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GENDERING THE DUTY TO CONSULT
How Section 35 and the Duty to Consult Are Failing Aboriginal Women

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Authors and Affiliations:
Jula Hughes, Elizabeth Blaney, Roy Stewart, University of New Brunswick

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GENDERING THE DUTY TO CONSULT
How Section 35 and the Duty to Consult Are Failing Aboriginal Women

Jula Hughes, Elizabeth Blaney and Roy Stewart*

This paper seeks to show that the Aboriginal rights jurisprudence failing Aboriginal women. The focus of the duty to consult on land and resources related to land, and on representational structures created by the Indian Act, have a gendered discriminatory effect on Aboriginal women and girls. We draw on our earlier work on the duty to consult and its application to off-reserve and non-status populations to 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.

1. Introduction

The legal recognition of constitutional Aboriginal rights in Canada, particularly since the development of the constitutional duty to consult, has reached a new high water mark.[1] The recent recognition of Aboriginal title lands in the *Tsilhqot'in* case[2] finally

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* Dr. Jula Hughes is a Professor of Law at the University of New Brunswick; Dr. Elizabeth Blaney is the Director of the New Brunswick Aboriginal Peoples Council; Roy Stewart is an Associate at Burchells LLP in Halifax. The authors gratefully acknowledge the support and leadership of Wendy Wetteland and the New Brunswick Aboriginal Peoples Council and of Patsy McKinney and Under One Sky; the support of the Social Sciences and Humanities Research Council; the Urban Aboriginal Knowledge Network (Atlantic); and the Faculty of Law at UNB. We are indebted to our research assistants Ashley Godfrey, Blaise Roberts and Remy Ventura, UNB Law.

[1] A note on terminology: In this paper, we use the term "Aboriginal" to collectively describe populations who assert Aboriginal rights under s. 35 of the *Constitution Act, 1982*, "status Indians" to describe a legal category of recognition by the government of Canada of status holders under the *Indian Act*, "non-status Indian" to

made good on the original promise in *Delgamuukw* that restoration of lands was going to be part of reconciliation.[3] Aboriginal rights to hunt, fish, harvest and trade have all been recognized as existing rights under section 35 of the *Constitution Act*, 1982.[4] To what extent these rights translate into actual improvements in the lives of Aboriginal people in Canada is much less clear. As is the case in many rights contexts, there is a disconnect between the recognition of rights and a delayed an uneven accrual of the benefit of rights.[5]

How else can it be explained that news of litigation successes of Aboriginal people occur surrounded by news items demonstrating the ongoing experience of extreme poverty, violence, marginalization and exclusion? In particular, there are grave concerns that the situation of Aboriginal women in Canada is not improving, but actually deteriorating, as regards rising rates of incarceration and ongoing economic deprivation for many. This means that a group that constitutes the

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describe a legal category of people for whom the federal government has jurisdictional responsibilities under s 91(24) of the *Constitution Act, 1867*, but who are not currently recognized under the *Indian Act, "*Indigenous" to collectively describe populations with rights under the United Nations Declaration on the Rights of Indigenous Peoples or to characterize Indigenous (as opposed to settler) law. We use "Aboriginal" and "Indigenous" interchangeably where a collective term is appropriate, but no specific legal framework is referenced. We acknowledge that these collective legal terms may or may not be the chosen terminology of Wolastoqiyik, Mi'kmaq, Passamaquoddy, Métis, and non-territorial Indigenous people residing in New Brunswick. When speaking of individual identities, we have sought to use preferred terms of self-identification.

