1997

Aboriginal Rights and the Constitution: A Story within a Story?

Darlene Johnston
Allard School of Law at the University of British Columbia, djohnston@allard.ubc.ca

Citation Details

Darlene Johnston, "Aboriginal Rights and the Constitution: A Story within a Story?" in Denis N Magnusson & Daniel A Soberman, eds, *Canadian Constitutional Dilemmas Revisited* (Kingston: Institute of Intergovernmental Relations, 1997) 131.

CANADIAN CONSTITUTIONAL DILEMMAS REVISITED

Aboriginal Rights and the Constitution: A Story Within a Story?

Darlene Johnston

INTRODUCTION

I welcome this opportunity to participate in the Lederman Symposium. Although I never had the privilege of meeting Professor Lederman, I do appreciate his profound contribution to Canadian constitutional scholarship. His writings demonstrate both commitment to constitutional renewal and respect for social and historical context. These qualities are essential in understanding group rights, particularly the rights of aboriginal peoples.

Proponents of group rights generally point to section 35 of the Constitution as a prime example of legal rights being vested explicitly in groups. Section 35 declares that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In attributing constitutionally protected rights to peoples rather than to individuals, the framers of the *Constitution Act, 1982* seem to have moved ahead of the theoreticians. Legal and political philosophers are just beginning to debate such issues as whether groups have an existence or value independent of their members and whether rights can or should be vested in groups as opposed to being vested in individual members.

As this debate unfolds, courts are being asked to give concrete meaning to the newly entrenched guarantees. Group rights, however poorly understood, are a Canadian constitutional reality. They promise to pose a continuing constitutional dilemma.

As a proponent of group rights, I must confess my own faith in the value of community. I belong to the Saugeen Ojibway Nation. I come from a reserve called Neyaashiinigmiing, which translates into English as "point of land surrounded by water". My identity as an individual is inextricably linked to my participation in

and commitment to this community. For me, it is a matter of intuition and experience that my community has value and that it needs protection from the group-destructive potential of the Canadian state. Whether my intuition can be grounded in a coherent theory of rights is another matter. I am not a philosopher. By training, I am a lawyer. Over the past few years, I have had the opportunity to test whether the courts can fulfil the promise of group protection contained in section 35. I think that the meaning of collective rights can best be explored by concrete example. In this paper, I propose to examine the leading case on section 35, *R v. Sparrow*[1], and its application to a fishing rights case involving my own community.

A STORY WITHIN A STORY

I would like to begin with a quotation from Michael McDonald, a professor of philosophy at the University of Waterloo. Professor McDonald is a strong proponent of group rights. He has been instrumental in developing a vocabulary for the emerging debate. In his article, "Should Communities Have Rights? Reflections on Liberal Individualism" , he discusses his vision of collective rights:

> With collective rights, a group is a rights-holder: hence, the group has standing in some larger moral context in which the group acts as a right-holder in relation to various duty-bearers or obligants. This is to say that for collective rights I picture a shared understanding within another shared understanding. First, there is the understanding that makes disparate individuals into a group or collective. Second, there is a larger or more encompassing society in which that group stands as a right-holder vis a vis others. So with minority rights, a minority, united by its group-constituting understanding, acts or tries to act as a rights-holder in a larger normative, social or legal, context. In particular, the minority wants its shared understanding recognized and respected as a distinct part of the larger social understanding in the society in which the minority is a part. To put this in terms of narratives, minority rights involve a story within a story. The stories are related but distinct. One story is not to be eliminated and replaced by the other. The options of assimilation and separation are ruled out as is the option of the substitution of one by the other.[2]

I would like to discuss whether Professor Mcdonald's metaphor of a story within a story is applicable to the situation of aboriginal peoples within the context of the Canadian state. Section 35 purports to secure a space for aboriginal stories within the larger framework of the Canadian constitution. I think there is a danger, in this postentrenchment era, to take section 35 for granted. Seen squarely within its historical context, section 35 represents a remarkable reversal of the group-destructive policy which the federal government had pursued for more than a century.

