Dalhousie Law Journal

Volume 14 | Issue 2 Article 7

10-1-1991

Justification and Cultural-Authority in s.35(1) of the Constitution Act, 1982: Regina v. Sparrow

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I. *Introduction*

Regina v. *Sparrow*[1] is the first decision of the Supreme Court of Canada under s.35(1) of the *Constitution Act, 1982.* The case has wide-reaching implications for the recognition and limitation of aboriginal rights. This case comment will explore some of the implications of *Sparrow,* with a focus on the test developed by the Court for the justification of government regulation of aboriginal rights. In particular, the question of the cultural authority of non-aboriginal judges to justify legislation regulating aboriginal rights will be addressed.[2]

1. *Regina* v. *Sparrow*

On May 25, 1984, Ron Sparrow was fishing for salmon in the Fraser River near his reserve. He was using a drift-net 45 fathoms long. At the time, the Indian food fishing license of the Musqueam Band specified that no drift-net longer than 25 fathoms could be used to catch salmon. Sparrow was charged under s. 61(1) of the *Fisheries Act*[3] with violating the terms of the Band's food fishing license. At trial, Sparrow admitted the particulars of the offence, but defended the charge on the grounds that he was exercising an aboriginal right to fish. He argued that the drift-net length restricted in the band's license was inconsistent with s. 35(1) of the *Constitution Act, 1982,* and was therefore invalid.

Section 35 of the *Constitution Act, 1982* reads as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

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*Dalhousie Law School, L.L.B. 1991. I would like to thank M.E. Turpel, a teacher, colleague and friend. Any errors or omissions are of course my own. The law is correct as of April, 1991.

1. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, aff'g (1986), 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300. Hereinafter referred to as *"Sparrow"*. All references are to 70 D.L.R. (4th) 385.

2. Other aspects of *Sparrow* are emphasized in two recent case-comments: M. Asch and P. Macklem, "Aboriginal Right and Canadian Sovereignty: An Essay on *R v. Sparrow"* (1991), 29 Alta. L.R. 498 (self-government and aboriginal sovereignty); W.I.C. Binnie, "The Sparrow Doctrine: The Beginning of the End or the Beginning?" (1990), 15 Queen's L.J. 217 (the importance of renewed political negotiations to address aboriginal issues).

3. R.S.C. 1985, c. F-14.

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

Sparrow was convicted of the fisheries offence at trial. The Provincial Court Judge found that no person could claim an aboriginal right unless supported by a treaty, proclamation, contract or other document. The County Court refused Sparrow's appeal. The Court of Appeal allowed Sparrow's appeal from the County Court judgment.[4] The Court found that the evidence that was before the trial judge was sufficient to establish that Sparrow was exercising an existing aboriginal right, and ordered a new trial. Mr. Sparrow appealed, and the Crown cross-appealed. On May 31, 1991, the Supreme Court upheld the decision of the Court of Appeal, dismissing both the appeal and the cross-appeal. The unanimous judgment of the Court was written jointly by Dickson C.J.C. and La Forest J. The judgment set out a test to determine if legislation is in violation of s. 35(1). As articulated, the test is expansive and will help to define the future direction of the s. 35(1) jurisprudence. Although the issue before the court was the narrow one of an aboriginal right to fish for food, *Sparrow* will provide a basis for the analysis of other aboriginal rights as well. In addition, although no treaty rights were at issue in *Sparrow*, the case will also likely provide the framework for analysis of treaty rights under s. 35(1).[5]

The Supreme Court articulated a two part test to determine if legislation infringes s. 35(1). In the first stage, the onus is upon the party challenging the legislation (i.e. the aboriginal person) to prove the existence of the aboriginal right, and to establish that the right has been infringed by the legislation. If the aboriginal person is successful, then consideration moves to the second stage, where the onus is upon the party seeking to uphold the legislation (i.e. the Crown) to establish that the legislation is justifiable. Legislation is justifiable only if it has a valid objective and is consistent with the fiduciary obligation owned by the Crown to aboriginal peoples.

