IN THE WAKE OF *SPARROW*: A NEW DEPARTMENT OF FISHERIES?

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I. Introduction

In 1982 Canadian politicians tried to attack some of the nation's most pressing social problems by recasting them in the form of amending procedures, basic freedoms, and enshrined rights, in an expanded written constitution. This "constitutionalization" approach had a simple but major flaw. When the politicians enshrined complex concepts without saying what they meant, they transferred enormous potential power to an institution with limited capacity: the judiciary.[1]

One target of the 1982 constitution-makers was the special concerns of Canada's aboriginal people. Appalling statistics on native infant mortality, unemployment, suicide rates, and other social ills, lack of effective control over matters affecting aboriginal communities, insufficient land, loss of subsistence-based ways of life, and erosion of traditional cultures, were all too apparent.[2] These were not simply aboriginal concerns. By taking over much of the land, and importing the curses as well as the blessings of alien cultures, non-aboriginal Canadians had helped cause the problems and would share their consequences. In the meantime, they shared an obligation to find answers. The politicians responded[3] by enshrining in section 35(1) of the *Constitution Act, 1982*, a recognition and affirmation of existing aboriginal and treaty rights[4] and provided for a constitutional conference[5] (and then several more)[6] to discuss further additions to the constitution. However, they left section 35(1) ambiguous, open-

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[1]See M. Mandel in *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Walland Thompson, 1989) c. 2, making a similar point.

[2]See B. Morse, "The Original Peoples of Canada" (1982) 5 Canadian Legal Aid Bulletin 1 at 1-16. These problems are still present: see J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Colonization* (Toronto: McClelland and Stewart, 1986); L. Krotz, *Indian Country: Inside Another Canada* (Toronto: McClelland and Stewart, 1990); and R. Paltiel, "Status Indians number half a million: Natives pay no taxes on reserves but suffer high rates of disease and suicide" *The [Toronto] Globe and Mail* (30 August 1990) at 5.

[3]See, generally, *infra*, note 8.

[4]"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Other elements of the response were a provision safeguarding the rights of aboriginal peoples against Charter guarantees (section 25), and one contemplating a conference on rights of aboriginal peoples to be added to the constitution (section 37). See *infra*, notes 5, 6.

[5]In section 37: *Supra*, note 4.

[6]In section 37.1, added in 1984.

ended, and largely undefined. Predictably, the unwieldy constitutional conference yielded only limited help in clarifying the meaning of section 35(1).[7] The bulk of this task was left to the courts.[8]

Today, in the wake of the Supreme Court's May, 1990 aboriginal rights decision in *R.* v. *Sparrow*,[9] we are seeing some of the judicial results of the constitutional activity of 1982. The new direction in the case law on aboriginal rights points to a greatly expanded executive role for the courts, a result which may help neither aboriginals, non-aboriginals, nor the courts themselves. Should we continue to rely so heavily on the judicial forum, or should we pay more attention to possible alternatives? This article focuses on the question of aboriginal rights, looking briefly at the legal situation before *Sparrow* and then at the case itself.

II. The Legal Situation Before Sparrow[10]

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[7]The main addition relating directly to aboriginal rights was section 35(4), stating that "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." This provision, and sections 35(3), 35(4), 37.1 and 54.1 were added to the *Constitution Act, 1982* by the *Constitutional Amendment Proclamation, 1984.* Even had more extensive amendments been achieved, their constitutional nature would have likely kept them to a relatively high level of generality, ensuring a significant role for judicial interpretation.

[8]For general accounts of the constitutional history of the aboriginal rights provisions and their amendments, see E. McWhinney, *Canada and the Constitution: 1972-1982* (Toronto: University of Toronto Press, 1982); N.K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983); Romanow, J. Whyte, and H. Leeson, *Canada Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Methuen, 1984); and B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986); and D. Milne, *The Canadian Constitution: From Patriation to Meech Lake* (Toronto: Lorimer, 1989. For the documentary history, see A.F. Bayesfky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill, 1989).

[9][1990] 1 S.C.R. 1075 [hereinafter *Sparrow*], where the Supreme Court of Canada held that section 35(1) of the *Constitution Act, 1982* entrenched a British Columbia Indian's aboriginal right to fish salmon for food against government regulation, unless government could meet certain judicially-administered criteria for justification.

[10]See, generally, B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) c. 3. See also P.A. Cumming and N.H. Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada in association with General Pub. Co., 1972); K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973) 51 Can. Bar. Rev. 450; B. Slattery, The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of their Territories (DPhil thesis, Oxford University, 1979), published by University of Saskatchewan, Native Law Centre; G.S. Lester, The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument (DJur thesis, York University, 1981)[unpublished]; and K. McNeil, *Common Law Aboriginal Title* (Oxford: Claredon Press, 1989).

If the constitution-makers of 1982 realised how little courts had clarified aboriginal rights before then, they might have hesitated. Although traditional aboriginal use and occupancy of land was a fact at the time of Confederation (and pre-dated it by at least 15,500 years),[11] for most of the twentieth century Canadian courts did not recognise any general right based directly on this fact. Non-legislative, non-treaty rights were thought to be limited to the qualified wording of an old prerogative instrument with shadowy boundaries; the Royal Proclamation of 1763.[12] Only in Calder v. *A.G.(B.C.)*[13] did the Supreme Court move toward supporting a general occupancy-based right, and even here only a minority accorded it full unequivocal common law status.[14] On other questions, such as proof, content, duration, liability to extinguishment, and compensability, there was almost no consensus whatever. By the eve of the *Constitution Act, 1982*, the highest Court had done little more to clarify or even summarize this situation,[15] and lower court decisions were a mass of contradictions. One provincial appellate court declared that aboriginal rights were simply too vague to recognise.[16] All in all, this was not a likely foundation on which to base increased judicial responsibility.

Yet increased judicial responsibility was an almost inevitable result of section 35(1).[17] Those who drafted this provision left the courts not only to clarify aboriginal rights but to say how they had been changed. Certainly, the mere fact

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[11]See R.E. Morlan, "Toward the Definition of Criteria for the Recognition of Artificial Bone Alterations" (1984) 22 Quaternary Research 160 at 161; and "Pleistocene Archaeology in the Old Crow Basin: a Critical Appraisal" (1985) Peopling of the Americas 27 at 43.

[12]See *infra*, part (e).

[13]*Calder* v. *A.G.(B.C.)*, [1973] S.C.R. 313 at 344 [hereinafter *Calder*].

[14]See *infra*, part (e).

