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## Section 35 of the Canadian Constitution Act and Indigenous Self-Determination in Canada

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### **Abstract**

*This research paper analyzes the impacts of Section 35 of the Canadian Constitution on the enhancement of Indigenous rights in Canadian politics. As outlined in Section 35, Indigenous rights are recognized as existing prior to the Constitution Act of 1982 and the identities of Aboriginal, Inuit and Métis peoples are defined. Academic literature, television broadcasts, and personal accounts of the implementation and effects of Section 35 were used to conduct this research and investigate the origins of this section in the Constitution. Notably, this analysis demonstrated that the inclusion of Section 35 in the Constitution has led to more public discussion and court cases to claim treaty rights by Indigenous peoples. The effect of including Indigenous rights in the Canadian Constitution has expanded the role of the courts in adjudicating relations between the Canadian government and Indigenous people, effectively expanding the accountability of the Canadian government to upholding treaty rights. Overall, the findings of this paper were that Section 35 plays a large role in promoting awareness of reconciliation to the Canadian public, however, it stops short of including Indigenous people as meaningful participants in their own self-determination.*

### **An Introduction to Section 35**

Enshrined in the Canadian Constitution Act of 1982, Section 35 has played a critical role in transforming Crown-Indigenous relations in a manner that emphasizes the importance of Indigenous self-governance (Webber 2016, 66). Why was Section 35 of the Constitution Act created and how does it reaffirm the rights of Indigenous people in Canada? Section 35 of the Constitution Act was created to reflect the public consensus that Indigenous people possess some inherent rights. It ratifies these rights by protecting against interference from the provincial and federal governments due to its status as supreme law and the provision of the duty to consult. Section 35 aimed to recognize the rights and identity of Indigenous people, but its effectiveness at upholding these rights is contested. This question is important to the politics surrounding the Canadian Constitution because although Section 35 plays a large role in Indigenous self-determination, by acknowledging the certain claims of Indigenous people against the Canadian state, it does not challenge the “de facto” (Nahwegahbow and Richmond 2008, 154) Crown sovereignty. For this reason, Section 35 is a critical steppingstone towards reconciliation between the Crown and Indigenous peoples in confronting the assumptions of Crown sovereignty over Indigenous self-determination. This research is significant as it could be used to inform future

policy decisions in Canada to better achieve the objectives of reconciliation. Specifically, this includes moving beyond consultation to the direct inclusion of Indigenous people in decision-making on matters that affect them.

This paper will explore academic literature on the creation of Section 35 of the Constitution and the impacts of its ratification, while also assessing the shortcomings of this discourse. Using television news broadcasts, personal accounts, policy analysis and case law, this paper will analyze how the Constitution Act of 1982 reflects the popular consensus that Indigenous people have inherent rights that must be reflected and protected in Canadian legislation. Following this, the discussion will outline potential implications, limitations, and further research as a result of the findings of this paper.

### **Review of the Academic Literature on Section 35**

Existing academic discourse surrounding Section 35 of the Constitution Act follows two main streams of thought: contingent theory and inherent theory. As defined by Hamar Foster (1992), contingent theory and inherent theory relate to the broader discourse around Aboriginal rights in Canada (343) but can be applied just as effectively to the conversation around Aboriginal rights in Section 35 of the Canadian Constitution. Moreover, these two theories follow a chronological timeline in academic literature. Prior to and early thereafter the repatriation of the Canadian Constitution in 1982, the argument of many academics was based on the principles of contingent theory in which Aboriginal rights are subject to Canadian statutes and treaties (Foster 1992, 343). However, as the rights outlined in Section 35 were claimed by Aboriginal groups throughout the 1980s and beyond, academic literature adopted inherent theory in arguing that Aboriginal rights are “historic rights” (Foster 1992, 343) that have been eclipsed by colonial interests and therefore should not be subject to colonial law. Nonetheless, there are some exceptions to this chronological timeline. Academic literature has done a good job of identifying the issues associated with the absence of explicit methodology for the application of Aboriginal rights in Section 35 and existing weaknesses in the protection of these rights. However, it has failed to assess exactly why this section of the Constitution was included. Generally speaking, there is only an overview that as the Canadian welfare state continued to expand following the Second World War, Canadian citizens became increasingly concerned with Aboriginal political and legal issues (Sanders 1983, 314).

