

**Taking Section 35 Rights Seriously:  
Non-derogation Clauses relating to Aboriginal and  
treaty rights**

**Final Report of the Standing Senate Committee on  
Legal and Constitutional Affairs**

**December 2007**



## MEMBERSHIP

### 39<sup>th</sup> Parliament – 2<sup>nd</sup> Session

The Honourable Senator Joan Fraser, *Chair*

The Honourable Senator Raynell Andreychuk, *Deputy Chair*

and the Honourable Senators Willie Adams, George Baker, P.C., John G. Bryden, Consiglio Di Nino, Lillian Eva Dyck, Mobina Jaffer, Serge Joyal, P.C., Sandra Lovelace Nicholas, Lorna Milne, Donald Oliver, Terry Stratton and Charlie Watt.

\*The Honourable Marjory Lebreton, P.C., (or the Honourable Gerald Comeau)

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### 39<sup>th</sup> Parliament – 1<sup>st</sup> Session

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\*The Honourable Céline Hervieux-Payette, P.C. (or the Honourable Claudette Tardif)

*\*Ex Officio Members*

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The Honourable Senator George Furey, *Chair*

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\*The Honourable Sharon Carstairs, P.C., (or the Honourable Fernand Robichaud, P.C.)

\*The Honourable John Lynch-Staunton, P.C. (or the Honourable Noël A. Kinsella)

*\*Ex Officio Members*

The Committee would like to thank the following staff for their hard work in the preparation of this report:

*From the Library of Parliament:*

Mary Hurley, Analyst  
Penny Becklumb, Analyst

*From the Committees Directorate:*

Marcy Zlotnick, Clerk of the Committee, 2nd Session of the 37th Parliament  
Shaila Anwar, Clerk of the Committee, 1st Session of the 39th Parliament  
Adam Thompson, Clerk of the Committee, 2nd Session of the 39th Parliament

Lyne Héroux, Administrative Assitant, 2nd Session of the 37th Parliament  
Natalie Lemay-Paquette, Administrative Assitant, 1st Session of the 39th Parliament  
Alana Blouin, Administrative Assistant, 2nd Session of the 39th Parliament

## ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Tuesday, November 20, 2007:

The Honourable Senator Fraser moved, seconded by the Honourable Senator Joyal, P.C.:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the implications of including, in legislation, non-derogation clauses relating to existing Aboriginal and treaty rights of the Aboriginal peoples of Canada under s.35 of the *Constitution Act, 1982*;

That the papers and evidence received and taken on the subject and the work accomplished during the Second Session of the Thirty-seventh Parliament, the First Session of the Thirty-eighth Parliament and the First Session of the Thirty-ninth Parliament be referred to the committee; and

That the committee present its report to the Senate no later than December 20, 2007.

The question being put on the motion, it was adopted.

Paul C. Bélisle  
*Clerk of the Senate*



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## Chair's Preface

This report concerns matters that are significant for Aboriginal and non-aboriginal Canadians alike.

When the study began, the Standing Senate Committee on Legal and Constitutional Affairs recognized that its examination of non-derogation clauses relating to constitutional Aboriginal and treaty rights in federal legislation would raise complex issues. Closer scrutiny and the testimony of a number of witnesses confirmed that this was the case. The Committee is of the view that the specific question put to us represents just one of a number of significant substantive questions and policy choices the government must address in relation to the nature and scope of section 35 of the *Constitution Act, 1982*.

Much remains to be done. We believe that all Parliamentarians and this Committee in particular, have a major role to play in ensuring that those questions and policy matters are fully canvassed and resolved, with a view to advancing the purpose of section 35.

The Committee's objectives in examining the non-derogation issue have been to contribute to a timely consideration of an important public policy matter, and to recommend a forward-looking approach that considers both the government's role under section 35 of the *Constitution Act, 1982*, in light of its fiduciary relationship with Aboriginal peoples, and the interests of the broader Canadian public.

In this spirit, our observations and recommendations provide guidance as to some of the next steps we believe the government should make, in keeping with its commitment to take section 35 rights seriously.

Our report deals with measures to advance implementation of 35 rights in the short and medium term. Committee members believe that it is also vital to have a view to the future, to reflect on whether and what other longer term measures may be desirable to further that objective.

The key point is that taking section 35 rights seriously may mean putting in place additional systems and processes designed to ensure neither government nor Parliament loses sight of that constitutional mandate. We look forward to further dialogue with Aboriginal and government stakeholders in this area.



## Introduction

This report has to do with the relationship between rights enshrined in section 35 of the *Constitution Act, 1982* and federal legislation. Subsection 35(1) reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Following the coming into effect of the *Constitution Act, 1982*, the initial “non-derogation clause” inserted in federal legislation typically provided that the act in question was not to be interpreted “so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.”<sup>1</sup> To paraphrase, the legislation in question was not intended to infringe Aboriginal or treaty rights.

Such clauses were included in certain federal statutes in response to Aboriginal people’s concerns about the legislations’ potential effect on their interests. First Nations and other Aboriginal groups saw inclusion of a non-derogation clause as a minimum stipulation that the law should be interpreted so as not to negatively affect their constitutional Aboriginal and treaty rights. It appears that for its part, the Department of Justice may have agreed to the clause’s inclusion as a matter of expediency, to avoid delays in the passage of a bill. Justice officials considered these clauses largely superfluous reminders of section 35 of the *Constitution Act, 1982*.

Current questions surrounding the use of non-derogation clauses arose some time after the Department of Justice altered their original wording. Departmental officials believed the change was necessary in light of Supreme Court decisions interpreting section 35. Aboriginal groups became critical of the revised wording, which they felt would not be effective in protecting their rights. Moreover, they were concerned that the courts would or could attribute different interpretations to differently worded non-derogation clauses in order to make sense of the differences in various statutes.

As detailed more fully in our background review below, questions concerning the use of non-derogation provisions have been raised by Senators since 2001 hearings before the Standing Senate Committee on Energy, the Environment and Natural Resources on Bill C-33, now the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*. Aboriginal Senators took the lead in pressing the government to address and resolve issues surrounding the insertion of non-derogation clauses in subsequent bills. When they and the Minister of Justice were unable to reach a solution acceptable to all, the government leader in the Senate introduced a motion in June 2003 to have the matter referred to committee<sup>2</sup>.

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<sup>(1)</sup> The online *Oxford English Dictionary* defines “[to] abrogate,” in part, as “[t]o repeal (a law, or established usage), to annul, to abolish authoritatively or formally, to cancel.” It defines “[to] derogate,” in part, as “[t]o repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the force and effect of; to lessen the extent or authority of.”

<sup>(2)</sup> Senate, *Debates*, 4 June 2003 (Hon. Sharon Carstairs).

Accordingly, in October 2003, the Senate instructed the Standing Senate Committee on Legal and Constitutional Affairs<sup>3</sup>:

to examine and report on the implications of including, in legislation, non-derogation clauses relating to existing aboriginal and treaty rights of the aboriginal peoples of Canada under s. 35 of the *Constitution Act, 1982*.

Subsequent Orders of Reference mirroring that of October 2003 were adopted by the Senate in November 2004, June 2006 and November 2007.<sup>4</sup>

During the course of four hearings convened in November 2003, and February and June 2007 to examine issues relevant to that topic, options presented to the Committee for dealing with the non-derogation issue by government and non-government witnesses appeared poles apart. While a government witness suggested that “[i]f section 35 is considered sufficient protection, a non-derogation clause is unnecessary and should be avoided,”<sup>5</sup> a representative of the national Congress of Aboriginal Peoples recommended, on the other hand, that a standard non-derogation clause be included in each piece of federal legislation.<sup>6</sup>

A review of the relevant legal and legislative background will assist in providing context for the divergent positions we heard.

## Legal and Legislative Background

### A. Pre-1982 Non-derogation Clauses

The use of statutory non-derogation clauses relating to the legal rights of Aboriginal people predates their constitutionalization in 1982.

By the early 1970s, Canadian courts had begun to acknowledge the existence of Aboriginal legal rights in the land other than those provided for by treaty or statute. In particular, the 1973 decision of the Supreme Court of Canada in *Calder v. British Columbia (Attorney General)*<sup>7</sup> confirmed that Aboriginal peoples’ historic occupation of the land gave rise to legal rights that survived European settlement, thus recognizing the possibility of present-day Aboriginal rights to land and resources.

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<sup>(3)</sup> Senate, *Debates*, 7 October 2003.

<sup>(4)</sup> Successive Orders of Reference were needed owing to the dissolution or prorogation of successive Parliaments from 2003 through 2007.

<sup>(5)</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings* (hereinafter, *Evidence*) Issue 22, 22 February 2007, testimony of Andrew Saranchuk, Acting Director and Senior General Counsel, Aboriginal Law and Strategic Policy, Department of Justice Canada.

<sup>(6)</sup> Gordon Polson, Legal Research Officer, Congress of Aboriginal Peoples, *Speaking Notes* presented to the Standing Senate Committee on Legal and Constitutional Affairs, 21 June 2007, p. 6.

<sup>(7)</sup> [1973] S.C.R. 313.

The *Calder* decision proved a significant factor in prompting the federal government to develop policies for addressing unsettled Aboriginal land claims. Arguably, this growing recognition of Aboriginal rights, as well as more structured assertions of interests in land and resources by First Nations and other Aboriginal groups,<sup>8</sup> were partially reflected by the inclusion of various non-derogation provisions in a small number of federal laws in the 1970s and early 1980s.

