IS MISSING AND MURDERED INDIGENOUS WOMEN AN ABORIGINAL RIGHTS ISSUE? THE INTERSECTIONAL RESONANCE OF SECTION 35

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I INTRODUCTION

The National Inquiry into Missing and Murdered Indigenous Women and Girls issued its Final Report in June 2019.[1] The report is an indictment of Canada's laws, policies, and practices as an ongoing genocide perpetrated against Indigenous women, girls, and 2SLGBTQQIA people.[2] At the time the report was released, most of the news coverage was taken up with debating the validity of the genocide allegation in law. This article does not seek to inquire into that question. Instead, it focuses on the rights-based framework of the Final Report and aims to tease out the relationship between the rights framework of the Final Report and the jurisprudence under section 35 of the *Constitution Act, 1982*, and more specifically the gender equality clause in section 35(4).[3]

On the face of the section 35 jurisprudence, there does not seem to be a nexus between Aboriginal rights and the pervasive violent victimization of Indigenous women and girls. Despite the specific guarantee of gender equality in section 35(4), the section 35 jurisprudence does not appear to include a gender analysis regarding the scope of rights, nor does it seem to require an investigation of gendered effects.

And yet, it seems disconcerting that neither the jurisprudence nor the literature regarding constitutionally guaranteed Aboriginal rights meaningfully connects with one of the most pressing and urgent contemporary issues in the lives of Indigenous peoples in Canada. It seems not implausible that Aboriginal rights guaranteed in section 35 of the *Constitution Act, 1982*, could be a source of rights to which Indigenous women are entitled flowing from their Indigeneity.

After briefly commenting on rights-based approaches and the particular rights framework of the National Inquiry, this article first reviews the history and jurisprudence under section 35(4) from a gender perspective. It goes on to consider why the section 35 jurisprudence does not speak to the rights of Indigenous women in a manner that would support the rights articulated by the National Inquiry. It argues that the courts have developed a decidedly masculine conception of Aboriginal rights, despite the express constitutional gender equality guarantee in section 35(4). The article then proposes a shift in the methodology for determining section 35 rights that includes gender and that reflects Indigenous relationality and intersectional gender equality.

Rights-based approaches root solutions to social problems in legally recognized and protected rights. Grave social problems tend to generate rights discourses, and the evolution of Canadian constitutional and human rights law shows that rights do not develop in the abstract,

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1. National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place* (Ottawa: Queen's Printer 2019). [National MMIWG Inquiry]

2. The National Inquiry chose to "use the term '2SLGBTQQIA' (representing Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual people) as well as people who are non-binary or gender nonconforming." They noted in their lexicon that "By putting '2S' at the front of the acronym, we are remembering that Two-Spirit people have existed in many Indigenous Nations and communities long before other understandings of gender and orientation came to us through colonization. This also puts Two-Spirit people right at the front of our conversations, rather than at the end." National MMIWG Inquiry, "Lexicon of Terminology" (2019) at 3, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/MMIWG_Lexicon_FINAL_ENFR.pdf>.

3. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

but rather emerge as a result of advocacy by affected groups seeking to remedy a particular problem. Systemic social problems frequently give rise to calls for rights, particularly when political and social responses have been inadequate or non-existent. The violent victimization of Indigenous women is a case in point. There has indeed been a long history of dissatisfaction with political responses to the crisis of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people.

The commissioners take a rights-based approach. In brief, the report posits four core rights: culture, health, security, and justice.[4] These rights are in turn anchored in a foundational right to self-determination, which is conceptualized as an inherent Indigenous right.[5] The report's analysis of the root systemic causes of violence against Indigenous women and girls is broad and considers underlying social, economic, cultural, institutional, and historical causes that contribute to the ongoing violence. Here, the commissioners describe historical, multigenerational, and intergenerational trauma; the social and economic marginalization of Indigenous women; institutional apathy; and a pattern of ignoring the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people as key causes.[6]

Rights-based approaches to the violent victimization of Indigenous women, girls, and 2SLGBTQQIA people may receive more attention in light of the Calls for Justice by the National Inquiry, but the prior literature on rights-based responses is not extensive. There is only a small literature advocating for a rights-based approach, and interventions discussing a rights-based approach tend to be specific to certain contexts. Therefore, they tend not to address the multiplicity of factors that have contributed to the current crisis of missing and murdered Indigenous women.[7]

A right-based approach is helpful to rights claimants because it determines the basis for the articulation of a claim, directs a procedural mechanism for its enforcement, and provides for a set of remedial responses. Once a right is recognized, there is a legal obligation to assure its protection. A legal framework based in rights provides both claimants and respondents with a coherent understanding of their legal rights and responsibilities. Rights-based approaches can also be useful for governments. From a policy perspective, grounding a legislative response in a rights guarantee allows governments to implement legislation and policies that focus on protecting the right rather than having to devise legislation that attempts to address the varied violations of the right. This type of approach is helpful when addressing an issue that results from a multiplicity of direct, indirect, and systemic causes. A rights-based approach focuses on the underlying goal of human rights law: the protection of individuals and groups from deprivation and suffering.

However useful rights-based approaches can be, they do require a demonstration and location of relevant rights. The location of the rights advocated for by the Final Report, including a right to protection, is not obvious. The source, scope, and implications of a

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4. National MMIWG Inquiry, *supra* note 1 at 151 ff.

5. *Ibid* at 122.

6. *Ibid* at 111–116.

7. For example, in "A Rights-Based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada," the authors focus on a rights-based approach to violence created as a result of resource extraction. Konstantia Koutouki, Katherin Lofts, & Giselle Davidian, "A Rights-Based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada" (2018) 27 Rev Eur Comp & Int"l Envtl L 63.

rights-based approach for Indigenous missing and victimized persons remain undertheorized in commentary and underexplored in the jurisprudence. Domestic constitutional texts do not speak expressly to the issue, and international legal norms, while more expressive, are difficult to enforce.

Potential international rights sources can be found in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in articles 21 and 22;[8] the International Covenant on Economic, Social and Cultural Rights,[9] and in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[10] However, these international sources have had limited practical effects. Canada originally opposed UNDRIP, and although it has since endorsed the declaration, the federal government's position on UNDRIP is evolving and it has at times taken the position that it is an aspirational document that is not legally binding.[11] British Columbia was the first province to implement UNDRIP (in 2019), but it will take time before its legal effects become apparent. An attempt to implement at the federal level failed when Bill C-292 died on the order paper (also in 2019). Moreover, until commissioning the National Inquiry into Missing and Murdered Indigenous Women and Girls in 2015, the Canadian government repeatedly ignored calls to action from the UN Committee on the Elimination of Discrimination against Women.[12]

In the *Canadian Charter of Rights and Freedoms*, equality rights protections under section 15 appear to be a promising source for a rights-based discourse regarding the violent victimization of Indigenous women, girls, and sexual and gender minorities, both because it has been used successfully in the past by Indigenous women's groups to challenge the discriminatory effects of the *Indian Act* and because subsection 15(2) has been interpreted by the courts to protect the substantive equality rights of traditionally disadvantaged groups. However, positive obligations are rarely recognized and are generally limited to cases of underinclusiveness.

