R. V. AGAWA

Ontario Court of Appeal, Martin, Blair and Robins JJ.A., August 3, 1988

J.T.S. McCabe and Brian Gover, for the applicant/appellant
W. Henderson and Harry S. Laforme, for the respondent

The respondent treaty Indian, a member of the Batchawana Indian Band which was a signatory to the Robinson Huron Treaty of 1850, was convicted at trial on six charges of fishing in 1984 by means of a gill net without a licence, contrary to s.12(1) of the *Ontario Fishery Regulations,* C.R.C. 1978, c.849, made pursuant to the *Fisheries Act,* R.S.C. 1970, c.F-14. The convictions were quashed by the Summary Conviction Appeal Court. A fishing licence had been issued annually to the Band for the years 1950 to 1983, but no licence was applied for in 1984, 50 that the Band could test its rights under s.35(1) of the *Constitution Act, 1982.* The Robinson Huron Treaty promised the right "to fish in the waters thereof, as they have heretofore been in the habit of doing...." The evidence established that Indians in the area occupied by the Band habitually fished with gill nets both for their own consumption and commercially when the treaty was executed. Two questions were raised on appeal; whether the *Ontario Fishery Regulations* prevail over the respondent's treaty rights, and, if so, has this been changed by s.35(1).

Held: Appeal allowed.

1. Although Indian treaties are *sui generis* and not the same as treaties between independent countries, they are similar to Canada's international treaties in that they are not self-executing. They can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute. The only effective protection of Indian treaty rights prior to 1982 was provided by s.88 of the *Indian Act,* R.S.C. 1970, c.I-6.

2. The phrase "all laws of general application...in force in any province" in s.88 refers only to provincial laws and not federal laws. In the event of conflict, Indian treaty rights prevail over provincial legislation but not over federal legislation.

3. The fact that the *Ontario Fishery Regulations* are administered by provincial officials does not alter their status as federal laws. Valid federal legislation prevails over the terms of Indian treaties unless that rule has been changed by s.35(1) of the *Constitution Act, 1982.*

4. Because s.35 is in Part II rather than Part I of the *Constitution Act, 1982,* the rights protected by s.35 cannot be limited under s.1, overridden under s.33, or enforced under s.24. Laws contravening s.35 can, however, be set aside under s.52(1).

5. Courts are entitled to take notice of the evolution of clauses in pre-Charter discussions. However, the discussions are of little assistance in establishing the meaning of specific terms.

6. The phrase "existing treaty rights" in s.35(1) means neither the rights established by a treaty at the time of its execution nor only those treaty rights which could be exercised after restriction or limitation by federal law on April 17, 1982 when the *Constitution Act, 1982* came into force.

7. The Indian treaty right to fish is an existing right; it has not been extinguished. At most' it has been restricted by the requirement that Indians be licensed before exercising it. The issue is whether that right can be restricted by the licensing requirement.

8. Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others.

9. Restrictions on treaty rights must be shown to be reasonable. The respondent did not dispute that conservation is the purpose of the licensing provisions in the Regulations. Since s.12(1) of the Regulations, which requires a licence for gm net fishing and applies to all residents of Ontario, serves a valid conservation purpose, it constitutes a reasonable limitation on the Band's treaty right to fish and, therefore, does not infringe s.35(1) of the *Constitution Act, 1982.*

10. No opinion was expressed on the respondent's submission (not pursued in argument) that Indian fishing rights constitute a prior claim on fishery resources.

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BLAIR J.A.: The question in this appeal is whether fishing rights granted to an Indian band by treaty are subject to limitation by the *Ontario Fishery Regulations,* C.R.C. 1978, c.849 made pursuant to the *Fisheries Act,* R.S.C. 1970, c.F-14.

The respondent was convicted on six charges, one in respect of every month from January to June 1984 inclusive, of fishing by means of a gill net without a licence contrary to s.12(1) of the *Ontario Fishery Regulations* which provides:

> 12.(1) Subject to subsection (3), no person shall, except under a licence prescribed therefor, take or attempt to take fish by any means....
>
> (3) A resident of Ontario may, without an angling licence, take fish by means of angling....

He was fined $503.00 on each charge or, in default, 30 days imprisonment concurrent. The convictions were quashed by the Summary Conviction Appeal Court. The Crown seeks leave to appeal and, if leave be granted, appeals from that decision.

The respondent is a member of the Batchawana Indian Band. The Band was a signatory to the Robinson Huron Treaty, Number 61, of 1850. In the six months of 1984 covered by the charges, the respondent caught in waters in the territory ceded by the treaty a total of 3,484 pounds dressed weight of lake trout and 4,816 pounds dressed weight of whitefish and sold them for $12,460.60. A fishing licence had been issued annually to the Batchawana Indian Band for the years 1950 through 1983, inclusive, but no licence was applied for in the year 1984. It was admitted that the reason the Band did not apply for a 1984 licence was to test its rights under s.35(1) of the *Constitution Act, 1982.*

The relevant part of the Robinson Huron Treaty of 1850 provides that:

> William Benjamin Robinson of the first part on behalf of Her Majesty and the Government of this Province [of Canada], hereby promises and agrees to... allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and *to fish in the waters thereof* as *they have heretofore been in the habit of doing....* [Emphasis added]

The evidence established that Indians in the area occupied by the Batchawana Indian Band habitually fished with gill nets for their own consumption and for commercial purposes when the treaty was executed. Dr. Charles E. Cleland, Professor of Anthropology and Curator of Anthropology at Michigan State University and an expert on Indians in the area, testified that from the time of Christ Indians were heavily dependent upon fish for their livelihood. The use of gill nets by the ancestors of the band can be traced back to 800 A.D. Professor Cleland's evidence was not disputed by the appellant and was accepted by both the trial judge and the summary conviction appeal court judge.

