Aboriginal Women's Rights as "Existing Rights"

by Sharon D. McIvor

Les femmes autochtones du Canada luttent depuis 1967 afin que leurs droits soient reconnus en tant que droits humains. Ces droits incluent, entre autres, le droit à l'identité et la préservation de leurs droits civils et politiques. L'auteure analyse les droits des femmes autochtones en tant que droits «existants» puisqu'il font partie du droit inhérent des autochtones à l'auto-gouvernement. L'auteure explique que les droits civils et politiques des femmes sont cruciaux afin qu'elles puissent participer à un gouvernement traditionnel, matriarcal et égalitaire.

For over 100 years Indian women who married non-Indians lost their Band Membership and Indian status and their right to live in and return to their home communities.

Aboriginal women of Canada have struggled since 1967 to have their right to identity and their civil and political rights recognized. Part of this battle included changing century-old provisions in the *Indian Act* which banished women from their families and communities by forcing them to give up their Indian status, Band membership, and, essentially, their identity as Aboriginal women if they married outside their race (Leslie and Macguire 25).[1] The Tory government amended the *Indian Act* in June 1985 through *Bill C-31*. Aboriginal women's struggle continues, however, as some Indian Chiefs are trying to overturn the amendments in court, claiming they interfere with their jurisdiction to determine membership in their own communities. It is my position that the civil and political rights of Indian women are fundamental human rights, and that they are Aboriginal rights which are now recognized under section 35(1) of the *Constitution Act, 1982*.[2] These rights have never be extinguished and they continue to exist.

Under the *Indian Act*, when Indian women married non-Indians they were banished from their communities and their legal right to be "Indian" was stripped from them. Indian women who married members of the "settler" community were excommunicated from Indian reserves and never allowed to return, even upon divorce. This denied their right and their ability to participate in elections of *Indian Act* Chiefs and Councillors, as well as removing their ability to choose to live on the reserve and to remain part of their Aboriginal community. The *Indian Act* provisions directly affected 12,000 Indian women, and constituted a severe restriction on their exercise of their civil and political rights. In 1985, these women and approximately 40,000 descendants were restored to their previous Indian status and Band membership.

One form of regulation with respect to political rights was removed when the intermarriage provisions were amended. Sex discrimination still exists in the *Indian Act* in the area of civil and property rights, however, and needs to be challenged under the *Canadian Charter of Rights and Freedoms* (hereafter *Charter*). Because marital property rights for Canadians is governed by provincial law and not federal law, in cases of Indian divorces involving land on Indian reserves, the wife is legally disadvantaged compared to other Canadian women. There is no federal law granting rights to women in cases of marital dispute or separation, and the Supreme Court of Canada has held in *Derrickson v. Derrickson* and *Paul v. Paul* that where there is a conflict between federal and provincial law, federal law prevails in the case of Indians. Also, wives of Indians living on reserve cannot enjoy any benefits related to possession of land in the event of divorce from an Indian male unless they own the land in their own name, with the blessing of the Band Council and the Minister of Indian and Northern Affairs. There is also continuing sex discrimination against Indian women which impacts upon their voting or political rights because 98 per cent of reinstated women and their children cannot vote for Chiefs and Council because they do not live on the reserve. This is an estimated 12,000 Indian women who regained status and their estimated 40,000 descendants in the first generation. Their second generation descendants are discriminated against compared to their cousins from male Indians. Sex discrimination continues in the *Indian Act*.

The recent *Sparrow* decision will be extremely significant for Aboriginal women in arguing that their political and civil rights are existing Aboriginal rights which have not been extinguished, in spite of the intermarriage provisions in the *Indian Act*. It will also be vital in arguing that any other existing and future discriminatory measures imposed by government or by Aboriginal communities are contrary to section 35(1) of the *Constitution*.

