

MEMORANDUM

Murdered and Missing Indigenous Women Legal Strategies

Prepared for the Legal Strategy Coalition on Violence Against Indigenous Women

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INTRODUCTION

This memo discusses possible legal avenues for addressing the issue of violence against Indigenous women in Canada. It consists of a compilation of work by law students Katherine Long and Alessandra Hollands, at the University of Toronto and Osgoode Hall Law School respectively, prepared for the Legal Strategy Coalition on Violence Against Indigenous Women. The analysis is divided into a discussion of international and domestic law. Please note that this memo will not survey the factual context in which violence against Indigenous women occurs.

On a domestic level, violence against Indigenous women could be addressed through a complaint to a human rights tribunal, a tort action, or by seeking a declaration under the *Canadian Charter of Rights and Freedoms*. Provincial and federal human rights codes recognize and affirm the fundamental right to equality of all persons and the right to be free from discrimination. This includes a right to the non-discriminatory provision of services. These documents inform provincial and federal police statutes, which delineate the scope of police duties towards citizens in their jurisdiction. Among these duties is an obligation to prevent crime and prosecute the perpetrators of crime. These statutes provide for complaint processes, and may serve to ground a duty of care in a tort action against police. This action could proceed on the grounds of misfeasance, under which the plaintiff must establish intentional or malicious conduct, or negligent investigation. Finally, under the *Charter*, a claimant could seek a declaration following a breach of section 7 or section 15. The nature of police obligations towards Indigenous women and the content of the guarantees contained in human rights legislation and the *Charter* must be interpreted in light of Canada's international obligations.

Under international law, Canada must protect and respect the rights of Indigenous women, and prevent any private individual or third party from violating those rights. This includes an obligation to ensure that Canadian law does not have an adverse impact on the interests of Indigenous women and to take due diligence by adapting gender-sensitive law and policy. International case law provides substance to this duty of due diligence, obligating the state to act promptly, taking effective action and preventative measures after obtaining knowledge of the human rights violation in question. Although this analysis is contextual, it has the power to impose a positive obligation on police to prevent women from violence. The state's obligation is heightened with regards to vulnerable groups.

Through these international and domestic means it may be possible to hold the Canadian government accountable for its failure to take steps to prevent systemic and disproportionate levels of violence suffered by Indigenous women and girls. While these avenues are analyzed separately, domestic and international documents inform one another, imposing an obligation on the Canadian government to remedy these persistent patterns of exclusion and marginalization.

DOMESTIC LAW

1. Human Rights Codes

Human rights codes provide an affordable means of holding the state accountable for its failure to protect Indigenous women from violence. All human rights codes in Canada prohibit discrimination in the provision of services, which likely includes police services. The provinces differ in their recognized prohibited grounds of discrimination. However, all provinces recognize sex and race as an unacceptable basis for distinction, with certain exceptions for public decency. The preamble and stated purpose of the codes will aid in the interpretation of the state's obligations. Each preamble differs slightly, and none recognizes the unique circumstances of Indigenous peoples within Canada. Note that one possible difficulty in establishing a human rights violation under a provincial or federal human rights codes is the positive dimension of the right asserted. These acts prevent discrimination, but do not necessarily impose a positive obligation to address inequality.

1.i. Federal

The stated purpose of the *Canadian Human Rights Act*¹ is to provide individuals with equal opportunities and to accommodate their needs consistent without discrimination on the basis of race, colour, sex, or sexual orientation amongst other grounds.² Under the Act, it is a discriminatory practice to deny a service or good ordinarily available to the public or to differentiate adversely with regard to an individual on the prohibited discriminatory grounds listed above.³

¹ *Canadian Human Rights Act*, RSC, 1985, c. H-6.

² *Ibid*, s. 2.

³ *Ibid*, s. 5.

1.ii. Provincial⁴

1.ii.a. Alberta

The preamble to *Human Rights Act*⁵ recognizes the inherent dignity, equality, and inalienable rights of all people regardless of race, colour, gender, sexual orientation, or source of income. Further, the Preamble asserts the importance of multiculturalism and of gaining an awareness of the racial and cultural diversity of Alberta.⁶

Under the Act, no person has the right to deny services or goods customarily available to the public, nor can any person discriminate against another person or class of persons in the provision of services on any of the aforementioned prohibited grounds.⁷

1.ii.b. British Columbia

The stated purposes of British Columbia's *Human Rights Code*⁸ include ensuring nothing impedes an individual's full participation in the economic, social, political and cultural life of the province; promoting a climate in which all are equal in dignity and right; preventing discrimination; and identifying and eliminating persistent patterns of inequality.⁹

The Code prohibits the unreasonable or malicious denial or discriminatory provision of services typically available to the public on the grounds of race colour, sex or sexual orientation.¹⁰ Discrimination on the basis of sex as relates to the "maintenance of public decency," however, does not contravene the act.¹¹

⁴ Please note that provinces are listed alphabetically.

⁵ *Human Rights Act*, RSA 2000, c A-25.5.

⁶ *Ibid*, Preamble.

⁷ *Ibid*, s. 4.

⁸ *Human Rights Code*, RSBC 1996, c 210.

⁹ *Ibid*, s. 3.

¹⁰ *Ibid*, s. 8(1).

¹¹ *Ibid*, s. 8(2).

1.ii.c. Manitoba

In Manitoba, the Preamble to *The Human Rights Code*¹² recognizes the dignity and worth of every human person as illustrated by the *Universal Declaration of Human Rights* (UDHR)¹³ and the *Charter*. It asserts the importance of distinguishing based on personal merits and according every person equal opportunities. This, it states, is not possible in the presence of unreasonable discrimination against individuals or groups and the failure to provide reasonable accommodation for persons with special needs, particularly in the context of historical disadvantage.¹⁴

Under the Code no person can discriminate regarding a service, good, right, benefit, program or privilege that is available to the public unless there is a bona fide and reasonable cause for the discrimination.¹⁵ No such cause exists where there is a failure to make reasonable accommodation, whether intentional or not.¹⁶

Prohibited grounds of discrimination include ancestry, ethnic background or origin, sex, gender identity, sexual orientation, source of income, and social disadvantage.¹⁷ Discrimination on the basis of social disadvantage only exists where the impugned distinction is based on a negative bias or stereotype related to that disadvantage.¹⁸

The Code is the only human rights act in Canada to explicitly provide for systemic discrimination, recognizing that certain actions, policies, or procedures that do not individually constitute discrimination can have a discriminatory impact when combined.¹⁹

1.ii.d. New Brunswick

The Preamble of New Brunswick's *Human Rights Act*²⁰ espouses the principle that each person is equal in dignity and rights without regard to race, colour, and sex, among other characteristics. It recognizes

¹² *The Human Rights Code*, CCSM c H175.

¹³ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. no.13 UN doc. A/810 (1948) [UDHR]

¹⁴ *Ibid*, Preamble.

¹⁵ *Ibid*, s. 13(1).

¹⁶ *Ibid*, s. 13(1).

¹⁷ *Ibid*, s. 9(2).

¹⁸ *Ibid*, s. 9(2.1).

¹⁹ *Ibid*, s. 9(3).

²⁰ *Human Rights Act*, RSNB 2011, c 171.

ignorance and disregard for the rights of others as a cause of social disadvantage, and the need for human rights to be guaranteed under the rule of law.²¹

The Act prohibits the discriminatory provision of services on the prohibited grounds of race, colour, age, and sex, among others.²² This provision does not apply to persons who have not attained the age of majority if the exclusion, denial or preference in question was authorised by the act of legislature or an act.²³

1.ii.e. Newfoundland and Labrador

The preamble to Newfoundland and Labrador's *Human Rights Act*²⁴ recognizes the equal and inalienable rights of all persons in accordance with the Universal Declaration of Human Rights without regard to race, colour, sex, sexual orientation, gender identity, and gender expression, among other grounds. It asserts the public policy of the province to provide equal rights and opportunities without discrimination and the duty of all persons to promote and observe the rights of others.²⁵

The Act prohibits denying a person or class of persons services or goods customarily offered to the public, or discriminating against a person with regards to those goods on prohibited grounds.²⁶ These grounds include race, colour, sex, sexual orientation, gender identity, and gender expression.²⁷

The Act must be read in conjunction with the *Labrador Inuit Land Claims Agreement Act*, which has precedence over the *Human Rights Act*.²⁸

1.ii.f. Nova Scotia

The stated purpose of Nova Scotia's *Human Rights Act*²⁹ includes recognition of the inherent dignity and equal rights of all persons and an assertion that law must protect human rights. The Act states the

²¹ *Ibid*, Preamble.

²² *Ibid*, s. 6(1)(b).

²³ *Ibid*, s. 6(3).

²⁴ *Human Rights Act* SNL 2010, c H-13.1.

²⁵ *Ibid*, Preamble.

²⁶ *Ibid*, s. 11(1).

²⁷ *Ibid*, s. 9(1).

²⁸ *Ibid*, s. 5.

²⁹ *Human Rights Act*, RSNS 1989, c. 214.

government, public agencies, and residents of Nova Scotia have a responsibility to ensure that each person is afforded equal opportunity.³⁰

For the purposes of the Act, discrimination is defined as distinctions made on the basis of a personal characteristic or a perceived characteristic that impose more of a burden or extend less of a benefit, whether intentional or not.³¹ The act prohibits discrimination in the provision of services based on race, colour, sex, sexual orientation, and gender expression among others.³²

1.ii.g Prince Edward Island

The preamble to Prince Edward Island's *Human Rights Act*³³ recognizes the inherent dignity and the equal and inalienable rights of all persons in accordance with the UDHR, regardless of age, gender expression, gender identity, sex, or sexual orientation among other grounds.³⁴

The act prohibits the discriminatory provision or manner of provision of services to which the public has access with regards to any individual or class of individuals.³⁵ However, this prohibition does not apply to distinctions based on age where those services are not available to that person as a result of a legislative act.³⁶ Discriminatory distinctions cannot be made on the basis of colour, gender expression, gender identity, race, sex, or sexual orientation.³⁷

1.ii.h. Ontario

The Preamble to Ontario's *Human Rights Code*³⁸ recognizes that every person possesses inherent dignity and inalienable rights as asserted in the UDHR. Each person must therefore be accorded equal rights and opportunities.³⁹

³⁰ *Ibid*, s. 2.

³¹ *Ibid*, s. 4.

³² *Ibid*, s. 5(1).

³³ *Human Rights Act*, RSPEI 1988, c H-12.

³⁴ *PEI Human Rights Act*, Preamble.

³⁵ *Ibid*, s. 2(1).

³⁶ *Ibid*, s. 2(2).

³⁷ *Ibid*, s. 13.

³⁸ *Human Rights Code*, RSO 1990, c H. 19.

³⁹ *Ibid*, Preamble.

Every person has the right to equal treatment with regard to services without discrimination on the grounds of race, sex, sexual orientation, gender identity or gender expression.⁴⁰ By failing to provide adequate police services and protection to Indigenous women, the government of Ontario violated the rights of Indigenous women under s. 1.

1.ii.i. Saskatchewan

The objects of *The Saskatchewan Human Rights Code*⁴¹ are the promotion of the equal inalienable rights and human dignity of all persons, and the furtherance of the public policy of promoting these rights and discouraging discrimination.⁴²

The *Saskatchewan Human Rights Code* prevents the denial of or discrimination in the provision of services to which the public has access, whether directly or indirectly.⁴³

1.iii. Human Rights Codes: Concluding Notes

Human rights codes provide a possible avenue for addressing the harm suffered by murdered and missing Indigenous women and their families. Particularly favourable human rights codes address international obligations in their stated purposes or Preambles, and recognize the importance of ameliorating historic disadvantage. These provisions tend towards an interpretation favouring substantive equality.

2. Police Statutes

Police statutes inform a possible negligence or *Charter* claim. These statutes delineate the duty of police towards the public and, where applicable, towards vulnerable groups. They determine the scope of police liability, eliminating personal liability for individual police officers but providing that the police commission or municipality may be held vicariously liable. These statutes establish complaint proceedings for concerns regarding policy and conduct. In many cases, officials within the police commission have the discretion not to investigate a complaint. All statutes provide for the informal

⁴⁰ *Ibid*, s. 1.

