HER MAJESTY THE QUEEN (Respondent) v. WILLIAM ALPHONSE, (Appellant) and CARRIER SEKANI TRIBAL COUNCIL, ATTORNEY GENERAL of CANADA, DELGAMUUKW et al, MUSQUEAM INDIAN BAND and OKANAGAN TRIBAL COUNCIL (Intervenors)

[Indexed as: **R. v. Alphonse**]

British Columbia Court of Appeal, Taggart, Lambert, Hutcheon, Macfarlane and Wallace JJ.A., June 25, 1993

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The accused, an Indian, was acquitted in Provincial Court ([1988] 3 C.N.L.R. 92) of charges arising under the *Wildlife Act,* S.B.C. 1982, c.57, for hunting out of season (s.27(1)(c)) and for having dead wildlife in his possession without a licence or permit (s.34(2)). The Province appealed to the County Court (reported in [1989] 1 C.N.L.R. 121) which allowed the appeal for hunting out of season but dismissed the appeal for possessing wildlife without a licence or permit under the *Wildlife Act*. The accused appealed from the conviction entered for hunting at a time not within open season.

The issues in this case concern the application of s.88 of the *Indian Act*, R.S.C. 1985, c.I-5, whether the *Wildlife Act* is a law of general application, whether the *Wildlife Act* is any less a law of general application because it affects an Aboriginal right and whether s.88 is inconsistent with s.35 of the *Constitution Act, 1982*.

Held: Appeal allowed; acquittal restored.

***per* Macfarlane J.A. (Taggart, Hutcheon and Wallace JJ.A., concurring)**

1. The *Wildlife Act* is a law of general application within the meaning of s.88 of the *Indian Act* and is referentially incorporated as federal law pursuant to s.88 of the *Indian Act*. Section 88 is not inconsistent with s.35(1) of the *Constitution Act, 1982*.

2. The accused was exercising an unextinguished Aboriginal right when he shot a deer on unoccupied, unfenced and uncultivated private land which was not "enclosed land" as defined by the *Trespass Act*, R.S.B.C. 1979, c411. Section 27(1)(c) of the *Wildlife Act* interfered with the Aboriginal rights of the accused and thus established a *prima facie* infringement of Aboriginal rights. This infringement has not been justified by the Crown. Therefore, applying s.52(1) of the *Constitution Act, 1982*, s.27(1)(c) of the *Wildlife Act* is of no force or effect with respect to Aboriginal peoples.

***per* Lambert J.A. (concurring in result)**

1. Section 27(1)(c) affects the core of Indianness for status Indians, non-status Indians and Métis alike, because it affects or may affect the exercise of their Aboriginal rights. Accordingly, s.27(1)(c) reaches into the federal legislative power under s.91(24) of the *Constitution Act, 1867*. Therefore s.27(1)(c) does not apply to them of its own provincial vigour.

2. Section 27(1)(c) of the *Wildlife Act* is not a law of general application for the purposes of s.88 of the *Indian Act*. There are two reasons for this conclusion and each is based on the fact that the accused was prevented from exercising an Aboriginal right, something that neither *R.* v. *Kruger*, [1978] 1 S.C.R. 104, or *R*. v. *Dick*, [1985] 4 C.N.L.R. 55, considered. First, s.27(1)(c) discriminates against Indians because it prevents the exercise by Indians of their Aboriginal hunting rights whereas for non- Indians it merely regulates their statutory hunting privileges. Second, s.88 applies only to status Indians under the *Indian Act* whereas Aboriginal rights are recognized and affirmed under s.35(1) of the *Constitution Act, 1982* for

Aboriginal peoples, including the Métis and Inuit. Because s.27(1)(c) applies to status Indians and non-Indians but does not apply to non-status Indians and Métis, it cannot be said to be of general application and therefore does not apply to the accused.

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MACFARLANE J.A. (Taggart, Hutcheon and Wallace JJ.A., concurring):

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PART I

INTRODUCTION

[para. 1] This appeal concerns Aboriginal hunting rights, and whether the provisions of the *Wildlife Act*, S.B.C. 1982, c.57 are inconsistent with the provisions of s.35(1) of the *Constitution Act, 1982*.

[para. 2] The appellant, a Shuswap Indian, was acquitted of charges laid under the *Wildlife Act*. He was charged in Count 1 with a violation of s.27(1)(c) for hunting at a time not within the open season, and, in Count 2, with the violation of s.34(2) of the Act for having dead wildlife in his possession, without having a license or permit. He was acquitted on both charges by His Honour, Judge Barnett, of the Provincial Court of British Columbia (the "trial judge"). That decision is reported at [1988] 3 C.N.L.R. 92.

[para. 3] The Province appealed to the County Court, and His Honour, Judge Hamilton (as he then was) (the "County Court judge"), allowed the appeal on Count 1, dismissed the appeal on Count 2, and found the appellant guilty of a violation of s.27(1)(c) of the *Wildlife Act.* That decision is reported at [1989] 1 C.N.L.R. 121.

[para. 4] On June 25, 1989, I granted leave to appeal against conviction and sentence. The Crown now concedes that the sentence was unlawful, so the sentence appeal must be allowed.

[para. 5] The facts may be briefly stated. The appellant, William Alphonse, is a Shuswap Indian and a member of the Williams Lake Band. He resides on the Sugar Cane Reserve near Williams Lake. On April 3, 1985, the appellant shot and killed a male mule deer. He did so at a place within the traditional hunting grounds of the Shuswap people on a date during the closed season. He had no permit to hunt. He shot the deer on private land registered in the name of Onward Cattle Co. Ltd.

[para. 6] The trial judge made these findings of fact, at pp. 94-95 of his reasons:

> 1. The Shuswap people have a history as an organized society going back long before the coming of the white man.
>
> 2. The hunting of deer was an integral part of the life of the Shuswap people and continues to be so to this day.
>
> 3. Deer have both cultural and material importance to the Shuswap people who have traditionally regarded them with great respect which resulted in effective conservation of the species.
>
> 4. Mr. Alphonse's hunting of the deer in this case was done with proper regard for the traditions of the Shuswap people and within the traditional territory of the Shuswap people.
>
> 5. Mr. Alphonse killed a deer on land which was Crown granted by the Province of British Columbia in 1890 or 1896, and remains privately owned.
>
> 6. The land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. Mr. Alphonse did not know the land was privately owned and there was
> nothing which should have made that fact apparent to him.
>
> 7. Mr. Alphonse was not concerned to know if he was hunting on privately or publicly owned lands. He believes that his right to hunt deer in the traditional territory of the Shuswap people cannot be restricted by laws enacted in the legislature of the Province of British Columbia.
>
> 8. Mr. Alphonse killed the deer within an area which has been designated as MU 5-2 by the Fish and Wildlife Branch. The deer populations within this area are stable and healthy. During the open season the previous fall, licensed hunters killed about 1,175 deer within MU 5-2. Conservation officers assume that the actual kill in any given year will be about double the number they consider to be legally killed.
>
> 9. There are official policies which allow regional managers within the Fish and Wildlife Branch to grant special permission to persons to hunt deer during the closed season. The permits granted are known as sustenance permits.
>
> 10. Mr. Alphonse never considered applying for a sustenance permit.

No contrary findings were made in the County Court.

PART II

THE TRIAL JUDGMENT

[para. 7] The trial judge dealt with three questions:

1. *Whether the appellant was exercising an unextinguished Aboriginal right when he shot the deer.*

He held, at p. 106:

I hold that when British Columbia entered Confederation in 1871 the Shuswap people continued to enjoy aboriginal hunting rights, Trutch's policies notwithstanding. The place where Mr. Alphonse killed a deer on April 1, 1985, was unoccupied Crown land in 1871 and Shuswap people had the right to hunt there.

The Parliament of Canada has never purported to extinguish the aboriginal hunting rights of British Columbia Indians. The legislature of British Columbia was not competent to extinguish aboriginal rights after 1871; such authority was reserved to Ottawa. And since April 17, 1982, no government is competent to extinguish the aboriginal rights of Canadian Indians. Such rights are now protected by s.35 of the *Constitution Act, 1982*.

[para. 8] 2. *Whether, given the circumstances, the Aboriginal right could be exercised on unoccupied private land*.

He did not find it necessary to decide whether Aboriginal rights can only be exercised upon unoccupied Crown lands, and whether the bare act of transfer to private ownership extinguishes Aboriginal rights. Instead he held, at p. 108:

In my opinion the material issue in the present case is essentially similar to that considered by the British Columbia Court of Appeal in *R*. v. *Bartleman* (1984), 12 D.L.R. (4th) 73, 13 C.C.C. (3d) 488 at 506-507, [1984] 3 C.N.L.R. 114 at 131-132. Mr. Bartleman was a member of the Tsartlip Indian band on Vancouver Island. His band enjoys the benefit of a treaty which, the Court held, had confirmed the right of Saanich people to hunt upon unoccupied lands within their traditional territory. Mr. Bartleman had hunted and killed a deer upon privately owned bush land. The Court considered the "private lands issue" and observed:

> In my opinion, the restrictions placed by the Treaty on the hunting rights of the Indians entitled to exercise the Treaty rights are, first, that the hunting must take place within the geographical area of the traditional hunting grounds of the Saanich people, and, in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier ....
>
> ... The land where Mr. Bartleman was hunting was uncultivated bush, it was not occupied by livestock, it was not surrounded by a fence or by a natural boundary, and it was not posted with signs prohibiting trespass. As such, hunting on the land was lawful under the *Wildlife Act* and the *Trespass Act*, R.S.B.C. 1979, c.411 ...
>
> ... I think, as a matter of law, that if anyone can lawfully hunt on the land during the hunting season, then hunting may take place there under the treaty.

[para. 9] 3. *Whether the regulation made pursuant to the Wildlife Act, requiring a sustenance permit to hunt out of season, is inconsistent with the provisions of s.35(1) of the Constitution Act, 1982.*

The regulation in question is B.C. Reg. 337/82, and it is authorized by s.110 of the Act. It provides that a Regional Manager may issue sustenance permits, with certain limitations. The trial judge referred to the limitations in this way at pp. 113-14:

There are many limitations; the most salient of which are:

1. Sustenance permit hunting cannot continue after February 15.

2. Sustenance permit hunting is limited to a maximum of 5% of the total available harvest. Thus, during the 1984-85 period, only 45 deer permits were available within MU 5-2.

3. Sustenance permits are "issued on a first come first served basis."

4. Sustenance permits are only issued to persons in "actual need" of food. Only persons who are unemployed and *receiving social assistance* can be considered to have an "actual need", and then only when other sources of food are "insufficient".

5. A person can kill only one deer or moose on a sustenance permit basis during an annual period.

6. A person must use the meat from a sustenance permit kill to feed himself and his or her lawful dependents. The definition of "lawful dependents" is drawn from the *Income Tax Act*, S.C. 1970-71-72, c.63; it speaks in terms of nuclear families, not extended families.

