BALANCING RIGHTS: THE SUPREME COURT OF CANADA, *R. v. SPARROW,* AND THE FUTURE OF ABORIGINAL RIGHTS

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Abstract/Resume

The rights of Aboriginal people in Canada are at a crucial stage in their development and recognition. One key to understanding this is section 35 of the *Constitution Act, 1982*. Until 1990 it was judicially undefined but for lower court decisions and academic commentary. The Supreme Court of Canada dealt with section 35 in its unanimous decision of *R*. v. *Sparrow*. This paper discusses and comments upon that decision.

Les droits des aborigènes au Canada sont à une étape cruciale de leur développement et de leur reconnaissance. Une clé à sa compréhension est section 35, de la *Loi constitutionelle de 1982*. Jusqu'en 1990, on ne l'a pas définie judiciairement, mais seulement pour les décisions des course basses et des commentaires scolaires. La Cour suprême du Canada s'est occupée de la section 35 dans sa décision unanime de *R.* v. *Sparrow*. Cet article discute cette décision et la commente.

Part II
Rights of the Aboriginal Peoples of Canada

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.

Constitution Act, 1982, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11, as amended by the *Constitution Amendment Proclamation, 1983,* R.S.C. 1985, App.III, No. 46, s.2.

Introduction

The rights of Aboriginal people[1] in Canada are at a crucial stage in their development and recognition. Never before have the nation's political and legal institutions been focused so clearly on this issue. Section 35 is one of the few provisions in the Constitution that explicitly refers to Aboriginal people and until May 1990, section 35 remained judicially undefined (but for lower court decisions and academic commentary). The May 1990 Supreme Court of Canada decision of *R.* v. *Sparrow*[2] is the first decision by the Supreme Court concerning section 35 of the *Constitution Act, 1982*. The unanimous judgement of the court, written by Mr. Justice Dickson, the Chief Justice of Canada, together with Mr. Justice LaForest, attempts to define the extent to which Aboriginal rights in section 35 are protected and the degree to which they may be enjoyed. In this way, *Sparrow* attempts to balance the rights and freedoms of Aboriginal people as a group, with the rights and freedoms enjoyed by the rest of Canadians. Writing on the concept of "freedom," Professor John Humphrey notes:

> But if freedom is the absence of restraint, it is obvious that in human affairs there has never been and never will be absolute or perfect freedom. Our conduct is constrained not only by the physical laws of nature of which we are a part, but also because

> we are social animals, by all kinds of restraints, moral, religious, legal, and economic....The real problem therefore is not to define freedom but to determine the extent to which it can and should be enjoyed by men and women living together in society (1979:137-138).

The above passage by Professor Humphrey exemplifies the *Sparrow* decision. Not only does the decision define "existing [a]boriginal and treaty rights," but it also determines, to some extent, the degree to which these rights may be enjoyed. In this way, *Sparrow* represents a masterful piece of jurisprudence by the Supreme Court.

In *Sparrow*, the court gives a broad interpretation to section 35(1) and thereby provides some satisfaction and hope to the Aboriginal people of Canada in their struggle to have the recognition and affirmation of their rights mean *something* in concrete terms. This discussion will outline and consider the *Sparrow* decision, and offer some commentary on its significance.[3]

The Facts

Ronald Sparrow, a member of the Musqueam Indian Band of British Columbia, was charged and convicted at trial under section 61(1) of the *Fisheries Act* [4] for fishing with a drift-net that was longer than that permitted by the Band's food fishing licence. The licence stated that drift-nets were to be limited to 25 fathoms in length. Sparrow was caught using a drift-net that was 45 fathoms in length. He admitted that the facts constituted an offence, but he defended his action on the basis that he was exercising an existing Aboriginal right to fish, and that the drift-net length restriction was inconsistent with section 35(1) of the *Constitution Act, 1982* and therefore invalid.

The Lower Courts

Judge Goulet of the British Columbia Provincial Court held that since Sparrow claimed an Aboriginal right that was not based on any special treaty, proclamation, contract or other document as per *Calder* v. *Attorney-General of British Columbia*[5] (in the Court of Appeal), Aboriginal rights could not be said to exist. Therefore, Sparrow was convicted at trial. Judge Lamperson of the County Court of Vancouver dismissed Sparrow's appeal for reasons similar to those of Judge Goulet.[6]

The British Columbia Court of Appeal held that the courts below erred in binding themselves to the *Calder* decision as that Court of Appeal decision was not binding.[7] The Court of Appeal stated that Sparrow was

exercising an existing Aboriginal right and as a result, they ordered a new trial.

