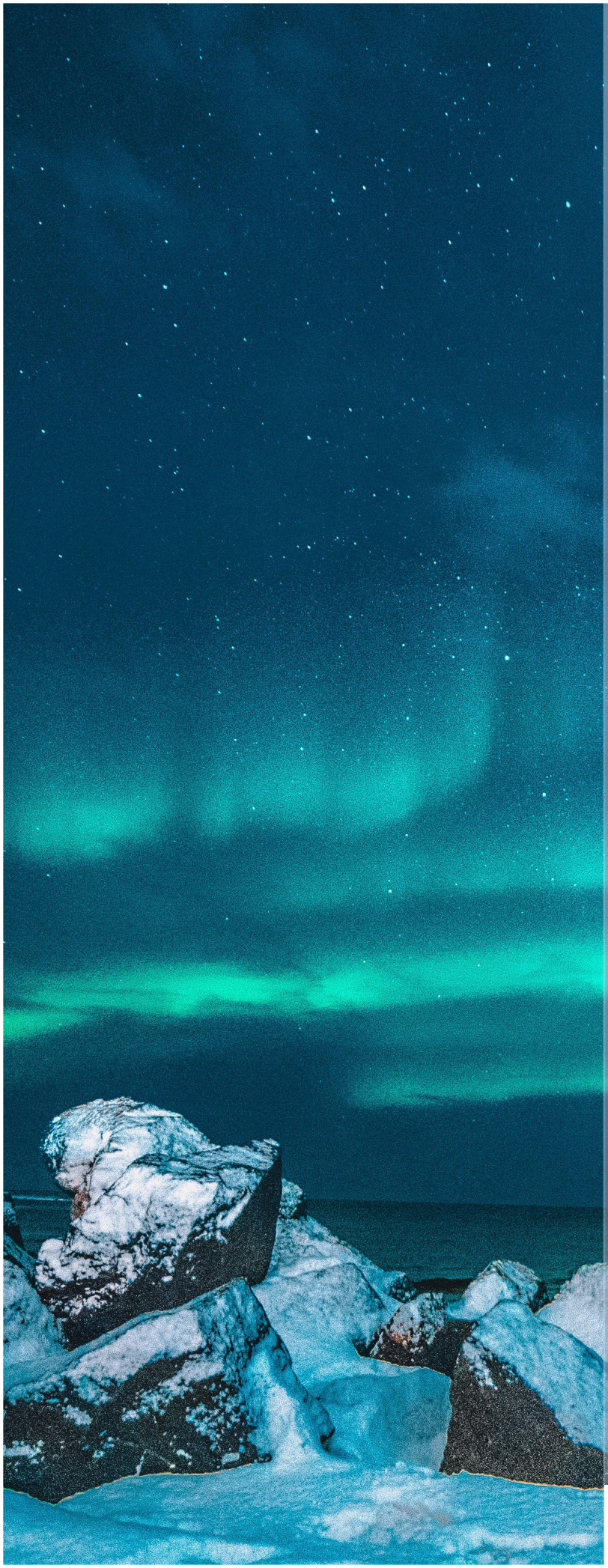

llj Lakehead
LAW JOURNAL
Volume 5 Issue 1

Is Missing and Murdered Indigenous Women an Aboriginal Rights Issue? The Intersectional Resonance of Section 35

Jula Hughes

(Un)protected Sources, (Un)protected Democracy: A Critical Analysis of Journalistic Source Protection Law

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LAKEHEAD LAW JOURNAL
EDITORIAL TEAM

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

*Jula Hughes**

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* Dean, Bora Laskin Faculty of Law, Lakehead University. Thank you to the Social Sciences and Humanities Research Council and Status of Women, Canada (now known as Women and Gender Equality, Canada) for funding the "Looking Out for Each Other" research and community action project; to Roy Stewart for our early discussions on conceptualizing gender rights under section 35; to Dr. Elizabeth Blaney, Michelle Perley, and Anthea Plummer from the New Brunswick Aboriginal Peoples Council for their leadership and guidance; to Danica Jorgenson and Ella Carr for their able research assistance; and to Dr. Blaney as well as Professors Vanessa MacDonnell, Gillian Calder, John Borrows, and Amar Khoday and the anonymous peer reviewers for their helpful feedback on earlier drafts.

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 Janovičcek & 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.

(UN)PROTECTED SOURCES, (UN)PROTECTED DEMOCRACY: A CRITICAL ANALYSIS OF JOURNALISTIC SOURCE PROTECTION LAW

*Noah S. Wernikowski**

CONTENTS

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I INTRODUCTION

Twenty-one years before the United Kingdom voted to leave the European Union, Quebec voted on whether to proclaim sovereignty and initiate secession from Canada. By a margin of 50.58 per cent to 49.42 per cent, Quebecers voted to remain.[1] The narrow victory spurred the federal government into action. To increase the visibility of their contributions to Quebec and to counteract the sovereignty movement, the federal government created a promotional program in 1996. It saw the federal government spending more than $40 million every year in sponsorship and advertising at community, cultural, and sporting events in Quebec.[2] Much of this money was spent on contracts with private advertising firms.[3]

In the early 2000s, a confidential source[4] who came to be known as "Ma Chouette" ("My Sweetie") contacted *Globe and Mail* reporter Daniel Leblanc. Relying on Ma Chouette, Leblanc wrote a series of articles on the sponsorship program alleging an appalling misuse of public funds.[5] For example, in March 2002, he reported that the federal government paid $550,000 to a Quebec company for a report "that no one could find."[6] The effects of Leblanc's articles reverberated across Canada. Significant public and political interest in what had become known as the "Sponsorship Scandal" led to a scathing report from Canada's Auditor General which showed that the government had paid more than $100 million in contracts for little or no work.[7] A Royal Commission was created, and the resulting Gomery Report exposed the worst political scandal in recent Canadian history. It led to the retirement of Prime Minister Jean Chrétien and eventual defeat of the Liberal government.

A properly functioning democracy requires an informed public. Journalism, which exposes matters of public importance, is therefore essential for a vibrant liberal democracy.[8] In an age where public relations officers and press secretaries are paid to obfuscate, journalists must cultivate relationships with other sources. Sources often speak to journalists only if they are assured anonymity, because speaking truth out of turn can lead to discipline and detestation.[9] Like many important stories, the Sponsorship Scandal would not have come to light had Leblanc been unable to assure Ma Chouette their anonymity.

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1. Gerald L Gall, "Québec Referendum (1995)" (21 August 2013), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/quebec-referendum-1995>.