II. *A Violation of an Aboriginal Right*

Prior to the judgment of Dickson J. (as he then was) in *Guerin* v. *The Queen,*[6] there were two competing notions of aboriginal rights. On one view, aboriginal rights were seen to be contingent on their recognition by

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4. *Supra,* note 1.
5. The *Sparrow* test was applied to treaty rights in *R.* v. *Joseph,* [1990] 4 C.N.L.R. 59 (B.C.S.C.).
6. [1984] 2 S.C.R. 335, 55 N.R. 161 *(sub nom Guerin* v. *Canada),* 13 D.L.R. (4th) 321, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120. Hereinafter *"Guerin."* All references are to (1984), 13 D.L.R. (4th) 321.

the Crown at the time of European settlement.[7] In other words, there were no aboriginal rights beyond those conferred by action of the European-settler state. The other view was that aboriginal rights are an inherent aspect of aboriginality, and that no recognition by the Crown is required to animate them. On this view, aboriginal rights derive from the nature of aboriginal communities, because "[t]he production and reproduction of native forms of community require a system of rights and obligations that reflect and protect unique relations that native people have with nature, themselves and other communities."[8] In *Guerin,* Dickson J. adopted the inherent approach to aboriginal rights. He recognized that the rights of the Musqueam to their land, though recognized by the Royal Proclamation of 1763 and other Crown Acts, were independent of such acts and predated them.[9]

In *Sparrow,* Dickson C.J.C. and La Forest J., writing for a unanimous court, re-affirm an inherent theory of aboriginal rights. Prior to *Sparrow,* a test often referred to for the proof of an aboriginal right was that in *Baker Lake (Hamlet)* v. *Canada (Minister of Indian Affairs and Northern Development),*[10] a case raising a question of common law aboriginal title. Mahoney J. set out a strict four-part test, requiring proof, *inter alia,* not only of occupation of the territory in question but that the occupation was to the exclusion of other organized societies. In *Sparrow,* the Supreme Court adopts a considerably more flexible approach to proof of constitutionally protected aboriginal rights. On the facts, the Musqueam did not occupy their territory to the complete exclusion of others, nor did they historically inhabit the land immediately around Canoe Passage where Ron Sparrow was fishing.[11] The Court indicates that an aboriginal right will come into being as the result of the social and cultural practices of an aboriginal community. To be an aboriginal right, a practice must be of long-standing, pre-dating the arrival of the Europeans, and must have been and remain an integral part of the lives of the aboriginal people in question.[12] There are indications in the case that there must be some connection, though not necessarily a direct connection, between the aboriginal right and land traditionally occupied by the aboriginal people.

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7. *St. Catherine's Milling Co.* v. *R.,* (1888) 14 App. Cas. 46, 4 Cart. 107, affg, 13 S.C.R. 577, which affirmed 13 O.A.R. 148, which affirmed 10 O.R. 196.
8. M. Asch and P. Macklem, *supra,* note 2, p. 502.
9. *Supra,* note 6, p. 336.
10. [1980] 1 F.C. 518, 107 D.L.R. (3d) 513, [1980] 5 W.W.R. 193, [1979] 3 C.N.L.R. 17. Additional reasons at [1981] 1 F.C. 266 (T.D.).
11. M.R.V. Storrow, Q.C. and M.A. Morellato, "Fishing Rights and the Sparrow Case", in *Aboriginal Law* (materials prepared for B.C. Continuing Legal Education, April 1990).
12. *Supra,* note 1, pp. 398-99.

