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Some Perspectives on the Origin and Meaning of Section 35 of the *Constitution Act, 1982*

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Foreword by Gordon Gibson

Contents

Foreword.....	3
Introduction.....	4
The Origin of Section 35.....	5
The Meaning of Section 35.....	14
Conclusion.....	18
References & About the author.....	19

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Foreword

The *Constitution Act, 1982* has had a number of unintended—one hopes—consequences. One of those is the growing phenomenon of “judge-made law” arising from adventurous interpretations of the *Charter*. We can be thankful that most of this can, in principle, be dealt with by way of the “notwithstanding clause” if elected legislatures see fit.

A second consequence has been the enduring grievance handed to Quebec separatists to nurture and exploit, as a result of the adoption of the 1982 Act over the virtually unanimous objection of the Quebec National Assembly.

These problems are well known. What is less understood is that Section 35—the subject of this paper—confers upon the Supreme Court of Canada the de facto making of Indian law. No “notwithstanding clause” is available to deal with such astonishing and debilitating judgements as *Delgamuukw*, which has essentially destroyed the treaty-making process in British Columbia. Absent further constitutional amendment, the courts can tell Parliament what to do without let or hindrance.

The next great question to come before the Supreme Court will be whether Section 35 gives constitutional authority to a third order of government, “of the Indians, by the Indians, and for the Indians,” as Abraham Lincoln would never have advocated. This is a fundamental question for the organization of Canadian society, which is already working its way through British Columbia’s court system.

Mel Smith was there in 1982, at the centre of the negotiations. He leads us through the fascinating history of Section 35—the slight consideration given, the cosmetic and minimalist intent, the politics involved. This paper will surely be cited to the court in arguing for a restrained interpretation of Section 35 insofar as self-government is concerned, based on the carefully laid-out evidence as to the actual intent of the framers. It is an important document, written by the pre-eminent legal practitioner of the BC government involved in the drafting, and a great service to the underlying debate on the future of Canada.

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Introduction

Of the several amendments that have been made to the Canadian Constitution over the years that directly affect provincial interests, all but one have been achieved as a result of extensive negotiations between the federal and provincial governments. The one exception is Section 35 of the *Constitution Act, 1982*, which figures so prominently in current treaty-making efforts in British Columbia.

From 1968 to 1992 (except for 1972 to 1975), efforts at constitutional reform in Canada were an almost unremitting process. First, the Victoria Charter round (1996 to 1971); then, the extensive federal-provincial negotiations (October 1976 to 1978); Bill C.60 (1978); another round (November 1978 to February 1979); the Patriation round (1980 to 1981); the Aboriginal Conferences (1983 to 1987); Meech Lake (1987); and the Charlottetown Accord (1992).

The list of subject-matters under discussion at each of these sets of negotiations was lengthy and, in each case, the process involved a great many meetings among federal and provincial officials, ministers and first ministers. For the purposes of this paper, the important point is that the subject of aboriginal rights was not even raised—much less negotiated—in any of the fed-

eral-provincial negotiations held over the years until very late in the 1981 Patriation process.

Section 35, as enacted in 1982, read 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 Métis peoples of Canada.

As this paper will show, Section 35 (minus the word “existing”) had been the product of *bilateral* discussions between the federal government and the aboriginal leadership for many months but the provinces had had no direct involvement in that process. I am suggesting that the proper meaning to be given the Section 35 ought to be conditioned, if not governed, by those circumstances and by the meaning of those words within the contemplation of the parties. The thesis of this analysis is that the expansive meaning given by treaty proponents to Section 35 (as amended in 1983) is not supported either by the circumstances of its passage or its plain meaning.

The Origin of Section 35

The Parliamentary Committee

The first time that the subject of aboriginal rights was raised was in late 1980, not in the context of federal-provincial negotiations but before a Parliamentary Committee. The timing is important. By mid-September 1980, the intensive federal-provincial round of meetings held throughout the summer to reach agreement on a Patriation package had failed. Prime Minister Pierre Trudeau announced that he would move ahead to patriate the *Constitution*, complete with a *Charter of Rights* and his own amending formula, notwithstanding opposition from eight provinces.

On October 2, 1980, Trudeau published the "Proposed Resolution . . . respecting the *Constitution of Canada*," which he proposed be passed by Parliament and forwarded to London for passage by the Parliament of the United Kingdom. However, before taking these later steps the Resolution was referred to a Special Committee of the Senate and the House of Commons on the Constitution of Canada (established by the Senate on October 23, 1980 and the House on November 3, 1980) "to consider and report."

It is important to note that at this point the Trudeau Resolution had no Section 35, or its equivalent, nor did it have Section 25 of the *Charter*, which states that *Charter* rights would not derogate from aboriginal or treaty rights. At this point, the only reference to aboriginal rights in the Resolution was the section that preserved "rights" not contained in the *Charter* "including those that may pertain to native people."