[2] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

[3] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

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

[5] Wanda J Blanchett, Vincent Mumford & Floyd Beachum, "Urban School Failure and Disproportionality in a Post-Brown Era Benign Neglect of the Constitutional Rights of Students of Color" (2005) 26:2 Remedial and Special Education 70; Mary Ellen Turpel, "Patriarchy and Paternalism: The legacy of the Canadian state for First Nations women" (1993) 6 Can J Women & L 174.

majority of Aboriginal people may be left behind in the jurisprudential development of Aboriginal rights, as women constitute 52% of the Aboriginal population.[6] The female Aboriginal prison population is at an all-time high.[7] The Inter-American Human Rights Committee has issued a report on missing and murdered Indigenous women and girls,[8] and the intergenerational impact of the residential school system on Aboriginal women and girls has been forcefully documented by the Truth and Reconciliation Commission on Indian Residential Schools.[9] Too many are still waiting for a rights discourse that affirms, protects and implements Aboriginal rights, treaty rights and land claims in a manner that connects meaningfully with their identities, goals, aspirations and challenges.

In this paper, we seek to demonstrate that the Aboriginal rights jurisprudence is suffering from a case of masculinity. The focus of the duty to consult on land and resources related to land, and on representational structures created by the *Indian Act*, have a gendered discriminatory effect on Aboriginal women and girls. Beginning with the decision in *Native Women's Association of Canada v Canada*, where the Supreme Court denied a *Charter* equality claim for the Native Women's Association of Canada to be funded for participating in the

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[6] Statistics Canada. "Aboriginal Population Profile" *Statistics Canada,* (2011) Online: http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/aprof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&SearchPR=01&A1=All&B1=All&Custom=&TABID=1

[7] Gillian Balfour, "Do law reforms matter? Exploring the victimization–criminalization continuum in the sentencing of Aboriginal women in Canada" (2013) 19:1 International Review of Victimology 85.

[8] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada* (2015).

[9] Murray Sinclair, *Honouring the Truth, Reconciling for the Future* (Winnipeg: Truth and Reconciliation Commission, 2015).

constitutional negotiations leading up to the Charlottetown Accord,[10] the courts have consistently failed to counterbalance these effects with any development of an Aboriginal women's equality jurisprudence.

The paper proceeds in three parts. First, we draw on our earlier work on the duty to consult and its application to off-reserve and non-status populations to outline the jurisprudential scope of the duty to consult and its conceptual limitations.[11] Second, we consider the gender implications of the current duty-to-consult jurisprudence. Third, we revisit the decision of the Supreme Court of Canada in NWAC and argue that the duty to consult should be extended to specifically cover the constitutional rights and socio-legal interests of Aboriginal women.

2. The Duty to Consult

We have previously written about the duty to consult and its current interaction, or lack thereof, with the urban Aboriginal population.[12] Our discussion paper examined the legal doctrine of the duty to consult, and with the guidance of community partners, explored the conceptual and practical challenges of making the duty work for urban Aboriginal people. We viewed this as of critical importance because despite some common assumptions, the majority of Aboriginal people are not born, nor live their lives, on remote *Indian Act* reserves; rather, the majority reside off-reserve and Aboriginal people in Canada are urbanizing at a rapid rate. The legal framework for Aboriginal consultation and governance has not kept up

[10] *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627. (NWAC)
[11] Jula Hughes & Roy Stewart, "Urban Aboriginal People and the Honour of the Crown - A Discussion Paper" (2015) 66 UNBLJ 263. (Discussion Paper)
[12] *Ibid.*

with the seismic demographic shifts occurring in Canada's Aboriginal population. Even though most Aboriginal people in Canada today live in urban and off-reserve environments, the law continues to proceed on a theory of Aboriginal identity, culture and practice that is focused on reserve lands and political structures created by the *Indian Act*.

The federal government has jurisdiction over Indians and lands reserved for Indians under section 91(24) of the *Constitution Act, 1867*. Using this power, the federal Parliament created the *Indian Act,* which determines who is an Indian for purposes of the *Act*. With this power to determine who is or is not an Indian, the law forced a fractured identity for Aboriginal people. The Crown created a system that resulted in the inability of Aboriginal people to freely choose their identities and membership to their own communities. Rather, the Crown forcefully imposed various labels on Aboriginal peoples depending on a wide-range of arbitrary factors. The artificial construction of different Aboriginal identities in turn caused a host of problems that spanned across generations for Aboriginal people.