[15]It did hold that claimed aboriginal rights were subject to federal legislation : *R.* v. *Derriksan* (1977), 71 D.L.R. (3d) 159 (S.C.C.) (a one-paragraph decision) and to some provincial legislation : *Kruger and Manuel* v. *The Queen* (1977), 75 D.L.R. (3d) 434 (S.C.C.).

[16]*Kanatewat et al.* v. *The James Bay Development Corporation and A.G. (Quebec)*, [1975] C.A. 166 at 175.

[17]The literature on this section is voluminous. See, for example, K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)," in W. Tarnopolsky and G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 467; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct. L. Rev. 255; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" in Beck and Bernier, eds., *Canada and the New Constitution, The Unfinished Agenda*, vol.1 (Montreal: Institute for Research on Public Policy, 1983); B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983) 8 Queens L.J. 232; B. Schwartz, supra, note 8; K. McNeil, "The Constitutional Act, 1982, Sections 25 and 35" (1988) 1 C.N.L.R. 1; W.F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982*, (Saskatoon: Native Law Centre, 1987); W.F. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II" (1988) 22 U.B.C. Law Review 207; and B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

of inclusion in the *Constitution Act, 1982*, suggested something more than a continuation of the *status quo*; but what was that something more? Were the rights to be entrenched, prevailing over inconsistent government action like Charter rights? However, section 35(1) was placed outside the Charter, and had been given no similar specific guarantee.[18] Another possibility was some form of enhancement short of entrenchment. This option would require further choices. Were unequivocal common law status or real property status or and strong presumptions against restriction intended?

The entrenchment route posed even more complex dilemmas. If the rights were entrenched, how were they entrenched? For example, against what government actions were they entrenched? When did the entrenchment take effect? Precisely what rights were entrenched? Were all aboriginal rights entrenched to the same degree? Moreover, section 35(1) not only lacked a specific guarantee, but it contained no justification provision like section 1 of the Charter, which permitted legislative infringement in special cases. If the entrenchment route were taken, it might be necessary to impose at least some restrictions. For example, the reference to treaties in section 35(1) and to treaties and land claims agreements in section 35(3)[19] suggests that it cannot have been intended to entrench aboriginal rights against consensual alteration. Absolute entrenchment might be qualified by imposing limits of a chronological,[20] jurisdictional,[21] or other nature,[22] or by creating a justificatory test for individual cases, even though the *Constitution Act, 1982* itself provided none for section 35(1) aboriginal rights. But these options, too, carry risks: general limits can produce arbitrary boundaries,[23] and assessment of justification in individual cases can be a subjective, highly discretionary process.[24]

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[18]The word "guaranteed" did appear in section 35(4) of the *Constitution Act*, 1982, added in 1984: see *supra*, note 7. Arguably, though, the concern of this provision was to guarantee the equal enjoyment of section 35(1) rights, not the rights themselves. If the latter effect had been intended it would have been a simple matter to add the word "guaranteed" to section 35(1) itself.

[19]Section 35(3), added in 1984, says that "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[20]For example, limiting entrenchment to post April 17, 1982 government restrictions.

[21]For example, limiting entrenchment to provincial government restrictions.

[22]For example, limiting entrenchment to government restrictions not agreed to by the aboriginal community concerned.

[23]For example, should entrenchment depend on whether or not an enactment was passed after April 17, 1982?

[24]This is so even under section 1 of the Charter, which provides some legislative criteria for justification. As I. Greene has observed, "[t]he fact that the Charter contains an explicit limitations clause is a reflection of the desire to provide guidance to the judiciary, but it is obvious that the judges are still left with a tremendous amount of discretion in setting limits on rights": *The Charter of Rights* (Toronto: Lorimer, 1989) at 56.

Finally, at the eleventh hour, the constitution-makers had entrenched not simply aboriginal rights but "existing" aboriginal rights.[25] What exactly did this mean? Did it freeze all rights, subject to all government restrictions modifying them before April 17, 1982, and then entrench the rights against government restrictions after this date? Did it mean "unextinguished"? Did it refer to the legal status or scope of aboriginal rights before April 17, 1982? Was some other meaning intended? The constitution-makers had hardly made things easy! Faced with this formidable interpretation challenge, the Supreme Court said virtually nothing about section 35(1) aboriginal rights for eight years. *Guerin et al.* v. *R.*,[26] their most important decision during this period, gave aboriginal people the benefit of a fiduciary duty, but the decision was based on aboriginal interest in aboriginal title and the commitments implicit in the surrender provisions of the *Indian Act*.[27] *Guerin* also gave common law recognition to occupancy-based aboriginal rights. This, and the new emphasis on fiduciary duty, may have reflected the presence of section 35(1), but the Court drew no such link at the time.

In the lower courts, an early Saskatchewan decision[28] held that section 35(1) treaty rights were not entrenched against pre-April 17, 1982 legislation, an Ontario decision[29] suggested that section 35(1) rights were entrenched against legislation enacted after but not before April 17, 1982, and a British Columbia decision[30] held that since April 17, 1982, aboriginal rights were entrenched against subsequent legislative extinguishment and some subsequent legislative regulation.[31] Clearly, an extraordinary range of choice confronted the Supreme Court when it considered the appeal in *Sparrow*.

III. Background to Sparrow

Without a doubt, *Sparrow*[32] was a landmark decision. This was the highest Court's first detailed look at section 35(1). Here, at last, the Court has produced some general rules for interpreting this most complex of constitutional provisions. Here is a new "entrenchment/justification" approach which may shape the

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[25]See *supra*, note 10.

[26][1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to D.L.R.].

[27]R.S.C. 1952, c.149.

[28]*R.* v. *Eninew* (1983), 1 D.L.R. (4th) 595 (Sask. Q.B.) [hereinafter *Eninew*], upheld on somewhat different grounds in [1984] 2 C.N.L.R. 126 (S.C.A.).

[29]*R.* v. *Hare and Debassige*, [1985] 3 C.N.L.R. 139 (O.C.A.).

[30]*R.* v. *Sparrow* (1986), 36 D.L.R. (4th) 346 (B.C.C.A.), discussed *infra*, part (c).

[31]Legislation which falls short of full extinguishment. See further *infra*, part (g).

[32]*Supra*, note 9; aff'g. (1986), 36 D.L.R. (4th) 246 (B.C.C.A.); which rev'd. (1986), 9 B.C.L.R. 599 (S.C.), aff'g. the conviction by Goulet Prov.Ct.J.

landscape for decades to come. Here, too, was an ambitious attempt to deal fairly and generously with some of the strong claims and pressing needs of our aboriginal peoples. A landmark, indeed!

But a landmark for what? For addressing the pressing social needs of Canadian aboriginal people? For clarity in this historically convoluted area of law? For resolving the many unanswered conceptual problems of aboriginal title? Or for a well-intentioned but misguided new era of judicial discretion and judicial activism?