The aboriginal leadership made numerous submissions and lobbied hard before the Parliamen-

tary Committee. As a result, when the Committee reported on February 3, 1981, one of the amendments it recommended was the precursor of the present section 35. It read:

The aboriginal and treaty rights of the aboriginal people are hereby recognized and affirmed.

The federal government accepted the recommended amendment along with several others and these appeared in a revised proposed federal Resolution.

In the book, *Canada . . . Notwithstanding*, Roy Romanow, John Whyte, and Howard Leeson describe these events:

The national Indian, Métis and Inuit organizations in Canada had energetically pressured the Joint Parliamentary Committee to amend the proposed resolution to entrench aboriginal and treaty rights. In a dramatic reversal of policy, the federal government agreed in late January to a number of important changes which, at least partially, met the requests of the native organizations. Section 25 of the proposed resolution, dealing with "un-declared rights," was amended to state that the provisions of the charter could not violate the rights of aboriginal peoples. Section 34 of the resolution was amended to entrench aboriginal and treaty rights. Finally, section 37 obligated the federal and provincial governments to future constitutional meetings with aboriginal leaders on all of the other outstanding issues. The Joint Parliamentary Committee unanimously approved the amendments on 30 January.

The dramatic turnabout by the federal government in accepting the changes was matched by the enthusiastic endorsement of the amendments by the native leadership. The National Indian Brotherhood had earlier advocated wide-sweeping and important amendments, such as Indian government. Denied a place at the CCMC negotiating table in 1980, the position of the brotherhood was that patriation should not occur at that time. The Métis supported this position. ... The result was that the National Indian Brotherhood launched a campaign in Great Britain against the failure in the proposed federal resolution to meet its demands. (Romanow, Whyte, and Leeson 1984: 121–22)

The important point to stress is that this section did not have its origins in, or survive the rigours of, the detailed federal-provincial negotiation to which the rest of the Patriation package was exposed. Indeed to this point there was no direct provincial involvement whatsoever.

Federal-Provincial Negotiations

Because of the combined opposition mounted in London by eight of the Provinces, which was having the desired effect upon British Parliamentarians, and because, in September 1981, the Supreme Court of Canada decided that for Ottawa to seek these amendments without greater provincial support would be a breach of constitutional convention, Mr. Trudeau delayed proceeding with his unilateral constitutional package. One further attempt at reaching an agreement among the federal and provincial governments was attempted. Those meetings took place in Ottawa during the week of November 2, 1981 and on November 5, 1981 an agreement was reached between the federal government and nine of the ten provinces that led to the long-sought patriation of the *Constitution*.

The long and difficult discussions that occurred during that week of November 2 were in no wise preoccupied with the subject of aboriginal rights. All of the discussion focused around the proposed *Charter of Rights* (and several of its components but not the aboriginal component); the amending formula, including a possible override provision; a possible referendum for constitutional amendments; minority language rights, and so on. In fact, it is my distinct recollection—and I attended all the meetings, including those of a plenary nature and those at which only one Premier, one Minister and one official from each province were in attendance—that the subject of aboriginal rights was not raised during the whole four days. This should not come as a surprise. As pointed out above, the subject of aboriginal rights had, during all the years I had been involved, never been on the table of federal-provincial constitutional negotiations. First Ministers' Conferences with the aboriginal leadership had never been held up to that date.

In that famous late-night session of November 5, convened in Premier Blakeney's suite, a representative from most of the provinces met to cobble together a proposal that might provide an acceptable compromise. I represented British Columbia at that meeting. As a framework for our effort, we took the revised federal resolution, which of course now contained the provisions on aboriginal rights that had been added as a result of the recommendation of the Parliamentary Committee previously described.

On this issue, Romanow, Whyte, and Leeson state:

In their meeting that late Wednesday afternoon, the three provincial ministers had discussed whether aboriginal rights should be included in the accord. The provision which had been added to the federal resolution by the joint parliamentary committee was now

under heavy criticism from most of the aboriginal groups. At the meeting of officials Leeson, knowing Blakeney's views on this issue, urged that the officials should recommend to the premiers that aboriginal rights be maintained in the accord in the form set out in the federal resolution. [Mel] Smith said that his government had strong reservations because almost none of British Columbia had been ceded by the Indians to the province through treaties. There was an uncertainty about the legal effect of this historical fact; the other provinces reluctantly acquiesced to this argument. (Romanow, Whyte, and Leeson 1984: 209)

The statement attaches far too much importance to my powers of persuasion. The fact of the matter is that there were several provinces that had serious reservations about the aboriginal rights provisions. These same authors seem to admit as much.