The history of the relationship between aboriginal peoples and the Canadian state is rife with attempts to eliminate the aboriginal story; to substitute the Euro-Canadian story; to deny that there was any story before 1492 and the arrival of Columbus. In the aboriginal story, we can recount direct attacks on the structural integrity of our communities. The practice of dispossession of traditional lands, the relocation to small, isolated, often barren reserves: these are all too-familiar episodes. We can point to institutionalized, even legalized, procedures designed to deconstruct aboriginal communities.

One of the most group-destructive practices was the legal procedure under the *Indian Act* known as enfranchisement. On its face, enfranchisement sounds like a good thing. If you start from the proposition that the right to vote is a good, and if you realize that before 1960, status Indians as defined under the *Indian Act* were denied the right to vote in federal elections, then a process designed to give Indians the vote must also constitute a good. However, enfranchisement was not intended to give "Indians" the vote but to turn them into non-Indians to avoid the legislativelysanctioned discrimination. Parliament presumed that it could convert Indians into nonIndian British subjects. In return for giving up their status, enfranchised individuals were able to vote in federal elections. Other incentives offered to the enfranchised included an allotment of reserve lands and a share of the tribes' assets. In a very real sense, enfranchisement involved the separation of the individual from the community.

To those who do not value community, the harm posed by enfranchisement may not be obvious. Elsewhere, I have tried to capture the impact of the procedure:

> What did enfranchisement entail for a First Nations individual? At the most basic level, it required self-alienation. The power of the Canadian state to determine one's identity had to be accepted. The Creator's gift of identity as an aboriginal person had to be rejected — cast aside as inferior to that of a British colonial subject. Enfranchisement also involved a denial of community autonomy and rejection of the values that community membership represented. It meant standing outside the circle that contained one's ancestors, language, traditions, and spirituality. For what? To escape the humiliating disabilities that the Canadian state had imposed in the first place. To acquire a separate allotment of land, in contravention of the tradition of communal stewardship of land. To be able to alienate one's allotment, ignoring the needs of future generations. The statistics reveal that the hardships imposed by the Indian Act proved more tolerable than the renunciation of identity [and community] that enfranchisement involved.[3]

Aboriginal communities proved quite resistant to the threat posed by enfranchisement. Between Confederation and 1920 only 102 individuals became enfranchised.[4]

The lengths to which the government was prepared to go in promoting the disintegration of aboriginal communities was demonstrated in 1920 when the enfranchisement procedure became compulsory. The *Indian Act* was amended to give the Superintendent General of Indian Affairs the power to enfranchise individuals against their will. The author of the amendment was Duncan Campbell Scott. While testifying before a Commons Committee reviewing the proposed amendments, Scott defended compulsory enfranchisement:

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. I do not want to pass into the citizen's class people who are paupers. This is not the intention of the Bill. But after one hundred years, after being in close contact with civilization it is enervating to the individual or to a band to continue in a state of tutelage, when he or they are able to take their positions as British citizens or Canadian citizens, to support themselves, and stand alone. That has been the whole purpose of Indian education and advancement since the earliest times. One of the very earliest enactments was to provide for enfranchisement of the Indian. So it is written in our law that the Indian was eventually to become enfranchised.
>
> ...Our object is to continue until there is not a single Indian in Canada that hasnot been absorbed into the body politic, and there is no Indian question, and no Indian Department, that is the whole object of this Bill.[5]

If under Canadian law Indians were destined to be "absorbed", it can hardly be said that there was room for the aboriginal story within the Canadian story. It is clear that Mr. Scott did not value community. There was to be no middle ground between the individual and the state. Indians were to "stand alone".