Mr. Sparrow, a Musqueam Indian, went fishing for salmon on May 25, 1984, in the Fraser Valley delta area of British Columbia, a traditional Musqueam fishing place. He was using a 45-fathom drift net. However, in the spring of 1983, the Department of Fisheries had reduced the maximum net length in the Musqueam Band's Indian food fishing licence from 75 fathoms to 25 fathoms. Mr. Sparrow was charged under section 61(1) of the *Fisheries Act*[33] with fishing with a drift net longer than permitted by licence.

Sparrow argued that he was fishing pursuant to an aboriginal right guaranteed by section 35(1) of the *Constitution Act, 1982*. At first, no success: Mr. Sparrow was convicted by a provincial court judge and the conviction was upheld by the British Columbia County Court. But the British Columbia Court of Appeal set aside the conviction and ordered a new trial. They held that Sparrow had provided adequate proof of an aboriginal title to fish, and that the federal government had failed to show that the right had been extinguished. The Court of Appeal said that since April 17, 1982, this right was entrenched against subsequent legislative extinguishment, and against all subsequent legislative regulation except that which could be justified according to certain criteria. However, the Court felt it had insufficient evidence in this case regarding (i) the alleged infringement of the aboriginal right and (ii) the facts which might justify the infringement. Hence the new trial.

The novelty of this decision should be appreciated. Until this decision, most courts had said that section 35(1) does not affect pre-April 17, 1982 legislation.[34] Since most decisions before *Sparrow* had not involved *post*-April 17, 1982 legislation, little had been said about it. In 1985, the Ontario Court of Appeal had suggested that aboriginal rights are entrenched against all post-April 17, 1982

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[33]*Supra*, note 27.

[34]*Eninew, supra*, note 28 referred to in part (b) was typical of the early decisions. See the other cases noted in D. W. Elliott, The Legal Status of Aboriginal and Treaty Rights in Section 35(1) (Research study commissioned for Canadian Bar Association Native Justice Committee, part 7., 1989) [unpublished].

legislation,[35] but this comment was *obiter*. The concept of qualified entrenchment, subject to a justification requirement, was applied for the first time in the British Columbia Court Appeal's decision in *Sparrow*.[36]

After the British Columbia Court of Appeal's decision in *Sparrow*, several other courts adopted its general approach.[37] Most notable was the Ontario Court of Appeal, which rejected its earlier approach and supported a form of entrenchment/justification in *Agawa*.[38] The Ontario Court of Appeal seemed to extend the entrenchment/justification approach to pre-April 17, 1982 legislative abridgment,[39] but it appeared to favour a less demanding test for justification, requiring only that the purpose – not the effect – of the government legislation be justified.

IV. The Supreme Court's Decision

The Supreme Court's own decision[40] of *Sparrow* followed closely in the footsteps of the British Columbia Court of Appeal. The main elements of the Supreme Court's reasoning are as follows:

(1) "Existing" in section 35(1) means (i) unextinguished as of April 17, 1982[41] (but does not mean subject to pre-April 17, 1982 regulatory régimes) and (ii) "affirmed in contemporary form".[42]

(2) The evidence of the aboriginal right is scanty in parts, but is not seriously

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[35]Thorson J.A.: "...I agree with the interpretation of s. 35 favoured by Professor P.W. Hogg in his *Canada Act, 1982 Annotated* (Toronto: Carswell, 1982) at p. 83, that these 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": *supra*, note 29.

[36]About the time of the B.C. Court of Appeal's decision, an article appeared in the Canadian Bar Review articulating a similar approach. Professor Brian Slattery's article, "Understanding Aboriginal Rights" (1987) Can. Bar Rev. 727, 782, was influential in subsequent decisions such as *R.* v. *Agawa* (1989), 65 O.R. (2d) 505 (C.A.) [hereinafter *Agawa*] and *Sparrow* at the Supreme Court level.

[37]For example, *R.* v. N.T.C. *Smokehouse* (15 January 1990) B.C.J. No. 434 (Co.Ct.) at 26; *R.* v. *Machatis*, (2 March 199)] A.J. No. 203 (Q.B.) at 11,16; and *R.* v. *Denny*, (5 March 1990) N.S.J. No. 56 (C.A.).

[38]*Agawa*, *supra*, note 36 rev'g. a decision of Vannini D.C.J. upholding a conviction on six charges.

[39]Infringement of aboriginal rights which is not so extensive as to abrogate them entirely.

[40]Reported in *Sparrow*, *supra*, note 9, rendered by Dickson C.J. and La Forest J. for the Court. The other members who participated in the decision were McIntyre, Lamer, Wilson, L'Heureux-Dubé, and Sopinka J.J.

[41]*Ibid.* at 42.

[42]*Ibid.* at 45.

disputed and will be accepted.[43] It shows that the Musqueam band lived in the relevant area (although not to the exclusion of others) as an organized society,[44] long before the coming of the Europeans, and that the salmon fishing was and is integral to their lives.

(3) The test for extinguishment is not simply whether the government action is "necessarily inconsistent" with the continued existence of the aboriginal right, but whether the Sovereign's intention to extinguish is "clear and plain."[45] Here it was not.

(4) The aboriginal right here was to fish for food for (i) subsistence and (ii) ceremonial and social purposes. It will not be decided here if it extends to other objectives such as commercial purposes.[46]

(5) Section 35(1) "affords aboriginal peoples constitutional protection against provincial legislative power," a protection which would result in any event from the decision in *Guerin*.

(6) Section 35(1) incorporates a fiduciary obligation toward aboriginal peoples, and should be generously construed.

(7) The aboriginal right enshrined in section 35(1) is not as susceptible to infringement as before April 17, 1982, since its new status in the constitution requires a different approach.[47] On the other hand, the right is not entrenched absolutely because the words "recognized and affirmed" are not absolute.[48] Moreover, the right is not entrenched subject to regulations in place on the eve of April 17, 1982, because that would constitutionalize "a crazy patchwork of regulations."[49]

(8) Section 35(1) protects aboriginal rights from infringement by government regulation, unless government is able to justify the infringement.

(9) To show a *prima facie* infringement of section 35(1) rights, those challenging the legislation must show that it (i) is an unreasonable limitation, (ii)

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[43]*Ibid.* at 49.

[44]*Ibid.* at 47-48.

[45]*Ibid.* at 56.

[46]*Ibid.* at 58-61.

[47]*Ibid.* at 80.

[48]*Ibid.* at 78.

[49]*Ibid.* at 77.

has the effect of imposing undue hardship, or (iii) denies the right holders their preferred means of exercising the right.