One of the arbitrary factors is the gender of one's Aboriginal ancestor. As is well known, marriage between Aboriginal and non-Aboriginal people was treated differently depending on whether the Aboriginal partner was male or female. The spouse and children of Aboriginal men were recognized as Aboriginal, while the spouse and children of Aboriginal women were not so recognized. As well, an Aboriginal woman marrying a non-status man lost her Indian status. Since the loss of status also resulted in a loss of residence on the reserve, a main source of off-reserve and non-status Aboriginal people in Canada is that they are descendants of

the female line. Being female frequently translated into a loss of the connection to the land, at least to those lands set aside as reserves.

In the discussion paper, we reviewed the existing jurisprudence and found that to date, the duty to consult has been related almost exclusively to land and resource rights that are tied to land. However, the academic literature surveyed and the community partners involved in that research both suggested the need for a more inclusive legal doctrine. A broader scope of consultation is urgently required because "Aboriginal people do not abandon their identity at the city gates."[13] This means that Aboriginal people, whether they were born into an urban setting or are leaving their reserve community for the city, should be viewed as having an Aboriginal identity and rights that require consultation.

In addition to the issue of government limiting its consultation practices to decisions that may affect land and its resource-based rights, many urban Aboriginal people face the difficult task of having government recognize them as rights-bearing people that require consultation. This is of particular significance when it comes to off-reserve non-status populations, because this group of Aboriginal people often have their 'Aboriginality' questioned by the government. This recognition crisis causes individuals to be caught in jurisdictional limbo as an Aboriginal person. Federal and provincial governments may refuse to recognize them as belonging to a legal rights bearing group. Policies of exclusion may also result in a refusal of membership in a band to which the individual has an ancestral connection. This, in turn, may result in disenfranchisement from band elections, exclusion from

[13] *Ibid* at 4.

residence on reserve, inability to live near family, and denial of full participation in one's culture.

Intersecting with this issue of identification is the problem of representation. On-reserve leadership often represents their off-reserve membership only marginally, or does not represent them at all.[14] The concern voiced by community organizations serving off-reserve populations is that governance structures established under the *Indian Act* are not well suited to represent the needs and positions of the off-reserve and non-status Aboriginal populations. This frequently results in a lack of services and programs, and in haphazard and uneven funding structures for existing culturally appropriate services and programs.

When government fails to consult with Aboriginal groups, there is the potential that the Aboriginal rights in question may be irreparably harmed. Off-reserve Aboriginal people are routinely left out, and their rights jeopardized, because of the underdeveloped stage of the jurisprudence on cultural and linguistic rights and because of the focus on land-related rights in the jurisprudence.[15] The lack of consultation with off-reserve populations is borne out in provincial Consultation Policies in Atlantic Canada. Three of the four Provincial Policies are expressly directed at "First Nations" as the Aboriginal groups who require potential consultation. This leaves out or creates uncertainty for off-reserve Aboriginal populations and their organizations: will a government view them as rights-bearers

[14] Hughes, Jula, Roy Stewart & Anthea Plummer. *Non-Status and Off-Reserve Aboriginal Representation in New Brunswick: Speaking for Treaty and Claims Beneficiaries* (Fredericton: UAKN, 2015).
[15] *Discussion Paper, supra* note 11 at 11.

requiring consultation? And if they are so viewed, who will represent them in consultation processes?[16]

The organizations providing services off-reserve that contributed to the discussion paper described the wide range of services offered, from education and employment to health, and argued that they should be consulted when governmental action is expected to affect their services and programs. These services and programs relate to potential or emergent positive rights.[17] Further, when urban Aboriginal organizations *are* consulted, they are often not funded adequately to participate in processes that are lengthy or highly technical.[18] As a result, Aboriginal rights, particularly cultural, linguistic, social and economic rights are at risk of being irreparably harmed.

In sum, our discussion paper identified three obstacles in the jurisprudence and governmental practice to engaging the duty to consult for the benefit of urban Aboriginal populations: a preoccupation with land and resource-based rights; the

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[16] The authors found that Newfoundland and Labrador's consultation policy applies to off-reserve Aboriginal organizations asserting land claims. Even though inclusive of off-reserve peoples, again, consultation is limited to land rights.