In the absence of a clear rights location, case law is unlikely to fill the gap. Instead, jurisprudence has grown up that makes the case for a rights-based response more difficult. For example, Ania Kwadrans argues that the International Covenant on Economic, Social and Cultural Rights creates a minimum core obligation on signatory states to provide economic

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8. Article 21 states that Indigenous peoples have the right to the improvement of their economic and social conditions and that the state should take effective measures to ensure this improvement, with particular attention to be paid to the status of elders, women, youth, children, and people with disabilities. Article 22 directs that particular attention be paid to the rights and needs of elders, women, youth, children, and people with disabilities and compels the state to take measures to guarantee that women and children are free from violence. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

9. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS 993 at 3.

10. CEDAW requires the state to take all appropriate measures to eliminate women's discrimination by any person, organization, or enterprise. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS 1249 at 13.

11. Yvonne Boyer, "First Nations, Metis, and Inuit Women's Health: A Rights-Based Approach" (2017) 54:3 Alta L Rev 611 at 623.

12. Lara Koerner Yeo, "A Comment: the UN CEDAW Committee's Concluding Observations of Canada" (2018) 14 JL & Equality 199 at 212.

social rights.[13] In her view, this minimum core requires the state to protect its resident from severe forms of suffering by recognizing a positive obligation to protect the life and security of the person of the state's residents.[14] At the level of domestic implementation, however, Kwadrans has to acknowledge that Canadian jurisprudence under section 7 of the Charter runs directly counter to the rights claim she advances.[15] Canadian courts have repeatedly ruled against interpreting a positive right to life and security of the person, and only a small number of dissents keep the door open to positive rights arguments.

In sum, rights-based approaches do require the identification of a legal right (or set of legal rights) and the location of its source. A key challenge is the identification of a right or set of rights grounded in Canadian or international law with jurisprudential traction. Furthermore, the cost of litigation and the relative bluntness of constitutional remedies can make it difficult to target a social issue effectively. Finally, the enforcement of the right may be elusive. Assuming that a rights-based approach is appropriate, the Final Report leaves work to be done in sourcing and litigating these rights.

The Final Report advances the discourse beyond the rights-based approach. It goes on to consider institutional policies and practices that have been implemented in response to violence experienced by Indigenous women and girls in Canada, including the identification and examination of practices that have been effective in reducing violence and increasing safety. A number of important themes regarding successful strategies emerge in this context, including relationality, intersectionality, and what the commissioners describe as a "distinctions-based approach."[16]

II ABORIGINAL RIGHTS AND GENDER

Canadian courts have been silent on women's gender-specific Aboriginal rights. This is notable because of the gendered discriminatory treatment of Indigenous women in Canadian law, particularly under the *Indian Act*, and because of the stark social realities crying out for a rights analysis. Importantly, the silence is striking because section 35 expressly protects gender equality in subsection 4. There is not a large academic literature on the intended purpose and function of the subsection. Sharon McIvor has argued for an important role. She asserts that the insertion of section 35(4) was one of three constitutional events leading to the recognition that "Aboriginal women's civil and political rights are 'existing' Aboriginal and treaty rights" (the others being the entrenchment of gender equality in sections 15 and 28 of the Charter and Bill C-31), leading up to the bar of regulatory extinguishment of Aboriginal rights in *Sparrow*.[17] Brian Slattery, writing in 1983, saw section 35(4) as working out the interaction between section 15, 25, and 28 of the Charter and section 35(1) of the *Constitution Act, 1982*. He was of the view that sex discrimination that was otherwise contrary to section 15 would

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13. Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?" (2016) 25:1 J L & Soc Pol'y at 80.

14. *Ibid* at 102.

15. *Ibid* at 78.

16. National MMIWG Inquiry, *supra* note 1 at 131, 83

17. Sharon Donna McIvor, "Aboriginal Women's Rights as 'Existing Rights'" (1995) 15:2 Can Women Stud 34 at 37.

arguably have been permissible in the context of Aboriginal and treaty rights by virtue of section 25. Section 28 operates to render the gender equality guarantee absolute in the context of the Charter. He went on to say:

> The proposed new subs. 35(4) does no more than spell out this consequence [of the absolute nature of the gender equality guarantee], providing that the aboriginal and treaty rights referred to in subs. 35(1) are guaranteed equally to male and female persons.[18]

Kent McNeil similarly argued that the purpose of section 35(4) for Aboriginal rights was to mirror section 28 in the Charter context:

> While this amendment applies specifically to section 35(1), it would be inconsistent for Aboriginal and treaty rights to be guaranteed equally to men and women for the purposes of that section and not for the purposes of section 25. . . . This interpretation may be supported by legislative intent, as section 35(4) was probably added to accomplish the same purpose vis-a-vis section 35(1) as section 28 was already thought to accomplish vis-a-vis section 25, namely to ensure that no gender discrimination took place insofar as the rights of the Aboriginal peoples are concerned.[19]

Bill Pentney thought that subsection 35(4) was essentially redundant or meaningless, but opined that its language strengthened the argument that the rights provided for in subsection 35(1) were guaranteed rather than merely noted.[20]

Courts have paid even less attention to subsection 35(4). Since coming into force in 1985, the Supreme Court of Canada has mentioned subsection 35(4) twice. The first mention occurred in 1994, when the court rejected in a single paragraph a gender equality claim to participation in the constitutional conferences on the basis that such a right would not be grounded in either historical practice or treaty and could therefore not be recognized under section 35 as an Aboriginal right.[21] The second mention occurred in 2010 in the *Beckman v Little Salmon/Carmacks First Nation* case.[22] Here, subsection 35(4) was referred to, again in a single paragraph, to suggest that there is no inherent conflict between individual constitutional rights governing the relationship between individuals and the state and Aboriginal rights governing the relationship between non-Indigenous and Indigenous peoples. In *Corbiere*, the court was invited to consider the relationship between gender equality and section 25 of the Charter but decided to leave it for another day. In her concurring opinion, Justice L'Hereux-Dube agreed on the section 25 issue, but noted that Aboriginal heritage, distinctiveness, and rights were all relevant contextual elements under section 15.[23]

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18. Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982/1983) 8 Queen's LJ 232 at 242.

19. Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall LJ 61.

20. William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee"" (1988) 22 UBC L Rev 207.

21. *Native Women's Assn. of Canada v Canada,* [1994] 3 SCR 627 [*NWAC*].

22. *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103.

23. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 54.