(10) To show justification, government must demonstrate (i) that it has a valid legislative objective and (in a case such as this one); (ii) that it has given the Indian food fishing top priority after the legislative objective (here, conservation) has been met; and (iii) depending on the circumstances of the inquiry, that there has been minimum possible infringement with respect to the desired result, fair compensation for any expropriation, and consultation with the aboriginal group concerned. The legislative objective must be "compelling and substantial" and could include (a) conserving and managing a natural resource or (b) preventing harm to the aboriginal people or the general populace. The "public interest" or mere "reasonableness" are not adequate criteria.

(11) For the criteria required above, the findings of fact in this case were insufficient. Accordingly, there should be a re-trial.

V. Legal Status

In a major analysis of section 35(1), it would have been helpful to discuss the legal status of aboriginal rights *before* this provision. This could have shed more light on the intended role of section 35. For example, if the status before section 35 was unclear, then section 35 could have performed a significant role in clarifying and strengthening aboriginal rights, without necessarily entrenching them. Conversely, if before section 35, aboriginal rights were clearly recognized as having full common law status, then section 35 might be seen as intended to elevate them to a level higher, to entrenched status. Unfortunately, *Sparrow* says little on this question.[50] As a result, we are left with the affirmation in *Guerin* that the Court recognized that aboriginal rights have common law legal status in *Calder*.[51] But only three of the seven judges in *Calder* went this far,[52] and pre-*Calder* case law on the legal status of aboriginal title is contradictory and uncertain.[53] If the pre-section 35 situation *was* uncertain, the Court should have looked beyond

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[50]The Court said that "[f]or many years the rights of the Indians to their aboriginal lands - certainly as legal rights – were virtually ignored", *supra*,note 9 at 64); that "[a]s recently as *Guerin*..., the federal government argued in this Court that any federal obligation was of a political nature"(at 67); and that "s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights"(at 69).

[51]*Guerin*, *supra*, note 26. See also *Roberts* v. *A.G.(Canada)* [1989] 1 S.C.R. 324 at 340.

[52]Hall J., for himself, Spence, and Laskin J.J. Judson J., for himself, Martland, and Ritchie J.J., held that whatever title the Nishgas may have had, had since been terminated: *Calder*, *supra*, note 13. Pigeon J. decided the case solely on the basis of a procedural technicality.

[53]See the cases considered in D.W. Elliott, "Aboriginal Title" in Morse, *supra*, note 10 c.3 at 76-84.

entrenchment options when construing the effect of section 35.[54]

More consideration of the pre-section 35 situation could have helped clarify just what this provision is recognizing and affirming. Are all the aboriginal rights caught by it of the same general kind or are proclamation-based rights different from occupancy-based rights?[55] And are rights affected by Europe "conquest"[56] different in status from rights affected by European "settlement"?[57]

Quite rightly, the Court did not emphasize these differences in *Sparrow*. Not all provisions of the Royal Proclamation apply to all regions of Canada,[58] and the precise territorial reach of this document is a matter of controversy.[59] Further, there is little consensus as to which parts of North America were acquired by conquest and which by settlement,[60] and neither of these doctrines fully described European acquisition from the North American aboriginal peoples.[61] Undue emphasis on the Proclamation or on the individual categories of conquest or

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[54]One such option was that section 35(1) did not entrench aboriginal rights, but clarified and strengthened them short of entrenchment: see text referred to at *infra*, note 74 *et. seq.*

[55]*Supra*, note 10 at 52-57.

[56]Two key early cases on the colonial acquisition doctrines of conquest and settlement are *Blankard* v. *Galdy* (1693) Holt 341 [hereinafter *Blankard* cited to Holt], 90 E.R. 1089 (K.B.) and *Campbell* v. *Hall*, (1774) 1 Cowp. 204 [hereinafter Campbell cited to Cowp.], 98 E.R. 1045 at 1047 (K.B.). See also secondary authorities, *infra*, notes 57 and 60.

[57]Yes: *Milirrpum* v. *Nabalco* [1971] 17 F.L.R. 141 (N.Terr.S.C.). No: B. Slattery, "Understanding Aboriginal Rights" (1987) Can. Bar Rev. 727. Rights subject to settlement survive acquisition, but differently from rights subject to conquest: Lester, *supra*, note 10 c. 19 and McNeil, *supra*, note 10, c.7. Under settlement the rights benefit from a presumption in favour of possession, and in favour of (a) limitations on the Crown's prerogative powers : Lester; see comments in (1982) 28 McGill L.J. 165) or (b) a fee simple interest: McNeil. McNeil distinguishes between these rights and those which he says depend on proof of a pre-existing native customary law.

[58]See Slattery, *supra*, note 10 Parts I, II; J. Stagg, *Anglo-Indian Relations in North America to 1763 and An Analysis of the Royal Proclamation of 7 October, 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981); Lester, *supra*, note 57, c.19; and McNeil, *supra*, note 10 at 224, fn 113 and at 274-75 (McNeil argues that the Proclamation's Indian provisions do not apply to those parts of Canada acquired by settlement).

[59]*Supra*, note 10 at 56. In regard to British Columbia, see the discussion in *Delgamuukw* v. *British Columbia*, [1991] B.C.J. #525 (S.C.) at 271-329.

[60]See Lester, *supra*, note 10; D.W. Elliott, review of Lester's, The Territorial Rights in (1982) 28 McGill L.J. 165 at 169-70; Slattery, *supra*, note 10, Part III; and McNeil, *supra*, note 10, c.8 at 244-89.

[61]Conquest assumed forceful subjegation of an inhabited territory, yet parts of North America were sparsely populated, and did not experience direct military confrontations. Conversely, although the settlement doctrine assumed vacant territory, North America as a whole was inhabited. In some cases, specific lands were vacated and then settled after initial confrontations. Accommodating these realities required a lessening of the original conquest/settlement distinctions, as seen in *Johnson* v. *M'Intosh* 21 U.S. (8 Wheat.) 543 at 590-92, 595 (S.C.).

settlement could generate uncertainty and suggest differing legal consequences for a phenomenon – prior occupation – which is common to all aboriginal people.

Even before *Sparrow*, the Court was starting to de-emphasize the Proclamation and its regional uncertainties, and to emphasize occupation of land from pre-European times.[62] In *Calder* and *Guerin*, the Supreme Court de-emphasized the differences between conquest and settlement.[63] But this is not enough. Having freed aboriginal rights from exclusive dependency on the Proclamation and shifted the focus to pre-European aboriginal occupancy, the Court should explain how occupancy rights relate to European acquisition. This task has already been started, and may have been carried some way in *Sparrow* itself,[64] but it should be completed. Before we can fully appreciate the changes made by section 35(1), we need a clear picture of the common law rights this section affects.