⁴¹ *The Saskatchewan Human Rights Code* SS 1979, c. S-24.1.

⁴² *Ibid*, s. 3.

⁴³ *Ibid*, s. 12(1).

resolution of complaints, with many providing that following such a resolution, the information disclosed cannot be employed in a civil, administrative, or criminal proceeding.

2.i. Federal Statutes

The *Criminal Code*⁴⁴ and the *Royal Canadian Mounted Police Act*⁴⁵ apply across Canada, governing a person's ability to lay information regarding indictable offences or seek a review following a conviction, and the provision of police services in numerous areas. It may be noted that the Royal Canadian Mounted Police (RCMP) have jurisdiction to perform federal, provincial, and municipal police services. In 2013, only Ontario, Quebec, and Newfoundland/Labrador maintain their own provincial police agencies. Other provinces, including British Columbia, contract the RCMP to perform police services at a provincial level. At the municipal level, municipalities can opt to contract with the RCMP pursuant to the Municipal Police Service Agreement. Currently, 61 such agreements are in force.⁴⁶

2.i.a. Criminal Code

Section 504 of the *Criminal Code* governs the process by which a person may lay information before a justice that another person has committed an indictable offense.⁴⁷ Under this section, a justice may receive information in writing or under oath where the person committed an offence in the province in which the justice resides, where the person resides or is believed to be; or if the person unlawfully received property or possesses stolen property within that jurisdiction.

The *Criminal Code* establishes procedures for an order to stand trial or to discharge. Section 584(1) establishes the test to be applied at a preliminary inquiry.⁴⁸ The Crown must provide the court with evidence upon which a reasonable jury could properly be instructed to convict. If the evidence is insufficient, the accused will be discharged.⁴⁹

⁴⁴ *Criminal Code*, RSC 1985, c. C-46.

⁴⁵ *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R- 10 [*RCMP Act*]

⁴⁶ The Honourable Wally Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Vol. II, (British Columbia: November, 2012), at 129 [*Missing Women Report*]

⁴⁷ *Ibid*, s. 504

⁴⁸ *Ibid*, s. 584.1.

⁴⁹ *United States of America v Sheppard*, [1977] 2 SCR 1067, 30 CCC (2d) 424, 34 CRNS 207.

Upon conviction, where an accused has exhausted all other avenues of appeal, he or she may apply to the federal Minister of Justice for review of a conviction or a finding that they were a dangerous or long-term offender.⁵⁰ The Minister may exercise certain powers as a commissioner, which he or she may delegate.⁵¹ If the Minister finds a reasonable basis for the conclusion that a miscarriage of justice might have occurred, the Minister may direct a new trial, a new hearing, or direct a reference to the Court of Appeal.⁵² The Minister's decision is not subject to appeal.⁵³ As section 696.4 indicates, this remedy is extraordinary and is not intended to serve as a further appeal.⁵⁴

2.i.b. Royal Canadian Mounted Police Act

Members of the RCMP have a duty to preserve the peace, prevent crime, and apprehend criminals, offenders, and others; to execute warrants; to escort and convey criminals; and to perform other duties specified by the Governor in Council.⁵⁵ Officers must perform these duties diligently, impartially and promptly,⁵⁶ and with respect for the rights of all persons.⁵⁷

Members of the public can file a complaint regarding the conduct or performance of a duty to the Royal Canadian Mounted Police Public Complaints Commission, to the province, or to a person with authority under the *RCMP Act*.⁵⁸ The complaint can then be dispensed of informally with consent of the complainant,⁵⁹ or an investigation can be launched.⁶⁰ Where the complaint is dealt with informally, no statement or information provided by any RCMP official can be used in a civil, administrative, or criminal proceeding.⁶¹ Note that the commission can choose not to investigate or to terminate an investigation where, amongst other reasons, an investigation is not practicable.⁶²

⁵⁰ *Criminal Code*, s. 696.1

⁵¹ *Ibid.*, s. 696.2.

⁵² *Ibid.*, s. 696.3.

⁵³ *Ibid.*, s. 696.3(4).

⁵⁴ *Ibid.*, s. 696.4.

⁵⁵ *RCMP Act*, *supra* note 45, s. 18.

⁵⁶ *Ibid.*, s. 37(a).

⁵⁷ *Ibid.*, s. 37(c).

⁵⁸ *Ibid.*, s. 45.35(1).

⁵⁹ *Ibid.*, s. 45.36(1).

⁶⁰ *Ibid.*, s. 45.36(4).

⁶¹ *Ibid.*, s. 45.36(2).

⁶² *Ibid.*, s. 45.36(5).

2.ii. Provincial Statutes

2.ii.a. Alberta

Under the *Police Act*,⁶³ the police have an obligation, among others, to carry out duties necessary to an officer's function as peace officer,⁶⁴ to encourage and assist the community in preventing crime,⁶⁵ and to foster a relationship between the police and members of the community.⁶⁶

The Chief of Police can be held vicariously liable for the tort of a police officer where the officer was under the Chief's direction at the time the tort was committed and the tort was committed in the performance or intended performance of the officer's duties.⁶⁷ A municipality may similarly be held liable.⁶⁸

A person directly affected by the conduct of a police officer, their agent, or a person with a close personal relationship with them, a person present at the time, or a person who suffered a loss as a result of the conduct in question may file a complaint.⁶⁹ Any person can file a complaint regarding the policy of the police.⁷⁰ Once a complaint is filed, it will be categorized as a complaint regarding either policy or conduct.⁷¹ A complaint can be resolved informally through an alternative dispute resolution process before or during an investigation with the consent of both parties.⁷²

2.ii.b. British Columbia

Under British Columbia's *Police Act*,⁷³ municipal police departments have a duty to preserve the peace, prevent crimes, and perform duties and functions relating to the administration of justice.⁷⁴

⁶³*Police Act*, R.S.A. 2000, c. P- 17 [*Alberta Police Act*].

⁶⁴ *Ibid.*, s. 38(1)(a)(i).

⁶⁵ *Ibid.*, s. 38(1)(a)(ii).

⁶⁶ *Ibid.*, s. 38(1)(a)(iii).

⁶⁷ *Ibid.*, s. 39(2).

⁶⁸ *Ibid.*, s. 40(2).

⁶⁹ *Ibid.*, s. 42.2(2).

⁷⁰ *Ibid.*, s. 42.2(3).

⁷¹ *Ibid.*, s. 43(11).

⁷² *Ibid.*, s. 43.1(1).

⁷³ *Police Act*, R.S.B.C. 1996, c. 367 [*BC Police Act*].

⁷⁴ *Ibid.*, s. 34(2).

Police officers cannot be held personally liable in tort for actions done by them during the performance or intended performance of their duties under the act.⁷⁵ This does not apply where the person has been grossly negligent, malicious, has engaged in wilful misconduct, or where the cause of action is libel or slander.⁷⁶ The municipality or regional district can be held jointly and severally liable for the actions of their employees while discharging their duties.⁷⁷

Complaints regarding police conduct can be made to the Police Complaint Commissioner by a person directly affected by or witness to the conduct, a person acting on their behalf where they are not capable, or by a third party complainant.⁷⁸ A complaint must be registered within a year of the impugned conduct, though this time period may be extended in certain circumstances.⁷⁹ Where the complaint does not pertain to death, serious bodily harm, or a reportable injury it may be resolved informally with the consent of both parties.⁸⁰ Statements made during this process cannot be used in any outside criminal or civil proceedings.⁸¹ If it is not, an investigation must be initiated.⁸²

2.ii.c. *Manitoba*

The Preamble of the Manitoba's *Police Services Act*⁸³ recognizes the importance of protecting and respecting the rights of victims of crime and the rights guaranteed in the *Charter* and the *Human Rights Code*. It also asserts the importance of providing police services in accordance with Manitoba's multiculturalism and with attention to the needs of First Nation, Metis and other Aboriginal peoples.

Under this act, police officers have a duty, among others, to preserve the peace,⁸⁴ prevent crimes,⁸⁵ and assist the victims of crime.⁸⁶ The police board in turn has a specific obligation to ensure that police services are delivered in a manner consistent with and reflective of community needs and values, and act as a liaison between the community and the police service.⁸⁷

⁷⁵ *Ibid.*, s. 21(2).

⁷⁶ *Ibid.*, s. 21(3).

⁷⁷ *Ibid.*, s. 20(1).

⁷⁸ *Ibid.*, s. 78(1).

⁷⁹ *Ibid.*, ss. 79(1) and (2).

⁸⁰ *Ibid.*, s. 157(1).

⁸¹ *Ibid.*, s. 166(1).

⁸² *Ibid.*, s. 90(1).

⁸³ *Police Services Act*, R.S.M. 1987, c. P150, C.C.S.M. c. P150 [*Manitoba Police Services Act*]

⁸⁴ *Ibid.*, s. 25(a).

⁸⁵ *Ibid.*, s. 25(b).

⁸⁶ *Ibid.*, s. 25(c).

⁸⁷ *Ibid.*, s. 28(2).

The *Manitoba Police Services Act* provides for cases in which a formal complaint is launched against an officer for causing death,⁸⁸ serious bodily harm,⁸⁹ or for breaking the *Criminal Code*.⁹⁰ In such cases, an investigation will be launched regardless of if the officer was on duty at the time.⁹¹

A municipality operating a police service may be held jointly and severally liable for a tort committed by a police officer for a tort committed during the performance of his or her duty.⁹² However, the Minister, the director, a member of the commission or police board, and any other person cannot be held liable for any act done or not done in good faith in the exercise of his or her power under the Act.⁹³

Under Manitoba's *Provincial Police Act*,⁹⁴ officers have a duty preserve the peace and prevent crimes.⁹⁵ The Chief of Police is liable with regards to torts committed by members of the police service in the performance or intended performance of their duties, and will be treated as a joint tortfeasor.⁹⁶

Where a complaint pertains to a member of the police force or the operation of the police force, the commission investigates the complaint and make an order.⁹⁷ That order can be appealed to a provincial judge.⁹⁸

2.ii.d. *New Brunswick*

Under the New Brunswick *Police Act*,⁹⁹ police officers have a duty to maintain order,¹⁰⁰ prevent crime,¹⁰¹ and enforce the law.¹⁰² Police officers cannot be held individually liable for acts committed in

⁸⁸ *Ibid*, s. 66(2)(a).

⁸⁹ *Ibid*, s. 66(2)(b).

⁹⁰ *Ibid*, s. 66(2)(c).

⁹¹ *Ibid*, s. 66(3).

⁹² *Ibid*, s. 40(1).

⁹³ *Ibid*, s. 88.

⁹⁴ *Provincial Police Act*, CCSM c P150 [*Manitoba Provincial Police Act*].

⁹⁵ *Ibid*, s. 5(a).

⁹⁶ *Ibid*, s. 21(2).

⁹⁷ *Ibid*, s. 26(4).

⁹⁸ *Ibid*, s. 26(5).

⁹⁹ *Police Act*, SNB 1977, c. P-9.2, s. 12(1) [*New Brunswick Police Act*].

¹⁰⁰ *Ibid*, s. 12(1)(a).

¹⁰¹ *Ibid*, s. 12(1)(b).

¹⁰² *Ibid*, s. 12(1)(c).

good faith while performing or intending to perform their duties.¹⁰³ However, the municipality can be vicariously liable for a tort committed by a member of the police force while performing their duties, or for a police officer's failure in their duty.¹⁰⁴

The public can file complaints with the Chief of Police, a civic authority, or the Chair of the Commission.¹⁰⁵ Complaints must be filed within a year of the event occurring,¹⁰⁶ though the Commission may extend this time limit in certain circumstances.¹⁰⁷ Once received, a complaint will be characterized as a policy complaint, conduct complaint, or a combination of the two.¹⁰⁸ The commission or a civic authority working in conjunction with the commission can dispose of policy complaints.¹⁰⁹ Where a complaint relates to police conduct, it will be dealt with through an investigation,¹¹⁰ though the Chief of Police may decide to resolve the complaint informally.¹¹¹ If a complaint is dealt with informally, no statements made during the resolution process can be used in subsequent administrative, civil or criminal proceedings.¹¹²

2.ii.e. Newfoundland

Under the *Royal Newfoundland Constabulary Act*,¹¹³ police officers have a duty to preserve the peace, prevent crimes, and assist the victims of crime, among others.¹¹⁴

A member of the public can file a complaint regarding police conduct or policies where that conduct or policy directly affects them.¹¹⁵ A complaint must be made within six months of the incident.¹¹⁶ After an investigation takes place,¹¹⁷ the Chief or Deputy Chief may choose to settle the matter with the agreement of both parties, dismiss the complaint, or discipline the officer in question.¹¹⁸ Decisions and

¹⁰³ *Ibid*, s. 7(12).