In administering the *Wildlife Act* it is the policy of the government of British Columbia to ignore the fact that some Indian people have the rights which other persons cannot claim. The policies adopted by government preserve the privileges of persons who hunt for sport over the rights of Indians who hunt for food. The bureaucrats who prepared the policies did not seek the input of Indian people. The policies may serve some conservation purposes, but such purposes could be served equally well if the aboriginal rights of Indian people were recognized. If conservation is the real issue, the solution is obvious.

In *Sparrow*'s case the Court of Appeal held that in allocating the salmon to be taken from the Fraser River, Fisheries Officers must give priority to the aboriginal rights of Indian people over the interests of other user groups. The fishing rights of Indian people can be regulated, but such regulations must be reasonably justified as being necessary for the proper management and conservation of the resource: see *R*. v. *Sparrow*, supra, pp. 95--96 C.C.C. [177-78 C.N.L.R.]. I hold that the government of British Columbia must follow precisely the same principles when it seeks to regulate the aboriginal hunting rights of Indian people.

The sustenance permit policy is meant to benefit a few particularly poor but motivated welfare recipients. It accords no recognition to the rights of Indians and is not meant to benefit them. It insults them.

[para. 10] In dismissing the charge under Count 1, the trial judge said, at pp. 114-115:

In count 1 Mr. Alphonse is charged under s.27(1)(c) of the *Wildlife Act* which makes it an offence for a person to hunt or kill wildlife at a time not within the open season. To the extent that this law (and the application of it) does not recognize the aboriginal rights of Indian persons, it is inconsistent with s.35 of the *Constitution Act*, *1982* and therefore of no force or effect. Indian persons who act in the exercise of their aboriginal rights cannot be found to have offended this law.

PART III

THE COUNTY COURT JUDGMENT

[para. 11] The County Court judge found it unnecessary to decide whether the appellant's Aboriginal right to hunt was extinguished, either before or after Confederation, or whether any such right extended to hunting on private property.

[para. 12] Referring to *R*. v. *Sparrow* (1986), [1987] 1 C.N.L.R. 145 at 177, [1987] 2 W.W.R. 577, 36 D.L.R. (4th) 246 at 276, 32 C.C.C. 65 at 95 9 B.C.L.R. (2d) 300 a decision of the British Columbia Court of Appeal, he stated the issue in this way [p. 125 C.N.L.R.]:

In my view the threshold question that arises from *Sparrow* is whether the regulation of deer hunting by means of open and closed seasons "is reasonably justified as being necessary for the proper management and conservation of deer or in the public interest"? If it is so justified then Indians, along with everyone else are bound by that regulation.

The respondent concedes that one of the matters included in the phrase "in the public interest" is the question of safety. Some regulations contained in the *Wildlife Act*, such as the
prohibitions against shooting across a public highway, are safety measures not conservation measures. Such public interest measures take precedence over Aboriginal rights: *Myran v. The Queen* (1975), 58 D.L.R. (3d) 1, 23 C.C.C. (2d) 73 (S.C.C.), *R.* v. *Napoleon* (1985), 21 C.C.C. (3d) 522, [19861 1 C.N.L.R. 86 (B.C.C.A.).

I find therefore that when the Court in *Sparrow* (supra) makes Aboriginal rights subject to both public interest and conservation measures, the Court was in proper circumstances giving priority to conservation measures over Indian rights.

> Is closing the season "reasonably justified"? The learned trial judge finds that closing the season to Indians is not reasonably justified when you have available the alternative conservation measure of closing the season to sport hunters. I do not think that is the test.

[para. 13] I pause to note that the Supreme Court of Canada in *R*. v. *Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, held that the public interest was not a relevant consideration.

[para. 14] The County Court judge then referred to what had been said in *R*. v. *Kruger*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, and in particular the words of Dickson J. at pp. 111-12. Turning again to the decision of the Court of Appeal in *Sparrow* he said [pp. 126-27]:

> In *Sparrow* the Court said at [p. 165 C.N.L.R.]:
>
> > ... *Kruger* established that an Indian's right to hunt in British Columbia is subject to regulation by the provincial *Wildlife Act* insofar as it is a "law of general application". Mr. Kruger therefore could be convicted of hunting without a permit required by that Act even if he was hunting on land which was the traditional hunting ground of his band.
>
> The issue in *Sparrow* was whether the coming into force on 17 April 1982 of s.35(1) of the *Constitution Act* had the effect of limiting the province's power to regulate the Indian fishery by laws of general application. For the purposes of this appeal there is no distinction between the right to fish and the right to hunt.
>
> Section 35(1) of the *Constitution Act* provides:
>
> > 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> *Sparrow* has now defined the limit of provincial power by saying that regulations which infringe the aboriginal right to hunt deer by reducing the number of deer available to a level below that required for reasonable food and societal needs will only be valid if they can be reasonably justified as being necessary for the proper management and conservation of the resource.

He concluded, at p. 127:

> It is clear from the evidence on this appeal that a regulation which closes the hunting season is necessary for the proper management and conservation of the resource. Section 27(1)(c) and the regulations specifying open and closed seasons are therefore valid notwithstanding their effect on aboriginal hunting rights. Section 35(1) of the *Constitution Act* does not afford the respondent a defence to the charge of hunting when the season is closed. The appeal from the respondent's acquittal on count 1 is allowed and the respondent is convicted on the offence under s.27(1)(c) of the *Wildlife Act* ...

PART IV

THE ISSUES ON APPEAL TO THIS COURT ON THE CONVICTION APPEAL

[para. 15] As stated by the appellant:

> 1. The County Court Judge erred in failing to hold that s.27(1)(c) of the *Wildlife Act* could only validly apply to restrictively regulate the aboriginal hunting rights of the Appellant if each of the following three conditions are satisfied:
>
> (a) s.27(1)(c) is made applicable by the Parliament of Canada enacting legislation to referentially incorporate s.27(1)(c) into federal law, the only possible legislation of this kind being s.88 of the *Indian Act*, R.S.C. 1985, c. I-5;
>
> (b) s.88 of the *Indian Act* is not inconsistent with s.35(1) of the *Constitution Act*, 1982; and

(c) s.27(1)(c) of the *Wildlife Act* is not inconsistent with s.35(1) of the *Constitution Act*, *1982*.

2. The County Court Judge erred in failing to hold that neither of condition (b) or condition (c) is satisfied, and accordingly he erred in convicting the Appellant.

[para. 16] As stated by the Province:

I. The aboriginal right to hunt in traditional tribal territories has been extinguished and has been replaced by a right, subject to the general laws of the Province, to enter unoccupied or vacant Crown land anywhere in the Province and to take game for sustenance (the "sustenance right").

II. Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, is valid legislation.

III. If aboriginal rights exist, sections 27(1)(c) and 34(2) of the *Wildlife Act* are valid and applicable to the Appellants, pursuant to s.88 of the *Indian Act*, notwithstanding section 35 of the *Constitution Act, 1982*.

[para. 17] The appeal was argued on that basis, but the Province has now amended its position. In effect, it no longer asserts that Aboriginal hunting rights have been extinguished, but submits that the *Wildlife Act*, other than s.2, is regulatory only. It continues to assert ownership of all wildlife in the Province, relying on s.2 of the *Wildlife Act*, and to say that s.2 has extinguished any ownership right in wildlife which the appellants may claim.

[para. 18] The short answer to the extinguishment aspect of the new argument is that neither the *Wildlife Act* nor s.88 of the *Indian Act*, which is said to referentially incorporate the *Wildlife Act* as federal law, reflect a clear and plain intention to extinguish Aboriginal hunting rights. There is no inconsistency between ownership of wildlife by the Crown, and the continued existence of Aboriginal hunting rights. Section 2 of the *Wildlife Act* provides, in part, as follows:

Property in wildlife

2.(1) Subject to subsection (2), the property in all wildlife within the Province is vested in the Crown in right of the Province.

(2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.

[para. 19] Thus an Indian, exercising his Aboriginal right to hunt on unoccupied Crown land, or lawfully on other lands, who complies with the Act and valid regulations thereunder, can do so, despite the fact that the Crown is the owner of all wildlife within the Province. In short, it is possible that the Aboriginal right to hunt can co-exist with the ownership by the Crown of all wildlife. Therefore, it is not extinguished but is subject to valid regulation. The exercise of the Aboriginal right is protected and preserved against invalid regulation by s.35(1) of the *Constitution Act, 1982*, as interpreted in *Sparrow*.

[para. 20] The amended position of the Province may be summarized in this way:

1. The Province submits that the appellant failed to establish that he was exercising an Aboriginal right when he shot a deer on private lands on April 3, 1985.

2. Section 27(1)(c) of the *Wildlife Act* is valid provincial legislation which is not inconsistent with s.35(1) of the *Constitution Act, 1982*.

3. Section 88 of the *Indian Act* is not inconsistent with s.35(1) of the *Constitution Act, 1982*.

4. The test applied by the Supreme Court of Canada in *Sparrow* with respect to fishing rights is not appropriate in the case of a hunting right; and, if it is, the statutory provision of a closed season for all hunters for conservation purposes does not fail that test.

[para. 21] I propose to deal with the issues in this order:

(a) The private lands issue.

(b) Questions raised with respect to s.88 of the *Indian Act*, R.S.C. 1985 c. I-5, and its relationship to s.35(1) of the *Constitution Act, 1982*.

(c) Whether s.27(1)(c) of the *Wildlife Act* is inconsistent with s.35(1) of the *Constitution Act, 1982*.

(a) The Private Lands Issue

[para. 22] The question is whether, in the circumstances, Mr. Alphonse's defence that he was exercising an Aboriginal right is defeated because he was hunting on private land.

(i) *Mistake of fact*

[para. 23] The trial judge found as a fact that the land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. He found that Mr. Alphonse did not know the land was privately owned and there was nothing which should have made that fact apparent to him. He concluded [p. 107]:

> It is apparent from Mr. Alphonse's testimony that he did know that other land in the same area was privately owned ranchland. But he says that he did not know that this land was privately owned. I believed him and I further find that there was nothing upon the land which would have caused a reasonable person to believe that it was probably privately owned.
>
> Mr. Alphonse's ancestors have hunted at this place since time immemorial and Mr. Alphonse has himself hunted there for 10 years. There is absolutely nothing in the evidence to suggest that any owner of the land has ever objected to this. Whatever uses may be made of the land, Mr. Alphonse's hunting did not impose upon the owner.

[para. 24] The trial judge found that the place where the deer was killed was part of the traditional hunting grounds of the Shuswap people. If the place had not been private property then Mr. Alphonse would have had the right, subject to valid regulation, to exercise his Aboriginal right in that place. There was evidence upon which the trial judge could conclude that Mr. Alphonse honestly and reasonably believed that he was entitled to exercise his Aboriginal right in that place. Thus, the fact that the place was private property is not fatal to the appellant's defence.