How might this exposition proceed?[65] It might start with Dickson J.'s statement in *Guerin* that the basis of aboriginal rights is aboriginal occupation and possession of land. It might incorporate Dickson J.'s suggestion in *Guerin* that aboriginal rights could survive European acquisition by virtue of the general principle that a change in sovereignty does not affect the presumptive title of the inhabitants.[66] It could add that this is possible both under conquest (where a presumption favoured existing private rights)[67] and settlement (which only required English legal principles to the extent that local conditions required, and

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[62]Both Judson and Hall JJ. emphasised occupation in *Calder*, *supra*, note 13 at 328, Judson J. and 368, 375-76, Hall J., as did Dickson J. in *Guerin*, supra, *note* 26 at 336.

[63]*Calder*, *supra*, note 13 at 389, where Hall J. said the principles applicable to conquest should also apply to acquisition by "discovery or declaration"; and *Guerin*, *supra*, note 26 at 376-79, where Dickson J. quoted from the suggestion in *Johnson*, supra, note 61 at 543, 573-74, 587-91 that the courts have modified the application of conquest and settlement to aboriginal rights to reflect historic government policy.

[64]The Court did say that British policy was "based on the [native population's] right to occupy their traditional lands", and that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [the natives' traditional lands] vested in the Crown"(at 64-65). These statements are relatively consistent with earlier legal doctrine (See *supra*, note 62, on occupation. On sovereignty and underlying title, see *St. Catherine's Milling and Lumber Company* v. *R.* (1888) 14 App. Cas. 46 at 55 (J.C.P.C.); cited in *Calder*, *supra*, note 13 at 322, Judson J. and 380, Hall J. See also *A.G. (Que.)* v. *Sioui*, [1990] S.C.J. #48, 24 May, 1990 at 34). *Quaere*, whether the Court was referring here to law or simply to policy?

[65]What follows is only a tentative sketch, and one of a number of possible approaches.

[66]*Guerin*, *supra*, note 26 at 336, referring to *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (J.C.P.C.).

[67]*Campbell*, *supra*, note 56.

so they need not displace pre-existing private rights)[68]. It would note that under both doctrines, the Crown would gain sovereignty and the underlying title to the land acquired. It might explain that the alienation and potential duration of aboriginal rights were limited, either by virtue of the unilateral legislative power of the Crown in conquest areas,[69] or, arguably, in regard to pre-acquisition inhabitants of settlement areas. In regard to these inhabitants, it could note that the lands were *not* vacant, and the situation was arguably closer to conquest.[70] By considering conquest and settlement together rather than separately, such an exposition could provide a general basis for the survival of aboriginal rights past European acquisition, in all parts of Canada.

On the key question of the effect of section 35(1) itself, the Supreme Court failed to consider all the possible options. It suggested that the main choice was between (i) absolute entrenchment,[71] (ii) frozen rights,[72] and (iii) its compromise entrenchment/justification approach.[73] In doing so, it failed to look carefully at another possible option; enhanced status short of entrenchment.[74] Arguably, although section 52(1) of the *Constitution Act, 1982* entrenched the recognition and affirmation of existing aboriginal rights in section 35(1), it did not necessarily accord superlegislative status to the rights themselves. Unlike Charter rights, these rights were not expressly "guaranteed".[75] Moreover, there was enough confusion in the pre-1982 case law that the Court could have used this option to significantly clarify and strengthen section 35(1) aboriginal rights without any need for entrenchment. For example, the Court could have clarified that aboriginal rights cannot be extinguished by Crown action alone; that they are protected by a strong presumption against extinguishment and abridgment; and that they can provide

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[68]See, for example, *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (1863) 2 Moo.P.C. (N.S.) 22 at 60-61 (J.C.P.C.).

[69]*Supra*, note 67.

[70]The assumption that settlement lands are vacant lands was basic to the original concept of settlement: see *Blankard*, supra, note 56. Although later decisions contemplated the survival of pre-existing rights in settlement areas, this occurred by way of exception to the normal settlement presumption in favour of English laws and legal institutions, and the status of these rights was arguably similar to those in conquest areas. *Contra,* McNeil, *supra*, note 10, suggesting that indigenous possession in settlement areas could benefit from an English common law presumption in favour of fee simple status.

[71]Rejected at *Sparrow*, *supra*, note 9 at 75, 77.

[72]*Ibid.* at 41-45 at 77.

[73]Adopted at *Sparrow*, *supra*, note 9 at 76-79. Another option, not seriously considered, but referred to and dismissed in passing, was preservation of the *status quo*: at 71-72.

[74]On this option, see Elliott, *supra*, note 34, Part 5.

[75]Compare the wording of sections 1 and 35(1). Arguably, too, the word "guaranteed" in section 35(4), which was added in 1984, refers to the equal enjoyment of the rights in section 35(1), and not to the status of the rights themselves.

enforceable property-type rights against third parties. This enhancement option would have enabled the Court to act effectively, but by eliminating old uncertainties, rather than creating new ones. It would have avoided the need to distinguish between different forms and times of entrenchment, or to generate and administer subjective criteria for justifying government restriction of entrenched rights.[76]

Ironically, although it seriously considered only entrenchment options, the Court ended up enhancing some aspects of aboriginal rights as *well* as adopting one form of entrenchment. For example, the test for proof was relaxed,[77] and, apart from entrenchment, the requirements for extinguishment were tightened.[78] This approach appears to result from the Court's view of section 35 as a kind of fiduciary promise to aboriginal people,[79] and from its interpretation presumption in favour of aboriginal rights.[80]

In considering the meaning of section 35, the Court could and probably should have looked at the *travaux préparatoires* leading up to it.[81] These may not have pointed conclusively in one direction or another,[82] but they might have been helpful. For example, although legislators and government officials were equivocal as to whether or not section 35's predecessor would entrench aboriginal rights, most of the aboriginal groups did appear to believe they would be strongly protected.[83] This would provide additional support for the Court's view of section 35 as a promise to be honoured.[84] At the very least, it would scotch any lingering notion that section 35 was merely a re-statement of the *status quo*.

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[76]See *infra*, part (h).

[77]See *infra*, part (d).

[78]See *infra*, part (g).

[79]*Sparrow, supra*, note 9 at 74.

[80]*Ibid.*

[81]See *Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 24 D.L.R. (4th) 536 at 550-555 (S.C.C.); and *Mercure* v. *A.G. (Sask.)*, [1988] 1 S.C.R. 234 at 248, on consideration of preparatory materials for constitutional or "almost constitutional" provisions.

[82]Elliott, *supra*, note 34, Part 3(vi)(b).