For example, the relevant provision of the *Indian Oil and Gas Act*<sup>9</sup> reads:

- (1) The Minister, in administering this Act, shall consult, on a continuing basis, persons representative of the Indian bands most directly affected thereby.
- (2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.<sup>10</sup>

## **B. Aboriginal and Treaty Rights in the Constitution**

The constitutionalization of Aboriginal rights in Part II of the *Constitution Act, 1982*, entitled “Rights of the Aboriginal Peoples of Canada,” necessarily created a newly authoritative legal foundation on which Aboriginal peoples might assert historic claims and defend treaty-based and other rights. Subsection 35(1) did not create rights, but rather provided for the constitutional recognition and affirmation of non-extinguished or extant rights. Under subsection 35(2), the “aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples.” Subsection 35(3) further specifies that, “[f]or greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of [modern] land claims agreements or may be so acquired.”<sup>11</sup>

The absence of terms defining “existing Aboriginal and treaty rights” placed the task of interpreting the scope of section 35 in the judicial sphere. In this light, the present discussion mandates our noting a number of fundamental principles stated in the Supreme Court of Canada’s section 35 decisions that have informed the Committee’s study of the non-derogation issue.

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<sup>(8)</sup> It is worth noting that, from 1927 through 1951, legal/political activity related to land claims by First Nations people was essentially prohibited owing to an amendment to the *Indian Act* making it illegal for any person to accept payment from an Aboriginal person for the pursuit of land claims.

<sup>(9)</sup> S.C. 1974-75-76, c. 15, R.S. 1985, c. I-7, s. 6.

<sup>(10)</sup> Other contemporaneous statutes with non-derogation clauses include the *Northern Pipeline Act* (S.C. 1977-78, c. 20, R.S. 1985, c. N-26, s. 25) as well as the *Canada Oil and Gas Act* (S.C. 1980-81-82-83, c. 81, R.S. 1985, c. O-6, s. 5.), which has since been repealed.

<sup>(11)</sup> The subsection added by the *Constitution Amendment Proclamation, 1983* confirmed the constitutional status of modern treaties.

## 1. The scope of section 35 rights: the *Sparrow* decision

In its landmark 1990 *Sparrow* decision<sup>12</sup>, the Supreme Court of Canada (the Court) established an initial interpretive framework for section 35 that has been refined in a number of the Court's subsequent judgments. The Court characterized section 35 as a "solemn commitment that must be given meaningful content"<sup>13</sup>, and emphasized that its inclusion in the Constitution represented "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights"<sup>14</sup>. It also provided that, as is the case with all rights, section 35 rights are not absolute, hence not immune from regulation. Under *Sparrow*, the Crown may enact legislation infringing existing Aboriginal and treaty rights, provided it can satisfy the justification test articulated by the Court.<sup>15</sup>

Reduced to its essence, the *Sparrow* justification test requires the Crown to establish that any infringing measures serve a "valid legislative objective" – such as natural resource conservation – and that they are in keeping with the special trust relationship and responsibility of the government vis-à-vis Aboriginal peoples. Further questions to be addressed, depending on the circumstances, include: whether the infringement has been minimal, whether fair compensation has been available in a context of expropriation, and whether the affected Aboriginal group has been consulted<sup>16</sup>.

## 2. Aboriginal rights and the purpose of section 35

In *R. v. Van der Peet*<sup>17</sup>, the Court defined the special nature of Aboriginal rights and the purpose of section 35, as key principles:

[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates

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<sup>(12)</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>(13)</sup> *Ibid.*, p. 1108.

<sup>(14)</sup> *Ibid.*, p. 1105.

<sup>(15)</sup> It was necessary for the Court to develop a separate test for assessing alleged infringements of Aboriginal and treaty rights because section 35 is situated outside the *Canadian Charter of Rights and Freedoms* with its section 1 limitation clause.

<sup>(16)</sup> Later Court decisions reaffirming and supplementing these elements include the 1996 fishing rights trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723), the landmark 1997 *Delgamuukw* decision on Aboriginal title (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010) and the *Haida Nation* (2004), *Taku River* (2004) and *Mikisew Cree* (2005) decisions concerning the Crown's obligation to consult Aboriginal people (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69).

<sup>(17)</sup> *Van der Peet*, *Ibid.*, at paras. 30-31.

aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. (emphasis in original)

### 3. The Crown's fiduciary relationship with Aboriginal peoples

In *Sparrow*, *Van der Peet* and subsequent rulings, the Court has also stressed that the fiduciary nature of the Crown's relationship with Aboriginal peoples has important implications for government conduct<sup>18</sup>. *Sparrow* stated that the "general guiding principle" for section 35 is that

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>19</sup>

Accordingly, "the honour of the Crown is at stake in dealings with aboriginal peoples"<sup>20</sup>. The more recent ruling *Haida Nation v. British Columbia (Minister of Forests)*, reiterated the Court's view that this principle "is not a mere incantation, but rather a core precept that finds its application in concrete practices"<sup>21</sup>.

In *Van der Peet*, the Court also restated a further *Sparrow* principle regarding section 35 interpretation, ruling that "the fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples"<sup>22</sup>.

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<sup>(18)</sup> In *R. v. Guerin*, [1984] 2 S.C.R. 335, the Court linked the fiduciary relationship in a First Nations context to the fact that the Aboriginal interest in land is inalienable except upon surrender to the Crown. See also Mary Hurley, *The Crown's Fiduciary Relationship with Aboriginal Peoples*, PRB 00-09E, Parliamentary Information and Research Service, Library of Parliament, December 2002.

<sup>(19)</sup> *Sparrow*, *supra* note 12, p. 1108.

<sup>(20)</sup> *Ibid.*, p. 1114.

<sup>(21)</sup> *Supra*, note 16, para. 16.

<sup>(22)</sup> *Supra*, note 16, para. 25.

At the same time, the Court's decision in *Wewaykum Indian Band v. Canada* has confirmed that in the Crown - Aboriginal context, as in others, "not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature"<sup>23</sup>. It also confirmed that the Crown "can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting"<sup>24</sup>.

### **C. Canadian Charter of Rights and Freedoms**

The Charter, Part I of the *Constitution Act, 1982*, contains a key provision relating to Aboriginal and treaty rights that is also directly relevant to the present matter. Section 25 reads:

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:

- (a) any rights or freedoms that have been recognized by the *Royal Proclamation of October 7, 1763*; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The section has often been referred to as a "shield" for the safeguard of collective Aboriginal and treaty rights.<sup>25</sup>

### **D. Post-1982 Federal Non-derogation Clauses**

In the post-1982 period, non-derogation clauses first appeared in federal legislation in 1986. Generally speaking, such provisions have been inserted in selected legislation, either during drafting or at some other point in the parliamentary process, where the statute in question was considered to directly, indirectly or potentially affect Aboriginal interests or legal rights. However, not every piece of legislation with possible impacts on Aboriginal rights and interests has contained a non-derogation clause.

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<sup>(23)</sup> [2003] 2 S.C.R. 259, 2003 SCC 4, para. 83.

<sup>(24)</sup> *Ibid.*, para. 96.

<sup>(25)</sup> The Supreme Court of Canada has not yet provided a definitive interpretation of the interaction between sections 25 and 35.

## 1. Original Wording: 1986-1996

While the clause's original formulation varies somewhat, it appears to reflect, at least in part, the terms of section 25 of the Charter, as illustrated by the underlined portions of provisions cited below.

Section 3 of the *Sechelt Indian Band Self-Government Act*<sup>26</sup> provides that:

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the members of the Sechelt Indian band, or any other aboriginal peoples of Canada, under section 35 of the Constitution.

Seven additional statutes contain substantially the same clause, four with simplified “for greater certainty” wording:

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.<sup>27</sup>

## 2. Revised Wording 1998-2002

According to witness testimony, the original post-1982 non-derogation language has never been tested in court. However, following the 1990 Sparrow decision, the non-derogation clause came under renewed scrutiny by federal officials.

By 1998, the wording of non-derogation clauses was altered with the apparent goal of more clearly expressing the government's intent that the non-derogation clauses “simply confirm that the legislation is subject to the normal application or operation of section 35.”<sup>28</sup> The Committee has noted, however, that in some instances, the original non-derogation wording appeared in legislation post-dating the Supreme Court of Canada's 1990 Sparrow decision by a number of years.

In 1996, Bill C-79, the Indian Act Optional Modification Act, which ultimately died on the Order Paper, proposed a non-derogation text that, in retrospect, appears to signal the

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<sup>(26)</sup> S.C. 1986, c. 27.

<sup>(27)</sup> They are: the *Canada Wildlife Act*, R.S. 1985, c. W-9, s. 2(3); the *Migratory Birds Convention Act*, S.C. 1994, c. 22, s. 2(3); the *Firearms Act*, S.C. 1995, c. 39, s. 2(3); and the *Oceans Act*, S.C. 1996, c. 31, s. 2.1. Section 3 of the *Canada Petroleum Resources Act*, S.C. 1986, c. 45, R.S. 1985, c. 36 (2<sup>nd</sup> Supp.) omits the “for greater certainty” phrase. It reads: “Nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.” The *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s. 48 and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, s. 50 contain identical non-derogation provisions that are applicable to a prescribed part of each statute.

<sup>(28)</sup> Andrew Saranchuk, *Evidence*, Issue 22, 22 February 2007.

subsequent modified formulation of federal non-derogation clauses.<sup>29</sup> The *Mackenzie Valley Resource Management Act*<sup>30</sup> was the first enactment in which the current reformulation appeared. It stipulated that

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal and treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.  
(emphasis added)

Identical wording appears in six additional statutes enacted between 1998 and 2002.<sup>31</sup>

In summary, while the original wording spoke of not abrogating or derogating from any existing Aboriginal or treaty rights under section 35, the revised formulation spoke rather of not abrogating or derogating from the protection provided for existing Aboriginal or treaty rights by the recognition and affirmation of those rights in section 35.

The modified wording appears to have passed largely unremarked from 1996 through 2001.<sup>32</sup> The matter was, however, raised during Parliamentary committee hearings on Bill C-33, now the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*,<sup>33</sup> which established agencies of public government in accordance with terms of the Nunavut Land Claims Agreement. Nunavut Tunngavik Incorporated (NTI), representing Nunavut Inuit interests, had advocated insertion of a non-derogation clause, but raised concerns about the revised provision in Bill C-33, as did the government of Nunavut.