2. Stephen Azzi, "Commission of Inquiry into the Sponsorship Program and Advertising Activities" (21 September 2006), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/sponsorship-program-and-advertising-activities-gomery-inquiry-commission-of-inquiry-into>.

3. *Ibid*.

4. This article uses the term "confidential source" to describe a source whose identity is known by the journalist, but who only provides information on the condition that their identity will not be revealed in the reporting of the information they have provided. This differs from an "anonymous source" whose identity is not known by the journalist.

5. *Globe & Mail c Canada (Procureur général),* 2010 SCC 41 at para 4, [2010] 2 SCR 592 [*Globe & Mail*].

6. Azzi, *supra* note 2.

7. *Ibid*.

8. *Denis v Côté*, 2019 SCC 44 at para 45, 437 DLR (4th) 191 [*Denis*]; *R v National Post*, 2010 SCC 16 at para 31 45, [2010] 1 SCR 477 [*National Post*]; Janice Brabyn, "Protection against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006) 69:6 Mod L Rev 895 at 921–928.

9. Brabyn, *supra* note 8; *Denis, supra* note 8 at para 35.

In this way, a vibrant liberal democracy depends on a journalist's ability to protect the confidentiality of their sources. In the words of the Supreme Court of Canada (SCC) in the seminal media rights decision *R v National Post*, the public has a profound interest in "being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality."[10]

The public, however, also has an interest in capable law enforcement and an effective judicial system. These interests require that courts and police have sufficient access to relevant information. This has resulted in the general rule that "the public has the right to every person's evidence," to use the SCC's phrase from *National Post*.[11] Search warrants can be executed, subpoenas can be issued, and disclosure can be ordered against parties who would rather not participate in judicial processes. When these mechanisms are used to force journalists to reveal the identity of their confidential sources, distinct public interests come into conflict. This article discusses the manner in which Canadian law mediates this conflict through the law of "protection of sources."

Part I of this article outlines the many Canadian legal powers that can be used to reveal the identity of journalists' confidential sources. These either compel journalists to reveal the identity of their sources or authorize investigations that could reveal such information. Part II provides an overview of the Canadian common law of protection of sources, outlining journalists' ability to protect source identity by resisting the powers outlined in Part I. It discusses the legal tests for obtaining a search warrant for journalists' premises and for establishing journalist–source privilege, and the way these tests relate to protections afforded by the *Canadian Charter of Rights and Freedoms*.[12] Part III assesses the extent to which the common law allows journalists to protect their sources, arguing that it provides grossly insufficient protection. Part IV describes the federal government's recent legislative response to a perceived inadequacy of protection, the *Journalistic Sources Protection Act* (JSPA).[13] Finally, Part V critically analyzes the JSPA.

This article ultimately suggests the JSPA improves the legal protection available to journalists but has three potential shortcomings: (1) It does not apply to most civil actions, (2) it contains an exception that may be abused, and (3) its focus on balancing may lead to an uncertainty chill. The effects of these shortcomings, and of the JSPA more generally, remain to be seen. They may be inconsequential, or they may undermine the important purpose of the JSPA—addressing the troubling defects in the common law of protection of sources. Journalists have reason to be optimistic, but also reason to be vigilant.

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10. *National Post*, *supra* note 8 at para 28. The case focused on under what conditions the police, when investigating a crime, can obtain a warrant for the production of a document that may reveal the identity of a journalist's confidential source. A confidential source provided the *National Post* a bank document that, on its face, implicated Jean Chrétien in a serious conflict of interest. It later came to light that the document was most likely forged. The alleged forgery prompted a police investigation, and the police sought a search warrant and assistance order in relation to the *National Post* offices and staff. The *National Post* resisted the warrant's issuance on the ground that it might reveal the identity of confidential sources.

11. *Ibid*, at para 1.

12. *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

13. *Journalistic Sources Protection Act,* SC 2017, c 22 [JSPA].

II PROCUREMENT OF EVIDENCE

The public's interest in capable law enforcement and an effective judicial system means everyone has the right to every person's evidence.[14] This means, that as a general rule, all evidence is producible, all witnesses are compellable, and all compelled witnesses must truthfully answer every question put to them.[15] This "fundamental first principle," as the SCC described it, operates unless some countervailing social value is deemed to take priority over the finding of truth.[16] This general rule manifests in a variety of legal powers that can be used to compel resistant witnesses and obtain sheltered evidence. The rules of civil and criminal procedure, which are outlined below, allow for the procurement of such evidence both before and during trial.

A. Civil Procedure

The rules of civil procedure derive largely from each province's Rules of Court (the Rules). Depending on the province, the Rules are made either by the lieutenant governor in council[17] or judges themselves[18] through authority delegated by provincial legislation. Working in tandem with the common law rules of evidence and applicable evidence acts,[19] the Rules establish the procedures for compelling evidence. Before trial, a party to a civil action is entitled to obtain as much information relevant to the opposing party's case as possible. This entitlement is affected by several rules that mandate the disclosure of documents and oral examination of parties.

Though the Rules are created by each province, they are largely similar. The province of Saskatchewan's Rules, which are largely equivalent to that of other provinces,[20] will therefore be used to illustrate Canadian civil procedure more generally. Saskatchewan's Rules require that every party to a civil action provide the opposing party a list of every relevant document in their possession.[21] Upon receiving the list, one may request a copy of every document mentioned.[22] If the request is resisted, the aggrieved party may apply for the court to order the document be produced.[23] A court may also order production of any document possessed by a non-party, as long as there is reason to believe that the document is relevant.[24] Every party also has to make itself available to be questioned under oath before trial about any relevant topic.[25]

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14. *National Post*, *supra* note 8 at 26.

15. *R v S (RJ)*, [1995] 1 SCR 451.

16. *R v Gruenke*, [1991] 3 SCR 263 at para 43.

17. For example, see *Judicature Act*, RSA 2000, c J-2, s 28.1(1)(a)(i) (Alberta); *Court Rules Act*, RSBC 1996, c 80, s 1 (British Columbia).

18. For example, see *Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 28(1) (Saskatchewan).

19. For a discussion on the applicability of various evidence acts, see Part V(A) of this article.

20. See generally *Alberta Rules of Court*, Alta Reg 124/2010, R 1.1; *British Columbia Supreme Court Civil Rules*, BC Reg 168/2009, R 1-2(2); *Manitoba Court of Queen's Bench Rules*, Man Reg 553/88; and *Saskatchewan 2013 Queen's Bench Rules* [*Saskatchewan Rules*].

21. *Saskatchewan Rules*, *ibid* at 5-5.