(ii) *Was it unlawful to hunt on those lands?*

[para. 25] The trial judge rested his decision on what was said by this Court in *R*. v. *Bartleman*, [1984] 3 C.N.L.R. 114, 12 D.L.R. (4th) 73, 55 B.C.L.R. 78, 13 C.C.C. (3d) 488. In that case the Court held that Mr. Bartleman had a treaty right to hunt over unoccupied lands, even though they were private lands. The passage in that judgment upon which the trial judge relied is found in the judgment of Mr. Justice Lambert, who said, at p. 92 [D.L.R.; pp. 131-32 C.N.L.R.]:

> The land where Mr. Bartleman was hunting was uncultivated bush, it was not occupied by livestock, it was not surrounded by a fence or by a natural boundary, and it was not posted with signs prohibiting trespass. As such, hunting on the land was lawful under the *Wildlife Act* and the *Trespass Act*, R.S.B.C. 1979, c. 411.

[para. 26] I understand that the references to the two statutes are these:–

> *Wildlife Act*
>
> Agricultural and cleared land
>
> 40.(1) A person who, without the consent of the owner, lessee or occupier of land,
>
> (a) hunts over or traps in or on cultivated land, or
> (b) hunts over Crown land which is subject to a grazing lease while the land is occupied by livestock commits an offence.
>
> (2) This section does not affect the *Trespass Act*.

The land on which Mr. Alphonse was hunting was not cultivated land. It was not subject to a Crown granted grazing lease, and it was not occupied by livestock.

Trespass Act, R.S.B.C. 1979, c. 411

Interpretation

1. In this Act

"enclosed land" includes land that is
(a) surrounded by a lawful fence defined by or under this Act;
(b) surrounded by a lawful fence and a natural boundary or by a natural boundary alone; or
(c) posted with signs prohibiting trespass in accordance with s.4.1;

Definition of trespasser

4(1) A person found inside enclosed land without the consent of its owner, lessee or occupier shall be deemed a trespasser.

I pause to note that the land in question was not "enclosed land".

[para. 27] When those statutory provisions are read together and applied to the facts in *Bartleman* the result was to find that Mr. Bartleman was not prohibited from hunting on the private lands in question. Similarly, Mr. Alphonse was not prohibited from hunting on the private lands in question.

[para. 28] But the Crown submits, on the basis of *R*. v. *Standingwater* [*"R*. v. *Horse"*], [1988] 1 S.C.R. 187, [1988] 2 C.N.L.R. 112, [1988] 2 W.W.R. 289, 47 D.L.R. (4th) 526, 39 C.C.C. (3d) 97, 65 Sask. R. 176, 82 N.R. 206 and *R*. v. *Mousseau*, [1980] 2 S.C.R. 89, [1980] 3 C.N.L.R. 63, [1980] 4 W.W.R. 24, 111 D.L.R. (3d) 443, 52 C.C.C. (2d) 140, 3 Man. R. (2d) 338 which is dealt with by Mr. Justice Estey in *Horse*, that persons who do not have the consent of the owner of private land do not have a right of access to hunt on such land. Those decisions depend upon agreements and legislation in Manitoba and Saskatchewan referred to by Estey J. at pp. 191-196 [S.C.R.; pp. 114-20 C.N.L.R.].

[para. 29] In *Horse* the appellants were charged with an offence under the Saskatchewan *Wildlife Act*, S.S. 1979, c. W-13.1. Their defence was that they were exercising a treaty right. The land upon which the hunting took place was privately owned. The lands were farm lands sown to hay and grain. The appellants did not have permission or authority from the owners or occupants of the lands to hunt there.

[para. 30] Mr. Justice Estey said, at p. 191 [S.C.R.; p. 114 C.N.L.R.]:

> To succeed, the appellants must demonstrate a right in law to hunt on these privately owned lands and to do so notwithstanding the regulation of hunting under the provincial statute.

[para. 31] The judgment referred to a number of Manitoba cases and to another Saskatchewan case. It is unnecessary to describe those cases; they are discussed fully in the judgment of Mr. Justice Estey. Each of the cases, however, concern legislation prohibiting hunting in certain circumstances. A provision in the *Game and Fisheries Act*, R.S.M. 1954, c.94, was discussed in the judgment. The provision is set out at p. 194 [S.C.R.; pp. 117-18 C.N.L.R.] of the reasons of Mr. Justice Estey, as follows:

> 76(1) No person shall hunt any bird or any animal mentioned in this Part if it is upon or over any land with regard to which notice has been given under this Part, without having obtained the consent of the owner or lawful occupant thereof.
> …
>
> 76(4) Nothing in this section limits or affects the remedy at common law of any such owner or occupant for trespass.

[para. 32] In distinguishing a decision of the Saskatchewan Court of Appeal in *R*. v. *Tobacco*, [1980] 3 C.N.L.R. 81, [1981] 1 W.W.R. 545, 4 Sask. R. 380 Mr. Justice Estey, at p.195 [S.C.R.; p. 118 C.N.L.R.], said:

> That case, however, was predicated upon the then Saskatchewan *Wildlife Act* which did not include the above-mentioned provision in the *Manitoba Wildlife Act* dealing with the rights of an owner at common law or by statute for trespass in respect of his land.

[para. 33] It is to be noted that the saving provision in the *Wildlife Act* in this Province preserves rights under the *Trespass Act* but not common law rights.

[para. 34] Applying the *Trespass Act* to the circumstances of this case, there was no prohibition with respect to hunting on the lands in question. That being so, it was not unlawful to hunt on those lands. Thus, it was not unlawful to exercise an Aboriginal right on those lands.

[para. 35] I would not give effect to the submissions of the Province that the appellant was not entitled to exercise an Aboriginal right in that place under those circumstances.

(b) Questions Raised With Respect to S.88 of the Indian Act R.S.C. c.1-5, and its Relationship to S.35(1) of the Constitution Act, 1982.

[para. 36] Section 88 provides:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

[para. 37] Questions to be discussed include:

(i) The application of s.88.

(ii) Is the *Wildlife Act* a law of general application?

(iii) Is the *Wildlife Act* any less a law of general application because it may affect the exercise of an Aboriginal right?

(iv) Is s.88 of the *Indian Act* inconsistent with s.35(1) of the *Constitution Act, 1982?*

(i) *The application of s.88 of the Indian Act*

[para. 38] The leading cases with respect to the application of s.88 of the *Indian Act* are *Kruger* and *Dick* v. *The Queen*, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129, 62 N.R. 1.

[para. 39] In my opinion these propositions flow from those judgments:

1. Provincial laws of general application which apply throughout the province to all residents, and which do not affect "Indians in their Indianness", "Indians qua Indians", or "Indians in relation to the core values of their society" or "the status and capacities of Indians" apply to Indians by their own force as valid provincial laws. They do not rely upon s.88 of the *Indian Act* for their application to Indians.

2. Provincial laws of general application which do affect Indians in the ways listed above will not apply to Indians by their own force. Such laws depend upon s.88 of the *Indian Act*, which gives them the force of federal law for their effectiveness in relation to Indians. Such federal incorporation is required because of the exclusive federal power over Indians which I have described in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97.

[para. 40] In *Kruger* the Court had to consider whether the *Wildlife Act* was a law of general application, and whether s.88 referentially incorporates the *Wildlife Act*. In affirming the judgment of Robertson J.A. in the British Columbia Court of Appeal, Dickson J. (later C.J.C.), held that the *Wildlife Act* was a law of general application. He said, at p. 112:

> Section 88 of the *Indian Act* appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

[para. 41] In dealing with the question of referential incorporation he said, at p. 116:

> If the provisions of the *Wildlife Act* are referentially incorporated by s.88 of the *Indian Act*, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the *Indian Act* or any order, rule, regulation or by-law made thereunder. That burden has not been discharged and, having regard to the terms of the *Wildlife Act*, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms.

[para. 42] The object of s.88 of the *Indian Act* was examined further in *Dick*. Mr. Justice Beetz, said, at pp. 325-26 [S.C.R.; p. 70 C.N.L.R.]:

> It has already been held in *Kruger* that on its face, and in form, the *Wildlife Act* is a law of general application. In the previous chapter, I have assumed that its application to appellant would have the effect of regulating the latter qua Indian. *However, it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator*. While it is assumed that the *Wildlife Act* impairs the status or capacity of appellant, it has not been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or discriminates against them in any way. (My emphasis)

at p.326 [S.C.R.; pp. 70-71 C.N.L.R.]:

> I accordingly conclude that the *Wildlife Act* is a law of general application within the meaning of s.88 of the *Indian Act*.
>
> It remains to decide whether the *Wildlife Act* has been referentially incorporated to federal laws by s.88 of the *Indian Act.*
> …
>
> I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s.88 in 1951.

at p.327 [S.C.R.; p. 71 C.N.L.R.]:

> I have come to the view that it is to the laws of the second category that s.88 refers. I agree with what Laskin C.J. wrote in *Natural Parents* v. *Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at p.763:
>
> > When s.88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the *Indian Act* unless given force by federal reference.

at p.328 [S.C.R.; p. 73 C.N.L.R.]:

> I accordingly conclude that, in view of s.88 of the *Indian Act*, the *Wildlife Act* applies to appellant even if, as I have assumed, it has the effect of regulating him qua Indian.

(ii) *Is the Wildlife Act a law of general application?*

[para. 43] The question of whether the *Wildlife Act* is a law of general application was considered in both *Kruger* and in *Dick*. As Beetz J. remarked in *Dick* at p. 325 [S.C.R.; p. 70 C.N.L.R.]: "It has already been held in *Kruger* that on its face, and in form, the *Wildlife Act* is a law of general application." Beetz J. confirmed in *Dick* at p. 326 [S.C.R.; p. 70 C.N.L.R.] that the Act was a law of general application.

[para. 44] I would conclude on the evidence that in this case the *Wildlife Act* affects Alphonse qua Indian. That is not to say the intended impact of the Act was to derogate from his rights as an Indian. Nothing in the Act shows that its policy was to single out Indian people for special or

peculiar treatment. Accordingly, I think Dick decides the question and find that the *Wildlife Act* is a law of general application, within s.88.

(iii) *Is the Wildlife Act any less a law of general application because it may affect the exercise of an Aboriginal right?*

[para. 45] I turn now to a discussion which arises only because the decisions in *Kruger* and in *Dick* did not rest upon the assertion of an Aboriginal right. Rather, these decisions concerned the operation of the provincial *Wildlife Act* in the face of the division of powers established by the *Constitution Act, 1867*, and in particular the federal power to legislate with respect to Indians and lands reserved for the Indians under s.91(24).

[para. 46] In *Dick,* Mr. Justice Beetz referred to the Aboriginal rights issue at p. 315 [S.C.R.; p. 59 C.N.L.R.]:

> One issue that does not arise is that of Aboriginal Title or Rights. In its factum, the appellant expressly states that he has "not sought to prove or rely on the Aboriginal Title or Rights in the case at bar". As in the *Kruger* case, the issue will accordingly not be dealt be dealt with any more than the related or included question whether the Indians' right to hunt is a personal right or, as has been suggested by some learned authors, is a right in the nature of a *profit a prendre* or some other interest in land covered by the expression "Lands reserved for the Indians", rather than the word "Indians" in s.91(24) of the *Constitution Act, 1867*. (See Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev*., 513, at pp. 518-519, Anthony Jordan, "Government, Two – Indians, One" (1978), 16 Osgoode Hall L.J. 709, at p. 719). No submission was made on this last point and in this Court, as well apparently as in the courts below, the case has been argued as if the Indians' right to hunt were a personal one.

