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## Aboriginal Group Rights and Environmental Protection

Randy Kapashesit and Murray Klippenstein \*

Aboriginal peoples base their relationship with the environment on concepts of respect and duty rather than rights and claims. Their belief in the seamless interaction and sacredness of all life does not allow for the separation of humanity from nature, or secular from spiritual life. Aboriginal environmental ethics reflect this sense of unity by emphasizing balance and sustainability. The authors find that Aboriginal ecological management systems incorporate these environmental ethics into activities such as hunting and fishing through social practices and sanctions. These ethics, although informal and unwritten, have been enforced by recognizable social institutions. Thus, Aboriginal ecological management systems continue to offer effective and viable models for sustainable environmental relations. The existence and success of Aboriginal ecological management systems leads the authors to argue for their recognition and protection through an interpretation of s. 35(1) of the *Constitution Act, 1982* based on group rights. Such an interpretation, it is suggested, flows from existing legislative structures, case law and the text of s. 35(1). The authors conclude that *Sparrow*, a recent decision by the Supreme Court of Canada, provides a promising legal framework for recognizing and protecting those Aboriginal group rights crucial to environmental protection.

La relation que partagent les peuples autochtones avec l'environnement puise ses sources dans les concepts de respect et de devoir, plutôt que ceux de droits et de réclamations. La nature sacrée et l'interdépendance de toutes les formes de vie ne peut nous permettre de séparer l'humanité de la nature, ou encore séparer la vie spirituelle de la vie séculière. La conception éthique des peuples autochtones en égard à l'environnement reflète cette unité, dans la mesure où elle prône l'équilibre et sustentation. Les auteurs sont d'avis que les systèmes d'administration écologique des peuples autochtones incorporent cette conception éthique au sein de diverses activités telles la pêche et la chasse, par le biais d'usages sociaux et de sanctions. Les mesures éthiques, bien qu'elles ne soient ni écrites, ni formelles, ont été renforcées à l'acte d'institutions sociales bien définies. Ainsi, les systèmes d'administration écologique des peuples autochtones constituent un modèle efficace et viable pour des relations environnementales sustentatrices. L'existence, ainsi que le succès, de ces systèmes d'administration écologique ont incité les auteurs à militer en faveur de leur reconnaissance et leur protection par le biais d'une interprétation de l'article 35(1) de la *Loi constitutionnelle de 1982* lequel article est basé sur les droits collectifs des peuples autochtones. Selon les auteurs, une telle interprétation découle des structures législatives existantes, de la jurisprudence, ainsi que du libellé de l'article 35(1). Les auteurs en concluant que l'affaire *Sparrow*, décidée par la Cour suprême du Canada, offre une perspective promettante en égard à la reconnaissance et la protection des droits collectifs des peuples autochtones, lesquels droits sont essentiels pour assurer la protection de l'environnement.

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**Introduction**

Aboriginal communities are generally characterized by a healthy respect for the environment. In view of this, it seems clear that there is much to be gained from encouraging Aboriginal communities to put that respectful outlook into practice in their own lives and in their own way. This article explains why Canadian society should give Aboriginal communities room to flourish in their

own ecological systems, and argues that the obligation to do so already is in place, in the form of s. 35(1) of the *Constitution Act, 1982*.<sup>1</sup>

The Aboriginal respect for the environment, which we will call Aboriginal environmental ethics, has a great deal in common with the ethical and philosophical attitudes of non-Aboriginal environmentalists. This often results in alliances between Aboriginals and non-Aboriginal environmentalists. Of course, under pressure, disputes over principles and goals surface, raising fundamental questions. How can white urban technocrats possibly regulate a relationship between Aboriginal hunter and game which from the hunter's perspective is spiritual? Why should Aboriginal communities be exempt from certain environmental laws?<sup>2</sup>

We argue that recognition of Aboriginal community practices and social structures is a step forward in environmental protection. These community practices are often unconscious propagators of accumulated centuries of respect for nature, both living and inanimate. It is a wise course to acknowledge and reinforce these practices in the Canadian legal system. In fact, we say that s. 35(1) has already done so.

We will argue that (1) Aboriginal environmental ethics existed in the past, and survive and function today. (2) These ethics are more than an abstract belief system; they are actually lived and practised in activities such as hunting, trapping and fishing. The practice of these ethics takes place at the social or group level, and requires social cohesion to operate. (3) Many of these activities, such as hunting, trapping and fishing, are recognized as Aboriginal or treaty rights. However, the essential group nature of these rights has not been fully elaborated by the courts and other legal institutions. Such an elaboration of the group nature of these rights would ensure that (4) the social structure by which Aboriginal environmental ethics is implemented would be explicitly protected by the Canadian legal system.

The recognition or rejection of the group nature of Aboriginal rights is an important aspect of Aboriginal environmental relations. The possibility of an Aboriginal role in environmental protection is very limited without a concept of Aboriginal rights as group rights. Of course, if a group conception of Aboriginal

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<sup>1</sup>Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*]. S. 35(1) states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>2</sup>See, generally, O.D. Schwarz, "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal" (1987) 9 *Environmental Ethics* 291; Law Reform Commission of Canada, *The Interaction Between Environmental Law Enforcement and Aboriginal and Treaty Rights in Canada* (Draft Study Paper) by D. Nahwegahbow & B. Morse (April 1986); J.W. Higham, "Environmental Assessment and Management on Indian Reserve Lands in Canada" (Paper presented to the VIII Annual General Meeting of the International Association for Impact Assessment, June 1989) [unpublished].

rights were to be fully adopted, it would also likely affect the manner in which Aboriginal law is applied in areas other than protection of the environment.

A group rights theory is needed particularly to counter the generally individualistic direction of analysis in the area of Aboriginal rights.<sup>3</sup> Schwartz, for example, argued against what he calls "history-based groupism,"<sup>4</sup> including in this concept rights granted to Aboriginal peoples as communities or collectivities rather than as individuals. He advocates that the s. 35(1) constitutional guarantee of Aboriginal rights should be interpreted with principles that

advance the ideals of liberal individualism, but which satisfy, or do as little affront as possible to, those whose constitutional programs are grounded in history-based groupism. When ... no reconciliation between conflicting philosophies can be expressed in practical arrangements, then liberal individualism ought to prevail.<sup>5</sup>

A group rights approach to Aboriginal rights is not inconsistent with the existence of individual Aboriginal rights. We will not attempt to label various activities as one class of rights or the other. However, it is implicit in our argument that many rights related to the environment are group rights rather than individual rights.

Our focus on group rights may be compared with the commonly heard claim for an Aboriginal right to self-government. The latter is a claim of immense significance to Aboriginal peoples. However, despite its domination of political discussion, the concept has received almost no recognition in the courts.<sup>6</sup> We will show that the notion of group rights, on the other hand, has been implicitly and sometimes explicitly accepted by the courts and legislatures for a very long time. Our hope is to begin to open up the real implications of that recognition. Of course, self-government and group rights share much common ground conceptually, and a fuller sense of group rights is compatible with recognition of a right to self-government.

We will first briefly review the characteristics of Aboriginal environmental ethics in order to determine whether and how we could expect such ethics to be applicable to environmental concerns felt by non-Aboriginal society. Then we will outline some anthropological perspectives on the manner in which Aboriginal environmental ethics survive and are practised. Finally, we will explore why and how the Aboriginal ecological management systems which incorporate

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<sup>3</sup>Pentney calls an adequate collective rights theory of aboriginal rights a "vital missing element" in current legal analysis. See W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I, The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21 at 23.

<sup>4</sup>B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986) at 39.

<sup>5</sup>*Ibid.*

<sup>6</sup>This may be changing. See *Eastmain Band v. Gilpin*, [1987] R.J.Q. 1637 at 1644, [1987] 3 C.N.L.R. 54 (Prov. Ct), where the court refers to the Crees' "residual sovereignty."

these ethics are protected as part of the Aboriginal group rights entrenched in s. 35(1). In particular, we will discuss the framework for applying s. 35(1) in *R. v. Sparrow*,<sup>7</sup> in which the Supreme Court of Canada first considered the effect of s. 35(1).

### I. Aboriginal Environmental Ethics

There is increasing interest in Aboriginal environmental perspectives, aptly summarized by Booth and Jacobs:

Modern residents of North America are facing ecological problems considerably more grave than those of the European immigrants, and without the option of immigrating away from those problems. As our awareness of the magnitude and the implications of these ecological problems has increased, so too has our search for solutions. Technological solutions are failing us, and there is a growing perception that it is our very culture and way of living which must change before solutions become possible. In a search for alternative ways of relating to the earth and her other inhabitants, it seems very natural to turn to cultures which successfully managed to live with this land, the culture of the Native Americans.<sup>8</sup>

Care must be taken when attempting to generalize about the belief systems of hundreds of distinct Aboriginal groups in North America. However, Aboriginal environmental belief systems share a number of features which can be identified and considered. These include a lack of division between humans and the rest of the environment, a spiritual relationship with nature, concern about sustainability, attention to reciprocity and balance, and the idiom of respect and duty (rather than rights).

Aboriginal ethics do not share the European tendency to pose "nature" in distinct opposition to humans. There is no gulf between these two components of the world. For example,

[i]n Cree, there is no word corresponding to our term 'nature.' There is a word *pimaatisiwin*, 'life,' which includes human as well as animal 'persons.' ... Humans, animals, spirits and some geophysical agents are perceived to have qualities of personhood. ... Human persons are not set over and against a material context of inert nature, but rather are one species of person in a network of reciprocating persons.<sup>9</sup>

Aboriginal belief systems have no counterpart to the admonition in Genesis to "fill the earth and subdue it, and have dominion over ... every living thing."<sup>10</sup>

<sup>7</sup>[1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

<sup>8</sup>A.L. Booth & H.M. Jacobs, *Environmental Consciousness: Native American Worldviews and Sustainable Natural Resource Management: An Annotated Bibliography* (Chicago: Council of Planning Librarians, 1988) at 2.

<sup>9</sup>C. Scott, "Knowledge Construction Among Cree Hunters: Metaphors and Literal Understanding" (1989) 75 J. Soc. & Anthro. 193 at 195.

<sup>10</sup>See L. White, Jr., "The Historic Roots of our Ecologic Crisis" in I. Barbour, ed., *Western Man and Environmental Ethics: Attitudes Toward Nature and Technology* (Reading, Mass.: Addison-

In a world view in which humans are seamlessly related to other animals and things, such an injunction would seem almost incomprehensible.