22. *Ibid* at 5-11.

23. *Ibid* at 5-12.

24. *Ibid*.

25. *Ibid*, at 5-13.

At trial, a party to a civil action is generally entitled to adduce the best evidence possible. Parties therefore may issue subpoenas to either compel a witness to testify during trial or to produce any document in their possession at trial.[26] If a witness fails to comply with a subpoena, the court may order the person to do so. It can even direct the police to apprehend the person to ensure compliance.[27] Also, if a witness refuses to be sworn in or to answer questions, the court may order the witness to do so.[28] These orders are all enforceable through contempt proceedings.

B. Criminal Procedure

The rules of criminal procedure also provide for broad rights to collect evidence, both before and during trial.

The rules of criminal procedure are mostly codified in the *Criminal Code*.[29] It allows law enforcement, during an investigation and prior to trial, to apply to a judge or justice of the peace for authorization to obtain evidence in a variety of ways. For example, law enforcement may apply for authorization to surreptitiously intercept private communications.[30] They also may apply for a warrant to track the locations of vehicles or transactions, such as credit card payments.[31] Warrants can also be issued authorizing surveillance or to search any building, receptacle, or place.[32] During an investigation, law enforcement is also permitted to apply for an order that an individual produce any "document that is in their possession or control when they receive the order."[33] These warrants and orders are granted only if law enforcement convinces the presiding judge or justice of the peace that doing so would not infringe the subject's section 8 Charter right "to be secure against unreasonable search and seizure."[34]

Accused persons also have tools available to them to compel the production of evidence prior to trial. The *O'Connor* regime, developed in the SCC case *R v O'Connor*, allows an accused to obtain any private record held by a third party, which could include a record held by a journalist that contains information about the identity of a confidential source.[35] Production is only ordered if a two-part test is satisfied. First, the record has to be likely relevant to the proceeding against the accused. Second, the deleterious effects of production must not outweigh the salutary effects of production to the extent that non-production would unreasonably interfere with the accused's right to a fair trial.[36]

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26. *Ibid* at 9-8.

27. *Ibid* at 9-11.

28. *Ibid* at 6-30.

29. *Criminal Code*, RSC 1985, c C-46. It is important to note that there are other acts, both federal and provincial, that authorize search powers [*Criminal Code*].

30. *Ibid*, ss 184–188.

31. *Ibid*, s 492.1.

32. *Ibid*, ss 487–487.1.

33. *Ibid*, s 487.014 (1).

34. Charter, *supra* note 12 at s 8. Section 8 compliance is determined by reference to the tests outlined in both the specific warrant-granting provisions of the *Criminal Code* and the common law interpreting these tests in light of the s 8 guarantee.

35. *R v O'Connor* [1995] 4 SCR 411.

36. *Ibid* at paras 138–164.

During trial, a variety of steps are also available to both the Crown and the accused to compel the appearance of a witness. For example, anyone who is "likely to give material evidence" can be subpoenaed to testify.[37] Judges may also order that a witness in custody testify[38] or that a witness testify by video or audio link.[39] As is the case with civil proceedings, these orders are all enforceable through contempt proceedings.[40]

III COMMON LAW PROTECTIONS FOR JOURNALISTIC SOURCES

Each power mentioned in Part I of this article can be used to determine the identity of a journalist's confidential source, either by compelling a journalist to testify on the matter or by permitting searches and surveillance likely to reveal the identity of a source. There are, however, two doctrines of Canadian common law that shield journalists from the exercise of such powers: The *Lessard* framework and the *Wigmore* test. Any discussion of the two doctrines that help journalists protect the identity of their sources would be incomplete without noting the conspicuous absence of a third form of protection: constitutional protection. This part of the article therefore discusses the *Lessard* framework, the *Wigmore* test, and the lack of constitutional protection at common law.

A. The *Lessard* Framework

Courts have developed a framework that governs all applications by law enforcement for search warrants, wiretaps, and production orders relating to the media (the *Lessard* framework).[41] The *Lessard* framework is different, and purportedly stricter, than the framework that governs the same applications relating to non-media subjects. It is intended to recognize "that the media plays a special role in a free and democratic society."[42] The *Lessard* framework therefore seeks to balance "the state's interest in the investigation and prosecution of crime" and the media's "right to be free from unreasonable search or seizure . . . *and* the guarantee of freedom of expression."[43] This contrasts with the usual framework, which aims to balance only the state's interest in prosecuting crime and the subject's right to be free from "unreasonable search and seizure."[44]

The *Lessard* framework was developed by the SCC in the 1991 decision *Société Radio-Canada c Lessard*.[45] It has been repeatedly affirmed,[46] most recently by the SCC in *R v Vice*

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37. *Criminal Code*, *supra* note 29 at s 698.

38. *Ibid*, s 527.

39. *Ibid*, ss 714–714.8.

40. *Ibid*, s 708.

41. See *Société Radio-Canada c Lessard,* [1991] 3 SCR 421, 130 NR 321 [*Lessard*]; *National Post*, *supra* note 8; and *R v Vice Media Canada Inc,* 2018 SCC 53 [*Vice*].

42. *Vice*, *ibid* at para 13.

43. *Ibid* at paras 1, 13 [emphasis added].

44. *Ibid* at para 13.

45. *Lessard*, *supra* note 41.

46. For example, see *National Post*, *supra* note 8.

Media Canada Inc.[47] Accordingly, the SCC in *Vice*, affirming the *Lessard* framework, found that the presiding judge or justice of the peace is to apply the framework in four distinct steps.

First, the presiding judge[48] considers whether to exercise their discretion to require notice of the application be given to the media. The status quo is that the application be heard on an *ex parte* basis. This means the media receives no notice and is not given an opportunity to appear and argue against the application.[49] Second, whether notice is given or not, the presiding judge next determines whether the order or warrant should be authorized. To give authorization, the judge first must be satisfied that the specific test for approving warrants and production orders outlined in the *Criminal Code* has been met.[50] Third, in order to give authorization, the judge must be satisfied that "the state's interest in the investigation and prosecution of crimes" is not outweighed by "the media's right to privacy in gathering and disseminating the news."[51] The judge considers all of the circumstances, including the following:

a. the likelihood and extent of any potential chilling effects;

b. the scope of the materials sought and whether the order sought is narrowly tailored;

c. the likely probative value of the materials;

d. whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources;

e. the effect of prior partial publication, now assessed on a case-by-case basis; and

f. more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party.[52]

Fourth, if the judge grants authorization because they are satisfied that all statutory conditions have been met and that the balancing exercise favours authorization, they finally consider whether to impose conditions on the order to ensure that the media "will not be unduly impeded."[53]

B. The *Wigmore* Test

Courts have also developed a framework known as the *Wigmore* test for establishing legal privilege on a "case-by-case" basis where no established "class privilege" applies. The framework is often applied when journalists seek to establish privilege with respect to their communications with sources. If established, journalist–source privilege shields the journalist from all court processes that could be used to compel information and evidence relating to their relationship with the source. Established privilege does more than allow a journalist not

47. *Vice*, *supra* note 41.

