It forms a separate part of the 1982 Act (i.e. Part II), which comes immediately after the Charter. This gives section 35 some advantages. For example, it means that it is not limited by section 1 of the Charter, which says that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Note that section 25 has been held to be subject to this restriction: see R. v. Nicholas and Bear, [1985] 4 C.N.L.R. 153, where New Brunswick Provincial Court Judge Desjardins said (at pp.162-63) that the Fisheries Act and regulations thereunder are for the purpose of conservation and management of the fisheries, and as such are reasonable restrictions on aboriginal rights to fish. He also held that section 35 of the 1982 Constitution Act did not protect these rights, because they were not in existence when that Act came into force. We will return to this issue in a moment.) Moreover, because section 35 is not in the Charter, it is not subject to section 33 which permits Parliament and the provincial legislatures to override certain of the Charter's provisions.

The words "aboriginal peoples of Canada" are defined in section 35(2) as including "the Indian, Inuit and Métis peoples of Canada." But no further definition of those terms is provided. The term "Indian" cannot mean the same thing as in section 91(24) of the 1867 Constitution Act because the Supreme Court of Canada has held that the term "Indians" in section 91(24) includes Inuit (see Re Eskimos, [1939] 2 D.L.R. 417), and convincing arguments have been made that Métis are also included in section 91(24) (see Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 Sask.L.Rev. 37). Yet in section 35 of the 1982 Act these three groups are differentiated. So "Indian" must have a narrower meaning than in section 91(24).

One approach to this issue would be to apply the Indian Act definition of "Indian" to section 35. The result would be that the term "Indian" in section 35 would refer to status Indians. However, this would seem to be inappropriate because it would give Parliament the legislative authority to define a term in the Constitution. Moreover, in 1985 Parliament amended the Indian Act so as to expand the class of status Indians to include some persons who had lost status or who never had status. So the definition of the class known as status Indians has changed since 1982. If the Indian Act definition of "Indian" is adopted for the purposes of section 35 of the 1982 Act, this means that Parliament has already unilaterally amended the Constitution. Clearly Parliament has no power to do this.

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Another approach to the definition of "Indian" in section 35, and to the definition of "Inuit" as well, would be to apply a test based on such things as racial blood content, cultural affiliation, group acceptance, self-identification or a combination of these factors. But section 35 provides no guidance as to the appropriateness of using any of these various factors to develop workable definitions.

The problem of defining the term "Métis" is even more complex. Are the Métis all persons of mixed blood, or only those persons of mixed blood who did not associate themselves with Indian tribes or bands? If one adopts a mixed blood approach, what percentage of Indian (or Inuit) blood is necessary to make a person Métis? (Apparently Louis Riel had only one-eighth Indian blood.) Or should the Métis be limited as a group to the descendants of those persons who made up the "Métis Nation" in the Red River region, and who later gathered around Batoche, in the nineteenth century?

These questions have yet to be resolved. Perhaps the best solution would be a constitutional amendment giving the aboriginal peoples themselves the power to determine who belongs to their respective groups, as part of broader powers of self-government. However, to do so one still has to decide to whom this power should be given, which itself involves making some determination of who the Indians, Inuit and Métis are. Perhaps this is not as big a problem as it may seem to be, for the core of each of those groups is probably fairly easily identified, and so persons who are within the core could initially be given the power to determine how broad the definition of the group should be.

Turning to subsection (1) of section 35, it recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". "Treaty rights" must include rights preserved or acquired by treaties entered into between Indian tribes or nations and the Crown, both before and since Confederation. Examples are treaty land entitlements (e.g. rights to have reserves set aside), annuity rights, and hunting and fishing rights. As we have seen, any rights acquired before or after April 17, 1982, by land claims agreements, i.e. by settlement of comprehensive claims based on aboriginal title, are also explicitly included by subsection (3). Possibly any rights which the aboriginal peoples may have by virtue of international treaties are covered as well. An example may be the Jay Treaty of 1794, entered into by Britain and the United States, which provided that Indians living on either side of the international boundary between Canada and the United States were to be free to pass across the boundary, and to trade freely with one another and carry their own goods across the boundary duty free.