Aboriginal environmental values, unlike Western values, ascribe an important spiritual role to nature. In addition, since Aboriginal people rarely distinguish between their religious and secular life, every aspect of life includes a spiritual dimension. There is never a sense of disconnectedness from the earth as its sacredness is lived consciously and completely at all times.<sup>11</sup>

A long term view of ecological stability, or what might be called a concern for sustainability, is to native communities an obviously central and necessary part of any attitude toward their surroundings. Emigration and technological "fixes" have not been viable alternatives. As one study of the hunting practices of the Waswanipi Crees of northern Quebec notes:

should this society ever contemplate the bizarre idea of hunting and trapping everything in the vicinity and then moving on, they would clearly do so at their peril for the simple reason that the whole of the subarctic is already occupied by hunting societies.<sup>12</sup>

An Inuit hunter captures the essence of this outlook: "I just get enough for my own use the coming year. Next year the animals are going to be there anyway, that's my bank."<sup>13</sup>

The need for reciprocity and balance is also a common feature of Aboriginal environmental ethics:

Reciprocity and balance are required on both sides of the relationship between humankind and other living beings. For everything taken, something must be offered in turn, and the permanent loss of something, such as the destruction of a species, irreparably tore at the balance of the world. ... It was vital that humans strove to stay within a natural balance and did not overbreed or overhunt.<sup>14</sup>

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Wesley, 1973) 18 at 23-27; J.B. Callicott, "Traditional American Indian and Western European Attitudes Toward Nature: An Overview" in J.B. Callicott, ed., *In Defense of the Land Ethic: Essays in Environmental Philosophy* (Albany: State University of New York Press, 1989) 7.

<sup>11</sup>Booth & Jacobs, *supra*, note 8 at 4-5. See also F. Berkes, "Environmental Philosophy of the Chisasibi Cree People of James Bay" in M.M.R. Freeman & L.N. Carbyn, eds, *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Boreal Institute for Northern Studies, University of Alberta, 1988) 7.

<sup>12</sup>Unpublished study by R. McDonnell cited in P.W. Hutchins, "The Law Applying to the Trapping of Furbearers by Aboriginal Peoples in Canada: A Case of Double Jeopardy" in M. Novak, et al., eds, *Wild Furbearer Management and Conservation in North America* (Toronto: Ministry of Natural Resources, 1987) 31 at 32. See also H.A. Feit, "Waswanipi Cree Management of Land and Wildlife: Cree Ethno-Ecology Revisited" in B. Cox, ed., *Native People, Native Lands: Canadian Indians, Inuit and Métis* (Ottawa: Carleton University Press, 1987) 75.

<sup>13</sup>H. Brody, *Living Arctic: Hunters of the Canadian North* (Toronto: Douglas & McIntyre, 1987) at 78.

<sup>14</sup>Booth & Jacobs, *supra*, note 8 at 4.

Finally, an Aboriginal's relationship to others is considered in a context of respect and duty, rather than in a model of claims and rights:

When the world of social relations transcends those that are maintained among human beings, this holds implications for the way one sees oneself in relation to all else. Within this encompassing web of social relations the individual is characterized as the repository of responsibilities rather than as a claimant of rights. Rights can exist only in the measure to which each person fulfils his responsibilities toward others. That is, rights are an outgrowth of every person's performing his obligation in the cosmic order. In such a society there is no concept of inherent individual claims to inalienable rights.<sup>15</sup>

For Aboriginal peoples, the clash of opposing rights misses the subtleties that the principles of respect and duty bring, whether speaking of humans or animals. Respect and duty are flexible principles that situate the "right" in a context of a relationship or many relationships, and cannot be abstracted from the nature of those relationships. As the relationships evolve, so too will the responsibilities. The context of respect and duty will also foster a sense of humility, rather than assertiveness, in recognition of the fact that the individual occupies a part of a large and supportive web.

We believe that the principles that characterize Aboriginal environmental ethics are fundamentally conducive to protection of the environment. It is for that reason that the central aspect of our argument is that acknowledging and reinforcing the practice of these Aboriginal environmental ethics by Aboriginal communities is in itself desirable.

In addition, Aboriginal ethics can educate non-Aboriginal society. Increasingly, non-Aboriginal efforts at systemizing new environmental ethics share the underlying elements of Aboriginal ethics. These efforts often radically depart from the traditional bases of moral philosophy.<sup>16</sup> For example, respect and duty toward all of nature forms the basis of a recent work by Rolston.<sup>17</sup> If non-Aboriginals are to construct a different Western environmental consciousness, they must truly learn from and draw upon what Aboriginal people have to teach.<sup>18</sup>

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<sup>15</sup>M. Boldt & J.A. Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in M. Boldt & J.A. Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165 at 166.

<sup>16</sup>For excellent surveys, see J.B. Callicott, "Introduction: The Real Work" in J.B. Callicott, ed., *supra*, note 10, 1, and R.F. Nash, *The Rights of Nature: A History of Environmental Ethics* (London: University of Wisconsin Press, 1989).

<sup>17</sup>H. Rolston, III, *Environmental Ethics: Duties to and Values in the Natural World* (Philadelphia: Temple University Press, 1988).

<sup>18</sup>A.L. Booth & H.M. Jacobs, "Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness" (1990) 12 *Environmental Ethics* 27.

It is not feasible to borrow Aboriginal environmental ethics and graft these onto non-Aboriginal cultures because Aboriginal cultures are embedded in a particular context where the impact and meaning of a tradition stems from life-long conditioning, preparation, and participation. Aboriginal cultures are built into language, into the way day-to-day life is lived, and it is found within a specific physical/social context.<sup>19</sup> However, while non-Aboriginals cannot adopt an Aboriginal world view, they can look to this world view for inspiration, and for a reminder that positive relationships with the environment can and do exist.

## II. Aboriginal Ecological Management Systems

If the Aboriginal environmental ethics discussed above are to protect the environment and serve as a guide to non-Aboriginals in the way we assert, it is necessary to show that Aboriginal ecological management systems incorporate such Aboriginal environmental ethics, and remain viable in Canada.

It is a common assumption in many quarters that local Aboriginal ecological management systems either have been destroyed by industrial society, or will inevitably disappear. To a large extent this assumption is based upon a lack of information about the way in which these systems have adapted to the dominance of industrial society. There is significant and increasing evidence that such systems, while often severely stressed, have the ability to survive.<sup>20</sup>

What exactly do we mean by an Aboriginal ecological management system? To most non-Aboriginals it is "invisible" and unknown. According to Feit:

Self-management in short is the direct exercise of effective managerial and regulatory practices with respect to wildlife and land. The legitimacy and authority for such practices are determined at the local level by reference to community-based systems of knowledge, values and practice. Furthermore, they are especially embedded in local practices and knowledge with respect to world view, property rights, social authority, and the definition of the sacred.<sup>21</sup>

Traditional management systems usually incorporate a collection of unwritten rules or social norms that govern activities such as hunting, fishing or trapping.<sup>22</sup>

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<sup>19</sup>*Ibid.* at 42.

<sup>20</sup>H.A. Feit, "The Future of Hunters Within Nation-States: Anthropology and the James Bay Cree" in E. Leacock & R. Lee, eds, *Politics and History in Band Societies* (Cambridge: Cambridge University Press, 1982) 373 at 373.

<sup>21</sup>H.A. Feit, "Self-Management and State-Management: Forms of Knowing and Managing Northern Wildlife" in Freeman & Carbyn, eds, *supra*, note 11, 72 at 74.

<sup>22</sup>For the best general description, see P.J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" (1987) 14 *Alternatives* 3. See also G. Osherenko, "Wildlife Management in the North American Arctic: The Case for Co-Management" in Freeman & Carbyn, eds, *supra*, note 11, 92 at 93, and F. Berkes & M.T. Farvar, "Introduction and Overview" in F. Berkes, ed., *Common Property Resources: Ecology and Community-Based Sustainable Development* (London: Bellhaven Press, 1989) 1.



Invariably, these systems also require social institutions for their perpetuation.<sup>23</sup>

Nelson has studied the Koyukon Indians of Alaska, and the way environmental ethics are implemented, both personally and through social institutions.

The Koyukon people are strongly influenced to harvest only as much as they can use and to use everything that they harvest. Among the Koyukon, reverence for nature, which is strongly manifested in both religion and personality, is unquestionably related to conscious limitation of use.<sup>24</sup>

He notes a "prodigious array of regulations and taboos"<sup>25</sup> applying with respect to natural entities, such as prohibitions against the killing of animals or plants and leaving them unused, and the understanding that hunters must go to great lengths to prevent the escape of wounded game.<sup>26</sup>

Feit has studied traditional management in the context of the Waswamipi Cree.<sup>27</sup> He has observed a stricture amongst the Cree that they must not kill more than they need, for fun, or for self-aggrandizement, although they are fully aware of their ability to do so. Bad luck in the hunt is seen as the result of a decision on the part of the animals that the hunter should not get what he wants, usually because he has failed to carry out one of his responsibilities.

Feit noted that the Cree also regulate the production, distribution, and harvest of animals by rotational hunting — not hunting in a given area for a period to allow the populations to grow. They also periodically shift their consumption from moose and beaver, which are most efficiently harvested, to more prolific but less efficiently harvested sources of food, particularly fish, or if necessary, to less valued purchased foods.

There are numerous examples of the way in which negative social sanctions, incentives or beliefs affect and control Aboriginal hunting practices. Cree hunters, for example, believe that excessive killing of geese will result in poverty and the hunter's death.<sup>28</sup> Game, such as beavers, can retaliate against bad hunting practices by disappearing for a period.<sup>29</sup>

Positive social practices and incentives similarly exist to govern relations with animals. These can consist of the ways in which men and women are raised, remain faithful to the way of life and its principles, and acquire social

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<sup>23</sup>Berkes & Farvar, *ibid.* at 5.

<sup>24</sup>R.K. Nelson, "A Conservation Ethic and Environment: The Koyukon of Alaska" in N.M. Williams & E.S. Hunn, eds, *Resource Managers: North American and Australian Hunter-Gatherers* (Boulder: Westview Press, 1982) 211 at 221.

<sup>25</sup>*Ibid.* at 219.

<sup>26</sup>*Ibid.*

<sup>27</sup>Feit, *supra*, note 12.

<sup>28</sup>*Supra*, note 9 at 204-05.

<sup>29</sup>Berkes, *supra*, note 11 at 16.

recognition and enhanced status within the community. For example, as noted above, part of the Cree ethic is that everything that is killed must be used, and that killing for fun or sport is a transgression. Thus, young boys who kill small animals when they are learning to hunt make a gift of these animals to an old woman, who prepares them to be consumed by herself, the boy, or the whole family.<sup>30</sup>

The "hunting boss" is one example of a specific social institution in the operation of some Aboriginal management systems. A particular territory may be recognized as under the general control of a territory leader, who acts as the custodian and "hunting boss" for that territory. The territory is not "owned" but is "managed" by the boss. Such a figure adds authority to "taboos," promotes wise hunting practices, and makes possible the collection and dissemination of detailed knowledge about the resource.<sup>31</sup> For example, Cree "talley-men" maintain a fairly detailed inventory of the number of beaver lodges within their area (which could include 50 to 100 lodges), and the size and condition of the population of each lodge to determine the numbers that could be taken without depleting the resource.<sup>32</sup>

A crucial element of Aboriginal management systems is their communal nature.<sup>33</sup> The resources, and the accumulated knowledge necessary to manage them, are shared between family groupings for the benefit of the whole community. Management principles balance the needs of particular groups within the community and the collective good of all. For example, households are often allowed access to resources beyond the portions of the community's territories to which that household possesses a primary right of access. With the permission of the "boss" of another portion of the territory, they may harvest that portion if they follow the local rules. This provides for orderly redistribution to hunters of resources within any part of the community's traditional lands.