48. For the sake of simplicity, I use the word "judge" here to denote both judges and justices of the peace.

49. *Vice*, *supra* note 41 at para 65.

50. *Ibid*.

51. *Ibid* at para 82.

52. *Ibid*.

53. *Ibid*.

to have to answer questions in court; it can be used to defend against the execution of warrants and similar orders. Privilege can be asserted against the issuance of a search warrant[54] or in support of an application to have an already-issued search warrant set aside.[55] Furthermore, judges and justices of the peace tasked with approving search warrants or surveillance orders must consider privilege when deciding whether to grant them. Law enforcement is also obliged to take great care in executing a search warrant in any place privileged documents are expected to be located.[56]

In *National Post*, the SCC established the parameters of source–journalist privilege in Canada. It is not a "class privilege" that creates a *prima facie* presumption of protection, but a "case-by-case" privilege that only protects information if the specific situation satisfies the *Wigmore* test.[57] The test requires the journalist to prove each of the following four criteria on a balance of probabilities.[58] First, the communication must originate in confidence that it will not be disclosed. Second, the confidence must be "essential" to the relationship in which the communication arises. In the journalist–source context, the first two criteria mean the communication must be "made *explicitly* in exchange for a promise of confidentiality."[59] Communication with non-confidential sources therefore receives no protection. Third, the relationship must be one that should be "sedulously fostered in the public good."[60] According to the SCC, the more formal and professional the journalist, the more likely their source is to receive protection: "The relationship between the source and a blogger might be weighed differently than [a journalist] who is subject to much greater institutional accountability within his or her own news organization."[61]

Fourth and finally, it must be shown that the "public interest served by protecting the identity of the informant from disclosure [outweighs] the public interest in getting at the truth."[62] According to the SCC, this fourth criterion "does most of the work."[63] Among other considerations, the weighing considers the nature and seriousness of the offence under investigation and the expected probative value of the evidence sought. For example, the mere identity of a source is likely to have little probative value.[64] However, a bloody knife passed to a journalist from a confidential source will have great probative value and will therefore be weighted differently. The weighing will also consider "the underlying purpose of the investigation, as inferred from the objective circumstances."[65] The more it seems the criminal investigation is aimed at silencing or punishing a source, the more likely privilege is to be

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54. *National Post, supra* note 8 at para 52.

55. *Ibid* at para 52.

56. *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860.

57. *National Post*, *supra* note 8 at para 53.

58. *Ibid* at para 60.

59. *Ibid* at para 56.

60. *Ibid* at para 57.

61. *Ibid*.

62. *Ibid* at para 53.

63. *Ibid* at para 58.

64. *Ibid* at paras 61, 65.

65. *Ibid* at para 62.

found. The weighing also considers "the stage of the proceedings." For example, the fact that proceedings might be at an early stage, such as at an examination for discovery, may militate in favour of recognizing privilege.[66] Finally, "The public interest in free expression [which manifests in protection of news gathering methods] will *always* weigh heavily in the balance."[67]

C. The Lack of Constitutional Protections

Although Canadian journalists can protect their sources' identities to some extent through the above-mentioned common law doctrines, the conspicuous absence of a third form of protection must be discussed. The SCC has repeatedly refused to give journalists a *constitutional* right to protect the identity of their sources.

Constitutional protection for news gathering could derive from the Charter. Determining whether state action is unconstitutional because it violates the Charter is a two-step process.[68] First, the party challenging the act attempts to establish that it limits a right explicitly guaranteed by the Charter. This involves interpreting Charter provisions or applying tests specific to particular Charter rights already developed at common law. If a limit is found, a violation is presumed unless the state can prove the infringement "can be demonstrably justified in a free and democratic society."[69] This is determined by applying the *Oakes* test,[70] which concludes that rights-limiting actions are justifiable only if they are prescribed by law, aimed at achieving a "pressing and substantial objective," and are proportionate in their pursuit of that objective.[71]

Section 2(b) of the Charter states "Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including *freedom of the press and other media of communication*."[72] Journalists have sought constitutional protection for news gathering activities, arguing search warrants conducted against journalists and orders that compel journalists to disclose the identity of their confidential sources limit their section 2(b) rights. Because the warrants and orders limit a Charter right, the argument continues, they are unconstitutional unless the state proves they are justifiable on the basis of the strict *Oakes* test.

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66. *Globe & Mail, supra* note 5 at para 58. This is a variation of the UK "newspaper rule," which allows journalists to protect their sources during the discovery stage of proceedings even where they may be required to disclose their sources at trial. See also *Canwest Publishing Inc v Wilson*, 2012 BCCA 181 at para 62, 349 DLR (4th) 739; *Wasylyshen v Canadian Broadcasting Corp*, 2005 ABQB 902 at paras 15–22 & 39–41, 63 Alta LR (4th) 238. Although the SCC noted that privilege is likely to be recognized at earlier stages of proceedings because at that "point the procedural equities do not outweigh the freedom of the press," it also stated that the early stages of proceedings might also militate in favour of *not* recognizing privilege if the information sought has "the potential to resolve certain issues prior to going to trial" (*Globe & Mail* at para 58).

67. *National Post, supra* note 8 at para 64.

68. See generally Peter W Hogg, *Constitutional Law of Canada: 2015 Student Edition* (Toronto: Carswell, loose-leaf updated 2015).

69. Charter, *supra* note 12 at s 1.

70. Developed in *R v Oakes*, [1986] 1 SCR 103. The Oakes test provides a mechanism for balancing charter rights with the imposition of reasonable limits on those rights.

71. *Ibid* at 72–75.