The subsection hardly fared better in the lower courts. Mostly, lower courts have also ignored the equality guarantee. As Yvonne Boyer has rightly observed: "Often the rights to gender equality that Aboriginal people collectively possess are viewed as non-existent, created by statute, or 'given' to Aboriginal women post-contact."[24]

When courts have adverted to it at all, the approach has generally been to ask whether the claimant had a previously recognized right under section 35(1) and then to consider as a second step whether the right as determined was equally available to men and women. This is evident in the Supreme Court's *Native Women's Association of Canada* (*NWAC*) decision.[25] In the same vein, the Federal Court of Appeal in *NWAC* rejected the claimants' section 35(4) argument. It determined that the right to participate in the constitutional review process was a statutory right derived from sections 37 and 37.1 of the *Constitution Act, 1982*, rather than an Aboriginal right that had been recognized and affirmed under section 35(1). As a result, the governmental action of excluding the Native Women's Association of Canada from funding was not subject to the gender discrimination inquiry under section 35(4).[26]

This analysis was also followed in *Scrimbitt* where the Federal Court of Appeal found that there was a lack of historical grounding of any right under subsection 35(1) and that the right claimed was statutory in nature.[27] A contrary example is the decision of the Yukon Supreme Court in the *Harpe* case, involving the interim appointment of a female acting chief. The court relied on the power of the traditional Elders Council to appoint an acting chief to be an Aboriginal right, and based on subsection 35(4) to interpret the power as extending to male and female persons. It may be significant that this rare exception to finding a gender-specific Aboriginal right arises in a context that not only pits two Indigenous women against each other, but also involves a contest between traditional and codified Indigenous governance models.[28]

In the treaty context, the requirement of finding that a treaty exists similarly precedes any consideration of the gender equality right. This is apparent in the *BC Native Women's Society* case, which held that a framework agreement was not a treaty, therefore precluding the application of subsection 35(4).[29]

In one instance, the equality guarantee was applied to extinguish rights. Following the enactment of Bill C-31, a constitutional challenge sought to invalidate the amendments on the basis that they were inconsistent with an Aboriginal right to self-government. In *Sawridge Band v Canada,* Muldoon J of the Federal Court viewed subsection 35(4) as extinguishing self-government rights to determining membership.[30] The decision was overturned on appeal on bias grounds.[31] More cursory and certainly less inflammatory, yet in a similar vein, the Canadian Human Rights Tribunal relied on subsection 35(4) to deny a First Nation's motion

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24. Boyer, *supra* note 11 at 626.

25. *NWAC, supra* note 21 at para 82.

26. *Native Women's Assn. of Canada v Canada*, [1992] 3 FC 192, 95 DLR (4th) 106 at para 19. [*NWAC* FCA]

27. *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513 at para 75.

28. *Harpe v Massie*, 2006 YKSC 1.

29. *British Columbia Native Women's Society v R*, [2000] 1 FC 304 at para 8.

30. *Sawridge Band v Canada*, [1996] 1 FC 3.

31. *Sawridge Band v Canada*, 2001 FCA 338, [2002] 2 FC 346.

to dismiss a complaint for lack of jurisdiction, implicitly accepting that the subsection would operate to limit self-government rights.[32]

More recently, there is some lower court case law regarding the interpretation and purpose of the subsection. In the case of a male rights claimant, the Quebec Superior Court accepted that the text of subsection 35(4) supports an individual reading of the right. The Court held that "The individual nature of this right [to fish] is apparent in subsection 35(4), which applies such aboriginal rights *equally to male and female persons*."[33] The Nova Scotia Supreme Court adopted a purposive analysis, stating that "Section 35(4) is a rebuke of the European colonial patriarchal value system imposed on aboriginal peoples by colonial settlers in the 1800's through legislation such as the Indian Act."[34] However, the court did not proceed to actually apply the subsection.

In sum, subsection 35(4) has been largely ignored or avoided. It has not so far provided a basis for the rights of Indigenous women. In the sparse jurisprudence that mentions the gender equality guarantee at all, a finding of an Aboriginal or treaty right under subsection 35(1) has been treated as a threshold requirement.

III THE MASCULINITY OF THE ABORIGINAL RIGHTS JURISPRUDENCE

As we have seen, neither courts nor commentators have paid much attention to subsection 35(4). One possible optimistic explanation for the juridical silence might be that courts do not need to resort to the Indigenous gender equality guarantee because rights under subsection 35(1) are construed in a manner that is attentive to the gender dimension of Aboriginal rights. However, this is not borne out by the jurisprudence. Instead, the Aboriginal rights jurisprudence is dominated by fishing, hunting, and land use focused on resource extraction. This suggests that the law in this area is not reflective of activities across the gender spectrum and instead appears to suffer from an inherent masculinity: The recognized Aboriginal rights relate to practices that fall within mainstream society's imaginary of men's practices. It is also clear that gender does not receive much attention in the Aboriginal rights jurisprudence. There are only four decisions of the Supreme Court of Canada that mention both Aboriginal rights and gender.[35] Of these, three references have some bearing on how Aboriginal rights and gender relate, and only one considers the issue in more than one sentence. From the short references, we learn that section 25 of the Charter is subject to the gender equality guarantee in section 28,[36] and that the Court understands the analogous ground of residence on- or off-reserve under section 15 of the Charter to be associated with gender for part of the protected group.[37]

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32. *Tabor v Millbrook First Nation*, 2015 CHRT 6.

33. *Ross v Québec*, 2010 QCCQ 790 at para 23 [emphasis in the original].

34. *Toney v Toney Estate*, 2018 NSSC 179 at para 100.

35. *R v Van der Peet*, [1996] 2 SCR 507; *R v Keegstra*, [1990] 3 SCR 697; *Corbiere, supra* note 23; *R v Kapp*, [2008] 2 SCR 483.

36. *Kapp, ibid* at para 97.

37. *Corbiere, supra* note 23 at para 19.

In the slightly lengthier discussion, we also learn that the Court adopts a historically progressivist view that societies ascend from band to tribe, where the indicator of the lower "band" stage is division of labour based on gender and age, while the higher "tribal" stage is reached when division of labour occurs as specialization.[38] In contrast to the gendered and generational division of labour at the band stage, the notion of specialization tends to be coded male. Only the last instance can be seen as grappling with the relationship between the scope of Aboriginal rights and gender, but it does so in a manner that is profoundly sexist. Rather than understanding evidence of a historically gendered division of labour as requiring an inquiry into the gendered contemporary expression of an Aboriginal right, the evidence is used to deny the Aboriginal right on the basis that a society with a gendered division of labour lacks the requisite sophistication for a right to trade. This evidence, together with a lack of evidence about preservation methods, both point the Court to finding that the "exchange or trade of fish was not central to the Sto:lo way of life."[39]

