What is Section 35 of the Constitution Act?

Section 35 is the part of the Constitution Act that recognizes and affirms Aboriginal rights. The Canadian government did not initially plan to include Aboriginal rights so extensively within the constitution when the Act was being redrafted in the early 1980s. Early drafts and discussions during the patriation of the Canadian Constitution did not include any recognition of those existing rights and relationships, but through campaigns and demonstrations, Aboriginal groups in Canada successfully fought to have their rights enshrined and protected.

It is important to understand that Section 35 *recognizes* Aboriginal rights, but did not create them Aboriginal rights have existed before Section 35.

Section 35 of *the Constitution Act* states:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 of *The Constitution Act, 1982* recognizes and affirms existing Aboriginal rights, but does not define them. What Aboriginal rights include has been the topic of much debate and discussion, and they have been defined over time through Supreme Court cases such as *R. v. Calder* and *R. v. Sparrow*. Aboriginal rights have been interpreted to include a range of cultural, social, political, and economic rights including the right to land, as well as to fish, to hunt, to practice one s own culture, and to establish treaties.[1]

Section 35 also recognizes that Aboriginal rights are existing. The Supreme Court of Canada has stated that this means that any Aboriginal rights that had been extinguished by treaty or other legal processes prior to 1982 no longer existed and therefore are not protected under the Constitution.[2] The significance of the term existing was further clarified in the case of *R. v. Sparrow*:

> **Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.**[3]

The *Constitution Act* recognizes Indian, Inuit and Métis as all Aboriginal with existing rights, and that recognition has been further defined for each group (as, for instance, for Métis in the *Powley* decision). Aboriginal rights in general are based on the continued occupation of lands by Aboriginal peoples since before European settlement.

Section 35 falls outside of the Charter of Rights and Freedoms, and it begins Part II of the constitution. This allows Section 35 to be exempt from the notwithstanding clause that applies to the Charter. In other words, the federal government cannot override Aboriginal rights.

The fight for Section 35

Section 35 of *the Constitution Act, 1982* was not included in Prime Minister Pierre Trudeau s initial proposal for patriation in 1980. Aboriginal Canadians had not been consulted about the new constitution, and there was initially very little reference to Aboriginal rights. Aboriginal groups across Canada became concerned that, with the transfer of constitutional powers from Britain to Canada, established agreements affirming Aboriginal rights and title would no longer hold legal weight. Aboriginal groups were also concerned that they would no longer be viewed as autonomous decision-makers on a federal level, and they saw the potential for the patriation to be yet another assimilationist policy, much like the 1969 White Paper, also proposed by the Trudeau government.

In response to the proposed patriation, many Aboriginal organizations and activists joined in demonstrations, fundraisers, and campaigns to have their title and rights explicitly recognized in the Constitution. One of these demonstrations was the Constitution Express, an action that contemporary activist Arthur Manuel describes as the most effective direct action in Canadian history, as it ultimately changed the constitution.[4] It took two years and the raising of concerns before an international audience, including the United Nations and the British Parliament, before the Canadian government finally agreed to include Aboriginal rights in the constitution. Because of the strong fight for recognition by Canada's Aboriginal peoples, Section 35 was added to the constitution in time to be formally patriated in 1982.

Section 35 initially consisted of clauses (1) and (2). Clauses (3) and (4) section was further developed in 1983-4 as a result of consultations with Aboriginal representatives during the First Ministers' Conference on Aboriginal Rights in March 1983.[5] These clauses were added after lengthy campaigns by women s groups, who were unrepresented in the initial discussions and experienced systemic gender discrimination from such legislation as Bill C-31.

Debates surrounding the value of Section 35

There has been much debate over the effectiveness of Section 35.

For example, Stó:lo author Lee Maracle considers that Section 35 reinforces colonialism by recognizing Canadian law as supreme, instead of breaking away from it as would be expected under a true nation-to-nation relationship.[6] Lawyer and judge Mary-Ellen Turpel also argues that by accepting the Constitution, a colonial form of rule based in Western (non-Indigenous) concepts and ideologies, such as individual rights and private property ownership, one is acknowledging the colonial power as the overarching, supreme law in which everything has to be adjusted to fit the terms of the dominant system.[7]

Some argue that there appears to be a disparity between the concept of Aboriginal rights being upheld by Section 35, and the daily lives of Aboriginal peoples, where many have been arrested for exercising what they understand as their Aboriginal rights, such as hunting or fishing:

> **Although s.35 guides court and government decisions that directly impact Indigenous Peoples, there remain a considerable number of Indigenous people who either are not directly aware of s.35 or believe it is meaningless in their lives. There are far more Indigenous people who personally know brothers, sisters, aunts, dads, and uncles who have been stopped, questioned, charged, and convicted for exercising their Aboriginal Rights, than who know of the existence or content of s.35. Section 35 to many Indigenous Peoples has remained a powerful yet invisible force.**
>
> Ardith Walkem and Halie Bruce[8]

On the other hand, John Borrows of the Nawash First Nation and Law Foundation at the University of Victoria argues that the Constitution helps settle what was a troubled relationship between the Canadian government and Aboriginal Peoples, with the government initially able to infringe on Aboriginal rights without providing Aboriginal peoples with the institutional means to resist the violation of their rights.[9] Borrows in fact suggests that the case *Calder v the Attorney General of BC*, in which Frank Calder lost his

case for Aboriginal title in 1973, may have turned out differently had Section 35 been in place at that time. Borrows also feels that recognition of Aboriginal rights in Section 35 places the issue squarely in the public eye crucial for the Canadian public s acceptance of pre-existing Aboriginal rights.[10]

Given that legal cases have at times upheld Aboriginal rights (e.g., *Sparrow*) and at other times allowed infringement, the true impact of Section 35 remains to be seen.

By Erin Hanson

Recommended resources for further reading:

Books & articles

Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution.* Agincourt: Methuen, 1984.

Aki-Kwe/Mary Ellen Turpel, Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges. *Canadian Women s Studies* 10.2 & 3 (1991): 149-157. Available online here via York University.

Walkem, Ardith and Halie Bruce, eds. *Box of Treasures or Empty Box? Twenty Years of Section 35.* Vancouver: Theytus, 2003.

Films:

Dancing Around the Table, Part One. Dir. Maurice Bulbulian. National Film Board of Canada, 1987.

Dancing Around the Table Part Two. Dir. Maurice Bulbulian. National Film Board of Canada, 1987.

Endnotes

1 Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution.* Agincourt: Methuen, 1984. 30.
2 Hirschl, Ran. *Towards Juristocracy.* Cambridge: Harvard University Press, 2004. 196.
3 *R. v Sparrow,* [1990] 1 S.C.R. 1075. Accessed online: http://scc.lexum.org/en/1990/1990scr1-1075/1990scr1-1075.htmll
4 Manuel, Arthur. Guest lecture, Introduction to First Nations Studies. University of British Columbia, Vancouver, B.C. 24 March 2009.
5 Asch.
6 Maracle, Lee. The Operation was Successful, But the Patient Died. In Walkem, Ardith and Halie Bruce, eds. *Box of Treasures or Empty Box? Twenty Years of Section 35.* Vancouver: Theytus, 2003. 309-315.
7 Aki-Kwe/Mary Ellen Turpel, Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges. *Canadian Women s Studies* 10.2 & 3 (1991): 149-157.
8 Walkem, Ardith and Halie Bruce, eds. *Box of Treasures or Empty Box? Twenty Years of Section 35.* Vancouver: Theytus, 2003. 10.
9 Borrows, Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples. In Walkem and Bruce, 225.
10 Borrows, 225-6.