¹⁰⁴ *Ibid*, s. 17(1).

¹⁰⁵ *Ibid*, s. 25(1).

¹⁰⁶ *Ibid*, s. 25.1(1).

¹⁰⁷ *Ibid*, s. 25.1(2).

¹⁰⁸ *Ibid*, s. 25.2(1).

¹⁰⁹ *Ibid*, s. 25.6(2).

¹¹⁰ *Ibid*, s. 26.2.

¹¹¹ *Ibid*, s. 27.7(1).

¹¹² *Ibid*, s. 27.8.

¹¹³ *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c. R-17 [*Constabulary Act*].

¹¹⁴ *Ibid*, s. 8(1).

¹¹⁵ *Ibid*, s. 22(1).

¹¹⁶ *Ibid*, s. 22(6).

¹¹⁷ *Ibid*, s. 24(3).

¹¹⁸ *Ibid*, s. 25(1).

orders made by an arbitrator or commissioner under the Act can be appealed with leave from a judge of the trial division.¹¹⁹

Persons acting in good faith under the *Constabulary Act* cannot be held liable for damages caused in discharging or in an attempt to discharge their duty.¹²⁰ However, the Act does not preclude or bar a civil action pursuant to a complaint or criminal prosecution.¹²¹

2.ii.f. *Nova Scotia*

The Nova Scotia *Police Act*¹²² governs the conduct of police. The Code of Conduct for members of the police force does not include a duty to act impartially or to respect the fundamental rights and freedoms of citizens.¹²³ However, board members do have an obligation to discharge their duties faithfully and impartially,¹²⁴ and in accordance with the *Charter* and the *Human Rights Act*.¹²⁵

A person directly affected by police action can register a complaint regarding the police department or an individual officer within six months of the event.^{126 127} However, the Act specifically provides that a third party can register a complaint only where the person directly affected endorses the complaint,¹²⁸ or that person is incapable of giving consent.¹²⁹ Where both parties agree, a complaint can be resolved informally,¹³⁰ in which case, if the complaint pertains to a member, the complaint will not appear on the officer's service record.¹³¹ If the complaint is not dealt with informally, either the designated investigator or a disciplinary authority must complete an investigation.¹³²

¹¹⁹ *Ibid*, ss. 36(1) and (2).

¹²⁰ *Ibid*, s. 58(2).

¹²¹ *Ibid*, s. 58(1).

¹²² *Police Act*, S.N.S. 2004, c. 31 [*Nova Scotia Police Act*].

¹²³ *Ibid*, s. 24(1).

¹²⁴ *Ibid*, s. 84(1)(g).

¹²⁵ *Ibid*, s. 84(1)(f).

¹²⁶ *Ibid*, s. 27.

¹²⁷ *Ibid*, s. 29.

¹²⁸ *Ibid*, s. 28(1).

¹²⁹ *Ibid*, s. 28(2).

¹³⁰ *Ibid*, s. 34(1).

¹³¹ *Ibid*, s. 34(3).

¹³² *Ibid*, s. 35.

2.ii.g. Ontario

Under the *Police Services Act*,¹³³ police services in Ontario must be provided in accordance with the rights guaranteed in the *Charter* and the *Human Rights Code*,¹³⁴ a respect for victims and their needs,¹³⁵ and with sensitivity to the pluralistic and multicultural nature of Canadian society.¹³⁶ In addition, a police officer has a duty to preserve the peace, prevent crimes, and assist the victims of crimes.¹³⁷

A member of the public can file a complaint regarding police conduct or policies.¹³⁸ If a complaint is made over six months after the events occurrence, the Independent Police Review Director may decide not to deal with the complaint.¹³⁹ This decision must be made with regards to whether the complainant is a minor, subject to criminal proceedings, and if the complaint involves the public interest.¹⁴⁰ The Review Director has no obligation to deal with complaints that are not in his opinion in the public interest,¹⁴¹ that are better dealt with under a different law,¹⁴² that concern policies not directly affecting the complainant, or that concern conduct not directly the complainant or certain persons closely linked with them.¹⁴³ Once a complaint is filed, the Review Director has the power to either take action or not to take action, as he or she deems appropriate.¹⁴⁴ Where a review or investigation is undertaken, the Chief of Police may decide to resolve the matter informally where it is not of a serious nature and both parties consent.¹⁴⁵

A member of the police commission cannot be subject to an action or other proceedings for damages for an act done in a good faith execution, or attempt to execute, their duty under the act.¹⁴⁶ However, the board or the crown for Ontario can be held vicariously liable for torts committed by members of the police force in carrying out their duties under the act.¹⁴⁷

¹³³ *Police Services Act*, RSO 1990, c. P. 15 [*Ontario Police Services Act*].

¹³⁴ *Ibid*, s. 1.2.

¹³⁵ *Ibid*, s. 1.4.

¹³⁶ *Ibid*, s. 1.5.

¹³⁷ *Ibid*, s. 42.

¹³⁸ *Ibid*, s. 58(1).

¹³⁹ *Ibid*, s. 60(1).

¹⁴⁰ *Ibid*, s. 60(3).

¹⁴¹ *Ibid*, s. 60(4.3).

¹⁴² *Ibid*, s. 60(4.2).

¹⁴³ *Ibid*, s. 60(5).

¹⁴⁴ *Ibid*, s. 63(1).

¹⁴⁵ *Ibid*, s. 66(4).

¹⁴⁶ *Ibid*, s. 29(1).

¹⁴⁷ *Ibid*, s. 50(1).

Under Ontario's *Public Authorities Protection Act*,¹⁴⁸ no action can be brought against a police officer or constable for anything done pursuant to a warrant issued by a justice of the peace or clerk of a small claims court, until a demand has been made or left at the person in questions place of employment by the person bringing the action or their counsel.¹⁴⁹

2.ii.h. *Prince Edward Island*

Under the *Police Act*¹⁵⁰ of Prince Edward Island (PEI), officers have a duty to maintain law and order, prevent crime, assist victims of crime, lay charges and assist in prosecution.¹⁵¹ Officers must adhere to the *Code of Professional Conduct and Discipline Regulations*¹⁵² in carrying out these duties.¹⁵³ This includes a duty to respect the rights of all persons; perform duties promptly, impartially and in accordance with the law without abusing his or her authority; and a duty to treat all persons equally, without regards to age, race, or sex, among other grounds.¹⁵⁴

Any person can make a complaint regarding a police officer's conduct where that conduct might reasonably be a breach of the Code of Conduct.¹⁵⁵ A complaint must be made within six months of the event in question, though an exception will be granted for minors and the mentally handicapped.¹⁵⁶ Following the registration of a complaint, an investigation will be launched.¹⁵⁷ Any statement made during the investigation cannot be used in subsequent criminal, civil, or administrative proceedings, except with the consent of the party who made the statement.¹⁵⁸

Following the *PEI Police Act*, no action or proceedings for damages can be made against a police officer for performance or intended performance of his or her duty, or the exercise or intended exercise of his or her powers under the Act.¹⁵⁹

¹⁴⁸ *Public Authorities Protection Act*, R.S.O 1990, c. P. 38.

¹⁴⁹ *Ibid*, s. 6(1).

¹⁵⁰ *Police Act* RSPEI 1988 c. P-11 [*PEI Police Act*]

¹⁵¹ *Ibid*, s. 7(1)(a)(b)(d) and (f)

¹⁵² *Code of Professional Conduct and Discipline Regulations*, PEI Reg EC142/10 [Code of Conduct].

¹⁵³ *PEI Police Act*, *supra* note 150, s. 14(1)

¹⁵⁴ Code of Conduct, s. 2

¹⁵⁵ Note that these breaches are defined separately under s. 3 of the Code of Conduct, and are substantially narrower than the standard of conduct listed above. However, it does include a duty to respond promptly and diligently. See *ibid* s. 3(b).

¹⁵⁶ *Ibid*, s. 21.

¹⁵⁷ *Ibid*, s. 26.

¹⁵⁸ *Ibid*, s. 30(1).

¹⁵⁹ *Ibid*, s. 15(4).

2.ii.i. Saskatchewan

Under Saskatchewan's *Police Act*,¹⁶⁰ the Minister and the Commission have a duty to promote adequate and effective policing across Saskatchewan, and preserve the peace, prevent crime and improve relationships between the police and communities within Saskatchewan.¹⁶¹

A member of the public can file a complaint to the office of the Public Complaints Commission (PCC), the police service, or numerous other offices.¹⁶² Complaints cannot be filed more than one year after the complainant could reasonably be expected to be aware of the incident complained of.¹⁶³ Statements or records received by the PCC cannot be used in civil proceedings, or in any proceedings outside of the act.¹⁶⁴ However, filing a complaint does not preclude taking other criminal or civil actions.¹⁶⁵

The police board and members of that board cannot be held liable for a loss or damage suffered as a result of regulations or orders made in good faith a person is acting under the authority of the *Saskatchewan Police Act*.¹⁶⁶ Where civil proceedings arise, the commissioner or members of the police commission cannot be compelled to testify regarding information obtained during the course of his or her duties, or to produce any papers, files, or other documents pertaining to the business or activities of the commission.¹⁶⁷

2.ii.j. Québec

Article 1457 of the *Civil Code of Québec*¹⁶⁸ establishes general provisions regarding civil liability. Under this section, each person has a duty to avoid injury to another by following rules of conduct in accordance with their circumstances. A person can be held civilly liable for failing in this duty.

Under the Québec *Police Act*,¹⁶⁹ the police are charged with maintaining peace, order and public security, and preventing and repressing crime. In doing so, members of the police force must ensure

¹⁶⁰ *Police Act*, 1990, SS 1990- 91, c. P- 15.01 [*Saskatchewan Police Act*].

¹⁶¹ *Ibid*, ss. 18 and 19(1).

¹⁶² *Ibid*, ss. 38(1) and (2).

¹⁶³ *Ibid*, s. 38(7).

¹⁶⁴ *Ibid*, s. 39(7).

¹⁶⁵ *Ibid*, s. 40(1).

¹⁶⁶ *Ibid*, s. 10(2).

¹⁶⁷ *Ibid*, s. 11.

¹⁶⁸ *Civil Code of Québec* S.Q. 1991, c. 64, a. 1457; 2002, c. 19, s. 15.

¹⁶⁹ *Police Act*, RSQ c P-13 [*Québec Police Act*].

individuals' safety, safeguard rights and freedoms, respect and attend to victims' needs, and work with the community in accordance with the values of cultural pluralism.¹⁷⁰

A member of the public can launch a complaint against a police officer for conduct that breaches the Code of Conduct.¹⁷¹ Complaints must be launched within a year after the event or after knowledge of the event.¹⁷² The Police Ethics Commissioner manages complaints involving the public interest, death or serious bodily harm, situations affecting public confidence in police officers, criminal or repeat offences, and other serious matters.¹⁷³ If the parties enter into conciliation proceedings, no statement made by complainant or the police during the course of conciliation is admissible evidence in other administrative, civil, or criminal proceedings.¹⁷⁴

2.c. Police Statutes: Concluding Notes

Provincial and federal police Acts impose duties on police officers to maintain the peace, prevent crime, and perform services impartially. As discussed below, this relationship with the public creates a duty of care towards members of the police commission's jurisdiction to ensure they are adequately protected, including Indigenous women. These acts contain many important similarities, but vary with regards to limitation periods, complaint proceedings, and exemptions of liability. The vast majority of Acts explicitly provide that either the municipality or the Chief of Police will be held vicariously liable for damages. If complainant chooses to pursue a complaint proceeding, he or she has between six months and a year to file his or her complaint. Most acts provide that information used during the resolution of a complaint proceeding may not be used in a subsequent action. For this reason, it may be advisable to avoid pursuing a complaint in order to more effectively address police negligence in civil court.