In the last hours of the November meeting, the question of the scope and meaning of aboriginal rights, which had become more pressing because of the ongoing political and legal actions in London by native organizations, influenced many of the participants to exclude the provisions of section 35 from the embryonic accord. Entrenchment of those rights in the form of the proposed section appeared to be against the wishes of most aboriginal organizations.

This was not the only reason for the deletion of the section. The constitutional demands of native organizations were not fully understood by the participants since they had never had the careful consideration by ministers and officials that the other issues had received. Some of the provinces were partic-

ularly worried about the possible implications of such constitutional rights upon traditional provincial legislative jurisdiction. In addition to the uncertainty generated within the governments with respect to these objectives, the first ministers, ministers, and officials were mesmerized by the tantalizing prospect of achieving a constitutional accord, at long last. The nature of the last minute negotiations—complex, occasionally bitter and hurried—militated against any careful consideration of the entrenchment of aboriginal rights. (Romanow, Whyte, and Leeson 1984: 212–13)

Robert Sheppard and Michael Valpy, in their book *The National Deal*, recounted the events somewhat similarly:

The only “sticky part” of the meeting, one of the quartet recalls later, was the debate over native rights. The two native rights clauses in the resolution—the affirmation of rights and the promise to hold a conference with native leaders to define these further—are in both the Blakeney and Peckford proposals. But B.C. has historically never recognized aboriginal title to vast tracts of land in that province and insists that the clauses be deleted.¹ They discuss this point for about fifteen minutes, during which time some of the officials speak by phone with their respective delegations. In the end, the two native rights sections fall to the floor. (Sheppard and Valpy 1982: 293–94)

These accounts of that event are substantially correct except that my main reason for opposing Section 35 at that time was that the provision had never been the subject of careful deliberation or, indeed, *any* deliberation in the federal-provincial

(1) Bill Bennett said in an interview later that he might not have signed the accord if the native-rights sections had been left in with the original wording.

context. It seemed to me that, since it was agreed that there would be a provision requiring a conference between first ministers and aboriginal leaders to deal with aboriginal issues, the prudent course was not to include the Section 35 clause at the time but rather to leave it to be discussed at the up-coming conference.

To sum up, when Prime Minister Trudeau unveiled, on November 18, 1981, the further revised proposed Resolution that had been the basis of the agreement of November 5 between the federal government and the nine provinces, it contained only the non-derogation clause (Section 25) and the requirement to convene an aboriginal conference within one year (Section 36). Section 35 was not included. On November 18, Trudeau introduced this Resolution into Parliament.

Second Thoughts

Following the unveiling of the “final” Resolution on November 18, fierce lobbying took place from two quarters. Women’s groups were deeply upset by having the override provision apply to the sexual equality clause and aboriginal organizations, which had been ambivalent about the draft aboriginal clause, suddenly united in demanding it be included. Native groups swarmed into Ottawa and massive demonstrations took place in provincial capitals. The main-stream media added its voice in support of these causes as did the federal New Democratic Party (NDP). It was all too much for the provincial premiers who “folded like omelettes” as one commentator put it.

Premier Lougheed proposed to his fellow premiers, in a series of long-distance telephone calls, that the word “existing” be added to the clause “aboriginal and treaty rights are hereby recognized and affirmed” and that the Resolution be amended accordingly. The provinces (except

Quebec) and the federal government agreed. A fresh Resolution containing this clause (and an amended over-ride clause to make it inapplicable to equality rights) was then introduced. It was passed by the Commons on December 2 and by the Senate on December 8, 1981. The Resolution was then transmitted to the Parliament of the United Kingdom for passage and the amendments came into effect on April 16, 1982.

Concerning these last-minute changes and constitution-making by long-distance telephone, Romanow, Whyte and Leeson make these interesting observations:

On 12 November the Saskatchewan premier promised leaders of the Saskatchewan Indian organizations that, if the accord were reopened, he would resurrect the original section on aboriginal rights. The commitment was made, however, without any expectation that the accord would, in fact, be reopened so quickly. In agreeing to the proposed new wording for section 28, Saskatchewan insisted that constitutional recognition of aboriginal rights be also included. Some of the other provinces, particularly British Columbia and Alberta, were neither prepared for nor desired this position. But now the political pressure was mounting for them to incorporate this measure. Lougheed, after several days of silence, acquiesced to the change if the word “existing” were added to the constitutional provision that aboriginal and treaty rights “are hereby recognized and affirmed.” On 23 November [Minister of Justice Jean] Chrétien announced to the House of Commons that all of the signature provinces had agreed to changes to women’s and aboriginal rights. Thus, the unsettling period of bilateral negotiations over long-distance telephone ended. It was a strange way by which to settle important and complex legal and social questions, and consider their

long-term ramifications but, perhaps, no less perplexing than many of the other decisions and events which transpired during this momentous period of Canada's history. (Romanow, Whyte and Leeson 1984: 214)

It is important to stress that this long-distance constitution-making was essentially an exercise involving only the Premiers and not having the usual deliberation of ministers and their senior officials. I remember being consulted (as Deputy Minister, Constitutional Affairs) on the new wording very briefly and under extreme time pressure. From British Columbia's perspective, I considered the addition of the word "existing" to be an improvement but no serious analysis was done as to what the clause meant. I have no doubt this was also the case within other provincial jurisdictions. Virtually nothing has been written that suggests there was any serious analysis as to what the words meant. If anyone had suggested (which they did not) that in later years the words would be interpreted to include the constitutional recognition of a third order of government, he would have been laughed out of court.