Sparrow appealed and the Crown cross-appealed, placing the following constitutional question before the Supreme Court of Canada:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations*, SOR/84-248, and the *Fisheries Act*, R.S.C. 1970, c.F-14, inconsistent with s.35(1) of the *Constitution Act, 1982*.[8]

The Supreme Court dismissed both the appeal and the cross-appeal and affirmed the setting aside of the conviction by the Court of Appeal. It then ordered a new trial on the question of whether the net length restriction was inconsistent with section 35(1) of the *Constitution Act, 1982* using the Supreme Court's justification analysis. The following discussion of *Sparrow* will follow, for the most part, the analytical framework and discussion as set out by the Supreme Court.

"Existing"

The court held that the term "existing" in subsection 35(1) means that the rights which were in existence when the *Constitution Act*, *1982* came into effect are those to which the section applies. The court rejected the notion that the term "existing" means at the time or, in a sense, freezing the meaning and regulation of those rights, as of April 17, 1982. Instead, the court noted that the academic commentary on the question supports the assertion that "existing" means "unextinguished."9 In this sense, April 17, 1982 is the operative date to determine whether rights existed or were extinguished. The court stated that in reading the phrase "existing [A]boriginal rights," an interpretation that is flexible so as to "permit their evolution over time"[10] is appropriate. The court adopted the language of Professor Slattery in noting that the word "existing" means that the rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour" (1988:782).

The above is a significant step forward in the advancement of Aboriginal rights in the Canadian judicial system in that the Supreme Court expanded Aboriginal rights to include the modern means of exercising such rights. Aboriginal rights cannot remain static in their implementation and, therefore, modern means of fishing and hunting, for example, can be considered within the ambit of exercising "existing [a]boriginal rights." This aspect of the interpretation of Aboriginal rights is crucial to their further development and recognition in Canada. It permits the evolution of culture and rights and does not bind them to the past in a way that restricts their

enjoyment.

Of course, the court's decision in *Sparrow* has had the effect of ensuring that Aboriginal and treaty rights enjoy constitutional status, save for the meaning of "recognized and affirmed." This means that Aboriginal rights are not dependent upon their common law status as reaffirmed by Justice Wilson in the Supreme Court of Canada decision of *Wewayakum Indian Band* v. *Canada*.[11] There, Justice Wilson held that "the law of [A]boriginal title is federal common law."[12] Dependence on the federal common law meant that Aboriginal rights were subject to legislative control or extinguishment by the federal Parliament. Section 35 and *Sparrow* have altered this situation radically.

The Aboriginal Right

The court then turned its attention to the right at stake in the case. The court recounted evidence that the Musqueam people have lived as an organized society in the area long before the arrival of European settlers and that "...the taking of salmon was an integral part of their lives and remains so to this day."[13] The Crown argued that the right to fish had been extinguished by regulations under the *Fisheries Act*. The court examined the regulatory history of fisheries in British Columbia, and stated that it is "...this progressive restriction and detailed regulation"[14] that the Crown presents as proof of extinguishment. The Crown argued that extinguishment need not be express, and could occur where the authority of the Crown is manifested in a way that limits the enjoyment of an Aboriginal right. The court dismissed the argument, reasoning that regulation itself does not necessarily mean extinguishment. It adopted the view of Mr. Justice Hall, in *Calder;*[15] he stated therein that the intention of the Crown to extinguish Aboriginal rights must be "clear and plain."[16] Nothing in the *Fisheries Act* or its regulations demonstrated to the court that the Crown had a clear and plain intention to extinguish the Aboriginal right to fish for food.

One of the difficulties with the court's use of the phrase "clear and plain" is the lack of precise definition. It is possible that an interpretation of the phrase "clear and plain" means "express" extinguishment. If outright prohibition by way of regulation is not tantamount to extinguishment, then what else could be, other than express extinguishment? Yet, in Sparrow, it must be noted that there was specific mention of Indian food fishing rights in the regulations. Subsection 27(1) of the regulations is as follows:

> 27(1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.[17]

Thus, this clause alone may have saved the right from being extinguished in that it illustrates the lack of a clear and plain intention to extinguish. This author is of the view that if "clear and plain" intention does not mean express extinguishment, then it means regulation and prohibition of the enjoyment of an Aboriginal right to such an extent that no other possible interpretation could be read. This places a heavy onus on the Crown to prove extinguishment. Therefore, even if the regulations had not mentioned Indian food fishing specifically, the right would have remained unextinguished.

Sparrow says little on whether the Crown continues to have the authority to extinguish Aboriginal rights after the adoption of the *Constitution Act, 1982* on April 17, 1982. It is submitted by this author that Sparrow does limit the authority of the Crown to extinguish Aboriginal rights after April 17, 1982. As of April 17, 1982, the Crown no longer possessed the authority to extinguish Aboriginal rights. After that date, Aboriginal rights became constitutionally recognized and affirmed and, therefore, beyond the Crown's power to extinguish. The issue of extinguishment is now limited to whether or not Aboriginal rights were extinguished prior to April 17, 1982.