A clash between these communal systems and Western systems is evident with respect to communal resources. The conventional wisdom of Western resource-managers leads them to believe that where there are locally managed communal property resources a "tragedy of the commons"<sup>34</sup> situation will occur. That is, profit maximization and self-interest will overcome self-regulation, resulting in depletion of the resource. In this view "degradation and destruction was the inevitable fate of resources which were shared by all and which were poorly protected from various human impacts."<sup>35</sup>

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<sup>30</sup>*Ibid.* at 15.

<sup>31</sup>C. Scott, "Hunting Territories, Hunting Bosses and Communal Production Among James Bay Cree" (1986) *Anthropologica* (N.S.) 28 at 163.

<sup>32</sup>Feit, *supra*, note 21 at 78-79.

<sup>33</sup>See, e.g., *supra*, note 31.

<sup>34</sup>G. Hardin, "The Tragedy of the Commons" (1986) 162 *Science* 1243.

<sup>35</sup>F. Berkes & D. Feeny, "Paradigms Lost: Changing Views on the Use of Common Property Resources" (1990) 17 *Alternatives* 48 at 48. See, generally, Berkes & Farvar, *supra*, note 22.

The "tragedy" scenario has not been born out in Aboriginal management systems, largely due to the existence of an environmental ethic, a social system, and institutions resting on collective "ownership" and self-management principles. While arrangements vary from group to group, they are based on the principle of sustainability and balance between the good of households/families and the community as a whole in a context of self-regulation and social sanctions.<sup>36</sup>

Aboriginal ecological management systems are distinct and largely independent of the resource regulation systems derived from a modern Western state. Aboriginal ecological management systems are based on local knowledge and structures, and derive legitimacy from their traditional origins. As Feit noted,

Self-management systems do not depend on recognition by any other governmental or administrative authority for their existence or essential operation. They do not therefore depend on the delegation of responsibility or authority, nor on the legal recognition of rights to such practices by the courts, legislation or other legal instruments of the state; although each of these latter may compliment self-management and/or enhance the possibilities for the effective practice of self-management.<sup>37</sup>

The tendency of state regulation systems has been to ignore or even destroy local Aboriginal management systems. Government wildlife managers tend to assume that Native communities have no self-imposed rules to control human behaviour and ensure conservation of animals.<sup>38</sup> Usher notes that "at best, neither [the state nor indigenous self-management] system has held the other in very high regard, and more usually neither has acknowledged the other as having any legitimacy."<sup>39</sup>

The separation of government and Aboriginal environmental management systems seems to be diminishing as governmental, scientific and development-based national and international organizations are seeking to learn from Aboriginal environmental knowledge.<sup>40</sup> Increased recognition can be seen in "co-management," an institutional arrangement in which government agencies and those who use the resources enter into an agreement for a specific geographical area which makes explicit a system of rights and obligations, and shares decision-making power. Co-management is often offered as a means

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<sup>36</sup>Berkes & Farvar, *ibid.*

<sup>37</sup>Feit, *supra*, note 21.

<sup>38</sup>Osherenko, *supra*, note 22 at 93.

<sup>39</sup>Usher, *supra*, note 22 at 3.

<sup>40</sup>For examples of evolving experience in joint cooperation between non-Aboriginal researchers and indigenous experts see T.A. Andrews, "Selected Bibliography of Native Resource Management Systems and Native Knowledge of the Environment" in Freeman & Carbyn, eds, *supra*, note 11, 105; M.M.R. Freeman, "Graphs and Gaffs: A Cautionary Tale in the Common-Property Resources Debate" in Berkes, ed., *supra*, note 22, 92.

whereby federal and provincial governments and Aboriginal groups can work together on conservation.

Recent experiments in co-management provide hopeful but mixed results. They tend to arise in crisis situations involving a threat to a particular species or resource. The degree of power accorded to the participating groups varies. In many cases, Aboriginal participants have advisory capacity only, and the governmental agency remains the ultimate authority.<sup>41</sup>

Feit urges the further development of co-management concepts and practical structures, but also sees a need to confirm the authority of Aboriginal management systems through

some form of clear recognition that co-management arrangements themselves derive from the systems of knowledge and social rights of the groups agreeing to co-manage with the state, as well as from the legal system of the state.

While a co-management system is likely to be given legal force within the structures of the state, co-management which is capable of being recognized as legitimate and effective in the North will in most cases have to be based on and express forms of pre-existing management.<sup>42</sup>

He emphasizes the need to develop forms of co-management which: "effectively recognize the autonomy of self-managers, and their participation with equal authority, legal standing, resources and respect."<sup>43</sup>

Another means to affirm the authority of Aboriginal management systems is through some form of legal recognition. Some writers suggest that Aboriginal harvesting rights are a form of property right in the resource,<sup>44</sup> and that the legal concept of *profit à prendre* comes close to describing Aboriginal harvesting.<sup>45</sup> Careful consideration would need to be given to the implications of applying an approach based on property to the communal aspect of Aboriginal harvesting. However, the plausibility, utility and disadvantages of such an approach are beyond the scope of this paper.

Other means are available for providing legal recognition of a group right to harvest, and protecting Aboriginal management systems. In 1974 the U.S. Federal District Court in Washington ruled that a treaty which gave an Aborig-

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<sup>41</sup>For experiences with co-management in Canada and Alaska see, Osherenko, *supra*, note 22; E. Pinkerton, *Co-operative Management of Local Fisheries: New Directions for Improved Management and Community Development* (Vancouver: University of British Columbia Press, 1989).

<sup>42</sup>Feit, *supra*, note 21 at 85.

<sup>43</sup>*Ibid.*

<sup>44</sup>We use the term "resource" with some misgivings, because of the implication that the subject exists for the use of humans. However, there does not seem to be a readily acceptable alternative.

<sup>45</sup>G. Sutton, *Trappers' Rights* (Edmonton: Alberta Central Trappers Association and Native Outreach, 1980); Hutchins, *supra*, note 12; P.J. Usher & N.D. Bankes, *Property, the Basis of Inuit Hunting Rights — A New Approach* (Ottawa: Inuit Committee on National Issues, 1986).

inal group the right to fish implied a right to fifty percent of the catch, and the right to an extensive role in managing the harvest. The Court further committed itself to a lengthy supervisory process to ensure that the Aboriginal right to manage the harvest was respected.<sup>46</sup> Canadian courts have also recognized that a treaty right to fish gives the Aboriginal group the right to prevent environmental encroachments which would have the effect of destroying part of the fish habitat.<sup>47</sup> However, the legal nature of a group right to harvest remains largely unexplored in the Canadian legal context.

In the following sections we will argue that if the existing rights of Aboriginal peoples are properly recognized as group rights, substantial reinforcement of Aboriginal ecological management systems will follow.

### III. The Political Background of Aboriginal Group Rights

Canada is a liberal-democratic society, and therefore tends to see the individual person, equipped with legally enforceable rights, as the most important social, political and legal unit. There is a strong and principled resistance to the recognition of rights that belong to groups.<sup>48</sup> In a few cases, certain rights are accorded to individuals because they belong to a particular group, but there is great reluctance to accept that any group, as such, has rights apart from those belonging to the individuals forming it.

The liberal individualist view is the underlying basis of the *Constitution*. It is true that certain rights in the *Constitution*, such as language rights and Aboriginal rights, are quite commonly referred to as "group rights." However, these references are often used very loosely, or to mean only that members of the specified groups have special individual rights.

Our argument is that many of the Aboriginal and treaty rights recognized by s. 35(1) of the *Constitution* must be seen as group rights in a particular sense: rights that are independent of the individuals forming the group and that allow the group to undertake certain actions as a group.

We will begin by reviewing the nature of group rights and several examples of groups rights in the Canadian *Constitution*. This is followed by an argument that the political theory of liberal individualism is not the correct model

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<sup>46</sup>The extensive history of this litigation is the subject of F.G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986).

<sup>47</sup>*Claxton v. Saanichton Marina Ltd.* (1989), 36 B.C.L.R. (2d) 79 at 91-92, [1989] 3 C.N.L.R. 46 (C.A.) [hereinafter *Claxton*].

<sup>48</sup>According to Weaver, "[o]ne of the most pervasive forces underlying the federal government's resistance to aboriginal rights demands is its steadfast commitment to liberal-democratic ideology" (S. Weaver, "Federal Difficulties with Aboriginal Rights" in Boldt & Long, eds, *supra*, note 15, 139 at 142).

for Aboriginal rights. In Part IV, a number of legal grounds will be outlined for the position that s. 35(1) of the *Constitution* is best interpreted by a group rights theory. As well, we will flesh out the content of a group right. Finally, we will highlight some specific applications of a group rights model in the area of Aboriginal ecological management systems in reference to the Supreme Court of Canada's decision in *Sparrow*.

### A. *Group Rights and Individual Rights*

In the liberal tradition, the individual is the only entity that has intrinsic moral value. Consequently, individuals are the only entities who can have rights. Schwartz states that "[a]n unprovable axiom of my approach is that the only thing ultimately of moral concern is the conscious state of sentient beings."<sup>49</sup>

As a result of this premise, when liberals speak of group rights, they generally are describing an arrangement which nevertheless is based on individual rights. Sometimes this merely means that individuals have the right to freely associate in groups. Alternatively, the description may refer to a person who has certain individual rights because he or she is a member of a particular group. Such conceptions of "group" rights may be considered "derivative" since they describe rights arising from the individual. These schemas "accommodate group rights by regarding them as perfectly translatable into the harder currency of individual rights. ..."<sup>50</sup>

A useful example of "derivative" group rights exists in the minority language rights found in s. 23(1) of the *Canadian Charter of Rights and Freedoms*.<sup>51</sup> This section provides in part that

Citizens of Canada ... whose first language ... is that of the English or French linguistic minority population of the province in which they reside ... have the right to have their children receive primary and secondary school instruction in that language.

In a reference to the Manitoba Court of Appeal interpreting this section Mr. Justice O'Sullivan observed:

As to s. 23 conferring rights on minorities, I think I need do nothing more than quote from the words of one of the principal framers of the *Charter*, The Hon. P.E. Trudeau who ... said:

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<sup>49</sup>Schwartz, *supra*, note 4 at 40.