Before *Sparrow* and before section 35(1) of the *Constitution Act*, 1982, the Government of Canada could and did discriminate against Indian women on the basis of sex. For over 100 years Indian women who married non-Indians lost their Band Membership and Indian status and their right to live in and return to their home communities. Not only did they deny them the right to live with their own families and people, but it denied them access to

their Aboriginal languages, cultures, and traditions as was found in the *Lovelace v. Canada* case decided by the United Nations Committee on Human Rights. The Supreme Court of Canada in *Lavell v. Her Majesty* in 1974 upheld the right of Canada to discriminate declaring that parliamentary supremacy meant if Canada had jurisdiction over Indians it could decide "who was an Indian." Parliament for 100 years decided Indian women were no longer Indians when they married non-Indians, and it decided non-Indian women were "Indians" when they married male Indians. These practices ended in 1985 will *Bill C-31, An Act to Amend the Indian Act.*

The right of women to maintain their civic and political role has existed since time immemorial. These rights are part of customary laws of Aboriginal people and part of the right of self-government.

Prior to 1982, federal Indian matters were governed solely by section 91(24) of the *Constitution Act,* 1867 (formerly called the *British North America Act*), under which authority Parliament passed successive versions of the *Indian Act.* Parliamentary supremacy ensured that Indians had no rights except those granted in legislation. This changed in 1982 with constitutional amendments recognizing the "existing" Aboriginal and treaty rights of Aboriginal peoples of Canada. Parliamentary supremacy is no longer enough. If Aboriginal and treaty rights are to be extinguished, they must be done so explicitly in law, and likely with the consent of Aboriginal peoples. What the *Sparrow* decision added was a reinterpretation of the regulation of rights versus the extinguishment of rights. The Supreme Court held that just because Aboriginal (fishing) rights were regulated for 100 years did not mean they were extinguished. Similarly for Aboriginal women's civil and political rights. Even if they were heavily regulated under the *Indian Act* for 100 years, it did not mean these rights were extinguished.

In the *Sparrow* case, which is a landmark case indicating the legal interpretation that will be given to section 35(1) of the *Constitution Act, 1982,* the Government attempted to prove that the right of Musqueam Indians to fish in the Fraser River had been extinguished by regulation prior to 1982, and therefore could not be recognized as an existing right under section 35(1). The Supreme Court disagreed with this position, and held that the fact "[t]hat the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished" (*Sparrow* 400). If a right is not extinguished, it exists. Furthermore, the court ruled that:

> an existing Aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. (*Sparrow* 396)

The Supreme Court agreed with Brian Slattery that "existing" means "unextinguished" instead of "exercisable at a certain time in history" (*Sparrow 396*),[3] and held that the term "existing" must be interpreted flexibly to permit its evolution over time (*Sparrow* 397).

Sparrow is significant in holding that certain Aboriginal and treaty rights may be regulated without being extinguished as a result. Aboriginal women's civil and political rights were regulated from 1867 to 1985 by the intermarriage provisions in the *Indian Act,* but I argue, that the fundamental human rights of Aboriginal women—including civil and political rights—form part of the inherent right to Aboriginal self-government which is now recognized and protected under section 35(1) of the *Constitution Act, 1982.* The decision in *Sparrow* provides a framework within which to make this argument.

The civil and political rights of Aboriginal women differ according to culture and tribal traditions. Most Aboriginal societies were traditionally matriarchal and matrilineal, including hunting and gathering societies. Aboriginal women's civil and political rights are foundational and do not derive their existence from documents or treaties (*Sparrow* 390). The right of women to establish and maintain their civic and political role has existed since time immemorial. These rights are part of customary laws of Aboriginal people and part of the right of Aboriginal self-government. "Such practices or forms of social organization do not require the imprimatur of state action to qualify as rights" (*Sparrow* 506).

Self-government is central to Aboriginal nationhood, culture, and existence, and the civil and political rights of women are central to traditional, matriarchal, and egalitarian forms of government. If Aboriginal self-government is central to the existence of Aboriginal nations, so must also the ability to determine civil and political rights of members be central to the exercise of the right of Aboriginal self-government (Asch and Macklem 505). This includes the right of women to define their roles in Aboriginal communities.