The fact is that the premiers and the Prime Minister had a political problem and including the amended clause, whatever it meant, was deemed to be the way to solve it. I have already emphasized that this and other aboriginal issues had not to this time been the subject of federal-provincial negotiations. They had been raised in an entirely separate process, that is, in the Joint Parliamentary Committee.

Bryan Schwartz, who was a Manitoba delegate to these conferences and very much an insider, makes this telling comment in his book, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*:

Ordinary citizens, politicians, and jurists were not better informed about the meaning

of s.35(1) than they were when the process began; it was as unclear what interests were encompassed by "aboriginal and treaty rights," and how much protection they were offered by s.35(1). Better preparation by the participants and more forthrightness in stating their positions might have led to greater progress. (Schwartz 1986: 102)

In my book, *Our Home or Native Land?*, I write this about the origin of Section 35, both the 1981 version and the amended version of 1983:

Sad to say, the full import of what they were agreeing to was not even understood much less discussed. I know, I was there. Others support that view. Looking back after the passage of several years, one astute observer who interviewed Premiers, Ministers and officials engaged in these Conferences said this:

Many respondents felt that those sections of the amendment package relating to aboriginal peoples were not well understood by governments, nor perhaps by aboriginal peoples. (The package was agreed to at the last minute by First Ministers after a very short discussion of its merits.) Elements of the package were not thoroughly discussed, there were few preliminary meetings, and there was little agreement on what the terms of the amendment meant. Many governments considered the commitment to be narrow in scope, while others interpreted it more widely.

Interviewees from both governments and aboriginal peoples' organizations spoke of governments being "backed into" this commitment, with the result that the commitment was not strong, and the understanding not deep. (Smith 1995: 146-47; citing Hawkes 1989: 9-10)

The 1983 Aboriginal Conference

The First Minister's Conference with Aboriginal leaders mandated by Section 35 of the *Constitution Act, 1982* was held in Ottawa on March 15 and 16, 1983. Preparatory meetings with officials identified a list of subject-matters that the aboriginal leadership placed on the agenda. These included "every issue of possible constitutional concern to aboriginal peoples" (Schwartz 1986). "Aboriginal Self-government" was item 3 on the agenda but so broad were the subjects stated that self-government could have been discussed under at least four other items as well. One cannot help but ask why, if it was seriously considered that the right to self-government was implicitly contained within Section 35 of the *Constitution Act, 1982*, there was such a preoccupation to deal with the subject at the 1983 Conference.

Not surprisingly the two-day 1983 Conference hardly scratched the surface of the agenda. I have reread the verbatim transcript of the 1983 Conference and the subject of self-government was scarcely touched upon.

In his opening statement, Prime Minister Trudeau made the following observation:

Our meeting marks a fresh start in the pursuit of the joint purposes we set in motion last year. We are finally dealing for the first time with a constitution which is our own, close now to all Canadians, to the many peoples and ethnic groups who make their home in this broad land. *We are dealing with a constitution which still needs to define the place of our aboriginal peoples in Canadian society.*

This is hardly the kind of statement which the Prime Minister would have made if there was any thought on the federal government's part that Section 35 of the *Constitution Act, 1982*, had already entrenched aboriginal self-government.

The opening statement of the Métis National Council put it this way:

The purpose of our participation in this conference is to entrench in the constitution the right of the Métis people to a land base and self-government ... We believe we must have these rights entrenched in the Canadian constitution to fulfil our Métis destiny.

In the same vein, the spokesman for the Native Council of Canada near the conclusion of the Conference had no doubt that the conference had not reached any agreement to entrench any rights for their people. He stated:

We are certainly not completely satisfied with what has come out of this conference over the past two days because it does not entrench any rights for our Métis and non-status Indian people in terms of what we came here for and what this conference was called for but we will sign the accord on the basis that at some future date we are going to get an opportunity to put our rights in the constitution as they should be.

Grand Chief Ahenekew, head of the Assembly of First Nations (AFN) stated at the beginning of the conference that their priority was to secure the constitutional entrenchment of aboriginal governments. He stated:

We hold as our first priority the commitment to continue to assert and secure constitutional entrenchment of the rightful place of Indian governments within the Canadian federation.