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The aboriginal rights recognized and affirmed by section 35 would be any rights which the aboriginal peoples have as the first inhabitants of Canada. These would include land rights based on aboriginal title, hunting and fishing rights, and the right to retain at least some of their customary laws (particularly in the area of family law: see Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185, where Mr. Justice Marshall of the Northwest Territories Supreme Court held that he was bound by section 35 to recognize a customary Inuit adoption). Arguably, an aboriginal right to self-government was also recognized and affirmed.

What, then, is the effect of section 35 on the rights recognized and affirmed thereby? Section 52(1) of the Constitution Act provides that the Constitution "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." Aboriginal and treaty rights are thus given constitutional status, so that any federal or provincial law which is inconsistent with them should be of no effect to that extent. This is extremely important because in the past aboriginal and treaty rights were subject to federal legislation, and aboriginal hunting rights, at least, were to some extent subject to provincial legislation (treaty rights were generally shielded against provincial legislation, because section 88 of the Indian Act provided them with this protection).

There is, however, a catch to this because only existing aboriginal and treaty rights are recognized and affirmed by section 35. In an article I wrote shortly after the 1982 Act was proclaimed ("The Constitutional Rights of the Aboriginal Peoples of Canada", [1982] 4 Supreme Court L.R. 255), I argued that "existing" means unextinguished. Aboriginal or treaty rights that had been completely abrogated prior to April 17, 1982, would not be revived by the section. However, rights that had been merely restricted or limited by legislation, but not abrogated, would still be in existence, and so would be caught by section 35. The legislation which restricted those rights would therefore be of no force or effect to the extent that it was inconsistent with them.

The example I gave was the federal Migratory Birds Convention Act. Although that Act has infringed both aboriginal and treaty rights, prior to April 17, 1982, it was upheld by the Supreme Court as valid legislation. My argument was that the Migratory Birds Convention Act merely restricted the hunting rights of aboriginal peoples--it did not abrogate them. Accordingly, those rights were still in existence in 1982, although they could not be fully exercised. They should therefore have been recognized and affirmed by section 35, making the Migratory Birds Convention Act of no force or effect to the extent that it is inconsistent with them.

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To date, however, the courts have not adopted this line of reasoning.

In R. v. Eninew, [1984] 2 C.N.L.R. 122, Mr. Justice Gerein of the Saskatchewan Court of Queen's Bench upheld the conviction of a Treaty 10 Indian for hunting ducks out of season contrary to the Migratory Birds Regulations. The offence was committed on April 29, 1982, just twelve days after the 1982 Constitution Act came into force. Mr. Justice Gerein said the issue to be decided was whether section 35 of the Act had the effect of invalidating the Migratory Birds Regulations insofar as they apply to Indians, restoring to them an unfettered right to hunt. He began by stating (at p.124) that the word "existing" relates to the entire phrase "aboriginal and treaty rights", not just to the word "aboriginal". This is no doubt correct. As to the effect of the word "existing", he said (at p.124) that it limits the rights of the aboriginal peoples "to those rights which were in being or which were in actuality at the time when the Constitution Act came into effect." At that time, he continued (at p.125), "Indians did not enjoy an unrestricted right to hunt.... [T]his treaty right had been abridged by a regulation of Parliament acting within its authority. The Constitution Act did not have the effect of repealing the regulation or rendering it invalid. Rather the Constitution Act only recognized and secured the status quo." This decision was upheld by the Saskatchewan Court of Appeal, but without dealing with the effect of section 35. (The Court of Appeal held that the regulation in question did not violate the accused's treaty rights, as the treaty provided for government regulation of hunting rights. This conclusion, however, is inconsistent with the decision of the Northwest Territories Court of Appeal in R. v. Sikyea (1964), 43 D.L.R. (2d) 150, affirmed by the Supreme Court of Canada, [1964] S.C.R. 642.)