[para. 47] Nothing in this case turns on the distinction between "Indians" and "Lands reserved for Indians".

[para. 48] Similarly, in *Kruger* Dickson J. (later C.J.C.) set aside the question of Aboriginal hunting rights at p. 108:

> The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgment, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.
>
> ... the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia ... will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue.

[para. 49] In short, *Kruger* and *Dick* only decided that the *Wildlife Act*, inasmuch as it affected the "core values of Indians", could not have any force unless it was incorporated as federal law because of the limitation on provincial legislative competence. The question remains, now taking the view that Aboriginal rights are affected, whether the *Wildlife Act* can still properly be viewed as a law of general application.

[para. 50] My conclusion is that a law can be considered no less a law of general application merely because it is Aboriginal rights, rather than the status and capacity of Indians, which are said to be affected by it. An acknowledgment that Aboriginal rights are at stake does not change the legislative competence required for the legislature to enact the *Wildlife Act*. Aboriginal rights are necessarily elemental to the Indianness or the core values of Indian society, and the status and capacity of Indians. This relationship is recognized in the description of an Aboriginal right as "an integral part of their distinctive culture": *Sparrow* (S.C.C.), at p. 1099 [S.C.R.; p. 175 C.N.L.R.].

[para. 51] In light of this relationship, it is clear that no new division of powers problem arises for a provincial law of general application that is seen to touch Aboriginal hunting rights rather than an

Indian engaged in hunting. The law may be incorporated as a federal law even if it affects values which are an integral part of the distinctive culture of the Aboriginal people. That is not to say that the effect of an incorporated law upon Aboriginal rights will go unchecked. Any infringement of Aboriginal rights must withstand scrutiny under s.35 of the *Constitution Act, 1982*. If incorporated legislation unjustifiably interferes with Aboriginal rights, it will have no force or effect by reason of s.52 of the *Constitution Act, 1982*. However, that analysis stands as a separate and subsequent review, which is properly done after division of powers issues have been resolved. This, in my opinion, brings any infringement of Aboriginal rights sharply into focus.

[para. 52] This approach takes proper account of the difference between a review of legislation from a division of powers point of view and the review of an alleged infringement of rights. Characterizing laws, such as the *Wildlife Act*, in relation to the legislative competence which is required to enact them is an entirely different exercise, having a profoundly different significance, from the examination of the effect of a law on protected Charter or Aboriginal rights. Under the first analysis, the impugned effects of valid laws may amount to an encroachment on another legislature's competing jurisdiction. This may be permissible; indeed, it may even be accommodated by doctrines such as "*the doctrine of necessary incidental effect*". On the other hand, transgressions of constitutionally-protected rights by the effects of legislation are much more rigorously scrutinized. Charter and Aboriginal rights must be jealously guarded from unjustified interference. This is in keeping with their significance and the primacy given to them by the Constitution.

[para. 53] In summary, the *Wildlife Act* is a law of general application. The reasoning in *Kruger* and in *Dick* applies to the exercise of an Aboriginal right. Provincial legislation may affect Aboriginal rights so long as the policy or intended impact of the legislation is not to derogate from Indian rights. By reason of s.88 of the *Indian Act* the *Wildlife Act* is given the same force as a federal law. But whether it can have any force and effect depends upon whether it can survive a *Sparrow* type analysis under s.35 of the *Constitution Act, 1982.*

[para. 54] I pause to make a general observation. Section 88 of the *Indian Act* applies to Indians as defined in s.2 of the Act. Such an Indian is commonly referred to as a "status Indian", as distinct from a "non-status Indian". As Hogg points out in *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 27.1(b), pp. 665-66:

> But there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also undoubtedly "Indians" within the meaning of s.91(24), although they are not governed by the *Indian Act*. The Métis people ... were ... excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s.91(24).

[para. 55] The Eskimos or Inuit people have been held to be within the meaning of "Indians" in s.91(24) in *Reference re Term "Indians,"* [1939] S.C.R. 104, but are specifically excluded from the operation of the *Indian Act* by s.4:

> 4.(1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

[para. 56] Section 88 applies to laws applicable to "Indians in the province". Thus, s.88 applies only to status Indians and excludes non-status Indians, Inuit and Métis. The aborigines affected by s.88 of the *Indian Act* are fewer in number than those over whom the federal authority extends by virtue of s.91(24). It follows that there are Indians (in a s.91(24) sense) who remain immune from provincial laws of general application affecting their Indianness. A provision similar to s.88, but applying to *all* Aboriginal groups would be required to entirely eliminate the federal immunity which operates in relation to Métis, Inuit, and non-status Indians. As Hogg remarks at 27.1(b), p. 666:

> The Parliament is, of course, under no obligation to legislate to the full limit of its authority, and, with respect to Indians, it has certainly not done so.

[para. 57] In my opinion the fact that some residual federal immunity remains outside the ambit of s.88 does not alter the character of provincial laws to which that section refers. Provincial laws which purport to apply to everyone in the Province, and which do not single out Indians for special treatment are laws of general application within the meaning of s.88. The extent to which they may be referentially incorporated as federal laws, and to whom they apply under the federal law, are different questions from whether provincial laws are intended to have general application.

(iv) *Is s.88 of the Indian Act inconsistent with s.35(1) of the Constitution Act, 1982?*

[para. 58] The appellant submits that, on its face, s.88 reflects non-recognition and denial of Aboriginal rights. By way of example, the appellant says that s.88 protects treaty rights but not Aboriginal rights. He asserts that s.88 has no purpose other than to derogate from Indian rights. In general, it is submitted that s.88 permits the incorporation into federal law of provisions which infringe s.35(1) of the *Constitution Act, 1982.*

[para. 59] The Province submits:

(a) section 88 is valid federal legislation the object of which is to accommodate the division of powers in Canada's federal system of government. Section 88 does not, in and of itself, interfere with Aboriginal rights; and

(b) the possibility that terms of incorporated provincial legislation may be found to interfere with a specific Aboriginal right does not support the proposition that s.88 itself is unconstitutional. Aboriginal rights are not absolute. Interference with the exercise of an Aboriginal right may be justified. *R*. v. *Sparrow*, *supra*, at 1075.

[para. 60] I am not persuaded that s.88 is unconstitutional.

[para. 61] It is obvious that in 1951, when what is now contained in s.88 was enacted, Parliament sought to use the legislative powers given it by s.91(24) to give force to provincial laws of general application that otherwise would not have applied to Indians. At the same time, Parliament limited this power of incorporation to guard against provincial interference with Indian treaty rights. Such incorporation may give to Indians benefits extended by provincial legislation; or it may work to regulate, and occasionally interfere with Aboriginal rights. I cannot accept the appellant's contention that the sole purpose of s.88 was to derogate from Indian rights. Section 88 was simply intended to permit the provinces to legislate with respect to all of its residents even though there was an effect upon Indians qua Indians. So long as the policy or intended impact of provincial legislation was not to derogate from Indian rights, such legislation could be referentially incorporated as federal law by reason of s.88.

[para. 62] The submission that the effect upon Indian rights permitted by s.88 is unconstitutional must rest on the premise that Aboriginal rights are absolute. *Sparrow* has held that Aboriginal rights are not absolute and that they may be impaired or restricted by valid regulations. Thus, a provincial law of general application, incorporated as federal law by s.88, may have the effect of interfering with the exercise of Aboriginal rights without being unconstitutional.

[para. 63] Of course, there is nothing in s.88 that indicates that Parliament intended to give (nor could it give) unconstitutional provincial laws the force of federal law. In *Kruger*, at p. 110, Dickson J. (later C.J.C.) identified provincial laws that would not be incorporated by s.88:

> The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in effect paralyses the status and capacity of a federal company; see *Great West Saddlery Co*. v. *The King* [[1921] 2 A.C. 91]. Such an act is "no law of general application." See also *Cunningham* v. *Tomey Homma* [[1903] A.C. 151].

He added, at p. 112:

> *It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians*. Were that so, s.88 would not operate to make the Act applicable to Indians.
>
> (My emphasis)

[para. 64] The views expressed by Dickson J. in *Kruger* were considered by Beetz J. in *Dick* at pp. 323-24 [S.C.R.; pp. 667-69 C.N.L.R.]. The reference is to a dissenting judgment by Lambert J.A. in the appeal to this Court:

The second passage of *Kruger* quote by Lambert J.A. is at p. 112 of the Supreme Court Reports:

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter – to "preserve moose before Indians" in the words of Gordon J.A. in *R*. v. *Strongquill* (1953), 8 W.W.R. (N.S.) 247 – it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s.88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

Lambert J.A. then emphasized the importance of the effect of the legislation as opposed to its purpose. At p. 489 of his reasons he wrote:

> ... evidence about the motives of individual members of the Legislature or even about the more abstract "intention of the legislature" or "legislative purpose of the enactment" is not relevant. What is relevant is evidence about the effect of the legislation. In fact, evidence about its "application".

With all due deference, it seems to me that the correct view is the reverse one and that what Dickson J., as he then was, referred to in *Kruger* when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored; they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when in
the above quoted passage, he wrote:

> It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.

[para. 65] In sum, s.88 does not have as its only function the incorporation of derogations from Aboriginal rights. Even if it did, some interference with Aboriginal rights by the effect of provincial law in combination with s.88 could be justified. It is true that the incorporation of provincial laws by s.88 could produce a result which is inconsistent with s.35 of the *Constitution Act, 1982*; however, it is the incorporated law which must be examined and, if necessary, read down to eliminate the unconstitutional effect.

(c) Whether s.27(1)(c) of the Wildlife Act is inconsistent with s.35(1) of the Constitution Act, 1982?

[para. 66] Section 27(1)(c) of the *Wildlife Act* provides:

> 27(1) A person commits an offence where he hunts, takes, traps, wounds or kills wildlife
>
> (c) at a time not within the open season,

Section 35(1)of the *Constitution Act, 1982* provides:

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

[para. 67] In *Sparrow* the Supreme Court of Canada explored for the first time the scope of s.35(1). At p. 1105 [S.C.R.; p. 178 C.N.L.R.] the Court said:

> Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords Aboriginal peoples constitutional protection against provincial legislative power.

[para. 68] The analysis required by *Sparrow* with respect to the application of s.35(1) is revealed by these passages: at p. 1111 [S.C.R.; p. 182 C.N.L.R.]:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s.35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s.35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.