Academic literature following contingent theory discusses Section 35 of the Constitution as being difficult to define for judicial purposes, due to its multiple interpretations. Some authors in this school of thought have focused on how the interpretation of treaty and title claims has been largely left to Canadian courts, which legitimizes the Constitution as the forebearer of Indigenous rights (Hurley 1983, 406). This implies that the existence of Indigenous rights is rooted in treaties and can be questioned within the parameters of Canadian common law, as opposed to being acknowledged as entirely inherent and inviolable. Academic literature has identified the confusion that exists between the origin of Aboriginal rights and their implementation, and how this has greater implications for the role of the Canadian government in ensuring these rights. Furthermore, contingent theory in academic literature acknowledges Section 35 of the

Constitution as only affirming the pre-existing rights of Aboriginal people from previous treaties, but offering no other enhancement to these rights (Sanders 1983, 314). This literature focuses on the legitimacy of the rights in Section 35 as hailing from previous documentation on behalf of the Canadian state. However, since the government acts on behalf of the state, they reserve the sovereign right to subjugate these rights on their own authority (Foster 1992, 345). Therefore, this legislation remains limited in its independence from government influence.

Conversely, academic literature on inherent theory postulates that Section 35 of the Constitution acknowledges the inherent rights of Indigenous peoples that existed before their recognition by colonial institutions (Foster 1992, 344). Many authors within this school of thought argue that Indigenous self-governance needs to be articulated outside of Canadian sovereignty, as without self-governing status, their existence remains “subservient to Canada’s laws” (Geddes 2019, 3). Inherent theory also questions the degree to which the Canadian state can remain truly sovereign while trying to accommodate First Nations’ interests, which arguably leads to independence for the subservient nation (Slattery 1992, 262). Similar to contingent theory, discourse around inherent theory also recognizes the need for more clarification regarding the origin of rights and which Aboriginal groups can claim rights under Section 35. Many groups fall under the umbrella term of First Nations, and requiring them to claim territorial rights using the same method discriminates against historically nomadic groups (Burke 2000, 6-7). At the core of inherent theory is the acknowledgement that Indigenous status is decided by the Canadian government, and without the ability of Indigenous people to define their membership, they lack recognition and the ability to define their place within the greater community of Canada (Christie 2003, 481-481). The literature surrounding this theory discusses how vulnerable Indigenous rights remain to government influence because, despite the acknowledgement of existing Indigenous rights, the Canadian state remains the only sovereign influence over the land.

Academic literature on both of these theories remains unclear on why Section 35 of the Canadian Constitution was created and exactly whose view it was that Indigenous rights are predominantly inherent. While both of these theories identify that, at least to a limited extent, Indigenous people have inherent rights, they differ in how they view the nature of these rights and where their power of application comes from. In all, academic literature has demonstrated that there is an overall consensus that Indigenous people have at least some inherent rights, but does not identify how this consensus came to be after many years of colonial policy in Canada.

### **Section 35 in Practice**

#### *The Creation and Restoration of Section 35*

The process of amending the Constitution to include Section 35 was a continuous effort on the part of Indigenous activists and Canadian politicians. According to Jack Woodward’s (2015) personal account of the Joint Committee proceedings on the Constitution in 1980, the New Democratic Party (NDP) had conditioned that Aboriginal rights must be included within the Constitution in exchange for their support of its passage. When Section 35 was removed from the initial draft constitution in 1981, Aboriginal leaders camped on Parliament Hill and occupied offices to urge its restoration (Woodward 2015). This account provides an interpretation of how

Section 35 came to be within Canadian legislation. Using content analysis, this account would suggest that despite the disregard of the Liberal government at the time to include a clause on Aboriginal rights in the Constitution, other political parties viewed this assertion of rights as integral to Canada's future. Furthermore, the resilience of Aboriginal leaders in their efforts to protest against the removal of Section 35 from the draft constitution indicates that there was a general consensus amongst Indigenous people that the Constitution would decide the future of their relations with the Canadian state. Indigenous leaders and Canadian politicians shared the common goal of protecting Indigenous rights and creating a consultation process to include Indigenous people in the decision-making process. Since the Constitution would be regarded as the supreme law of the land, it would therefore protect against arbitrary infringements by the government (Department of Justice 2017).