¹⁷⁰ *Ibid*, s. 48.

¹⁷¹ *Ibid*, s. 143.

¹⁷² *Ibid*, s. 150.

¹⁷³ *Ibid*, s. 148.

¹⁷⁴ *Ibid*, s. 164.

3. Negligence

Police statutes establish three central duties owed to the public: to enforce the law, maintain law and order, and provide impartial service without regards to race, national or ethnic origin, colour, gender, or social standing.¹⁷⁵ In addition to these general duties, the police owe a private law duty of care towards individual members of the public, and may be sued on the basis of negligent investigation or misfeasance. Under the former claim, a plaintiff will succeed where harm is reasonably foreseeable, sufficient proximity exists, and there are no policy considerations to limit that duty. The onus rests with the plaintiff to demonstrate a causal connection between the impugned breach of duty and the harm suffered. Where the plaintiff fails to establish a causal relationship such that police conduct at minimum materially contributed to the injury suffered at the hands of a third party, the claim will fail. By contrast, misfeasance is an intentional tort still reflected in many police statutes¹⁷⁶ requiring the plaintiff to establish deliberate, unlawful conduct during the exercise of a public function that knowingly exposes the plaintiff to the possibility of harm. By broadening the scope of police liability, the Court departs from a highly deferential attitude towards public authorities. It recognizes the importance of ensuring accountability and the equal protection of all persons by the police regardless of ethnic origin or gender.

3.i. **Doe v Metropolitan Toronto (Municipality) Commissioners of Police**¹⁷⁷

In *Jane Doe*, the court considered whether the police owed a private law duty of care to warn potential victims. Second, the court discussed whether the police infringed upon the plaintiff's right to life, liberty, and security of the person and to equality before and under the law as guaranteed by sections 7 and 15 of the *Charter*.

The court answered yes to all questions, awarding the plaintiff damages in the amount of \$220,364.32. MacFarland J held where the danger is reasonably foreseeable and where the potential victim is of such a narrow category as to establish a relationship of sufficient proximity, police owe a private law duty of care to warn or, alternatively, to protect from harm. The court granted a declaration that the plaintiff's

¹⁷⁵ All police officers must swear an oath to provide services impartially. See Dr Melinda Buckley, "Violence Against Women: Evolving Canadian and International Standards on Police Duties to Protect and Investigate," (2012) at 2. This report prepared for the Honourable Wally Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Vol. I, (British Columbia: November, 2012).

¹⁷⁶ See *BC Police Act*, *supra* note 73, at s. 79.

¹⁷⁷ (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (Ont Ct Gen Div) [*Jane Doe*]

Charter rights were violated. Under section 7, the court held that knowingly using a potential victim as bait in an investigation without knowledge or consent violates the security interest in discordance with the principles of fundamental justice whereby discretion cannot be exercised arbitrarily or for improper motives regardless of the broad and generous interpretation granted to law enforcement officials. Under section 15, the court found gender as a basis for failure to warn need not have been the only factor, nor even the major or primary factor, in order for discrimination to be found.

3.i.a. *Facts*

The plaintiff was the fifth reported victim to be attacked at knifepoint and sexually assaulted by a serial “balcony rapist.”¹⁷⁸ The previous offences had occurred within an eight-month vicinity in the Church-Wellesley area of Toronto, and the four other victims were all single white women with dark hair living alone in second or third floor apartments.¹⁷⁹ By the time she was sexually assaulted, then, the police were privy to a specific victim profile and perpetration tactic confined to a narrow geographical area, having already surveyed the neighbourhood, identified a list of potential targets and determined the “certainty” of future recurrence.¹⁸⁰ That said, the police opted not to issue public or private warnings, on the alleged grounds that doing so would jeopardize the investigation by urging the perpetrator to flee elsewhere and continue undetected.¹⁸¹

When the Police Commission refused to settle for \$50,000, an apology and a promise for institutional reform, the plaintiff brought both a civil action for police negligence and a constitutional claim for the infringement of her security of person and equality rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

3.i.b. *Reasoning*

With respect to the civil action, the Court found that the police owed a duty of care pursuant to the two-stage *Ann’s/ Kamloops Test*. At the first stage, the Court held that where the danger is reasonably foreseeable and the potential victim is of such a narrow category to establish a relationship of sufficient proximity, police owe a duty to warn or, alternatively, to protect from harm through other reasonable

¹⁷⁸ *Ibid* at para 1.

¹⁷⁹ *Ibid* at paras 110 – 11.

¹⁸⁰ *Ibid* at para 117.

¹⁸¹ *Ibid* at paras 80, 110, 115.

means.¹⁸² At the second stage, the Court held that no policy considerations limited or negated the scope of the duty given that the Police Commission had opted to warn potential victims in other cases of serial sexual assault.¹⁸³ In addition, the Court found that causation could be established according to the but-for test, satisfied with Doe's allegation that had she known of her high-risk status, she would have taken extra measures to protect herself.¹⁸⁴

3.i.c. Notes

Elizabeth Sheehy argues that establishment of causation in *Jane Doe* hinged on grounding the tort action in a constitutional claim, thereby suggesting that the normative public/ private legal dichotomy can and ought to be transcended in cases where the victim's vulnerable position necessarily engages with broader social justice issues.¹⁸⁵ Just as the Charter challenges "properly [characterized] the wrong" by encompassing the institutional discrimination at play, so too do they "shift the causation analysis to focus on sex discrimination and the social entrapment of battered women as the wrongs, thus making it easier for the claim to succeed."¹⁸⁶ Moreover, the incorporation of "feminist language, knowledge about male violence against women, and activist political strategy" into the *Charter* challenge by the plaintiff, WAVAV and LEAF framed both the constitutional claim and the civil action.¹⁸⁷ Indeed, at the outset MacFarland J. cites the plaintiff's counsel's submission that "the sexual victimization of women is one of the ways that men create and perpetuate the power imbalance of the male-dominated gender hierarchy that characterizes our society" and relies on this argument throughout to ground the police negligence analysis.¹⁸⁸

3.ii. B.M. v British Columbia (Attorney General)¹⁸⁹

In *B.M.*, the court considered whether a defendant police service was liable for negligence investigation and, if so, whether the defendant's negligent investigation caused or contributed to the plaintiff's posterior injury.

¹⁸² *Ibid* at paras 170 – 172.

¹⁸³ *Ibid* at para 93.

¹⁸⁴ *Ibid* at para 178.

¹⁸⁵ "Causation, Common Sense and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from Jane Doe to Bonnie Mooney" (2005) 17 CJWL 87 at 90.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid* at 88.

¹⁸⁸ *Jane Doe*, *supra* note 177, at para 9.

¹⁸⁹ [2004] 10 WWR 286, 31 BCLR (4th) 61 (BCCA) (*B.M.*).

The court dismissed the appeal, ruling that while police do owe a private duty of care to conduct thorough investigations, factual causation cannot be established where there is a sufficient temporal lapse between the police's breach and the perpetrator's wrong.

3.ii.a. *Facts*

The plaintiff had separated from her common law partner following a highly abusive relationship that culminated in a conviction for serious assault with a weapon.¹⁹⁰ After agreeing to meet him in an "open public space" to discuss property concerns, he became violent and intentionally blocked her vehicle when she attempted to leave, proceeding to chase her until she escaped and eventually reached a police station.¹⁹¹ Although the RCMP constable had access to the plaintiff's statement and the defendant's criminal record revealing a history of violence against herself and others, he informed her that there were not sufficient grounds to file a complaint pursuant to section 810 of the *Criminal Code* and declined to investigate the threat.¹⁹² Instead, he advised that she consult a lawyer to attain a restraining order and she remain in "public places" in the meantime (a recommendation that the trial judge held to make "no sense" given her location in rural B.C.).¹⁹³ Seven weeks later, the defendant broke and entered the plaintiff's home with a firearm, murdered her friend and shot and disabled her eldest daughter.¹⁹⁴ After the plaintiff and her daughters escaped, he burnt down the house and committed suicide.¹⁹⁵

The plaintiff filed a complaint that the RCMP constable had failed in his investigative duty under s 45 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-9, whereupon an internal investigation was conducted and the Superintendent found her claim to be substantiated and issued a formal apology.¹⁹⁶ That said, the final report concluded that it was "impossible" to determine whether the in/action of the constable in question had impacted the perpetrator's course of action.¹⁹⁷

The plaintiff then brought a civil action for police negligence where the trial judge found that while the police owe a private law duty of care to protect women and children from domestic violence, causation

¹⁹⁰ *Ibid* at paras 20 – 22.

¹⁹¹ *Ibid* at paras 26 – 28.

¹⁹² *Ibid* at paras 16, 28.

¹⁹³ *Ibid* at para 28.

¹⁹⁴ *Ibid* at para 31.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* at para 33.

¹⁹⁷ *Ibid*.

could not be established given the temporal lapse between the constable's breach and the perpetrator's wrong.¹⁹⁸ The plaintiff appealed.

3.ii.b. Reasoning

The majority decision does not undertake a duty of care analysis, submitting that the case is “more appropriately decided on a causation analysis” that ultimately fails on the grounds that police conduct could not be proven on a balance of probabilities to have caused or materially contributed to the injury.¹⁹⁹ Specifically, the reasoning hinges on the seven-week temporal lapse between the victim's interaction with the police and the perpetrator's thereby “unpredictable” violent outburst, where it is underscored that “police are guardians, not guarantors, of public wellbeing.”²⁰⁰

The dissenting opinion undertakes a duty of care analysis, submitting that in a legislative context where the Ministry of the Attorney General for British Columbia had passed and the RCMP had adopted a policy heightening the duty of police to protect in domestic violence cases, “the discretion whether to act on a complaint is very limited.”²⁰¹ Accordingly, although BM could not pass the but-for test for causation given the uncertain factual connection between the police's breach and perpetrator's wrong, it could meet the material contribution threshold of “above *de minimis*” on the equitable rationale that “to insist upon strict proof would leave a right without a remedy.”²⁰²

3.ii.c. Notes

Justice Donald in dissent holds that the trial judge erred in his application of the principles governing causation by using an unduly onerous standard for finding causation and failing to make an inference of causation based on the particular circumstances of the case.²⁰³ Specifically, Justice Donald relies on *Athey v Leonati* where the defendant need not be a sufficient independent cause of the plaintiff's injury, but rather make a necessary material contribution in the creation or exacerbation of the plaintiff's injury beyond the *de minimis range*.²⁰⁴ Accordingly, if it is proven that the defendant was one of the contributing causes in a single indivisible injury, then the defendant is wholly liable for all the damages

¹⁹⁸ *Ibid* at paras 34 – 37.

¹⁹⁹ *Ibid* at para 138.

²⁰⁰ *Ibid* at paras 138, 141-143.

²⁰¹ *Ibid* at para 50.

²⁰² *Ibid* at paras 88, 94.

²⁰³ *Ibid* at para 61 – 69.

²⁰⁴ [1996] 3 SCR 458 at paras 15 – 17, 140 DLR (4th) 235.

resulting from that injury, even in the context of a pre-existing injury.²⁰⁵ Here, “the plaintiff’s case for causation must rest on the basis that the police did not lessen the risk of harm by intervening and that their failure amounts to a material contribution to the loss,” a case that could be substantiated in the interests of justice and fairness given the legislative policy context surrounding domestic violence.²⁰⁶

Justice Smith for the majority upholds the trial judge’s causation analysis, finding that deference to fact supports the opinion that “the officer’s inaction did not materially increase the risk of harm to the extent that he must bear responsibility for [the perpetrator’s] acts,” that is, that the defendant did not pass the *di minimis* threshold set out in *Athey* due to a tenuous evidentiary basis that an adequate investigatory standard would have prevented the assault.²⁰⁷ In doing so, the majority affirms the “fundamental principle” of tort law that the specific causal connection between the defendant’s wrong and plaintiff’s injury is the “linchpin of liability in negligence regardless of the broader policy and legislative context.”²⁰⁸

Since the B.M. decision, however, not only has relevant domestic and international jurisprudence continued to uphold the principle that police are not specially immune to civil liability for negligent misconduct, but the contentious material contribution threshold that divided the Court in the BM causation analysis has since been somewhat clarified.²⁰⁹ In *Resurface Corp. v Hanke*, the Supreme Court of Canada held that the material contribution threshold may be applied under exceptional circumstances where the plaintiff can establish two criteria: first, that it is impossible to prove that the defendant’s actions caused his or her damage using the but-for test and that this impossibility results from factors beyond the plaintiff’s control; and second, that the defendant breached the standard of care and that his or her injuries fell within the *scope of risk* created by the defendant’s breach.²¹⁰ Noting the “subtle yet significant shift” from material contribution to “injury” to material contribution to “risk,”

²⁰⁵ *Ibid.*

²⁰⁶ *B.M.*, *supra* note 15 at para 9.