Officials of the Department of Indian Affairs and Northern Development testified that an amendment to return to the original wording would have the effect of limiting Parliamentary supremacy<sup>34</sup> - a submission NTI representatives criticized as legally

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<sup>(29)</sup> Subsection 4(3) read: “For greater certainty, nothing in the *Indian Act*, applied in accordance with this Act, shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal and treaty rights of Indians, including the inherent right of self-government, by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.” (emphasis added)

<sup>(30)</sup> S.C. 1998, c. 25.

<sup>(31)</sup> The *Canadian Environmental Protection Act*, S.C. 1999, c. 33, s. 4; the *Canada National Parks Act*, S.C. 2000, c. 32, s. 2(2); the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17, s. 21.1 added by S.C. 2001, c. 40, s. 1; the *Yukon Act*, S.C. 2002, c. 7, s. 3; the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18, s. 2(2); and the *Species at Risk Act*, S.C. 2002, c. 29, s. 3. The 1998 *Canada Marine Act* (S.C. 1998, c. 10) is the only statute over this period to contain a differently worded non-derogation provision. It reads: “For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the application of section 35 of the *Constitution Act, 1982* to existing aboriginal or treaty rights of the aboriginal peoples of Canada.” (emphasis added)

<sup>(32)</sup> For instance, a review of briefs submitted to Parliamentary Committees in relation to the *Mackenzie Valley Resource Management Act*, *supra* note 30, shows two references to the legislation’s non-derogation language. Neither deals with possible implications of the revision.

<sup>(33)</sup> S.C. 2002, c. 10.

<sup>(34)</sup> House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, Issue 25, 30 October 2001, testimony of Will Dunlop, Director, Resource Policy and Transfers Directorate, Natural Resources and Environment Branch.

unfounded<sup>35</sup> - and that the changed wording sought to maintain neutrality, and was aimed neither at changing the status quo, nor at taking away or topping up constitutional protections.<sup>36</sup>

In the view of Nunavut witnesses, however, deletion of the non-derogation clause in Bill C-33 was preferable to maintaining it as drafted, particularly since the legislation was implementing a constitutionally protected modern treaty. They found the new wording confusing and ineffective, and were concerned about possible deleterious interpretations that it might attract. The Government of Nunavut<sup>37</sup> took the position that

not only does the present language not provide assurances that Parliament does not intend to impair existing Aboriginal treaty rights through this legislation . . . . By limiting the protection of the clause to just the protection provided for Aboriginal treaty rights, by the recognition and affirmation of those rights in clause 35, the provision incorporates the common-law authority to infringe Aboriginal and treaty rights . . . .

In the result, the clause was deleted by the Senate Energy Committee, and the deletion endorsed by the Senate and the House of Commons.

The debate initiated in the context of Bill C-33 continued during the Senate Energy Committee's consideration of a number of subsequent bills, all eventually enacted with the revised non-derogation provision. Over this period, Aboriginal Senators actively pursued the concerns raised by NTI and Nunavut government spokespersons in relation to Bill C-33 with federal officials. An undertaking, by the then Minister of Justice, to review the issue did not lead to an agreement on the non-derogation question.

### **3. Developments 2002-2007**

A review of adopted and proposed legislation since 2002 presents an inconsistent picture.

#### **Bill C-7, the First Nations Governance Act**

In March 2002, the Final Report of the Joint Ministerial Advisory Committee (JMAC) appointed to advise the then Minister of Indian Affairs with respect to legislative options related to the First Nations Governance Initiative counselled inclusion of a non-derogation clause in the anticipated legislation, and recommended a return to the original wording. In JMAC's view, this version

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<sup>(35)</sup> Letter addressed to the then Chair of the House Committee by Nunavut Tunngavik Legal Counsel, 7 November 2001.

<sup>(36)</sup> Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, Issue 19, 29 November 2001, testimony of Mary Douglas, Legal Counsel.

<sup>(37)</sup> *Ibid.*, testimony of Lois Leslie, then Senior Legal Advisor, Department of Executive and Intergovernmental Affairs, Government of Nunavut.

would accomplish the Minister's stated objective of ensuring that the amendments do not infringe aboriginal or treaty rights. It would set out the legislative intent of Parliament in enacting the amendments and does not affect the recognition and affirmation of aboriginal and treaty rights set out in section 35 of the *Constitution Act, 1982*.

JMAC also took the position that the wording used from 1998-2002 "would not achieve the Minister's objective, as it appears to have a different purpose and effect."

As introduced in October 2002, Bill C-7 contained no non-derogation clause. Ultimately, however, the then House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources unanimously adopted an opposition amendment to include an originally worded non-derogation clause. Bill C-7 died on the Order Paper.

### ***The First Nations Fiscal and Statistical Management Act***

As was the case with Bill C-7, the House Aboriginal Affairs Committee unanimously adopted an opposition amendment to insert an originally worded non-derogation clause into Bill C-19. A revised version of this legislation was ultimately adopted as Bill C-20 in 2005, with the non-derogation clause intact.<sup>38</sup>

### ***The Specific Claims Resolution Act***

This legislation to reform the specific claims process, enacted in November 2003 and not proclaimed in force, contains no non-derogation provision.<sup>39</sup> It appears none was proposed during the legislative process.

### **Bill C-50, An Act to Amend the Criminal Code in Respect of Cruelty to Animals**

The first three identical versions of this bill adopted by the House of Commons over the course of the 37th Parliament contained no non-derogation provision.<sup>40</sup> In May 2003, however, with respect to the bill's second iteration, this Committee adopted, and the Senate endorsed, a form of statute-specific non-derogation provision that was not accepted by the House of Commons. When the legislation was reintroduced in the House of Commons in 2005, in a modified fourth version, it included the revised non-derogation clause used in government legislation as of 1998. The bill died on the Order Paper when the 38th Parliament was dissolved and has not been re-introduced.<sup>41</sup>

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<sup>(38)</sup> S.C. 2005, c. 9.

<sup>(39)</sup> S.C. 2003, c. 23.

<sup>(40)</sup> All died on the Order Paper.

<sup>(41)</sup> Bill C-373, one of two Private Member's bills related to animal cruelty introduced during the First Session of the 39th Parliament, contained the revised non-derogation clause. Bill S-213 contained no such provision. Both bills died on the Order Paper with the prorogation of Parliament in September 2007 but have been reinstated in the same form for the Second Session as Bill C-373 and Bill S-203 respectively.

### ***The First Nations Oil and Gas and Moneys Management Act (FNOGMA) and the First Nations Commercial and Industrial Development Act (FNCIDA)***

Both statutes were adopted in November 2005. *FNOGMA* includes the revised non-derogation clause.<sup>42</sup> Although *FNCIDA* also provides for non-derogation, its approach to the subject differs significantly from that of the statutes reviewed above. It authorizes the development of project-specific regulations by the Governor in Council, in accordance with agreements with First Nations communities and the province, including regulations to<sup>43</sup>

provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including limiting the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights.

This approach appears to establish a precedent for dealing with non-derogation of Aboriginal and treaty rights as a regulatory matter rather than addressing the issue explicitly in legislation, with obvious implications for Parliamentary scrutiny.

### **Bill C-32, An Act respecting the sustainable development of Canada's seacoast and inland fisheries**

This legislation, which was introduced in December 2006 as Bill C-45, died on the Order Paper in September 2007, and was re-introduced as Bill C-32 in November 2007, does not contain a non-derogation clause *per se*. Among other application principles it does, however, stipulate that those engaged in administering the legislation and its regulations must “seek to manage fisheries and conserve and protect fish and fish habitat in a manner that is consistent with the constitutional protection provided for existing aboriginal and treaty rights of the aboriginal peoples of Canada.”<sup>44</sup> This phrasing represents another novel approach to non-derogation.

## **E. Issues Considered**

In exercising our mandate to examine and report on the implications of including non-derogation clauses in federal legislation, the Committee decided to focus on five distinct but related issues. The following sections set out a summary of evidence witnesses gave before us on these issues, followed by our conclusions with respect to each.

The Committee’s discussion and recommendations should be read in the context of several core principles related to section 35 articulated by the Supreme Court of Canada, as outlined above. Our deliberations have been guided by the “solemn commitment” the

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<sup>(42)</sup> S.C. 2005, c. 48.

<sup>(43)</sup> S.C. 2005, c. 53, par. 3(2)(q).

<sup>(44)</sup> See clause 6(d).

section represents; the reconciliation purpose it embodies; the fiduciary nature of the relationship that underlies its implementation; and the implications of this relationship for the honour of the Crown. We have also remained sensitive to the fact that section 35 rights are not immune from infringement, provided such infringement can be justified.

With this in mind, members of the Committee trust that the following deliberations will assist the government, and the Department of Justice in particular, in fulfilling their role in the evolving area of section 35 Aboriginal and treaty rights. The Committee decided that, for purposes of this study, it would be more useful to hear from senior government officials than ministers. Accordingly, senior officials appearing before us, who have long experience in these matters, represented the Department of Justice and the Department of Indian Affairs and Northern Development, that is, those departments most closely connected with the non-derogation issue.

## **1. Purpose and Effect of Non-derogation Clauses**

The Committee heard significantly divergent testimony from government and non-government witnesses with respect to the purpose and effect of non-derogation clauses.