If an aboriginal right is defined by the social practice of the aboriginal community, then in defining the right, the courts must be sensitive to aboriginal understandings of their own cultural practices. The Supreme Court of Canada makes this point explicitly: "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[13] Because aboriginal rights are *sui generis,* they need not conform to traditional common law rights. In the context of *Sparrow,* the Supreme Court noted that the fishing rights at issue:

> . . . 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 what the reasons for judgment in *Guerin* . . . referred to as the *"sui generis"* nature of aboriginal rights . . ."[14]

The Supreme Court of Canada rejects the notion that aboriginal rights should be "frozen", either in their traditional form or in their pre-1982 regulated form. Instead, aboriginal rights must be interpreted flexibly "so as to permit their evolution over time."[15] The aboriginal right-holders are not confined to traditional practices or technologies in exercising the right.[16]

Aboriginal rights may be extinguished by state action. The Supreme Court of Canada interprets the qualifier "existing" in s. 35(1) of the *Constitution Act, 1982* to mean "unextinguished": only rights which were not extinguished prior to 1982 are recognized and affirmed by s.35 of the *Constitution Act, 1982*[17] The Court rejects the notion that aboriginal rights which were regulated prior to 1982 (such as the right to fish) are recognized and affirmed in their regulated form as of 1982. To constitutionalize regulated rights would result in a "constitutional patchwork quilt", with aboriginal rights varying with the different regulatory schemes in different jurisdictions as of 1982.[18] Instead, the continuing right of the Federal government to regulate aboriginal rights is recognized, but all regulation, whenever enacted, must be justified by the Crown under the *Sparrow* test.

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13. *Ibid.,* p. 411.
14. *Ibid.,* p. 411.
15. *Ibid.,* p. 397.
16. This fact was apparently ignored in the post-*Sparrow* case of *R.* v. *Gladstone* (1990), B.C. Prov. Ct., (unreported). Judge Lemiski concluded that the aboriginal accused were not exercising an aboriginal right because there was no evidence "that the Accused were conducting a transaction 'in keeping with the culture and existence' of the Heiltsuk Band. To the contrary, they were acting in a manner not dissimilar to the manner in which criminals transport and sell narcotics" (pp. 16-17).
17. *Supra,* note 1, p. 395.
18. *Ibid.,* p. 397.

The Court reiterates the principle that for an aboriginal right to have been extinguished prior to 1982, the intention of the sovereign to extinguish the right must have been "clear and plain".[19] The Crown's argument that an aboriginal right is extinguished whenever the sovereign acts in a manner necessarily inconsistent with the continued enjoyment of the right is rejected. Even though the fisheries regulations denied Indians the right to fish except on a discretionary basis, the Court finds that "[t]hese permits were simply a manner of controlling the fisheries, not defining underlying rights."[20]

The question of the extinguishment of aboriginal rights after 1982 however, remains open. By implication of s. 35(3), aboriginal rights can be surrendered voluntarily by aboriginal peoples, and so extinguished, in exchange for land claims agreements and presumably for other treaty rights as well. But it is doubtful that extinguishment of aboriginal rights without consent is possible after 1982. In *Sparrow,* the Court refers in passing to a "situation of expropriation".[21] One interpretation of the phrase is that there will be cases in which the expropriation and extinguishment of aboriginal rights will be justified under the *Sparrow* test. However, the possibility of expropriation is difficult to reconcile with the wording of s. 35(1), which states categorically that existing aboriginal rights are "recognized and affirmed." The constitutional entrenchment of aboriginal rights surely precludes their extinguishment short of a constitutional amendment. A "situation of expropriation" could be taken to mean a situation where government policy or legislation interferes so substantially with the exercise of the aboriginal right that it cannot effectively be exercised at all. Although such a policy or legislation might be justifiable under the *Sparrow* test, the aboriginal right would not itself be extinguished, and would revive if the situation of expropriation ended.

1. *The prima facie violation of s.35(1)*

Once the aboriginal right had been identified, the Court sets out a three-part test to determine if a *prima facie* infringement of s. 35(1) has occurred. The onus of proving a *prima facie* infringement is on the group challenging the legislation (i.e. the aboriginal claimant). The first requirement is proof that the limitation on the aboriginal right is unreasonable. If proof of unreasonableness is more than a nominal requirement, it will place an onerous burden on aboriginal claimants.