<sup>50</sup>R.R. Garet, "Communitality and Existence: The Rights of Groups" (1983) 56 S. Cal. L. Rev. 1001 at 1007; F. Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes" (1979) 27 Political Studies 421 at 438.

<sup>51</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

"In my philosophy the community, an institution itself, has no rights. It has rights by delegation from the individuals. You give equality to the individuals and you give rights to the individuals. Then they will organize in societies to make sure those rights are respected...."

The provisions of s. 23, in my opinion, are guarantees given to individuals even though they contemplate the exercise of the rights in group action.<sup>52</sup>

It is possible, however, to conceptualize "stronger" forms of group rights, in which the rights are not merely derivatives of individual rights. In one such model, the interests to be protected by rights are those of individual humans but those interests can only be protected by a group in which the individual is a member, and therefore only that group has legal rights.<sup>53</sup> In another model, the group itself has intrinsic moral worth and therefore it is appropriate to speak of the group as having rights.<sup>54</sup>

There is a serious tension between these stronger formulations of group rights and mainstream liberal theory. Much group rights theory is probably incompatible with the core of liberal theory.<sup>55</sup> However, we will examine a number of existing examples of rights in the Canadian constitutional system which appear to be group rights in the stronger sense, and we will show that a similar formulation for Aboriginal rights is plausible.

Although probably not directly applicable to the case of Aboriginals, the notion of a sovereign state is itself one example of group rights in the above sense. "When the state imposes taxes, breaks up a monopoly, requires attendance at school, or conscripts a person and sends him into battle, it is not exercising rights taken over from individuals, for they never had such rights."<sup>56</sup> The right to self-determination is another right existing in the state which belongs to the state as a group, and which cannot be described in individual terms.<sup>57</sup>

There are two examples within the Canadian constitutional structure of group rights (other than Aboriginal rights, which we will discuss later). One

<sup>52</sup>*Reference Re Public Schools Act (Man.)* (1990), 64 Man. R. (2d) 1 at 79 [hereinafter *Manitoba Reference*]. This section was subsequently addressed in *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 362, 364, 365, 369, [1990] 3 W.W.R. 97 without specifically considering whether the rights were rights of individuals or groups.

<sup>53</sup>V. Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought" (1982) 44 J. of Politics 21 at 24.

<sup>54</sup>Garet, *supra*, note 50 at 1001-02; J. Crawford, "The Rights of Peoples: Some Conclusions" in J. Crawford, ed., *The Rights of Peoples* (Ottawa: Clarendon Press, 1988) 159 at 163-66.

<sup>55</sup>For a general critique of group rights theory, see M. Tushnet, "Rights: An Essay in Informal Political Theory" (1989) 17 Pol. & Soc. 403, and M. Tushnet, "Law and Group Rights: Federalism as a Model" in A.C. Hutchinson & L.J.M. Green, eds, *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 277.

<sup>56</sup>*Supra*, note 53 at 24.

<sup>57</sup>*Ibid.* at 25-27.

such example is the existence of provinces, and the other is the package of denominational rights protected in s. 93 of the *Constitution Act, 1867*.<sup>58</sup>

A central reason for the Canadian state being formed into a federal system rather than a unitary state was to allow special rights for French-speaking Canadians. The provinces were created as holders of these rights, and these rights took the form of the provincial powers in s. 92 of the *Constitution Act, 1867*. These provincial powers are held collectively by the residents of the provinces.<sup>59</sup>

The other example of groups rights exists in s. 93 of the *Constitution Act, 1867*, which protects "any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union." These rights protect the separate school system including the right to a separately elected school board and the right to government revenues for those schools. They are thus rights pertaining to certain institutions rather than individuals, and indeed are rights which by their nature are not exercisable by individuals. These denominational group rights came under severe attack in the decades following 1867, and retained little force after a decision by the Privy Council in 1928.<sup>60</sup> However, the Supreme Court of Canada has recently overturned that decision in what one commentator has called "a legal triumph for constitutionally protected group rights."<sup>61</sup>

Thus there are several examples of group rights already existing in the Canadian constitution. There is no reason the concept cannot be workable in the Aboriginal context, even if the specific form turns out to be quite different than that of the existing instances of group rights.

### B. *Aboriginal Rights as Group Rights*

Aboriginal and treaty rights are often viewed as group rights in the weak sense, meaning special individual rights which are enjoyed by Indian persons

<sup>58</sup>30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) [hereinafter *Constitution Act, 1867*].

<sup>59</sup>F.L. Morton, "Group Rights Versus Individual Rights in The Charter: The Special Cases of Natives and the Quebecois" in N. Neville & A. Karnberg, eds, *Minorities and the Canadian State* (Oakville, Ont.: Mosaic Press, 1985) 71 at 71; R.M. Dawson, *The Government of Canada*, 5th ed. by N. Ward (Toronto: University of Toronto Press, 1990) at 26.

<sup>60</sup>*Tiny Roman Catholic Separate School Trustees v. R.*, [1928] A.C. 363, [1928] 2 W.W.R. 641.

<sup>61</sup>*Reference re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18. See, G. Bale, "Reference Re Funding For Roman Catholic High Schools — *Tiny* Convincingly Overruled But Equality Rights Needlessly Compromised" (1989) 11 Sup. Ct. L. Rev. 399 at 416. Note Bale's critical analysis of how judges' religious affiliation had affected their decisions and compare, in the context of Aboriginal group rights, J. O'Reilly, "The Courts and Community Values: Litigation Involving Native Peoples and Resource Development" (1988) 15 Alternatives 40. See generally, J.E. Magnet, "Minority-Language Educational Rights" (1982) 4 Sup. Ct. L. Rev. 195.



because they belong to the group identified as Indians. Hunting rights, for example, are usually seen as merely the right of an individual hunter to hunt without some of the restrictions that apply to non-Aboriginal hunters.

We will argue below that many Aboriginal rights, such as hunting rights, in fact are group rights in the strong sense. There is already some vague and general recognition of the true group nature of Aboriginal rights. For example, Mr. Justice O'Sullivan noted in the *Manitoba Reference* case that "[a]lthough the *Charter* did confer group rights on Indians and Métis and on denominational groups, there is no warrant for holding that the *Charter* otherwise conferred group rights on minorities."<sup>62</sup>

We will also argue that liberal individualist premises are not the appropriate principles for interpreting Aboriginal and treaty rights. This fundamental point will be enlarged first in terms of political theory, and then in Part IV based on legal grounds.

#### 1. Aboriginals and Liberal Individualism

Any political theory, such as the political theory of liberal individualism, serves a number of functions. It serves an explanatory and organizing purpose by attempting to provide a coherent and satisfying explanation for life experiences. In addition, it provides a guide for action, a system of ideals and goals that helps give direction to individual and group endeavors. The better suited a system is to fulfil these functions, the more likely it is to be adopted and sustained over time.

In that context, it is crucial to realize that liberal individualism has never been and is not a part of Aboriginal culture. The Aboriginal political tradition is one centred on communalism in which individuals do not have rights that can be used as "trumps." The environmental ethics reviewed earlier similarly do not encourage individuals to think of themselves as having "claims" against other persons and nature. An Aboriginal person's individual self-interest is not assumed to be distinguishable from the good of the tribe, or indeed of the environment.

Aboriginal communities did not experience oppression on the scale seen in European history, an oppression which gave such impetus to the development of individual rights. Aboriginal peoples never experienced feudalism or the tyranny of absolute personal authority.<sup>63</sup> Respect for individuals was maintained,

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<sup>62</sup>*Manitoba Reference*, *supra*, note 52 at 79. See also, generally, the dissenting judgment of O'Sullivan J.A. in *Manitoba Metis Federation Inc. v. A.G. Canada*, [1988] 3 C.N.L.R. 39 (Man. C.A.).

<sup>63</sup>M. Boldt & J.A. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" in Boldt & Long, eds, *supra*, note 15, 333 at 336; Svensson, *supra*, note 50 at 424.

but through an egalitarianism not based on rights, and through the systematic application of the ideal of consensus.<sup>64</sup>

The question therefore is whether native communities will adopt a liberal individualist political vision. Will they be incorporated into a liberal individualist culture? What are the ways in which this could happen? What happens if Aboriginal communities find the liberal individualist vision unacceptable?<sup>65</sup> Obviously, voluntary acceptance, after adequate consideration, is the most defensible manner for the adoption of a political theory (liberal individualist or otherwise).<sup>66</sup>

This question leads to a crucial distinction between Aboriginal peoples and "minorities." The existence of such a distinction is a hotly debated issue. Most theorists who consider the possibility of group rights treat the issue as a question of whether "minorities" should have such rights, frequently using Aboriginal peoples as the paradigmatic example of a minority.<sup>67</sup> In so doing, they ignore a fundamental distinction, which, generally speaking, that non-Aboriginal communities have consented to a liberal individualist political model or ideal, while Aboriginal groups have not.

Most minority groups in Canada are the result of immigration, itself a form of consent to the liberal individualist political structure. For many immigrants, such a political system was a major reason for entering Canadian society. For other immigrants, it was an acceptable condition of pursuing economic opportunity on this continent. Of course any minority group (or individual) is free to reject liberal individualism and attempt to convince others to change the political system, or to emigrate, but such a group or individual cannot claim that they have been politically compelled to live according to liberal individualist premises.

Aboriginal communities, on the other hand, have not in any comparable way consented to be part of a liberal individualist social structure. It might be argued that treaties signed between the Crown and various Aboriginal groups comprise such consent. However, the factual circumstances surrounding treaties simply do not allow them to be held up as some sort of consent to the liberal individualist ground-rules of European society. While the wording of many treaties refers to the Indians as "His Majesty's subjects," Aboriginals often saw this

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<sup>64</sup>Svensson, *ibid.* at 432; Boldt & Long, *ibid.* at 336-39.

<sup>65</sup>N. Glazer, "Individual Rights Against Group Rights" in E. Kamenka & A. Tay, eds, *Human Rights: Ideas and Ideologies* (London: E. Arnold, 1978) 87.

<sup>66</sup>It is important to remember throughout, that, unlike in a situation of apartheid, Aboriginal persons are at any time free to reject or abandon Aboriginal culture and assimilate into liberal individualist Canadian society.

<sup>67</sup>See, e.g., Van Dyke, *supra*, note 53 at 28-30; Svensson, *supra*, note 50 at 438; W. Kymlicka, "Liberalism, Individualism, and Minority Rights," in Hutchinson & Green, eds, *supra*, note 55, 181.

as of little practical significance. The facts surrounding various treaties differ, but there are numerous examples of Aboriginals insisting on preservation of the central aspects of their way of life. For example, on the occasion of one band's signing of Treaty 9,<sup>68</sup> as recorded by the official report signed by the Treaty Commissioners,

Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.