²⁰⁷ *Ibid* at para 190.

²⁰⁸ *Ibid* (“A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff. A defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff” at paras 157 – 158).

²⁰⁹ See e.g. *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 (public actors can owe a private duty of care where it can be established that they had both a statutory obligation to exercise a duty and the necessary proximity and day to day involvement to exercise control); *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 [*Hill*] (police can be liable for negligent investigation); *Jessica Lenahan (Gonzales) et al. v United States* (2007), Inter-Am Comm HR, No 80/11 (the state owes a duty of due diligence to protect victims of domestic violence, especially where the risk of harm has been recognized through the issuance of a restraining order).

²¹⁰ 2007 SCC 7, at paras 24-25 [2007] 1 SCR 333.

Erika Chamberlain notes that this relaxed standard for harm may be especially conducive to establishing causation where Courts must predict human behaviour, that is, on how a third-party perpetrator “would have reacted” had the defendant not been negligent: “It seems relatively uncontroversial that failure to enforce a protection order materially contributes to the risk that the victim will suffer continued violence, even if police inaction does not materially contribute to the injury itself.”²¹¹

3.iii. Hill v Hamilton-Wentworth Regional Police Services ²¹²

In *Hill*, the court considered whether the police can be held liable for negligent investigation and, if so, whether the respondents breached the duty of care owed to the appellant.

The court dismissed both the appeal and cross appeal, finding the police are not immune from liability under the law of negligence. There is a tort of negligent investigation, with police conduct measured against the standard of how a reasonable officer in similar circumstances would have acted. On the facts of the case, the respondents’ conduct, considered in light of police practices at the time, met this standard and the appellant’s negligence claim must fail.

3.iii.a. Facts

Hill (“the appellant”) was investigated for suspected robbery by the police (“the respondents”) based on a tip, a police officer’s photo identification, eyewitness identifications, a potential sighting near the site of a robbery and witness statements that the robber was Indigenous.²¹³ During their investigation, the respondents were asked to identify the robber from a photo lineup including the respondent and 11 similar-looking Caucasian foils despite the facts that police had information suggesting that two Hispanic men were the robbers and that two similar robberies occurred while the appellant was in custody.²¹⁴ The appellant was subsequently tried, wrongfully convicted and ultimately acquitted after over 20 months of imprisonment for a crime he did not commit.²¹⁵

²¹¹ “Tort Claims for Failure to Protect: Reasons for (Cautious) Optimism Since Mooney” (2012) 74 Sask L Rev 245 at 255, 260.

²¹² 2007 SCC 41, 3 SCR 129.

²¹³ *Ibid* at para 6.

²¹⁴ *Ibid* at paras 6 – 7.

²¹⁵ *Ibid* at para 11.

The appellant brought a civil action against the police for negligent investigation and the trial judge dismissed the claim. He appealed and the Court of Appeal unanimously recognized the tort of negligent investigation but a majority held that the police were not liable. The appellant appealed and the respondents cross-appealed from the finding that there is a tort of negligent investigation.

3.iii.b. Reasoning

McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. Hold that the tort of negligent investigation must exist in Canada. Police owe a duty of care to a suspect under investigation pursuant to the two-stage *Ann's/ Kamloops Test*. At the first stage, it is reasonably foreseeable that negligent investigation on behalf of the police may cause harm to the suspect and the parties share sufficient proximity due to the personal, close and direct nature of the relationship.²¹⁶

The respondents and interveners representing the Attorney Generals of Ontario and Canada argue that at the second stage, several policy considerations negate a duty of care: that imposing a duty would discount the “quasi-judicial” nature of police work; would create the potential for conflict between a duty of care in negligence and other duties owed by police; would undermine investigatory discretion; would promote a “chilling effect” of defensive policing, and would result in a flood of claims.²¹⁷

The Court rejects these policy arguments on the grounds that “policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent.”²¹⁸ Notably, the Court likens police officers to other professionals who exercise discretion in their work but are subject to a duty of care (e.g. lawyers and doctors) such that while “discretion, hunch and intuition” inform policing, an objective standard of reasonableness for best practices is the defining feature of professionalism.²¹⁹

To bring an action for negligent investigation, the persuasive onus is on the plaintiff to prove a causal connection between the defendant’s breach of the relevant standard of care and his or her compensable injury, where police conduct is measured against a standard of how a reasonable officer in similar

²¹⁶ *Ibid* at paras 21 – 39.

²¹⁷ *Ibid* at para 48.

²¹⁸ *Ibid*.

²¹⁹ *Ibid* at para 54.

circumstances would have acted.²²⁰ The standard is flexible and covers all areas of investigative police conduct such that minor errors do not constitute a breach, consistent with the inherent discretionary nature of policing.²²¹ In the present case, the respondents' conduct, considered in light of police practices at the time, met this standard and the appellant's negligence claim must fail as no evidence suggests that a reasonable police officer at the time would not have performed by the same token.²²²

Bastarache, Charron and Rothstein JJ in dissent counter that the tort of negligent investigation must not exist in Canada. First, liability fails in the duty of care analysis: sufficient proximity cannot be established due to the antithetical relationship between police/ state intervention and suspect/ citizen autonomy and policy considerations would negate a duty as fear of civil liability may undermine the legal system in particular and public interest more broadly.²²³ Second, the civil standard is inconsistent with criminal standards, as the narrow private focus risks losing sight of the broad public effects of policing as an institution.²²⁴ In sum, "a private duty of care owed by the police to suspects would necessarily conflict with an officer's overarching public duty to investigate crime and apprehend offenders," thereby undermining the administration of justice in particular and public interest more generally.²²⁵

3.iii.c. Notes

A common thread weaving through the relevant jurisprudence is repeated reference by police defendants to policy considerations regarding the administration of justice that arguably limit or eliminate the scope of a duty of care. Among the most oft cited are that imposing a duty would undermine investigatory discretion, would promote a "chilling effect" of defensive policing, and would result in a flood of claims.²²⁶ Such collateral consequences would ostensibly render findings of police negligence "bad for policing" by creating a situation in which police officers are "second-guessing

²²⁰ *Ibid* at paras 67 – 73.

²²¹ *Ibid*.

²²² *Ibid* at paras 74 – 89.

²²³ *Ibid* at paras 131 – 132.

²²⁴ *Ibid* at para 149.

²²⁵ *Ibid* at para 112.

²²⁶ *Ibid* at 48; Erika Chamberlain, "Negligent Investigation: Tort Law as Police Ombudsman" in Andrew Robertson and Tang Hang Wu, eds, *The Goals of Private Law* (Oregon: Hart Publishing, 2009) 283 [Chamberlain, "Negligent Investigation"] at 284.

themselves instead of making the tough investigative decisions that are necessary” and not “self-critical and [providing] constructive criticism” for fear of civil liability.²²⁷

That said, these predictions rest on two “spurious assumptions:” first, that civil actions are a universally available option and second, that the police are an institution receptive to public criticism and prone to internal scrutiny.²²⁸ In this way, these predictions not only discount access to justice issues that preclude many potential litigants from pursuing civil action, but also fail to recognize the social cost of police negligence where “not just the uncompensated victim, but also the public at large, will pay the price of a breach of accepted investigatory standards by the police.”²²⁹ So long as Courts conform to clear and consistent standards for establishing reasonable foreseeability and sufficient proximity, the imposition of a duty of care presumably ought not hinder, but rather help police investigations by incentivizing police to take greater care and continuously improve best practices in order to avoid future liability.²³⁰ Indeed, “policy considerations should not form a legal shield behind which state agencies can be negligent or discriminatory with impunity,” especially where recourse to civil action may pose the “only” remedial avenue towards both compensating victims and deterring police in the context of misconduct.²³¹

3.iv. Odhavji Estate v Woodhouse²³²

In *Woodhouse*, the court considered whether the police officers, Chief, Board and Province breached a duty to take reasonable care to ensure that police officers complied with legal obligation to cooperate with SIU investigation.

The court found the appeal should be allowed in part. The actions in misfeasance in a public office against the police officers and the Chief and the action in negligence against the Chief should proceed. The actions in negligence against the Board and the Province should be struck from the statement of claim.

²²⁷ Melanie Randall, “Sex Discrimination, Accountability of Public Authorities and the Public/ Private Divide in Tort Law: An Analysis of *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*” (2000) 26 Queen’s LJ 451 [Randall, “An Analysis of Doe”] at 486.

²²⁸ *Ibid* at 487.

²²⁹ Randall, “An Analysis of *Doe*,” *supra* note 53 at 492; Laura Hoyano, “Policing Flawed Police Investigations: Unraveling the Blanket” (1999) 62 *Modern Law Review* 912 at 933.

²³⁰ Erika Chamberlain, “Negligent Investigation: Tort Law as Police Ombudsman” in Andrew Robertson and Tang Hang Wu, eds, *The Goals of Private Law* (Oregon: Hart Publishing, 2009) 283 at 284.

²³¹ Randall, “An Analysis of *Doe*,” *supra* note 53 at 488-489.

²³² 2003 SCC 69, 3 SCR 263.

Public actors owe a private duty of care where a nexus between the defendant's wrong and the plaintiff's injury can be established through statutory obligation and sufficient proximity in terms of requisite day-to-day involvement and supervision to exercise control.

3.iv.a. Facts

Odhavji was fatally shot by police officers and the Chief of Police notified the Special Investigations Unit (SIU).²³³ The police officers did not cooperate with SIU requests and the victim's estate and immediate family ("the plaintiffs") alleged that the failure to adequately investigate the shooting resulted in depression and anxiety and in turn brought actions for negligence against the officers, the Chief, the Metropolitan Toronto Police Services Board and the Province ("the defendants") under ss 113(9) and 41(1) of the Ontario *Police Services Act* whereby members of the are under a statutory obligation to cooperate with SU investigations and the chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the *Act*, respectively.

²³⁴

The defendants brought motions under rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure* to strike out the claims for disclosing no reasonable cause of action whereupon the motions judge and Court of Appeal struck out portions of the statement of claim. The plaintiffs appealed the decision to strike the claims for misfeasance in a public office against the officers and the Chief, and the claims for negligence against the Board and the Province.

3.iv.b. Reasoning

Under rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, the test for whether a pleading should be struck for disclosing no reasonable action is whether it is plain and obvious that the action is certain to fail, that is, that a duty of care is not recognized.²³⁵ The onus is on the plaintiff to prove on a balance of probabilities that the defendant owed a duty to take reasonable care.²³⁶

²³³ *Ibid* at para 2.

²³⁴ *Ibid* at paras 3 – 4.

²³⁵ *Ibid* at paras 13 – 15.

²³⁶ *Ibid*.

In terms of the misfeasance claim against the police officers and the Chief, Iacobucci J held that certainty of failure was not plain and obvious in that the allegations contained in the statement of claim pleaded each constituent element of the tort. Specifically, misfeasance is an intentional tort defined by (1) deliberate and unlawful conduct in the exercise of public functions; and (2) the defendant's awareness that the conduct is unlawful and likely to injure the plaintiff.²³⁷ Here, the awareness requirement constitutes the nexus between the parties such that failure of a public officer to perform a statutory duty can amount to misfeasance.²³⁸ In the case at hand, the plaintiffs can argue that the Chief was intentionally and unknowingly uncooperatively with the SIU investigation pursuant to his statutory obligations under the *Police Services Act* and thus the allegation ought not be struck from the statement of claim.²³⁹

With respect to the negligence claim against the Chief, Iacobucci J again held that certainty of failure was not plain and obvious in that a prima facie duty of care could be established pursuant to the two-stage *Ann's/ Kamloops Test* and thus the action should proceed for the issue to be determined at trial. At the first stage, it was reasonably foreseeable that the officers' failure to cooperate with the SIU investigation and, by extension, that the Chief's lack of supervision would harm the plaintiffs.²⁴⁰ Further, there was sufficient proximity between the defendants and the plaintiffs consistent with the statutory duty imposed by the *Act* and public expectations surrounding police conduct. At the second stage, no policy considerations were found to negate the duty of care.²⁴¹

That said, Iacobucci J held that no such prima facie duty of care could be established for the Board and Province. Specifically, the negligence claims fail at the second stage in that there was not sufficient proximity between the defendants and the plaintiffs in terms of both private law and statutory duties as neither had specific involvement in supervision of officers and involvement in their day-to-day conduct, but rather had general policy and monitoring powers with which the Court ought to avoid interference.²⁴²

²³⁷ *Ibid* at para 23.