Two questions are raised in this appeal. The first is whether the Ontario Fishery Regulations prevail over the respondent's treaty rights. If the first question is answered in the affirmative, the second question is whether the legal position is changed by s.35(1) of the *Constitution Act, 1982.*

Treaty Rights and Section 88 of the Indian Act

Canadian Indian treaties were described by Chief Justice Dickson as *sui generis* in *Simon* v. *The Queen,* [1985] 2 S.C.R. 387 at 404, 24 D.L.R. (4th) 390 at 404, [1986] 1 C.N.L.R. 153 at 169. They are not the same as treaties between independent countries: see *Simon,* at p.404 S.C.R., 404 D.L.R., 169 C.N.L.R. and *Horse* v. *The Queen,* [1988] 2 W.W.R. 289 at 300, [1988] 2 C.N.L.R. 112 at 125 (S.C.C.). Indian treaties are, however, similar in one respect to Canada's international treaties. They are not self-executing and can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute. Some marginal constitutional protection was provided before 1982 by the Terms of Union with British Columbia of 1870 and the agreement transferring jurisdiction over natural resources to the three prairie provinces incorporated in the *Constitution Act, 1930:* see as to British Columbia *Jack* v. *The Queen,* [1980] 1 S.C.R. 294, (1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25, 100 D.L.R. (3d) 193 and as to the prairie provinces *R.* v. *Sutherland,* [1980] 2 S.C.R. 451 at 461, [1980] 5 W.W.R. 456, [1980] 3 C.N.L.R. 71 at 77-78 and *Moosehunter* v. *The Queen,* [1981] 1 S.C.R. 282 at 285, [1981] 1 C.N.L.R. 61 at 62-63, 123 D.L.R. (3d) 95.

In practical terms, however, the only effective protection of Indian treaty rights until 1982 was provided by the *Indian Act,* R.S.C. 1970, c.I-6, enacted by the Parliament of Canada pursuant to its power under s.91(24) of the *Constitution Act, 1867* to make laws in relation to "Indians and lands reserved for Indians". Section 88, which was only inserted in the Act in 1951(1951 S.C., c.29, s.87), provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, 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 such laws make provision for any matter for which provision is made by or under this Act.

The Supreme Court of Canada has established that the phrase "all laws of general application in force in any province" in s.88 refers only to provincial laws and not federal laws. The result is that, in the event of conflict Indian treaty rights prevail over provincial legislation: *R.* v. *White and Bob* (1966), 52 D.L.R. (2d) 481; *Simon* v. *The Queen,* supra. Where, however, treaty rights conflict with federal legislation, the federal law prevails as the Supreme Court of Canada held in *Sikyea* v. *The Queen,* [1964) S.C.R. 642, 50 D.L.R. (2(1) 80 and *R.* v. *George,* [1966) S.C.R. 267, 55 D.L.R. (2d) 386. Martland J. in *George* said at p.281 S.C.R., 398 D.L.R.:

> This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

R. v. *George,* was applied by this court in *R.* v*. Hare and Debassige,* [1985] 3 C.N.L.R. 139, 20 C.C.C. (3d) 1.

In the present case, the learned summary conviction appeal court judge treated the *Ontario Fishery Regulations* as if they were provincial laws subject to Indian treaty rights because they are administered by provincial officials. The delegation of administrative authority over the *Ontario Fishery Regulations* is a proper exercise of Parliament's legislative authority and does not alter their status as federal laws: see *Re: Shoal Lake Band of Indians No. 39 et al. and The Queen in right of Ontario* (1979), [1980]1 C.N.L.R. 94, 25 O.R. (2d) 334. The respondent conceded that the summary conviction appeal court judge had erred but, nevertheless, invited this court to hold that, even before s.35(1) took effect, Indian treaty fishing rights should not have been restricted by the *Ontario Fishery Regulations.*

This court is not at liberty to depart from the rule established by the Supreme Court of Canada that valid federal legislation prevails over the terms of Indian treaties unless that rule is changed by s.35(1) of the *Constitution Act, 1982.* This is a possibility which was contemplated by Chief Justice Dickson in *Simon* v. *The Queen,* supra, when he observed at p.411 S.C.R., 409-10 D.L.R., 175 C.N.L.R.:

> Under s.88 of the *Indian Act,* when the terms of a treaty come into conflict with federal legislation, the latter prevails, subject to whatever may be the effect of s.35 of the *Constitution Act, 1982.*

<u>The Effect of Section 35 of the Constitution Act. 1982</u>

Three provisions of the *Constitution Act, 1982* deal with the rights of aboriginal peoples. The first is s.25, which is part of the *Canadian Charter of Rights and Freedoms* forming Part I of the Act, and reads as follows:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
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> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Paragraph (b) was added by the *Constitution Amendment Proclamation, 1983.* This section confers no new rights but rather shields the treaty and other rights of aboriginal people from interference from other Charter provisions.