[83]*Ibid.*

[84]"While it does not promise immunity from government regulation...it does hold the Crown to a substantive promise": *Sparrow, supra*, note 9 at 78-79; "...s. 35(1) is a solemn commitment that must be given meaningful content": at 75. Although the precise content of the commitment was never made clear by government, it was held out as significant, and was relied on as such by the aboriginal peoples: (*supra*, note 78). This specific representation and reliance was superimposed on the general trust-like relationship between government and aboriginal peoples noted in *Sparrow, supra*, note 9 at 74-75).

VI. Proof and Content

On proof, the Court *assumed* the existence of prior rules, and then, without specific explanation, proceeded to change one of them. Prior to *Sparrow*, the most commonly followed general test for proof of aboriginal title was that of Mahoney J., in *Baker Lake*.[85]

There Mahoney J. had required:

> (1) That [the aboriginal people] and their ancestors were members of an organized society.
>
> (2) That the organized society occupied the specific territory over which they asserted the aboriginal title.
>
> (3) That the occupation was to the exclusion of other organized societies.
>
> (4) That the occupation was an established fact at the time sovereignty was asserted by England.[86]

Without referring to the *Baker Lake* requirements, the Court noted that the Musqueam had lived in the relevant area, as an organized society, and that the traditional fishing activity was integral to their way of life.[87] The fact that the Musqueam had not enjoyed *exclusive* occupancy of their territory caused the Court no difficulty. Was this because they considered exclusive use too demanding a requirement?[88] If so, what lower test should the courts apply? *Predominant* occupancy?[89] Any occupancy?

Rightly, though, the Court avoided any extended inquiry into the general system of traditional Musqueam custom. For occupancy-based title, the object is not to decide if aboriginal groups had systems of law and tenure sufficiently similar

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[85] *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1980), 107 D.L.R. (3d) 513 (F.C.T.D.).

[86] *Ibid.* at 545-45. Mahoney J.'s four requirements were cited and applied in numerous subsequent decisions: see, for example, *A.G. (Ont.)* v. *Bear Island Foundation* (1984), 15 D.L.R. (4th) 321, 335 (O.H.C.); *R.* v. *Cote*, [1989] 3 C.N.L.R. 141 at 156 (Que.Prov.Ct.); and *Jules* v. *Harper Ranch*, [1989] B.C.J. No. 861, Vancouver Reg. C890403, May 1989, at 52. See, however, *infra*, note 92.

[87] *Sparrow, supra*, note 9 at 46-47.

[88] See also *Delgamuukw, supra*, note 59 at 801, where McEachern C.J.S.C. expressed doubts about applying the exclusivity requirement too rigidly.

[89] In *U.S.* v. *Santa Fe Pacific Railroad Co.* (1941), 314 U.S. 339 (S.C.) [hereinafter *Sante Fe*], the United States Supreme Court required "definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes)... ." Predominant occupancy or use, which would fall between the two extremes described here, might provide a workable minimum requirement.

to those of the common law to merit recognition;[90] it is simply to determine whether or not the lands (or waters) in question were occupied and used by an identifiable aboriginal group. In regard to the amount of proof needed, the Court took an extremely liberal approach. Although the evidence of traditional use was "scanty" in parts, the Court considered it adequate that it was not seriously disputed.[91] Hence, once minimal proof is presented, the onus apparently shifts to government to produce serious evidence in rebuttal. This approach may be necessary. Proof of aboriginal title is often buried in the dust of centuries, beyond the reach of written records. At some point, though, the facts may be simply too distant for *any* clear measurement in an adjudicatory forum. In any event, if the Court is changing the rules here, it should explain what it is doing.[92]

Regarding content, *Sparrow* shows that an aboriginal right to fish for food can extend to ceremonial as well as strictly subsistence purposes. Although this approach shows flexibility, it may prove extremely difficult to quantify just what numbers ceremonial purposes require. And what about fishing for commercial purposes? *Sparrow* avoided deciding if the aboriginal right extended to fishing for commercial and any other non-dangerous purposes. The judges said this issue had not been argued in the courts below. On one hand, recognising an aboriginal commercial fishing right would be consistent with the Court's view that section 35 requires aboriginal rights to be construed generously, and "in a contemporary form".[93] On the other hand, such a right would place holders of aboriginal rights in a stronger position than the aboriginal residents of the prairie provinces.[94] It could also bring aboriginal claimants into more obvious competition with non-aboriginal commercial fishing interests. This issue is bound to re-surface in the Supreme Court, and when it does, it will be a difficult one.

One aspect of the Court's emphasis on rights being recognized and affirmed "in a contemporary form"[95] is the likelihood that modern *means* of fishing (and hunting), such as automated fishing equipment (and rifles for hunting) will be considered an acceptable means of exercising the traditional right. This would be

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[90]As assumed in *Re Southern Rhodesia*, [1919] A.C. 211, 233 (J.C.P.C.); and *Milirrpum* v. *Nabalco Pty.* (1971), 17 F.L.R. 141 (N.T.S.Ct.: Australia). See *Delgamuukw, supra*, note 59 at 805, where the fact that there were long-standing villages and village customs was considered sufficient.

[91]*Sparrow, supra*, note 9 at 49. See, generallly, the discussion of problems of eveidence and proof in *Delgamuukw, supra*, note 59 at 143-242, 800-807.

[92]See also *A.G.(Ontario)* v. *Bear Island Foundation*, [1991] S.C.J. #61 at 12-13, where once again the Supreme Court hinted that the *Baker Lake* approach needed changing, but failed to specify how.

[93]*Sparrow, supra*, note 9 at 45.

[94]These people are subject to the "for food" limitation of the *Natural Resources Transfer Agreements*.

[95]*Sparrow, supra*, note 9 at 45, quoting from B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 782.

consistent with the Court's recent approach in treaty cases.[96] It would seem entirely reasonable.

VII. Extinguishment, Abridgement, and Regulation

With respect to extinguishment,[97] the Court addressed a question which had gone unresolved since *Calder*. In *Calder*, Judson J., for three judges had held that government action necessarily inconsistent with the continued existence of the aboriginal title was sufficient to extinguish it.[98] On the other hand, Hall J. for three other judges had concluded that the Sovereign's intention to extinguish must be clear and plain.[99] In *Sparrow*, the Crown tried to build on Judson's test. They argued that detailed government regulation of Indian fishing over the years was sufficiently inconsistent with the continuation of any aboriginal fishing right to extinguish it.[100] The Court rejected this argument. The proper test, it said, is that of Hall J. in *Calder*.[101] Mere regulation, however detailed, is not enough to show a clear and plain intention to extinguish. By endorsing Hall J.'s test, the Court implied that necessary inconsistency is not enough either, even in the stringent form proposed by Judson J.[102] On the other hand, the Court did not require that a clear and plain intention to extinguish be stated expressly. What role, if any, then, was envisaged for implied extinguishment?[103] Unfortunately,

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[96]See for example, *Simon* v. *R.* (1985), 24 D.L.R. (4th) 390, 403 (S.C.C.).