Contrary to Professor McDonald's model, the intention was to eliminate one story and replace it with another. It may be tempting to dismiss Mr. Scott simply as a bureaucrat from an unenlightened era. Can the same be said of the architect of the *Charter*? In 1969, Prime Minister Trudeau showed the same impulse to replace the aboriginal story in defending his governments now infamous "White Paper":

> We can go on treating the Indians as having special status. We can go on adding bricks of discrimination around the ghetto in which they live and at the same time perhaps helping them preserve certain cultural traits and certain ancestral rights. Or we can say you're at a crossroads — the time is now to decide whether the Indians will be a race apart in Canada or whether it will be Canadians of full status. And this is a difficult choice. It must be a very agonizing choice to Indian peoples themselves because, on the one hand, they realize that if they come into society as total citizens

> they will be equal under the law but they risk losing certain of their traditions, certain aspects of a culture and perhaps even certain of their basic rights.[6]

Mr. Trudeau had seriously underestimated the strength of attachment to culture and tradition which existed within aboriginal communities. The scheme to bring us into Canadian society as undifferentiated individuals, stripped of our collective rights, encountered massive resistance and was abandoned.

Little more than a decade later, Mr. Trudeau's patriated Constitution entrenched Indian special status and guaranteed equality before the law. Seen from the perspective of compulsory enfranchisement and the "White Paper", section 35 represents a dramatic reversal in the Canadian story about aboriginal peoples.

As a chapter in the repatriation story, section 35 demonstrates the extent to which actors can modify the script. It was initially conceived by the drafters of the Constitution as a non-derogation clause, to protect treaty rights from the levelling effect of the Charter's equality guarantees. A sustained aboriginal lobby managed to transform the shield into a sword. The extent of this transformation was not lost on the politicians. At the last moment, the aboriginal rights guarantee was deleted from the package in an effort by the federal negotiators to appease the concerns of the western premiers. Only a very strong public outcry, including the voice of prominent jurist Thomas Berger, managed to save section 35. However, the revived guarantee contained a substantial compromise. It spoke only to "existing" aboriginal and treaty rights. Although it represented more than a non-derogation clause, the final version could hardly be called a sword. At best, it provided a broader shield, designed to protect aboriginal rights not only from section 15 challenges by private parties but also from government infringement.

In spite of the eleventh-hour compromise, section 35 holds out a promise of accommodation. On its face, it has the potential to create a space for aboriginal peoples as aboriginal peoples within the Canadian constitution. Of course, the extent to which this potential can be realized depends largely upon the interpretation that section 35 receives from Canadian courts. The first interpretation provided by the Supreme Court of Canada has set the parameters for the aboriginal rights story within the Canadian constitutional saga.

THE *SPARROW* STORY

On May 25, 1984, Ron Sparrow went fishing for salmon. Mr. Sparrow is a member of the Musqueam Indian Band whose traditional territory includes the Fraser River estuary. Mr. Sparrow was fishing in waters covered by a licence issued to his Band by the Department of Fisheries and Oceans. He was charged under a provision of the *Fisheries Act* because the drift net he was using was longer than the restricted length specified in the licence. Mr. Sparrow did not deny that his net

was longer than the licence allowed. However, he defended the charge by asserting that section 35 guaranteed his aboriginal right to fish and that the net length restriction was inconsistent with section 35 and therefore unenforceable.

Mr. Sparrow's case was heard by the British Columbia Provincial Court, then appealed to the County Court, then to the British Columbia Court of Appeal and finally to the Supreme Court of Canada. It provided the Supreme Court with the opportunity "to explore for the first time the scope of s.35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada."[7]

The Court heard from several interveners, including six provincial attorneys general, several commercial fishing organizations, and the Assembly of First Nations. It was presented with wildly differing views of the meaning behind the text that "existing" aboriginal rights are "recognized and affirmed". Some supporters of aboriginal rights argued that the multitude of rights that had been abrogated or extinguished by state action prior to 1982 could be revived by section 35. The government lawyers, by contrast, argued that "existing" means that section 35 only protects the exercise of rights in the manner by which they were regulated in 1982, the so-called "frozen rights" thesis.