In R. v. Sutherland and Napash, [1984] 4 C.N.L.R. 133, the distinction between rights that were abrogated and those that were merely restricted was put directly to Ontario Provincial Court Judge Cloutier with respect to two Treaty 9 Indians who had been charged with possession of geese and ducks contrary to the Migratory Birds Convention Act. Judge Cloutier apparently accepted the distinction, and said an argument could be made that restricted rights still exist and are therefore reinstated by virtue of section 35, irrespective of the Migratory Birds Convention Act. However, he went on to hold that, on the basis of authority (mainly the Sikyea case, supra), the Migratory Birds Convention Act did not merely restrict treaty rights--it abrogated them in these circumstances. This is a questionable conclusion, in my view unsupported by the authorities Cloutier referred to, which were not concerned with the distinction between restriction and abrogation of rights. Although it is true that the Act places Indians in the same position as other Canadians insofar as the

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hunting of most migratory birds is concerned, it does allow Indians to take certain birds (e.g. scoters, auks and guillemots) for food or clothing, and so preserves their special right to hunt to some extent. In other words, their special right to hunt migratory birds was not entirely taken away by the Act.

Moreover, the question which I think must be asked in these circumstances is whether a right to hunt can be broken down into separate rights to hunt different species or categories of game. Is the right to hunt mallard ducks or Canada geese, or even migratory birds generally, a right which can be isolated and abrogated, while the right (or rights) to hunt other types of game continues? Or is there a general right to hunt which is merely restricted by a prohibition on the hunting of certain species or categories of game? In my opinion, it is more in keeping with general principles of constitutional interpretation to read section 35(1) as referring to broad classes of rights, such as the right to hunt or the right to fish, or even the right to hunt and fish, rather than fragmenting the rights protected by that section into narrow rights to take certain species or categories of game or fish. If this approach is adopted, then aboriginal and treaty rights to hunt and fish could have been in existence on April 17, 1982, even though those rights were no longer exercisable on that date where certain species or categories of game and fish were concerned. (See, however, R. v. Flett, [1987] 3 C.N.L.R. 70, where Manitoba Provincial Court Judge Martin distinguished between extinguishment and regulation, and concluded that the Migratory Birds Convention Act extinguished the right of treaty Indians to hunt migratory birds because, in his mistaken view, it placed Indians on exactly the same footing as white recreational hunters. Martin went on to hold that, due to section 35(1) of the 1982 Constitution Act, the Migratory Birds Convention Act is now of no force or effect to the extent that it is inconsistent with that right, but given his conclusion that the right had been extinguished prior to April 17, 1982, this is probably wrong.)

Another federal statute that has been challenged as being inconsistent with aboriginal and treaty rights and therefore constitutionally invalid to that extent is the Fisheries Act. Most of the recent cases dealing with the applicability of that Act and the regulations made under it to aboriginal peoples have held the word "existing" in section 35(1) of the 1982 Constitution Act to mean that limitations on aboriginal and treaty rights to fish that were already in place on April 17, 1982, continue to be effective.

For example, in Steinhauer v. R., supra, Alberta Court of Queen's Bench Judge Veit held that the accused did not have an existing treaty right to fish without a licence because that right had been

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taken away by the Alberta Fishery Regulations prior to April 17, 1982.

Similarly, in R. v. Seward, [1985] 4 C.N.L.R. 167, British Columbia Provincial Court Judge Greer, in convicting six treaty Indians of offences under the British Columbia Fishery (General) Regulations, agreed (at pp.181-82) with the conclusion reached by Mr. Justice Gerein in R. v. Eninew, *supra*, that the word "existing" limits the rights of aboriginal peoples "to those rights which were in being or which were in actuality at the time when the Constitution Act, 1982 came into effect".

In R. v. Hare and Debassige, [1985] 3 C.N.L.R. 139, Mr. Justice Thorson of the Ontario Court of Appeal, in applying the Ontario Fishery Regulations to two treaty Indians, adopted (at p.155) the interpretation of section 35(1) that Professor P.W. Hogg offered in his Canada Act 1982 Annotated (1982) at p.83 that aboriginal and treaty rights have been "'constitutionalized' prospectively, so that past (validly enacted) alterations or extinguishments continue to be legally effective, but future legislation which purports to make any further alterations or extinguishments is of no force or effect." Thorson J.A. went on to say that "whatever right the respondents' forefathers may once have enjoyed under Treaty 94 in relation to fishing by means of gill nets had become lost by operation of federal legislation well before these charges were brought." (Note that Thorson J.A.'s comments on the effect of section 35(1) were probably *obiter*, because he had previously said that the relevance of that section was not apparent to him, as the offences had occurred in 1980.)