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19. *Ibid.,* p. 401, adopting the test for extinguishment given by Hall J. in *Calder* v. *British Columbia (A.G.),* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, at 210, [1973] 2 W.W.R. 68; aff'g 13 D.L.R. (3d) 64, 74 W.W.R. 481; which affirmed 8 D.L.R. (3d) 59, 71 W.W.R. 81.
20. *Ibid.,* p. 401.
21. *Ibid.,* p. 416.

Furthermore, the requirement would be redundant, since the Crown must in effect prove the reasonableness of the limitation in the second part of the *Sparrow* test. The proof of unreasonableness should be viewed as a threshold requirement to weed out spurious claims. For example, proof of another method of managing the resources more in keeping with the aboriginal right should be a sufficient demonstration of unreasonableness. In the post-*Sparrow* case of *R.* v. *Gladstone,*[22] Judge Lemiski adopted an even lower threshold of unreasonableness. Judge Lemiski found that the fact that the aboriginal right had been exercised "to some extent" prior to the arrival of the Europeans, coupled with the fact that the Europeans had interfered with the aboriginals' "activity choices", was sufficient to establish that the limitation was unreasonable.[23]

The second and third requirements to establish a *prima facie* infringement are that the regulation or legislation imposes an undue hardship, and that the regulation denies to the right-holders their preferred means of exercising the right. On the facts of *Sparrow,* the purpose of the test is to determine "whether the purpose or effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right."[24] To the extent that these requirements are rigorously applied, they should be seen as alternative requirements. If the party challenging the legislation proves that either in purpose or in effect the legislation imposes an undue hardship or prevents the right-holders from exercising their right as they would wish, then there is a *prima facie* infringement of s. 35(1).

III. *The Justificatory Standard*

The *Sparrow* doctrine permits state regulation of aboriginal rights which have been constitutionally entrenched by s. 35(1) of the *Constitution Act, 1982* provided that such regulation is justified. Although there is no language in s. 35(1) explicitly permitting the justification of legislation restricting aboriginal rights, the Court reads s. 35(1) in conjunction with Federal legislative powers in the Constitution. To reconcile s. 35(1) with Federal powers, Federal legislation infringing s. 35(1) aboriginal rights must be justified under a two-part test: it must be enacted pursuant to a valid objective, and it must uphold the honour of the Crown. The party seeking to uphold the regulation (i.e. the Crown) bears the onus of justification.

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22. *Supra,* note 16.
23. *Ibid.,* p. 11.
24. *Supra,* note 1, p. 412.

1. *The standard*

The first requirement is a valid legislative objective. *Sparrow* provides some guidance for determining what a "valid" objective might be. In the context of fishing, the Court suggests that the objective of conservation and resource management will generally be valid. Legislation with the objective of conservation would be consistent with a wide range of aboriginal rights, since ". . . the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights,"[25] The Court also suggests that the objective of preserving s. 35(1) rights would be valid, as would legislation preventing the exercise of s. 35(1) rights that would harm the general population of aboriginal peoples. Beyond these objectives, the Court says only that such "other objectives found to be compelling and substantial" would be valid.[26]

It is difficult to generalize about the exact nature of valid legislative objectives for the purposes of s. 35(1) analysis. This is particularly true because of the Supreme Court's clear indication that a case-by-case approach is appropriate to the justificatory standard:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.[27]

Nonetheless, a pattern does emerge from the *Sparrow* judgment. Regulations that protect s. 35(1) rights, whether fishing rights or otherwise, will have valid objectives. The example in *Sparrow* is fisheries conservation legislation; another example would be environmental protection legislation protecting the resources upon which the aboriginal right depended.

Because of the constitutional nature of aboriginal rights recognized and affirmed by s. 35(1), very little legislation beyond that intended to uphold or preserve s.35(1) rights should be considered to have a valid objective. This position receives support in the *Sparrow* judgment. The two examples given by the Court are legislation intended to avert harm to the public or to the aboriginal people themselves, and legislation with some other "compelling and substantial objective." Justifying legislation protecting the public from harm is appropriate, so long as the potential

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25. *Ibid.*, p. 413.
26. *Ibid.*, p. 412. The "valid objective" test is in substance derived from B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, p. 782.
27. *Ibid.*, p. 410.

harm is serious. Professor Slattery suggests that an example of such legislation would be standard safety restriction for the use of firearms in hunting.[28] The further requirement that there exist no other reasonable means of avoiding the harm would follow from the Crown's obligation to uphold its fiduciary duty (articulated in the second part of the justification test).