On the issue of "existing" the Court chose a middle ground between revived and frozen rights. Only such rights as had survived unextinguished until 1982 could gain protection from section 35. However, once within the guarantee provided by section 35, the content of the right was not determined by the regulatory regime in place in 1982. The Court held that "the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time."[8]

It was obvious to the Court that there would be competing perceptions of whether a given aboriginal right could be termed "existing". In an attempt to ensure that both the aboriginal and the government voices were heard, the Court developed a procedural framework which involved a series of shifting burdens of proof. Paradoxically, it provides an opportunity for the telling of aboriginal stories while preserving the state story of elimination.

At the outset of any section 35 litigation, whether criminal or civil, the onus is on the aboriginal claimant to establish the right for which constitutional protection is being sought. This evidentiary burden is really an invitation to aboriginal people to tell their own story. In *Sparrow*, courts are urged to stretch their imaginations beyond conventional legal categories in order to glimpse the aboriginal reality. The Supreme Court lead by example in its approach to the right claimed by Mr. Sparrow:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be

> careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of ... the "sui generis" nature of aboriginal rights.
>
> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.[9]

The Court is acknowledging that aboriginal peoples are in the best position to speak to the nature of our rights, of the role they have in our cultures and their importance to our continued existence as peoples.

Once we have had our say, the onus shifts to the Crown to prove extinguishment. Its hard to imagine any other rights litigation in which the government is formally encouraged to demonstrate that it has intentionally prohibited the exercise of an established right. As long as the extinguishment occurred before 1982, there is no requirement to justify the state interference with aboriginal or treaty rights.

Extinguishment of rights is a concept that Canadian law has reserved exclusively for aboriginal peoples. It is a tragic example of the divergence between legal reasoning and aboriginal reality. As a lawyer, I can recite the test for extinguishment, but as a descendant of leaders who negotiated several treaties with the Crown I cannot accept that treaty rights can exist and then cease to exist. Treaties are a matter of honour. The promises that the Crown has made do not disappear when the government chooses to violate them. What has been lost is the Crown's honour, not the rights that were secured by treaty.

Rather than speaking of extinguishment of rights, the Court should have acknowledged that it was limiting its ability to enforce the promises that the Crown has made to aboriginal peoples. The government is not accountable for having violated rights before 1982, provided its intention to do so was "clear and plain". The lastminute inclusion of the word "existing" has preserved the power of state story to displace the aboriginal story.

Only if the government fails to prove extinguishment does the promise of section 35 become operative. The courts will recognize only those rights which have not been thoroughly repressed as of 1982. Rights which manage to survive the extinguishment test are accorded constitutional recognition and affirmation.

On the meaning of "recognized and affirmed" the Court was presented with competing theories. Once again, it looked for middle ground. The Court was not prepared to protect surviving aboriginal rights from all forms of state interference. Since section 35 does not appear within the *Charter* portion of the *Constitution Act, 1982*, infringements cannot be justified by reference to section 1. However, the Court did not interpret the textual placement of section 35 as conferring absolute immunity from state regulation. It did provide some restraints on the

government propensity for interference with aboriginal rights by establishing a test of justification.

The scope of the scrutiny is disturbingly uneven. Not all infringements require justification. Only those infringements which impose "undue hardship" have to be justified by the government. Apparently aboriginal people are expected to accept some hardship as our "due". It remains to be seen if the courts differ from the governments in their assessment of the degree of hardship which aboriginal people are owed.

At this point in the *Sparrow* story, an aboriginal listener will be bemused, if not disillusioned. Rights exist only if they haven't been absolutely violated; but existing rights are not absolute. Infringements of existing rights must meet a justificatory standard; unless, of course, the interference does not satisfy the prior standards of unreasonableness, adversity and undue hardship. The burden falls on the aboriginal claimant to establish a sufficiently adverse interference with a "protected" right before the government is required to justify its infringement.

This burden is misplaced. Once the aboriginal claimant has established an "existing" right, the protection of section 35 should be automatic. The courts should then call upon the Crown to demonstrate the reasonableness of its limitation. After all, Ron Sparrow proved that he had an existing aboriginal right to fish. He exercised that right and was charged for using a net longer than 25 fathoms. Before the Crown can secure a criminal conviction shouldn't it be required to prove that this net length restriction is reasonable and necessary? Why should the defendant have the additional burden of proving that this state interference is sufficiently adverse in order to trigger the protection of section 35?