### **Evidence**

Speaking candidly, Andrew Saranchuk related the Department of Justice's position:

[W]hen dealing with specific requests for inclusion of a non-derogation clause, there was sometimes or perhaps generally little in-depth analysis or discussion concerning the intended purpose or effect of such a clause .... Instead, the issue tended to be dealt with on an *ad hoc* basis. Calls for an inclusion of a clause or debates over wording were often made late in the legislative process. In the result, the focus was often on avoiding delays to the passage of the bill, rather than on the impact the provision might have on the operation of the legislation. As a result, non-derogation clauses were added to statutes often as a matter of compromise or expediency.<sup>45</sup>

To the extent that the purpose and effect of non-derogation clauses were considered, Mr. Saranchuk told the Committee that, in the government's view, non-derogation clauses are intended "to act as nothing more than a reminder or a flag for those administering the legislation that they must be aware of Aboriginal and treaty rights and act in a way consistent with the constitutional protection afforded those rights by section 35 of the *Constitution Act, 1982*."<sup>46</sup>

Mr. Saranchuk related the government's concern of the risk that courts could give "unintended substantive effect to a non-derogation clause,"<sup>47</sup> based on the legal presumption that every provision of a statute is intended to be given meaning. This concern

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<sup>(45)</sup> *Evidence*, Issue 22, 22 February 2007.

<sup>(46)</sup> *Ibid.*

<sup>(47)</sup> *Ibid.*

about the potential “topping up” of section 35 rights became specific after the 1990 *Sparrow* decision, in which the Supreme Court confirmed that there are limits to those rights:

It was considered possible that a non-derogation clause inserted in the statute after the *Sparrow* decision could be interpreted as eliminating the government’s ability to argue that a particular infringement is justified under the *Sparrow* test. This would result in more protection for Aboriginal and treaty rights than is provided in section 35. In response to this concern, over time, the wording of non-derogation clauses was altered to more clearly express the intention of government, that these clauses simply confirm that the legislation is subject to the normal application or operation of section 35.<sup>48</sup>

Mr. Saranchuk cited the *Fisheries Act* to illustrate that some infringement of Aboriginal or treaty rights may be necessary in some instances. If the inclusion of a non-derogation clause in this statute were to make that impossible, it would be difficult to ensure conservation and continued use of the fishery by all users.<sup>49</sup> According to Claire Beckton, Assistant Deputy Attorney General at the time of her testimony in November 2003, the government is of the view that it is important to have flexible legislative schemes in place that can “adapt to changing circumstances and values.”<sup>50</sup>

In terms of the desired approach to take, Mr. Saranchuk stated that the government’s view from the outset has been that non-derogation clauses relating to section 35 rights are “unnecessary” because those rights already enjoy clear protection under the Constitution, “which is the supreme law of the land.”<sup>51</sup> However, both he and Ms. Beckton took the position that the core issue at play has to do with “determining the appropriate relationship between federal legislation and Aboriginal and treaty rights”, that it is “less about the wording of particular clauses and more about policy choices”.<sup>52</sup>

Both officials also described a broad spectrum of possible approaches that could be taken in the future, depending on the policy choices made. At one end, clauses in existing legislation could be repealed in light of uncertainty surrounding them. At the other, a broadly worded clause could be added to the *Interpretation Act* to be applicable to all federal legislation “if it is determined that Aboriginal and treaty rights require more protection than is provided by section 35.” A third option could entail developing “a framework that would set out when a non-derogation clause might be considered and when it would not”.<sup>53</sup>

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(48) *Ibid.*

(49) *Ibid.*

(50) *Evidence*, Issue 16, 5 November 2003.

(51) *Evidence*, Issue 22, 22 February 2007.

(52) Claire Beckton, *Evidence*, Issue 16, 5 November 2003; Andrew Saranchuk, *Ibid.*

(53) Claire Beckton, *Ibid.*

Not surprisingly, witnesses representing Aboriginal groups had very different views about the purpose and effect of non-derogation clauses relating to section 35 rights. Roger Jones, Policy Advisor to the Assembly of First Nations, told the Committee that a review of the case law

establishes with absolute certainty that section 35 does mean something. The courts are saying that section 35 requires that Canadian common law, statutory law, needs to reconcile with Aboriginal law and Aboriginal rights and title. The courts are saying that reconciliation requires the perspectives of Aboriginal peoples to be taken into account in law-making in this country.

Inserting a non-derogation clause into a statute really does not measure up to that standard . . . [and] simply will not achieve that end result, but it would be a start.<sup>54</sup>

Mr. Jones related the need for non-derogation clauses to what he described as the government's approach of avoiding dealing with Aboriginal and treaty rights:

If that is the approach and they are not necessarily vigilant in making sure that their laws are not going to affect treaty and Aboriginal rights, then surely a non-derogation clause is a minimum measure that can be taken to make sure that the rights and interests are protected.<sup>55</sup>

Non-government witnesses emphatically rejected the notion that non-derogation clauses serve or could serve merely as "flags" or reminders of section 35 in the *Constitution Act, 1982*. Jim Aldridge, General Counsel to the Nisga'a Lisims Government and co-Chair of the 2002 Joint Ministerial Advisory Committee, explained that

We all know that every provision of an enactment must be given separate meaning, and merely being a flag or some sort of marker that says, by the way, there are constitutional rights [in] the Constitution . . . obviously has no legislative effect. We do not enact things as markers.<sup>56</sup>

Witnesses also rejected the Department of Justice's concern that non-derogation clauses could improve upon, or 'top up' constitutional protection. Mr. Aldridge told us that "[n]on-derogation clauses speak only to the interpretation of a statute, not to the content of Aboriginal or treaty rights or to the constitutional protection afforded to those rights."<sup>57</sup> John Merritt, Legal Counsel and Advisor to Nunavut Tunngavik Incorporated and Inuit Tapiriit Kanatami, described some of the government's concern about unintended consequences as "exaggerated." As he explained:

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<sup>(54)</sup> *Evidence*, Issue 32, 20 June 2007.

<sup>(55)</sup> *Ibid.*

<sup>(56)</sup> *Ibid.*

<sup>(57)</sup> *Ibid.*

The courts will always interpret guarantees of rights for one particular set of people in the context of rights also available to other Canadians.<sup>58</sup>

A number of witnesses focussed on the role of parliamentary intent in the non-derogation context. Professor Bradford Morse of the University of Ottawa's Faculty of Law expressed the view that

the purpose of Parliament . . . in advocating the inclusion of such clauses . . . has been this desire to ensure that the act as passed, when passed for an entirely different purpose, does not denigrate in any way from the Aboriginal and treaty rights that are recognized in the Constitution. That was true in the *Northern Pipeline Act* before the constitutional change in 1982, and it is still true now with those rights recognized in section 35 as part of the supreme law of the land.

That is really the driving objective of Parliament. Perhaps not from time to time of government or the Department of Justice in particular, but the purpose has been that the legislation not do something that parliamentarians had not intended it to do. If they had intended it to do so, they could have done so expressly; and then one would question whether or not that was constitutionally valid.<sup>59</sup>

In this respect, Mr. Merritt suggested that the Department of Justice “seems to confuse its intentions and preferences with Parliament's. It is Parliament's intentions that count and the fact that the executive branch would like to achieve certain things is secondary to the discussion that the Department of Justice should have with you.”<sup>60</sup> Mr. Aldridge echoed the view that the key question is that of Parliament's intention, “as expressed through the words that it enacted.”<sup>61</sup>

All non-government witnesses were of the opinion that non-derogation clauses should continue to be included in federal legislation, and that the revised or “new” wording employed by the Department of Justice since 1998 is not an appropriate model to retain. According to Mr. Aldridge, that version “speaks not to a rule of construction concerning the rights but rather to a rule of construction that says nothing abrogates from the protection provided for those rights,”<sup>62</sup> and is therefore ineffective. A majority favoured including a non-derogation clause in the *Interpretation Act*, to apply to all federal statutes. As our witnesses informed us, this approach has been adopted in Manitoba and Saskatchewan.

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<sup>(58)</sup> *Ibid.*

<sup>(59)</sup> *Evidence*, Issue 32, 21 June 2007.

<sup>(60)</sup> *Ibid.*, 20 June 2007.

<sup>(61)</sup> *Ibid.*

<sup>(62)</sup> *Ibid.*

The first of two alternative models proposed by witnesses for insertion in the federal interpretation statute would be based on the original post-1982 version previously discussed, which echoes the terms of section 25 of the Charter. Witnesses appeared to prefer the second, more exhaustive, model advanced by Mr. Merritt, as developed by Aboriginal Senators and discussed on the floor of the Senate in June 2003.<sup>63</sup> It reads:

- (1) Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them.
- (2) For greater certainty, nothing in subsection (1) enhances or diminishes the capacity of Parliament to make laws consistent with section 35 of the *Constitution Act, 1982*.

According to Mr. Merritt, the first paragraph is “essentially relaying an intention from Parliament that public officials should actively try to uphold and implement [Aboriginal and treaty rights]. It is a positive statement”. The second paragraph stipulates that “[i]nsofar as Parliament in the future feels obliged to make a specific exception to what otherwise is its general determination to protect Aboriginal treaty rights, Parliament of course retains that capacity.”<sup>64</sup>

Professor Morse indicated to the Committee that such a solution would serve as a “message to all courts and all lawyers, whether in government or outside, that all federal legislation should be interpreted with due respect to the importance of section 35 rights in the unique position of First Nations, Inuit and Métis peoples in Canada.”<sup>65</sup>

On the other hand, Gordon Polson of the Congress of Aboriginal Peoples suggested a need for “continual reiteration.” He recommended including a blanket non-derogation clause in each piece of federal legislation with wording duplicating that of section 25 of the Charter. In his view, such “special consideration is essential” in order to “prevent Aboriginal peoples from being adversely affected by federal law.”<sup>66</sup>

## **Discussion and Recommendations**

The Committee agrees with both government and non-government witnesses that the current *ad hoc* approach to legislated non-derogation clauses is unsustainable. It has resulted in different clauses based on one of two main variations in some, but not all, federal statutes with potential impacts on Aboriginal rights and interests. This approach appears to us to accentuate the government’s concern about the courts assigning an unintended scope to any such clause, if only to distinguish its purpose from that of another differently worded one. However, we disagree that non-derogation clauses are unnecessary

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<sup>(63)</sup> Senate, *Debates*, 9 June 2003, p. 1547.