72. Charter, *supra* note 12 at s 2(b) [emphasis added].

For example, in both *Lessard* and *National Post*, parties claimed the execution of search warrants on journalistic premises limited their section 2(b) rights. The majority of justices in both cases proclaimed support for a free press and spoke vaguely of a connection between Charter values and news gathering activities.[73] However, they ultimately refused to find a limit of section 2(b). There was therefore no need to apply the *Oakes* test to determine whether the warrants were nonetheless constitutional. The SCC instead developed common law doctrines—the previously mentioned *Lessard* framework and *Wigmore* test—to purportedly balance competing interests and in some instances grant journalists powers to resist source disclosure. The SCC ambiguously stated that section 2(b) should be "balanced" when applying the *Lessard* framework and *Wigmore* test,[74] but did not explicitly incorporate constitutional standards into these doctrines, which demand less strict justification for infringing source confidentiality than the *Oakes* test would.

In the words of Justice Abella dissenting in *Vice*, the court has for twenty-five years avoided giving any "distinct constitutional content to the words 'freedom of the press' in s.2(b)."[75] To the chagrin of other dissenting SCC judges[76] and many academic commentators,[77] Canadian journalists therefore do not have a constitutional right to protect the identity of their sources. News gathering activities likewise receive no distinct constitutional protection. In the words of Benjamin Oliphant, "Canadian courts have tended to treat [the "freedom of press" guarantee in] s.2(b) as one of the Charter's few superfluities."[78]

This approach starkly contrasts with that of the European Court of Human Rights [ECtHR]. In the 1996 decision *Goodwin v United Kingdom*,[79] the ECtHR explicitly held that the right to free expression created by article 10(1) of the *European Convention on Human Rights*[80] protects the ability of journalists to shield the identity of their confidential sources. Because protection of sources has been assigned rights status, any limit must pass the ECtHR's proportionality test to be lawful. The proportionality test resembles the *Oakes* test. It requires all legal powers to identify sources be prescribed by law, pursue a legitimate aim, and be a means of pursuing that legitimate aim that is "necessary in a democratic society."[81]

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73. Jamie Cameron, "Does Section 2(b) Really Make a Difference? Part 1: Freedom of Expression, Defamation Law, and the Journalist-Source Privilege" (2010) 6:6 CLPE Research Paper 28/2010 at 136; *Lessard*, *supra* note 41 at 429; *National Post*, supra note 8 at para 41.

74. See *National Post*, *supra* note 8 at paras 5, 26, 64; *Lessard*, *supra* note 41 at para 24.

75. *Vice*, *supra* note 41 at paras 109–171 (dissent by Abella J, with Wagner CJ, Karakatsanis J, and Martin J concurring).

76. See e.g. *Lessard*, *supra* note 41 at paras 56–85 (dissent by McLachlin J).

77. See Benjamin Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013) 59:2 McGill LJ 283; *Cameron*, *supra* note 73; Simon Kupi, "Charter-ing a Course: National Post, Journalist-Source Privilege and the Future of Canada's Charter 'Press Clause'" (2011) 69:2 UT Fac L Rev 78; and Gerald Chan, "Transparency Confined to the Courthouse: A Critical Analysis of Criminal Lawyer's Assn., C.B.C. and National Post" (2011) 54:7 SCLR 169.

78. Oliphant, *ibid* at 285.

79. *Goodwin v United Kingdom,* [1996] 22 EHRR 123, 1 BHRC 81, 22 EHRR 123, [1996] ECHR 16 [*Goodwin*].

80. General Assembly of the United Nations, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No 5, 213 UNTS 222 (1950) at 230.

81. *Goodwin*, *supra* note 79.

IV. SUFFICIENCY OF AVAILABLE PROTECTIONS FOR JOURNALISTS

Part I of this article outlined a wide variety of legal powers that can be used to compel resistant witnesses and obtain otherwise sheltered evidence in Canada. All of these powers can, and often are, used to determine the identity of a journalist's confidential source. There are only two doctrines at common law that shield journalists from the exercise of these powers, both of which were outlined in Part II. The *Lessard* framework governs applications by the police for search warrants and production orders relating to the media, and the *Wigmore* test allows journalists to establish privilege with respect to their communications with sources. Part III of this article discussed whether these doctrines sufficiently protect journalists' interests in maintaining their sources' confidentiality in light of the fact that a vibrant liberal democracy depends on a journalist's ability to protect such confidentiality.

In 2006, Janice Brabyn observed that doctrines like the *Wigmore* test and *Lessard* framework rarely provide sufficient protection. Unless doctrines that protect source identity on the basis of a balancing test include a "constitutional imperative or strong presumption in favour of news gatherer/confidential source protection," judges across common law jurisdictions "have proved to be unreliable protectors of news gatherers' sources."[82] Although judges applying doctrines such as these are supposed to be evenly balancing interests, they tend to treat freedom of the press as a mere exception or qualification to other more established interests and procedures. In the words of Brabyn, judges see other interests "with greater favour than they do the confidentiality needs of news gatherers."[83]

Although Brabyn's observations predated *National Post* and were not focused exclusively on Canada, they now seem prophetic. Simon Kupi has more recently described Canada's common law protections as "essentially skeletal"[84] and stated the *Wigmore* test is "an approach . . . ill-suited to journalist-source privilege, past its prime as a feasible test and entirely uncertain in its balancing-oriented application."[85] These remarks are echoed by Jamie Cameron, who said the *Wigmore* test and *Lessard* framework mean "expressive freedom remains at risk."[86] Quite simply, these academics say the tests are insufficient.

The cases applying the *Lessard* framework and *Wigmore* test, which are rarely decided in favour of the journalist, demonstrate the accuracy of Kupi's and Cameron's observations. For example, in the city of Montreal, an estimated 98 per cent of all applications for a warrant to investigate a journalist submitted by the police to a justice of the peace are granted.[87] Also, according to David Paciocco (now a justice) and Lee Stuesser, the *Wigmore* test is stringent and journalist–source privilege is only found "in rare cases."[88]

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82. Brabyn, *supra* note 8 at 929.

83. *Ibid*.

84. Kupi, *supra* note 77 at 90.

85. *Ibid* at 96.

86. Cameron, *supra* note 73 at 156.

87. Canada, Parliament, *House of Commons Debates*, 42-1, No 148 (11 May 2017) at 1715 (Deputy Speaker; Canada, Parliament, *House of Commons Debates*, 42-1, No 148 (9 June 2017) at 1320 (Brigitte Sansoucy) [collectively, Parliamentary Debates].

88. David M Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011) at 256.

Given how apparently easy it is to obtain search warrants and how difficult it is to establish journalist–source privilege, it is not surprising that there have been high-profile abuses of police powers against journalists.