Professor Hogg's interpretation of section 35(1) was also accepted in R. v. Nicholas and Bear, *supra*, by New Brunswick Provincial Court Judge Desjardins, who added (at p.165) that section 35 "has not changed ... rights existing on the 17 April 1982, but has in fact 'recognized' and 'affirmed' constitutionally the Indian rights as they stood as affected by valid legislation and case law on that particular date (*i.e.* a 'freeze')."

Finally, in R. v. Googoo, [1987] 2 C.N.L.R. 137, Nova Scotia Provincial Court Judge O'Connell said (at p.141) that "[e]xisting means unextinguished", and that any aboriginal or treaty right which the accused Indian may have had to possess a fishing net had been extinguished by the Nova Scotia Fishery Regulations before April 17, 1982. (Note that the regulation in question in Googoo had been amended in 1983, but O'Connell decided that did not matter, as the new regulation was basically the same as the old one, and so did not suppress any rights enjoyed by the accused on April 17, 1982.)

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These decisions, like the Migratory Birds Convention Act cases, reveal a tendency on the part of the courts to regard aboriginal and treaty rights as divisible into small parts. A general right to fish, it seems, is divisible into many narrower rights, such as a right to fish without a licence, a right to fish with a gill net, and even a right to possess a net. Taking away any one of these rights is an extinguishment of the narrow right, rather than a restriction on the general right to fish. One may wonder how far this process of fragmentation of rights will go. Is there a separate right to take every single species of fish that may be caught? Are different sorts of nets each the subject of a distinct right? What about different net sizes?

There is another aspect of these section 35(1) decisions which is equally troublesome. If the effect of the section was to constitutionalize aboriginal and treaty rights just as they stood on April 17, 1982, that is, subject to any validly enacted limitations in force at that time, this means that those rights can be defined only by reference to the legislation which contains those limitations. In other words, ordinary statutes, and even regulations made under delegated authority, must to some extent determine the meaning of terms contained in the Constitution. If this is correct, the result is somewhat startling. Under the Fisheries Act, the federal government has made separate sets of regulations for each province and territory in Canada, and in some cases for individual species of fish as well. Since these regulations vary from one part of the country to the other, what we have are at least twelve different sets of delegated legislation which must be consulted to find out the extent of the aboriginal and treaty rights to fish which have been recognized and affirmed by section 35(1). Nor is this all. If we look at these regulations more closely, we will discover that they contain precise provisions governing such matters as the species and quantities of fish which can be lawfully taken, the types of nets and other equipment which can be used, and even the size of the holes in certain kinds of nets. Though these minute provisions have not been incorporated into the Constitution as such, they must be consulted and applied like a template to the fishing rights of the aboriginal peoples to determine where the limits of those rights lie. Moreover, unless the word "existing" is read as meaning from time to time (which none of the decisions referred to above suggested), the template which is to be applied is that which existed on April 17, 1982. Where fishing is concerned, then, the aboriginal peoples' rights were "frozen" by these different sets of detailed regulations, which may have been amended since April 17, 1982, and which could be repealed, but which would nonetheless continue to limit the extent of those rights for the purpose of the Constitution. If this is so, Canada must have one of the most bizarre constitutions in the world!

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This brings us to Sparrow v. The Queen, [1987] 1 C.N.L.R. 145, which is probably the most important case decided so far on the effect of section 35(1). This case involved the application of the Fisheries Act and the British Columbia Fishery (General) Regulations to the Musqueam Indian band. Under the regulations, the band had been issued an Indian food fish licence each year, starting in 1978, which authorized them to take salmon for food. In 1983, the licence was amended to reduce the length of drift nets which the Musqueams could use from 75 to 25 fathoms. The issue to be decided was whether this amendment was of any force or effect, in view of section 35(1) of the 1982 Constitution Act. Unlike the other cases we have looked at, Sparrow thus involved an amendment affecting Indian fishing rights made after section 35(1) came into force on April 17, 1982.