[97]Note that extinguishment by government action after April 17, 1992 may no longer be possible: see *infra*, Part (h).

[98]*Supra*, note 13. Judson J. quoted (at 335) from *Santa Fe Pacific, supra*, note 89, which said that Indian title can be extinguished "by the exercise of complete dominion adverse to the right of occupancy".

[99]*Calder, supra*, note 13 at 404. Hall J. quoted (at 404) from *Lipan Apache Tribe* v. *U.S.*, 180 Ct. Cl. 487 [hereinafter *Lipan*] which said that "[i]n the absence of a clear and plain indication in the public records that the sovereign 'intended to extinguish' all of the [claimant's] rights in their property, Indian title continues". In *Lipan, supra*, the United States Supreme Court quoted in turn from *Santa Fe, supra*, note 89, the apparent origin of the "clear and plain" test.

[100]*Sparrow, supra,* note 9 at 52-53.

[101]*Ibid.* at 56. The Court did not explain this choice. Was it influenced by the pro-Indian presumption in *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29 at 36? By the fact of section 35(1)? By the common law presumption against expropriation of property?

[102]I.e., government action amounting to complete dominion inconsistent with any conflicting interest.

[103]If it has rejected necessary inconsistency, including Judson J.'s concept of complete domination inconsistent with any conflicting interests, then the Court has not left much room for implied extinguishment. Perhaps Judson J.'s test might reach the clear and plain intention threshold in a situation where the main or sole conflicting interests are aboriginal rights. This might explain how the British Columbia Supreme Court could find sufficient intention to extinguish in *Delgamuukw, supra*, note 59 at 852, a case involving some of the same colonial enactments as *Calder*.

the Court did not say.[104] The Court stressed that extinguishment is not the only possible form of government action capable of affecting aboriginal rights.[105] It suggested that while extinguishment completely abrogates aboriginal rights (and, presumably, the aboriginal title on which they are based) it is possible to restrict aboriginal rights short of ending them completely.[106] This was the kind of restriction the Court referred to as "regulation".[107] Apparently, regulation corresponds to abridgement.[108] However, not every restriction (or regulation or abridgement) constitutes "infringement" for the purpose of the Court's justification process.[109] To demonstrate that a restriction is a *prima facie* infringement sufficient to require justification, the aboriginal party must show that the restriction is "adverse."[110] Here the Court required more than quantitative measurement. The unreasonableness of the limit, undue hardship, denial of aboriginal peoples' preferred means of exercising the aboriginal right, and unnecessary interference with interests protected by the right, are all[111] factors it said must be considered.[112]

VIII. Justification[113]

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[104]Hall J. provided little guidance in *Calder* itself. At 403-404 of *Calder*, *supra*, note 13, he quoted from a decision indicating that in peacetime, extinguishment can only be affected with the consent of the aboriginal peoples. At 401, he considered relevant the absence of "express words extinguishing aboriginal title" and of "legislation specifically purporting to extinguish the aboriginal title." At 413, he appeared to contemplate the possibility of extinguishment by implication, but said no such extinguishment had been authorized in *Calder*. The *Santa Fe*, *supra*, note 89 decision, the apparent origin of Hall J.'s "clear and plain" requirement, did contemplate implied extinguishment, but added that it "cannot be *lightly* implied": *supra*, note 98 at 354 [emphasis added].

[105]*Sparrow, supra*, note 9 at 53-57. (The Court's decision did not extend to consensual arrangements affecting aboriginal rights.)

[106]*Ibid.*

[107]The Court differentiated between regulation in this sense, and "regulations" or "regulatory" as opposed to "statutes" and "statutory": for example, *Sparrow, supra*, note 9 at 51, 79.

[108]On pre-section 35 abridgement, see *Hamlet of Baker Lake, supra*, note 85.

[109]For the justification process, see *infra*, Part (h).

[110]*Sparrow, supra*, note 9 at 82

[111]The Court gave no indication as to the relative weight that should be placed on each of the factors.

[112]*Sparrow, supra*, note 9 at 83. Effectively, then, aboriginal parties must demonstrate that from their perspective, the restriction was unjustified. See, *infra*, Part (h).

[113]At the time of writing, only a relatively small number of post-*Sparrow* infringement and justification cases had been reported - a situation unlikely to last long. The following might be noted: R. v. *Adolph*, [1990] B.C.J. No 1566 (Co.Ct.); *R.* v. *Joseph*, [1990] B.C.J. No.1749 (S.C.) (Atreaty case) [hereinafter *Joseph*]; *R.* v. *Commanda*, [1990] O.J. No.1603 (Dist. Ct.)(a treaty case); *R.* v. *Nikal*, [1990] B.C.J. No.2376 (S.C.); *R.* v. *Joseph (No.2)* [1991] Y.J. No.37 (Y.T. Terr. Ct.) [hereinafter *Joseph (No. 2)*]; *Delgamuukw, supra*, note 59; *R.* v. *Archie*, [1991] B.C.J. No.525 (S.C.); and *R.* v. *Duncan*, [1991] B.C.J. 3023 (S.C.)(intervenor status in criminal proceedings).

Before the enactment of the *Constitution Act, 1982*, the validity of aboriginal title depended on whether or not they had been abridged or extinguished, and abridgment and extinguishment depended on government intention. With the decision in *Sparrow* to accord aboriginal rights entrenched status, it was necessary either to allow aboriginal rights to prevail over government action in all situations, or to find some criterion other than government intention for determining when government action would be permitted to prevail. The Court chose the latter route. It said that government action will prevail over entrenched aboriginal title to the extent that it was justified.[114] Justification has replaced government intention as a main test for validity. However, the shift has not been complete. Certainly, justification does not replace intention in regard to extinguishment by pre-April 17, 1982 legislation, as seen above, and it does replace legislative intention in regard to post-April 17, 1982 legislative abridgement or regulation, such the licensing change challenged in *Sparrow* itself. But what about pre-April 17, 1982 legislative abridgement? On one hand, the Court treated this situation like pre-April 17, 1982 legislative extinguishment.[115] On the other hand, when the Court talked about justification, it made no distinction between justification of post-April 17, 1982 regulation and regulation before this date.