[17] Positive rights require government to take some affirmative step by providing a service or funding a project. It is well accepted in the legal literature that the denial of positive rights has detrimental gendered effects (Brodsky & Day, 2002). By contrast, the jurisprudence on the duty to consult predominantly entertains rights of non-interference with property interests, clear examples of negative rights (Newman, 2014). Negative rights are rights to be left alone by the state and tend to be of equal importance to men and women and to the enfranchised and disenfranchised.

[18] See generally, *Discussion Paper, supra* note 11. A more recent example is a $5000 grant to the New Brunswick Aboriginal Peoples Council to participate in a consultation on the Energy East pipeline project, a sum that would not cover travel costs for member consultation, let alone the retainer of experts and/or facilitators. Letter from Wendy Wetteland, Chief of the NBAPC to the Honourable James Gordon Carr, Minister of Natural Resources, Canada dated February 23, 2017. The letter is on file with the authors.

uncertain legal status of the Aboriginal identity of many urban Aboriginal people; and a lack of governmental and judicial awareness of, and willingness to engage with, organizations providing political representation and/or social services to urban Aboriginal people.

3. Gendered Impacts

In this part, we will consider the gendered impacts of the Aboriginal rights jurisprudence in the context of the historical and ongoing discrimination against women and descendants in the female line under the *Indian Act*. In brief, there are at least four elements of the jurisprudence that have detrimental gendered impacts on Aboriginal women: first, the gender discriminatory recognition regime of the *Indian Act* resulted in women and their descendants making up the majority of the off-reserve population, therefore, the consultative and substantive limitations of the jurisprudence affecting off-reserve populations disproportionately affect women and their descendants; second, the doctrinal characterization of Aboriginal rights as *sui generis* tends to create narrowly focused and rather limited rights while affording judges a large margin of discretion; third, the retrospective gaze and concern with historical practices tend to accrue to the detriment of women; and fourth, the characterization of Aboriginal rights as communal links Aboriginal rights closely to reserve governance structures. We now address each of these issues in turn.

The first point was poignantly made by one of our research partners: everything would have been different if my grandmother had been my

grandfather.[19] Indeed, the life stories of urban Aboriginal people who are descendants in the male line are often considerably different from descendants in the female line. A descendent in the male line might indicate that the original decision to move away from the reserve was prompted by an educational or employment opportunity, and that the relationship with on-reserve relatives and friends remained close. Status under the *Indian Act* tends to be uninterrupted and government officials commonly accept them as Aboriginal and treaty rights holders. By contrast, descendants in the female line often point to lack of resources or family breakdown as the reason for leaving the reserve. Their status was often interrupted and sometimes later restored and their relationships with family remaining on the reserves frequently affected by stigma attached to marrying out. Exercising treaty rights is commonly fraught with legal uncertainty. The majority of members of native councils fall in this latter category. Despite Bill C-31 and Bill C-3, the gender discriminatory regimes of *Indian Acts* over time continue to linger and are now expected to persist beyond the enactment of Bill S-3.[20] Limited look-back in the legislation, second generation cut-off, presumptions about unknown fathers, under-inclusive membership codes, impoverished resource bases of many reserves and attitudinal barriers all conspire to perpetuate gender discrimination. This results in a state of affairs where Aboriginal women and their descendants are more likely to be non-status, more likely to live off-reserve regardless of choice, and more likely to

[19] Patsy McKinney, Director, Under One Sky Headstart, personal conversation.
[20] Galloway, Gloria. "Senators amend legislation aimed at removing sexism from Indian Act", *The Globe and Mail* (24 May 2017), online: <www.theglobeandmail.com/news/politics/senators-amend-legislation-aimed-at-removing-sexism-from-indian-act/article35110342/>.

be denied band membership. The lived reality of many Aboriginal women as non-status, is to reside in urban and off-reserve populations which are left unconnected to the land and resource based rights developed under s 35, which turn out to have a masculine bias. This is evident in the scope or nature of the activities protected under s 35, which is focused on activities such as fishing, hunting and resource extraction, all connected to the imaginary of masculinity.