The British Columbia Court of Appeal, in a unanimous decision, distinguished between extinguishment and regulation of Indian fishing rights. As a consequence of the enactment of section 35(1), an aboriginal right to fish for food can no longer be extinguished by legislation. However, it can still be regulated, as long as the regulations give it priority over commercial and sports fishing, and do not infringe on the aboriginal food fishery in the sense of reducing the available catch below that required for reasonable food and societal (*i.e.* ceremonial) needs. Moreover, regulations which "bear upon the exercise of the right may nonetheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest" (p.178). Because there was not enough evidence to determine whether these criteria had been met in this instance, the Court of Appeal ordered a new trial.

What is especially significant about the Sparrow case is the manner in which the Court of Appeal arrived at its conclusion that section 35(1) did not entirely take away Parliament's power to regulate aboriginal fishing rights. The Court said that section 35(1) does not purport to revoke the power of Parliament under the Constitution Act, section 91, subheadings (12) and (24), to make laws in relation to sea coast and inland fisheries, and Indians and lands reserved for the Indians. So "[t]he power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on April 17, 1982 may not be taken away" (p.177). The aboriginal right of the Musqueams to fish for food and ceremonial purposes has always been a regulated right (originally, it had been regulated by the Musqueams themselves). It continued to be a regulated right on April 17, 1982. It has never been fixed, always taking its form from the circumstances in which it has existed. "If the interests of the Indians and other

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Canadians in the fishery are to be protected", the Court concluded (at p.177), "then reasonable regulations to ensure the proper management and conservation of the resource must be continued."

The Court of Appeal was thus able to avoid the absurdity of concluding that the 75-fathom net length in the Musqueams' pre-1983 licences was constitutionally protected. It also avoided the fragmentation of aboriginal rights which we noticed earlier. The Court said (at p.178):

It is necessary to distinguish between a right and the method by which the right may be exercised. The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians.

At the same time, however, the Court seriously limited the protection accorded by section 35(1). Not only do past limitations on aboriginal rights continue to be effective, but those limitations can even be extended, so long as this is done for the purposes of management and conservation, and does not extinguish or unreasonably infringe the right in question. Moreover, in the case of conflict between aboriginal rights and conservation, conservation comes first.

What the Court of Appeal seems to have done in Sparrow is to read a "reasonable limits" restriction into the rights protected by section 35(1). Whether or not this is desirable on policy grounds, there is nothing in the 1982 Constitution Act itself which justifies this approach. We have seen that section 35 is located outside the Charter, and is therefore beyond the reach of section 1. The implication which should be drawn from this is that the framers of the Act intended section 35 to stand on its own, free from the limitations to which Charter rights are subjected.

My own view of Sparrow is that it is a subversive decision. If the Court of Appeal's interpretation of section 35(1) is generally adopted, then I think the protection which the section purports to give to aboriginal and treaty rights will end up being largely illusory, at least insofar as hunting and fishing rights are concerned.

Our discussion has centred primarily on the effect of section 35(1) on federal legislative power. Although we do not have time to pursue the matter further today, it must nonetheless be remembered that provincial legislative power is subject to the

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section as well. In the prairie provinces, however, the Natural Resources Transfer Agreements continue to apply. In R. v. Horse, [1984] 4 C.N.L.R. 99, the Saskatchewan Court of Appeal held that, with regard to provincial game laws, treaty hunting and fishing rights were merged and consolidated by those agreements, which are part of the Constitution of Canada. The Court decided that section 35(1) must be read subject to the agreements, and for this reason it has no effect on the application of provincial game laws to treaty Indians under the agreements. An appeal of this decision was heard by the Supreme Court of Canada on October 19, 1987, but a judgment has not yet been delivered.

Given the confused state of the present case law on section 35(1), it is too early to provide an adequate assessment of its impact. The first Supreme Court decisions on this section are going to be extremely important because they are going to set the tone and create the precedential framework for future decisions. It is therefore essential that any cases taken to the Supreme Court as test cases be supported by favourable factual circumstances and superior legal argument. At stake will be the rights not only of those directly involved, but of all the aboriginal people of Canada, present and future.