The "compelling and substantial objective" category should be viewed as a residual category for objectives of overriding importance. There is a suggestion in the judgment itself that the category should be construed narrowly. The British Columbia Court of Appeal held in *Sparrow* that objectives "in the public interest" were valid.[29] The Supreme Court of Canada rejected this category as excessively vague:

> We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.[30]

If "compelling and substantial" is not to be excessively vague, it must be given a determinate meaning. Slattery provides an appropriate formulation when he suggests that the residual category should cover regulations implementing "state policies of overriding importance to the general welfare (as in times of war or emergency)".[31] A useful analogy would be the high standard of justification required to justify an infringement of s. 7 of the *Charter*.[32] Such regulations would, of course, only be justifiable so long as the exceptional circumstances continued.

If legislation is found to have a valid objective, analysis moves to the second stage of the justification test. The Crown must establish that the substance of the legislation is in keeping with the fiduciary duty owed by the Crown to aboriginal peoples. The fiduciary duty of the Crown to aboriginal peoples was first recognized in the judgment of Dickson J. (as he then was) in *Guerin*.[33] The recognition of the fiduciary duty in *Guerin* was confined to the surrender of otherwise inalienable lands to the Crown. The interest of the Indians in the land "gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with

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28. *Supra*, note 26, p. 782.
29. (1986), 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300.
30. *Supra*, note 1, p. 412.
31. *Supra*, note 26, p. 782.
32. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 485, 63 N.R. 266, per Lamer J. (as he then was): "[s]ection 1 may ... successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional circumstances, such as natural disasters, the outbreak of war, epidemics, and the like." *Ibid.*, [1985] 2 S.C.R. 485, p. 518.
33. *Supra*, note 6.

the land for the benefit of the surrendering Indians."[34] While this fiduciary obligation is similar both to a trust and to agency, it is in fact a *sui generis* obligation owed by the Crown to the Indians. In *Sparrow,* Dickson C.J.C., writing with La Forest J., expands the scope of the fiduciary principle by making it a "general guiding principle for s. 35(1)."[35] The government has a general fiduciary duty to all aboriginal peoples:

> [t]hat is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and the aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[36]

In the context of the aboriginal right of fish for food, to uphold the honour and fiduciary obligation of the Crown the regulatory scheme must give first priority to the Indian right to fish for food. "The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."[37]

There is a tension between judicial deference to complex regulatory schemes designed by experts on the one hand, and on the other, judicial intervention to hold the Crown to its fiduciary responsibility in s. 35(1) of the *Constitution Act, 1982.* In general, the *Sparrow* test opts for intervention. A valid legislative objective is insufficient: the regulatory scheme is subject to substantive scrutiny to ensure that it is consistent with the fiduciary duty of the Crown. A regulatory scheme will only be consistent with the duty of the Crown if the aboriginal right holders are given priority access to any resources beyond what is necessary to fulfill the valid objective. Although the Court will leave the "detailed allocation of maritime resources . . . to those having expertise in the area", it will scrutinize the conservation plan to assess its priorities.[38]

Beyond the two branches of the justification test, the Court in *Sparrow* lists a number of additional factors which may be considered depending on the circumstances. These factors include:

> . . . the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation

34. *Ibid.,* p. 339.
35. *Supra,* note 1, p. 408.
36. *Ibid.*
37. *Ibid.,* p. 414.
38. *Ibid.*

> measures being implemented. The aboriginal peoples, with their history of conservation consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[39]

The Court acknowledges that the justificatory standard may place a "heavy burden" on the party seeking to uphold the legislation.[40] An onerous justificatory standard is appropriate because the constitutional text does not explicitly state that violations of s. 35(1) rights can be justified. In effect, only legislation that upholds the aboriginal right in question to the extent possible within the context of a limited set of valid legislative objectives, will be justifiable.