The court concluded that the Crown failed to prove that the right had been extinguished and that the right remains an "existing" right that ought not to be "...defined by incorporating the ways in which it has been regulated in the past."[18] The court raised the issue of whether or not the existing right included a right to fish commercially, but decided to restrict its decision to the right to fish for food for social and ceremonial purposes.

It is disappointing that the court did not address the issue of whether or not the Musqueam right to fish included a right to fish commercially. Indeed, the court's interpretive view that Aboriginal rights must be viewed in a "contemporary form" raises the question of an Aboriginal right to fish commercially in a serious way. Extending this issue to resource rights, such as oil and minerals, means that it is possible that some Aboriginal people hold "Aboriginal" rights, to some degree, to those properties. If so, the effect of *Sparrow* has barely been felt. The real issues to be confronted in the coming years will be the extent to which section 35 protects vital economic interests in Aboriginal lands and resources.

"Recognized and Affirmed"

It is within its discussion of the phrase "recognized and affirmed" that the court gives a substantive discussion of the meaning of section 35. The court begins by looking at the background of section 35 and notes that Crown sovereignty is to be assumed. The court writes:

> ...there was from the outset never any doubt that sovereignty and

> legislative power, and indeed the underlying title, to such lands vested in the Crown.[19]

The above statement by the court is disappointing to those advocating "inherent" rights within the confines of section 35. The court makes it clear, and leaves little doubt, that inherent sovereignty and legislative power vests in the Crown. The court affirms the existence of inherent Aboriginal rights in its discussion of the existence of Sparrow's right to fish. Nevertheless, the extent to which this right can be exercised and can be said to be "inherent" is severely limited by the court's statement noted above. If sovereignty and legislative power vest in the Crown, then the sovereignty and legislative power that Aboriginal people may possess must originate from the Crown and, therefore, cannot be inherent. To this extent, "inherent" Aboriginal sovereignty is not reaffirmed or recognized by the court. However, this is not to suggest that the court takes a middle road on the issue of inherent rights. While the rights to fish and to hunt are one thing, the Aboriginal right of self-government is another. In this way, it is submitted that the court upholds, to some degree, the view that inherent Aboriginal rights, such as fishing and hunting, exist. At the same time, the court severely limits the extent to which an inherent right of self-government can be said to exist in section 35. Noteworthy is that the whole existence of inherent Aboriginal rights in section 35 is questionable considering the fact that the court is making its decision upon the basis that section 35 "recognizes and affirms" Aboriginal rights. But for this constitutional provision, "inherent" Aboriginal rights would continue to be subject to the common law and, thus, extinguishment. Therefore, because inherent rights are dependent upon section 35 for recognition, they are by definition, not inherent. As Justice Wilson held in the *Wewayakum* decision:

> In *Calder* v. *Attorney-General of B.C.*...this court recognized [A]boriginal title as a legal right derived from the Indians, historic occupation and possession of their tribal lands. As Dickson, J. ...pointed out in *Guerin,*...aboriginal title predated colonization by the British and survived British claims to sovereignty.[20]

After summarizing government-Aboriginal peoples relations over the past few decades, the court notes that section 35 represents the

> ...culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights.[21]

The court continues by stating that section 35 provides, at the least "...a solid constitutional base upon which subsequent negotiations can take place."[22]

This political statement by the Supreme Court is most interesting in that it underscores the importance that the court places on the fiduciary relationship that the Crown has with Aboriginal people. However, a continued problem with the enjoyment of Aboriginal and treaty rights has been with respect to implementation. Thus, even though the court states that section 35 is a solid constitutional base for subsequent negotiations, the results of such negotiations are dependent upon the implementation process. Based on the federal government's past record with regard to implementation, *Sparrow* may provide little protection for Aboriginal peoples from being held hostage to the federal government's fiscal authority (see, for example, Moss, 1985:684; and Coon-Come, cited in Cassidy, 1991). Indeed, the 1992 Charlottetown Accord, while providing for an explicit constitutional entrenchment of the inherent right of self-government and the recognition of a third order of government[23] did not contain any provisions relating to fiscal relationships between Aboriginal governments and the federal and provincial governments. This was left to the draft political accord on Aboriginal matters which is not legally binding.