The second and main provision dealing with aboriginal and treaty rights is s.35 which constitutes all of Part II of the *Constitution Act, 1982* and provides:

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

Sub-sections (3) and (4) were added by the *Constitution Amendment Proclamation, 1983.* Because s.35 is in Part II of the *Constitution Act, 1982* and not Part I, which comprises the Charter, the rights protected by s.35 cannot be limited under s.1, overridden under s.33, or enforced under s.24 of the Charter. Laws contravening s.35 can, however, be set aside under s.52(1) of the *Constitution Act, 1982* which provides:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The third set of provisions dealing with aboriginal peoples occurs in Parts IV (now repealed) and IV.1 entitled Constitutional Conferences which are not relevant to this appeal.

Section 35(1), for the first time, entrenches aboriginal and treaty rights in the constitution by recognizing and affirming "existing aboriginal and treaty rights of the aboriginal peoples". Aboriginal rights are not involved in this case. The issue in this appeal comes down to the meaning to be given to the words "existing treaty rights" in s.35(1) and, in particular, the significance of the inclusion of the word "existing" in this phrase. There are two alternatives. Do the words mean the rights established by a treaty at the time the treaty was executed? Or do they mean only those treaty rights which could be exercised after restriction or limitation by federal law on April 17, 1982 when the *Constitution Act, 1982* came into force?

How s.35 came to be incorporated in the *Constitution Act, 1982* is described in contemporary accounts of the evolution of the Act from the initial proposal made by the Government of Canada in 1978 for a Charter of Rights and patriation of the constitution. Originally no significant protection of aboriginal rights was proposed. it was not until the process was well advanced and being considered by a Joint Parliamentary Committee that the Government of Canada, on January 30, 1981, amended its proposal to include a clause identical with the present s.35(1) except for the absence of the word "existing". The negotiations which followed between the federal and provincial governments resulted in the deletion of the clause in the inter-governmental agreement known as the "Accord" of November 5, 1981. There were protests against this deletion which led to further federal-provincial discussions. The final result was an agreement on November 23, 1981, to re-insert s.35(1) in the proposal with the addition of the word "existing". It is generally believed that the word was added to provide some restriction on the concept of aboriginal rights which native organizations claimed included the right of self-government. The inclusion of the word "existing" allayed the fears of some provinces as to the section's impact on their jurisdiction: see Romanow, Whyte and Leeson, *Canada ... Notwithstanding, The Making of the Constitution 1976-1982,* (1984), at pp.121-22, 209, 212-14 and 268-69; K.M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", Tarnopolsky and Beaudoin eds., *The Canadian Charter of Rights and Freedoms* (1982), at p.477; Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" *op. cit.,* at pp.228-237; and Douglas Sanders, "The Indian Lobby", Banting and Simeon eds., *And No One Cheered, Federalism, Democracy and the Constitution Act* (1983); Douglas Sanders, "The Rights of Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314 at pp.330-31.

Courts are entitled to take notice of the evolution of clauses in pre- Charter discussions just as references to the pre-Confederation discussions leading to the *Constitution Act, 1867* have been accepted as an aid in interpreting that Act. In *Re Representation in the House of Commons of Certain Provinces of the Dominion Consequent upon the Last Decennial Census* (1903), 33 5.CR. 475 (affirmed [1905] AC. 37), Mills J. said at p.581:

> In order that this question may be clearly understood, and the Act correctly construed, it is necessary to briefly refer to the constitutional discussions which took place in old Canada, now Ontario and Quebec, before the act of confederation was adopted, and out of which this provision of the British North America Act grew. When we look at the terms of the union agreed to at the conference of Quebec, between Canada and the Maritime Provinces, and which constituted the basis of the terms submitted to the Colonial Secretary and which are contained in the British North America Act, they will aid us in more clearly understanding what the framers of the Act sought to accomplish.

The pre-Confederation debates have been referred to by the Supreme Court of Canada as an aid to the interpretation of the *Constitution Act, 1867* twice in the past decade: *Re: Authority of Parliament in relation to the Upper House,* [1980] 1 S.C.R. 54 at 66 and *Attorney General of Canada* v. *Canadian National Transportation Ltd.,* [1983] 2 S.C.R. 206 per Laskin C.J. at 225.

Professor Lysyk, as he then was, stated that, in the House of Commons, "the Ministers of Justice and of Indian and Northern Affairs expressed the view that the addition of the word 'existing' carried no legal consequences": *op. cit.,* p.478. The Minister of Justice said that it only made explicit what was already implicit in the section: see House of Commons Debates, November 24, 1981, pp.13203-13206. However, while it is permissible to refer to the reports of pre-Charter discussions to trace the evolution of s.35(1*)* and to ascertain when and in what circumstances the word "existing" was inserted, they are of little assistance in establishing its meaning. In *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, Lamer I observed that speeches made in Parliament, while admissible, should be given minimal weight in the interpretation of Charter provisions. He said at pp.508-9:

> Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies which adopted the *Charter.* In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

The statutory history of s.35(1) is thus of little assistance in determining its meaning and effect and no consensus has yet emerged from the judicial decisions and academic articles in which it has been considered and to which I will now refer.