2. *Regina v. Oakes*

In *Regina* v. *Oakes,*[41] Dickson C.J.C. set out what has since been accepted as the test to be applied when legislation or government action violating a *Charter* right is sought to be justified under s. 1 of the Charter. The *Oakes* test is in two parts:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . . Secondly . . . the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" . . . . There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question . . . . Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[42]

Comparisons between the justificatory standard in *Sparrow* and the justificatory test set out in *Oakes* are inevitable. Because s. 35 is part of the *Constitution Act, 1982,* and not part of the *Charter,* the justificatory

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39. *Ibid.,* pp. 416-17.
40. *Ibid.,* p. 416.
41. [1986] 1 S.C.R. 103, 65 N.R. 87, 26 D.L.R. (4th) 200, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 19 C.R.R. 308. Hereinafter referred to as "Oakes". All references are to 26 D.L.R. (4th) 200.
42. *Ibid.,* p. 227 (emphasis in original).

standard in s. 1 of the *Charter* does not apply to s. 35. Nor is there any justification requirement explicitly articulated in the text of s. 35 itself. Nonetheless, the Supreme Court has read a justificatory standard into s.35(1).

Like the first branch of the *Sparrow* justification test, the first branch of the *Oakes* test inquires into the objective of the legislation at issue. But the *Oakes* standard requires only that the objective relate to "concerns which are pressing and substantial in a free and democratic society."[43] In practice, the test has become in most cases a perfunctory initial threshold. The threshold for the first branch of the *Sparrow* test is and should be considerably higher. Not only is the exercise of justification not directly mandated by the text of s. 35(1), but what is being constitutionalized are inherent aboriginal rights which exist independently of their constitutionalization. Accordingly, it is appropriate that if legislation is not intended to uphold the aboriginal right in question, or to avert serious harm to the public, then it must relate to state policies of overriding importance (such as war or emergency).

The second branch of the *Oakes* test (in its three parts) requires that the means used to achieve the objective be proportional to the objective of the legislation. The second branch of the *Sparrow* test is also a form of proportionality test, but the means must be measured against a sandard external to the legislation, namely the fiduciary duty of the Crown: "[t]he special trust relationship and the responsibility of the government vis-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[44] While the significance of the legislative objective, and with it the permissible means, may vary, in the case of s. 35(1) the Crown will have to prove that the means are proportional to the consistently high standard of the Crown's fiduciary duty.

It is important that the justificatory standard that has been read into s. 35(1) of the *Constitution Act, 1982* be allowed to develop independently of the justificatory standard in s. 1 of the Charter. If the promise of Dickson J. (as he then was) in *Guerin* that aboriginal rights are *sui generis* is to have meaning, then the regulation of aboriginal rights must be subject to a higher standard of justification appropriate to the fiduciary relationship between the Crown and aboriginal peoples.

3. *The judge as social critic*

David Beatty argues that judges assessing government action against the

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43. *Ibid.*
44. *Supra*, note 1, p. 413.

standard of s. 1 of the *Charter* are playing the role of social critics. That is, judges are "more or less impartial observers given the task of evaluating the various policies Governments have enacted into law . . ."[45] He suggests that judges evaluate the integrity and morality of government policies against two principles of social well-being to determine if the policies are justifiable. The first principle is utilitarian: a policy is not justifiable if the cost of the policy outweighs its benefits. The second principle is that a policy is not justifiable if there is a less intrusive means available to achieve its objectives. Beatty argues that these two principles are a condensation of the four parts of the *Oakes* test. The utilitarian principle follows from both the first part of the Oakes test (pressing and substantial objective) and from the third proportionality principle (proportionality between means and objective). The alternative means principle follows both from the first (rational connection) and second (minimal impairment) proportionality principles.