The court notes that the interpretation of the phrase "recognized and affirmed" is derived from "general principles of constitutional interpretation."[24] Thus, section 35 is to receive the full effect of constitutional entrenchment in that the judiciary must make certain that the law of the constitution prevails over other laws.[25] In addition, the court states that section 35 is to be interpreted in a "purposive way." That is, it must be given a "generous, liberal interpretation."[26] The court cites its earlier decision of *R*. v. *Nowegijick* [27] wherein it stated that

> ...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.[28]

The court also adopted the views of the Ontario Court of Appeal's decision in *R.* v. *Agawa*.[29] There, the Ontario Court of Appeal noted an earlier decision by itself in *R*. v. *Taylor and Williams*[30] where it held that Indian rights ought not to be interpreted in a vacuum and that such rights be governed by the special trust relationship in the honour of the Crown, especially that no appearance of "sharp dealing" be sanctioned.[31]

The above interpretive principles provide solid protection for Aboriginal people and their rights. However, the question arises as to whether or not the Crown and Aboriginal peoples can contract out of these constitutional

interpretive principles. As well should the government be able to insist that Aboriginal people forsake these interpretive principles in the signing and ratification of land claim settlement agreements? For example, the *Nunavut Agreement-in-Principle*[32] contains a clause that appears to negate the interpretive principles outlined in *Sparrow*. The *Nunavut Agreement-in-Principle* provides that:

> There shall not be any presumption that doubtful expressions in the Final Agreement be resolved in favour of Government or Inuit.[33]

Clearly, the interpretative approach outlined in *Sparrow* dictates that doubtful expressions be interpreted in favour of Aboriginal people, in this case the Inuit. It remains to be seen whether this clause will remain in the Final Agreement and, if so, whether or not it is inconsistent with section 35. This is most important because land claims agreements are included within the ambit of section 35 by virtue of subsection 35(3) which reads:

> (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.

Subsection 35(3) provides a mechanism for constitutionalizing land claims agreements and forms of self-government, to the extent those agreements are "self-government" (Isaac, 1991a:1). Indeed, this raises the issue of whether Aboriginal people can contract out of their Aboriginal rights and the interpretive scheme set out by the court in *Sparrow*. Can past agreements be held to be unconstitutional to the extent that they go against the spirit of section 35 and *Sparrow*? As well, does the fiduciary responsibility of the Crown place a burden on the Crown to ensure that provincial governments meet their legal obligations to Aboriginal people?

When the court writes that "sharp dealing" should not be conducted by the Crown, it could be read to speak to the issue of implementation raised earlier. Frequently, the federal government has read the fiscal provisions of an agreement in such a way so as to limit, sometimes drastically, the amount of funding available to an Aboriginal group or community. This is the case with regard to the implementation of the *James Bay and Northern Quebec Agreement* (Moss, 1985; Cassidy, 1991). The "sharp dealing" phrase by the court appears to go towards the implementation of agreements and, to this extent, is a great step forward.

The court held that section 35 is not subject to section 1 of the *Canadian Charter of Rights and Freedoms,*[34] the section which guarantees rights and freedoms subject to reasonable limits, because section 35 is outside of the Charter. However, the court stated that

notwithstanding that section 35 is not subject to the limitations imposed by section 1 of the Charter, it is nevertheless not absolute in nature. "Rights that are recognized and affirmed are not absolute."[35] Federal legislative powers continue to exist, including the power to legislate on matters relating to "Indians, and Lands reserved for the Indians" as per section 91(24) of the *Constitution Act, 1867*,[36] the old *British North America Act* which first divided the powers of government between federal and provincial governments.

The effect is that federal legislative powers are subject to limitations and any government regulation or legislation that interferes with the enjoyment of section 35 right(s), must be justified by the government. The justification of governmental interference is in keeping with a purposive and liberal approach to interpretation and holds the Crown "to a high standard of honourable dealing with respect to the aboriginal peoples of Canada."[37] The court concludes that although the phrase "recognized and affirmed"

> ...does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s.35(1).[38]

The above statement by the court is illustrative of the balancing of rights of Aboriginal people with the rest of Canada; it attempts to define the limits that will be imposed upon the freedom of Aboriginal people to reach this balance. It is indicative of Professor Humphrey's statement, cited at the beginning of this article, wherein the problem was defined as not being the definition of freedom, but rather, the extent to which freedom can be enjoyed.

The Justificatory Analysis

Following the discussion of what subsection 35(1) means, the Supreme Court outlined the tests for a *prima facie* interference with the enjoyment of a section 35(1) right and for the justification of such interference. The first issue to be addressed is whether the legislation at issue "has the effect of interfering with an existing [A]boriginal right."[39] If so, it is a *prima facie* infringement. The court notes that in ascertaining the nature of the right effected, courts must be careful to understand the *sui generis* nature of

Aboriginal rights as per *Guerin*.[40]

In order to determine whether or not the rights interfered with equal a *prima facie* infringement, three questions are posed by the court.

1. Is the limitation unreasonable?

2. Does the regulation impose undue hardship?

3. Does the regulation deny to the holders of the right their preferred means of exercising that right? The burden of proving a *prima facie* infringement is with the individual or group challenging the legislation.