In 2010, police in the province of Quebec initiated a corruption investigation into the management of public construction contracts. As the investigation continued, several journalists published stories on the investigation. It became clear that someone within the police service was leaking information to journalists.[89] In response, in September 2013, the Sûreté du Québec (Quebec's provincial police force) launched a criminal investigation into an alleged "disclosure of the existence and content of communications intercepted by wiretapping."[90] The police logged the incoming and outgoing call data of six journalists, allowing them to see who the journalists were calling, when they were calling, and from where they were calling.[91] Over the next three years, twenty-four surveillance warrants were issued and executed against journalists. None of the journalists were alleged to have committed crimes; the warrants were aimed only at identifying confidential sources.

As the surveillance came to light in 2016, public and political uproar followed.[92] Canada's rating in Reporters Without Borders' World Press Freedom Index dropped out of the top twenty for the first time.[93] The province of Quebec established a commission of inquiry—the Chamberland Commission—to look into the matter.[94] The commission concluded that the surveillance was not an isolated incident.[95] Like Kupi and Cameron, it also determined that Canadian common law provides insufficient protection to journalists preserving their sources' confidentiality and recommended that Canadian legislators act quickly to remedy the situation.[96] It is clear that the common law inadequately protects journalists' ability to maintain their sources' confidentiality.

V. THE *JOURNALISTIC SOURCES PROTECTION ACT*

Federal legislators responded to the Chamberland Commission's call. On November 22, 2016, federal opposition senator Claude Carignan introduced the bill that would become the *Journalistic Sources Protection Act*.[97] It quickly passed through both houses of Parliament with bipartisan support and received royal assent on October 18, 2017. This part of the article

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89. See *Côté c R*, 2018 QCCQ 547 at paras 4–176 [*Côté*].

90. In contravention of the *Criminal Code*, *supra* note 29, s 193(1).

91. Quebec, "Commission d'enquête sur la protection de la confidentialité des sources journalistiques: Report Overview" (2017) at 10, online (pdf): *Gouvernement de Québec* <www.cepcsj.gouv.qc.ca/fileadmin/documents_client/documents/CEPCSJ_Rapport_Accessible.pdf> [Quebec Commission].

92. For example, see Parliamentary Debates, *supra* note 87; Kamila Hinkson, "La Presse Columnist Says He Was Put under Police Surveillance as Part of 'Attempt to Intimidate'" (31 October 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/journalist-patrick-lagace-police-surveillance-spying-1.3828832>.

93. Reporters Without Borders, "Top Marks for Press Freedom Leadership Abroad but Room for Improvement at Home" (2017), online: <https://rsf.org/en/canada>.

94. Quebec Commission, *supra* note 91.

95. *Ibid*, 10–11.

96. *Ibid*, 4.

97. JSPA, *supra* note 13.

describes the JSPA, which has two parts: one that displaces the *Wigmore* test and one that alters the *Lessard* framework.

A. Section 39.1 Objections: The New *Wigmore* Test

Section 2 of the JSPA displaces the *Wigmore* test by inserting section 39.1 into the *Canada Evidence Act* (CEA).[98] Section 39.1 creates a procedure whereby journalists can resist "the disclosure of information or document before a court, person or body with the authority to compel" such disclosure.[99] Journalists therefore no longer have to rely on the *Wigmore* test to establish privilege; they can instead file a "section 39.1 objection" if the requested "information or document identifies or is likely to identify a journalistic source."[100]

The section 39.1 objection test is essentially a modified *Wigmore* test. The first two *Wigmore* factors ensure that only communications between a journalist and a *confidential* source can be privileged.[101] The third *Wigmore* factor establishes that communication between a source and journalist is more likely to be privileged the more *professional* the journalist is.[102] This is mirrored in the section 39.1 objection test, which applies only to communications between "journalists" and "journalistic sources," both of which are narrowly defined. "Journalist" is defined as "A person whose main occupation is to contribute . . . to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person."[103] It excludes hobbyist bloggers but includes many, like freelancers, who work outside traditional media organizations. "Journalistic source" is also narrowly defined, applying only to sources that "confidentially transmit information to a journalist on the journalist's undertaking not to divulge" their identity.[104] The fourth *Wigmore* factor sees the court weighing the public interest served by protecting the source's confidentiality with the public interest served in "getting at the truth."[105] This component of the test is also paralleled in the section 39.1 objection test, which asks whether "the public interest in the administration of justice [which is equated with "getting at the truth"] outweighs the public interest in preserving the confidentiality of the journalistic source."[106]

Although the section 39.1 objection test and *Wigmore* test are similar, the section 39.1 objection test is more journalist-friendly in two important ways. First, the burden of proof lies on the journalist asserting privilege in the *Wigmore* test,[107] but it lies with the party requesting disclosure in the section 39.1 objection test.[108] If a journalist files an objection, there is a presumption in favour of confidential source protection. Such a presumption is a feature

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98. *Canada Evidence Act*, RSC 1985, c C-5 [CEA].

99. *Ibid*, s 39.1(2).

100. *Ibid*.

101. *National Post*, *supra* note 8 at para 56.60.

102. *Ibid* at para 57.

103. CEA, *supra* note 98, s 39.1(1).

104. *Ibid*.

105. *National Post, supra* note 8 at para 53.

106. CEA, *supra* note 98, s 39.1(7)(b).

107. *National Post, supra* note 9 at 60.

108. CEA, *supra* note 98, s 39.1.

Brabyn opined is necessary to properly protect source identity in the absence of constitutional protection.[109] Second, the party seeking disclosure must prove that "the information or document cannot be produced in evidence by any other reasonable means" in addition to having to prove that "the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source."[110] Requiring the party seeking disclosure to prove both criteria prior to obtaining a disclosure order greatly increases source identity protection.

B. Section 3 of the JSPA: The New *Lessard* Framework

As was discussed in Part I(B) of this article, warrant-granting powers are mostly outlined in the *Criminal Code*.[111] To obtain a warrant, wiretap, or production order (collectively, "warrants"),[112] law enforcement must satisfy a judge or justice of the peace that all statutory preconditions outlined in the warrant-granting provisions in the *Criminal Code* have been met. This is all that is typically required. The *Lessard* framework governs applications for all warrants relating to the media and imposes additional hurdles on the applicant party. It requires applicants to satisfy judges or justices of the peace that all statutory preconditions have been met *and* that "the media's right to privacy in gathering and disseminating the news" does not outweigh "the state's interest in the investigation and prosecution of crimes."[113] It also encourages judges or justices of the peace to "exercise discretion" in deciding whether to give the media notice of the application and whether to impose conditions on the execution of the warrant.[114] Although the *Lessard* framework expands protection for journalists, it allows warrants against journalists to be presumptively issued on an *ex parte* basis. This means it is likely that journalists will have their phones wiretapped and the identity of their sources revealed without their knowledge and without an opportunity to argue against the warrant's issuance.