It is noteworthy in this context that despite their current social and symbolic location, the activities now protected under s 35 were not historically, or are now, only practiced by men. Land and resource rights are extremely important to women. It bears remembering that the grandmother of Aboriginal rights cases in the Supreme Court, *Van der Peet*, was brought by a Sto:lo woman, Dorothy van der Peet, who was selling the catch of her common law spouse.[21] In the same year, a Quebec Algonquin woman, Frida Morin Coté, was a co-appellant in a case involving the right to teach traditional fishing practices.[22] Finally, a foursome of women, Sally, Susan, Mary, and Lovey Behn were co-appellants in the *Behn* case originating in Fort Nelson, British Columbia that dealt with the duty to consult with respect to logging.[23]

In any event, the close jurisprudential connection of Aboriginal rights to land and natural resources remains largely unresponsive to women's interests. More specifically, the gendered impact is accentuated because the jurisprudence focuses on land that courts recognize as not yet taken away. The duty to consult has been

[21] *R v Van der Peet*, [1996] 2 SCR 507.
[22] *R v Côté*, [1996] 3 SCR 139.
[23] *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [2013] 2 SCR 227.

understood as imposing on governments an obligation to engage with Aboriginal populations about future intended deprivations of land and interests in land as part of the justification of rights limitations under s. 35(1). A basic principle of the law of property says *nemo dat quod non habet*, nobody can give what they do not have. Aboriginal populations only have effective claims to consultations where they have something to give, and conversely have no lever to entice government to the negotiation table where they have already been deprived of their interest in land and therefore no longer have anything to give away. The jurisprudence on the duty to consult thus predominantly concerns prospective rights of non-interference with land property interests.

Aboriginal women and their descendants have been displaced in large numbers and have lost or are thought to have lost land rights. The recognition of self-governance through custom membership codes enacted as part of Bill C-31 (the same bill that restored entitlement to status to many female line descendants) has resulted in status and legal rights to land having been cleaved. This interacts unfavourably with case law that sees the land rights of Aboriginal populations as more analogous to private law property rights than public law territorial sovereignty because private law property rights tend to have possessory or site-specific elements.

Gendered effects may further result from the characterization of Aboriginal rights as *sui generis* by which the courts mean that they are qualitatively different

from common law rights.[24] The first case where the Supreme Court of Canada established that Aboriginal rights were *sui generis* was in *Guerin*.[25] In that case, the Musqueam Band had sued the Crown for breach of fiduciary duty, breach of trust, and breach of agency in relation to the Crown's lease of a golf club on terms less favourable than those approved by the Band. It is worth considering the context of the *sui generis* discussion in that case and to trace, at least summarily, its evolution. In *Guerin*, Justice Wilson found that the Crown should be considered a fiduciary. This required a finding that the Crown owed more than a general political and public obligation to the Band. She said:

> The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[26]

At this time, what is *sui generis* is not the right, but the relationship between the Crown and the Band. By the time the *Sparrow* case is decided in 1990, the attention has shifted from the nature of the relationship to the nature of the right:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right … The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin* referred to as the "*sui generis*" nature of aboriginal rights.[27]

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[24] John Burrows and Leonard I. Rotman, "Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta L Rev 9.
[25] *Guerin v The Queen*, [1984] 2 SCR 335.
[26] *Ibid* at para 104.
[27] *R v Sparrow,* 1 SCR 1075 at para 68.