Although the above questions seem to get at the heart of the issue, what is the definition of "unreasonable" or "undue hardship" which one is to apply? By whose standards are these terms to be defined? What is the precise nature of *sui generis* right(s)? Indeed, the Aboriginal definition of unreasonable, undue hardship or *sui generis* can differ greatly from that provided for by non-Aboriginal people. It is submitted that in applying the court's interpretive scheme (particularly that requiring greater sensitivity towards Aboriginal people), the court dictates that the Aboriginal versions of undue hardship, unreasonableness and *sui generis* be given greater weight than those given by non-Aboriginal people.

Once an infringement has been determined, the analysis then moves to the issue of justification.

The justificatory analysis is sub-divided into two components. First, is there a valid legislative objective and, second, can the legislative infringement be justified considering the honour of the Crown and its special trust relationship with Aboriginal peoples? On the issue of a valid legislative objective, the court held that such matters as conservation and resource management were valid objectives. However, arguments using a general clause such as the "public interest" are not valid. The court held that the "public interest" was "so vague as to provide no meaningful guidance and so broad as to be unworkable.[41]

Needless to say, the above use of a "valid legislative objective" leaves much to be desired on behalf of Aboriginal people. It is a problem of language. Although there can be little doubt that conservation and resource management represent valid legislative objectives, it is not nearly as clear just what other provisions could be held to be valid.

Once a valid legislative objective is found, the analysis moves to interpreting the legislation in question with regard to the special status of Aboriginal rights in Canada and the trust relationship between the Crown and Aboriginal peoples. With respect to fishing, the court held that in this particular case, conservation and resource management can supersede

the Aboriginal right to fish. However, regardless of whether or not the regulations are "reasonable," they must nonetheless be "scrutinized" by the justificatory analysis. In addition to the above, the Supreme Court states that the following types of questions should be posed within the justificatory analysis depending on the facts of the case. For example, has there been as little infringement as possible in order to achieve the desired result? In the case of expropriation, has fair compensation been made available? Has the Aboriginal group in question been consulted with regard to conservation measures being employed? The above are just examples provided by the court. The court concludes its discussion of the justification of legislation that infringes upon the enjoyment of section 35 rights by stating that the phrase "recognized and affirmed" "...requires sensitivity to and respect for the rights of [A]boriginal peoples on behalf of the government, courts and indeed all Canadians."[42]

The above indicates that "expropriation" can be justified and therefore can be included, at least in some circumstances, as being a valid legislative objective and capable of superseding an Aboriginal right. The court needs to expound more on this. Is all expropriation valid, or must it be shown to be exceptional? It is submitted that in order for the Crown to justify expropriation, it must, where it interferes with the enjoyment of Aboriginal rights, meet the justificatory test. As well, on the issue of conservation measures, the court inferred that Aboriginal people should be consulted. Does this, by implication, rule out the ability of Aboriginal rights to supersede certain conservation measures, or must conservation measures meet certain standards before being accepted as being beyond the limits of section 35?

Although section 35 is not part of the *Charter of Rights and Freedoms* and its section 1 limitation clause,[43] the justificatory analysis in *Sparrow* is similar to that of the analysis of section 1 of the *Charter* as outlined in *R.* v. *Oakes*.[44] In order for a *Charter* right to be limited by section 1, two criteria must be met. First, the legislation in question must be of sufficient importance to warrant an override of a constitutional right. Second, the limitations imposed must be reasonably and demonstrably justified using a three-part proportionality test composed of the following three points:

1. The measures must be designed to achieve the desired objective.

2. The measures must impair rights as little as possible.

3. The proportionality between the effects of the measures and the objectives desired must be of sufficient importance.[45]

Sparrow's "valid legislative objective" test is similar to the *Oakes* "sufficient importance" requirement. The *Oakes* proportionality test mirrors aspects of the *Sparrow* justificatory analysis in that *Sparrow* asks that if the limitation is found to be unreasonable, does it impose undue hardship and does it deny to the holder of the right their preferred means of exercising that right?

Because the *Sparrow* justification analysis is outside of the *Charter*, it can develop unhindered by the *Charter's* section 1 jurisprudence. This is not to suggest that the section 1 jurisprudence will not have some effect on further judicial interpretation of *Sparrow*. The justificatory analysis in *Sparrow*, with its weaknesses, is a needed component so as not to leave the federal government's legislative authority unchecked.

Sparrow and Aboriginal Self-Government

The Supreme Court makes no specific mention of the concept of Aboriginal self-government in *Sparrow* (Isaac, 1992b). However, it does state that section 35 provides "a solid base upon which subsequent negotiations can take place."[46] In addition, by providing an understanding of section 35 in *Sparrow*, the Supreme Court has opened the door for using section 35 to promote the recognition and affirmation of Aboriginal self-government.

In February 1992, the Royal Commission on Aboriginal Peoples released a statement on self-government entitled *The Right of Aboriginal Self-Government and the Constitution: A Commentary*.[47] The Royal Commission outlined six criteria that are essential to satisfy the Aboriginal desire for self-government. They state that the right of self-government should be

> *inherent* in nature, *circumscribed* in extent, and *sovereign* within its sphere...The provision should be adopted with the *consent* of the Aboriginal peoples, and should be *consistent* with the view that Section 35 may already recognize a right of self-government....
>
> [I]t should be *justiciable* immediately[48] [emphasis in original].