Another potential explanation for the lack of judicial and learned commentary on Indigenous gender equality rights is that women are not advancing Aboriginal rights claims. Again, as Val Napoleon has rightly argued, the jurisprudence does not bear this out.[40] Beginning with the grandmother of Aboriginal rights cases in the Supreme Court, *Van der Peet*, women have been active participants in litigating Aboriginal rights, both as individuals and less visibly, but numerically significant, in all claims brought by entire communities. For present purposes, it is useful to consider the cases with named female rights claimants as these cases most overtly invite a consideration of the gendered expression of the Aboriginal right in issue. In the *Van der Peet* case, a Sto:lo woman, Dorothy van der Peet, was appealing her conviction for selling salmon, the catch of her common law spouse.[41] In the same year, an Algonquin woman in Quebec, Frida Morin Coté, was a co-appellant regarding the right to teach traditional fishing practices.[42] Some years later, a foursome of women—Sally, Susan, Mary, and Lovey Behn—were co-appellants in the *Behn* case originating in Fort Nelson, British Columbia, and dealing with the duty to consult regarding logging.[43] Two women chiefs were also named in this case, both personally and as representatives of their communities. More recently, Leah Gardner, a non-status Anishinaabe woman, was a co-appellant in the *Daniels* case (which comments on section 35 but is focused on section 91(24) of the *Constitution Act, 1867*).[44] The final case involving a female Indigenous rights litigant was *Ktunaxa Nation*, where Kathryn Teneese represented the nation in her role as director and chief negotiator.[45]

Rather than demonstrating attentiveness to the gender equality dimension of Aboriginal rights cases, the reasoning in *Van der Peet* and its progeny erases gendered aspects of the claimed rights. The cases evince a number of strategies of erasure.

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38. *Van der Peet*, *supra* note 35 at para 90.

39. *Ibid*.

40. Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233 at 241.

41. *Van der Peet, supra* note 36.

42. *R v Côté*, [1996] 3 SCR 139.

43. *Behn v Moulton Contracting Ltd*., [2013] 2 SCR 227.

44. *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.

45. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 SCR 386.

A first strategy is *collectivism*. The insistence that Aboriginal rights are communal and collective often means that individual women are unable to claim Aboriginal rights on their own for their own purposes. Therefore, rights are shaped by the power relationships in communities, which are unlikely to favour women's interests.[46] In *Van der Peet* itself, the right claimed is characterized as the communal right to sell fish for goods or money, which the Court then further transformed into a commercial fishing right. There is no investigation into the gendered division of labour as a modern expression of the traditional asserted right, or into the connection between the right to fish and the right to sell. From a gender perspective, it would have been useful to ask: What was the role of women with respect to fishing? What was the role of women with respect to trade? Along similar lines, it would prove useful to question fishing and trading/selling as gendered activities within a mainstream understanding of gender roles. In other words, what aspects of these roles are gendered historically, and which stem from ahistorical modern thinking? Similarly, the rights of the women in *Behn* to be consulted on an extractive industry project is subjugated to a communal and ultimately governmental duty to consult exercise, denying the claimants' standing.

A second strategy evident in *Van der Peet* is the *denial of relationality*. Van der Peet was selling fish to her woman settler neighbour. The Court does not ask about the relationship between Ms. Van der Peet and her neighbour, nor does it inquire into the role of trading between neighbours as a mode of maintaining relationships between women and other members in the community. Instead, the activity is denuded of any relational meaning and transformed into a purely commercial transaction. In the course of so doing, the Court brackets out gender, and also a key Indigenous perspective on rights surrounding food. Tla-o-qui-aht scholar Johnnie Manson reports one research participant, stating:

> Hunting and eating are situated within a network of relationships—between the self, the community, the land and animals—with women being responsible for ensuring that rules of relationality were followed.[47]

A third strategy is the *imposition of facially neutral but effectively gendered criteria*. For example, the distinction between *integral* and *incidental* activities appears neutral on its face. In *Van der Peet*, the Court declared that incidental practices, customs, and traditions cannot qualify as Aboriginal rights through a process of piggybacking on integral practices, customs, and traditions. Since the trade was incidental only to the integral activity of fishing, the latter was protected while the former was not. Despite facial neutrality, this criterion has a gendered effect. The Court reproduces a colonial view of the gendered division of labour, where women are characterized as help maids and their work as incidental to the integral work of men.

This imposition of facially neutral but effectively gendered criteria is also apparent in the *Côté* decision. The Court characterizes the right as the right to fish, to which the right to teaching traditional fishing is merely incidental.[48] No gender analysis is performed. An important aspect of the case deals with the limits on motor vehicle access being subject to a fee. The question of transportation is not analyzed from the perspective of the teaching

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46. Emily Luther, "Whose 'Distinctive Culture'? Aboriginal Feminism and *R. v. Van der Peet*" (2010) 8:1 Indigenous LJ 27.

47. Johnnie Manson, *Relational Nations: Trading and Sharing Ethos for Indigenous Food Sovereignty on Vancouver Island* (2016) MA Thesis, UBC [unpublished] at 125.

48. *Côté*, *supra* note 42 at para 56.

context, nor from the perspective of the participation of the elderly, women, or children. In our community-based research, the role of women in teaching cultural activities is frequently emphasized.[49] When our project participants speak about teaching, the skill taught is merely an element, often a secondary one. The primary object may be spending time together doing traditional things. Often, the young participants are reluctant teens feared to be at risk or very young children excited to spend time with grandparents. It is difficult to reconcile what the Court imagines as the function of teaching fishing with the stories about teaching.[50] In the stories, resistance, cultural resilience, and tenderness in the face of the racist everyday abound. This is not to suggest that outcomes in these cases would necessarily have been different had a gender dimension of Aboriginal rights been explored, but it is important to ask whether the understanding of the right is unduly narrow, masculine, and utilitarian.

The *distinctiveness requirement*[51] similarly operates as a gendered criterion.[52] Given the masculine bias of Western understandings of culture, it is probable that masculine activities are more likely to be seen as those that "make a culture what it is." Gendering activities in the Western intellectual project serves, at least in part, as a tool to legitimize and strengthen some activities while simultaneously debasing others. Women's activities are frequently essentialized and universalized, no matter their cultural distinctiveness. A closer look might reveal a different picture. One of our project participants commented that his (Inuk) mother took care of the kids, seemingly conforming to the universalist narrative of women's work. He then paused and explained that this meant that she went out on the ice and hunted seal and butchered the meat and fed the family. Taking care of the kids, indeed.

By contrast, the distinctiveness of the work of men is more readily visible to the courts. While Dorothy van der Peet's activity was not seen as distinctive to her culture even though the activity had been proven as a historical practice, the timber harvesting activity of three Wabanaki men was recognized despite being characterized as acts of survival rather than acts of cultural import.[53] Commentators have suggested that the difference in approach is grounded in a more generous view of the right.[54] It is arguable that gender played an important role in the invisibility of Dorothy van der Peet's labour as a cultural activity and in recognizing the otherwise indistinguishable right in *Sappier and Gray*. As is generally the case, not asking about gender amounts to imposing a masculine gendered view.