This stage of the *Sparrow* analysis, the test for "prima facie interference with an existing aboriginal right", is partially redeemed by the Supreme Court's attention to specificity. "The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake."[10] Once again, the Court has created a space for the telling of the aboriginal story. Despite the inappropriateness of the preconditions to the justification analysis, these can typically be satisfied by the aboriginal claimant. There is no shortage of evidence that government regulation of aboriginal rights are unreasonable and create adversity.

If this last hurdle is cleared by the aboriginal claimant, then the protection of section 35 comes into play. The courts assume their conventional constitutional role of scrutinizing the impugned regulation for a "valid legislative objective". However, the *Sparrow* analysis adds a "guiding interpretive principle" which is unique to section 35. The Supreme Court recognizes that "the honour of the Crown is at stake in dealing with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first

consideration in determining whether the legislation or action in question can be justified."[11]

The history of this special trust relationship is a story that the governments have been keen to forget. In reminding the Crown of its obligation to respect aboriginal and treaty rights, the Court has lent its constitutional weight to the voice of aboriginal peoples. Although section 35 was not interpreted as the all-encompassing, resuscitative force that aboriginal peoples had been awaiting, it does provide a little space for aboriginal stories within the context of the Canadian constitutional story. Just how much space is the task of intrepid storytellers to discover.

THE STORY OF JONES AND NADJIWON

The opportunity to tell a story within a story poses a dilemma for some aboriginal peoples. There are those who feel that it is not appropriate to tell their nation's story within the confines of the Canadian constitutional story. Many do not regard the *Canada Act, 1982* as an appropriate vessel for their rights. Still more do not trust the Canadian courts to adequately protect those rights. Already, revered elders have had their sacred stories dismissed as not being grounded in reality, as judicially perceived.[12]

In my community, many were skeptical of the promise contained in section 35. However, we did not have the choice of whether or not to go to court. In 1989, our chief, Howard Jones, and members of a well-known fishing family, Francis and Marshall Nadjiwon, were charged with taking more lake trout than permitted by the commercial fishing licence issued to our band by the Ministry of Natural Resources. Faced with potential fines and jail terms, the chief and fishermen were advised to defend the charges by challenging the constitutional validity of the government-imposed limit on our community harvest of lake trout.

My people, the Saugeen Ojibway, are a fishing people. It is no accident that our traditional territory is surrounded by water. For thousands of years we have occupied the peninsula which separates Lake Huron and Georgian Bay. Today it is commonly known as the Bruce Peninsula, but we continue to call it the Saugeen Peninsula. The peninsula is not hospitable to farmers. Our people survived by fishing, hunting and gathering.

In the last century, our leaders had to make some very difficult choices in the face of encroachments by squatters and the failure of the Crown to live up to its promises to protect our lands. Between 1836 and 1854, the Saugeen Territory was reduced from a 2 million acre tract to a cluster of small reserves along the shore of Lake Huron and Georgian Bay. The location of these reserves, adjacent to the

best fishing grounds within our once vast Territory, attests to the importance of the fishery to our way of life. In an effort to ensure our survival as a people, our leaders made deliberate decisions to tie our destiny to the fishery.

In 1836, our chiefs signed a treaty which surrendered 1.5 million acres in return for a promise by the Lieutenant Governor that "he would remove all the white people who were in the habit of fishing on their grounds." Although several subsequent treaties were signed involving lands, our fishing rights were never surrendered. When faced with criminal prosecution for exercising our fishing rights, the defence was grounded in this promise from 1836.

