

Native Women's Association of Canada



NATIVE WOMEN & ABORIGINAL TREATY RIGHTS

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An NWAC Discussion Paper

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Native Women and Aboriginal Treaty Rights

In 1982, the Constitution of Canada was changed. The law which changed the Constitution is called the *Constitution Act, 1982*. This law added the Canadian Charter of Rights and Freedoms as well as a number of other sections to the Constitution.

One of the other sections which was added to the Constitution in 1982 was section 35 of the *Constitution Act, 1982* which recognized and affirmed aboriginal and treaty rights. At the time this section was first included in the Constitution, it read:

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

In 1983 section 35 was changed by adding two new paragraphs. These two new paragraphs read as follows:

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

It is important to remember that section 35 is part of the Constitution of Canada, but it is not part of the Canadian Charter of Rights and Freedoms. Section 35 is in a different part of the *Constitution Act, 1982*. We will discuss each of the four paragraphs of section 35 below.

1. Subsection 35(1)

Subsection 35(1) contains the actual guarantee of existing aboriginal and treaty rights. It says that these rights are recognized and affirmed. However, there are a number of questions about the full meaning of the words in subsection 35(1)

a) What does the word "existing" mean?

There has been a lot of discussion about the word "existing" contained in subsection 35(1).

Sometimes certain aboriginal rights were surrendered voluntarily (for example, in some treaties) and were extinguished, that is, they no longer exist. But, in cases where this happened, the aboriginal rights which were surrendered were usually replaced by treaty rights and these treaty rights are also protected by subsection 35(1).

There are other cases where an aboriginal right was limited or interfered with by a law or a regulation passed by the federal or provincial government. An example of this would be fishing regulations which set out the seasons, bag limits and other limitations on how and when fishing could be carried out. There are two questions in this kind of case.

The first question is whether or not these laws extinguished the aboriginal right to fish, meaning that there is no longer an "existing" aboriginal right, or whether these laws and regulations only interfered with the way in which the aboriginal right to fish could be carried out without actually extinguishing it.

The second question is, if the laws or regulations just limited the way the right to fish could be carried out or exercised, without actually extinguishing it, what was the "existing" aboriginal right recognized by subsection 35(1)? Is it the full, original aboriginal right to fish at all times of the year without limitations on how many fish can be caught or what equipment can be used, or is the "existing" aboriginal right only the right to fish subject to the limitations in the law and regulations which were in effect at the time section 35 was added to the Canadian Constitution?

The Supreme Court of Canada decided some of these questions in the *Sparrow* case which was about fishing rights. They answered the first question by saying that a law or regulation which limited the way in which the aboriginal right to fish could be exercised did not have the effect of extinguishing that right. In other words, the right is still an "existing" right recognized by section 35 of the *Constitution Act, 1982*.

They answered the second question by saying that this "existing" aboriginal right was the full, original right which could only be limited by government in certain cases. They said that the aboriginal right to fish was more important than non-Native sport fishing or commercial fishing. The only purpose for which the government could limit the aboriginal right was for conservation purposes. In other words, the government would have to prove that the limits which they put on the aboriginal right to fish were absolutely

necessary for conservation, and that any other reason for limiting the aboriginal right to fish, for example for the purpose of keeping enough fish available for sports fishermen or for commercial fishermen, is not legal.

This case was very important because it decided that, just because an aboriginal right had been limited by laws or regulations, it didn't mean that it had been extinguished and no longer "existed" within the meaning of section 35.

b) What does the word "treaty" mean?

There have also been court cases on what is meant by the word "treaty" in subsection 35(1). Does this word mean only formal treaties such as the numbered treaties which were signed in Ontario, Saskatchewan, Manitoba, Alberta and other parts of Canada, or could it also mean more informal kinds of treaties? The Supreme Court of Canada has decided that the word "treaties" in subsection 35(1) can mean all sorts of treaties, even ones for which there was no document signed by both parties. Treaties don't have to be about land or hunting rights, they may be about different things like trade or peace and alliance between the parties.

As long as there is enough historical evidence showing that there was an agreement on certain subjects between an aboriginal nation and the Crown's representatives, courts today will find that there is a treaty on those subjects.

c) What is an "aboriginal right"?

There are other questions about subsection 35(1) for which we don't have clear answers. One of the most important ones is about the nature or the content of aboriginal rights. What kind of right is included in the term "aboriginal right"? For example, most people (even most governments) would agree that hunting and fishing activities are aboriginal rights and are protected by subsection 35(1). But what else is included in the words "aboriginal right"?

Aboriginal people obviously argue that the aboriginal rights recognized in subsection 35(1) include the widest range of rights possible, including the right to self-government. The right to self-government is an "inherent" right, that is a right which we have had as aboriginal people from time immemorial and which does not have to be given to us by any other government. The present discussions on constitutional changes should be aimed at clarifying the aboriginal right to self-government which is already protected by sub-section 35(1).

For a discussion about the proposals made by the federal government, please read the discussion paper called "Native Women and Self-Government".

2. Subsection 35(2)

Subsection 35(2) tells us who are the "aboriginal people" whose rights are recognized in subsection 35(1). They include Indians, Inuit and Métis people. It is important to understand that the word "Indian" in subsection 35(2) does not mean only "Indians" as defined in the Indian Act. The definition of "Indian" in the Indian Act is only for the purposes of knowing who has rights under that Act, and is not for the purposes of deciding who has constitutional rights.