²³⁸ *Ibid* at para 29.

²³⁹ *Ibid* at para 42.

²⁴⁰ *Ibid* at paras 53 – 59, 62 – 69.

²⁴¹ *Ibid*. While Counsel for the Chief submits that imposing a private law duty on the Chief to ensure that the officers cooperate with the investigation would compromise the independence of the SIU, the Court holds that “It is difficult to see how this is the case, particularly as the Chief already is under a statutory obligation to ensure such cooperation” at para 60.

²⁴² *Ibid* at 68 – 72.

3.iv.c. Notes

Iacobucci J.'s decision points to a policy/operational distinction in liability for public actors. With regards to statutory duties, where enabling legislation requires a public authority to take a particular course of action, a public authority cannot be liable in negligence if it was doing what was required to do by statute. However, a public authority can be liable in negligence if it was negligently performing its statutory duty, failing to fulfill its statutory duty or the court determines a common law cause of action exists²⁴³ The mere fact of a breach of statute is not determinative of negligence per se in that recognizing a nominate tort would risk liability without fault, but may be evidence of a standard of care and its breach²⁴⁴

For statutory powers where enabling legislation gives a public authority discretion, public actors can be held liable in negligence for operational decisions but cannot be liable in negligence for a policy decisions unless they are not exercised consciously or in good faith²⁴⁵ Operational decisions must be reasonable and reasonably carried out. Here, Court review is appropriate to assess manner and quality in all relevant circumstances, which may include budgetary restraints, available personnel and equipment.²⁴⁶

Policy decisions vary infinitely and can be made at both high and low levels of government; here, Court review is not appropriate so long as the public authority exercising bona fide discretion on policy design.²⁴⁷ Upon inspection by government, a policy decision becomes operational by way of implementation.²⁴⁸ Albeit the dominant approach in Canada, the policy/operational distinction “does not work very well as a legal test” as Courts have found it notoriously difficult to decide whether a decision falls on the policy or operational side of the line. After a review of foreign jurisprudence, the Supreme Court of Canada made the following 3 observations:

1. The net of immunity is cast too broadly if all the rational government acts that involve discretion are protected;
2. Only “core” policy decisions should be protected from negligence liability; and

²⁴³ *R. v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at paras 29 – 30, 143 DLR (3d) 9.

²⁴⁴ *Ibid.*

²⁴⁵ *Just v British Columbia*, [1989] 2 SCR 1228 at paras 18 – 25, 41 BCLR (2d) 350.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

3. Core policy decision should not be defined as a “non-operational” decision, but should be defined positively as a decision that is grounded in social, economic and political considerations.²⁴⁹

Based on these premises, the SCC concluded that “core” policy governmental decisions protected from judicial review are “decisions as to a course or principle of action that are based on public policy consideration, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.”²⁵⁰

v. Police Statutes: Concluding Remarks

Police can be held civilly liable through the torts of negligent investigation and misfeasance. Establishing misfeasance requires proof of a higher level of misconduct in addition to intent. The tort of negligent investigation introduces the possibility of holding police accountable for failing to investigate or for investigating negligently. To establish this claim, the plaintiff must demonstrate the police owed a duty of care not only to the public, but also to him or her as plaintiff. He or she must show that the harm suffered was reasonably foreseeable and sufficiently proximate, and that no policy considerations limit the scope of this duty. A key issue will be establishing factual causation under either the ‘but for’ test or the material contribution test. The tort of negligent investigation provides a tool for holding police accountable for their failure to provide adequate protection to Indigenous women from violence. It recognizes that deference to public authorities is not appropriate in all contexts. For the rule of law to have meaning within Canada, all individuals must be guaranteed the same protection from violence or threats of violence without discrimination.

²⁴⁹ *R. v Imperial Tobacco Canada Ltd.* 2011 SCC 47 at paras 78, 84 – 86, [2011] 3 SCR 45.

²⁵⁰ *Ibid* at para 90.

4. The Charter

Based on a finding of negligent investigation, it may be possible to seek a declaration that the state's conduct was unconstitutional. Under section 7 of the *Charter*, it can be argued that state action, or alternatively, failure to act, deprives the victims of their right to life and security of the person. Negligent investigation violated the victims' families' right to security of the person by harming their psychological integrity, and further infringed on potential victims right to security of the person by placing them at an elevated risk of harm by a third party. Ultimately, the imposition of these harms violated principles of fundamental justice, including arbitrary application of the law, and the denial of both substantive equality and due diligence practices.

Under section 15 of the *Charter*, failure to provide Indigenous women with the benefit of police protection from violence creates a discriminatory distinction based on the prohibited grounds of race and sex. As such, this analysis must be informed by the value of substantive equality, and the state's obligation to take measures to protect vulnerable and historically excluded groups.

The content of the claimant's *Charter* rights must be informed by Canada's obligations under international human rights law and the values recognized in human rights codes. These documents guarantee the equal provision of services, and legally obligate the state to adopt due diligence practices to reduce violence against Indigenous women in Canadian society.

4.i. Section 7

Section 7 of the *Charter* guarantees the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Potential difficulties in establishing a section 7 claim with regards to missing and murdered indigenous women include the applicability of the *Charter*, the interest engaged, and demonstrating a violation of the principles of fundamental justice.

4.i.a. *The Applicability of the Charter*

The *Charter* applies to state laws and actions.²⁵¹ However, the Supreme Court has recognized that where the state has a positive obligation to act, inaction, such as a failure to enact protections necessary to a person's physical integrity, might engage section 7.²⁵² The Supreme Court first considered whether section 7 included a positive dimension in *Gosselin v Québec (Attorney General)*.²⁵³ The case involved a constitutional challenge to the validity of a social assistance scheme setting the base amount of welfare payable for those under 30 at approximately one third of that payable to those over 30. Rejecting the claim, McLachlin CJ for a narrow majority concluded:

Section 7 speaks of the right *not to be deprived of* life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of these.²⁵⁴

However, this holding does not constitute a complete bar on asserting positive obligations under section 7. McLachlin CJ stressed the lack of evidence to support the claimant's argument in this case, and cited the living tree doctrine to emphasize the importance of engaging in a flexible application of the *Charter*. Indeed, she recognized the possibility of a future interpretations of section 7 to include affirmative rights.²⁵⁵

In other cases, the courts have recognized that a policy of inaction may trigger a section 7 violation. In *Jane Doe*, the court noted that the police actively adopted a policy of treating potential female victims as bait, and thereby exposed women to physical harm that they could have otherwise protected against. This conduct was sufficient to trigger section 7.²⁵⁶ In a case of violence against Indigenous women, it may be possible to argue that policies adopted by the police and RCMP with regard to certain groups of women violated section 7 by exposing them to a high risk of physical harm.

²⁵¹ Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2005) at 54.

²⁵² Stewart, *Fundamental Justice*, at 55.

²⁵³ *Gosselin v Québec (Attorney General)* 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

²⁵⁴ *Ibid*, at para 81.

²⁵⁵ *Ibid*, at 82-83.

²⁵⁶ *Jane Doe*, *supra* note 177, at para 186.

4.i.b. *The Interest Engaged*

The state's conduct with regards to Canada's missing and murdered indigenous women violates the security interest of those who suffered physical violence at the hands of a third party. In addition, it violated the right to security of the person of the family members of indigenous women who have gone missing or been murdered by exposing them to psychological harm. Lastly, it violated the security of myriad indigenous women by putting them at an elevated risk of physical harm.

4.i.b.i. *Psychological Integrity*

Security of the person refers to a person's bodily integrity and their psychological integrity. In *R v Morgentaler*,²⁵⁷ a majority of the court struck down Canada's therapeutic abortion law. Dickson CJC, Lamer J concurring, held "state interference with bodily integrity and serious state imposed psychological stress, at least in the criminal context, would constitute a breach of security of the person."²⁵⁸ The court found that refusing a woman's power to choose whether or not to have an abortion put her at physical risk and imposed serious emotional stress.²⁵⁹

The threshold for finding an interference with security of the person on the basis of one's psychological integrity is objective and high. In *New Brunswick (Minister of Health and Community Services) v G(J)*,²⁶⁰ the court attempted to delineate boundaries on psychological integrity in the context of the security interest. While recognizing that it would not be possible to provide an exact standard due to the variable facts of each case, the court held that the state action must have profound and serious effects on a person's integrity judged objectively against a person with reasonable sensibility.²⁶¹

To establish a breach of security of the person, the claimant must establish a causal relationship between the impugned state action and serious psychological stress. In *Blencoe v British Columbia (Human Rights Commission)*,²⁶² the accused was charged with multiple counts of sexual harassment. As a result of the claims, which were brought before the British Columbia Human Rights Commission, and the media attention they received, the claimant lost his job and fell into a depression. In refusing to

²⁵⁷ [1988] 1 SCR 30 [*Morgentaler*].

²⁵⁸ *Ibid*, per Dickson J, at 56.

²⁵⁹ *Ibid*, per Dickson J, at 56.

²⁶⁰ [1999] 3 SCR 46 [(*G*)/*J*]

²⁶¹ *Ibid*, at paras 59 and 60.

²⁶² 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*]

find a violation of security of the person, the court found that the infringement on psychological integrity must firstly be state caused, and secondly must be serious.²⁶³ The prejudice suffered by the claimant resulted from the allegations of sexual harassment, not the impugned human rights proceedings. In this case, it will likely be possible to establish a direct causal relationship between the police's failure to provide adequate protection or investigation for missing and murdered Indigenous women caused serious harm to the psychological integrity of family members.

4.i.b.ii. Risk

In the past, courts have been hesitant to find a breach of security of the person in cases of an elevated risk of physical harm. In *Trang v Alberta (Edmonton Remand Centre)*,²⁶⁴ inmates at the Edmonton Remand Centre applied for relief under section 7 on the basis that conditions in the vans that transported them to the jail were unsafe. The Alberta Court of Appeal found the elevated risk of riding in prison vans did not engage the *Charter*. The Court expressed concern that the proposed claim elevated everyday risks to the level of a *Charter* violation, stressing that not every state imposed increase in risk will engage the *Charter*.²⁶⁵

Courts have recognized an increased of physical harm risk violates the right to security of the person where the risk in question is high and serious. In *Victoria (City) v Adams*²⁶⁶ the Court held that municipal prohibitions banning the temporary erection of shelter concerned homeless persons' right to security, since the law greatly increased the health risks associated with homelessness. In *R v Bedford*,²⁶⁷ the Supreme Court returned to the question of risk, holding that criminalizing activities associated with prostitution violates section 7 of the *Charter*, since the legislation prevented sex workers from taking steps to protect themselves against the risks associated with a lawful activity.²⁶⁸ This echoes MacFarland J's reasoning in *Jane Doe*. Examining the police policy with regard to potential victims of a serial rapist, she found the state's failure to warn women of the risk in question prevented them from taking steps to protect themselves. As a result, these women suffered an elevated risk of harm at the hands of a third party.²⁶⁹ On this reasoning, a potential victim of violence could

²⁶³ *Ibid*, at para 57.

²⁶⁴ 2007 ABCA 263, [2007] AJ No 907 [*Trang*]

²⁶⁵ *Ibid*, at para 28

²⁶⁶ 2008 BCSC 1363, [2008] BCJ No 1935

²⁶⁷ 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*]

²⁶⁸ *Ibid*, at para 60.

²⁶⁹ *Jane Doe*, *supra* note 177, at 186.

establish a breach of security of the person due to elevated exposure to risk where the risk in question had not materialized.