The rights of women were not explicitly recognized in the treaties between the Aboriginal peoples and the settlers, but they are rights which women have exercised since the formation of their indigenous societies. In some cases, these rights were suppressed or regulated by non-Aboriginal law, such as the *Indian Act.*

The *Sparrow* decision makes it clear, however, that Aboriginal women's civil and political rights were not frozen in their regulated form when section 35(1) recognized and affirmed "existing" Aboriginal rights. Using the Court's interpretation, the civil and political rights of Aboriginal women were affirmed in 1982 in their contemporary form "rather than in their primeval simplicity and vigour" (*Sparrow* 397), or in the form they had been

restricted to under the *Indian Act*. Moreover, even if women's rights were so restricted that women were banished from Aboriginal communities, this in itself does not lead to extinguishment of their rights. There can be no "extinguishment by regulation" of Aboriginal rights (*Sparrow* 391). Moreover, fundamental human rights, like civil and political rights of Aboriginal women, can never be extinguished. Therefore, these rights existed in some form in 1982, and are now recognized and affirmed in their full, unregulated form under section 35(1).

Sparrow held that there must be a "clear and plain" intention on the part of the Government where it intends to extinguish Aboriginal and treaty rights. This holding relied on a statement by Justice Hall in *Calder* that: "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'" (216). The Court also noted that in "the context of Aboriginal rights, it could be argued that before 1982, an Aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute" (*Sparrow* 401). On this point, Aboriginal women would have had to overcome the argument that their political and civil rights were necessarily inconsistent with the *Indian Act*, had *Bill C-31* not reinstated them and attempted to end sex discrimination against Indian women.

The scope of modern-day Aboriginal women's civil and political rights will be determined in the context of the inherent right of self-government. They demand to be part of the policy and processes.

Prior to the 1985 amendments to the *Indian Act*, Parliament made it clear in law that Indian women who married with non-Indian men lost their civil and political rights within their communities. The *Lavell* decision of the Supreme Court of Canada agreed that parliamentary supremacy and the federal power to pass laws in relation to Indians and lands reserved for Indians under section 91(24) of the *Constitution Act, 1867* gave parliamentarians the right to determine who had Indian status.

After the 1985 amendments to the *Indian Act*, Parliament's clear and plain intention was restorative of rights that had been regulated (*Sparrow* 401). It reinstated Indian women and their children to their communities and ended legislated sex discrimination. Even if an Indian woman had lost status forty years earlier than 1985, she could have that status restored. If she had since died, she could still have her status restored. In either case, her descendants could apply to have Indian status and Band membership. The legislation also restored control of band membership and regulation of Indian lands to *Indian Act* governments. The legislation effectively restored the civil and political rights of Indian women who regained their Band membership and right to vote in Band elections .

The scope of modern-day Aboriginal women's civil and political rights will be determined in the context of the inherent right of self-government. Over the past few years, organized Aboriginal women's groups like the Native Women's Association of Canada have fought for participatory rights. In other words, they demand, as women, to be part of the policy and legislative processes that are being set up to define, develop and interpret their forms of Aboriginal government. This process includes defining who is a member of the "group" or of the "collective." What *Bill C-31* did was to restore women and their descendants to the "base group," Band or Tribe that will exercise the right of self-government.

Some Aboriginal leaders and some governments will look to the nature of Aboriginal women's civil and political rights and believe that the manner in which the rights were regulated under the *Indian Act* will determine the scope of the rights. The Court in *Sparrow* rejected that approach. Aboriginal women, themselves, must be part of the process of delineating their civil and political rights. The Court also held that any future restriction on Aboriginal rights "must be in keeping with section 35(1) (*Sparrow* 401). As a result, Aboriginal women can use section 35(1) as a point of negotiation for definition of their modern civil and political rights.

The Court in *Sparrow* also stated that section 35(1) was to be interpreted in a purposive way: "[w]hen the purposes of the affirmation of Aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded" (407). This provides further support for the argument that section 35(1) recognized and affirmed the civil and political rights of Aboriginal women as part of the inherent right of Aboriginal self-government.

The Supreme Court of Canada has also held that Aboriginal and treaty rights should be interpreted by taking into account Aboriginal history and tradition (*Sparrow* 408).[4] In interpreting Aboriginal women's civil and political rights as Aboriginal and treaty rights under section 35(1), the Court must take into account the historic roles of women within their traditional as well as contemporary Aboriginal societies. In this context, it is argued that the federal government has an active responsibility to respect and protect the rights of Aboriginal women as part of its fiduciary duty toward Aboriginal people.

> 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. (*Guerin*)

This trust responsibility may also require the Government of Canada to protect the civil and political roles of Aboriginal women within their societies.