<sup>(64)</sup> *Evidence*, Issue 32, 20 June 2007.

<sup>(65)</sup> *Ibid.*, 21 June 2007.

<sup>(66)</sup> *Ibid.*

in light of the constitutional protection afforded Aboriginal and treaty rights under section 35.

The Department's position has consistently been that a non-derogation clause might be appropriate "if it is determined that Aboriginal and treaty rights require more protection than is provided by section 35."<sup>67</sup> The Committee disagrees with this premise. Aboriginal groups do not seek the inclusion of non-derogation clauses in federal legislation to gain additional rights, or take the position that section 35 is insufficient. Rather, the Committee concludes that non-derogation clauses serve the important purpose of expressing to all Parliament's clear intention that legislation is to be interpreted and implemented consistently with section 35.

Accordingly, the Committee supports the continued use of non-derogation clauses. We consider that the approach adopted by both Saskatchewan and Manitoba appears to be a sensible way to achieve consistency and clarity, and accept the recommendation of the majority of witnesses that a clearly worded clause should be added to the federal *Interpretation Act* for application to all federal statutes.

In doing so, we further note that, pursuant to subsection 3(1) of the *Interpretation Act*, a provision of that Act does not apply to an enactment where a contrary intention appears. Thus, if in the future Parliament considers it inappropriate for the non-derogation clause to apply to a given federal statute, the expression of a contrary intention in that statute would be sufficient to address the concern. In short, we find it preferable, in the interests of upholding the honour of the Crown, to make inclusion of a non-derogation clause in all legislation the default position through the insertion of a provision in the *Interpretation Act*, with explicit action needed to opt-out of its application.

As to the wording to be included, we favour that first proposed by Senator Sibbeston in 2003 and recommended by several non-government witnesses. As outlined above, that wording makes a positive statement declaring Parliament's intention. Clearly, such a statement would leave Parliament's legislative capacity undisturbed.

### **Recommendation 1:**

**The Committee recommends that the Government of Canada take immediate steps to introduce legislation to add the following non-derogation provision to the federal *Interpretation Act*:**

**Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them.**

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<sup>(67)</sup> Claire Beckton, *Evidence*, Issue 16, 5 November 2003.

In light of this recommendation, we think it is also important, for purposes of clarity and to avoid future confusion, that all existing non-derogation clauses included in federal statutes since the enactment of section 35 in 1982 be repealed.

**Recommendation 2:**

**The Committee recommends that the legislation to amend the *Interpretation Act* also provide for the repeal of all non-derogation clauses relating to Aboriginal and treaty rights included in federal legislation since 1982.**

**2. Section 35 Rights and the Role of the Department of Justice**

The Committee has extensive knowledge of and experience with the Department of Justice's role and practices in relation to rights enshrined in the *Canadian Charter of Rights and Freedoms* (Charter). During its hearings, witness testimony suggested to Committee members that while section 35 and Charter rights are of equal stature, the Department's role in relation to each category differs in practice.

**Evidence**

Department of Justice witnesses made it clear that the Department recognizes section 35 as a constitutional guarantee that is binding on the Government of Canada.<sup>68</sup> In 2003, Ms. Beckton indicated to the Committee that “[t]he federal government takes [section 35] rights seriously and seeks to protect both Aboriginal and treaty rights. These rights receive a high degree of constitutional protection.”<sup>69</sup> In 2007, Mr. Saranchuk reiterated that section 35 “contains the ultimate bedrock guarantee of Aboriginal and treaty rights. It is a constitutional guarantee that cannot be taken away by legislation.”<sup>70</sup>

Departmental witnesses' comparison of section 35 rights with Charter rights outlined notable differences between them. At least two of the distinctions outlined by Ms. Beckton appear especially relevant to a discussion of the Department's role:

One important way in which Aboriginal and Charter rights differ is that, in the case of Charter rights, there exists a formal process of review under the *Department of Justice Act* related to the constitutionality of proposed federal legislation. There is no similar review process for Aboriginal and treaty rights.

A further difference is that the sets out certain rights that are protected, whereas section 35 refers broadly to Aboriginal and treaty rights and does

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<sup>(68)</sup> *Ibid.*

<sup>(69)</sup> *Ibid.*

<sup>(70)</sup> *Evidence*, Issue 22, 22 February 2007.

not specify them. In this way, Charter rights are potentially more easily definable than Aboriginal and treaty rights. . . .<sup>71</sup>

On the first point, Ms. Beckton acknowledged that there is concern about “the potential for legislation to have unanticipated impacts on Aboriginal and treaty rights because there is no process for parliamentarians to assess specifically how legislation may affect these rights”.<sup>72</sup> On the second, Charles Pryce, Senior Counsel in the Department of Justice’s Aboriginal Law and Strategic Policy Directorate, underscored the point that “at this stage in the development of law, . . . the scope of Aboriginal rights, and even treaty rights, particularly historical treaty rights, is unclear. It is one thing to say that we should recognize and fully implement . . . rights, but there is not always a clear picture as to the scope of those rights.”<sup>73</sup>

Both Ms. Beckton and Mr. Saranchuk referred to the Department’s broader role within government with respect to section 35 rights. According to Ms. Beckton, “we are always alert in terms of policy development to advising other departments about their obligations and responsibilities when we know of existing Aboriginal or treaty rights, or when the government believes that Aboriginal or treaty rights are likely to be found.”<sup>74</sup> Mr. Saranchuk added that “we do give daily advice, as the Department of Justice, on an ongoing basis to other government departments, in terms of how to meet their rights and responsibilities vis-à-vis the Aboriginal peoples.”<sup>75</sup>

Non-government witnesses appearing before the Committee conveyed their view that the government is not taking section 35 rights seriously enough. Roger Jones told the Committee that:

[t]he old rules of the game really have not changed. The federal Crown, through its lawyers and bureaucrats, still behave[s] in a pre-1982 context, where they believe that Parliament is still supreme in terms of how they see . . . 91(24)<sup>76</sup> as if section 35 really does not matter a whole lot in terms of safeguarding and making treaty and Aboriginal rights a reality.

. . .  
When we see that the federal government has so much control over law-making, policy making, prosecutions, judging the outcomes of prosecutions, and so on, then obviously it is in our interests to try to put some safeguards into legislation that says, “Well, hold on. There are treaty and Aboriginal rights that the Constitution recognizes. Your failure to do a

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<sup>(71)</sup> *Evidence*, Issue 16, 5 November 2003.

<sup>(72)</sup> *Ibid.*

<sup>(73)</sup> *Evidence*, Issue 22, 22 February 2007.

<sup>(74)</sup> *Evidence*, Issue 16, 5 November 2003.

<sup>(75)</sup> *Evidence*, Issue 22, 22 February 2007.

<sup>(76)</sup> Section 91(24) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative authority in respect of “Indians, and Lands reserved for the Indians.”

section 35 analysis when you are making these laws puts our rights at risk”.<sup>77</sup>

Gordon Polson expressed the similar view that, “25 years after the repatriation of the Canadian Constitution, the gap still exists between theoretical equality and government practice with respect to the recognition and protection of Aboriginal rights. This is an issue we have to deal with on a daily basis.”<sup>78</sup>

As alluded to previously, non-government witnesses drew the Committee’s attention to the potential for confusion between the Department of Justice’s intentions and preferences and those of Parliament. John Merritt took the position that the absence of a process to enable Parliament to assess the effects of laws on section 35 rights “is the nub of the problem”. He suggested the Department ought to be working much more proactively with Parliament in such a process:

[W]hen developing new laws, the Department of Justice should actively turn its mind to the potential for there to be abrogation, derogation or infringement of any kind. That is the Department of Justice's responsibility. It should be doing that and notifying parliamentarians when they are considering new laws. . . .

[I]f there is a diminution of Aboriginal or treaty rights necessary to accommodate a new legislative proposal . . . that should be Parliament's call. The executive branch should not pre-decide on that matter. . . . [It] should be clearly flagged and brought home to parliamentarians to make a choice.

Finally, if . . . there is some completely unforeseeable problem involving infringement between a new law and Aboriginal treaty rights, Parliament always has the prerogative to amend laws to deal with that problem squarely. If there is a conflict, that conflict should be brought back to Parliament. The Department of Justice should not predetermine the resolution.<sup>79</sup>

Mr. Merritt expressed concern that, at the moment, the debate regarding the potential impact of new laws first takes place within the Department of Justice, with the consequences left to the courts, and without any input from Parliamentarians, the “custodians of [section 35] rights.”<sup>80</sup> In his view, “[i]f Parliament is adopting laws without informing and satisfying itself that there are no unintended infringements of Aboriginal rights, then ask whether it is a motive consistent with the honour of the Crown.”<sup>81</sup>

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<sup>(77)</sup> *Evidence*, Issue 32, 20 June 2007.

<sup>(78)</sup> *Ibid.*, 21 June 2007.

<sup>(79)</sup> *Ibid.*, 20 June 2007.