On being informed that their fears were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter among themselves .... The next morning ... the chief spoke, stating that ... they were prepared to sign, as they believed that nothing but good was intended.<sup>69</sup>

The Supreme Court of Canada has recently reviewed the context in which certain treaties were made and commented on the expectations of the parties:

An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based upon those hunting rights. It can be seen that the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping and fishing throughout the tracts surrendered."<sup>70</sup>

The treaties therefore cannot be seen as some form of consent to a new, individualist way of life. Indeed, opting for an individualist approach was never an issue in the negotiations.

The distinction between Aboriginal and non-Aboriginal communities, based on a conception of consent or acceptance, means that it is plausible to allow group rights for Aboriginals but not for other non-Aboriginal groups. It is not necessary to develop theories about how, "within liberalism," it is possible to identify and distinguish groups that are deserving of group rights from groups that are not so deserving. Recognition of Aboriginal group rights does not necessarily mean that "a Pandora's box has been opened from which all sorts of

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<sup>68</sup>*The James Bay Treaty: Treaty No. 9* (Ottawa: Government Printing Bureau, 1906).

<sup>69</sup>*Ibid.* at 5.

<sup>70</sup>*R. v. Horseman*, [1990] 1 S.C.R. 901 at 928, [1990] 3 C.N.L.R. 95 at 100. The Court went on to find that treaty rights had subsequently been unilaterally abridged by the federal government in 1930. See also R. Price, ed., *The Spirit of the Alberta Indian Treaties* (Toronto: Butterworth, 1979); R. Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1975).

groupings might spring, demanding rights.”<sup>71</sup> On the other hand, the failure to recognize that Aboriginals are in a unique position distinct from “minorities” may have that result.

It is of course possible to think that Aboriginal groups can come to adopt liberal individualism by compulsion rather than by voluntary acceptance, or through some combination of the two. Much of historical Canadian Indian policy was based on such an assumption. However, a judicial interpretation of s. 35(1) of the *Constitution* using liberal individualist premisses, when such premisses have not been accepted by Aboriginals, would also amount to compulsion. In such a case, the relevant decisions would be in the hands of non-Aboriginal judges. Such court decisions, for example decisions involving hunting and fishing rights, would affect the basic ground rules for the everyday life of many Aboriginal groups, and would be implemented with force, if necessary.

There are those who maintain that it is legitimate for the Canadian state to impose liberal individualist premisses upon Aboriginals.<sup>72</sup> There obviously would be some irony in the imposition of “freedom of choice.” However, such a position to some degree inevitably follows from the emphasis on individual freedom, above all.

One also must ask whether the imposition of liberal individualism through s. 35(1) would be successful. Certainly, proponents of that position might reasonably assume that such imposition could be maintained for a lengthy period. However, a review of the historical experience with such policies does not hold much hope for its success.

A historical review of past attempts to assimilate Aboriginals serves two purposes. First, it clearly establishes that Aboriginals did not live according to liberal individualist assumptions. Secondly, it demonstrates the extreme difficulty in imposing such a world view, and suggests the futility, or at least the riskiness, of such an attempt.

A clear cycle occurred in Canadian history, stretching over a period of a hundred years, in which state coercion was consistently applied in an attempt to incorporate Aboriginals into a liberal society. The duration and intensity of the compulsion may well have exceeded the attempt to impose communism on Eastern Europe. Nevertheless, when the question was finally explicitly put to Aboriginal societies in 1969, the rejection of liberal individualism was unequivocal.<sup>73</sup> The 1982 constitutional amendment was the first step down a different

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<sup>71</sup>Van Dyke, *supra*, note 53 at 31-32. Van Dyke tries to avoid this Pandora's box by providing criteria for identifying groups deserving of rights as a group.

<sup>72</sup>Schwartz, *supra*, note 4 at 40.

<sup>73</sup>See, generally, S.M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

road. Although the s. 15 equality provisions of the proposed constitution guaranteed them freedom from discrimination as individuals, Aboriginal groups fought for and achieved further recognition of their rights as "peoples."

## 2. The Attempted Imposition of Liberal Individualism

The attempted imposition of liberal individualism onto Aboriginal peoples was part of an explicit, comprehensive government policy in place as early as 1850. It was centrally administered in an active and determined manner, and backed by legal sanctions. The policy had a number of aspects. The approach was gradualist, and claimed to protect Indians from white exploitation while it took effect, but it was never doubted that the ultimate goal was assimilation. Education was one of the elements of the policy, used to wean younger individuals away from their culture. Central social features of Aboriginal cultures were prohibited. Incentives were put in place to induce potential leaders to abandon Aboriginal culture. Meanwhile, political representation of traditional viewpoints was prevented and prohibited, as was the use of lawyers to directly enforce such legal rights as Aboriginal peoples possessed.

The assimilationism of Indian policy was explicit throughout. Indian Commissioner Hayter Reed reported in 1889 that, "[t]he policy of destroying the tribal or communist system is assailed in every possible way and every effort made to implant a spirit of individual responsibility, instead."<sup>74</sup>

Duncan Campbell Scott, who negotiated a number of treaties on behalf of the federal government, and who for decades was the leading architect of Canadian Indian policy (including the years 1913 to 1932 when he was Deputy Superintendent of Indian Affairs) wrote in 1914 that:

[t]he happiest future for the Indian race is absorption into the general population, and this is the object of policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.<sup>75</sup>

In 1920, Scott addressed a parliamentary committee regarding proposed legislation which would allow him unilaterally to strip an Indian of Indian status:

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point ... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department, and that is the whole object of this Bill.<sup>76</sup>

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<sup>74</sup>J. Leslie & R. Maguire, eds, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Treaties & Historical Research Center, Indian & Northern Affairs, 1978) at 89.

<sup>75</sup>E.B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 34.

<sup>76</sup>Leslie & Maguire, *supra*, note 74 at 114.

Education was a major tool in this program. Indian Commissioner Hayter Reed, in implementing the plans for residential schools, instructed in 1889 that:

every effort should be directed against anything calculated to keep fresh in the memories of children habits and associations which it is one of the main objects of industrial institutions [residential schools] to obliterate.<sup>77</sup>

In 1894 regulations were passed to compel Indian attendance at school.<sup>78</sup> Residential schools were favoured because, as Deputy Superintendent Frank Pedley observed in 1903, they secured "the removal of the pupils from the retrogressive influence of home life."<sup>79</sup>

Important Aboriginal cultural practices were prohibited as part of the overall program of assimilation. In 1884, the *Indian Act*<sup>80</sup> was amended to make the potlatch and certain dances subject to a prison sentence. Potlatches were community gatherings in which a host distributed gifts, often in very substantial quantities, with elaborate ritual and ceremony. Missionaries saw them as pagan and immoral occasions. However, another important factor in their prohibition was that "the Victorian idea of progress, which encouraged the individual accumulation of material goods, was the direct antithesis of the values implicit in the potlatch."<sup>81</sup> On the prairies, traditional dance festivals were seen as incompatible with farming because they took time away from the harvest. To discourage participation in these festivals, Indians were prevented from leaving their reserves unless they received a special pass from the Indian agent.<sup>82</sup>

Another part of the overall strategy was to induce leading Indian individuals to abandon their culture. This occurred mainly through "enfranchisement," in which an Indian relinquished Indian status and became a citizen.<sup>83</sup> As early as 1857, the *Act for the Gradual Civilization of the Indian Tribes in the Canadas*<sup>84</sup> specified that an adult male Indian who was of good character and fluent in English or French would be eligible for enfranchisement, and as an inducement, could be offered up to fifty acres of the Band's reserve land in fee simple and a share of band funds.<sup>85</sup> Enfranchisement of an Aboriginal against his or her will was authorized by legislation for the periods 1920-1922 and 1933-1951.<sup>86</sup>

<sup>77</sup>Titley, *supra*, note 75 at 78.

<sup>78</sup>Leslie & Maguire, *supra*, note 74 at 97.

<sup>79</sup>Titley, *supra*, note 75 at 76. See generally, C. Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988).

<sup>80</sup>R.S.C. 1985, c. I-5 [hereinafter *Indian Act*], previously R.S.C. 1952, c. 149.

<sup>81</sup>Titley, *supra*, note 75 at 163.

<sup>82</sup>*Ibid.* at 165.

<sup>83</sup>S. Imai & K. Laird, "The Indian Status Question: A Problem of Definitions" (1982) *Can. Legal Aid Bulletin* 113 at 115.

<sup>84</sup>S.C. 1857, c. 26, ss I, VII, X.

<sup>85</sup>Titley, *supra*, note 75 at 4.

<sup>86</sup>Leslie & Maguire, *supra*, note 74 at 115, 124, 151.

When the legislation for forcible enfranchisement was introduced, Scott wrote that the purpose was,

that [Indians] may eventually be merged in the general body of citizenship. If this in any way conflicts with the aspirations of Indians whose faces are set against ultimate destiny, it can only be regretted.<sup>87</sup>

While this massive assimilation effort was being implemented, Indians were denied any method by which they could use the political process to resist. Indians were not allowed to vote in federal elections until 1960.<sup>88</sup> More importantly, the formation of Indian associations for political purposes was stifled, by means including the passage of legislation for that very purpose.

The official response to efforts by Indian activist F.O. Loft is an example. Loft's political efforts were an important early challenge to official policy. Loft began organizing the "League of Indians of Canada" in 1918 as a national Indian political body. Scott soon began using his staff to spy on and discredit Loft, and instigated a police investigation with the intention of finding some pretence for the laying of criminal charges. When Loft began having unprecedented political success, Scott in 1920 initiated the process to have Loft enfranchised against his will. The process was never completed, due to changes in the legislation.<sup>89</sup>

Similarly, when the tribes of the Iroquois Confederacy in the Great Lakes area, known collectively as the Six Nations, carried out a sustained and effective campaign in the 1920's for recognition of the sovereignty they had never formally relinquished, including a high profile appeal to the League of Nations which severely embarrassed Canada,<sup>90</sup> Scott's response was to obtain an Order-in-Council unilaterally abolishing the traditional hereditary council and imposing an elected council.<sup>91</sup> The resulting elections were boycotted by a majority of the constituents, resulting in a compliant council, whose meetings were presided over by the local Indian superintendent.<sup>92</sup>

In 1914, the Allied Tribes of British Columbia was formed as an organization of coastal and interior Indians primarily to advance the land claims of British Columbia Indians. The organization began a highly effective lobbying effort. Eventually, a joint committee of the Senate and House of Commons was created to investigate the claims. However, the committee's report concluded that the entire issue of the land claims was attributable to the "mischievous" agi-

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<sup>87</sup>Letter From Scott to David S. Hill (11 June 1921) as cited in Titley, *supra*, note 75 at 116.

<sup>88</sup>*Canada Elections Act*, S.C. 1960, c. 39, s. 14. Compare *Canada Elections Act*, R.S.C. 1952, c. 23, ss 14(2)(e) & 14(4).