The situation regarding extinguishment is no clearer. Although the section 35 justification does not apply to pre-April 17, 1982 extinguishment,[116] it is not clear whether post-April 17, 1982 extinguishment is possible any more. If it is, it may be that this kind of extinguishment is subject to *both* the (i) "clear and plain intention" test and (ii) the justification requirement.

Compounding the confusion is the Court's statement that section 35(1) and the *Guerin* decision protect aboriginal rights against provincial legislation.[117] Does this mean that the principles regarding infringement and justification do not apply – or do not apply fully – to provincial legislation? If not, it would be helpful to know what the legal situation of provincial legislation is.

The Court's justification requirement bristles with problems. First, it is difficult to see how the Court can infer a justification requirement for section 35

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[114]*Sparrow, supra*, note 9 at 76.

[115]When referring to *Baker Lake, supra*, note 25 for example, the Court appeared to regard the pre-section 35 tests for extinguishment and abridgement as the same: *Sparrow, supra* note 9 at 55. Did it assume that the clear and plain intention test applies to both?

[116]See, however, *Delgamuukw, supra*, note 59 at 880-904, suggesting the framework for a "justification and reconciliation" process based on a Crown fiduciary duty. The duty here was said to result not from section 35 but from extinguishment accompanied by a governmental promise (at 880).

[117]*Sparrow, supra*, note 9 at 68.

which is analogous to that in section 1,[118] when section 1 clearly does not apply to section 35. Second, as noted above, except for post-April 17,1982 legislation, the Court provides no indication as to just where the new justification requirement applies. Third, at every stage of the justification process, the Court has proposed an extraordinarily subjective collection of criteria.[119] What determines what legislative objectives are valid? "Long recognition" of their value; for how long and by whom? Are the objectives "uncontroversial"?[120] How is the presence or absence of controversy measured? Are conservation and management objectives automatically valid? What level of conservation is required;[121] preservation of the resource to protect it from extinction or preservation of the resource sufficient to maintain existing user levels? If "public interest" is too broad to be workable,[122] how will the Court assess "harm to the general populace or to the aboriginal peoples themselves, or other objectives found to be compelling and substantial"?[123] How will it be determined if there has been adequate consultation with the aboriginal group in question? What conservation measures will require consultation? Which groups need be consulted? How is the requirement of a priority allocation for aboriginal users to be assessed where land use interests rather than resource rights are involved?[124] How is it to be determined if there has been minimum possible infringment to achieve the desired result? How are these questions to be monitored on an ongoing basis?

Finally, let us recall that justification depends on a finding of *prima facie* infringement which requires an aboriginal parties to demonstrate, in effect, that the restriction was *prima facie un*justified.[125] For this purpose, what amounts to an "unreasonable" limitation of an aboriginal right? What constitute "reasonable" food and ceremonial needs?[126] What constitutes a denial of a right-holder's

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[118]See *Nikal, supra*, note 112 at 11-12, where the British Columbia Supreme Court felt it should apply to section 35 justification the section 1 *Charter* test in *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321 at 346 (S.C.C.).

[119]The questions here are adapted from Elliott's, *supra* , note 10, c. 3 at 93.

[120]*Sparrow, supra*, note 9 at 84.

[121]See the reference to this controversy in *Nikal, supra*, note 112 at 8-9.

[122]*Sparrow, supra*, note 9 at 84.

[123]*Sparrow, supra*, note 9 at 83-84.

[124]See *Delgamuuk, supra*, note 59 at 886-903, suggesting that multple land use situations would require a more flexible process, more oriented to "reconciliation" than justification alone.

[125]*Supra*, Part (g).

[126]Accurate statistics may be elusive, and the reasonableness requirement adds to the difficulty of the inquiry. In *Joseph, supra*, note 112 at 1749, a treaty case applying the *Sparrow* infringement and justification tests, it was conceded that the evidence regarding the adequacy of the Indians' catch for their needs was "vague and imprecise".

"preferred" means of exercizing that right?[127] When does a restriction "unnecessarily" infringe protected interests? What constitutes "undue time and money per fish caught", or "hardship...in catching fish"?[128] Will what is reasonable at the time and place of one case be reasonable for another case two, twelve, or twenty-four months later, or in a neighbouring region?

How well equipped are courts to answer questions of this nature? In rejecting a "crazy patchwork of regulations", is the Court substituting its own patchwork of judicial discretion?

IX. Conclusion

Sparrow is a landmark indeed, an ambitious attempt to fit a new constitutional superstructure onto a complex old subject. The danger is that *Sparrow* might prove too ambitious, in the wrong places. As an alternative to entrenchment and justification, the Supreme Court could have considered the lower-profile but potentially effective option of enhanced status.[129] It could have done more to answer the lingering questions about the status, proof, content, duration, restriction, and enforceability of aboriginal rights. It could have concentrated on reducing uncertainty and on laying a coherent case law foundation for social reform. Instead, the Court has expanded its own discretionary power, and propelled itself toward a new and questionable role as a constitutional department of fisheries.[130]

However well-intentioned, the judiciary remains an adversarial forum, staffed by non-elected officials with limited resources and hampered by limited ability to handle large-scale multi-issue, multi-party social problems. Aboriginal issues are more than legal issues. They will not be solved by ambiguous legislative provisions, constitutional or otherwise. They require governmental expertise, political judgement, negotiated arrangements,[131] and effective political involve-

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[127]*Joseph (No. 2)*, *supra*, note 112 where the aboriginal people and apparently some of the enforcement officers though the Indian food licence precluded fishing for grayling by means of rod and reel. Need the preferred means be a traditional means? Could it include personal preference? Where does "control" amount to "denial"?

[128]*Sparrow, supra*, note 9 at 83.

[129]*Supra*, Part (e).

[130]Indeed, this movement into traditional executive fields need not stop at fisheries. Ongoing judicial involvement in game and environmental administration are two other potential consequences of the approach in *Sparrow*.

[131]Negotiated land claims agreements can and should address the needs of non-treaty aboriginal people such as Mr. Sparrow, and balance these needs against interests of other aboriginal and non-aboriginal Canadians. Similar agreements can and should take place in the treaty regions of the country: most treaty benefits are obsolete and inadequate.

ment by aboriginal peoples themselves,[132] not open-ended judicial discretion. There will be no winners – aboriginal or otherwise – if the Supreme Court's new grasp should exceed its reach.[133]

[132]Those who question the effectiveness of the political forum should consider the example of Mr. Elijah Harper, Manitoba M.L.A.

[133](Contrary to the hope in Browning's *Andrea del Sarto*, line 8). It is probably too late now to turn back from entrenchment/justification. It is not too late for the Court to try to reduce uncertainty by narrowing its justification criteria and attempting to answer the questions left unanswered in *Sparrow*.