A further important consideration came into view in the *Delgamuukw* decision. There, the Court held that Aboriginal rights are not fully explained by adopting either a common law or an Indigenous law perspective. Instead, the Court analyzed the applicable property law regime as trans-systemic, bearing influences from both common law and Indigenous legal systems.[28]

Despite this, in *Sappier and Gray* the Court articulated a theory of Aboriginal rights as lesser than a common law right. While a common law property right would protect an interest in a resource, the Aboriginal right did not extend to the resource (lumber) but rather was constrained by a particular pre-contact practice of harvest.[29]

Borrows and Rotman rightly noted over two decades ago that the *sui generis* doctrine presented Aboriginal people with a number of challenges. On the one hand, it is based on the recognition that Aboriginal perspectives on rights matter and that courts should be cautious when importing common law principles directly.[30] On the other hand, accepting this characterization may implicate sovereignty claims. More importantly for present purposes, the *sui generis* nature of rights lacks applicable standards.[31] This leaves it vulnerable to influences from extraneous sources. The interpretation of *sui generis* rights without reference to clearer standards leaves judges with much discretion, which may not be exercised in a helpful manner given

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[28] Delg*amuukw v British Columbia*, [1997] 3 SCR 1010 at para 112.
[29] *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 21.
[30] Burrows and Rotman, *supra* note 23 at 11.
[31] Ibid at 32.

the emergent state of knowledge regarding Indigenous legal principles and perspectives.[32]

Since there are few articulated standards for the treatment of *sui generis* rights, there exists the real danger that Aboriginal rights may receive even less protection under this categorization than under conventional categories at common law. Vague standards are additionally vulnerable to discretionary shrinkage based on prejudices and stereotypes. For example, there is a stereotypical view of Indigenous people eking out a living in a remote location. An Aboriginal right to trade or harvest is therefore likely to be limited to subsistence or 'moderate livelihood' levels rather than to levels associated with economic wellbeing or success.[33] Similarly, women's equality rights developed under s. 15 of the *Charter* are generally not understood to encompass rights related to socio-economic wellbeing. Economic rights are either denied altogether[34] or constructed so as to be in the nature of poverty rights.[35] Economic rights of Aboriginal women are therefore subject to a double rights discount: one stemming from the discretionary and vague standards of the doctrine of *sui generis*; and the other from the weak socio-economic rights of women under the *Charter*.

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[32] Ibid at 32-37.
[33] *R v Van der Peet, supra* note 21 at para 279.
[34] *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381.
[35] Women's equality rights remain strangely disconnected from economic rights. Neither extreme poverty, as in *Gosselin, supra* note 34, economic deprivation short of extreme poverty as *in Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, or even inequality in the context of economic privilege as in *Symes v Canada*, [1993] 4 SCR 695, has attracted court attention to the economic dimensions of equality claims. For an excellent analysis see: Gwen Brodsky & Shelagh Day, *"Beyond the social and economic rights debate: Substantive equality speaks to poverty*" (2002) 14 Can J Women & L185.

A third source of gendered impacts arises from the historical focus of the jurisprudence on pre-contact practice.[36] Unlike common law rights, which are able to evolve and offer protections responsive to contemporary life, Aboriginal rights are often stuck in the past because courts require that they be traced to moments predating European contact or the effective assertion of British sovereignty. This requirement risks piecemeal development of Aboriginal women's rights, contingent on historical gender roles which may vary greatly, be difficult to prove and not be responsive to the damage done to gender relations by colonial and post-colonial legal and governance regimes. The underlying paradigm that informs the jurisprudence on this point is grounded in a retrospective theory of constitutional remedies analogous to tort law or the law of equity. The remedy is aimed at restoring a *status quo ante*, to be made whole again as one was before the breach (of unlawful assertion of European sovereignty). Justice LaForest summarized this view in a real estate case, *Canson*, drawing on *Guerin* as follows:

> What the Court sought to do was to place the Indians, so far as money could do it, in the same position as they would have been but for the breach of the Crown's obligation to the Indians.[37]

This retrospective focus has meant that the history of Aboriginal-settler relations remains out of bounds in Aboriginal rights cases. There is no right to reserve residence, to community membership and recognition of status because none of these institutions were conceivable before settler sovereignty.

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[36] Emily Luther, "Whose 'Distinctive Culture'? Aboriginal Feminism and R. v. Van der Peet" (2010) 8:1 Indigenous LJ 27 at 50.
[37] *Canson Enterprises Ltd. v Boughton & Co*., [1991] 3 SCR 534 at para 19.