<sup>89</sup>*Supra*, note 75 at 105.

<sup>90</sup>See, *ibid.*, c. 7.

<sup>91</sup>*Ibid.* at 126.

<sup>92</sup>*Ibid.*

tation by “designing white men” such as the legal counsel for the Indians.<sup>93</sup> The result was the adoption of s. 141 of the *Indian Act*, which prohibited the solicitation or collection of funds from Indians in order to pursue claims on their behalf, a prohibition which was in effect from 1927 to 1951.<sup>94</sup>

While being denied input through the political process, Indians were also prevented from litigating, or even investigating their legal rights. On one occasion Scott instructed his staff to investigate lawyers hired by the Six Nations and stated that “[w]hat I want to do is to squelch these gentlemen at the start.”<sup>95</sup> He also sought to have another lawyer advising the Six Nations deported.<sup>96</sup> On occasion, the government refused to allow Bands to use Band funds to hire lawyers.<sup>97</sup>

This combination of educational, cultural, political and legal measures represented a textbook example of imposition of the values embodied in the political theory of liberal individualism. There were almost no limits on the measures which were available to ensure that the dominant ideology was accepted. Success ought to have been assured. However, that was not to be.

### 3. The Rejection of Liberal Individualism

In 1969, the Liberal government of Prime Minister Trudeau began a major revision of Indian policy, which laid out the full liberal individualist programme, while at the same time creating a consultation process so that the Indian community had the opportunity to respond. The *Statement of the Government of Canada on Indian Policy, 1969*,<sup>98</sup> known as the White Paper, asserted that “[t]his Government believes in equality. It believes that all men and women have equal rights.” It further stated that “the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.” Aboriginal land title was rejected as a basis for claims.<sup>99</sup> In defending the White Paper, Prime Minister Trudeau stated that “the time is now to decide whether the Indians will be a race apart in Canada or whether it [*sic*] will be Canadians of full status.”<sup>100</sup>

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<sup>93</sup>*Ibid.* at 156.

<sup>94</sup>*Ibid.* at 157.

<sup>95</sup>*Ibid.* at 117.

<sup>96</sup>*Ibid.* at 130.

<sup>97</sup>*Ibid.* at 96 and see *Chisholm v. R.*, [1948] 3 D.L.R. 797, [1948] Ex. C.R. 370.

<sup>98</sup>Department of Indian Affairs & Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen’s Printer, 1969).

<sup>99</sup>Weaver, *supra*, note 73 at 167.

<sup>100</sup>The speech is reproduced in P.A. Cumming & N.H. Mickenberg, eds, *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada in Association with General Publishing, 1972) at 331.



The White Paper was strongly rejected by Indian leaders. An important cause for complaint was that the radical nature of the White Paper came as a surprise and did not reflect the consultation process. However, the substance of the White Paper was also clearly unacceptable. The National Indian Brotherhood, the major national Indian organization, declared that the White Paper would lead to "the destruction of a Nation of People by legislation and cultural genocide."<sup>101</sup> According to Weaver,

[t]he White Paper became the single most powerful catalyst of the Indian nationalist movement, launching it into a determined force for nativism — a reaffirmation of a unique cultural heritage and identity. Ironically, the White Paper had precipitated 'new problems' because it gave Indians cause to organize against the government and reassert their separateness, precisely the results Davey [Trudeau's adviser] had tried to avoid.<sup>102</sup>

Not long thereafter, Indian leader George Manuel felt moved to announce that

[a]t this point in our struggle for survival, the Indian peoples of North America are entitled to declare a victory. We have survived.<sup>103</sup>

When Trudeau's government initiated a new constitutional amendment process in 1980, the native communities began organizing to obtain separate constitutional recognition. Their goal was clearly to ensure group rights. The submissions of all three national Aboriginal organizations to the Special Joint Committee studying constitutional amendment included a proposed section which stated that "[W]ithin the Canadian federation, the Aboriginal peoples of Canada shall have the right to self-determination" and which committed all levels of government to negotiate constitutional rights in a number of fields "so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada."<sup>104</sup> Thus, despite a century of subjection to liberal individualist policies, Aboriginal groups remained determined to find an alternative solution.<sup>105</sup>

What can be concluded from this history? A legal interpretation of s. 35(1) based on liberal individualist premises conflicts with existing Aboriginal reali-

<sup>101</sup>Weaver, *supra*, note 73 at 174.

<sup>102</sup>*Ibid.* at 171.

<sup>103</sup>Haig-Brown, *supra*, note 79 at 132.

<sup>104</sup>D.E. Sanders, "Aboriginal Peoples and the Constitution" (1981) 19 *Alta. L. Rev.* 410 at 422. The three organizations were the National Indian Brotherhood, the Native Council of Canada, and the Inuit Tapirisat.

<sup>105</sup>However, according to a former assistant deputy minister of Indian Affairs and Northern Development writing in 1984, "the Canadian government is still deliberately and systematically committed to implementing its 1969 White Paper proposals" (D. Nicholson, "Indian Government in Federal Policy: An Insider's Views" in L. Little Bear, M. Boldt & A. Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 59 at 60).

ties. It is doubtful whether such an interpretation, when implemented as law, will be capable of responding to social needs in the long run.

#### IV. Legal Recognition of Aboriginal Group Rights in S. 35(1)

##### A. *The Legal Basis for Aboriginal Group Rights*

There are a number of legal grounds for concluding that the most accurate interpretation of the s. 35(1) constitutional affirmation of Aboriginal and treaty rights is anchored in group rights. We will argue that the prevailing statutory structure governing such rights, the legal concepts of Aboriginal rights recognized by the courts, and the text of s. 35(1) provide such grounds.

##### 1. The Existing Legislative Structures

An examination of the legal structure applied to Indian peoples confirms that their rights have been recognized as group rights. The *Royal Proclamation* of 1763,<sup>106</sup> while not legislation, has been recognized as having the force of legislation and represents one of the first bridges between the Aboriginal and English legal systems. The *Royal Proclamation* recognized certain lands as Indian territories and provided that lands in those territories could only be purchased from Indians consenting as a group "at some public Meeting or Assembly of the said Indians."<sup>107</sup>

The system created by the *Indian Act*, which was imposed even in the absence of a treaty, is based in part on the group nature of rights held by Aborigines. The system established for reserves is an example. The *Indian Act* provides in s. 2(1) that a reserve is "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." A "band" is (in part) defined as "a body of Indians. ..."

An individual member of a Band derives very few individual rights from the reserve. He or she does not have, as a matter of right, the option to reside on the reserve unless the Band Council specifically grants that right. In fact, the individual can be barred from entering the reserve by the Council.<sup>108</sup> Furthermore, since electoral status depends on residence on the reserve (s. 77) the individual Band member also is not guaranteed the right to vote in elections of the Band's chief and council. Similarly, a non-resident is not entitled to vote on whether some or all of the reserve should be surrendered to the Crown (s. 39). Thus, even important individual political rights with respect to the reserve are subordinate to the collective will. Such a structure cannot easily be explained

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<sup>106</sup>Reprinted in R.S.C. 1985, App. II, No I [hereinafter *Royal Proclamation*].

<sup>107</sup>*Ibid.*

<sup>108</sup>*Joe et al. v. Findlay et al.*, [1981] 3 W.W.R. 60, 122 D.L.R. (3d) 377 (C.A.).

by a theory of individual rights, or of group rights seen as derivative of individual rights.

## 2. The Prevailing Legal Concepts

There is comparatively little discussion in decided cases of the group nature of Aboriginal and treaty rights. One important factor for such lack of discussion, at least in the area of hunting, fishing and trapping rights, is that for many decades the issues have been litigated as a result of charges laid against particular individuals. While the result was that issues regarding group rights were not brought into focus, the cases do lend support to the claim that Aboriginal and treaty rights include rights of the group.

The group nature of treaty rights was an issue in *R. v. Pawis*,<sup>109</sup> an action brought by a number of individual Indians to enforce a treaty. The issue of whether an individual could take action on the treaty was raised. The court concluded that:

Although each individual Ojibway Indian was to benefit from the Treaty, it seems to me that the language used therein precludes the idea that each individual was a party to the contract and had therefore the status to sue personally and individually for an alleged breach thereof. Since the Treaty was negotiated and entered into with the Ojibway Indians taken as a group, it seems to me that an action based on the Treaty, alleging breach of the promise subscribed therein toward the group, could only be instituted by the contracting party itself, that is to say, the group.<sup>110</sup>

The manner in which the concept of Aboriginal title became legally recognized in Canada is in itself evidence of the group nature of the rights. Mr. Justice Judson stated in the groundbreaking Canadian case, *Calder v. A.G. British Columbia*:

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the *Proclamation of 1763*, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ...<sup>111</sup>

Clearly, an important factor in the court's mind for recognizing Aboriginal rights was that Aboriginal peoples were living in "organized ... societies."<sup>112</sup>

<sup>109</sup>(1979), [1980] 2 F.C. 18, 102 D.L.R. (3d) 602 (T.D.).

<sup>110</sup>*Ibid.* at 30; But see the remarks of Mahoney J. in *R. v. Blackfoot Band of Indians*, [1982] 4 W.W.R. 230 at 238, 3 C.N.L.R. 53 (F.C.T.D.) [hereinafter *Blackfoot Band*]. However, the sole issue in *Blackfoot Band* was whether a treaty benefit should be distributed *per capita*, or *per stirpes*. In fact, either mode of distribution would have been consistent with a group rights theory of the treaty. See also G.S. Lester, "Do Treaty Indians Have a Corporate Personality? A Note on the Pawis, Blackfoot, and Bear Island Cases" [1990] 1 C.N.L.R. 1. Lester argues that a treaty has the effect of incorporating the Aboriginal group by Royal Prerogative.

<sup>111</sup>[1973] S.C.R. 313 at 328, 34 D.L.R. (3d) 145 [hereinafter cited to S.C.R.].

<sup>112</sup>*Ibid.*

One would expect that rights recognized because Aboriginals were "organized in societies" would be primarily group rights rather than individual rights. In *Sparrow* the Supreme Court has recognized this in a general way, observing that "[f]ishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group."<sup>113</sup>

### 3. The Text of S. 35(1)

The rights recognized in s. 35(1) are referred to as rights of "peoples." The word "peoples" is used in the *Constitution Act, 1982* only with respect to Aboriginal peoples. All other rights are variously ascribed to "everyone,"<sup>114</sup> "every citizen,"<sup>115</sup> "any person,"<sup>116</sup> "every individual,"<sup>117</sup> "any member of the public"<sup>118</sup> and "citizens of Canada."<sup>119</sup> Is the term "peoples" of legal significance?