[para. 69] at p. 1112 [S.C.R.; p. 182 C.N.L.R.]:

> 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 ...
>
> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s.35(1), certain questions must be asked. First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

[para. 70] at p. 1113 [S.C.R.; p. 183 C.N.L.R.]:

> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional Aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> The Court of Appeal below held, at p. 96, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*" (Emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.
>
> The justification of conservation and resource management, on the other hand, is surely uncontroversial.

[para. 71] at pp. 1114-5 [S.C.R.; p. 183-84 C.N.L.R.]:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* and *Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modem fishery inevitably blurs with the efficient allocation and management of this scarce and

valued resource. The nature of the constitutional protection afforded by s.35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. ... in *Jack* v. *The Queen*, *supra,* for such guidelines.

[para. 72] at pp. 1115-6 [S.C.R.; p. 184 C.N.L.R.]:

We therefore repeat the following passage from *Jack*, at p. 313:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish ...

While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is
established.

[para. 73] at p. 1119 [S.C.R.; p. 186-87 C.N.L.R.]:

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown ... The constitutional entitlement embodied in s.35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering over-all 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.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[para. 74] The Province asserts that it should not be assumed that the same tests apply to fishing as to hunting.

[para. 75] The County Court judge said there is no distinction in this case between the right to fish and the right to hunt (p. 126). In *Kruger* hunting and fishing rights were treated alike. (p. 111) In my view, the *Sparrow* analysis is equally applicable to fishing, hunting, or to any other Aboriginal right, except perhaps when it comes to a detailed allocation of resources. At that stage the task of

scrutinizing a conservation plan to assess priorities "must be left to those having expertise in the area". (*Sparrow*, p. 1116 [S.C.R.; p. 184 C.N.L.R.]). Competing interests have to be balanced. The claims of the Aboriginal peoples must be taken seriously. Consultation is necessary. The plan may differ depending upon the resource in question, the steps which must be taken to conserve it, and other factors. *Sparrow* does not set out an exhaustive list of those factors (p. 1119 [S.C.R.; p. 187 C.N.L.R.]). They may vary from case to case and from resource to resource.

[para. 76] The first step in the *Sparrow* analysis is to ask whether the legislation in question has the effect of interfering with an existing Aboriginal right. In this case both judges below held that the Aboriginal rights of Mr. Alphonse had been infringed. But the Province submits that the evidence does not support a finding that Mr. Alphonse was exercising an Aboriginal right because the traditional preference of the Shuswap people was to hunt in the Fall, to hunt when food was needed, and not to kill deer of the species which Mr. Alphonse shot. The Province asserts that, therefore, the first step in the *Sparrow* analysis was not established.

[para. 77] But the findings of the trial judge, listed earlier, were supported by the County Court judge and, in my view, were ones which a judge, properly instructed, could reasonably have made: *R*. v. *Yebes*, [1987] 2 S.C.R. 168 at 185-86, [1987] 6 W.W.R. 97, 17 B.C.L.R. (2d) 1.

[para. 78] The appellant makes this submission with respect to prima facie infringement, in paras. 14-15 of his factum

> 14. It is respectfully submitted that, having regard to those findings of fact, an application of the foregoing principles justifies the conclusion that s.27(1)(c) of the *Wildlife Act* constitutes a *prima facie* infringement of s.35(1):
>
> (a) The closed season, coupled with the low bag limits, prevents subsistence hunters from obtaining sufficient venison for their food needs.
>
> (b) The closed season prevents the Indian practice of hunting game for food throughout the year.
>
> (c) The closed season and bag limits impact negatively upon the traditional practice whereby the Indian subsistence hunter shares the bounty of his hunt with members of his extended families and band elders.
>
> (d) The subsistence permit policy does nothing to alleviate against the prima facie infringement of s.35. Indeed, as the Provincial Court Judge ruled, it adds insult to infringement.
>
> 15. Sensitivity to the aboriginal perspective is especially important in this analysis. That perspective should inform the Court's assessment of the "undueness" of hardship caused by s.27(1)(c), and of its "unreasonableness". In this regard, useful reference may be made to the testimony of the Indian witnesses quoted by Barnett, P.C.J., at pp. 22-25 of his Reasons for Judgment. These witnesses make clear that, for them, far more is involved than just a source of protein, their way of life and distinctive cultural identity is at stake. In the words of Chief Alice Abbey:
>
> > “... it's our gift, it's a nourishment for us, a total nourishment."

[para. 79] I think the judges below were correct in proceeding on the basis that the provisions of the *Wildlife Act* interfered with the Aboriginal rights of Mr. Alphonse.

[para. 80] The County Court judge reached his conclusion that s.27(1)(c) of the *Wildlife Act* did not contravene s.35(1) without having the advantage of the analysis by the Supreme Court of Canada in *Sparrow.* Thus the appropriate legal tests were not applied in this case.

[para. 81] Instead the County Court judge had regard to the public interest test prescribed by the Court of Appeal, which was later rejected by the Supreme Court of Canada. Although a conservation test was applied, it did not have regard to the factors mentioned and the analysis provided by the Supreme Court of Canada judgment in *Sparrow*. Accordingly, I think the appeal must be allowed.

[para. 82] The Province submits there should be a new trial so the Crown may have an opportunity to adduce evidence on the questions raised by *Sparrow*.

[para. 83] In my opinion this is not a case where it would be appropriate to grant a new trial. Instead, I would allow the appeal and acquit the appellant on the basis that he has established a prima facie infringement of his Aboriginal rights. That infringement has not been justified by the Crown. This conclusion should come as no surprise to the Province, which suggested earlier that such a course be followed. The appeal went ahead, however, because the appellant wished to fully argue his case before this Court.

[para. 84] Whether, in another case, the Crown can justify the closed season provision in the *Wildlife Act* is another matter. But the Crown will have to demonstrate, amongst other things, that it is justified in giving no priority in the *Wildlife Act* or its regulations to the Indians, despite the fact that they have an unextinguished Aboriginal right to hunt.

PART V

SUMMARY

[para. 85] 1. Mr. Alphonse was exercising an unextinguished Aboriginal right when he shot a deer on unoccupied, unfenced, uncultivated private land, which was not "enclosed land" as defined by the *Trespass Act.*

[para. 86] 2. The *Wildlife Act* is a law of general application within the meaning of s.88 of the *Indian Act*, and is referentially incorporated as federal law pursuant to s.88.

[para. 87] 3. Section 88 is not inconsistent with s.35(1) of the *Constitution Act, 1982.*

[para. 88] 4. Section 27(1)(c) of the *Wildlife Act* constitutes a prima facie infringement of Aboriginal rights which has not been justified on the evidence before the court and thus it is inconsistent with s.35(1) of the *Constitution Act, 1982*. Accordingly, applying s.52(1) of the *Constitution Act, 1982*, s.27(1)(c) is of no force or effect with respect to Aboriginal persons.

[para. 89] I would allow the appeal against conviction and sentence, and would acquit the appellant.

LAMBERT J.A. (concurring):

PART 1

THE PROCEEDINGS

[para. 90] On 3 April, 1985, William Alphonse shot and killed an antlerless male mule deer. He was charged on these two counts:

Count 1 William ALPHONSE, on or about the 3rd day of April, A.D. 1985, at or near 150 Mile House in the Province of British Columbia, did kill wild life, to wit: a mule deer, at a time not within the open season,

CONTRARY TO SECTION 27(1)(c) OF THE *WILDLIFE ACT OF BRITISH COLUMBIA*

Count 2 William ALPHONSE, on or about the 3rd day of April, A.D. 1985, at or near 150 Mile House in the Province of British Columbia, did have in his possession dead wild life, to wit: a mule deer, without being the holder of a licence or permit as provided by regulation,

CONTRARY TO SECTION 34(2) OF THE *WILDLIFE ACT OF BRITISH COLUMBIA*

[para. 91] Mr. Alphonse is a Shuswap Indian. He is a member of the Williams Lake Indian Band. He lives on the Sugar Cane Reserve near 150 Mile House. He killed the deer for food for himself, his family, and other band members. He shot the deer with a rifle on land held in fee simple by the Onward Cattle Co. Ltd. about seven miles south of the Sugar Cane Reserve. His defence to both counts was that he killed the deer and kept its carcass in the exercise of his
Aboriginal rights.

[para. 92] After a thirteen-day trial in 1987 and 1988, His Honour Judge Barnett of the Provincial Court of British Columbia acquitted Mr. Alphonse on both counts. Judge Barnett decided that when Mr. Alphonse killed the deer and kept its carcass he was exercising his Aboriginal rights; that those rights had not been extinguished; that they could be exercised on the private land where the deer was shot; and that ss.27(1)(c) and 34(2) of the *Wildlife Act*, the sections under which Mr. Alphonse was charged, were, in their application to this case, inconsistent with s.35 of the *Constitution Act, 1982* which recognizes, affirms and guarantees Aboriginal rights and gives them constitutional protection. Judge Barnett's reasons are reported at [1988] 3 C.N.L.R. 92.

[para. 93] In relation to the facts, Judge Barnett said this, at pp. 94-95:

The evidence in this case supports the following propositions:

1. The Shuswap people have a history as an organized society going back long before the coming of the white man.

2. The hunting of deer was an integral part of the life of the Shuswap people and continues to be so to this day.

3. Deer have both cultural and material importance to the Shuswap people who have traditionally regarded them with great respect which resulted in effective conservation of the species.

4. Mr. Alphonse's hunting of the deer in this case was done with proper regard for the traditions of the Shuswap people and within the traditional territory of the Shuswap people.

5. Mr. Alphonse killed a deer on land which was Crown granted by the Province of British Columbia in 1890 or 1896, and remains privately owned.

6. The land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. Mr. Alphonse did not know the land was privately owned and there was
nothing which should have made that fact apparent to him.

7. Mr. Alphonse was not concerned to know if he was hunting on privately or publicly owned lands. He believes that his right to hunt deer in the traditional territory of the Shuswap people cannot be restricted by laws enacted in the legislature of the Province of British Columbia.

8. Mr. Alphonse killed the deer within an area which has been designated as MU 5-2 by the Fish & Wildlife Branch. The deer populations within this area are stable and healthy. During the open season the previous fall, licensed hunters killed about 1,175 deer within MU 5-2. Conservation officers assume that the actual kill in any given year will be about double the number they consider to be legally killed.

9. There are official policies which allow regional managers within the Fish & Wildlife Branch to grant special permission to persons to hunt deer during the closed season. The permits granted are known as sustenance permits.