Although section 35 provided an opportunity to tell the Saugeen Ojibway story, a great deal depends upon the listener. As someone who stands outside the community, there is a risk that the judge will devalue what is experienced as essential to those within. To our great relief, we perceived that Judge Fairgrieve was a good listener. He seemed genuinely interested in our story. He allowed more than 400 exhibits to be introduced documenting our history as a fishing people. The trial was held in a courtroom some two hours from the reserve. To facilitate the testimony of elders, however, the trial judge travelled to Cape Croker. By visiting the reserve, he gained both cultural and geographical context for our fishing rights. Judge Fairgrieve took seriously the Supreme Court's admonition "to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

From the Saugeen Ojibway perspective, our people have lived by fishing for thousands of years. To live by fishing means more than to fish for our own consumption. There are also spiritual, cultural and commercial aspects to the fishery. In earlier times, we traded fish for corn and other necessities. Today, our fishermen sell to commercial buyers to earn income to support their families. One example of the fishery's cultural importance is the significantly greater retention of our language among families engaged in traditional fishing activity.

Perhaps the most distinctive aspect of our understanding of our right to fish is that it belongs to the community, not to the individual. The government's licensing regime, introduced in the 1850's, respected this reality by issuing community licences in the name of the chiefs. When fees were eventually imposed for issuing licences, the expense was borne by the community, not by individual fishermen.

Dr. Roz Vanderburgh, an anthropologist who studied traditional resource use at Cape Croker interviewed several elders during the mid-1970's. As an expert witness at trial she was asked if the fishery was seen as a collective right as opposed to an individual resource. She replied: "It never occurred to me to even ask that question because it is so clear that there is no sense of individual ownership of any of the natural resources by aboriginal peoples, not just the people at Cape Croker, but by any of the aboriginal peoples that I've worked with."

Judge Fairgrieve was persuaded by the evidence introduced to support the Saugeen Ojibway understanding of the rights at stake. On the issue of whether there is an existing aboriginal or treaty right to fish for commercial purposes, he found that "the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds...It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base."[13]

Having found an existing commercial fishing right, the trial judge had to determine whether the lake trout quota, which the fishermen had been charged for exceeding, constituted an infringement. The lake trout quota had been imposed by the Ministry of Natural Resources in 1984 as part of its overall program to "rationalize" the commercial fishery in the Great Lakes. Without consulting with our people, the Ministry decided that lake trout should not be a commercial species and restricted its harvest by labelling lake trout as "incidental catch". This meant that fishermen were expected to target other "commercial" species for harvest such as whitefish. If, incidentally, they caught lake trout in their nets while trying to catch whitefish, they could sell only the amount specified in the licence. The problem is that the labels created by the Ministry bear no relation to the habits of fish. Whitefish and lake trout don't realize that one is a "commercial" species and the other "incidental". They swim in the same waters and get caught in the same nets.

Similarly, the quotas imposed on our people bore no relation to our community harvest. Before the imposition of the quota system, our fishermen caught and sold more lake trout than whitefish. This predominance of lake trout was due, in part, to an aggressive stocking program undertaken by the Ministry in Georgian Bay. Yet, when the Ministry imposed its quotas, our community was limited to harvesting 10,022 pounds of lake trout and 18,200 pounds of whitefish. At the time, lake trout was selling for two dollars per pound, limiting the community harvest to a value of $20,044. This quota was too low to sustain even one individual operation, let alone the more than fifteen families who were dependent on the lake trout fishery for their livelihood.

The ratio of the lake trout to the whitefish quota made a bad situation worse. The limit on lake trout would always be reached before the allowable harvest of whitefish. To continue fishing for whitefish meant catching lake trout which could not be sold. The fishermen were faced with a dilemma. They could continue fishing, and simply dump "incidental" fish, a practice common among non-native commercial fishermen. This waste was disrespectful to the fish and the resulting pollution disrespectful to the water. To avoid this wrongful conduct, they could pull their nets and stop fishing, but then they were at a loss as to how to provide

for their families. Alternatively, they could continue fishing and selling, conduct which the Ministry had made illegal by imposing a limit which took no account of the existing communal rights.

In the eyes of the fishermen, the last option was the most justifiable, believing as they did in their right to fish as their fathers and grandfathers had taught them. The Ministry had enforcement officers to enforce its view of what harvest our community was entitled to, and so our chief and fishermen were charged.