Judicial Opinion of Section 35

In *R.* v. *Hare and Debassige,* supra, the offence of fishing by means of a gill net without a licence contrary to s.12(1) of the *Ontario Fishery Regulations* was committed prior to the proclamation of the *Constitution Act, 1982.* This court followed *R.* v. *George,* supra, in holding that Indian treaties were subject to valid federal legislation. The Court also stated that s.35(1) did not apply to a pre-proclamation offence. Nevertheless, Thorson J.A. expressed, in *obiter,* the opinion that s.35(1) protected only those treaty rights which had not been "lost by operation of federal legislation". He said at p.16 [p.155 C.N.L.R.]:

> The offences in this case occurred in October, 1980. Quite apart from that, as I read s.35, any treaty right for which protection may be claimed thereunder must have been in existence on April 17, 1982, when the *Constitution Act, 1982* was proclaimed in force, and if any such right had become extinguished before that date, s.35 does not have the effect of reviving it. In this I agree with the interpretation of s.35 favoured by Professor P.W. Hogg in his *Canada Act 1982 Annotated* (1982), at p.83, that these rights have been
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> > … "constitutionalized" prospectively, so that past (validly enacted) alterations or extinguishments continue to be legally effective, but future legislation which purports to make any further alterations or extinguishments is of no force or effect.
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> In this case, as earlier concluded, whatever right the respondents' forefathers may once have enjoyed under Treaty No.94 in relation to fishing by means of gill-nets had become lost by operation of federal legislation well before the charges were brought. One may leave to

> another occasion any speculation on what effect s.35 might have on any right enjoyed by the respondents in common with all other persons to fish by a means that had not become unlawful before April 17, 1982, but which is thereafter sought to be made unlawful for all persons by an amendment to the regulations promulgated after that date.

He also emphasized that the reason for limitation of treaty rights was conservation and the proper management of fish and wildlife resources when he said at p.17 [p.156 C.N.L.R.]:

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s.35 of the *Constitution Act, 1982,* the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.
>
> The prohibitions found in ss.12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly, it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

The same interpretation was placed on s.35(1) in two decisions of the Saskatchewan Court of Queen's Bench which precede *Hare.* In *R.* v. *Eninew* (1983), [1984] 2 C.N.L.R. 122, 7 C.C.C. (3d) 443, 1 D.L.R. (4th) 595 (Sask.Q.B.), the accused, a Saskatchewan treaty Indian, was convicted of hunting out of season in summary conviction proceedings under the *Migratory Birds Convention Act,* R.S.C. 1970, c.M-12. On appeal, the accused argued that s.35(1) invalidated the restrictions in the *Migratory Bird Regulations,* C.R.C. 1978, c.1035, s.5(4) as they applied to Indians and restored to Indians an unfettered right to hunt. This argument was rejected by Gerein J. who said at pp.598-99 [pp.124-25 C.N.L.R.]:

> What then is the effect of the word "existing"? In my opinion, it circumscribes the rights of the aboriginal peoples of Canada. It limits the rights of those peoples to those rights which were in being or which were in actuality at the time when the *Constitution Act, 1982* came into effect, namely, April 17, 1982. Were it to be otherwise, Parliament would have used the word "original" or some like word or would have utilized some other device such as a date.
>
> As of April 17, 1982, and more particularly as of April 29, 1982, when the offence was committed, Indians did not enjoy an unrestricted right to hunt. As stated earlier, this treaty right had been abridged by a regulation of Parliament acting within its authority. The *Constitution Act, 1982* did not have the effect of repealing the regulation or rendering it invalid. Rather the *Constitution Act, 1982* only recognized and secured the *status quo.* What might be the fate of any future legislation similar to the regulation herein is another matter to be dealt with at another time. In the result, I conclude that s.5(4) of the *Migratory Bird Regulations* is still in effect and the appellant is bound thereby.

An identical decision was rendered on the same facts by Milliken J. in *R.* v. *Bear,* [1983] 3 C.N.L.R. 57. The decision of Gerein J. in *Eninew* was followed by the New Brunswick Court of Queen's Bench in *R.* v. *Martin* (1985), 65 N.B.R. (2d) 21 and in *R.* v. *Paul,* released March 15, 1988, unreported.

In *R.* v. *Eninew; R.* v. *Bear,* [1984] 2 C.N.L.R. 126, 10 D.L.R. (4th) 137, 12 C.C.C. (3d) 365, the Saskatchewan Court of Appeal dismissed appeals from the above Queen's Bench decisions but for different reasons. The treaty right of the appellant, Bear, to hunt and fish was "subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada". The appellant Eninew's treaty right to pursue hunting, trapping and fishing was "subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty". Since the treaty rights were subject to regulation, the Court held that it made no difference to the outcome which view of the treaty rights was adopted. Hall J.A. stated at pp.128-29 C.N.L.R., 368 C.C.C., 140 D.L.R.:

> In my opinion, it makes no difference to the outcome whether the reasons followed in the trial courts are adopted or whether, as the appellant contends, s.35(1) of the *Constitution Act, 1982* recognizes and affirms the treaty rights as originally set out in the respective treaties. The rights so given were not unqualified or unconditional. In each case the right to pursue the avocation of hunting was subject to such regulations as may from time to time be made by the Government of Canada. Regulations made under the *Migratory Birds Convention Act* are the type of regulations which were contemplated in Treaties Nos. 6 and

> 10. The purpose of the *Migratory Birds Convention Act* is to conserve and preserve migratory birds, including mallard ducks. That purpose is of benefit to the appellants.

