



## **Gendering the Duty to Consult: How Section 35 and the Duty to Consult Are Failing Aboriginal Women**

### **KEY FINDINGS**

The constitutional duty to consult of the Constitution Act has adverse and gendered effects on Aboriginal women, specifically that:

1. The gendered discrimination inherent in the *Indian Act* resulted in Indigenous women and their descendants making up the majority of the off-reserve population, hence, the consultative and substantive limitations of the jurisprudence affecting off-reserve populations disproportionately affects women and their descendants who are left unconnected to the land and resource-based rights developed under section 35.
2. The interpretation of Aboriginal rights as *sui generis rights* without reference to clearer standards tends to create narrowly focused and rather limited rights while affording judges a large margin of discretion which may not be exercised in a helpful manner given the emergent state of knowledge regarding Indigenous legal principles and perspectives. To date, this has resulted in the exclusion of socio-economic rights of Aboriginal women.
3. The retrospective concern with historical practices tends to be at the detriment of women, who are often confined to historical gender roles that vary greatly, are difficult to prove and are not responsive to harms imposed by contemporary legal and governance practices.
4. Characterization of Aboriginal rights as being communal rather than individual links Aboriginal rights closely with reserve governance structures, where power relationships are unlikely to favour women's interests.

### **INTRODUCTION**

This paper seeks to demonstrate that the Aboriginal rights jurisprudence is failing Aboriginal women. The focus of the duty to consult on land and resources related to land, as well as on representational structures created by the Indian Act, has a gendered discriminatory effect on Aboriginal women and girls. We outline the jurisprudential scope

of the duty to consult and its conceptual limitations. We then consider the gender implications of the current duty-to-consult jurisprudence. We conclude by revisiting the decision of the Supreme Court of Canada in *Native Women's Association of Canada* (1994) and argue that the duty to consult should be extended to specifically cover the constitutional rights and socio-legal interests of Aboriginal women.

### **METHODOLOGY**

*Gendering the Duty to Consult: How Section 35 and the Duty to Consult Are Failing Women*, is the first paper in what will be a trilogy of papers all written in consultation with the New Brunswick Aboriginal Peoples Council. Expanding and elaborating on Hughes and Stewart's, *Urban Aboriginal People and the Honour of the Crown*, this paper reviews case law and academic legal literature on section 35 and the duty to consult. The legal research collected and the arguments put forth in this paper will provide the academic context for a second paper exploring two case studies of Missing and Murdered Indigenous Women in Atlantic Canada as well as a third paper grounded in interviews with female Indigenous political leaders.

### **MAIN FINDINGS**

This paper examined the gendered dimensions of Aboriginal rights enshrined in section 35. Despite the significant advocacy of Aboriginal women in favour of the adoption of section 35 in the *Constitution Act, 1982*, the provision has done little to protect the rights of Aboriginal women. This first paper argues that the history of section 35 demands a gendered interpretation and application. Aboriginal rights as developed in the jurisprudence has assumed masculine qualities that has adversely impact Aboriginal women. The governance structures of off-reserve populations including bodies such as native councils, women's organizations such as the Native Women's Association of Canada and status-blind organizations like friendship centres are routinely ignored by governments and courts, again with detrimental impacts on Aboriginal women, the majority of which reside off-reserve. This paper outlined the law as it stands as well as identified some of its shortcomings when analysed through a gendered lens. The subsequent papers in the trilogy will conceptualize section 35 so that it may better protect Aboriginal women and their socio-economic rights.

### **CONCLUSIONS / POLICY RECOMMENDATIONS**

This paper envisages section 35(4) as having the potential to enhance the legal and socio-economic status of Aboriginal women against the Canadian state. It makes two policy recommendations. First, that the section 35 jurisprudence would be improved by further developing the interpretation and application of subsection 35(4), which guarantees Aboriginal and treaty rights equally to men and women. Second, that the duty to consult be extended to explicitly include all decisions regarding the political and social rights of Aboriginal women, particularly those residing off-reserve.

**For more information on this project visit:**

**ABOUT US:**

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The Urban Aboriginal Knowledge Network, the UAKN, is a community driven research network focused on the Urban Aboriginal population in Canada. The UAKN establishes a national, interdisciplinary network involving universities, community, and government partners for research, scholarship and knowledge mobilization. For more information visit:

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