A fourth strategy evident in the cases has already been noted in passing: the sometimes subtle, sometimes dramatic *cultural translation* of the activity from an Indigenous and feminine frame into masculine and settler economic terms. The activity of selling a small amount of catch to a neighbour becomes commercial fishing. The activity of teaching children traditional fishing methods becomes motorized access to a fishery.

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49. The Looking Out for Each Other project conducted sharing circles in Indigenous communities across Eastern Canada. Details about the project can be found on the project webpage at http://nbapc.org/programs-and-services/lofeo. Notes and transcripts from sharing circles are on file with the author.

50. Kayo Ohmagari and Fikret Berkes, "Transmission of Indigenous Knowledge and Bush Skills among the Western James Bay Cree Women of Subarctic Canada" (1997) 25:2 J Hum Ecol 197.

51. *Van der Pee*t, *supra* note 35 at para 71.

52. Luther, *supra* note 46 at 29.

53. *R v Sappier; R v Gray*, 2006 SCC 54.

54. Luther, *supra* note 46 at 33.

The outcome of these strategies is that Indigenous women are typically unsuccessful in their rights claims, sometimes even in cases where their male co-claimants are successful. For example, in the *Daniels* case, the Court denied the declaration that would have responded to a claim of a right to recognition to Leah Gardner while granting the declaration most relevant to Harry and Gabriel Daniels. But the implications of the strategies of gender erasure are broader than the direct litigation effects of individual claimants. The scope of Aboriginal rights under section 35 has taken on decidedly masculine contours.

Some criteria have been criticized from several angles, but additional concerns may arise from a gender perspective. For example, it is well established that Aboriginal rights under section 35 are subject to a requirement that the underlying practice or activity can be traced back to pre-contact or pre-Crown sovereignty. This requirement has been widely criticized for resulting in frozen rights,[55] for being inconsistent with the constitutional recognition of Métis rights,[56] and for raising difficult evidentiary issues.[57] It is also clear that rights under section 35 must have been "existing" and could not have been "extinguished" at the time of patriation of the constitution. Again, the requirement that the right be shown to be unextinguished has been the subject of criticism.

From a gender perspective, some additional issues arise. First, the record of Indigenous women's pre-contact history is even more difficult to establish and highly likely to be misinterpreted through a settler patriarchal lens.[58] Second, the focus on pre-contact/pre-Crown-sovereignty history eliminates from view the history of targeted violence and gender discrimination experienced by Indigenous women at the hands of colonial and settler governments.[59] Third, gender equality for Indigenous women living today either in (predominantly) settler or in Indigenous communities is a constitutional imperative, not a social fact.[60] Fourth, the backward look into pre-contact history fails to take into account the current aspirations, political organizing, and life course of Indigenous women today.[61] Let me say something more about each of these.

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55. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37; McNeil, *supra* note 19; Leonard I Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36:1 Alta Law Rev 1; Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42:4 McGill LJ 1011.

56. *Van der Peet, supra* note 35 at para 169, L'Heureux-Dubé J, dissenting.

57. Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can Bar Rev 36 at 61.

58. Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 173.

59. McIvor, *supra* note 17.

60. Borrows, *supra* note 55.

61. Linda Archibald & Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project* (Ottawa: Status of Women Canada, 1999).

A. Gendered Impacts of the Pre-contact Requirement

Pre-contact and initial-contact Indigenous history is highly contested,[62] as is treaty history.[63] The inattention of historians to women's history is widely recognized and strengthens a gendered, class-based, and Eurocentric/white supremacist master narrative.[64] The literature on Indigenous women's history continues to be sparse[65] and is almost entirely absent in the historical accounts in the jurisprudence.[66] The work of historians in this area is painstaking, often involving archival work using a great variety of sources.[67] The timelines of litigation are, by comparison, unforgiving. Both the state of historiography and the dynamics of litigation are substantial obstacles to proving women's Aboriginal rights.[68]

The historical evidence regarding pre-colonial and early colonial gender relations in Indigenous nations across Canada is not merely difficult to prove, it also appears to be varied. Both matrilineal and patrilineal accounts exist, and scholars have argued for a preponderance of matrilineal and matriarchal structures.[69] Many of the historical accounts on which arguments of patrilineal structures in Indigenous nations have been based postdate European contact by as much as 200 years, and it is therefore uncertain whether they reflect a *status quo ante* or whether they are themselves the result of the cultural exchange between Europeans and First Peoples.[70] What is certain is that the *Indian Act* imposed a patrilineal system of recognition on Indigenous communities across the country.[71] Until 1985, a man with Indian status who married a non-status woman retained his status and was able to bring his wife to the reserve as a member with status. At the same time, a woman with Indian status who married a non-status man lost her status and with it the right to reside on reserve[72] and to participate in the governance of her community.

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62. Eric H. Reiter, "Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond" (2010) 8:1 Indigenous LJ 55; Arthur J Ray, *Telling it to the Judge: Taking Native History to Court* (Montreal: McGill-Queen's University Press, 2011).

63. Janna Promislow, "Treaties in History and Law" (2014) 47 UBC L Rev 1085.

64. Reiter, *supra* note 62 at 61-62.

65. Mary Jane Logan McCallum & Susan M Hill, "Our Historiographical Moment: A Conversation about Indigenous Women's History in Canada in the Twentieth Century" in Nancy Janovi□ek & Carmen Nielson, eds, *Reading Canadian Women's Gender History* (Toronto: University of Toronto Press, 2019) 23. This chapter is evidence that sparse and non-existent are, however, very different.

66. Reiter, *supra* note 62 at 62.

67. McCallum & Hill, *supra* note 65.

68. Sákéj Youngblood Henderson, "Aboriginal Rights: Aboriginal Attorney General" (2003) 22 Windsor YB Access Just 265.

69. But note Karl Hele's cautionary note about matriarchy: Karl Hele, "Dispersed but Not Destroyed: A History of the Seventeenth-Century Wendat People" (2014) 34:2 Can J Native Studies 252 at 253.

70. Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill LJ 656.

71. Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3; Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 Am Q 259.

72. Joyce A Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4:1992–1993 Cont Forum Const 110; Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) CJWL 106; Joyce A Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 34:4 Can J Political Science 715.

The *Indian Act* has been amended on a number of occasions with a view to limiting gender discriminatory effects.[73] The statutory system has deeply affected the sense of identity, community, and gender relations. Before Confederation, and certainly before the arrival of Europeans, it seems safe to assume that there was not a single system or approach taken by all First Peoples across nations and over time. Sometimes the differences between nations may have been subtle; at other times they were probably stark.