Following a First Ministers Conference on the Constitution on November 5th, an agreement was made with those in attendance that Aboriginal rights and matters pertaining to them would be entrenched in the Constitution (Secretariat of the Conference 1981, 3). However, the inclusion of Section 35 was primarily the result of the lobbying and publicity campaigns of Aboriginal organizations, which restored Section 35 on the premiers' condition that rights were defined as "existing" (Meekison 1999, 10). Additionally, the amendments for Aboriginal rights added following a conference between Indigenous leaders and the First Ministers in 1983 demonstrated that the political discourse at the time assumed a widespread belief amongst Canadians that Indigenous rights should be included in the Constitution (CBC 1983). The desire for a "common ground" (CBC 1983) amongst Indigenous leaders, political leaders, and by extension the Canadian public was made evident by engaging in a publicly broadcasted discussion on Indigenous rights. Drawing upon thematic analysis, it could therefore be argued that Indigenous leaders played an important role in opening serious discussion at the national level on the recognition of Indigenous rights. However, this discussion was met with the recognition of politicians that Indigenous rights must be affirmed within Canadian legislation, even if only to consolidate their account and prevent future disparities on treaty rights.

*Section 35 in Delgamuukw v. British Columbia*

The adoption of Section 35 in the Constitution Act has been a critical deciding factor in territorial and treaty claims since its enactment in 1982. To illustrate this, the case law of *Delgamuukw v. British Columbia* arguably set the precedent for claiming land rights using oral history as evidence and preventing provincial governments from interfering with Aboriginal titles. After unsuccessful negotiations with the Government of British Columbia in 1984, the Supreme Court of British Columbia ruled that the Gitksan and Wet'suwet'en First Nations had no claim over the land, as any title they held was relinquished when British Columbia joined Confederation (*Delgamuukw v. British Columbia* 1997). However, in 1997, the Supreme Court of Canada ruled that the provincial government of British Columbia had no authority to abate the rights of the First Nations to their traditional territories, as their Aboriginal title is protected under Section 35 of the Constitution (*Delgamuukw v. British Columbia* 1997). This case reaffirmed that Aboriginal rights and title are protected from government extinguishment under the Constitution Act, because the powers of the government are not defined as such and must comply with the highest law

(Department of Justice 2017). Furthermore, *Delgamuukw v. British Columbia* set the precedent for acknowledging the inherent territorial rights of Indigenous peoples by the admission of the Gitksan “adaawk” (1997, at para 13) oral history as acceptable court evidence. This case demonstrates that Section 35 is founded on the inherent rights of Indigenous people, rights that existed before colonization by the Crown, and cannot be infringed upon by any order of government.

Despite the ruling on *Delgamuukw v. British Columbia*, there exist several challenges that these First Nations people continue to face over two decades later due to the failure of Section 35 to encapsulate Indigenous sovereignty over a territory. Many unauthorized companies continue to operate in the ancestral territory of the Gitksan and Wet’suwet’en people, including Coastal GasLink (MacDiarmid 2019). Hereditary chiefs are unable to reject the Coastal GasLink operations within their recognized territory due to the agreements made between elected band councils elicited by the Crown and Coastal GasLink (MacDiarmid 2019). Without a degree of Indigenous self-governance exercised by hereditary chiefs that enforces the duty to consult, the rights outlined in Section 35 of the Constitution Act can be undermined by other institutions reminiscent of Canada as “a settler colonial state” (MacDiarmid 2019).