I have already indicated above that the First Ministers' agreement of late November 1981 to add Section 35 with the word "existing" was done by long-distance telephone and without the usual serious federal and provincial deliberation. In his

opening statement at the Conference, Premier Lougheed gave an illuminating review of those events and the meaning to be given to the word "existing." He stated:

I would like to start out to outline some of the background events which led up to this conference, which I think has been appropriately viewed as historic. Like most other provinces, Alberta had its first direct real involvement with the aboriginal constitutional issue in November, 1981. The federal government had previously held discussions with aboriginal leaders which led to an aboriginal rights provision in Section 34 of the federally proposed constitutional text.

That provision recognized and affirmed treaty and aboriginal rights. As a party to the consensus on the constitution in the fall of 1981, Alberta had to determine where it stood on the proposed rights provision.

Our difficulty, Mr. Chairman, was that the force and the scope of the aboriginal rights provision was unclear. The government of Alberta supported, and still does fully support, existing aboriginal and treaty rights. The proposed aboriginal rights provision was open to the interpretation, however, that it would create new aboriginal rights *that were not previously recognized in law*. Not having been part of the earlier discussion between the federal government and Indian leaders, the Premiers on November 5, 1981, were not prepared to include any additional provisions without understanding fully what was being requested and the consequences of such requests.

Mr. Chairman, Alberta recognizes the importance of this issue to the aboriginal peoples of Canada. In November of 1981, we worked closely with the Alberta Métis lead-

ers and others to develop an alternative wording which would satisfy our respective concerns. The present recognition and affirmation of existing aboriginal and treaty rights in Section 35 of the Constitutional Act, 1982, is the result of that cooperation.

I wanted to outline this recent history today, Mr. Chairman, because I understand that the inclusion of the word "existing" in Section 35 has been a subject of considerable concern among aboriginal representatives at the preparatory meetings which have preceded this conference. In response to the concern, I want to emphasize that the intent of the Alberta government in agreeing to the present wording of section 35 was neither to freeze the legal *status quo* of aboriginal and treaty rights for all time, nor to deny any modern treaty or agreements between governments and aboriginal peoples the protection of Section 35. In effect, *it was a commitment by governments to protect those aboriginal rights which exist now and to recognize those which may come into existence as a result of this conference.*

Considering the background and without wishing to debate specific agenda items at this time, Alberta is unwilling to remove the word "existing" from Section 35. Any consideration of the removal of the word "existing" can only come about after an agreement has been reached not only on the definition of these rights, but also on a full understanding of their implications and their consequences. (My emphasis)

Near the conclusion of the Conference, Georges Erasmus of the AFN responded to Premier Lougheed as follows:

Just before we leave item 1, there were a few items that were not covered yesterday

and we do want to register our feelings on them for the record.

One of the items that was not discussed at all was the question of the removal of the word “existing.” We understand Alberta’s feelings and in private meetings with the provinces, et cetera, and including the federal government, it was our understanding that by and large “existing” is something that governments want to maintain at this time, but *we want to make it very clear to yourselves and to this country that we want that term removed and we are going to continue to work to have that removed.* (my emphasis)

To this general overview of the 1983 Conference must be added a more careful and detailed examination. This is vital to understanding the origin and meaning of Section 35(3).

The most thorough account of the proceedings of the four Aboriginal conferences held in the 1980s is that produced by Bryan Schwartz of the Faculty of Law at the University of Manitoba. Professor Schwartz was a Manitoba delegate to these conferences and, therefore, very much an insider. His book, *First Principles, Second Thoughts*, is a classic account of those events (see Schwartz 1986).

The federal government circulated a federal proposal on the first afternoon of the 1983 Conference that did not bear the support of a number of the provinces so that the essential work of refining the federal proposal took place that evening in a closed ministerial level meeting. Drafters worked through the night to prepare a legal draft but all decisions were to be subject to the approval of First Ministers. At that meeting, there was agreement that there should be further constitutional conferences to deal with aboriginal issues. (You will recall that the *Constitution Act, 1982* had only required one such meeting). There was general agreement that there should be a

clause guaranteeing sexual equality with respect to the rights of the aboriginal peoples.

The late-night drafting in federal hands saw the introduction of a clause to amend Section 35 to have it extend to future land-claim agreements. Although one aboriginal group had lobbied for such a clause for some months on a Canada-wide tour, the provision was not contained in the federal draft of the previous day nor had it been discussed at either the first day of the conference or the evening meeting of ministers. In short, the provincial delegations had no opportunity to discuss it before it was added to the federal proposal.