Variability in gender relations among Indigenous Peoples of course persist to the present, and this has on occasion been argued before the courts. For example, in the pleadings of the Inuit Tapirisat (IT) at trial in *NWAC*, the IT took the position that "their society is totally different from that of the other named aboriginal groups (or associations), that women are not disadvantaged in it, and do not seek separate funding or representation."[74] Somewhat analogous to the problems arising in Aboriginal rights jurisprudence with regard to site specificity,[75] a historical focus would require the reconstruction of historical gender roles and gender relations, which in turn may well give rise to a patchwork of gender rights depending on the particular historical practice of the nation in question. This seems inconsistent with the broad language and the intent of subsection 35(4).

Further, historians and courts have tended to read a historical record that is already mediated through European voices through a colonial and patriarchal lens.[76] Racist and romanticized notions of Indigenous history are both problematic here. While the harm of racist accounts is more obvious, romanticized ideas of Indigenous life before the arrival of Europeans have a tendency to flatten out Indigenous history into an ahistorical Arcadia and obscure the legal and political responses in historical and contemporary Indigenous laws and governance to issues like sexual violence.[77]

B. Failure to Redress Gendered Impacts of Colonial and Postcolonial Practices

Aboriginal rights analysis as contemplated in *Van der Peet* conveniently obscures the damage done to the rights of women and to gender relations by colonial and settler-colonial legal and governance regimes.[78] The gender discriminatory scheme of the *Indian Act* imposed a uniform patriarchal structure on First Nations, and the amendments mentioned above have proven inadequate and incomplete for Aboriginal women and descendants in the female line

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73. *Indian Act*, RSC, 1985, c.I-5 as amended by C-31 [*An Act to Amend the Indian Act*], 2011 C-3 [*Gender Equity in Indian Registration Act*] section 6, and 2017 S-3 [*Elimination of Sex-Based Inequalities Act*], section 6.

74. *Native Women's Assn. of Canada v Canada*, [1992] 2 FC 462 at para 33.

75. Robert Hamilton, "After *Tsilhqot'in Nation*: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNBLJ 58.

76. Arielle Dylan & Bartholomew Smallboy, "The Constructed 'Indian' and Indigenous Sovereignty: Social Work Practice with Indigenous Peoples" in Beth R Crisp, ed, *The Routledge Handbook of Religion, Spirituality and Social Work* (London & New York: Taylor & Francis, 2017) 55; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Ash, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, (Vancouver: UBC Press, 1997) 173.

77. Emily Snyder, Val Napoleon, & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48 UBC L Rev 593.

78. *Van der Peet, supra* note 35 at para 44.

in terms of remedying the historical disadvantage regarding status.[79] At the same time, they have proven extremely controversial among First Nations community residents who have often come to equate being Indigenous with status,[80] and with band councils struggling to stretch finite resources to accommodate returning women and their families.[81]

Historical discrimination is also not limited to the provisions related to status and membership in the *Indian Act*. Importantly, there is a long history in Canada of associating Aboriginal women with sex work. The 1892 *Criminal Code* contained a separate provision for the pimping and prostitution of Aboriginal women as well as interracial intercourse.[82] This has become a discriminatory trope that continues to shape both the stigma surrounding sex work and the public discourse on Indigenous women and their sexuality.[83]

There is a clear relationship between gender discrimination in the status regime of the *Indian Act*; the historical gendered and ethnospecific criminalization of Indigenous women; and missing and murdered Indigenous women, girls, and 2SLGBTQQIA people because there is a large population of women, girls, and gender and sexual minority people who have had to struggle with a lack of recognition, the denial of access to land, and the denial of a right to be free from discrimination in mainstream society. Many cases of missing and murdered Indigenous women and girls documented by the NWAC exhibit this connection.[84] For many Indigenous women, girls, and 2SLGBTQQIA people, there are no safe spaces. The reserve is not safe, nor is the urban environment.

As we have seen, the history of Indigenous–settler relations remains out of bounds of the scope analysis in Aboriginal rights cases. There is no Aboriginal right to reserve residence, community membership, or recognition of status because none of these institutions were conceivable before settler sovereignty. There is no Aboriginal right to be free from state interference in parenting one's children, nor a right to social supports for women living and parenting off-reserve.

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79. McIvor, *supra* note 17; Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts between Collective and Individual Rights" (1990) 15 Queen's LJ 279; Luther, *supra* note 46.

80. Green, "Constitutionalising the Patriarchy," *supra* note 72; Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights " (2004) CJWL 106; Green, "Canaries in the Mines," *supra* note 72 at 715; Martin J Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada" (2007) APRCI 1.

81. Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queens's University Press, 2009) at 40, 110.

82. Yvonne Boyer, "First Nations Women's Contributions to Culture and Community through Canadian Law" in Gail Guthrie Valaskakis, Eric Guimond, & Madeleine Dion Stout, eds, *Restoring the Balance: First Nations Women, Community, and Culture* (Winnipeg: University of Manitoba Press, 2011) at 78; *The Criminal Code of Canada, 1892*, 55-56 Victoria, Chapter 29, Together with *An Act to Amend the Canada Temperance Amendment Act*, 1888, being Chapter 26 of the Same Session, 1892. (Ottawa: S.E. Dawson, 1892) at s 190.

83. Andrea Krüsi et al, "'They Won't Change It Back in Their Heads that We're Trash': The Intersection of Sex Work-Related Stigma and Evolving Policing Strategies" (2016) 38:7 Soc Health & Illness 1137 at 1141.

84. Yasmin Jiwani & Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006) 31:4 Can J Comm at 896; Maryanne Pearce, *An Awkward Silence: Missing and Murdered Vulnerable Women and the Canadian Justice System* (PhD in Law Thesis, University of Ottawa, 2013) [unpublished].

C. Structural Violence, Systemic Discrimination

Assuming a historical right to gender equality could be made out, it has been argued that such a right would be considered extinguished in 1982 as a result of the gender discrimination expressly imposed by the *Indian Act*.[85] It can hardly be said that the imposition of gender discrimination was merely regulatory, nor was it transitory. Rather, Aboriginal gender discrimination has been woven into the fabric of Canadian law and political structure. It is useful in my view to think of this as an example of structural violence. Stephanie Montesanti offers the following definition:

> Structural violence refers to the social arrangements that put people and populations in harm's way. . . . Structural violence is built into the fabric of society—political and economic organization of our social world—and creates and maintains inequalities within and between different social groups, and also among ethnic-cultural or other minority groups (referred to as ethnicity and minority-based structural violence). . . . [O]ur attention to structural violence directs us to examine the "everydayness" of violence from the vantage point of complex political, social, historic, and economic processes.[86]

Despite this deeply problematic history, politicians and the courts have often been less interested in the ways in which Canadian law has targeted Indigenous women in a gender discriminatory manner and more concerned with the threats to gender equality emanating from Indigenous self-government. In this context, the Canadian state describes itself as the enlightened standard bearer of women's equality, protecting Indigenous women from Aboriginal governments and Indigenous men. At the same time, this discourse disavows any settler responsibility for lateral violence.