#### *Section 35 and the Duty to Consult*

Another significant element of Section 35 is the duty to consult and its implications on self-governance. Considering that Indigenous sovereignty has not been officially recognized by the Supreme Court of Canada as of 2016, Section 35 creates important questions around how Indigenous people can fully exercise their rights without such sovereignty (Webber 2016, 71). The case of *Haida Nation v. British Columbia (Minister of Forests)* (2004) displays the importance of the duty to consult with Indigenous peoples on matters relating to their title. Primarily, the Crown had failed to uphold the provision of consultation when the government of British Columbia delegated responsibility for any damage to the territorial resources of Haida Nation to the logging company Weyerhaeuser Co. (*Haida Nation v. British Columbia* 2004). The ruling of the Supreme Court of Canada had affirmed that it was the duty of the provincial government on behalf of the Crown to consult and to “engage in something significantly deeper” (*Haida Nation v. British Columbia* 2004, at para 79) through reasonable accommodation of the Haida Nation. This case maintains the provision of Section 35 that guarantees the rights of Aboriginal title through consultation with the Crown to protect against government interference. In considering this case, consultation and reasonable accommodation were important in protecting the territorial integrity of the Haida Nation as well as their Aboriginal title by ensuring that the government did not infringe upon these rights.

### **A Discussion of the Findings on Section 35**

Overall, the research presented in this paper has many implications for Indigenous people within the greater context of Canada and the Canadian Constitution. While in law, Section 35 protects the rights of Indigenous people from government interference, in practice, there are several ways in which governments can infringe upon these rights. As previously illustrated, the struggle of the Gitksan and Wet’suwet’en First Nations to claim territorial rights in the face of the Coastal GasLink pipeline can be seen as one way in which governments do not prioritize the rights of Indigenous people, and consequently erode them. Additionally, *Haida Nation v. British Columbia*

raises questions about to what extent the provision of the duty to consult and accommodate should imply self-governance for Indigenous peoples in order to protect their rights. The demands of consultation can largely be achieved without meaningful discussion as Section 35 only requires this consultation to happen at a procedural level (Urquhart 2019, 156). Furthermore, the public recognition of the inherent nature of the rights in Section 35 implies that the success of reconciliation in crafting the nation-to-nation approach between Canada and Indigenous peoples could be integral to the sustainability of these two nations.

There are, however, some limitations to be considered when analyzing these findings. Although the implications of this research suggested that Indigenous people should be granted more sovereignty to fully exercise their rights outlined in Section 35, it was not examined whether most First Nations have a greater ability to self-govern after having successfully made treaty claims. Similarly, the inclusion of present-day relations between the Crown and Indigenous people was limited, even though efforts for reconciliation are on-going and fully implementing the rights in Section 35 is considered an essential part of this process (Department of Justice 2018). Additionally, it was not considered the extent to which Indigenous people are satisfied by the concessions made to their honour on behalf of their rights being upheld in court. Specifically, do Indigenous people who receive material concessions for the potential violation of their title and territorial rights feel accommodated in a manner beyond “thin” (Urquhart 2019, 163) consultation?”

All considered, future research on this topic could involve an exploration of the contemporary Canadian political discourse around the inherent rights of Indigenous people. While Section 35 of the Constitution Act is largely interpreted by the courts and academic literature as affirming the inherent rights of Indigenous people, its use in practice still recognizes the legitimacy of Canadian sovereignty and law in conceding these rights to Indigenous people. Even so, recent efforts by the Canadian state at reconciliation with Indigenous people suggest that Section 35 could play a key role in administering some level of Indigenous self-governance (Department of Justice Canada 2018). In this manner, future research could involve examining the use of Section 35 in reconciliation efforts.

### **Conclusion**

In conclusion, Section 35 of the Constitution Act 1982 has had a significant impact on the recognition of the rights of Indigenous people in Canada. Section 35 was entrenched in the Constitution as a result of Indigenous activists and Canadian politicians who acted on the shifting public discourse around Indigenous rights. Cases such as *Delgamuukw v. British Columbia* demonstrate that although Section 35 protects against governments extinguishing treaty and territorial rights, the Constitution offers limited protection in guaranteeing the priority of these rights in the face of other interests, particularly economic ones. Additionally, *Haida Nation v. British Columbia* further emphasizes the importance of consultation, albeit at a procedural level, when upholding the rights in Section 35 in the face of other interests. It is, therefore, a consideration that some degree of sovereignty be awarded to Indigenous people which would allow their communities and governmental structures to implement the rights outlined in Section 35, and safeguard against their infringement by the framework of the settler colonial state.

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