While the Royal Commission outlines a number of approaches to recognizing the above principles, each places the right of self-government within the ambit of section 35 and suggests that such a right be considered an "existing [A]boriginal and treaty right" as per subsection 35(1). In this way, *Sparrow*, to the extent that it defines subsection 35(1), has a direct role to play in the constitutional recognition of Aboriginal self-government as put forward by the Royal Commission.

In August 1993, the Royal Commission affirmed in February 1992

presentation by releasing its discussion paper entitled *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*.[49] The Royal Commission argues that the inherent right of self-government is already and existing Aboriginal and treaty right that is recognized and affirmed by subsection 35(1) of the *Constitution Act, 1982.*

The Royal Commission is not alone in its approach. On February 28, 1992, the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (the Unity Committee) released its report.[50] Noting that they endorse the six criteria for self-government outlined by the Royal Commission,[51] the Committee recommended that a new subsection be added to section 35 to read:

> For greater certainty, the rights recognized and affirmed by subsection (1) include the inherent right of self-government within Canada.[52]

The above recommendation is significant in general as well as to the *Sparrow* decision in particular. If accepted and entrenched, the above provision would be subject to the interpretation of subsection 35(1) as outlined in *Sparrow*. This means that a liberal, generous approach would be given in the interpretation of the right and that it would be interpreted in a "purposive way." Not only does it satisfy the Aboriginal demand for a recognition of the "inherent" right of self-government, it also provides stability to the federal and provincial governments in knowing that the right cannot be absolute in nature, as provided for in *Sparrow*. While it is too early to discuss the significance and effect of these proposals in any detail, it suffices to say that the Sparrow decision has provided a means for such to be put forward and to be entertained seriously by government. *Sparrow* balances the interests of both sides, government and Aboriginal, in such a manner as to facilitate the goals and responsibilities of each.

The Aboriginal provisions of the 1992 *Charlottetown Accord* represent a significant move forward by the political leadership of Canada in furthering the development of Aboriginal rights. However, this was not without intense political pressure placed on the federal and provincial governments by Aboriginal peoples in general and their leadership in particular. It is submitted that the *Sparrow* decision has had a major effect respecting the way in which Aboriginal demands are considered. The importance of negotiating self-government (s.35.2 of the draft legal text) and the broad and liberal interpretation (taking into account the spirit and intent) of treaty rights found in section 35.6(1) of the proposals, find a portion of their basis in *Sparrow*. The *Sparrow* decision remains a central cornerstone in the development of a more liberal and expansive interpretation of Aboriginal rights in Canada regardless of the demise of the *Charlottetown Accord*.

Conclusion

As the development of Aboriginal rights moves forward and as their constitutional entrenchment becomes better understood, *Sparrow* lays the groundwork in helping to create an atmosphere conducive to the full attainment and recognition of Aboriginal rights. The decision provides substantive meaning, with some shortcomings, to section 35. As such, it represents the single most important judicial decision on Aboriginal rights in Canada to date.

The *Sparrow* decision leaves many questions about Aboriginal rights and its own analysis of section 35 unanswered. The justificatory analysis is structured in a manner that allows a court a great deal of discretion when dealing with a section 35 case. Even where the discretion may be little, the judgement itself poses difficult situations for Aboriginal peoples. Such is the case when one considers the duty of consultation. The court states that Aboriginal peoples are to be "consulted" respecting conservation measures being undertaken and such consultation should be, at the least, a matter of informing the Aboriginal peoples concerned. Nowhere does the court state what the precise relationship is between Aboriginal rights and the imposition of conservation measures. For that matter, the precise nature of Aboriginal rights in general is not developed further except to the extent that they remain *sui generis.*

This leads to another problem with the decision. The court had plenty of room to tighten some of the loose principles relating to Aboriginal rights and Aboriginal title. Instead, it opened the door to judicial intervention and discretion in the interpretation of section 35 and Aboriginal rights. A more precise meaning of the nature of Aboriginal rights and Aboriginal title has yet to be provided by the Supreme Court. This matter should have been, at the least, developed within the decision and then reserved for future deliberation. As it stands, the issue of the nature of Aboriginal rights was not given a substantive revision except to incorporate past judicial principles into section 35.