4.i.c. The Principles of Fundamental Justice

A state action that engaged a claimant's interest under section 7 and does not accord with the principles of fundamental justice will be found to be unconstitutional. The question of whether a principle of fundamental justice has been violated is a qualitative one that asks whether the law or state action can be applied to any one individual.²⁷⁰

The principles of fundamental justice consist of procedural and substantive norms that constitute “the basic tenets of our legal system.”²⁷¹ However, these principles are distinct from conceptions of natural justice, and go beyond general public policy concerns.²⁷² The court may recognize new principles of fundamental justice on a case-by-case basis where the claimant succeeds in meeting three formal requirements:

1. It must be a legal principle
2. There must be sufficient consensus that it is fundamental to the operation of our legal system
3. It must be capable of being identified with sufficient precision to provide a manageable standard against which to measure deprivations to life, liberty and security of the person.²⁷³

Here, the Court adopts a highly contextual “balancing test” that weighs the competing interests of the state and individual on the facts of the case.²⁷⁴ Where the impugned state action is procedural in nature (e.g. negligent investigation), the Court will consider the common law duty of procedural fairness as a minimum standard for determining the scope and content of the applicable principle of fundamental justice.²⁷⁵ While procedural fairness was traditionally posited on a “administrative decision-making continuum” where the duty applied disparately to the administrative, executive, judicial or quasi-judicial spheres, the Court has recently rejected this distinction in favour of the recognition that

²⁷⁰ *Bedford*, *supra* note 267, at paras 123-129.

²⁷¹ *Re BC Motor Vehicle Act* [1985] 2 SCR 486, at para 31, 23 CCC (3d) 289 [*Re Motor Vehicle Act*]

²⁷² *Ibid.*

²⁷³ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, 1 SCR 791 at 209 [*Chaoulli*]; *R v Marmo-Levine*, 2003 SCC 24, at para 113, [2003] 3 SCR 571 [*Marmo-Levine*].

²⁷⁴ See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 45, 1 SCR 3.

²⁷⁵ *Ibid* at para 113 (although not identical, the same “values and objectives” underlie the duty of fairness and the principle of fundamental justice).

“decision [that] is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness” regardless of provisions included in the enabling statutory authority.²⁷⁶ That said, the acknowledgement that some administrative decisions mandate either more deference or protection than others manifests in the flexible rather than fixed criteria applied to determine the appropriate level of procedural fairness:

1. The nature of the decision made and the procedures followed in making it, that is, “the closeness of the administrative process to the judicial process”;
2. The role of the particular decision within the statutory scheme;
3. The importance of the decision to the individual affected;
4. The legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and
5. The choice of procedure made by the agency itself.²⁷⁷

Although discretionary powers are generally granted considerable latitude, that discretion must nonetheless respect the relevant statute, the rule of law, the fundamental values of Canadian society and the *Charter*.²⁷⁸ With regards to s 7 claims, discretionary powers must be exercised in accordance with the principles of fundamental justice where the life, liberty and security of the person could be infringed as the result of a decision.²⁷⁹ In the law enforcement context, while police discretion does not violate the principles of fundamental justice even where the impugned decision does not entail “the *most favourable* procedure that can possibly be imagined,” it does so where it does not involve “at a *minimum*” a *fair* procedure.²⁸⁰

4.i.c.i. Arbitrariness

The Supreme Court recognizes that a norm against arbitrariness is a principle of fundamental justice. In *Bedford*, McLachlin CJ concluded the norm against arbitrariness applies where there is no connection between a law or state action, and its effect.²⁸¹ Previous standards for finding a law arbitrary articulated lower thresholds, such as where the law is not necessary to achieve the objective of the legislation in

²⁷⁶ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20, 174 DLP (4th) 193 [*Baker*].

²⁷⁷ *Ibid* at paras 23 – 27.

²⁷⁸ *Ibid* at 53.

²⁷⁹ *United States v Burns*, 2001 SCC 7 at para 32, 1 SCR 283.

²⁸⁰ *R v Beare; R v Higgins*, [1988] 2 SCR 387 at paras 51, 54, 55 DLR (4th) 481.

²⁸¹ *Bedford*, *supra* note 267, at para 35, per McLachlin CJ.

question, and higher thresholds, requiring the claimant establish the effect of the law is inconsistent with its objective.²⁸²

To date, few decisions have explicitly relied on the norm against arbitrariness to invalidate state action. In *Canada (AG) v PHS Community Services Society (PHS)*,²⁸³ the Supreme Court allowed a challenge to the Federal Minister of Health's decision declining to renew an exemption under the *Controlled Drug and Substances Act* to permit the establishment of a safe injection site. The Court found the decision was contrary to the purpose of the act, namely, the protection of health and public safety. As a result of the inconsistency between the object of the law and its effects, a majority of the court ruled it was unconstitutional.²⁸⁴ In *Chaouli v Quebec (Attorney General)*,²⁸⁵ McLachlin CJ and Major J in a concurring judgement found a ban on private health insurance imposing unreasonable wait times for certain patients arbitrarily denied patients' right to life and security of the person.²⁸⁶ These cases demonstrate that state conduct may breach of the norm against arbitrariness where the effect of that conduct is inconsistent or unconnected with the purpose of the enabling statute.

4.i.c.ii. *Substantive Equality*

The proposition that substantive equality is a principle of fundamental justice under section 7 finds support in case law. In *Jane Doe v Toronto (Metropolitan) Commissioners of Police*,²⁸⁷ MacFarland J found the police failed to warn potential female victims of the presence of a serial rapist in their community, effectively using them as bait. Under section 15, the Court found the police failed in their duty to warn the complainant "because of a stereotypical discriminatory belief that as a woman she and others like her would become hysterical and panic and scare off an attacker . . . A man in similar circumstances . . . would have been warned".²⁸⁸ With regards to section 7, the Court accepted the reasoning of the Divisional Court, which found that the state's actions engaged the complainant's right to security of the person by exposing her to a risk of assault. The court found these actions could not accord with the principles of fundamental justice on the grounds that "[t]hese principles, while entitled to broad and generous interpretation, especially in the area of law enforcement, could not be said to

²⁸² Stewart, *Fundamental Justice*, at 136.

²⁸³ 2011 SCC 44, [2011] 3 SCR 134 [*PHS*].

²⁸⁴ *Ibid*, at para 100.

²⁸⁵ *Chaoulli*, *supra* note 273.

²⁸⁶ *Ibid*, at para 153, per McLachlin CJ and Major J.

²⁸⁷ *Jane Doe*, *supra* note 177.

²⁸⁸ *Ibid* at paras 181-182

embrace discretion exercised arbitrarily or for improper motives”²⁸⁹ State actions that deprive an individual of their section 7 interests in violation the norm of substantive equality are contrary to the principles of fundamental justice. An impugned state action cannot be grounded in discriminatory attitudes. The fact that such attitudes are not the sole or primary factor motivating the state conduct is irrelevant.²⁹⁰ Moreover, as Kerri Froc notes, “[d]iscriminatory state action, unfairness and violation of international conventions almost seemed self-evident to the Court as violations of fundamental justice”.²⁹¹ These analyses support the notion that substantive equality and the protection against discriminatory conduct must be taken into account in a section 7 analysis.

Despite implicit support in the case law, to establish the claim that substantive equality is a principle of fundamental justice it must be possible to establish that substantive equality 1) is a legal principle 2) that there is sufficient societal consensus surrounding that it is fundamental justice system and 3) the such a principle provides a manageable standard.

1) Substantive equality is a legal principle

The legal principle of substantive equality exists on both an international and domestic level. Internationally, the norm of substantive equality is at the core of the *Convention on the Elimination of All Forms of Discrimination Against Women*²⁹², the *Convention on the Elimination of Racial Discrimination*²⁹³ and the *Declaration of the Rights of Indigenous People*.²⁹⁴ These conventions assert the importance of taking positive action to remedy systemic inequality and historical disadvantage, rejecting the formalist view that equality consists in uniform treatment.

Domestically, the principle of equality informs Canadian jurisprudence on a number of levels. It is enshrined in the *Charter* under section 15. It has been identified as a central aspect of the constitutional principle of democracy.²⁹⁵ Finally, the court has applied the norm of substantive equality in numerous

²⁸⁹ *Ibid* at para 186

²⁹⁰ *Ibid* at para 183

²⁹¹ Froc, “Constitutional Coalescence” at para 63.

²⁹² *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS.1982 no. 31, Ga Res. 34/180 (entered into force 9 January 1982)[CEDAW]

²⁹³ *International Convention on the Elimination of Racial Discrimination*, 7 March 1966, 660 UNTS 195, 5 ILM 352 (entered into force 4 January 1969) [CERD]

²⁹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/61/L.67: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [UNDRIP]

²⁹⁵ *Reference re Secession of Québec* [1998] 2 SCR 217, 161 DLR (4th) 385.

cases as a *Charter* value. In a concurring judgement in *New Brunswick (Minister of Health and Community Services) v JG*,²⁹⁶ L’Heureux-Dubé applied an equality lens in her approach to section 7. In discussing the role of equality concerns, she writes:

In considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the quality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15.²⁹⁷

More recently, in *R v Mabior*²⁹⁸ the court concluded the law of fraud vitiating consent must be interpreted in light of the *Charter* values of equality, human dignity, and autonomy.²⁹⁹ The court reiterated the importance of these values in *R v Hutchinson*³⁰⁰ when interpreting the law of consent in the context of sexual assault.³⁰¹ The role of substantive equality in international law, and in domestic law in *Charter* and common law interpretation demonstrates that it functions as a legal principle.

2) There is sufficient consensus that substantive equality is fundamental to the operation of the Canadian legal system

Equality is a fundamental to Canadian society and the operation of the Canadian legal system. As Dickson J concluded in *R v Big M Drug Mart*,³⁰² “[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.”³⁰³ The value of equality is equally central to the Canadian legal system, and is a necessary aspect of the rule of law. In *Roncarelli v Duplessis*,³⁰⁴ Rand J concluded that the arbitrary and discriminatory exercise discretion violates the rule of law. Underlying this view is the notion that equality is a fundamental aspect of the rule of law in Canadian society and its legal system.

3) Substantive equality can be identified with sufficient precision to provide a manageable standard

Substantive equality is a precise, identifiable principle capable of setting a standard against which to measure the deprivation of life, liberty, and security of the person. As discussed above, an equality

²⁹⁶ [1999] 3 SCR 46, [1999] SCJ No 47 [*JG*].

²⁹⁷ *Ibid*, at para 115, per L’Heureux-Dubé.

²⁹⁸ 2012 SCC 47, [2012] 2 S.C.R. 584 [*Mabior*].

²⁹⁹ *Ibid*, at para 22.

³⁰⁰ 2014 SCC 19, [2014] S.C.J. No. 19 [*Hutchinson*].

³⁰¹ *Ibid*, at para 36 and 72.

³⁰² *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [*Big M Drug Mart*].

³⁰³ *Ibid* at para 94, per Dickson J.

³⁰⁴ [1959] SCR 121 [*Roncarelli*].

value operates on both an international and domestic level. In the legal context, equality is not “a protean word.” It is capable of concise articulation and has the capacity to both expand the scope of section 7 and limit it. In *R v Mills*,³⁰⁵ the Court upheld the constitutionality of newly enacted disclosure requirements in the context of a sexual assault case. In doing so, the Court held that the accused’s right to a full defense must be balanced against the complainant’s right to privacy. Equality animated both of these concerns. Similarly, in *R v Darrach*,³⁰⁶ the court considered the constitutionality of the newly enacted provisions governing the exclusion of evidence in sexual assault cases. The court found that the legislation granted sufficient discretion to ensure that both the accused’s right to cross-examine and the complainant’s equality and privacy rights were respected. These cases demonstrate that equality is neither indefinable nor overly broad. It provides a sufficient standard for measuring deprivations to life, liberty, and the security of the person.