He held that the treaty rights could be limited by reasonable regulations and said at p.129 C.N.L.R., 368 C.C.C., 140 D.L.R.:

> It follows that the treaty rights can be limited by such regulations as are reasonable. The *Migratory Birds Convention Act* and the regulations made pursuant to it, based as they are on international convention, are reasonable, desirable limitations on the rights granted....
>
> The result is that the enactment of s.35(1) of the *Constitution Act, 1982* does not exempt the appellants in this case from the operation of the *Migratory Birds Convention Act.*

Re Steinhauer and The Queen, [1985] 3 C.N.L.R. 187, 15 C.R.R. 175 (Alta.Q.B.) and *R.* v. *Sundown,* released February 11, 1988, (Sask.Q.B.) unreported, followed *Eninew* and *Bear,* supra.

A different approach to s.35(1) was taken in *Sparrow* v. *The Queen* (1987), 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145 where the British Columbia Court of Appeal dealt with an amendment to the *British Columbia Fishery Regulations* made after the *Constitution Act, 1982* was proclaimed. The regulations, like those in the present case, were made pursuant to the federal *Fisheries Act.* The appellant was a member of an Indian band which held an Indian food fishing licence. He was charged with fishing for salmon with a larger net than was authorized by the amended regulations but which had been lawful under the former regulations. Since there had never been a treaty between the band and the Crown, the case dealt with the application of s.35(1) to aboriginal rights and not treaty rights. The court held, in a by-the-court decision, that s.35(1) protected aboriginal fishing rights from extinguishment but not regulation under valid federal legislation enacted after the *Constitution Act, 1982* took effect. The court stated at p.269 D.L.R., 599-600 W.W.R., 168 C.N.L.R.:

> ...[T]hat before 17th April 1982, the aboriginal right to fish was subject to regulation by legislation; and that it was subject to extinguishment. The question whether there is now a power to extinguish does not arise in this case but it is relevant to observe that extinguishment and regulation are essentially different concepts. Even if there cannot now be extinguishment, it would not follow that there cannot be regulation. It may be that a power to extinguish is necessarily inconsistent with the recognition and affirmation of aboriginal right in s.35(1). There is no necessary inconsistency with a power to regulate.

The court had earlier rejected the doctrine of "extinguishment by regulation" when it said at p.265 D.L.R., 596 W.W.R., 165 C.N.L.R.:

> The only submission that the right is not an existing one was that of counsel for the federal Crown who put forward the doctrine, apparently propounded in this case for the first time, of extinguishment by regulation". The major premise is that the aboriginal right to fish was unrestricted. The minor premise is that, over the past century or so, restrictions have been imposed by both federal and provincial fisheries legislation. So, it is said, whatever right to fish is retained by Indians cannot be an aboriginal right because it has been restricted. No logical basis is suggested for the proposition that a right which is restricted ceases to be a right.

The court continued at pp.266-67 D.L.R., 597 W.W.R., 166 C.N.L.R.:

> In our view, the extinguishment by regulation" proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right does exist....
>
> In this case we are concerned only with the federal power to regulate. The issue is whether the coming into force of s.35(1) has the effect of limiting that power and, if it does, in what respect.

The court rejected the Crown's argument that the decisions in *R.* v. *Eninew; R.* v. *Bear* and *R.* v. *Hare,* supra, supported the argument that s.35(1) provided no basis for restricting its power to regulate. *R.* v. *Eninew; R.* v. *Bear* was said to be of little assistance because the treaty provisions themselves made hunting and fishing rights subject to future regulation. *R.* v. *Hare* was described as of limited application because it dealt with an offence which occurred before s.35(1) came into

effect and did not involve regulations imposed afterwards.

The court had no difficulty in holding that aboriginal fishing rights were subject to regulation where it was demonstrated that restriction was necessary for the conservation of the fishery. This principle was conceded by counsel for the appellant who argued that the Crown had failed to demonstrate the necessity of the reduction in net size. The importance of conservation was recognized by the court by quoting the passage in the judgment of Thorson J.A. in *Hare,* supra, referred to above and by adding a further observation at p.272 D.L.R., 603 W.W.R., 172 C.N.L.R.:

> It must be borne in mind that what is recognized and affirmed by s.35(1) is the "existing" right. In 1982, the Indian right to fish existed in circumstances profoundly different from those prevailing before or in the early years of white settlement when the fishery was thought to be "inexhaustible": see Dickson J. in *Jack* v. *The Queen* [[1980] 1 S.C.R. 294 at p.309, [1979] 2 C.N.L.R. 25]. The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.