Section 3 of the JSPA alters the *Lessard* framework by amending the *Criminal Code*. The new section 488.01-2 framework is more journalist-friendly in two important ways. First, it creates a stricter test for issuance of all warrants under the *Criminal Code* against journalists. Any warrant "relating to a journalist's communications or an object, document or data relating to or in the possession of a journalist" may now only be issued if (1) "there is no other way by which the information can reasonably be obtained" and (2) "the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information."[115] Importantly, warrant applications now must go before a judge. Warrants against journalists may be issued only by judges; justices of the peace are no longer able to issue them.[116]

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109. Brabyn, *supra* note 8 at 929.

110. CEA, *supra* note 99, s 39.1(7).

111. *Criminal Code*, *supra* note 29.

112. For the sake of simplicity, I use the term "warrants" to describe all warrants, wiretaps, and production orders that can be issued under the *Criminal Code*.

113. *Vice*, *supra* note 41 at para 82.

114. *Ibid*.

115. *Criminal Code*, *supra* note 29, ss 488.01(3), 488.02(5).

116. *Ibid*, s 488.01(2).

Second, the section 488.01-2 framework creates a procedure that gives journalists an opportunity to effectively challenge warrants *before* any information that could reveal the identities of sources is accessed by law enforcement. Although warrant applications are still presumptively made on an *ex parte* basis,[117] judges may request that a special advocate attend the application to "present observations in the interests of freedom of the press."[118] More importantly, if a warrant has been issued and executed, all documents obtained are to be immediately sealed.[119] Law enforcement cannot examine or reproduce these documents without further authorization.[120] The journalist is then able to apply to have the documents permanently sealed if disclosure "is likely to identify a journalistic source."[121] The judge then hears the matter and decides, only after hearing from the affected journalist, whether the document should be disclosed.[122] Disclosure requires that the judge be satisfied "there is no other way by which the information can reasonably be obtained" and "the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information."[123]

VI. SHORTCOMINGS OF THE *JOURNALISTIC SOURCES PROTECTION ACT*

The JSPA was overwhelmingly praised in the weeks following its enactment.[124] The measures it introduced clearly improve the legal protection available to journalists shielding the identity of their confidential sources. Although the JSPA gives journalists cause for optimism, it has three potential shortcomings that will be discussed in this part of the article.

A. An Applicability Gap

The JSPA amends the CEA and the *Criminal Code*. Its reach is therefore limited to proceedings to which the CEA and *Criminal Code* apply. This leaves an applicability gap wherein the maladroit common law frameworks continue to be the only protection available to journalists.

As was discussed in Part I of this article, legal authority to compel journalists to reveal the identity of their sources derives from the rules of civil and criminal procedure. Canadian

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117. *R v Canadian Broadcasting Corporation*, 2018 ONSC 5856, 150 WCB (2d) 418 [*CBC*].

118. *Criminal Code*, *supra* note 29, s 488.01(4).

119. *Ibid*, s 488.02(1).

120. *Ibid*, s 488.02(2).

121. *Ibid*, s 488.02(3).

122. *CBC*, *supra* note 117 at paras 6 & 20.

123. *Ibid*, s 488.02(4)–(7).

124. See National Union of Journalists, "Canada Strengthens the Protection of Journalists' Sources" (26 October 2017), online: <www.nuj.org.uk/news/canada-strengthens-the-protection-of-journalists-sources>; Justin Safayeni, "The Journalistic Sources Protection Act: A Primer" (26 October 2017), online: *Ryerson University Centre for Free Expression Blog* <www.cfe.ryerson.ca/blog/2017/10/journalistic-sources-protection-act- primer>; Lisa Taylor et al, "Here's What You Need to Know about Canada's New Shield Law for Confidential Sources" (23 October 2017), online: *J Source Blog* <http://j-source.ca/article/understanding-canadas- new-shield-law-confidential-sources/>.

criminal procedure is largely codified in the *Criminal Code* and is therefore totally within the purview of the JSPA. Civil procedure, however, derives from each respective province's Rules of Court. These Rules work in tandem with the common law rules of evidence and *applicable* evidence acts to establish the procedure for compelling evidence.

Either the federal CEA or a provincial evidence act (each province has its own evidence act[125]) will apply to any given civil action. The federal CEA applies to "all civil proceedings and other matters whatever respecting which Parliament has jurisdiction."[126] It therefore applies to all actions before courts created by federal statute, all actions before other courts determining matters under federal laws, and some actions before other courts that focus on a subject matter obviously within the constitutional competence of the federal government.[127] Each respective province's evidence act applies to every other action, which includes most civil actions before provincial courts.

The section 39.1 objection test, which is codified in the CEA, therefore does not apply to most civil actions because they focus on matters neither under federal law nor within the constitutional competence of the federal government. Where the section 39.1 objection test does not apply, journalists only have one doctrine to resist being compelled to disclose the identity of their confidential sources: the *Wigmore* test. It is not difficult to conceive of hypothetical situations where this issue would arise. Imagine a situation where a journalist living in Saskatchewan relied on a confidential source to publish an article about a local politician. During the interview, the journalist recorded the source's name and contact information into a notebook. After publication, the politician took offence and initiated a defamation action against the journalist. In accordance with Saskatchewan's Rules of Court, the journalist was forced to provide the politician with a list of every document in their possession "that may be relevant to a material issue."[128] After receiving the list, which necessarily includes the notebook, the politician demanded a copy of the notebook's contents.[129] The journalist could not resist the request by recourse to the CEA, which would have no bearing on the defamation action; the only option would be to try to establish privilege on the basis of the *Wigmore* test.[130]

Considering the problems with the *Wigmore* test outlined in Part III, this is particularly troubling. Furthermore, if the journalist were unable to establish privilege on the basis of *Wigmore* yet continued to resist production of the notebook, they may eventually be found in contempt of court.[131]

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125. See *The Evidence Act*, SS 2006, c E-11.2 of the province of Saskatchewan.

126. CEA, *supra* note 98, s 2.

127. Canadian federalism is characterized by a "division of powers" that assigns legislative powers and responsibilities between the federal and provincial governments. Generally speaking, provincial governments are constitutionally prohibited from legislating in an area of federal competence, like criminal law. The federal government is constitutionally prohibited from legislating in an area of provincial competence, like health care (See generally Hogg, *supra* note 68).

128. *Saskatchewan Rules*, *supra* note 20 at 5-5.