Beatty's image of the judge as a social critic is a useful lens through which to examine the issue of justification under s. 35(1). Both of his principles of social well-being are integral to the *Sparrow* justificatory test. The utilitarian principle is apparent in the first part of the test. The court is called upon to weigh the benefit to the right-holders of allowing them unregulated access to the resource against the potential harm to the general public, including the right-holders, of preventing the government from regulating the right. The harm may consist of harm to the resource upon which the right depends, harm to individuals, or the frustration of government objectives of overriding importance. Where the benefit would outweigh the harm, the regulatory scheme is at least justifiable under the utilitarian principle. Beatty's alternative means or "Paretian" principle is central to the second part of the justification test. A regulatory scheme is only justifiable if there are no alternative means available of implementing the objective of the scheme that are more consistent with the fiduciary duty of the Crown. For example, if fisheries regulations do not give top priority to aboriginal rights within the context of an overall conservation plan, the regulations will not be justifiable. In fact, the Court explicitly acknowledges the importance of the alternative means principle when it includes minimal impairment of the aboriginal right in the list of additional factors relevant to the justification issue.[46]

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45. D. Beatty, "The End of Law: At Least as We Have Known It", in R.F. Devlin, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publication, 1991), pp. 391-413, at p. 392.
46. *Supra,* note 1, p. 417.

Like *Oakes, Sparrow* calls upon judges to be social critics. But there is a difficulty with judges assuming the role of social critics in the context of s. 35(1). Through the political process, Canadians have given themselves a Charter and their judges the authority to act as social critics in interpreting the Charter. But who has given judges authority to be social critics of aboriginal societies? More fundamentally, is it even *possible* for judges to understand aboriginal culture in anything other than the dominant society's terms? The danger of misunderstanding aboriginal culture is recognized by Dickson C.J.C. and La Forest J. in *Sparrow* when they caution against subsuming aboriginal rights within the traditional rights conceptions of the common law:

> Fishing rights are not traditional property rights. . . . Courts must be careful . . . to avoid the application of traditional common law concepts of property . . . it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. . . .[47]

But the problem goes beyond good intentions and sensitivity to difference. The question is, can judges *know* difference? M.E. Turpel argues they cannot:

> Can a judge *know* a value which is part of an Aboriginal culture and not of her own? The extent to which anyone can *know* the basic differences as opposed to identifying difference, especially when functioning in an institutional role defined as deciding the supreme law of a state is a fundamental problem for constitutional analysis. This is especially the case with respect to choices regarding different cultural systems because the knowledge structures valued by the Canadian judicial system are fundamentally different from the knowledge structures embraced by Aboriginal peoples.[48]

The assumption that knowing difference is possible becomes a tool of cultural hegemony.[49] By assuming the authority to interpret aboriginal culture, judges re-interpret it in the terms of their own cultural categories. The aboriginal culture is understood through tropes like "noble savage", "traditional life style", "civilization", and "modernization."[50]

It seemed with *Sparrow* that the courts had come a long way in the 21 years since Davey C.J.B.C. wrote in *Calder* v. *British Columbia (A.G.),* that the Nishga "were at the time of settlement a very primitive people with few of the institutions of civilized society."[51] But the difficulty of

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47. *Ibid.,* p. 411.
48. M. E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90), 6 C.H.R.Y.B. 3, p. 24.
49. *Ibid.,* p. 25.
50. See B. Ominayak and J. Ryan, "The Cultural Effects of Judicial Bias", in S.L. Martin and K. E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), pp. 346-357.
51. *Supra,* note 19, (1970), 13 D.L.R. (3d) 64, at 66 (B.C.C.A.).

judging aboriginal culture from the perspective of the dominant society was re-emphasized in March of 1991 by another B.C. Chief Justice, McEachern, C.J.S.C. (as he then was). In *Delgamuukw* v. *British Columbia*[52] (the Gitskan and Wet'suwet'en land claim) McEachern J. had occasion to comment on traditional Gitskan and Wet'suwet'en existence:

> . . . it would not be accurate to assume that . . . pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs, [sic] that aboriginal life in the territory was, at best, 'nasty, brutish and short.'[53]

The claim is not that judges like Davey and McEachern are racist. Many such views are held in good faith, accompanied by a genuine desire to do what is best for aboriginal people. Such views are not extraordinary; they are points on a continuum of dominant society understandings of aboriginal society.