One of the purposes of *Bill C-31* was to remove sex

discrimination from the *Indian Act* and bring the legislation in line with the *Canadian Charter of Rights and Freedoms*. Discrimination on the basis of sex is no longer allowed under section 15 of the *Charter of Rights and Freedoms*. Furthermore, in 1983, Aboriginal women were successful in lobbying federal and provincial governments, and Aboriginal leaders, to have section 35(4) added to the *Constitution Act, 1982* which affirms that Aboriginal and treaty rights are guaranteed equally to men and women. This, to women, is a double confirmation of their rights. The section did not create new rights, but confirmed that women's rights are contained in section 35(1) (*Nowegijick* 198). Both of these instruments prevent Parliament from establishing new rules in the *Indian Act* in the future that discriminate on the basis of sex.

The federal government has an active responsibility to respect and protect the rights of Aboriginal women as part of its fiduciary duty toward Aboriginal people.

International law also dictates the recognition of fundamental civil and political rights of Aboriginal women under the *International Covenant on Civil and Political Rights;* the *Convention on the Elimination of All Forms of Discrimination Against Women,* and the *Universal Declaration of Human Rights.* Other sections of the *Charter of Rights and Freedoms* also require governments to respect the civil and political rights of all women, including Aboriginal women. Human rights codes of the provinces and territories call for the adherence to fundamental human rights without discrimination based on race or sex. All of these instruments should prevent both Parliament and Aboriginal communities from discriminating against Aboriginal women on the basis of sex or race in future. At least some of them will be valuable in challenging existing discrimination that is still going on.

Three events have occurred in constitutional history that lead to the conclusion that Aboriginal women's civil and political rights are "existing" Aboriginal and treaty rights. In 1982, the *Constitution Act* recognized gender equality in sections 15 and 28 at the same time that it also recognized existing Aboriginal and treaty rights. In 1983, all First Ministers and Aboriginal representatives endorsed the inclusion of section 35(4) in the *Constitution Act, 1982* to recognize that men and women equally enjoy Aboriginal and treaty rights. In 1985, Parliament passed amendments to the *Indian Act* purportedly to eradicate sex discrimination against Indian women. What the *Sparrow* decision adds is an end to the federal theory that Aboriginal rights have been extinguished by regulations. Just as the Aboriginal right to fish was not extinguished by specific fisheries legislation, so, too, the *Indian Act* has not extinguished female civil and political rights. There can be no extinguishment by regulation of Aboriginal women's civil, political and property rights.[5]

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[1]Leslie and Macguire note that *An Act of 1851,* 14-15 Victoria, c. 59, was the first to exclude white men married to Indian women from being "legal Indians," but white women married to Indian men and their children would henceforth be "Indians.". At page 55, the authors report that the Act of 1869 "was the first Canadian statute governing status of native women after marriage to non-Indians, or to Indians of other bands." The 1876 Act disenfranchised illegitimate children, Indians who lived continuously outside Canada for five years and to half-breeds.

[2]Section 35(1) states: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

[3]See Slattery (781-82); McNeil (258); Pentney.

[4]"In this context, the Court is citing *Agawa:*: "The second principle... emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights in a vacuum. The honour of the Crown is involved in the interpretation of Indian treaties, as a consequence, fairness to the Indians is a governing consideration...This view is reflected in recent judicial decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin* v. *The Queen* (1984), 13 D.L.R. (4th) 321" (215-16).

[5]"In fact, extinguishment by regulation has for many years been a premise of the federal Indian claims policy. If the doctrine has 'no merit', which is certainly the view for the time being of the Supreme Court of Canada, then a substantial chunk of the governmental defences against Aboriginal rights claims across Canada...may collapse" (Binnie 226).

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MARIE-CLAUDE JULIEN

Passe temps

Le temps passe, lentement
Il semble
Car rien ne change
Il n'y a qu'un seul coucher de soleil

Le temps passe vite il semble
Car les gens oublient
Il y a des levers de soleil
Après les nuits

Le temps tourne en rond
Il danse
Car tout recommence toujours
Il y a des matins et des soirs

Le temps passe en long
Il temble
Il n'y a qu'un seul début
Et une seule fin

La poésie de Marie-Claude Julien apparaît plus tôt dans ce numero.