<sup>(80)</sup> *Ibid.*

<sup>(81)</sup> *Ibid.*

Mr. Aldridge also stressed the need for “an open, frank and honest debate about the desirability of [an] infringement and then Parliament can decide.” Moving the debate from Parliament into the courts, he suggested, is not only costly for Aboriginal groups, but “leads to acrimony and division instead of the reconciliation that we all should be striving for.”<sup>82</sup>

Non-government witnesses recommended that the federal government be required, when developing new laws, to perform a “mandatory and transparent”<sup>83</sup> section 35 compliance analysis analogous to the review mandated by the *Department of Justice Act* in relation to Charter rights. As Roger Jones put it,

Something like that should be undertaken with respect to section 35 rights as well but, by their own admission, they do not do that analysis. They assume that there is no negative effect on treaty and Aboriginal rights, or if there is, too bad, or you will have to deal with it yourself in court, in litigation, which comes at a cost to First Nations people, Inuit people, and others as well. There are [at present] not any checks and balances really in the system of law-making, unless it is done at the level of senators and members of Parliament to be scrutinizing legislation so that these negative impacts do not arise.<sup>84</sup>

Mr. Polson endorsed the notion of systematic review.<sup>85</sup> Professor Morse of the University of Ottawa also agreed that a provision similar to that requiring the Minister of Justice to conduct a Charter compliance review “can be included in the *Department of Justice Act* . . . [to compel] the Minister of Justice to engage in a similar review on all bills, to ask the question whether or not this bill might intentionally or unwittingly impact upon [section 35] rights”. He proposed that the provision also “compel the Minister of Justice to formally report to Parliament on his conclusions and the reasons therefore”<sup>86</sup> to both inform and enable debate among Parliamentarians. In his view, such a requirement “will trickle down within the legislative drafting process. It will elevate the attention that legislative drafters bring to bear on any bill that they are dealing with to consider these issues.”<sup>87</sup>

In response to a concern raised by a Committee member, Roger Jones agreed that regulations drafted by the Department of Justice have the potential to infringe section 35 rights as much as, or more than, legislative provisions. He explained that

it is the regulatory power that stands to be much more damaging. . . .  
[R]egulations are drafted by the Department of Justice, cabinet approves

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(82) *Ibid.*

(83) Roger Jones, *Ibid.*

(84) *Ibid.*

(85) *Ibid.*, 21 June 2007.

(86) *Ibid.*

(87) *Ibid.*

them, they are published for three or six months and then they become law. They do not undergo scrutiny by the House or the Senate. . . It is an executive power. Who will scrutinize those regulations to ensure that they are not in violation of treaty and Aboriginal rights, when you know that no one really has access to the drafting exercise that goes on at the Department of Justice?<sup>88</sup>

Mr. Jones also noted that often “the federal Crown does find itself in a conflict of interest when dealing with First Nations rights because of its fiduciary relationship with First Nations people, and of course the Justice Department, being the solicitor for the Crown, is in the same position.” Referring to a model adopted in some American jurisdictions to safeguard Aboriginal interests where the federal government would otherwise be in conflict, he raised the possibility of establishing “a section 35 Attorney General whose specific role would be to act as an independent institution and whose purpose would be to ensure the Aboriginal interest is properly regarded and considered.”<sup>89</sup>

### **Discussion and Recommendations**

The Committee strongly subscribes to the Supreme Court of Canada’s view that, as guarantees enshrined in Canada’s Constitution, the rights section 35 protects are “equal in importance and significance to the rights enshrined in the Charter.”<sup>90</sup> Department of Justice witnesses who appeared before us do not question that equality of status. Nor do Committee members wish to downplay their efforts and those of other government officials to come to terms with the relatively new constitutional reality that section 35 represents. Nevertheless, we are concerned about the potential risk, under the status quo, of what one of our witnesses referred to as casual, unintentional infringements<sup>91</sup> of section 35 rights, and their implications for the health of the fiduciary relationship and the honour of the Crown. In our opinion, the equal constitutional stature of section 35 rights needs to be more fully reflected in government processes and practices than currently appears to be the case.

In stating this conclusion, Committee members are mindful of the unique situation of the federal government which, while acting on behalf of and in the interests of all Canadians, must also honour its special trust relationship with Aboriginal people. As noted in a previous section of this report, the Court has acknowledged that “[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting”<sup>92</sup>. We know this singular position may, on occasion, present additional challenges to the government in seeking the balance necessary to fulfill its dual role.

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<sup>(88)</sup> *Ibid.*, 20 June 2007.

<sup>(89)</sup> *Ibid.*

<sup>(90)</sup> *Van der Peet*, *supra* note 16, para. 19.

<sup>(91)</sup> John Merritt, *Evidence*, Issue 32, 20 June 2007.

<sup>(92)</sup> *Wewaykum*, *supra*, note 23.

While recognizing the potential challenges facing government in this respect, we remain persuaded that there is an immediate need to develop within government, and the Department of Justice in particular, a consistent approach to section 35 rights that is based on and confirms their constitutional status as a matter of course and regular practice. This approach should include mandatory systematic review by the Department of Justice of all draft laws and regulations for their potential impact on Aboriginal and treaty rights. Ideally, this review should be conducted while instruments are in development, and prior to the introduction of any legislation, thus enabling potential impacts to be addressed at the earliest opportunity, and mitigated or eliminated where possible. Because it is imperative, in our view, to ensure Parliament is kept aware at all times of the effect federal bills and regulations may have on Aboriginal and treaty rights, any potential impact or infringement identified as a result of review of any legislation should be reported to Parliament for its debate and decision.

This new requirement should, in our view, be modeled on and adapted from the current section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act*, which require the Minister and Deputy Minister of Justice respectively to vet new bills and regulations for consistency with Charter provisions, and to report any inconsistencies to the House of Commons.

In order to enhance the effectiveness of the review process we recommend, the Committee believes the Department should collaborate with other government departments and agencies, as well as with Aboriginal stakeholders having section 35-related expertise, to develop base criteria as well as department-specific criteria against which to evaluate new federal legislation and regulations with respect to their potential interaction with section 35 rights. This is especially important as section 35 rights are, as our witnesses underscored, not defined with any specificity. These criteria should not be static, but should be revised over time to reflect changing legal and factual circumstances.

### **Recommendation 3:**

- (a) The Committee recommends that the Government of Canada require the Minister of Justice or her/his Deputy, as the case may be, to examine every bill and draft regulation for its potential interaction with section 35 Aboriginal and treaty rights, with a view to ensuring consistency with those rights. This requirement should be analogous to that found in section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* in respect of Charter rights;**
- (b) The Committee recommends that the Government of Canada ensure that adequate resources are made available to the Department of Justice to enable it to carry out this additional responsibility;**
- (c) The Committee recommends that concurrently, the Department of Justice undertake an administrative process, in collaboration with other federal departments as well as Aboriginal organizations**

**representing a broad cross-section of First Nations, Inuit and Métis men and women, to develop criteria to evaluate all new federal legislation and regulations for their potential interaction with section 35 Aboriginal and treaty rights, with a view to ensuring consistency with those rights;**

- (d) The Committee recommends that the Department of Justice develop a process, to include consultation with broadly representative Aboriginal groups, for reviewing federal laws and regulations already in place based on these criteria, and report to Parliament on its findings.**

It is the Committee's expectation that systematic review of statutory instruments based on section 35 analysis will foster within government and the Department of Justice ongoing attention to section 35 guarantees in the development of laws and policies. Such a development would, in our view, be consistent with the Crown's fiduciary relationship with Aboriginal peoples.

The Committee also believes that it would be suitable to further enhance the Department's section 35-related capacity, while reducing the potential for conflict of interest within the Department that was mentioned by our witnesses. The Department of Justice should, in our view, designate a unit within the Aboriginal Affairs Portfolio with responsibility for monitoring compliance with section 35 Aboriginal and treaty rights, both within the Department and across departments, and for maintaining ongoing dialogue with Aboriginal communities and organizations likely to be affected by government bills, regulations and policies. It is important, in our opinion, for purposes of objectivity, that members of such a unit not also be involved in litigating Aboriginal and treaty rights matters.

**Recommendation 4:**

**The Committee recommends that the Aboriginal Affairs Portfolio within the Department of Justice include a unit with broad responsibilities**

- a) for monitoring compliance with section 35 Aboriginal and treaty rights within the Department and across departments,**
- b) for maintaining ongoing dialogue with broadly representative Aboriginal communities and organizations, and**
- c) in particular, for assisting the Minister in respect of the requirement described under Recommendation 3.**

### 3. Need for Greater Consultation

The Committee is aware that recent key Supreme Court of Canada rulings<sup>93</sup> have turned on the nature and scope of the Crown's obligation to consult Aboriginal people in relation to measures affecting their interests. Both government and non-government witnesses viewed the matter of consultation and involvement of Aboriginal groups in the development of legislation as relevant to our study on the use of non-derogation clauses.

#### Evidence

All government witnesses spoke of the potential benefits of enhanced consultation with Aboriginal groups and communities "at the front end", as government legislation is being developed, largely as an alternative to having recourse to non-derogation clauses "at the back end". In 2003, Christine Cram, then Director General of the Department of Indian Affairs and Northern Development's Strategic Policy, Planning and Intergovernmental Relations Branch, acknowledged that "[n]one of us is happy with putting in non-derogation clauses at the end of the process to fix a problem that should have been identified much earlier."<sup>94</sup>

Ms. Beckton told the Committee that this approach is "piecemeal", adding that

If the real concern is that not enough is being done to take account of Aboriginal and treaty rights as legislation is drafted and considered in Parliament, one possibility could be to find better ways of ensuring that the views and interests of Aboriginal peoples are taken into account in the legislative process. The federal government routinely engages Canadians in the process of developing or amending legislation. . . . A more systematic approach to consultation with Aboriginal peoples could be to explore ways to incorporate and accommodate Aboriginal interests. This could lead to a more effective treatment of Aboriginal concerns.<sup>95</sup>

Mr. Saranchuk told us that discussions with Senators have given him a greater appreciation of the perspective according to which failure to involve Aboriginal people, "through effective consultation, in the development of legislation that may affect their Aboriginal and treaty rights . . . means that the only way to adequately protect [those rights] is to include a non-derogation clause . . ."<sup>96</sup> In his view,

Even if non-derogation clauses are not to be included in future legislation, there is still room for Aboriginal peoples to be more involved in the development of those legislative initiatives that might affect their rights. In that way, it might be possible for Aboriginal concerns to be considered before legislation is enacted. . . This would mean that Aboriginal people

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<sup>(93)</sup> See *Haida, Taku River and Mikisew Cree*, *supra* note 16.