When the revised federal draft was unveiled on the second morning of the 1983 Conference, as Schwartz points out, the Attorney General of British Columbia, Mr. Williams, complained that on the previous evening, only the amendments on sexual equality and ongoing process had been agreed to: “*other than that nothing was agreed and I don’t know where these words come from*” (1986: 99). Further discussion at the plenary session on the second day indicated there was some debate whether the federal draft had properly reflected the previous evening’s discussion. On the suggestion of Premier Bennett, the matter was referred to another back room session to attempt to iron out the difficulties.

Further amendments were made to the modern land-claims agreement provisions that Schwartz states were “*as a result of last minute discussions which hardly anyone could have fully followed, understood and evaluated*” (1986: 100).

At the conclusion of the two-day 1983 Conference, agreement was reached between the federal and nine provincial governments to amend the Constitution to provide for further aboriginal conferences; to shore up the equality provision; and to extend the scope of Section 35(1) to future land-claim agreements.

Subsequently, nine provincial legislatures and parliament passed the resolutions and the Constitution was amended accordingly in 1984.

Section 35, as amended now reads:

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

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

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

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in sub-section (1) are guaranteed equally to male and female persons (SI/84-102.)

About the outcome of the 1983 Conference, I say this in *Our Home or Native Land?*:

At the first such Conference in March 1983, agreement was reached to amend the meaning of "treaty rights" in section 35 to include rights contained in existing or future negotiated land claim agreements. This was an amendment which, in the context of current

land claim settlements, is of enormous importance. The amendment nullified half of the meaning of the word "existing" for the clause would now relate to all *future* treaties and land claim agreements as well as those existing in 1982. It is not certain that the Premiers of the day fully understood what the implications of the amendment might be. They may well have considered it highly technical and had their attention diverted to the more politically catchy agreement made at the same Conference guaranteeing aboriginal and treaty rights equally to male and female persons. (Smith 1995: 144)

The Ongoing Quest to Entrench Self-Government

The centrepiece of preparatory meetings leading up to the second conference in 1984 and the 1984 Conference itself focused on the attempt to entrench self-government into the Constitution. The effort was unsuccessful. As Schwartz sums up, all four of the conferences "failed almost entirely to better define, or even discuss in any length, the legal implications of section 35 of the *Constitution Act, 1982*" (1986: 353).

One must ask again why the preoccupation of the second and subsequent aboriginal conferences would be to entrench self-government in the Constitution if, in fact, it had already been entrenched by virtue of the 1983 amendment to Section 35(3).

The Meaning of Section 35

On a plain reading of the language of the section, the existing aboriginal and treaty rights and, in addition, the rights contained in land claim agreements entered into after April 16, 1982, are recognized and affirmed. Two questions arise: what is the *effect* of the section and what are its *contents*?

The Effect of Section 35

To provide in the *Constitution* that certain things are “recognized and affirmed” can mean a great deal or mean very little. At the one extreme, it can be interpreted as nothing more than a symbolic recognition expressing a high regard for the subject in question. An example of this is the clause contained within the preamble of our *Constitution* that we recognize the supremacy of God; an expression of noble sentiment but not interpreted (as yet anyway) as in any way to guide or restrain individual or governmental conduct. At the other extreme, the words “recognized and affirmed” could be interpreted to almost mean “guaranteed” or “inviolable” and thereby beyond the reach of ordinary legislation at either the federal or provincial level.

It becomes readily apparent that at what point on the spectrum a judge comes down is, in the absence of other factors that bear on the interpretation of the words, a highly subjective matter. As we know, the Supreme Court of Canada, first in the *Sparrow* case and then in the *Delgamuukw* case, has gone a long way to giving an expansive meaning to the words. As I understand the *Sparrow* decision, the Court found that these words do not automatically render legislative action unconstitutional, if that action affects the exercise of

aboriginal rights, provided the legislative action can pass a justification test that the Court in *Sparrow* described as a “strong check on legislative power.” For the purposes of this paper, it is not necessary to set out the justification test contained in *Sparrow* and elaborated upon by the Court in *Delgamuukw*. In my view, I believe it is fair to say that the effect of a practical site-specific application of the test laid down (as distinct from the concept in a mere theoretical setting) is seriously to impair, at great cost to the taxpayer, the exercise of legislative action and the management of the public lands.

In my view, the Court has gone too far along the spectrum of interpretations to be given to the words “recognized and affirmed.” Subsequent efforts will have to be made in future cases, by governments and their advocates willing to advance provincial interests fully, to induce the Court to pull back from its present position. Without question, provincial interests have not been aggressively advanced—or even mildly advanced in some cases—before the courts in recent years on aboriginal issues. That must change.

In the vacuum created by the lack of a substantive presentation of provincial interests before the courts in these matters, the sophistry of the reports of the Royal Commission on Aboriginal Peoples has flooded in. Propositions by a coterie of academics who spend all their time spinning fanciful theories largely out of thin air and with little regard to the state of the law and jurisprudence before 1990 have, alas, been adopted by the bright and “progressively minded” young law clerks in the Supreme Court of Canada and, thence, have entered into that Court’s judgments.