Before the Ministry was required to justify the imposition of the lake trout quota, we had to prove that this "interference" amounted to an "infringement" of our now judicially-recognized communal right. The trial judge, in his reasons, expressed some uneasiness with this stage of the *Sparrow* analysis. On the aboriginal burden of characterizing the interference as unreasonable or unnecessary he observed: "All of these questions might have appeared more relevant to the question of whether the interference was justified, not whether any interference occurred."[14]

In regarding the distinction between interference and infringement as somewhat artificial, Judge Fairgrieve was in good company. The Ontario Court of Appeal had already virtually collapsed the distinction. In *R.v. Bombay*, the first Ontario appellate decision to apply the *Sparrow* framework to treaty, as distinguished from aboriginal rights, concluded that "if interference is established, that will constitute a *prima facie* infringement of s.35(1)."[15]

Not surprisingly, the chief and fishermen had little difficulty establishing that the lake trout quota interfered with the exercise of our collective fishing rights. The trial judge made the following findings:

> In the context of the Cape Croker Band's right to fish commercially, there can be little doubt that the limit on the number of lake trout they could lawfully catch imposed an "adverse restriction" on the exercise of their right. The band's quota had already been reached by the end of June, only part way through the fishing season, and had the direct consequence of terminating the exercise of their right in relation to the species the band preferred to harvest. The restrictions clearly limited the income which the band members would have received had they been permitted to continue harvesting for splake [lake trout].
>
> In terms of assessing whether the quota caused "undue hardship", it is difficult to know what degree of hardship was "due" and to isolate the impact of the lake trout quota from other restrictions imposed as part of the same regulatory scheme. The financial hardship caused to the band by the curtailed commercial activity, however, was documented by the evidence. The band's fishing income is a crucial part of what was essentially a subsistence economy. More limited access to the resource caused by the quota produced greater deprivation and, predictably, contributed to

> the negative consequences of increased unemployment and poverty on both an individual and communal level.[16]

This finding of communal hardship flows from the collective nature of the right at stake. The trial judge showed equal sensitivity to the aboriginal perspective on the meaning of the interference as well as the right.

The aboriginal task of establishing the right and the interference, though an evidentiary burden, is also a benefit. It is a rare opportunity to have an aboriginal story validated by an outsider in a position of authority. Of course, much depends upon the listener. After years of having protests fall on deaf ears, our elders and fishermen were relieved to have the trial judge listen respectfully. It was even more gratifying, perhaps, to see the Ministry of Natural Resources officials called upon to justify their interference with the exercise of our fishing rights.

As the first step in the justification analysis, *Sparrow* requires a valid legislative objective for the impugned regulation. The Ministry argued that the imposition of the lake trout quota was aimed at reducing mortality rates and establishing a selfsustaining lake trout population. *Sparrow* had already endorsed the validity of the conservation objective, suggesting that the "justification of conservation and resource management ... is surely uncontroversial."[17] *Sparrow* does not simply ask "why", but "how".

It is not enough for the Ministry to justify its interference by relying on stock assessment data and population models to establish the effects of quotas on mortality rates. The issue is not purely scientific. It is a matter of obligation. *Sparrow* requires the government to satisfy a second level of the justification test. Some things bear repeating:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* and *Guerin*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[18]

However well-meaning the Ministry's attempts to rehabilitate lake trout stocks, the method adopted had to honour earlier promises made by the Crown to our people.

If harvest controls are necessary to sustain the lake trout population, then allocations among competing users cannot be avoided. The allocations must be constitutional. Section 35, according to *Sparrow*, "demands that there be a link between the question of justification and the allocation of priorities in the fishery."[19] In *Sparrow*, the Supreme Court assigned a priority to the Musqueam food fishery

which was second only to conservation. This did not mean that conservation could be practiced solely at the expense of the Indian food fishery . The Court explained:

> The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If more realistically, there were still fish after the Indian food fishing requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.[20]

Sparrow does not explicitly rank the priority to be accorded to treaty commercial fishing rights, this was the task which fell to Judge Fairgrieve.