<sup>(94)</sup> *Evidence*, Issue 16, 5 November 2003.

<sup>(95)</sup> *Ibid.*

<sup>(96)</sup> *Evidence*, Issue 22, 22 February 2007.

would not always have to rely on court challenges after a law is passed in order to protect their rights. Such an approach may address the view of some Aboriginal groups that it is the lack of consultation that has led to the demand for non-derogation clauses.<sup>97</sup>

In response to Committee members' questions concerning the government's consultation obligations, the Department's Charles Pryce acknowledged that "[t]he duty to consult is extremely important and is an aspect of honour of the Crown."<sup>98</sup> He referred to it as "front end protection" that "avoids the potential possibility of infringement, by adequate engagement with Aboriginal groups, so that the decisions taken are designed in ways that avoid the infringement."<sup>99</sup> Mr. Pryce also emphasized to the Committee, however, that

the duty to consult is in the early stages of development. Precisely what the scope of that duty is and whether as a legal duty it applies to the drafting and consideration of statutes as they go through Parliament is a question that has not been answered.<sup>100</sup>

On the matter of the government's approach to consultation, in light of Supreme Court of Canada rulings, Mr. Pryce advised us that

There is work within the government, beyond the Department of Justice, to try to develop frameworks and policies that both reflect the developments in the law and perhaps go further, policies dealing with consultation. . . . Whether it is about the legislation, which may be more as a matter of policy than of law, or whether it is with respect to decisions taken pursuant to legislation . . . all points to protection up front before the damage is done to either rights or claimed rights.<sup>101</sup>

Non-government witnesses spoke in support of consultation measures as key in addition to non-derogation clauses, and not in substitution for them. According to John Merritt,

Consultation is a very good thing. It is a very useful development in the case law, but I do not think it is a substitute for clarity with respect to interpretation provisions that appear in legislation. . . . In fact, clarity on this point would assist in consultation, because it would add focus and clarity; it would not be a substitute.<sup>102</sup>

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(97) *Ibid.*

(98) *Ibid.*

(99) *Ibid.*

(100) *Ibid.*

(101) *Ibid.*

(102) *Evidence*, Issue 32, 20 June 2007.

Roger Jones spoke of the importance of government's developing a "meaningful and efficient consultation and accommodation policy" in order to deal with the interests of Aboriginal peoples "in a more substantive manner."<sup>103</sup> The Assembly of First Nations brief described the "urgent need for the joint development of a Federal Consultation and Accommodation policy pursuant to the shared objective of reconciliation."<sup>104</sup>

Gordon Polson from CAP echoed these thoughts, calling for development of a "meaningful and substantive consultation and accommodation protocol ... to ensure that the impact of federal legislation on Aboriginal people is minimal."<sup>105</sup> In support of that submission, he reminded the Committee that the Government of Canada "has a fiduciary duty toward Aboriginal peoples, which includes a duty to consult and to accommodate, regardless of an Aboriginal or treaty right having been established or not."<sup>106</sup>

According to Professor Morse, "clearly more can be done to minimize the risk of [legislation] being contrary to the Constitution." In his opinion,

The challenge as well for [the] Department of Justice is it generally sees the drafting of bills as something secret and confidential that it does not wish to talk about. However, it does pierce that veil from time to time. . . . clearly, at the policy stage, prior to the drafting of the bill, there is an opportunity for proper discussions and representations to be made across tables between government representatives and representatives from the relevant national Aboriginal organizations.<sup>107</sup>

## **Discussion and Recommendation**

The Committee strongly endorses the objective of dealing with potential Aboriginal interests at the front end of the legislative process through regular consultation processes. Few would disagree that this approach is infinitely preferable to the human and financial costs involved in leaving Aboriginal people to resort to the courts following a claimed rights violation that might have been prevented through appropriate consultation. The courts should be the body of last resort, not the first. This view was shared by every witness appearing before us.

Effective consultation with Aboriginal stakeholders throughout the legislative process also represents more, in our view, than a means of avoiding litigation. It promotes reconciliation, the underlying purpose of section 35, and is consistent with the honour of the Crown. In this light, the Committee believes that, prior to and during the development of legislation or regulations that may or will interact with Aboriginal interests, the

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(103) *Ibid.*

(104) Assembly of First Nations, "The Outstanding Matter of Reconciliation: the ongoing necessity of non-derogation clauses", written submission to the Senate Standing Committee on Constitutional and Legal Affairs, June 2007, p. 13.

(105) *Evidence*, Issue 32, 21 June 2007.

(106) *Ibid.*

(107) *Ibid.*

Department of Justice and other federal departments should undertake meaningful and substantive consultations with concerned Aboriginal organizations and communities, always with a view to developing statutory instruments that are consistent with section 35 rights. In situations where Aboriginal matters are the specific subject of draft legislation, enhanced Aboriginal involvement in its development is especially crucial.

Although recognizing that the full extent of the government's duty to consult has yet to be determined, Committee members believe that it is incumbent on government, whether on the basis of a legal duty or as a matter of policy, to accelerate its efforts to develop and finalize comprehensive consultation policies with respect to the legislative process and Aboriginal stakeholders, for the earliest possible implementation. It is also our view that, in the spirit of reconciliation, these policies should be developed in collaboration with Aboriginal organizations having legal and policy expertise to bring to bear. The Committee acknowledges the government's 1 November 2007 announcement of an action plan to develop guidelines to address its consultation obligations toward Aboriginal people, and strongly believes the development of consultation criteria should also be extended to the legislative process.

**Recommendation 5:**

**The Committee recommends that the Department of Justice, in collaboration with other departments and broadly representative Aboriginal organizations, expedite its completion of comprehensive consultation policies with respect to the legislative process and Aboriginal stakeholders. The objective is to develop statutory instruments consistent with section 35 rights. The Department of Justice should provide yearly progress reports to the Committee until the policy is finalized and in place.**

**4. Harmonizing Canadian Law with Aboriginal Legal Traditions**

The question of harmonizing the current law with Aboriginal legal traditions, while not actively pursued with Department witnesses, was addressed with non-government witnesses as one aspect of reconciliation and merits the Committee's particular attention here.

**Evidence**

Roger Jones of the Assembly of First Nations reminded the Committee that

Government-driven legislation initiatives merely express the common and civil law view of property and civil rights in Canada. This is also embodied in the federal *Interpretation Act*, [which] specifically says that it is the common and civil law in Canada that is authoritative about what the law is. It excludes Aboriginal law or Inuit law, which obviously is

something that is a reality in this country as well, but not necessarily visible to people on a day-to-day basis.<sup>108</sup>

Professor Morse also addressed the matter of Aboriginal or indigenous law as a third source of Canadian law:

We have had our highest court in the land . . . saying clearly that traditional Aboriginal law is part of the Canadian law. We are a tri-juridical country, not merely a bi-juridical one. As the federal government is attempting to reflect . . . both the common law and "droit" civil, it must also pay attention and seek to respect and reflect the law of indigenous nations. That presents a huge challenge in a country such as ours. . . . but it does not mean that one should not try at all. Not trying is effectively saying that while we know there is a third legal system in the country, and it is part of our law, we will not pay attention to it; that clearly seems to me to be an unacceptable approach.<sup>109</sup>

On behalf of the Congress of Aboriginal Peoples, Gordon Polson noted that

it is important to understand the term "Aboriginal law" . . . and how we look at it. As it stands now, Aboriginal law generally refers to the evolving body of law that Euro-Canadian society uses to legally address issues surrounding the rights of Aboriginal and non-Aboriginal peoples. It is not actually the law of Aboriginal peoples, because Aboriginal peoples have their own legal practices and justice systems. They have been in use since time [immemorial]. To a great extent, that is where much of the debate surrounds this particular issue, because we have different perspectives and ways of looking at matters.<sup>110</sup>

Professor Morse suggested that the most effective way of ensuring Aboriginal law is adequately considered in the Department of Justice is "to have active involvement of appropriately selected representatives of First Nations, Métis and Inuit peoples."<sup>111</sup> Mr. Jones suggested investigating approaches taken in other jurisdictions, such as the Philippines, where the constitution and laws acknowledge that indigenous legal traditions need to be taken into account.<sup>112</sup>

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(108) *Ibid.*, 20 June 2007.

(109) *Ibid.*, 21 June 2007.

(110) *Ibid.*

(111) *Ibid.*

(112) *Ibid.*, 20 June 2007.

## Discussion and Recommendation

The harmonization of Aboriginal legal traditions with common and civil law traditions has long been a matter of special interest to the Committee. In 2004, our Second Report on Bill S-10, now the *Federal Law - Civil Law Harmonization Act, No. 2*,<sup>113</sup> observed that:

There is a third historical source of law – Aboriginal traditional law – that pre-existed the two other sources of law. It is composed of the customs and traditions central to the culture of our Aboriginal peoples. Canada has yet to adequately address that oral legal heritage.

We were encouraged by the testimony of the Minister of Justice, who spoke of his personal commitment, and that of his Department, to work with Aboriginal peoples to identify and to better appreciate Aboriginal legal traditions and to consider how they can be brought into the mainstream of our legal system. . . .<sup>114</sup>

At the time, the Committee expressed its “fervent position that a way should be found to integrate Aboriginal legal traditions into Canadian law alongside the civil and common law in a manner that will better reflect Canada’s diversity.”<sup>115</sup>

As reconciliation is an important purpose of section 35, we believe that now, more than ever, government needs to take far greater initiative in this area than appears to have been the case to date. It seems to the Committee that appreciation of the non-derogation issue would be enhanced by fuller understanding of traditional Aboriginal law, and that demonstrable progress in working toward harmonization of Aboriginal legal traditions, including customary law, is long overdue.