There is nothing in the Constitution which says specifically who is an "Indian" or "Inuit" or "Métis" person with constitutional rights. This question is left open. It is very likely, that the word "Indian" in subsection 35(2) takes in a much wider range of people than the Indian Act, and includes a lot of the people who are not considered "Indians" under the Indian Act.

3. Subsection 35(3)

This subsection makes it clear that the word "treaty" in subsection 35(1) does not only include old, historical treaties, but also includes modern land claims agreements, such as the James Bay and Northern Quebec Agreement and other land claims agreements which either have already been signed or which may be signed in the future.

Rights which aboriginal people have under these land claims agreements are also treaty rights recognized by sub-section 35(1).

4. Subsection 35(4)

Subsection 35(4) is obviously a very important one for Native women. It has not yet been interpreted by the courts so there are still many unanswered questions about how it will actually work to protect equality between aboriginal men and aboriginal women.

There are, however, some things that we do know. The opening words of subsection 35(4), that is "Notwithstanding any other provision of this Act", are very important. The word "notwithstanding" means "in spite of" or "regardless of". The "Act" which is mentioned is the Constitution Act, 1982. So these opening words mean in spite of, or regardless of anything else in the Constitution Act, 1982, the aboriginal and treaty rights mentioned in subsection 35(1) are guaranteed equally to male and female aboriginal persons.

As we mentioned at the beginning of this paper, the Canadian Charter of Rights and Freedoms is also included as a part of the Constitution Act, 1982. Aboriginal women are worried that the Charter may not be able to protect their rights especially because of sections 25 and 33 of the Charter which might allow an aboriginal government to interfere with their rights or to deny them. For more discussion of this issue, please read the discussion paper called "Native Women and the Charter".

Subsection 35(4) guarantees sexual equality when aboriginal or treaty rights are involved. It is not part of the Charter; it stands alone and sections 25 and 33 of the Charter do not apply to it. This means that an aboriginal government cannot use section 25 or section 33 of the Charter to prevent an aboriginal woman from enjoying her aboriginal or treaty rights on an equal basis with aboriginal men.

That is the good news. Unfortunately, not all of the problems are solved by subsection 35(4) of the Constitution Act, 1982. The guarantee of equality is only for aboriginal and treaty rights, not for other kinds of rights. There are some kinds of rights which will probably not be considered aboriginal or treaty rights, but for which many aboriginal women feel they need a guarantee of equality.

For example, is the right of a woman to be paid the same salary as a man who is doing the same or a similar kind of work an aboriginal or treaty right, or is this right a basic human right which is not necessarily connected to being an aboriginal person? It is a right which is guaranteed under the Canadian Charter of Rights and Freedoms, but the Charter might not be strong enough to protect aboriginal women in some cases. It could be hard to argue that in a case where an aboriginal government employed both men and women to do the same kind of work, but paid the women much less, or otherwise discriminated against women in its employment policies, that this would be a violation of an aboriginal or treaty right.

There are other cases where it may be quite clear that there is an aboriginal or treaty right involved, but it is not clear just what the right is, or how it should be applied.

For example, the right to hunt is an aboriginal right protected by subsection 35(1). But in some aboriginal societies, only men hunted certain kinds of animals. Women traditionally may have hunted other animals but not those reserved to the men. Section 35(4) says that the aboriginal right is guaranteed equally to men and women. Does this mean that now the women of those societies have the same right as the men to hunt these animals, or does it mean that society as a group has the right to hunt in the same manner as they did traditionally, that is, with women being excluded from hunting certain animals?

5. Self-Government and Section 35

There are several different issues to be discussed under this heading. The first is whether or not the right to self-government is included in the aboriginal or treaty rights recognized in section 35. As mentioned above, there is disagreement between aboriginal people and the government on this question but, one way or the other, this question will probably be decided through the present round of constitutional negotiations.

If the right to self-government is included as part of an aboriginal or treaty right recognized in subsection 35(1), either because it is already there, or because it is specifically added to the section during the negotiation process, then subsection 35(4) will apply to the right of self-government.

However, even if self-government is included in subsection 35(1) and section 35(4) applies to it, it is still not clear just how far the protection for sexual equality goes. Once again, it depends on the interpretation of the words "aboriginal and treaty rights" in section 35.

What subsection 35(4) says is that existing aboriginal and treaty rights are guaranteed equally to male and female persons. If the aboriginal or treaty "right to self-government" is included in section 35, then section 35(4) could be interpreted as meaning that male and female persons are equally guaranteed only their right to be governed by their own aboriginal governments, according to their own systems and institutions, whatever those systems and institutions might be.

If this is the interpretation given to section 35, then it would not necessarily mean that the actual systems and institutions of aboriginal governments have to guarantee equality between men and women, or that specific actions taken by an aboriginal government under those systems or institutions could not be discriminatory.

If the right to self-government is added to a different section of the Constitution or if a new section is created, then subsection 35(4) will not apply to the right because subsection 35(4) only applies to the rights mentioned in subsection 35(1).

It is therefore extremely important to watch the details of the constitutional process to see where amendments relating to self-government are going to be placed in the Constitution and to ensure that there are adequate guarantees of equality under self-government.

These guarantees could take several forms. One partial solution would be to ensure that the Canadian Charter of Rights and Freedoms applies to all aboriginal governments.

This will require clarification of sections 25 and 33 of the Charter to ensure that they could not be used to deny or interfere with equality rights. In addition to this, however, it will probably be necessary to include additional specific sections in the Constitution to ensure full rights for aboriginal women under self-government.