Fourthly and finally, the insistence that Aboriginal rights are communal in nature means that courts have been focused on what settler law considers Aboriginal communities, i.e. governance structures established under the *Indian Act* such as band councils. In that context, the power relationships in reserve communities tend to shape rights, another factor that is unlikely to favour women's interests.[38] The protracted battle for marital property legislation applicable to reserve residences is but one example where the rights of Aboriginal women have been litigated in the context of the *Indian Act* and reserve structures.[39]

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.

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[38] Wendy Moss, "Indigenous Self-Goverment 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 36 at 48.

[39] The British Columbia Native Women's Society (BCNWS) was concerned with the division of matrimonial property under the Framework Agreement on First Nations Land Management. The BCNWS argued that the there was a *lacuna* in the *Indian Act*: provincial legislation governing the division of matrimonial property did not apply to reserve lands because it was in conflict with the *Indian Act*. The BCNWS claimed that this legislative gap breached their members' s 15 *Charter* rights, as the *Indian Act* contained no provisions for dealing with property during the breakdown of marriage. See also: Linda Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (2017 CanLIIDocs 2) at 20.13.5.5.4 and the sources cited therein: W. Cornet & A. Lendor *Discussion Paper: Matrimonial Real Property on Reserve* (Ottawa: Indian and Northern Affairs Canada, 2003) 8-12. *Les biens immobiliers matrimoniaux situés dans les réserves Document de travail*; Jo-Ann Greene (2003); Toward Resolving the Division of On-Reserve Marital Property Following Relationship Breakdown (Indian and Northern Affairs); Senate Standing Committee on Human Rights (November 2003) A Hard Bed to Lie In: Matrimonial Property On Reserve. Interim Report. (Ottawa: Senate).

4. The Missed Opportunity of Subsection 35(4)

In the final part of the paper, we discuss the missed opportunity to advance the legal and socio-economic status of Aboriginal women against the Canadian state through the development of specific Indigenous gender equality rights. In the context of constitutional entrenchment of Aboriginal rights, Indigenous women carried out a sustained and extremely successful campaign for the enactment of strong gender equality language as a part of s 35. Despite this, the courts have yet to interpret this language in a manner that would translate into improved rights protections for Aboriginal women.

Matters were off to a poor start when a majority of the Supreme Court rejected the proposition that s 35(4) required the federal government to facilitate the participation of Aboriginal women in constitutional debates in the NWAC case.[40] This was because the Court dealt with the question of the Aboriginal right as a threshold matter. Rather than asking whether the equality guarantee meant that Aboriginal women had a right to participate in the development of the scope of Aboriginal rights, the Court held that Aboriginal women had to persuade it first that an Aboriginal right of participation in constitutional talks existed. In light of the subsequent development of the duty to consult in the *Haida* consultation trilogy, there is serious doubt about the correctness of that conclusion.[41] This is because the duty applies specifically to potential rather than previously proven rights.[42]

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[40] *NWAC, supra*, note 10.
[41] Discussion paper, *supra* note 11 at 269-271.
[42] *Ibid* at 269.

A decade after the NWAC case, the Métis National Council of Women (MNCW) brought an equality-based claim to access to programming. In *Métis National Council of Women v Canada*,[43] the MNCW argued that their exclusion from an Aboriginal job creation program, which was implemented by the government, violated the MNCW's section 15 *Charter* rights. The MNCW argued that the Métis National Council, as a male dominated organization, would exclude the MNCW from aspects of the employment program and its benefits. The Court decided that "[t]he difficulty with the applicants' argument [was] that it [was] premised solely on the exclusion of the MNCW which, as a corporation, does not enjoy equality rights under the Charter nor does it have innate personal characteristics."[44] Additionally, similar to the NWAC decision, the Court held that there was no evidence to support the contention that the MNCW members would be excluded or under-represented regarding the employment program, if represented solely by the Métis National Council. The rationale was that the Métis National Council was already inclusive of an Aboriginal women's viewpoint.