The Committee agrees with one of our witnesses, that “[s]ection 35 needs to be embodied in the laws of this country. It needs to be embodied in the policies of government”.<sup>116</sup> Since the Law Commission of Canada was unable to pursue its intended significant study of indigenous legal traditions in this country, we reiterate the concern we expressed in our Second Report about the “timeframe for progress in this area” and believe the government should address this important outstanding matter on an expedited basis.

### **Recommendation 6**

**The Committee recommends that the government take immediate steps, in close collaboration with First Nations, Inuit and Métis people having expertise in their respective domestic legal traditions, to both**

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<sup>(113)</sup> S.C. 2004, c. 25.

<sup>(114)</sup> Standing Senate Committee on Legal and Constitutional Affairs, Second Report, 1<sup>st</sup> Session, 38<sup>th</sup> Parliament, 25 November 2004.

<sup>(115)</sup> *Ibid.*

<sup>(116)</sup> *Evidence*, Issue 32, 20 June 2007.

- a. undertake comprehensive identification of those traditions, including customary and oral law, and
- b. develop policies to facilitate their recognition and their integration into Canadian law alongside the common and civil law.

## 5. Implementation Matters

A related issue raised by witnesses that warrants comment in this report, and that will continue to engage our attention as the law of section 35 evolves, concerns the implementation of laws. Although the Committee heard little testimony about the actual implementation of laws that do or may interact with Aboriginal rights and interests, the matter of how to ensure law enforcement is carried out in a manner consistent with section 35 was a matter of concern to a number of Committee members.

### Evidence

On behalf of the government, Ms. Beckton advised us that government departments

have regular federal-provincial-territorial meetings with our counterparts to talk about various issues that are raised and what the provinces are planning to do. ... I also agree that cultural awareness training throughout the different levels of government, both federal and provincial, is very important, so that the fishery officer or the person dealing with firearms has a better understanding of the different cultures.<sup>117</sup>

Ms. Christine Cram of the Department of Indian Affairs advised the Committee about a second national forum, the federal-provincial-territorial-Aboriginal process, in which federal, provincial and territorial ministers for Aboriginal affairs and six national Aboriginal organizations meet annually to discuss common issues.<sup>118</sup>

A Committee member's suggestion that the executive branch could be empowered to organize a given law's implementation to prevent potential clashes with section 35 rights was described by Mr. Pryce as "a very interesting and potentially valuable idea", and one for which statutory precedent exists "as an acknowledgement of cultural differences or social differences that need attention."<sup>119</sup> Mr. Saranchuk agreed that this would be a valid approach, noting that "there needs to be a cultural shift in certain ... circumstances," and

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<sup>(117)</sup> *Evidence*, Issue 16, 5 November 2003.

<sup>(118)</sup> *Ibid.*

<sup>(119)</sup> *Evidence*, Issue 22, 22 February 2007. Mr. Pryce appears to have been alluding to *Criminal Code* sentencing principles, which include a requirement that sentencing courts take into consideration reasonable sanction other than imprisonment for all offenders, but "with particular attention to the circumstances of aboriginal offenders".

an attempt, “to find ways . . . to remind the people who are actually applying the law on the ground how it is that they can best apply it.”<sup>120</sup>

Non-government witnesses did not address the matter of implementation, beyond agreeing with Committee members that those applying the laws must do so taking into account section 35 rights. As John Merritt stated,

[I]f you adopt an *Interpretation Act* [non-derogation] provision . . . the starting point is that when Parliament adopts new laws, it intends to respect the rights of Aboriginal peoples. It does not want these new laws being interpreted or administered day in, day out . . . in such a way as to short-change Aboriginal people.<sup>121</sup>

## Discussion

The Committee agrees that there is a need for increased awareness, both cultural and legal, about how federal, provincial and territorial laws should be implemented to respect 35 rights. In our view, section 35 signifies that “culture-blind” application of the law is not necessarily appropriate in all circumstances and contexts: firearms regulations may not apply the same way at the corner of Yonge and Bloor as they do on Nunavut’s Ellesmere Island or to Treaty 8 beneficiaries in certain treaty areas. It does not appear acceptable to us that Aboriginal persons charged with offences under fishing, hunting or firearms statutes should be placed in the position of having to rely on lengthy and costly court processes to affirm their Aboriginal rights owing to enforcement officials’ possible lack of awareness about section 35 implementation.

In the Committee’s view, it is important that enforcement officials receive adequate training to ensure their implementation of the laws they apply remains sensitive to the dictates of section 35. We therefore urge federal departments to take immediate steps to develop or expand appropriate tools for that purpose. Furthermore, recognizing that many statutory and regulatory schemes that may trigger section 35 rights fall within provincial jurisdiction, the Committee also urges the Department of Justice, the Department of Indian Affairs and Northern Development, and other federal departments to ensure the matter of enforcement in relation to section 35 rights is systematically included on the agendas of meetings with their provincial and territorial counterparts.

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<sup>(120)</sup> *Ibid.*

<sup>(121)</sup> *Evidence*, Issue 32, 20 June 2007.

## Conclusion

In bringing our report to a conclusion, the Committee underscores its recognition of the inclusion of section 35 in the Canadian Constitution in 1982 as a watershed development in the history of Aboriginal and non-Aboriginal relations in this country, and the culmination of Aboriginal peoples' lengthy struggle for recognition of their legal rights. We also recognize that, in constitutional terms, the "living tree" of section 35 remains in its relative infancy.

The Crown's complex and far-reaching obligations under section 35 have yet to be fully defined, as do section 35 rights themselves. We acknowledge the ongoing work of the Department of Justice, as well as the Department of Indian Affairs and Northern Development and other government departments and agencies, to address the demands of a shifting legal and constitutional context. The practical, feasible solutions set out in this report are intended to assist the government in that task.

Committee members realize that our recommendations will not exhaust the need for ongoing parliamentary scrutiny of government action in relation to section 35 implementation. Challenges remain before the reconciliation purpose of section 35 is truly realized and its full implementation achieved. As one witness reminded us,

Section 35 was the promise of rights' enjoyment by Aboriginal peoples here in this country. We are still on that quest. . .<sup>122</sup>

Committee members remain confident that these challenges are not insurmountable, with the concerted good faith collaborative efforts of all parties.

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<sup>(122)</sup> *Ibid.*



## **APPENDIX I**

### **Who the Committee Heard From**

*As an individual*

Bradford Morse, Professor, Faculty of Law, University of Ottawa

*Assembly of First Nations*

Roger Jones, Policy Advisor

*Congress of Aboriginal Peoples*

Gordon Polson, Legal Research Officer

*Department of Indian Affairs and Northern Development*

Christine Cram, Director General, Strategic Policy, Planning and Intergovernmental Relations Branch, Policy and Strategic Direction Sector

*Department of Justice Canada*

Clare Beckton, Assistant Deputy Attorney General

Charles Pryce, Senior Counsel, Aboriginal Law and Strategic Policy

Andrew Saranchuk, Acting Director and Senior Legal Counsel, Aboriginal Law and Strategic Policy

*Nisga'a Lisims Government*

Jim Aldridge, General Counsel

*Nunavut Tunngavik Incorporated/Inuit Tapiriit Kanatami*

John Merritt, Legal Counsel/Advisor



## **APPENDIX II**

### **Summary of Recommendations**

#### **Recommendation 1**

The Committee recommends that the Government of Canada take immediate steps to introduce legislation to add the following non-derogation provision to the federal *Interpretation Act*:

Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them.

#### **Recommendation 2**

The Committee recommends that the legislation to amend the *Interpretation Act* also provide for the repeal of all non-derogation clauses relating to Aboriginal and treaty rights included in federal legislation since 1982.

#### **Recommendation 3:**

- (a) The Committee recommends that the Government of Canada require the Minister of Justice or her/his Deputy, as the case may be, to examine every bill and draft regulation for its potential interaction with section 35 Aboriginal and treaty rights, with a view to ensuring consistency with those rights. This requirement should be analogous to that found in section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* in respect of Charter rights;
- (b) The Committee recommends that the Government of Canada ensure that adequate resources are made available to the Department of Justice to enable it to carry out this additional responsibility;
- (c) The Committee recommends that concurrently, the Department of Justice undertake an administrative process, in collaboration with other federal departments as well as Aboriginal organizations representing a broad cross-section of First Nations, Inuit and Métis men and women, to develop criteria to evaluate all new federal legislation and regulations for their potential interaction with section 35 Aboriginal and treaty rights, with a view to ensuring consistency with those rights;
- (d) The Committee recommends that the Department of Justice develop a process, to include consultation with broadly representative Aboriginal groups, for reviewing federal laws and regulations already in place based on these criteria, and report to Parliament on its findings.

#### **Recommendation 4**

The Committee recommends that the Aboriginal Affairs Portfolio within the Department of Justice include a unit with broad responsibilities

- (a) for monitoring compliance with section 35 Aboriginal and treaty rights within the Department and across departments,
- (b) for maintaining ongoing dialogue with broadly representative Aboriginal communities and organizations, and
- (c) in particular for assisting the Minister in respect of the requirement described under Recommendation 3.

#### **Recommendation 5**

The Committee recommends that the Department of Justice, in collaboration with other departments and broadly representative Aboriginal organizations, expedite its completion of comprehensive consultation policies with respect to the legislative process and Aboriginal stakeholders. The objective is to develop statutory instruments consistent with section 35 rights. The Department of Justice should provide yearly progress reports to the Committee until the policy is finalized and in place.

#### **Recommendation 6**

The Committee recommends that the government take immediate steps, in close collaboration with First Nations, Inuit and Métis people having expertise in their respective domestic legal traditions, to both

- (a) undertake comprehensive identification of those traditions, including customary and oral laws, and
- (b) develop policies related to their recognition and their integration into Canadian law alongside the common and civil law.