Having found an existing collective right to fish for livelihood purposes and *prima facie* interference, the protection of section 35 had come into play. The promise of constitutional recognition and affirmation would mean little if the full right, including its commercial aspect, was not given priority. The trial judge ruled that the priority assigned to "Indian fishing" generally can include treaty commercial fishing where the particular facts establish the existence of such a fishery. "If it did not, it would be difficult to see any sense in which it had special constitutional status."[21]

The Ministry did not introduce any evidence that the treaty commercial fishery had received priority in the lake trout allocation. In fact, the opposite was established to the satisfaction of the trial judge:

> I accept that a consequence of the constitutional recognition and affirmation given by s.35(1) to the defendants' aboriginal and treaty rights to fish for commercial purposes is that the Saugeen Ojibway Nation has priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation have been met. I am also satisfied that the evidence relating to the allocation of the quotas under the existing regulatory scheme has made no attempt to extend priority to the defendants' band. Scrutiny of the government's conservation plan discloses that anglers and non-native commercial fishermen have in fact been favoured, and that the allocation of quotas to the Chippewas of Nawash, much less the Saugeen Ojibway as a whole, did not reflect any recognition of their constitutional entitlement.
>
> . . . . .
>
> While the allocation process adopted when the quota system was introduced in 1984 may have reflected social and political realities at the time, it is not at all apparent that the constitutional realities played any role at all. Neither has it been demonstrated

> that since that time appropriate adjustments have been made in response to a belated recognition of the priority of the band's right.[22]

In order to conserve a scarce resource, choices have to be made. Section 35 has introduced some constraints on the choices that the government can make. This new constitutional reality was brought home to the Ministry of Natural Resources when Judge Fairgrieve ruled that the requisite justification had not been provided and that, as a consequence, the lake trout quota imposed on the native fishery was of no force and effect.

THE END OF THE STORY, AND THE BEGINNING

In his concluding remarks, Judge Fairgrieve affirmed that section 35 had introduced a new chapter in the story of the relationship between aboriginal peoples and the Crown:

> ...a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s.35(1) of the *Constitution Act, 1982*, particularly after the judgment of the Supreme Court of Canada in *Sparrow*, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.[23]

Perhaps the biggest adjustment required is one of attitude. Many government officials have to unlearn the attitudes fostered by the old stories of assimilation and substitution. In providing constitutional protection for treaty and aboriginal rights, albeit protection that is limited and uneven, section 35 has created a space for aboriginal stories within the Canadian constitutional story.

NOTES

1. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.
2. (1991) Canadian Journal of Law and Jurisprudence 217 at 220.
3. "First Nations and Canadian Citizenship" in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal & Kingston: McGillQueen's University Press, 1993) 349 at 361-362.
4. Canada, Parliament, *Annual Report 1921*, Sessional Paper No.27, 13.
5. National Archives of Canada, RG 10, vol. 6810, file 470-2-3, vol.7: Evidence of D.C. Scott to the Special Committee of the House of Commons examining the Indian Act amendments of 1920.

6. P.E. Trudeau, excerpts from a speech given 8 August 1969, in Vancouver, as reproduced in Cumming and Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada, 1972), 331.
7. *Supra*, note 1.
8. *Ibid.*
9. *bid*, at p.1111.
10. *Ibid.*
11. *Ibid*, at p.1114 .
12. See *Delgamuukw v. British Columbia* (1991) 79 D.L.R (4th) 185 (B.C.S.C.)
13. *R. v. Jones et al* (1993), 14 O.R. (3d) 421 at 441.
14. *Ibid*, at 442.
15. *R. v. Bombay* [1993] 1 C.N.L.R. 92.
16. *Supra*, note 13 at p.442.
17. *Supra*, note 1 at 1113.
18. *Ibid*, at p.1114.
19. *Ibid*, at p.1115.
20. *Ibid*, at p.1116.
21. *Supra*, note 13 at 445.
22. *Ibid*, at p.449.
23. *Ibid*, at p.452-453.