Although *Sparrow* was concerned with aboriginal and not treaty rights, its conclusions can properly be considered in this case. It rejected the two extreme views that under s.35(1) aboriginal rights could either not be interfered with or were defined by fishing regulations in existence when the section came into force. The court found a compromise between these extremes by approving restrictions on fishing rights which could be justified under s.35(1) as conservation measures. In concluded at p.276 D.L.R., 607 W.W.R., 177 C.N.L.R.:

> We conclude that none of the submissions made to us as to the effect of s.35(1) upon the power to regulate is entirely right but that the correct position lies between that put forward by the appellant and that put forward by the provincial Crown. There continues to be a power to regulate the exercise of fishing by Indians even where that fishing is pursuant to an aboriginal right but there are now limitations on that power.

A new trial was ordered in *Sparrow* because the trial judge had misdirected himself in holding that there were no aboriginal fishing rights in British Columbia. As a consequence, he had not properly considered whether the reduction of the additional net size was required to conserve fish stocks. The decision is now under appeal to the Supreme Court of Canada.

Sparrow was followed and applied in two Manitoba provincial court decisions: *R.* v. *Flett,* [1987] 5 W.W.R. 115, [1987] 3 C.N.L.R. 70 and *R.* v. *Stevenson,* released January 27, 1988, unreported, as well as in an Alberta provincial court decision in *R.* v. *Arcand,* released February 23, 1988, unreported.

<u>Academic Comment on Section 35(1)</u>

The effect of s.35(1) has been carefully examined by scholars concerned with the rights of aboriginal peoples in Canada. They are almost unanimous in their view that a treaty right, which has not been extinguished but merely limited or restricted by federal legislation, is an existing treaty right within the meaning of s.35(1). Only a treaty right which has been extinguished is incapable of revival. A representative statement of this view is provided by Professor Kent McNeil in "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup.Ct.L.Rev. 255. Professor McNeil adopts the approach of distinguishing between "sleeping" rights, which can be protected under s.35(1) and "dead" rights, which are incapable of revival. He wrote at pp.257-58:

> While it may be conceded that section 35(1) probably does not revive rights previously abrogated by legislation, it is suggested that different considerations apply to rights that were merely restricted but not extinguished. Thus, where aboriginal title to land had been extinguished by legislation, that title would no longer have been in existence on April 17, 1982 and therefore would not have been revived by section 35(1). Aboriginal or treaty rights to hunt, trap and fish that have been limited by federal or provincial legislation, on the other hand, continue to exist even though their exercise has been restricted. *A workable test that*

> *might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it was repealed. if the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).* [Emphasis added.]

Professor Norman K. Zlotkin, in "Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference" (1983) (Institute of Intergovernmental Relations, Queen's University, Discussion Paper No.15), approved the test proposed by Professor McNeil to distinguish rights that have been extinguished from those that have merely been limited. The test was also approved by Professor Brian Slattery in his article "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232 where he wrote at p.264:

> One must distinguish here between a statute that specifically nullifies a treaty right and an enactment that merely fails to implement or observe it. Legislation of the latter kind would not relieve the Crown of its obligations under the treaty.... Thus, legislation imposing general restrictions on fishing would not release the Crown from specific treaty promises regarding native fishing rights, even though those undertakings are not observed by the statute. The treaty provisions have been infringed but not terminated. It follows that in order to determine what treaty rights are covered by section 35 one looks to the texts of treaties in force as of 17 April 1982, not to legislation. *In a nutshell, section 35 recognizes and affirms existing treaty rights not existing statutory rights.* [Emphasis added.]

Professor Douglas Sanders, in "The Rights of the Aboriginal Peoples of Canada", Beck and Bernier eds., *Canada and the New Constitution, The Unfinished Agenda,* Vol.1(1983), distinguishes consensual extinguishment of treaty rights, which removes them from the protection of s.35(1), from non-consensual limitation which does not deprive them of the protection of the section. Rights which were extinguished ceased to exist but rights which had been merely limited continued in existence as he explained at p.331:

> The consensual loss of treaty rights (as occurred with valid surrenders of reserve lands) would be confirmed, but the nonconsensual loss (as in the example of hunting and fishing rights) would not be.

The literature is reviewed by Professor W.F. Pentney in *The Aboriginal Rights Provisions in the Constitution Act, 1982,* (Saskatoon: University of Saskatchewan, Native Law Centre, 1987). His views *are* summarized at pp.iii and iv of the preface:

> Section 35 of the Constitution Act, 1982, is an independently enforceable guarantee of "existing aboriginal and treaty rights." The word "existing" is interpreted in this thesis to mean "not extinguished" rather than "not subject to any restriction." Section 35, therefore, protects any rights which have not previously been lawfully extinguished. An analysis of the scholarly commentary and the cases on section 35 reveals a divergence of opinion on this point, but a principled analysis of the provision supports the view advanced in this thesis.

The divergence of opinion referred to by Professor Pentney is illustrated by the caution expressed by Professor Lysyk that the insertion of the word "existing" in s.35(1) might have a limiting effect. In his article, referred to above, he said, *op. cit.,* at pp .485-86:

> [F]ederal enactments have paramount effect over treaty rights and the latter must yield to the extent of any conflict It has been suggested above that prior to insertion of the word "existing" in what is now subs.35(1) of the Constitution Act a strong argument would have been available to the effect that the constitutional recognition and affirmation of treaty rights was intended to accord primacy to treaty rights against all federal, as well as against all provincial, legislation. The present formulation, however, expressed in terms of "existing" treaty rights, suggests an entrenchment of, not a change in, existing law.