D. Lack of Respect for Indigenous Women's Political Organizing as an Exercise of Aboriginal Self-Government Rights

Relatedly, the political participation and representations of Indigenous peoples generally and of Indigenous women in particular have not been seen as exercises of Aboriginal rights under section 35. Notably, the Supreme Court of Canada observed in the *NWAC* case:

> I also agree with the conclusions of the Court of Appeal with respect to the inapplicability of s. 35 of the *Constitution Act, 1982* to the present case. The right of the Aboriginal people of Canada to participate in constitutional discussions does not derive from any existing Aboriginal or treaty right protected under s. 35. Therefore, s. 35(4) of the *Constitution Act, 1982*, which guarantees Aboriginal and treaty rights referred to in s. 35(1) equally to male and female persons, is of no assistance to the respondents.[87]

As noted above, the structure of legal analysis for section 35(4) is important. The Court engages in a two-step process: First, determine whether it is a treaty right or an Aboriginal

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85. *Contra* see McIvor, *supra* note 17 at 37.

86. Stephanie Rose Montesanti, "Mapping the Role of Structural and Interpersonal Violence in the Lives of Women: Implications for Public Health Interventions and Policy" (2016) 15:1 BMC Women's Health 1.

87. *NWAC, supra* note 21 at para 76, affirming the view in *NWAC* FCA, *supra* note 26 at para 19.

right for the purposes of subsection (1); second, consider whether there are any gender discriminatory barriers to the enjoyment of the right so determined.[88] From a textual perspective, this makes sense because section 35(4) references the rights in subsection (1). Despite the textual surface appeal of this analytical schema, this is problematic because, as we have seen, the facially gender neutral conception of rights under section 35(1) is highly gendered and detrimentally affects women rights claimants.

In other words, using the narrow historical lens of the Supreme Court jurisprudence, the constitutional law answer to Indigenous women's Aboriginal rights claims will likely boil down to this: It is impossible to prove the pre-contact history, the rights claimed had been extinguished by 1982, it is constitutionally irrelevant that Canada discriminated against rights claimants, and the contemporary political life and aspirations of Indigenous women remain invisible to the law. Not a single case has succeeded by advancing the Aboriginal rights of Aboriginal women.[89] Thus, it may be said that Aboriginal women have on occasion had their constitutional rights as women recognized under section 15 of the Charter, but not their rights as Aboriginal people under section 35.

IV THE WAY FORWARD

The gender equality guarantee in subsection 35(4) could play an important part in protecting the rights to culture, health, security, and justice advocated in the Final Report of the National Inquiry into Murdered and Missing Indigenous Women and Girls. Policy considerations support the idea that Aboriginal rights under section 35 should include a right for Aboriginal women to be safe on the land.

A revision of the courts' current approach to section 35 is not only grounded in policy considerations, however, it is also supported by the constitutional text and the legislative record. It is clear from the Constitutional Debates that the content of rights guaranteed under subsection 35(1) was seen as far from certain. In their book *Canada . . . Notwithstanding*, Roy Romanow, John Whyte, and Howard Leeson offer a nearly contemporaneous and very much insider view of provincial perspectives on the constitutional process:

> Section 35 of the Constitutional [*sic*] Act says that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed." For much of the period of constitutional negotiations between 1978–1981, the federal government was reluctant to include such a provision. . . . Many provinces were also concerned about the consequences of including the recognition of aboriginal rights since they were not clear what the consequence of such a provision would be for provincial lands and provincial legislative authority. . . . Of greater concern to these groups [Aboriginal groups] was the addition of the word "existing" to the phrase "aboriginal and treaty rights" in late November 1981 when section 35 was, with some reluctance, being accepted by the provinces. . . . Furthermore, a significant problem remains: the

88. *Ibid*, at para 82.

89. *McIvor v Canada (Registrar of Indian & Northern Affairs)*, 2009 BCCA 153 at paras 66–67; *Van der Peet, supra* note 35; McIvor, *supra* note 17.

> absence of any definition of aboriginal or treaty rights will raise acute problems when attempts are made to vindicate those rights against governments.[90]

The same can be said of the undeclared rights protected under section 25 of the Charter. Romanow, Whyte, and Leeson noted that:

> Provinces feared that the section protecting "undeclared rights" would lead the courts to define new, unexpected rights. For example, since aboriginal rights were not mentioned, perhaps courts would recognize them as undeclared rights, and provincial authority would be affected in unforeseen ways.[91]

The authors go on to describe a shocking lack of understanding and knowledge about Aboriginal affairs by high-ranking political officials in the context of the constitutional patriation debates. Explaining the addition and subsequent deletion of section 35 from the constitutional draft that would become the Charter, they note that Aboriginal organizations were concerned about the particular phrasing, but went on to say:

> This was not the only reason for the deletion of the section. The constitutional demands of native organizations were not fully understood by the participants since they have never had the careful consideration by ministers and officials that the other issues had received. Some of the provinces were particularly worried about the possible implications of such constitutional rights upon traditional provincial legislative jurisdiction. In addition to the uncertainty generated within the governments with respect to these objectives, the first ministers, ministers, and officials were mesmerized by the tantalizing prospect of achieving a constitutional accord, at long last. The nature of the last minute negotiations—complex, occasionally bitter and hurried—militated against the careful consideration of the entrenchment of aboriginal rights.[92]

The word "existing" was inserted late in the drafting process to render the content of subsection 35(1) marginally more certain: Rights that were clearly and unambiguously extinguished would not be revived by the rights guarantee. It is much less certain that adding "existing" was either intended to or should have had the effect of limiting Aboriginal and treaty rights to historical rights. Rather, two other provisions suggest a broad and purposive interpretation, one in the Charter and the other a subsequent amendment in section 35 itself. The textual argument is strengthened by section 25 of the Charter, which notes "other rights or freedoms that pertain to the aboriginal peoples of Canada" in addition to Aboriginal and treaty rights and specifies in paragraph (b) "that now exist by way of land claims agreements or may be so acquired."[93] Section 25 protects these additional rights from diminishment or abrogation

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90. Roy J Romanow, John D Whyte, & Howard A Leeson, *Canada . . . Notwithstanding: The Making of the Constitution, 1976–1982* (Toronto: Thomson Carswell, 1984) at 268.

91. *Ibid* at 77.

92. *Ibid* at 213.

93. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 25.

by way of Charter interpretation.[94] This language is more consistent with a forward-looking, purposive interpretive stance.

Section 35 was also amended subsequent to enactment. The amendment in subsection (3) was added at the same time as the sex equality provision in subsection (4). It affirms that new rights could be obtained by way of agreement; and that these new rights would also be protected by subsection (1). This strongly suggests that Aboriginal rights were intended to be developed through modern treaty processes, a view that is inconsistent with the notion that Aboriginal rights must be anchored in historical practice.