In fairness, however, the *Sparrow* case dealt only with a fishing violation and the court decided to restrict its judgement to that particular factual situation. It is important, therefore, to recognize that the *Sparrow* decision deals only with a small aspect of Aboriginal claims, namely personal fishing rights. The important issue of self-government is left to speculation. Also left to speculation is a clear understanding of the doctrine of paramountcy respecting an Aboriginal right which conflicts with a federal or provincial statute. As well, although the court held that the sovereignty of Canada has never been doubted, it does not deal with the issue of Aboriginal sovereignty which it has alluded to in other decisions.[53] The really crucial issue for the court to deal with in light of section 35 is the extent to which section 35 recognizes and affirms the Aboriginal right to

internal sovereignty on Aboriginal lands. The *Sparrow* decision offers little guidance in answering this fundamental question.

The analytical framework provided for by the court is not perfect. Indeed, this discussion has pointed to areas where elements of the framework leave much to be desired. However, notwithstanding the apparent weaknesses in the decision, it offers the best attempt to date to balance the rights and freedoms of Aboriginal people with the rights and freedoms of non-Aboriginal people in Canada. In this way, the Supreme Court has written an exemplary decision and a powerful statement on Aboriginal rights which has political implications.

The real test for the *Sparrow* doctrine of balancing rights will come when it is argued that section 35 includes an inherent right to self-government. Only at that stage will the court's stand on Aboriginal rights, Aboriginal title and indeed, Aboriginal peoples, become lucid. While the decision now provides a satisfactory balancing of Aboriginal and non-Aboriginal issues, its real test has yet to come. How will the court, using *Sparrow* as a basis, interpret section 35 in light of self-government arguments? While this 1990 Supreme Court decision offers hope, time will be the real test for *Sparrow*.

Notwithstanding its shortcomings and weaknesses, the significance of the decision goes beyond the issue of fishing and effects the very essence of Aboriginal rights. Although *Sparrow* is significant in its impact on the definition and constitutionalization of Aboriginal rights, it does not necessarily guarantee a better and more equitable standard of living for Aboriginal people in Canada. It provides, nonetheless, the impetus for political action on this very important and crucial issue.

As the debate over the constitutionalization of the inherent right of self-government continues, *Sparrow* sends a strong message to all parties concerned. When dealing with the rights of Aboriginal people, their rights are to be taken seriously, sensitively and in such a manner as to maintain the honour of the Crown in its fiduciary relationship with them.

Notes

1. The term "Aboriginal Peoples" is used to connote the legal definition given to the term in subsection 35(3) of the *Constitution Act, 1982*; namely a group comprising Indian, Métis and Inuit peoples. See also T. Isaac, "The Power of Constitutional Language: The Case Against Using ‘Aboriginal Peoples' as a Referent for First Nations," (1993) 19:1 *Queen's Law Journal* 415-442.

2. *R*. v. *Sparrow*, [1990] 1 Supreme Court Reports 1075, [1990] 3 Canadian Native Law Reporter 160, 70 Dominion Law Reports (4th) 385, [References herein are to 70 D.L.R. (4th) 385].

3. For additional commentary on *Sparrow* see Binnie, 1991; Isaac, 1991b; Asch and Macklem, 1991; Elliot, 1991.

4. *Fisheries Act,* R.S.C. 1970, c.F-14, ss.34, 61(1), now R.S.C. 1985, c.F-14, ss.43, 79.

5. *Calder* v. *Attorney-General of British Columbia*, 34 Dominion Law Reports (3d) 145, [1973] S.C.R. 313, aff'g. (1970), 13 D.L.R. (3d) 64, (B.C.C.A.).

6. *R.* v. *Sparrow*, [1986] B.C.W.L.D. 599.

7. *R.* v. *Sparrow*, 36 Dominion Law Reports (4th) 246, 9 British Columbia Law Reports (2d) 300 (B.C.C.A.).

8. *Sparrow, supra,* note 2 at 392.

9. *Ibid*, 396-397.

10. *Ibid.*, 397.

11. *Wewayakum Indian Band* v. *Canada* (1989), 92 National Reports 241; [1989] 1 S.C.R. 332.

12. *Ibid.*, 262.

13. *Sparrow, supra*, note 2 at 398.

14. *Ibid.*, 400.

15. *Calder, supra,* note 5 at 210.

16. *Sparrow, supra*, note 2 at 401.

17. *Ibid.*, 394.

18. *Ibid.*, 401.

19. *Ibid.*, 404.

20. *Wewayakum, supra*, note 11 at 262.

21. *Sparrow, supra*, note 2 at 406.

22. *Ibid.*

23. Draft Legal Text of the 1992 *Charlottetown Accord*, October 9, 1992. See sections 35.1(1) and 35.1(2) respectively. See also the "Best Efforts Draft: Political Accord Relating to Aboriginal Constitutional Matters," c.October 1992.

24. *Sparrow, supra*, note 2 at 407.

25. Section 52(1) of the *Constitution Ac*t, 1982 reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

26. *Sparrow, supra*, note 1 at 407.

27. *R.*v. *Nowegijick*, [1983] 1 S.C.R. 29 (1983), 144 Dominion Law reports (3d) 193.