Professor D. Sanders, also recognized the problems of interpretation created by s.35(1). In "The Renewal of Indian Special Status", Bayefsky and Eberts eds., *Equality Rights and The Canadian Charter of Rights and Freedoms* (1985), he wrote at pp.554-55:

> Section 35 is a substantive section, giving Constitutional protection to "existing aboriginal and treaty rights...." Some content can be clearly identified as falling within the section, though the full scope of the rights referred to is, at present, subject to quite different interpretations.

Section 35(1) has been the subject of less extensive comment in general textbooks on Canadian constitutional law. Although the authors take note of some of the literature referred to above, they conclude, without the same detailed analysis, that the section only protects treaty rights as limited by federal legislation when the *Constitution Act, 1982* was proclaimed. The conclusion of Professor Hogg in *Canada Act 1982 Annotated* (1982) was approved by Thorson J.A. in *Hare,* supra. It is repeated in his *Constitutional Law of Canada,* 2nd ed. (1985), at *p.566.* The same view is expressed in *Laskin's Canadian Constitutional Law,* Vol.1, 5th ed. (1988) at *p.659* and Magnet, *Constitutional Law of Canada,* Vol. 11, 3rd ed. (1987) at p.974 where he wrote:

> It seems most likely that "existing" adds nothing to section 35(1). With or without the word, the section was never intended to revive aboriginal or treaty rights which had been legally ended in the past. Therefore, treaty protected hunting rights will continue to be subject to the Migratory Birds Convention Act, R.S.C. 1970, c.M-12 as held in various pre-1982 cases beginning with *R. v. Sikyea .....*

Some academic commentators have raised a further problem which cannot be ignored. The *Ontario Fishery Regulations* contain detailed rules which vary for different regions in the province. Among other things, the regulations specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable fisheries regulations in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s.35(1) were those remaining after regulation at the time of the proclamation of the *Constitution Act, 1982.* This, it is argued, might necessitate reading what Professor Slattery has termed the "myriad of regulations" in existence of April 17, 1982 into the treaty rights protected by s.35. Logically it might seem to follow that even a minor variance of the regulations affecting Indian treaty fishing rights might possibly require a constitutional amendment: see also McNeil *op. cit.,* at p.258.

This problem is confronted by Professor Slattery in a recent article, "Understanding Aboriginal Rights" (1987), 66 Can. Bar. Rev. 727. He recognizes the need for greater flexibility in changing legislation and regulations in the future to conserve wildlife resources and protect endangered species from extinction. Although his article deals with aboriginal rights, his observations, in my opinion, apply equally to treaty rights. Like other authors referred to above, he regards the words "existing rights" as meaning "unextinguished rights". But he recognizes that even though these rights may be "unextinguished", the question remains as to the degree to which they may be subject to regulations pr limitations either in place at the proclamation of the *Constitution Act, 1982* or enacted thereafter. Professor Slattery envisions a number of possible solutions. The first is to read into the aboriginal or treaty rights the "myriad of regulations" in existence on April 17, 1982. An alternative is to recognize unextinguished aboriginal rights in their original form unrestricted by subsequent regulation. Professor Slattery rejects both suggestions and proposes a compromise at p.782:

> The desirable solution, then, lies between these two extremes. *It is submitted that section 35(1) permits a court to uphold certain regulations in existence at the commencement date, while striking down others, and allows legislatures a limited power of regulation in the future.* The governing criteria should be worked out on a case by case basis. But, at the least, the following sorts of regulations would be valid: (1) regulations that operate to preserve or advance section 35 rights (as by conserving a natural resource essential to the exercise of such rights); (2) regulations that prevent the exercise of section 35 rights from causing serious harm to the general populace or native peoples themselves (such as standard safety restrictions governing the use of fire-arms in hunting); and (3) regulations that implement state policies of overriding importance to the general welfare (as in times of war or emergency). [Emphasis added.]

This approach would import a justificatory process, comparable to that provided in s.1 of the Charter, to assess the validity of past, present and future limitations on Indian fishing treaty rights. This approach avoids the rigidity of definitions of Indian treaty rights in terms of what they were at the time treaties were executed or as they had been restricted when the *Constitution Act, 1982* was proclaimed.

Conclusion

Although great respect is due to the dicta pronounced by this court in *Hare,* supra, and the views of other courts, it must be recognized that there is no decision binding on this court and no judicial or academic consensus on the meaning of the words "existing treaty rights" in s.35(1). It is arguable that the phrase refers either to rights created by Indian treaties or to only such of those rights as

were legally exercisable on April 17, 1982. Which of these two views should prevail depends upon the proper construction of the phrase "existing treaty rights". This cannot be undertaken as an arid semantical exercise concentrating on the meaning of particular words and especially the word "existing". Rather, the phrase "existing treaty rights" must be interpreted in its context in s.35(1) which includes the principles governing the status and interpretation of Indian treaty rights in Canada.