In those future law suits (and in particular that now initiated by the British Columbia Liberals), more of the history of the origin of this section must be emphasized as outlined in the earlier part of this analysis. There can be no doubt, judging from the lack of provincial involvement in the early stages; minimal deliberation in formulating the words; and reliance on the future aboriginal conferences to negotiate matters of substance, that the formulation of Section 35 was not viewed by the First Ministers, or even by the aboriginal leaders, as being intended to be much more than a symbolic recognition of the rights stated.

But, I am not so much concerned in this paper with the *effect* of Section 35 as I am with its *content*.

The Contents of Section 35

Generally

It is obvious from a plain reading of Section 35 that there is no attempt to define the rights to which it refers. The section was generally described at the time it was enacted as being an empty box. What were the existing aboriginal rights referred to? One would have to look to the jurisprudence for an answer. What were the existing treaty rights? One would have to look to the treaties themselves, as interpreted by the courts, for an answer. The section does not expand by one iota the meaning and content of aboriginal and treaty rights. Whatever they are, they are. What the section does do is give those rights (whatever they are) some degree of constitutional status.

“existing”

More than likely the section would not have been agreed to in November 1981 by the requisite number of provinces had not the word “existing” been added. Premier Lougheed, who was its au-

thor, describes why it was added in the quotation that appears earlier in this paper (page 12). As Mr Lougheed says, the word was added as it was feared that without it the section “would create new rights that were not previously recognized in law.”

The Supreme Court of Canada considered the meaning of “existing” in the *Sparrow* case and concluded that such rights are those that were in existence when the *Constitution Act, 1982* came into force although they may be exercised “in a contemporary form rather than in their primeval simplicity and vigour.” The Court in that case also spoke of “flexibility” and permitting “evolution over time.”

It is important to emphasize that the Dickson Court in *Sparrow* gave meaning to the word “existing” that certain academics and perhaps even the Lamer Court would take away. Dickson’s talk of flexibility and “evolution” have in some quarters been misconstrued to refer to substantive new rights rather than merely the changing form of existing rights. Efforts to retain this distinction should be made in future litigation.

As is indicated above, the aboriginal leadership was adamantly opposed at the 1983 Conference to the word “existing” and sought to have it removed. Their frontal assault on the word proved unsuccessful in attracting sufficient government support to remove it. However, by virtue of the 1983 modern land-claim agreement amendment, the aboriginal leadership in effect achieved half their objective by having the section apply to *future* treaty rights as well as to existing rights.

“aboriginal rights”

These rights are those that are determined by a court to be aboriginal rights in site-specific situations. Inasmuch as aboriginal rights, by virtue of their nature, are prior in time to the present, the

question arises as to what is the import of the term “aboriginal rights” being qualified by the word “existing”? “Existing” must be given some meaning and effect.

When Lougheed and the other Premiers considered agreeing to Section 35, I believe they did so because they thought that “existing” aboriginal rights would only include those rights that had been determined by a Court to be aboriginal rights prior to the coming into force of the section. That is why in his statement at the 1983 Conference explaining his understanding of the meaning of “existing” he excluded “*new rights not previously recognized by law.*”

Inasmuch as the Supreme Court of Canada in 1982 cases after 1982 and, more particularly, in *Delgamuukw*, greatly expanded the law on aboriginal rights, could it be successfully argued that these new kind of rights do not have the protection of Section 35 at all? They are aboriginal rights to be sure but they do not fall within Section 35 because they did not exist in 1982. This is a legal argument waiting to be made.

On another issue, some argue that the so-called “inherent” right to self-government is implicit in the words “aboriginal rights” as they appear in this section. There is no judicial support for this view (as yet anyway). This is because it is a fundamental constitutional principle of Canadian federalism that the totality of legislative power is distributed by the Constitution between the federal Parliament and the several provincial legislatures. There is no room for a third order of government having constitutional status, such as the native leadership seeks, short of a constitutional amendment.

This proposition that the “inherent” right to self-government is implicit in the words “aboriginal rights” is trite law. A long line of cases going back as far as 1887 and up to the present day

constitute an unbroken line of authority on the point. In *Delgamuukw*, the trial judge said:

neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award . . .

The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same law and the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself.

In the same case, on appeal, Macfarlane, J.A., speaking for the majority stated:

With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. In 1871, two levels of government were established in British Columbia. The division of governmental powers between Canada and the Provinces left no room for a third order of government.

Any doubt that aboriginal people are subject to this distribution is eliminated by s.91(24), which awards legislative competence in relation to Indians to Parliament.