In *McIvor v The Registrar, Indian and Northern Affairs Canada*,[45] which dealt with the gendered nature of the second-generation cut-off rule under s 6 of the *Indian Act*, the trial judge held that section 6 of the *Indian Act* violated the section 15 *Charter* rights of Ms. McIvor and her son Jacob. This was because Ms. McIvor and her son faced the second-generation cut-off rule one generation earlier than male status-Indians who married and had children with a non-status spouse prior to

[43] *Métis National Council of Women v Canada (Attorney General),* [2005] 4 FCR 272, [2005] 2 CNLR 192.
[44] *Ibid* at para 50.
[45] *McIvor v The Registrar*, *Indian and Northern Affairs Canada*, 2007 BCSC 827.

1985. The trial judge held that this constituted on-going discrimination on the basis of sex and matrilineal descent. The government appealed and the British Columbia Court of Appeal upheld the constitutional ruling, but narrowed the remedy to a declaration and suspended it for one year, to permit Parliament to remedy the discrimination.[46] The Court refused to consider arguments under sections 28 and 35, characterizing them as unnecessary in light of the success of the Respondent under s 15 of the Charter and as underdeveloped in argument and the record.

Courts have been more interested in giving effect to intersectional Aboriginal equality rights against Aboriginal governments. Following the 1985 amendments (Bill C-31) to the *Indian Act*, some band councils were reluctant to extend band membership to women who had regained status. In *Sawridge Band v Canada,*[47] multiple bands challenged sections 8 to 14.3 of the *Indian Act* on the grounds that these sections infringed their right to determine their own membership codes. The bands asserted that s 35 protected the right to membership determination as an Aboriginal right. The Court upheld the Bill C-31 amendments, ruling that there was no Aboriginal right under s 35 to control membership codes.[48] The Court stated that even if there was such an Aboriginal right, it would have been extinguished by s 35(4), which guarantees Aboriginal and treaty rights equally to Aboriginal men and women. It is difficult to ignore the profound irony in holding that a constitutional

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[46] *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 overturning *McIvor v The Registrar*, *Indian and Northern Affairs Canada*, 2007 BCSC 827.

[47] *Sawridge Band v Canada,* [1995] 4 CNLR 121 (FCTD).

[48] Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" *Indigenous peoples and the law: comparative and critical perspectives* (Hart Publishing, 2009) 233; Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall LJ 61.

Aboriginal rights guarantee could be interpreted as an act of extinguishment. This is not to suggest that the exclusion from membership was unproblematic, merely to note the tension in the interpretive approach.

Another First Nation attempted to deny membership, and thus voting in band elections, based on a woman's Bill C-31 status. In *Scrimbitt v Sakimay Indian Band Council,* [49] the Band refused to let Ms. Scrimbitt to vote in council elections because she was a 'Bill C-31er.' The Band relied on a custom to deny membership to women who married outside of the band; and claimed an Aboriginal right under s 35 to control their band membership. The Court held for the Applicant, finding that there was no evidence of an Aboriginal custom of denying voting in band council elections.

In 2006 in the Yukon, members of the Ta'an Kwach'an argued that the elders of the Ta'an Kwach'an Council did not have the power to appoint an acting Chief.[50] More importantly, the members claimed that traditionally it was only a male person who could be Chief, and therefore, should the elders be held to have the power to appoint a Chief, that person could not be female. The Court rejected this argument based on the equality guarantee in subs 35(4) and held that

> section 35(4) of the Charter of Rights and Freedoms states that Aboriginal rights are guaranteed equally to male and female persons. I interpret the power of the Elders Council to appoint an acting Chief to be an Aboriginal right and thus the power would include both male and female persons.[51]

In light of the current state of development of the case law, the recognition of intersectional Aboriginal equality rights is in its very early stages. The situation

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[49] *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FCR 513, [1999] FCJ No 1606.
[50] *Harpe v Ta'an Kwach'an Council*, [2006] 2 CNLR 70.
[51] *Ibid* at para 89.

could be improved by developing the interpretation and application of subs 35(4) and by extending the duty to consult to specifically address the political and social participation rights of Aboriginal women, particularly those residing off-reserve.