Two principles governing the interpretation of Indian treaties and statutes apply equally, in my opinion, to the interpretation of *s.35(1).* The first was stated by Dickson J. in *Nowegijick* v. *The Queen,* (1983)1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89 where he said at p.36 S.C.R., 198 D.L.R., 94 C.N.L.R.:

> [T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

This principle was applied to the interpretation of aboriginal rights in *s.35(1)* by the British Columbia Court of Appeal in *Sparrow* v. *The Queen,* supra, at p.268 D.L.R., 599 W.W.R., 168 C.N.L.R..

The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p.367 O.R., 123 C.N.L.R.:

> The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.

This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120.

While it is consistent with authority to dispose of this appeal by resolving any ambiguity in s.35(1) in favour of the Indian band, I consider that there is a more positive justification for the continuing exercise of Indian treaty rights to fish. In this case, it seems to me that it is impossible to say that this right does not exist. It has not been extinguished. At most, it has been restricted by the requirement that Indians be licensed before exercising it. What is at stake is not the existence of the Indians' treaty right to fish but whether that right can properly be restricted by the licensing requirement.

In addressing this question it must be borne in mind that not all Indian treaty rights are absolute and immutable. While Indian property rights derived from treaties may remain virtually unqualified, hunting and fishing rights cannot be divorced from the realities of life in present-day Canada. Much has changed since the treaty was executed in *1850.* At that time, fish and game may have been regarded as limitless resources. They are no longer. Conservation and management of fish and game resources are required if they are to be protected from extinction and preserved for the benefit of Indians as well as other Canadians. This fact is recognized in the extracts quoted earlier from the judgments of this court in *Hare,* supra, and the British Columbia Court of Appeal in *Sparrow,* supra. It has also been recognized by the Supreme Court in *Jack* v. *The Queen,* [1980] 1 S.C.R. 294, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25 where Dickson J. said at p.313 S.C.R., 207 D.L.R., 41 C.N.L.R., "Conservation is a valid legislative concern". Professor Slattery, *op. cit.,* also suggests that aboriginal rights might be properly restricted for other reasons of overriding importance to the general welfare, such as public health and safety.

In this respect, Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s.1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society. In the United States the rights proclaimed by the *Bill of Rights* are not qualified by a provision similar to s.1 of the Charter, yet they have been subjected, nonetheless, to reasonable limitation by judicial decisions.

This test of reasonableness has been applied to Indian treaty and aboriginal rights. The Saskatchewan Court of Appeal in *R.* V. *Eninew; R.* **v.** *Bear,* supra, applied the same principle to provisions in Indian treaties, making them subject to governmental regulation. It held that restrictions on hunting and fishing rights must be shown to be reasonable for the purpose of conservation. In *Sparrow,* supra, the British Columbia Court of Appeal held that restrictions on aboriginal fishing rights must also be reasonably justified as conservation measures.

Conservation, in my view, is manifestly the purpose of the licensing provisions in the Regulations. At first instance, the learned justice of the peace found that:

> The purpose of the Fisheries Act and Regulations made thereunder, although binding upon all persons, is not to abolish the rights to fish of all persons, but to monitor and regulate, so that the fisheries resource will provide an adequate supply of fish now, and in the future.

On a fair reading of the reasons of the learned summary conviction appeal court judge those findings were, in my opinion, approved and affirmed by him. He stated, after referring to the judgment appealed from, that:

> It is implicit from these observations and the concerns expressed elsewhere in his Reasons for Judgment over the depletion and extinction of the fish population if the fishing by Indians and of others with gill nets for commercial purposes were not monitored and regulated to ensure an adequate supply of fish now and in the future, that it had been established as a fact in evidence that prior to the Treaty the Indians had been in the habit of fishing with gill nets both for their own consumption and for commercial purposes as well.
>
> Such a finding is indeed supported by the evidence and accepted as a fact by the trial Judge and for the purposes of this appeal.

These concurrent findings were not disputed by counsel for the respondent who stated, as noted above, that the purpose of the challenge to the *Ontario Fishery Regulations* was to test Indian rights under s.35(1) of the *Constitution Act, 1982.* Since s.12(1) of the Regulations, which requires a licence for gill net fishing and applies to all residents of Ontario, serves a valid conservation purpose, it constitutes a reasonable limitation on the Batchawana Band's treaty right to fish and, therefore, does not infringe s.35(1) of the *Constitution Act, 1982.* From this, it follows that the appeal must succeed.

It is almost unnecessary to add that this decision is based upon the facts established in this case. Counsel for the respondent did not pursue in argument the submission made in his factum that Indian fishing rights constitute a prior claim on fishery resources. In support of this argument the factum quoted a passage from the judgment of Dickson J. in *R.* v. *Jack, supra,* at p.313 S.C.R., 207-8 D.L.R., 41 C.N.L.R. where he said that he agreed with "the general tenor of the argument" that "the burden of conservation measures should not fall primarily upon the Indian fishery". The adjustment of priorities, where required in appropriate cases, between Indian fishermen based on their treaty rights and other fishermen must be left for another day.

For the foregoing reasons, I would grant leave to appeal, allow the appeal, set aside the order of the summary conviction appeal court judge and restore the conviction.