It could be argued that the term does not necessarily have any special significance and can be given an individualist interpretation, equivalent to "Aboriginal persons," in line with other references in the *Constitution*. This objection ultimately is not convincing. The very uniqueness in the *Constitution* of the term "peoples," and the fact that it is used repeatedly but only with respect to Aboriginals, suggests a special meaning.<sup>120</sup> The word "peoples" itself suggests a group. S. 35(2) states that "aboriginal peoples of Canada includes the Indian, Inuit and Metis peoples of Canada," a rather bizarre wording if individual persons was the intended meaning.

It could also be argued that the reference to "persons" in s. 35(4) demonstrates that the rights referred to in s. 35(1) are those of individuals.<sup>121</sup> However, s. 35(4) is clearly intended as a qualification of s. 35(1). Had "persons" been intended, it surely would have been employed in the primary wording of s. 35(1). Furthermore, as noted earlier, it is probably the case that some Aboriginal rights are individual rights, and this subsection simply means that such individual Aboriginal rights are guaranteed equally, while Aboriginal group rights must be administered impartially as between genders.

The term "peoples" occurs nowhere else in Canadian law, and there is therefore little domestic assistance in fleshing out the concept. However, the

<sup>113</sup>*Supra*, note 7 at 182.

<sup>114</sup>*E.g.*, *Charter*, ss 2, 11 & 12.

<sup>115</sup>*E.g.*, *ibid.*, ss 3 & 6.

<sup>116</sup>*E.g.*, *ibid.*, s. 11.

<sup>117</sup>*E.g.*, *ibid.*, s. 15.

<sup>118</sup>*E.g.*, *ibid.*, s. 20.

<sup>119</sup>*E.g.*, *ibid.*, s. 23.

<sup>120</sup>The term "peoples" is also applied to Aboriginals in ss 25 and 37.1(2) of the *Constitution*.

<sup>121</sup>S. 35(4) states that "[n]otwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

term as a legal concept is commonly used in international law and its meaning in that context is relevant to the interpretation of s. 35(1) as a group right.

This reference to international law may be met with certain objections. It could be argued that reference to international law is precluded by the word "existing" in s. 35(1) since that word would prevent any reference to international law which would add to existing Aboriginal and treaty rights. However, as argued by McNeil and Slattery, the fact that a right has not been specifically recognized does not mean that it did not previously exist. Furthermore, the word "existing" should not be interpreted to mean that the evolution of an existing right is arrested.<sup>122</sup>

Secondly, it could be objected that international law is simply not relevant since it is not clear, as a matter of international law, that Aboriginals have been recognized as "peoples."<sup>123</sup> However, it does not follow that the concepts or general obligations of international law relating to "peoples" are irrelevant. In 1976, Canada ratified the *International Covenant on Civil and Political Rights*<sup>124</sup> and the *International Covenant on Economic, Social and Cultural Rights*,<sup>125</sup> both of which provide specific rights to "peoples."<sup>126</sup> These Covenants are relevant as aids to interpreting domestic law.

As a general rule, international law obligations such as those of the Covenants do not have the force of law within Canada unless they are implemented by domestic legislation.<sup>127</sup> Consideration is therefore required as to whether s. 35(1) has the effect of implementing the Covenants so as to make those conventions part of the law of the land. There are good reasons to think that s. 35(1) has that effect. The drafters of s. 35(1), who surely were aware of Canada's obligations under the International Covenants, likely departed from the more individualistic words used elsewhere in the Act for that reason.

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<sup>122</sup>K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct L. Rev. 255 at 259; B. Slattery, "The Hidden Constitution: Aboriginal Rights In Canada" (1984) 32 Am. J. of Comp. Law 361 at 378. In *Sparrow, supra*, note 7 at 1091-94, the Supreme Court rejected the argument that existing rights had been frozen according to the regulations in force in 1982 and stated, "[e]xisting suggests that those rights are affirmed in a contemporary form rather than in their primieval simplicity and rigour."

<sup>123</sup>R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 Am. J. Int. L. 369; see also R.L. Barsh, "Indigenous North America and Contemporary International Law" (1983) 62 Ore. L. Rev. 73 at 80.

<sup>124</sup>19 December 1966, 999 U.N.T.S. 171, No. 14668, Annex to GA Res. 2200A, 21 U.N. GAOR, Supp. No. 16, p. 49, U.N. Doc. A/6316 (1966).

<sup>125</sup>16 December 1966, 993 U.N.T.S. 3, No. 14531, Annex to GA Res. 2200A, 21 U.N. GAOR, Supp. No. 16, p. 52, U.N. Doc. A/6316 (1966).

<sup>126</sup>M. Cohen & A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265 at 285; Y. Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 Int. & Comp. L.Q. 102 at 106.

<sup>127</sup>Cohen & Bayefsky, *ibid.* at 294.

However, even assuming that s. 35(1) does not have the effect of implementing the Covenants, and the Covenants are thus not formally part of internal Canadian law, a rule of construction of statutes which states that Parliament and the legislatures are presumed not to intend to act in violation of Canada's international legal obligations is potentially applicable.<sup>128</sup> An interpretation of s. 35(1) which is consistent with the international rights of "peoples" would thus be superior to one which was not.<sup>129</sup>

If international law is relevant, what does it tell us about the rights of "peoples?" The first and still the clearest right of peoples in international law, as stated in both International Covenants, is that "[a]ll peoples have the right to self-determination."<sup>130</sup> However, the actual meaning of the right to self-determination in international law is highly contentious.<sup>131</sup> Some assert that the right necessarily includes the right to form a sovereign nation, if desired.<sup>132</sup> Others argue for a much more limited content. For example, at a recent seminar organized by the United Nations Working Group on Indigenous Populations, representatives of the Canadian government argued that self-determination, in an external sovereignty sense, does not apply in international law to enclave populations within non-colonial states, but agreed that "practical forms of self-government within the framework of the state" are necessary and possible.<sup>133</sup>

It is beyond the scope of this paper to explore the specific content of the right to self-determination, but it can hardly be denied that it is a group right. Indeed, the United Nations Human Rights Committee has rejected applications brought by individuals claiming a violation of self-determination.<sup>134</sup>

In summary, a consideration of the text of s. 35(1) suggests that the "aboriginal and treaty rights" protected therein are group rights rather than individual rights. Consideration of international law points to these s. 35(1) rights as including the right to self-determination. However, whether or not s. 35(1)

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<sup>128</sup>*Ibid.* at 295.

<sup>129</sup>It is arguable that this presumption is possible only if the statute under consideration is, on its face, ambiguous. Whether or not there is such a precondition, the use of the term "peoples" would appear to be ambiguous. S. 35(1) therefore seems an appropriate subject for application of the rule of construction. *Ibid.* at 298.

<sup>130</sup>Dinstein, *supra*, note 126; Crawford, *supra*, note 54 at 164.

<sup>131</sup>D. Makinson, "Rights of Peoples: Point of View of a Logician," in Crawford, ed., *supra*, note 54, 69 at 73-76, 85-86; G. Nettheim, "'Peoples' and 'Populations' — Indigenous Peoples and the Rights of Peoples" in Crawford, ed., *supra*, note 54, 107 at 118.

<sup>132</sup>R.L. Barsh, "Indigenous Peoples and the Right to Self-determination in International Law" in B. Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney, Australia: Law Book, 1988) 68 at 71.

<sup>133</sup>E.-I.A. Daes, "On the Relations between Indigenous Peoples and States" (1989) 11 *Without Prejudice* 41 at 48.

<sup>134</sup>Crawford, *supra*, note 54 at 164-65.

rights include the right of self-determination, international law concepts strongly suggest that “peoples” rights are group rights.

### *B. The Content of Aboriginal Group Rights*

Certain conclusions follow when a right exists in a group, rather than in individuals. First, acceptance of a group as a bearer of rights implies recognition of certain specific rights in that group. We call this the principle of “necessary rights.” For example, the right to exist as a group, or to put it another way, the right to preserve itself.<sup>135</sup> Secondly, the group to which the right is attached has the authority and inevitably bears the political responsibility for administering that right as between the members of the group. This is the principle of “internal authority.” Thirdly, the exercise of the group right must be coordinated with persons or other groups who are not members of the group. This is the principle of “external relations.”

These three principles of group rights can be applied to Aboriginal rights in many contexts. We will briefly explore these principles in the context of hunting, fishing and trapping rights. This particular area is chosen as an example because of its centrality to Aboriginal history and to environmental relations. It is probable that these principles apply as well to other areas of native law.

#### 1. Necessary Rights

Johnston has argued that a corollary to the existence of Aboriginal group rights is the right of group self-preservation. She applies this principle to reserve lands, arguing that because of the central role that reserve lands play in the preservation of Aboriginal groups, the federal government’s power under the *Indian Act* to expropriate reserve lands conflicts with this basic group right.<sup>136</sup>

Similarly, there are many situations where hunting, fishing or trapping practices are essential to Aboriginal identity as a separate group. The preservation of those practices would then be included in the right of group self-preservation. The idea that hunting is essential to “Indianness” is not a novel one. The concept has been accepted by the courts in a somewhat different context, dealing with the federal/provincial division of powers. In *R. v. Dick*, Mr. Justice Lambert of the British Columbia Court of Appeal opined, in dissent, that

killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the Alkali Lake Band. It is at the centre of what they do and what they are. ...<sup>137</sup>

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<sup>135</sup>D.M. Johnston, “Native Rights as Collective Rights: A Question of Group Self-Preservation” (1989) 2 Can. J. L. & Juris. 19 at 34.

<sup>136</sup>*Ibid.* at 32.

<sup>137</sup>(1983), 3 C.C.C. (3d) 481 at 491, [1983] 2 C.N.L.R. 134, aff’d [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55 [hereinafter *Dick* cited to C.C.C.].

I think it is worth adding that I have derived some sense of the nature of Indianness from the fact that the Indians in Alberta, Saskatchewan and Manitoba have the right to hunt and fish for food at all seasons of the year. ... I think that those rights are characteristics of Indianness, at least for those Indians ...<sup>138</sup>

It may be necessary to develop principles that recognize other aspects of "Indianness" protected as part of the group rights in s. 35(1). Obviously, this would be a complicated and difficult task. Nevertheless, s. 35(1) requires the court to undertake such an enterprise, particularly in the areas of hunting, fishing and trapping.

## 2. Internal Authority

Our review of Indian ecological management systems demonstrated that group administration of Aboriginal hunting, fishing and trapping survives and operates effectively. Consequently, the principle of internal authority seems naturally and easily applicable. S. 35(1), properly understood, protects these time-honoured systems as part of the group right. Such recognition has a number of implications.

A crucial first step is coming to terms with the unwritten nature of Aboriginal ecological management systems. Furthermore, these systems are not governed by Western practices of "positive" law, in which a clearly definable authority issues specific rules. Therefore, Canadian legal institutions, including legislatures, courts, and administrative tribunals, will be required to demonstrate the willingness and flexibility to recognize a different system of law.