28. *Ibid.*, 144 D.L.R. (3d) 193 at 198.

29. *R.* v. *Agawa* (1989), 65 Ontario Reports (2d) 505 (Ont. C.A.).

30. *R.* v. *Taylor and Williams* (1981), 34 Ontario Reports (2d) 360 (Ont. C.A.).

31. *Ibid.*, 34 O.R. (2d) 360 at 367.

32. Canada, Department of Indian and Northern Affairs, *Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada,* (Ottawa:1990). For a discussion of the Nunavut Agreement see, for example, Isaac, 1992.

33. *Ibid.*, Article 2.10.3.

34. *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, [enacted by the *Canada Act, 1982* (U.K.), 1982, c.11, Schedule B].

35. *Sparrow, supra*, note 2 at 409.

36. *Constitution Act, 1867*, 30 & 31 Vict., c.3 (R.S.C. 1985, App.II, No.5).

37. *Sparrow, supra*, note 2 at 409.

38. *Ibid., 410.*

39. *Ibid.*, 411.

40. *Ibid.* Reference is to *R.* v. *Guerin* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335. *Sui generis* are rights of their own class or kind.

41. *Ibid.*, 412.

42. *Ibid.*, 417.

43. *Charter,* supra, note 33; section 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

44. *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 65 N.R. 87, 26 D.L.R. (4th) 200.

45. *Ibid.*, 26 D.L.R. (4th) 200 at 227.

46. *Sparrow, supra*, note 2 at 406.

47. Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary,*(Ottawa: February 13, 1992).

48. *Ibid.*, 23.

49. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: RCAP, 1993).

50. Canada, Special Joint Committee of the Senate and of the House of Commons on a Renewed Canada, *Report of the Special Joint Committee on a Renewed Canada*, (Ottawa: February 28, 1992).

51. *Ibid.*, 29.

52. *Ibid.*, 107.

53. In *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1055, Lamer, J., as he then was, stated: "The British Crown recognized that the Indians had certain ownership rights over their land...It also allowed them autonomy in their internal affairs, intervening in this area as little as possible." Again in Sioui at p.1054 (emphasis by J. Lamer), the court cites a passage from *Worcester* v. *Georgia* (1832), 6 Peters 515 at

548-549, wherein the Court summarized the practice of the British in North America before the American revolution as follows: "Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."

References

Asch, Michael and P. Macklem
1991 Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*. *Alberta Law Review* 29(2):498-517.

Binnie, W.I.C.
1991 The Sparrow Doctrine: Beginning of the End or End of the Beginning? *Queen's Law Journal* 15:217.

Canada, Department of Indian Affairs and Northern Development
1990 *Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada*. Ottawa.

Canada, Special Joint Committee of the Senate and of the House of Commons on a Renewed Canada
1992 *Report of the Special Joint Committee on a Renewed Canada*. Ottawa: Minister of Supply and Services.

Cassidy, Frank (Editor)
1991 *Aboriginal Self-Determination*. Halifax: Institute for Research on Public Policy.

Elliot, D.W.
1991 In the Wake of Sparrow. *University of New Brunswick Law Journal* 40:23-43.

Humphrey, John P.
1979 The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society, in R. St. J. MacDonald and John P. Humphrey (Editors): *The Practice of Freedom*. Toronto: Butterworths.

Isaac, Thomas

1993 The Power of Constitutional Language: The Case Against Using "Aboriginal Peoples" as a Referent for First Nations. *Queen's Law Journal* 19(1):415-442.

1992a The Nunavut Agreement-in-Principle and Section 35 of the *Constitution Act, 1982*. *Manitoba Law Journal* 2:390-405.

1992b The Storm Over Aboriginal Self-Government: Section 35 of the *Constitution Act, 1982* and the Redefinition of the Inherent Right of Aboriginal Self-Government. *Canadian Native Law Reporter* 1992(2):6-24.

1991a The *Constitution Act, 1982* and the Constituionalization of Aboriginal Self-Government in Canada: *Cree-Naskapi (of Quebec) Act*. *Canadian Native Law Reporter* 1992(1):1-13.

1991b Understanding the Sparrow Decision: Just the Beginning. *Queen's Law Journal* 16(2):377-379.

Moss, Wendy

1985 The Implementation of the James Bay and Northern Quebec Agreement, pp. 684-844 in Brad Morse (Editor): *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*. Ottawa: Carleton University Press.

Royal Commission on Aboriginal Peoples

1993 *Partners in Confederation: Aboriginal Peoples Self-Government and the Constitution.* Ottawa: Royal Commission on Aboriginal Peoples.

1992 *The Right of Aboriginal Self-Government and the Constitution: A Commentary*. Ottawa: Royal Commission on Aboriginal Peoples.

Slattery, Brian

1988 Understanding Aboriginal Rights. *Canadian Bar Revie*w 66:727-782.