10. Mr. Alphonse never considered applying for a sustenance permit.

[para. 94] The Crown appealed to the Summary Conviction Appeal Court and the appeal was heard by His Honour Judge Hamilton of the County Court of British Columbia. Judge Hamilton's reasons are reported at [1989] 1 C.N.L.R. 121. Judge Hamilton summarized some of the evidence in these two paragraphs, at p. 123:

> According to the evidence of Herbert Langin, a wildlife biologist employed by the Ministry of the Environment and Parks, the length of open season is fixed on estimates of the deer population and the number of deer that will likely be taken during any particular week of open season. The preliminary management plan involves as its first priority the distributions of the number of deer, the second priority is to provide for hunting opportunities and the third priority is to provide for viewing opportunities. Langin said that if the open season is extended to where more than 25-30 percent of the deer are harvested then the deer population would decline. The severity of previous winters and other environmental factors are also considered. Some specific problems relating to time and place are also considered. Langin gave an example of where one year the open season was reduced by twelve days in one area because some of the lower elevation resident deer were being harvested at too high a level, while in the same year the season was opened earlier in some areas where the non-migrating deer spend the early part of the fall. One of the reasons for having the open season in the fall is that the deer are not in such concentrated groups as they are found in the spring and are less vulnerable than they are in the spring.
>
> According to the evidence of Roy Slavens, the Conservation Officer who found the respondent with the dead deer, in 1984 the open season for antlered deer was from September 10 to November 17 but the open season for antlerless deer was only two days, October 17 and 18, 1984. Slavens says the deer the respondent shot was a male antlerless fawn which would have been born in about June 1984 and was therefore ten months old when killed. The evidence was that male deer that young would not have been involved in the reproduction process that year.
>
> Historically the Indians did not hunt all year round. They hunted primarily in the fall, dried their meat to preserve it and hunted at other times when food was required. The respondent says he hunted whenever he needed food for his family and killed about fifteen deer per year.

Then, relying on that evidence, he concluded his reasons in this way, at pp. 126-27:

> *Sparrow* has now defined the limit of provincial power by saying that regulations which infringe the Aboriginal right to hunt deer by reducing the number of deer available to a level below that required for reasonable food and societal needs will only be valid if they can be reasonably justified as being necessary for the proper management and conservation of the
> resource.
>
> It is clear from the evidence on this appeal that a regulation which closes the hunting season is necessary for the proper management and conservation of the resource. Section 27(1)(c) and the regulations specifying open and closed seasons are therefore valid notwithstanding their effect on Aboriginal hunting rights. Section 35(1) of the *Constitution Act* does not afford the respondent a defence to the charge of hunting when the season is closed.

[para. 95] The *Sparrow* decision referred to by Judge Hamilton was the decision of this Court, reported at (1986), [1987] 1 C.N.L.R. 145, [1987] 2 W.W.R. 577, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65 (B.C.C.A.). The test for permissible infringement of Aboriginal rights propounded in this Court was substantially modified by the Supreme Court of Canada in its decision reported at [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 427, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241 some time after Judge Hamilton had given his judgment in this summary conviction appeal.

[para. 96] Judge Hamilton entered a conviction on Count 1. He dismissed the Crown's appeal from the acquittal on Count 2 on the basis of the rule against multiple convictions.

[para. 97] This appeal is brought by Mr. Alphonse from the conviction entered on Count 1. There is no appeal by the Crown from the acquittal on Count 2.

PART II

THE ISSUES

[para. 98] This appeal was argued at the same time as the appeal in *R*. v. *Dick* [reported *infra*] on which judgment is being given at the same time as judgment in this appeal. The issues raised in both appeals were argued together. The appellants in each appeal were granted intervenor status in the other appeal, and the intervenors in both appeals, including the federal Crown, were the same. The Province, as respondent in both appeals, filed a single factum. The issue which I regard as decisive in both appeals was stated by the appellant in *Dick* in these terms:

> 1. The Learned County Court Judge erred in law in holding the *Wildlife Act* S.B.C. 1982, c.57 is an Act of general application and so will apply to the Appellant.

I regard that issue as being properly before the Court in both appeals. It was certainly argued in both appeals.

[para. 99] Some months after the two appeals were argued, the same division of the Court heard the argument in *Delgamuukw* v. *British Columbia* another case in which judgment is being given at the same time [[1993] 5 W.W.R. 97] as judgment in this appeal. By then the Province had changed its position on a number of issues and, at the conclusion of the argument in *Delgamuukw*, counsel for the Province delivered to the Court an "Amended Provincial Position Re: *Dick* and *Alphonse* Appeals". According to that statement of position the Province was no longer arguing that Aboriginal title and Aboriginal rights throughout British Columbia had been comprehensively extinguished between 1858 and 1871, and the Province was no longer arguing that the right to hunt deer for food and ceremonial purposes, in the exercise of the rights encompassed by Aboriginal title or in the exercise of Aboriginal sustenance rights, was specifically extinguished by colonial game legislation between 1858 and 1871. However, the Province retained one particular extinguishment argument which it put in these terms:

> 3. Insofar as the Appellants in the *Dick* and *Alphonse* appeals allege that they "owned" the wildlife, the Province submits that those ownership rights over wildlife have been extinguished by virtue of the provisions of section 2 of the *Wildlife Act*, first enacted as S.B.C. 1971, c.69, s.28.

[para. 100] In September 1992, a letter was written by the Registrar to all counsel in this appeal and to all counsel in the *Dick* appeal indicating that the Court had received the Amended Provincial Position, and informing them that the Court did not consider it necessary to hear further argument as a result of that change of position. Perhaps understandably, no counsel responded to the contrary. Indeed no counsel responded at all. Accordingly, the Court has decided that it is not necessary to deal with the issues which the Province has now abandoned, although, since they were fully argued, it would not be improper to deal with them. Since I have dealt with the origin and nature of Aboriginal rights and with comprehensive extinguishment in my reasons in *Delgamuukw* I do not propose to deal with them here. Since the game legislation in the Colonial period lacked the clear and plain intention necessary to extinguish Aboriginal rights, and since the argument about specific extinguishment through the Game ordinances has been abandoned, I do not propose to deal with it either.

[para. 101] Judge Barnett found as a fact that the Shuswap people have a history as an organized society going back long before the arrival of Europeans; that hunting deer for food and other purposes was a tradition of the Shuswap people and formed an integral part of their lives; and that when Mr. Alphonse killed the deer and kept its carcass he did so in accordance with the traditions of the Shuswap people and within their traditional territory.

[para. 102] On the basis of those findings of fact, Judge Barnett concluded that when Mr. Alphonse killed the deer and kept its carcass he was exercising his Aboriginal rights. It was not necessary for Judge Barnett to decide whether the rights being exercised were rights derived from Aboriginal title or were separate Aboriginal hunting rights, and it is not necessary for me to

consider that question either. I will sometimes refer in these reasons to rights derived from either source as being Aboriginal hunting rights. Subject only to the two remaining questions about extinguishment, Judge Barnett's conclusion that when Mr. Alphonse killed the deer he was exercising his Aboriginal hunting rights must stand.

[para. 103] The two remaining questions about extinguishment are the question about ownership of wildlife and the question about hunting over land held by a private owner in fee simple. The latter question also includes issues about regulation of hunting in particular areas. I propose to consider those two remaining questions about extinguishment in the next two Parts of these reasons, namely Parts III and IV. Then, in Part V, I will come to what I regard as the decisive issue, namely, whether the prohibition against hunting in the closed season contained in s.27(1)(c) of the *Wildlife Act* is a law of general application. If it is not, then in my opinion it did not apply to Mr. Alphonse when he shot the deer.

PART III

EXTINGUISHMENT OF ABORIGINAL RIGHTS: CROWN OWNERSHIP OF WILDLIFE

[para. 104] For convenience, I will set out again the Province's position from its statement of Amended Provincial Position on the question of extinguishment of ownership rights in wildlife:

> 3. Insofar as the Appellants in the *Dick* and *Alphonse* appeals allege that they "owned" the wildlife, the Province submits that those ownership rights over wildlife have been extinguished by virtue of the provisions of section 2 of the *Wildlife Act*, first enacted as S.B.C. 1971, c.69, s.28.

[para. 105] The relevant provisions are s-s.2(1) and 2(2) which read:

> 2(1) Subject to subsection (2), the property in all wildlife within the Province is vested in the Crown in right of the Province.
>
> (2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.

I do not understand that it is any part of Mr. Alphonse's case that he "owned" the male mule deer which he shot, before he shot it. My understanding of Mr. Alphonse's case is that he had a right to hunt and kill the deer, derived either from the Aboriginal title of the Shuswap people to possession, occupation, use and enjoyment of their traditional lands and to the resources of those lands, including the wildlife resources, or, alternatively, from the Aboriginal hunting rights of the Shuswap people over their traditional ancestral lands. I do not understand that the Shuswap people considered that they "owned" the wildlife in their traditional ancestral lands. The concept of ownership of wildlife is, in my opinion, entirely a common law concept.

[para. 106] By the same token, I do not understand that it is any part of Mr. Alphonse's case that he "owned" the carcass of the deer after it was dead. He had an Aboriginal interest in the carcass based on the communal right which he exercised when he killed the deer, and based on the Aboriginal rights of self-government and self-regulation of the Shuswap people to deal with the carcass in accordance with the customs, traditions and practices of the Shuswap people which formed and continue to form an integral part of their distinctive culture.

[para. 107] So, to return to the Province's Amended Position, I do not understand that the appellant Alphonse alleges that he "owned" the deer. That is enough to conclude this point.

[para. 108] However, I should add that, in my opinion, the Province did not have the power in 1971 to extinguish any aspect of an Aboriginal hunting right. Such a right relates to the core of Indianness and as such comes within the exclusively federal nature of the legislative power held by the Parliament of Canada under head 91(24) of the *Constitution Act*, *1867*: "Indians and lands reserved for the Indians". The only argument which could be made that s.2 of the *Wildlife Act* has been referentially incorporated as federal legislation must rest on s.88 of the *Indian Act*. But in my opinion, s.88 cannot bring about an extinguishment of Aboriginal rights through referential incorporation of Provincial legislation because, whatever the intention of the Provincial legislature, s.88 does not contain any clear and plain intention of the Sovereign power acting legislatively in Parliament to bring about an extinguishment, and such an indication of intention is necessary

before an extinguishment can occur. I do not propose to say any more on this point. It has been dealt with more fully in Part IV Division 2, Subdivision (c) of my reasons in *Delgamuukw*.

PART IV

EXTINGUISHMENT AND REGULATIODN OF ABORIGINAL RIGHTS: CROWN GRANT IN FEE SIMPLE

[para. 109] I now come to the question about hunting over land that was owned by the Onward Cattle Co. Ltd. in fee simple. There are two aspects of this question.

[para. 110] The first aspect of this question relates to whether extinguishment may have arisen either from the passing of the legislation authorizing the issuance of the first fee simple title over the land in question (which, in my reasons in *Delgamuukw*, I have called "implied extinguishment") or from the issuance of the fee simple title itself (which I have called "extinguishment by adverse dominion"). In my opinion neither type of extinguishment occurred in this case. If the authorizing legislation was passed before 1871, it lacked the clear and plain intention to extinguish either through the passage of the legislation or through the issuance of fee simple title under the legislation. If the legislation was passed after 1871 then the Province lacked the legislative capacity to extinguish Aboriginal title or hunting rights because that title and those rights lie at the core of Indianness and so come within the exclusively federal nature of head 91(24) of the *Constitution Act, 1867*. I do not propose to deal more fully with this aspect of this question. It is dealt with in Part IV of my reasons in *Delgamuukw*, particularly in Subdivisions (e) and (f) of Division I and in Division 2.