Zion has pointed out the analogy between Aboriginal systems of norms and the English common law, which Blackstone defined as a collection of "maxims and customs" of antiquity.<sup>139</sup> However, searching out the "Indian common law" requires diligence and sensitivity. Such common law is not found in reported cases. As Zion noted:

The infrastructure is important because it is the law. The religious outlook [animism, or a holistic relationship to the environment] and the interlocking pattern of families and Elders constitute the court, the flow of law. Legal relationships are family and religious relationships, and the law operates in accordance with the structure found.<sup>140</sup>

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<sup>138</sup>*Ibid.* at 493. Lambert J.A., in dissent, took note of the fact that "[t]he meat was shared out among Band members in accordance with the institutional practices of the Shuswap People" (*supra* at 490). The Supreme Court of Canada spoke approvingly of his views, although it decided the case on a different point (see *supra*).

<sup>139</sup>J.W. Zion, "Searching for Indian Common Law" in B.W. Morse & G.R. Woodman, eds, *Indigenous Law and the State* (Holland: Foris Publications, 1988) 121 at 124-25.

<sup>140</sup>*Ibid.* at 128.



Identifying Aboriginal law, therefore, has many practical implications. Evidentiary rules may have to be changed to allow elders to testify directly as to the norms which govern situations. Judicial bodies will have to learn to understand and recognize community decisions reached in a consensual process. The courts will have to recognize that internal authority may be administered without using the discourse of individual "rights." Some of these changes will require legislation.

Alternatively, it may be possible for Aboriginal societies to codify the norms and practices of traditional ecological management. Grant describes the long consultative process through which the Gitksan and Wet'suwet'en peoples of British Columbia codified their traditional fishery management practices. For example, they adopted their own definition of law:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force, ostracism or shame by an individual or group possessing a socially recognized privilege of so acting.<sup>141</sup>

Fishing by-laws such as those adopted by the Gitksan and Wet'suwet'en have been increasingly upheld by Canadian courts.<sup>142</sup>

### 3. External Relations

In the Aboriginal ecological management context, the principle of external relations has a number of specific implications because of two additional factors: the sensitivity of the resource and Aboriginal priority to it.

A group right to conduct a particular activity (such as hunting, fishing and trapping) is meaningless when the object of that right (the deer stock and the deer's habitat, the fish stock and the fish habitat) is subject to damage or depletion by external individuals or groups, unless the group has some means to protect that stock or habitat from those external factors.

In *Claxton*, a treaty with an Indian band that stated "we are at liberty to ... carry on our fisheries as formerly."<sup>143</sup> The Court ruled that this was sufficient grounds to prevent construction of a marina in the relevant bay, which would have had the effect of destroying part of the fishery. Similarly, a group right to hunt over a particular territory, a right which is found in many treaties, includes the right to restrict access to outside hunters where such influx would endanger

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<sup>141</sup>P.R. Grant, "Recognition of Traditional Laws in State Courts and the Formulation of State Legislation" in Morse & Woodman, eds, *supra*, note 139, 259 at 260.

<sup>142</sup>See *R. v. Lewis*, [1989] 4 C.N.L.R. 133 (B.C. Cy Ct.); *R. v. Nikal*, [1989] 4 C.N.L.R. 143 (B.C. Cy Ct.); *R. v. Ward* (1989), 93 N.B.R. (2d) 370, [1989] 2 C.N.L.R. 142 (C.A.). Note, however, that these by-laws were passed under delegated powers under the *Indian Act*. We argue that such laws have legal force independent of the *Indian Act*.

<sup>143</sup>*Supra*, note 47 at 81.

the stock of wildlife. The second factor which adds content to the principle of external relations is the existence of Aboriginal priority. The Supreme Court has recognized in *Sparrow* that the special nature of treaty and Aboriginal rights gives Aboriginals priority or preferred access to resources when needed for food. This may require limits on the extent to which non-group members have access to the resource. Theoretically, such limits could be imposed on non-Aboriginals by the relevant Aboriginal group itself, or by the provincial or federal government. If the provincial or federal government declines to acknowledge sole Aboriginal authority for such purpose, such a government would nevertheless be required, as a practical necessity, to work in partnership with the Aboriginal group in order to achieve the result.

### C. *The Effect of Sparrow*

This article has argued that a proper interpretation of s. 35(1) would include group rights and that group rights in the context of Aboriginal environmental relations would entail the recognition and protection of Aboriginal ecological management systems as detailed above. In *Sparrow*, the Supreme Court set out a framework for the application of s. 35(1). In this final section we will examine this framework and its possible application in the context of environmental rights.

The Supreme Court's decision in *Sparrow* is consistent with the group rights approach to s. 35(1) we have outlined. As noted earlier, the Court asserted that the Aboriginal fishing rights which were at issue in the case

are rights held by a collective and are in keeping with the culture and existence of that group... .

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.<sup>144</sup>

The Court then set out an analytical framework for determining whether legislation conflicts with s. 35(1) Aboriginal rights. As a first step in this framework, it must be determined whether the limiting legislation constitutes a *prima facie* infringement of the right. If so, the second step requires the government to justify the regulation. This second step itself comprises two parts, the first determining whether the regulation has a valid legislative objective, and the second determining whether the regulation is consistent with the government's special fiduciary duty to Aboriginals.

In the first step, the tests as to whether there has been an infringement are, first, "is the limitation unreasonable?", or secondly, "does the regulation impose undue hardship?", or thirdly, "does the regulation deny to the holders of the

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<sup>144</sup>*Supra*, note 7 at 1112.

right their preferred means of exercising that right?"<sup>145</sup> Although not specifically considered by the court at this step, the group nature of the right would be significant in determining whether or not infringement has occurred.

If Aboriginal harvesting is a largely group-based activity, then interference with the group aspects of the activity would constitute infringement. Any government system which licenses or permits hunting or trapping would constitute an infringement if the system did not follow the group's internal allocation system. The British Columbia Supreme Court, in applying the *Sparrow* decision, has noted that

the aboriginal right includes the right, not the privilege but the right, to follow the directions of the traditional leaders of the band in conducting the fishery, the place of fishery and the method of fishery, and the right not to be required to choose between an employee or representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people.<sup>146</sup>

A system which permitted outsiders, such as sporthunters, access to these resources would conflict with the local management system and thus constitute a *prima facie* infringement.

Once a *prima facie* infringement of Aboriginal or treaty rights has been demonstrated, the second step of the analysis requires the government to then justify the regulation. In the justification analysis, the first of the two parts requires the government to show a valid legislative object. "Conservation" is accepted by the Court as a valid object.

The analysis then proceeds to the second part of the justification issue. The general principle governing this part is that,

the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>147</sup>

Applying this principle in *Sparrow*, the Court focussed on an allocation question: assuming the condition of the fish population is such that it is safe to harvest, who has priority for the available fish? The Court ruled that Aboriginals must be given top priority for their food requirements.<sup>148</sup> In addition, the Court identified further questions to be addressed within the analysis of justification, such as "whether there has been as little infringement as possible in order to effect the desired result," and "whether the aboriginal group in question has

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<sup>145</sup>*Ibid.*

<sup>146</sup>*R. v. Nikal*, [1991] 1 C.N.L.R. 162 at 167.

<sup>147</sup>*Supra*, note 7 at 1115-16.

<sup>148</sup>*Ibid.* at 1116.

been consulted with respect to the conservation measures being implemented.”<sup>149</sup>

Finally, the Court recognized that questions of management also arise, although it did not pursue them in detail.<sup>150</sup> A regulatory scheme which transfers decision-making power from the Aboriginal group to regulatory officials would clearly contravene the principle of internal authority. In addition, by weakening local management systems, it would contravene the principle of group self-preservation. It is hard to imagine how the “special trust relationship” can have any substance if it does not include protection for the group nature of the Aboriginal right, which is such an essential characteristic of the right.

It is possible to construct an interpretation of *Sparrow* which downplays the group nature of Aboriginal rights, and the role of Aboriginal management systems. For example, the Court stated that

the objective of this requirement [the Aboriginal priority for food] is not to undermine Parliament’s ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.<sup>151</sup>

This could be taken to mean that the government’s jurisdiction over management remains unchanged, with the possible exception that Aboriginal rights be considered and factored into the plans, and Aboriginal peoples have input. Such an interpretation would leave all authority with Parliament, giving Aboriginal peoples no more than the right to be consulted. This would require minimal consideration of Aboriginal group rights, and little respect for Aboriginal management systems.

Such a reading of *Sparrow* is neither necessary nor consistent with the principles on which the decision is based. The Court emphasized Parliament’s responsibility for “overall” management.<sup>152</sup> Such “overall” responsibility does not preclude the continued existence of Aboriginal management systems, which could be incorporated into general plans. Accommodation would accomplish the conservation objective and respect the trust relationship. Therefore, where a viable Aboriginal management system exists, the government arguably must accommodate it rather than displace it. Indeed, the Court specifically notes that the objective of “the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.”<sup>153</sup>

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<sup>149</sup>*Ibid.* at 1119.

<sup>150</sup>*Ibid.* at 1116.

<sup>151</sup>*Ibid.* at 1119.

<sup>152</sup>*Ibid.*

<sup>153</sup>*Ibid.* at 1115.

On the basis of *Sparrow*, it would seem that an Aboriginal local management system, in appropriate circumstances, is the *preferred* means of conservation. If coherent evidence was brought before a court demonstrating an existing, viable and effective traditional Aboriginal management system (whether written or unwritten) it is difficult to see how a government could successfully justify externally imposed legislation (which infringed on Aboriginal or treaty rights), since legislation then would not constitute the method of attaining its objective (such as conservation) with "as little infringement as possible."<sup>154</sup> To comply with s. 35(1), the government should be required to integrate Aboriginal ecological management systems into environmental protection programs.<sup>155</sup>

### Conclusion

The Canadian legal and political system has always recognized that Aboriginal communities are separate and unique. Part of that uniqueness lies in the special relationship that Aboriginal peoples have cultivated with their environment over the centuries. Section 35(1) of the *Constitution Act* confirms the uniqueness of Aboriginal communities. It will also require a re-evaluation of the approach taken with respect to Aboriginal and treaty rights in the past, and a further elaboration of those rights. A sensible and sensitive interpretation of the Aboriginal and treaty rights will guarantee for Aboriginal peoples the ability to sustain and develop their environmental understandings, as a group, for the benefit of themselves, the environment, and the rest of Canadian society.

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<sup>154</sup>*Ibid.* at 1119.

<sup>155</sup>The principle could even be extended to those situations where an Aboriginal management system had once existed, but is now weakened, for example, through long imposition of external regulation. In such a case, the special trust relationship would require the government to repair such a system, by incorporating and encouraging it, for example, by providing an important role to local elders. The principle may even be applicable to situations where an Aboriginal management system is all but defunct. In such a case, externally administered conservation measures may be allowed, but on a time limited basis so that if Aboriginal systems revive, they can again be accorded primacy.