Looking at subsection 35(1) from the perspective of subsection (4), it is further not persuasive that Aboriginal rights are to be based strictly in pre-contact/pre-Crown-sovereignty practice because they are subject to a gender equality guarantee. The evidence may be mixed or uncertain when it comes to gender relations and a gendered division of labour between men and women in Indigenous societies prior to the arrival of European settlers.[95] If all rights were based in historical practice, subsection (4) would only apply to women who can trace their ancestry back to an egalitarian society. But the Aboriginal rights gender equality guarantee is not on its face limited to those nations that can demonstrate a history of gender equality. Instead, it is intended to be remedial of gender inequality in the present.

To effectively vindicate the gender equality concerns, the overall approach to section 35 should be revised to include a gender analysis in all Aboriginal rights cases. At one level, this may lead to some modest adjustments. At the stage of characterizing the rights claim, it will be important to ensure that the claim is expressed in a gender-inclusive fashion. This means asking whether the right itself is gendered or whether it might be expressed differently across the gender spectrum, and to be especially attentive to the nature and scope of rights claimed by Indigenous women. It also means that courts should inquire specifically into any relational aspects of the right. For example, Yvonne Boyer suggests an Aboriginal rights-based approach to addressing Indigenous women's health concerns on the basis that Indigenous women traditionally used the land to collect medicines to maintain their health.[96] She suggests that subsection 35(4) should be interpreted as guaranteeing Indigenous women substantive equality rights with regard to their Aboriginal rights based on their traditional uses of the land and the differential gendered effects of colonialism.

Similarly, Aboriginal rights should be considered from a communal and individual perspective, as the gender equality guarantee speaks about male and female persons—in

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94. Jane Arbour has suggested that section 25 resolves potential conflicts between Indigenous group rights protected in section 35 and elsewhere on the one hand, and individual Charter rights on the other. For this analysis to succeed, she excludes gender equality from her consideration. Jane M Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the *Canadian Charter of Rights and Freedoms*" (2003) 21 SCLR 3.

95. Sanders, *supra* note 70; J Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2008) 7:1 Meridians: Feminism, Race, Transnationalism, 132; Linda M Gerber, "Multiple Jeopardy: A Socio-Economic Comparison of Men and Women among the Indian, Metis and Inuit Peoples of Canada" (1990) 22:3 Can Ethnic Stud; M Annette Jaimes, "'Patriarchal Colonialism' and Indigenism: Implications for Native Feminist Spirituality and Native Womanism" (2003) 18:2 Hypatia 58; Margaret M Kress, *Sisters of Sasipihkeyihtamowin—Wise Women of the Cree, Denesuline, Inuit and Métis: Understandings of Storywork, Traditional Knowledges and Eco-justice among Indigenous Women Leaders* (PhD Thesis, University of Manitoba, 2014) [unpublished].

96. Boyer, *supra* note 11.

other words, individuals. The gender discriminatory regime of the *Indian Act*, including the disenfranchisement of Indigenous women from the governance of their communities and a male dominated band system, means that Indigenous women's groups can find themselves at odds with mainstream Indigenous organizations and governance structures. As Brenda Gunn has rightly argued, the conflict has resulted in a dichotomy between individual and collective rights that disproportionately disadvantages Indigenous women. The artificial distinction between Indigenous rights and Indigenous women's rights is not only damaging, it is incorrect. The collective nature of Aboriginal rights necessitates the inclusion of the rights of Aboriginal women because they are a part of the collective.[97]

When inquiring into the cultural distinctiveness of a practice and whether it is integral or merely incidental, the gender location of the practice should be considered. If a practice is historically or presently associated with female labour, special care must be exercised to avoid the introduction of gender stereotypes into the analysis. Courts should ask whether gender could be a factor in seeing the activity as incidental or integral. If so, the practice should not be characterized as incidental but instead be recognized as a gender-specific, distinct, and integral practice.

On the flipside, it is important to consider gendered impacts of cases that may foreground male-connoted practices. For example, economic marginalization is a significant contributor to the victimization of women, and cases dealing with economic entitlements are a crucial component in addressing violence against Indigenous women, girls, and 2SLGBTQQIA people. Therefore, resource extraction and harvesting cases have implications for these groups, even though none of them make reference to the victimization of Indigenous women.

Furthermore, in applying evidentiary standards, courts need to take a realistic approach to the limitations of the state of research regarding women's history generally and Indigenous women's history in particular. Evidentiary requirements should be sufficiently contextualized so that women's claims are not inevitably doomed to fail.

Beyond these moderate tweaks to Aboriginal rights analysis, some more substantial changes should be considered. Addressing the Aboriginal rights of Indigenous women will require tackling the long-standing jurisprudential aversion to positive rights. These might include rights to housing, health funding, and parenting supports. It is clear that this is not going to be easy in light of the liberal rights framework developed under the Charter, but the fiction that the rights of citizens are best respected by governmental inaction is not only unsustainable given the social, economic, and political situation of Indigenous women, it is itself a highly gendered discourse. Here, the history of gender discrimination under the *Indian Act* and the impact on Indigenous women and their descendants is most relevant and it will be important to consider the needs of off-reserve and non-status women and the urban Indigenous population more generally.

Finally, gendering the section 35 analysis also has implications for the duty to consult. Val Napoleon has argued that "aboriginal women's issues must be contextualised within the larger political frames of self-determination and self-government" and that "a gendered and feminist analysis must be applied to the larger political projects of self-determination and

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97. Brenda L Gunn, "Self-Determination and Indigenous Women: Increasing Legitimacy through Inclusion" (2014) 26:2 CJWL 241.

self-government."[98] At the political level, this entails a strengthening of relationships between all levels of government and Indigenous women's and 2SLGBTQQIA organizations, and bringing these groups into consultations, treaty processes, and policy development. Specifically, the duty should be extended to require separate consultations with Indigenous women, 2SLGBTQQIA people, and their organizations. This is not only appropriate with respect to the content of the duty but also addresses a concern that was highlighted by the National Inquiry. Specific consultations could go a long way toward recognizing women's agency and to help avoid failed claims resulting from stereotypical reasoning and inappropriate translation of a claim into settler and masculine terms. To take on board the admonition that Aboriginal rights jurisprudence should take the Indigenous perspective on the right seriously[99] should also mean that the perspective of Indigenous women, girls, and 2SLGBTQQIA people are specifically considered.

Ending the violence against Indigenous women, girls, and 2SLGBTQQIA people will require a sustained and multipronged effort. The role of constitutional law in this regard will of necessity be a mere component. That said, constitutional law can frame the issues and assist in transforming policy objectives and recommendations into actionable legal claims. In this way, it can be a driver of systemic change through political ebbs and flows. The Aboriginal gender equality guarantee is one prime location in the constitutional text and jurisprudence to bring about this change.

98. Napoleon, *supra* note 40 at 255.

99. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 32.