[para. 111] The second aspect of this question relates to whether the exercise by Mr. Alphonse of a hunting right incidental to his Aboriginal title or of a separate hunting right over the traditional ancestral lands of the Shuswap people may have been regulated in such a way as to preclude that exercise on land owned by the Onward Cattle Co. Ltd. in fee simple. In my opinion there is nothing in the *Wildlife Act*, the *Trespass Act*, or any other provincial legislation which, by referential incorporation as federal legislation or otherwise, might be thought to have precluded the exercise by Mr. Alphonse of a right to shoot the mule deer on this private land. The land was uncultivated bush; it was not occupied by livestock; it was not surrounded by a fence or a natural boundary; and it was not posted with signs prohibiting trespass. Just as in *R*. v. *Bartleman*, [1984] 3 C.N.L.R. 114, 12 D.L.R. (4th) 73, 55 B.C.L.R. 78, 13 C.C.C. (3d) 488 (B.C.C.A.), where such land was available for the exercise of treaty hunting rights over unoccupied lands, so in this case it was available for the exercise of Aboriginal hunting rights. That is not to say that it would not have been available if it had been occupied by livestock or surrounded by a fence. Such a supposition raises a number of questions which it is not necessary to resolve in this appeal.

[para. 112] I conclude that the fact that the land where the deer was shot was owned in fee simple by the Onward Cattle Co. Ltd. did not preclude Mr. Alphonse from exercising his Aboriginal right to kill the deer on that spot.

PART V

DID THE WILDLIFE ACT APPLY TO MR. ALPHONSE: IS IT A LAW OF GENERAL APPLICATION?

[para. 113] So I now come to what I regard as the decisive question in this appeal. It is whether s.27(1)(c) of the *Wildlife Act* is a law of general application for the purposes of s.88 of the *Indian Act*. If it is, then it might be said to have been referentially incorporated through s.88 of the *Indian Act* as federal legislation so as to have become potentially applicable to Mr. Alphonse when he exercised his Aboriginal hunting rights. If it is not, then it could not have been incorporated as federal legislation under the terms of s.88, and would not apply to Mr. Alphonse. In that case, of course, he could not be convicted under s.27(1)(c) because, in my opinion, that section could not apply to Mr. Alphonse from its own provincial vigour when he was exercising Aboriginal rights lying at the core of his Indianness.

[para. 114] I propose to address this question, first, by discussing briefly the wording and judicial history of s.88; then by referring to the leading cases of *R*. v. *Kruger* [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, and *R*. v. *Dick*, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R., 23 D.L.R. (4th) 33, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129, 62 N.R. 1 in their jurisprudential context;

and, finally, by indicating the two reasons which have led me to conclude that s.27(1)(c) of the *Wildlife Act* is not a law of general application for the purposes of s.88.

[para. 115] Section 88 reads in this way:

> 88. Subject to the terms of any treaty and any other Act of Parliament all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

This section was introduced into the *Indian Act*, as s.87, when the Act was revised in 1951. At that time there was a substantial body of judicial opinion in support of what was called the enclave theory. That theory was that provincial laws, or at least many provincial laws, did not extend to Indians on reserve lands, and that those lands constituted enclaves beyond the reach of provincial legislative capacity and amenable only to federal legislation. (See, for example: *Surrey (District)* v. *Peace Arch Enterprises Ltd*. (1970), 74 W.W.R. 380 (B.C.C.A.) and *R*. v. *Jim* (1915), 22 B.C.R. 106 (S.C.).)

[para. 116] It seems to me that the legislative purpose of s.88, when it was enacted, was to overcome the enclave theory with respect to laws that were broadly general in their application and so to extend to Indians the benefits of social and commercial legislation which were being extended to all other people in the province in enactments dealing with such things as credit, insurance, the family, and the acquisition of goods.

[para. 117] It was more than twenty years after s.88 was first enacted that the enclave theory was laid to rest by the decision of the Supreme Court of Canada in *Cardinal* v. *Attorney General of Alberta*, [1974] S.C.R. 695, [1973] 6 W.W.R. 205. That case involved the application of the Alberta *Wildlife Act*. I should note also that, at p. 710, Mr. Justice Martland, for the majority, said that it was not necessary, for the purposes of that case, to determine the meaning and effect of s.88.

[para. 118] That brings me to *Kruger* in 1978, the first case in the Supreme Court of Canada to examine the concept of what constitutes a law of general application for the purposes of s.88 of the *Indian Act*.

[para. 119] It is significant that the case was argued throughout on an agreed statement of facts. Mr. Kruger and Mr. Manuel were members of the Penticton Indian Band. They shot four deer for food for themselves, their families, and other band members on unoccupied Crown land during the closed season established under the *Wildlife Act*. They were charged under the then equivalent to what is now s.27(1)(c). They were convicted by the Provincial Court Judge, acquitted by the Summary Conviction Appeal Court Judge, convicted again by the Court of Appeal and had their conviction upheld by the Supreme Court of Canada. Mr. Justice Dickson gave the judgment of the Supreme Court of Canada. He started off by saying that Aboriginal title, including, as I have said, Aboriginal hunting rights as an incident of Aboriginal title, was not in issue in the appeal. This is how he put it, at pp. 108-109:

> Before considering the two other grounds of appeal, *I should say that the important constitutional issue as to the nature of Aboriginal title, if any, in respect of land in British Columbia*, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 – issues discussed in *Calder* v. *Attorney General of British Columbia – will not be determined in the present appeal*. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to Aboriginal title are woven with history, legend, politics and moral obligations. *If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.* (my emphasis)

[para. 120] Mr. Justice Dickson then went on to the two principal issues in the case, which he called "Laws of General Application" and "Referential Incorporation". It must be remembered that there was an agreed statement of facts which did not extend to the fundamental facts necessary to establish Aboriginal title or Aboriginal hunting rights.

[para. 121] On the question of what constitutes a law of general application and what does not, Mr. Justice Dickson said this, at pp. 110-112:

> There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. *The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company; see Great West Saddlery Co. v. The King*. Such an act is no "law of general application." See also *Cunningham* v. *Tomey Homma*.
> . . .
>
> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter – to "preserve moose before Indians" in the words of Gordon J.A. in *R*. v. *Strongquill* – it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. *It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s.88 would not operate to make the Act applicable to Indians*. But that has not been done here and in the absence of clear evidence the Court cannot so presume. (my emphasis)

[para. 122] I have underlined the words "intention", "effect", "object", "purpose", and "policy". In my opinion they are not being used to create precise distinctions, but more or less interchangeably to indicate the point at which the provincial legislation would cease to be a law of general application.

[para. 123] The main point in the *Kruger* case, in my opinion, is that if an enactment impairs the status and capacities of Indians then it is not a law of general application and s.88 does not apply. That is plainly said in the last two sentences I have underlined. But there was no evidence in that case that the *Wildlife Act* impaired the status and capacities of Indians, and it is crucial to note that questions of Aboriginal title, including Aboriginal hunting rights, were expressly not considered.

[para. 124] Mr. Justice Dickson found it unnecessary to resolve any question about referential incorporation because he considered that the *Wildlife Act* was a law of general application which applied, from its own provincial force, to Mr. Kruger and Mr. Manuel.

[para. 125] The next case is *Dick* v. *The Queen*, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129, 62 N.R. 1. Mr. Dick and some companions, all from the Alkali Lake Band of the Shuswap people, went fishing on 4 May, 1980. On the way, Mr. Dick shot a deer. May is the closed season for deer. He was charged under the then equivalent of s.27(1)(c) of the *Wildlife Act*. At his trial, extensive evidence was led about the sustenance practices of the Shuswap people and how important hunting for deer for food was to the Shuswap people. Mr. Dick was convicted. His conviction was upheld by the Summary Conviction Appeal Court; by this Court (with one dissent); and unanimously by a five judge panel of the Supreme Court of Canada.

[para. 126] The judgment of the Supreme Court of Canada was given by Mr. Justice Beetz. Again he started off by explaining, at p. 315 [S.C.R.; p. 59 C.N.L.R.], that he was not considering the questions in the appeal as they would arise if Mr. Dick were to be regarded as exercising an Aboriginal hunting right. Mr. Justice Beetz said this:

> One issue that does not arise is that of aboriginal title or rights. In its facturn, the appellant expressly states that he has "not sought to prove or rely on the Aboriginal Title or Rights in the case at bar". As in the *Kruger* case, the issue will accordingly not be dealt with ....

[para. 127] Mr. Justice Beetz dealt with two principal issues. The first was whether hunting deer for food was such a central part of the life of Mr. Dick and other Shuswap Indians of the Alkali Lake Band that it lay at the core of their Indianness. Mr. Justice Beetz said that he was prepared to assume that was so, in a passage, at pp. 320-321 [S.C.R.; p. 65 C.N.L.R.], that seems to accept that it was so, although the point was not decided. As a result of that assumption, it would follow that the *Wildlife Act* did not apply to Mr. Dick from its own provincial vigour. Mr. Justice Beetz framed that issue, in his own words, in terms of status and capacity, but he did not answer it in those terms. Instead he answered it in terms of whether the *Wildlife Act* impaired the Indianness of the Alkali Lake Band.

[para. 128] The second principal issue dealt with whether the *Wildlife Act* was a law of general application and so became referentially incorporated as federal law applicable to Indians by s.88 of the *Indian Act*. On that issue, Mr. Justice Beetz said this, at pp. 323-324 [S.C.R.; pp. 68-69 C.N.L.R.]:

> ... what Dickson J., as he then was, referred to in *Kruger* when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when in the above-quoted passage, he wrote:
>
> > It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. (my emphasis)

At pp. 325-328 [p. 70 C.N.L.R.], Mr. Justice Beetz said this:

> It has already been held in *Kruger* that on its face, and in form, the *Wildlife Act* is a law of general application. In the previous chapter, I have assumed that its application to appellant would have the effect of regulating the latter qua Indian. However, it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator. While it is assumed that the *Wildlife Act* impairs the status or capacity of appellant, it has not been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or discriminates against them in any way.
>
> I accordingly conclude that the *Wildlife Act* is a law of general application within the meaning of s.88 of the *Indian Act*.
>
> I accordingly conclude that, in view of s.88 of the *Indian Act*, the *Wildlife Act* applies to appellant even if, as I have assumed, it has the effect of regulating him *qua* Indian. (my emphasis)

[para. 129] This case now raises the question that was specifically excluded from consideration in Kruger and in *Dick*, namely, does the fact that the *Wildlife Act* prohibits the exercise of Aboriginal hunting rights in accordance with Aboriginal customs, traditions, and practices that were and are an integral part of the distinctive culture of the holders of the rights, make the *Wildlife Act* no longer a law of general application but rather an Act that "singles out Indians for special treatment or discriminates against them in any way," to use the words of Mr. Justice Beetz, for the Supreme Court of Canada, in *Dick*.