129. *Ibid* at 5-11.

130. The journalist, however, is more likely to be able to establish privilege based on the *Wigmore* test because the hypothetical proceedings are still at the discovery phase. See *Globe & Mail, supra* note 5 at para 58.

131. For a discussion of how issues of contempt are to be adjudicated in situations such as these, see *St Elizabeth Home Society v Hamilton (City)*, 2008 ONCA 182, 291 DLR (4th) 338.

B. The Section 488.01(5) Exception

The JSPA alters the *Lessard* framework by amending the *Criminal Code*, creating a new framework that governs all applications for warrants, wiretaps, or production orders relating to the media. Although it is clearly more journalist-friendly than the previous *Lessard* framework, the section 488.01-2 framework contains an exception that may be exploited as a loophole. Subsection 488.01(5) the *Criminal Code* states:

> (5) Subsections (3) and (4) do not apply in respect of an application for a warrant, authorization or order that is made in relation to the commission of an offence by a journalist.

The section 488.01-2 framework does not apply if the warrant concerns alleged wrongdoing on the part of the targeted journalist. While section 488.01(6) grants judges discretion to protect journalistic sources in such instances, it is clear that the improved protections afforded by the section 488.01-2 framework become irrelevant.

Although journalists should not benefit from increased procedural protections when they are accused of criminal wrongdoing in their private lives, the broad wording of section 488.01(5) leaves open a loophole that could be exploited by some law enforcement officers wanting to uncover the identity of a confidential source. Imagine a situation where a confidential source gives a journalist confidential documents from Immigration, Refugees and Citizenship Canada that prove two immigrants were wrongfully deported. The journalist publishes a story, and law enforcement becomes eager to determine the identity of the source. Such hypothetical officers could bypass the section 488.01-2 framework protections by premising their warrant application on a questionable charge against the journalist.

Canada's *Security of Information Act*[132] criminalizes the act of intentionally "receiving any secret official code word, password, sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time he receives it, that [it] is communicated to him in" an illegal manner, such as by way of an unauthorized leak of confidential information.[133] If law enforcement were to premise the warrant application on the source's alleged illegal activities—the disclosure of the "secret" documents to the journalist[134]—the section 488.01-2 framework would apply. But if law enforcement were to premise the warrant application on an alleged contravention of the *Security of Information Act* on the part of the journalist—the receiving of "secret" documents[135]—the section 488.01-2 framework apparently does not apply. The journalist would be left with only the insufficient protections available at common law.

The broad wording of the section 488.01(5) exception, combined with the existence of broadly worded offences that could be used to criminalize news gathering behaviour, means there is potential for abuse.

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132. *Security of Information Act,* RSC 1985, c 0-5 [SIA].

133. *Ibid*, s 4(3).

134. In contravention of SIA, *supra* note 132, s 4(1).

135. In contravention of SIA, *supra* note 132, s 4(3).

C. The Hazards of Balancing

Like the *Lessard* framework and *Wigmore* test before them, the new protections created by the JSPA rely on a balancing test. Disclosure of a confidential source's identity ultimately hinges on a judge's determination of whether the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

Judges[136] and academics[137] have noted that balancing tests lead to uncertainty, which discourages sources from speaking to journalists. The law of protection of sources is premised on the notion that sources are disinclined to speak to journalists who cannot guarantee their anonymity. This premise assumes sources consider the state of the law—and whether court processes could be used to reveal their identity—before deciding to offer information to a journalist. If protection is contingent and uncertain—if no one knows whether a court would eventually compel disclosure—sources will rarely speak to journalists. In this way, a law that gives uncertain protection may be no better than a law that gives no protection.

As Kupi notes, a "test that provides some level of *certainty* for sources" is required to mitigate this chilling effect on sources.[138] Balancing tests are case and fact specific. Their results are difficult to predict, which leaves both journalists and sources unsure of whether confidentiality will be maintained. Although the shifted burden of proof helps ease uncertainty, the persisting focus on balancing means the risk of an uncertainty chill remains.

D. The Path Forward

The JSPA is a relatively new piece of legislation and its impact largely remains to be seen. It did not appear in a single published decision until October 2018[139] and has only been considered by the SCC once.[140]

The scarce case law means the effects of these potential shortcomings, and the JSPA more generally, remain to be seen. The applicability gap may plague journalists, or supplemental provincial legislation may be enacted to round out source protection. The section 488.01(5) exception may be egregiously exploited, or the provision may be interpreted in a manner that prevents such abuse. The balancing test may leave sources reluctant to speak to journalists, or the shifted burden of proof may leave them encouraged. Although there are some areas of concern and it is not yet clear whether the JSPA will in itself sufficiently address the troubling deficits in the protection available at common law,[141] there is still reason for journalists to be optimistic.

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136. *Bransburg v Hayes*, 408 US 665 (1972) at para 702: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem . . . For them, it would appear that only an absolute privilege would suffice."

137. See Kupi, *supra* note 77.

138. *Ibid* at 109.

139. See *CBC*, *supra* note 117 at para 7.

140. The JSPA has only appeared in four written decisions: *CBC*, *supra* note 117; *Côté*, *supra* note 89, *Côté c R*, 2018 QCCS 1138; and *Denis c Côté*, 2018 QCCA 611; see also *Denis*, *supra* note 8.

141. Which was discussed in Part III of this article.

VII CONCLUSION

A healthy democracy requires an informed public. An informed public depends, at least partially, on journalists' ability to protect their sources' confidentiality. Without assurances of confidentiality, many important stories like the Sponsorship Scandal would never have come to light.

In Canada, the rules of criminal and civil procedure create many powers that can be used to reveal confidential sources' identities. Journalists and sources have little power to resist these powers at common law. As was demonstrated by the events that led to the creation of the Chamberland Commission, the two common doctrines of source protection—the *Lessard* framework and the *Wigmore* test—are unacceptably deficient.

In October 2017, federal legislators responded to this deficit and enacted the JSPA. It was widely praised and clearly increases the legal protection available to journalists. It, however, has three potential shortcomings: (1) It does not apply to most civil actions, (2) it contains an exception that may be abused, and (3) its focus on balancing may lead to an uncertainty chill. It is not yet clear how problematic these issues will be because the JSPA has not yet received much judicial attention.

Canadian legislators, academics, and freedom-of-expression advocates must carefully follow JSPA jurisprudence and advocate for legislative change if the cases begin to go awry. The JSPA is a clear improvement and gives journalists cause for optimism, but it also gives cause for vigilance. A healthy Canadian democracy depends on it.