The Supreme Court of Canada did not deal with the issue of the “inherent right” to self-government in *Delgamuukw* but did so in *The Queen vs Pamajewon and Jones*, in 1996, by upholding a decision of the Ontario Court of Appeal rejecting the inherent-right argument as the basis for conducting gambling on reserves.

Treaty Rights

By virtue of subsection (3) of Section 35 passed at the 1983 Conference, the term “treaty rights” is amended to include rights contained in future land-claim agreements. Schwartz is of the view that this amendment “was a significant step in defining and extending the scope of the constitutional protection given the rights of aboriginal peoples” (1986). And so it is, for before the amendment only pre-1983 treaty rights were covered whereas after the amendment post-1983 treaty rights were also included.

The crucial question is whether self-government regimes can properly be included within land-claim agreements and thereby acquire the protection of Section 35(1).

Schwartz addresses the question thus:

Could any of those agreements acquire the constitutional protection of s.35(3)? If the answer is yes, then by expanding the scope of s.35(1) to include post-April 17, 1982, agreements, s.35(3) may have provided a mechanism whereby Indian self-government in Canada can receive constitutional recognition and protection . . . For now, I will say only that the effect that s.35(3) may have on the constitutional position of aboriginal self-government may be one of the most important outcomes of the March '83 Conference—even if that effect did not occur to many, or even any, of the participants. (1986: 141)

In a closely knit argument that deserves careful study, Schwartz gives both the pros and cons of the legal position and speculates as to whether Section 35(1) amended by Section 35(3) in 1984 could give constitutional protection to agreements on self-government (1986: 280–85). I have no doubt that the speculations of Schwartz have had an influence on the thinking of the Royal Commission on Aboriginal Peoples and may yet have a similar influence on the Supreme Court of Canada when that Court is squarely faced with the issue of whether Sections 35(1) and 35(3) gives constitutional recognition to aboriginal self-government.

In answer to the question, I would argue in the negative for the following reasons.

When the First Ministers agreed to Section 35(3), they did so in the knowledge of the kind of land-claim agreements that existed up to that time. To elaborate on the point: by 1982, two modern land-claim agreements had been concluded in Quebec; four were in progress in the Northwest Territories and a further 14 were in progress in the Yukon. In all of the Northwest and Yukon Territories land-claim negotiations, the matter of self-government was being negotiated through separate agreements *outside of*, and separate from, the land-claim agreement negotiations. In the case of the two land-claim agreements in Quebec, the measure of self-government extended is largely administrative in nature, under Quebec law and under the control of the Quebec government. No wholesale giving away of legislative power, à la Nisga'a, here.

My point is that when governments agreed to amend Section 35(1) so that it applied to future land-claim agreements, they were entitled to assume that the nature and content of such future agreements would be of the genre of modern land-claim agreements recently concluded and then being negotiated, that is, absent self-government arrangements. Of all the modern land-claim agreements, only British Columbia

has allowed itself to be so compromised. It calls for a judicial determination.

(1) To suggest that Section 35(1), as amended, allows senior governments to divest their legislative powers permanently through future land-claim agreements is to suggest that the 1983 amendment had the affect of amending the *Constitution's* amending formula. That is impossible because to amend the amending formula requires the approval of *all* provinces. Quebec did not approve the 1983 amendment.

(2) Short of a constitutional amendment, no government or legislature has the constitutional power to give away its legislative power nor can it do so under the guise of a land-claim agreement. A provincial government can give away in land-claim agreements its revenue on virtually any basis it wishes; it can divest itself of public lands for any consideration it deems appropriate; but, it cannot divest itself of legislative power and put it forever beyond its capacity to retrieve that power. No proper reading of Section 35 can help it do so.

Conclusion

Section 35 of the *Constitution Act, 1982*, as amended, has been interpreted in an expansive manner far beyond what was ever intended by its framers. The Supreme Court of Canada has been unduly influenced by the views of certain academics in arriving at its expansive views.

For British Columbia, the challenge is two-fold. First, through aggressive advocacy in future cases,

cause the Court to retrench or qualify its previously expressed broad interpretations. Secondly, do all in the Province's power to prevent the Court from finding that the inherent right to aboriginal self-government is to be found in Section 35 or that land-claim agreements can be constitutionalized under that section.

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Melvin H. Smith, QC, spent 31 years in the public service of British Columbia. A lawyer by profession, from 1967 until 1997 he was the ranking official on constitutional law and constitutional reform issues for four successive provincial administrations. He was a key player in the Patriation of the Constitution in 1981 and also served as a Deputy Minister for 13 years in various Ministries until his early retirement in 1991. A leader in the "No" campaign on the Charlottetown Accord, he now spends his time as a consultant, commentator on public issues, columnist, and university lecturer. He is the author of the Canadian best seller, *Our Home or Native Land?* He lives in Victoria, British Columbia.

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