A partial response to the problem of cultural difference would be to expand the consultation requirement articulated in *Sparrow*. In *Sparrow*, the Court indicated that consultation with aboriginal peoples will in some cases be a requirement for the justification of legislation. As a first step towards the recognition of cultural difference, consultation with aboriginal people should be a requirement in every case where government action will affect aboriginal rights. If no agreement can be reached beween the aboriginal people and the government, then the aboriginal people would be required to justify their refusal to agree to the scheme. To the extent possible, the justification would be evaluated according to the standards of the particular aboriginal culture and society.[54] Under the direction of the aboriginal people involved, the judge would adopt the role of an aboriginal social critic. The judge would retain a discretion to assess the justification according to the standards of non-aboriginal society in those few cases where overriding concerns warrant suppressing cultural difference. In practice, concerns important to non-aboriginal society would also be important to aboriginal society,

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52. *Delgamuukw* v. *British Columbia*, [1991] B.C.J. No. 525 (B.C.S.C.).

53. *Id.* In *Leviathan*, Thomas Hobbes described the life of man in the state of nature as "solitary, poor, nasty, brutish, and short." McEachern J. also indicates that the Indians "are probably much more united and cohesive as peoples, and they are more culturally sensitive to their birthright than they were when life was so harsh and communication so difficult."

54. Such a justificatory standard should take into account the extent to which an aboriginal people had freely accepted a position within the Canadian political system (for example by treaty).

and it would generally be unnecessary for the judge to step out of the role of an aboriginal social critic. If the aboriginal people fail to justify their refusal to agree to the regulatory scheme, then the Crown would still be required to justify the scheme under the two-part *Sparrow* test. Otherwise, the regulatory scheme would be found to infringe s. 35(1) of the *Constitution Act,* 1982.

IV. *Conclusion*

In *Sparrow,* Dickson C.J.C. and La Forest J. articulate a basic framework for the recognition and affirmation of aboriginal rights in s. 35(1) of the *Constitution Act, 1982.* The framework is intended to be applicable on a case-by-case basis beyond the facts of *Sparrow* to all aboriginal rights.[55] Although the framework is a useful one, it leaves important questions unanswered. The first such question is the nature of aboriginal rights. It is clear from the case that the relationship between a right as traditionally practised and as presently practised can be a flexible one. But it is not clear if limits on the present practise of rights will be set through restrictive definition of the right, or if limits will be imposed only through justifiable regulation. In *Sparrow,* it was accepted that any limit on the means of exercising the aboriginal right to fish for food would be a matter of regulation, not of definition. It is not clear how the courts will proceed with economically more valuable rights, where limits will presumably be a much larger issue.

A more important question is the degree to which the courts are prepared to recognize cultural difference within the context of s. 35. Although the Court in *Sparrow* makes a genuine effort to be sensitive to the values of aboriginal culture, the Court never relinquishes its role as a social critic of aboriginal society. In future aboriginal rights cases, the courts must go beyond sensitivity and bring aboriginal perspectives directly into the courtroom. A larger number of aboriginal judges might be a step towards this goal. But there are problems of cultural authority even with an aboriginal judge, because of the diversity of aboriginal cultures. What is needed is greater participation by the aboriginal people affected in any particular case. One possibility is to make the consent of aboriginal people a requirement for the justification of regulations infringing aboriginal rights under s. 35 (1), and to require aboriginal people to justify a refusal to consent to the regulations, according to the standards of their own society and culture.

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55. In *Delgamuukw,* McEachern J. limited the effect of *Sparrow* largely to aboriginal rights to fish. *Supra,* note 52.