[para. 130] In my opinion there are two reasons why s.27(1)(c) of the *Wildlife Act* singles out Indians for special treatment and discriminates against them. But before coming to the two reasons, I propose to say a word about the terms that were used in *Kruger* and in *Dick* to describe the legislative circumstance that may make an Act unconstitutional. The words were "object", "purpose", "effect", "intent" and "policy". Since the time when *Kruger* and *Dick* were decided, we have had the benefit of the Supreme Court of Canada decisions in *R*. v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481 and *Irwin Toy Ltd*. v. *Quebec* (A.G.), [1989] 1 S.C.R. 927 which established, respectively at pp. 331-332 and pp. 972-977, that either an unconstitutional purpose

or an unconstitutional effect can invalidate legislation. I regard that as a general rule about constitutionality, applicable not only to Charter cases but also to other constitutional cases including cases about the distribution of legislative powers. But, however that may be, I have no doubt that when the test to be applied is whether an Act “singles out Indians for special treatment or discriminates against them in any way" the Act will not be an Act of general application unless both the purpose and effect of the Act pass the test of not singling out Indians for special treatment or discriminating against them.

[para, 131] Accordingly, in dealing with the two reasons why I consider that s.27(1)(c) of the *Wildlife Act* discriminates against Indians, I propose to concentrate on its effect, which I can anticipate and understand, rather than on its purpose, which I find more difficult to discern. But, since the question that is being addressed is whether s.27(1)(c) is a law of general application, surely the very word "application" must direct us to the question of whether the effect is a general one or a discriminatory one.

[para. 132] Each of the reasons on which I rely depends on the fact that the right that Mr. Alphonse was prevented from exercising was an Aboriginal hunting right. Accordingly, neither of the reasons was considered in *Kruger* or in *Dick,* and those cases specifically and expressly leave open the question of what effect the fact that the right being exercised was an Aboriginal right would have on the reasoning and conclusions in those cases.

[para. 133] Each of my reasons is an "argument" and not a "point", for the purposes of the distinction made by Chief Justice Duff in *Thomson* v. *Lambert*, [1938] S.C.R. 253 at 268-269. In other words, if an issue, (that is, a point,) is raised by the parties through their counsel, then the Court in its consideration of that issue or point is not confined to the very arguments made by counsel but is free to think about arguments that counsel may not have addressed specifically. The scope of the Court's thinking is confined by the issues that were raised but not by the arguments actually made by counsel on those issues.

[para. 134] *The first reason* why s.27(1)(c) of the *Wildlife Act* may be said to discriminate against Indians is a qualitative one. That is, it discriminates against them because it prevents the exercise by Indians of their Aboriginal hunting rights whereas for non-Indians it merely regulates their statutory privilege to hunt for game.

[para. 135] When s.27(1)(c) of the *Wildlife Act* applies to non-Indians, it prevents them from hunting during the closed seasons. They have no right to hunt during those seasons, so no hunting right or other right is being taken away from them. Nor are they being prevented from exercising any hunting right or other right. They have a privilege to hunt during the open season in accordance with the terms of the licence or permit that is required to be held by them before they set out to hunt. That statutory privilege is shared by Indians and non-Indians alike. It can be taken away from both Indians and non-Indians, and, in the closed season, it is taken away from both Indians and non-Indians. That operation of the statutory privilege occurs under the terms of the statute, and when it applies it applies to both Indians and non-Indians. So it is in that respect, a law of general application. And as Mr. Justice Dickson pointed out in *Kruger*, the fact that it falls with much greater frequency, hardship, and suffering on Indians who depend on hunting for sustenance than on sportsmen who do not, does not make the law any less a law of general application.

[para. 136] It was that situation in relation to the removal of a privilege to hunt for deer that was discussed and decided in *Kruger* and in *Dick*. Both of those cases expressly left open the question of whether s.27(1)(c) of the *Wildlife Act* would still be a law of general application if Aboriginal title and Aboriginal hunting rights were taken into consideration.

[para. 137] But the situation is entirely different when the right that an Indian is being prevented from exercising is either an incident of Aboriginal title to the exclusive possession, occupation, use and enjoyment of land and its resources, or an Aboriginal hunting right. In either case, the right is derived from the customs, traditions and practices of the Indian people in question, and has been nurtured and protected as an integral part of their distinctive culture since before British sovereignty was first asserted, and has been incorporated into the common law and protected by the common law ever since. When an Indian is prevented from exercising such a fundamental right, a right that is now constitutionally recognized, affirmed and guaranteed by s.35 of the *Constitution Act, 1982*, he is suffering a qualitatively different consequence than the consequence that is visited on both Indians and non-Indians when their statutory hunting privilege is not extended to the closed season.

[para. 138] In suffering the consequence of being prevented from exercising an incident of his Aboriginal title to land or his Aboriginal hunting rights, Mr. Alphonse was *singled out* from non-Indians and he was *discriminated against* in such a way as to demonstrate that the application of s.27(1)(c) is not general, and s.27(1)(c) is therefore not a law of general application.

[para. 139] By contrast, *the second reason* why s.27(1)(c) of the *Wildlife Act* may be said to discriminate against Indians is a quantitative one, that is, it applies to some Indians but not to others.

[para. 140] We know from the decision of the Supreme Court of Canada in *Dick* that the question of whether a law is one of general application or not is a question that must be determined once s.88 has been deemed to be applicable. In *Dick*, it was assumed that the *Wildlife Act* did not apply of its own force to Indians for whom hunting for sustenance was at the core of their Indianness. Accordingly, the *Wildlife Act* cannot be a law of general application in its own provincial vigour because it does not apply to a significant segment of the population, and probably it does not apply to a majority of the hunting population, of its own provincial vigour. So it follows from *Dick* that one must assume that s.88 applies, and if it applies, then one must ask whether, with the addition of the federal legislative force to the provincial legislative force, the law is a law of general application.

[para. 141] But s.88 only applies to status Indians under the *Indian Act*. It does not apply to non-Indians, Inuit and Métis. I do not think there are any Inuit with Aboriginal hunting rights in British Columbia. But there are many non-status Indians and many Métis. And there is no reason whatsoever to believe that they do not hold Aboriginal title to their traditional ancestral lands and Aboriginal hunting rights in their traditional ancestral hunting areas. Indeed, s.35 of the *Constitution Act, 1982* recognizes, affirms, and guarantees those rights.

[para. 142] The *Indian Act* defines an Indian to mean "a person who pursuant to this Act is registered as an Indian, or is entitled to be registered as an Indian". Section 4.1 of the *Indian Act* provides that a reference to an Indian in s.88 includes any person whose name is entered on a Band list and who is entitled to have it entered on the list. But there remain many non-status Indians and Métis who are not Indians for the purposes of the *Indian Act* and to whom s.88 does not apply. Yet those very people may well belong to a community of people which holds Aboriginal title or Aboriginal rights. It must be remembered that membership of such a community must be determined in accordance with the customs, traditions and practices of the Aboriginal people in question, and not in accordance with the *Indian Act* or with non-Indian common law principles. Professor Hogg sums up this point in *Constitutional Law of Canada* (3rd ed. Carswell, 1992) at 27. 1 (b), pp. 665-66, in this way:

> But there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also undoubtedly "Indians" within the meaning of s.91(24), although they are not governed by the *Indian Act*.

[para. 143] Section 27(1)(c) affects the core of Indianness for status Indians, non-status Indians and Métis alike, because for all of them it affects or may affect the exercise of their Aboriginal rights. Accordingly, it reaches into the exclusive federal nature of the federal legislative power under s.91(24) of the *Constitution Act, 1867*. Therefore it does not apply to them of its own provincial vigour. Only by the operation of s.88 can s.27(1)(c) of the *Wildlife Act* be given federal vigour, and so be made to apply to status Indians under the *Indian Act*. However, it still would not apply to non-status Indians and Métis in the exercise of their Aboriginal rights, because they are not considered to be Indians for the purposes of the *Indian Act.* In my opinion, because s.27(1)(c) of the *Wildlife Act* applies to status Indians and to non-Indians but does not apply to non-status Indians and Métis, it cannot be said to be a law of general application. It *singles* out status Indians for special treatment in comparison to non-status Indians and Métis in relation to the exercise of similar Aboriginal rights, and it *discriminates* against status Indians and in favour of non-status Indians and Métis.

[para. 144] For these two reasons I conclude that s.27(1)(c) of the *Wildlife Act* is not a law of general application.

[para. 145] Each of the two reasons which I have given is, in itself, a sound reason for concluding that s.27(1)(c) of the *Wildlife Act*, even if deemed to have been given federal force as well as provincial force in relation to Indians, would not be a law of general application for the purposes of s.88. The first reason is because it takes away an Aboriginal, fundamental and constitutionally

protected right from Indians, but only fails to extend a privilege with respect to non-Indians. The second reason is because it applies to some Indians and not to others.

[para. 146] I wish to emphasize that both of the reasons that I have given relate to the exercise of Aboriginal rights. It is the prohibition of the exercise of Aboriginal rights that prevents the law from being a law of general application. And it is only in the context of Aboriginal rights that *Kruger* and *Dick* are not binding on the question of whether s.27(1)(c) of the *Wildlife Act* is a law of general application for the purposes of s.88 of the *Indian Act*.

[para. 147] It is therefore my opinion that when Mr. Alphonse shot the antlerless male mule deer on 3 April, 1985 in the exercise of his Aboriginal rights he did not commit an offence under s.27(1)(c) of the *Wildlife Act*. Section 27(1)(c) did not apply to him of its own provincial legislative vigour when he carried out the act which lay at the core of his Indianness, namely the act of killing the deer and keeping its carcass. And s.27(1)(c) could not be given federal vigour because it was not a law of general application.

PART VI

OTHER ARGUMENTS AND PROPOSED DISPOSITION

[para. 148] A number of other arguments were raised on this appeal. They included a *Sparrow* argument on s.35(1) of the *Constitution Act, 1982*; an argument that because of *Sparrow*, the *Wildlife Act* applied in some circumstances and not in others and so was not a law of general application; an argument that the law of Aboriginal rights is federal common law and for that reason cannot be altered by a provincial legislature; an argument that Mr. Alphonse was exercising a right that was an incident of his Aboriginal title and that s.88 only applied to laws relating to Indians and not to laws relating to lands reserved for the Indians; an argument that the land where Mr. Alphonse shot the deer was subject to an interest other than the interest of the Province and was immune from provincial regulation under s. 109 of the *Constitution Act, 1867*; and an argument that the generality of s.88 was an impermissible inter-delegation of legislative powers in that it represented a legislative departure from the fiduciary obligations of the Sovereign in Parliament to the Indians. (Whether referential incorporation of already read-down legislation so as to read it up again under s.88 constitutes unconstitutional inter-delegation of the core of an exclusive federal power was not argued as a separate point from the fiduciary question.) It is not necessary for me to deal with any of those arguments.

[para. 149] I would allow the appeal, set aside the conviction, and enter a verdict of acquittal.