4.i.c.iii. Due Diligence

As a procedural safeguard (i.e. state protection of human rights) with a substantive dimension (i.e. gender equality), due diligence can be persuasively argued as a principle of fundamental justice. It is therefore necessary to determine whether the international standard of due diligence meets the three *Chaoulli* requirements for determining a principle of fundamental justice:

1) Due Diligence is a legal principle

Not only is due diligence a legal principle in international public law, but it is also a codified rule in international conventions that Canada has explicitly ratified such that state accountability for violence against women falls squarely in the realm of law versus policy. Further, the Court has explicitly referenced Canadian ratification of CEDAW as a contextual lens through which domestic laws surrounding sexualized violence ought to be interpreted and applied.³⁰⁷

In addition, analogies can be drawn between the international due diligence standard and the domestic tort of negligent investigation, further suggesting that state accountability for violence against women falls squarely in the realm of law rather than public policy.³⁰⁸ For example, the burden of proving

³⁰⁵ [1999] 3 SCR 668, 75 Atla LR (3d) 1 [Mills].

³⁰⁶ 2000 SCC 46, [2000] 2 SCR 443.

³⁰⁷ See *R v Ewanchuk*, [1999] 1 SCR 330 at paras 69 – 73, [1999] SCJ No 10 [Ewanchuk].

³⁰⁸ See *Hill*, *supra* note 209.

knowledge of “real and immediate risk to the life of an identified individual or individuals” mirrors the requirement of sufficient proximity and reasonable foreseeability for establishing a duty of care and the criteria to be “judged reasonably” resembles the reasonable person test employed to determine the appropriate standard of care at common law.

2) Due diligence is vital to our societal notion of justice, which implies a significant societal consensus

Societal consensus surrounding the mandate for state protection of human rights is evidenced in Canadian domestic and international commitments. Domestically, due diligence reflects express *Charter* values relating to the administration of justice, as well as addition to racial, gender and sex equality provisions included in federal and provincial human rights legislation.³⁰⁹ In addition, due diligence embodies unwritten constitutional principles that frame the “internal architecture” of our constitution (namely, the rule of law whereby all exercises of legitimate public power must have a source in law and every state official or agency is subject to constraint of the law). Internationally, ratification of CEDAW suggests that state accountability for the prevention of violence against women is a principle supported by Canada both at home and abroad.

3) Due diligence is capable of being identified with precision and applied in a manner that yields a predictable result.

The due diligence principle can be applied both precisely and predictably so as to engender a reasonable standard against which to measure deprivations of life, liberty or security of the person. In terms of precision, state duty to protect is clearly defined in common law (discussed above) and statutory (discussed below) sources outlining investigatory standards and best practices. With regards to predictability, domestic and international evidence suggests that where states are held accountable for gender-based violence, there is a greater likelihood of actionable punishment for perpetrators and, by extension, emotional and financial compensation for victims.³¹⁰

Second, because the impugned state action is procedural in nature, it is necessary to consider the common law duty of procedural fairness in relation to the enabling statutory authorities order to

³⁰⁹ See e.g. *Canadian Human Rights Act*, RSC 1985, c H-6, ss 2 – 3; *Human Rights Code*, RSBC 1996, c 210, ss 7 – 14.

³¹⁰ See e.g. *Doe*, *supra* note 177 (where the joint civil action and *Charter* claim against police for failure to warn resulted in a damages award over 4 times the amount of the plaintiff’s settlement offer, in addition to a declaration that her security of the person and equality rights had been violated); *Maria da Penha Maia Fernandes v Brazil* (2001), Inter-Am Comm HR. No 54/01, Case 12.051 (where shifting the focus to state accountability resulted in remedial action for a victim of domestic violence after 20 years of stagnation in the Brazilian justice system).

determine the scope and content of due diligence as a principle of fundamental justice based on the five flexible *Baker* criteria:

1. The nature of the decision to investigate with due diligence and the procedures followed in making it resemble the judicial process insofar as both serve as composite parts of a holistic structure of law enforcement in Canada, with both the executive and judiciary branch granted a relatively high degree of independence in prosecution and punishment but nonetheless bound by law.³¹¹
2. The decision to investigate with due diligence is both expressly and impliedly encompassed within the relevant statutory scheme.

In British Columbia, several statutes govern state and police standards of conduct:

*Royal Canadian Mounted Police Act*³¹² and the *Royal Canadian Mounted Police Regulations*³¹³

In addition to being Canada's federal police force, the RCMP and BC's provincial police force have contracts with police divisions in many municipalities to provide services, including the Vancouver Police Department. Under the *Act*, police can be liable for conduct complaints where police behaviour causes or has potential to cause physical, emotional or financial harm to any person; violates a person's dignity, privacy or other legal rights; or is likely to undermine public confidence in police.³¹⁴ According to the corresponding *Regulations*, such conduct includes neglect of duty, poor service, or inadequate police service and failing to uphold the political impartiality of the RCMP, all of which have been identified at root causes of the negligent investigation of missing and murdered indigenous women.³¹⁵

³¹¹ See *Hill*, *supra* note 209 at 48 – 50 (where the police respondents and the interveners representing the Attorneys General of Ontario and Canada and various police associations explicitly rely on the “quasi-judicial nature of policing” as a policy argument).

³¹² *RCMP Act*, *supra* note 45.

³¹³ SOR/88-361 [*RCMP Regulations*].

³¹⁴ See generally *RCMP Act*, *supra* note 45.

³¹⁵ See *RCMP Regulations*, *supra* note 317 at ss 37 – 58.

*British Columbia Police Code of Ethics*³¹⁶

The *Code*, which applies both individually and collectively to all police officers alongside their respective organizations or agencies regardless of rank or position, mandates adherence to the following fundamental principles while exercising discretion in the administrative decision-making process:

- Democracy & the rule of law
- Justice & equality
- Protection of life & property
- Safeguarding the public trust
- That the police are the public and the public are the police
- The principles of the Constitution of Canada
- The rights enshrined in the *Charter of Rights & Freedoms*.³¹⁷

The *BC Police Act*³¹⁸ sets out duties to maintain law and order and effective levels of policing at multiple levels of law enforcement, including the Minister, the Municipality and the chief constable and municipal police.³¹⁹ Failure to perform these duties or acts of police misconduct can result in joint and several liability for the minister (on behalf of the government) and the municipality or regional district (on behalf of its agents), but not in personal liability for constables, officers or investigators.³²⁰ Notably, misconduct includes “neglect of duty,” defined as “neglecting, without good or sufficient cause, to ... promptly and diligently do anything that it is one’s duty as a member to do ... [or] ... promptly and diligently obey a lawful order of a supervisor.”³²¹

1. The importance of the decision to investigate with due diligence is paramount to respecting the dignity and worth of the individuals and groups affected, including victims and survivors of sexualized and racialized violence, as well as their friends, families and communities.

³¹⁶ Justice Institute of British Columbia, *British Columbia Police Code of Ethics* (2005) online at <<http://www.jibc.ca/>>.

³¹⁷ *Ibid.*

³¹⁸ *BC Police Act*, *supra* note 73.

³¹⁹ *Ibid* at ss 2, 15, 34.

³²⁰ *Ibid* at ss 11, 20-21.

³²¹ *Ibid* at s 77.

2. Given the statutory duties and in particular a societal reliance on police as guardians of the law more generally, the legitimate expectations of the persons challenging police decisions to investigate with due diligence have clearly been breached by state procedures operating to the contrary.
3. As discussed, the choice of procedure made by the police as an agency itself, although afforded a high degree of discretion, must be nonetheless exercised in accordance with the relevant statute, the rule of law, the fundamental values of Canadian society and the *Charter*.³²² The “critical failures” of the RCMP and VPD not only contravene provisions set out in the relevant statutory authorities, but also domestic and international commitments and obligations surrounding the administration of justice, human dignity and worth, gender and racial equality, the sanctity of life and personal security.

The high degree of procedural fairness required in light of the legal, institutional and social context suggests that the state could not likely argue that the life and security of person interests engaged by the negligent investigations for missing and murdered indigenous women in the DTES and Highway of Tears were in accordance with due diligence as a principle of fundamental justice.

4.ii. Section 15

Section 15(1) of the *Charter* guarantees equality before and under the law, as well as the right to equal protection and benefit of the law without discrimination based on enumerated or analogous grounds. The purpose of this guarantee is to ensure substantive (rather than formal) equality and to prevent discrimination.³²³ In *Kapp*, the court established a two-step test for determining a breach of section 15(1), requiring the claimant to establish (i) the impugned state action created a distinction on an enumerated or analogous ground and (ii) that the distinction created a disadvantage by perpetuating prejudice and stereotype.³²⁴

4.ii.a. Differential Treatment

³²² *Baker* supra note 276 at para 53.

³²³ *R v Kapp* 2008 SCC 41, [2008] 2 S.C.R. 483, [*Kapp*].

³²⁴ *Ibid*, at para 17.

Differential treatment exists where the law imposes more of a burden or extends less of a benefit to a given group.³²⁵ This distinction can be either direct or indirect, and does not have to be intentional.³²⁶ The claim at issue is fundamentally comparative, and requires establishing a comparator group. Given that the state conduct in question engages the grounds of race and sex, it could be possible to compare violence against Indigenous women to violence against Indigenous men, or violence against non-Indigenous women.

Following the norm of substantive equality, treating a historically marginalized and excluded group in the same fashion as the general public, thereby failing to consider and accommodate difference constitutes differential treatment.³²⁷ Moreover, where a group suffers from disadvantage, such as Indigenous women, section 15 may require the state to take positive action to reasonably accommodate that disadvantage.³²⁸ In this case, accommodation could impose an obligation to adopt a different policy in the investigation of murdered or missing Indigenous women.

4.ii.b. Affirmative Action

Under section 15(2), differential state treatment does not violate section 15 where the government can demonstrate that the program has an ameliorative or remedial purpose and targets a disadvantaged group identified by the enumerated or analogous grounds.³²⁹ This test focuses on purpose, asking whether there is a rational connection between the means chosen and the legislative goal.³³⁰ State conduct that restricts or punishes will rarely be qualified as ameliorative. Given the undeniably negative impact of the state's failure to address violence against Indigenous women (and the historical disadvantage faced by indigenous peoples in Canada as a whole), it seems unlikely the state would succeed in establishing that their policies qualify as affirmative action.

The state's failure to protect indigenous women could be argued to constitute differential treatment on the enumerated grounds of sex and race. The state is clearly aware of the disproportionate number of missing and murdered indigenous women. However, efforts to address the heightened threat to indigenous women have been inconsistent and largely ineffective. For instance, despite high number of

³²⁵ *Ibid.*

³²⁶ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 174.

³²⁷ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 46 CRR (2d) 189 [*Eldridge*].

³²⁸ *Ibid.*, at paras 60-62.

³²⁹ *Kapp*, *supra* note 310, at para 41.

³³⁰ *Ibid.*, at para 48.

MMIW, many police forces in Vancouver did not have a Missing Persons Unit, and when one existed, it rarely included a senior officer.³³¹ Moreover, police agencies within British Columbia used comparatively poor risk assessment methods and cross-referencing tools.³³² As a result, indigenous women did not and do not enjoy the same protection from violence as other women, which is a significant problems given their particularly high risk of violence.

4.ii.c. *Discrimination*

A law has a discriminatory impact where the purpose or effect of the law is the perpetuation of prejudice against a historically disadvantaged group or where a disadvantage imposed by law is based on stereotypes.³³³ However, where a law perpetuates the disadvantage of a historically disadvantaged group, there is no need to show prejudice or stereotyping.³³⁴ In this case, it is possible to establish both pre-existing disadvantage and stereotyping. For a discussion of the former, please see factor one of the *Law* test below.

It may be possible to argue that the government's failure to address violence against Indigenous women stems from the prejudiced belief that Indigenous women have less inherent worth than non-Indigenous women, which is further compounded by stereotypes that Indigenous women are promiscuous or drug-users. *The Report of the Missing Women* supports this argument. The report notes the negative commentary surrounding many missing women who were at one time in "high-risk lifestyles." Some family members notes that strangers told them the missing "deserved" what happened to them.³³⁵ This reflects the view that missing women are less deserving of respect and basic human rights, such as the right to live free from violence. On this basis, it may be possible to establish that the police negligence in their investigation of the murdered and missing indigenous women violated section 15 of the *Charter*. This claim hinges on an equality analysis attentive to the need to accommodate difference to give substance to the guarantee of substantive equality.

In addition to the perpetuation of historic disadvantage and stereotyping, the *Law* factors, while not a formal test, provide a way of honing in on particular aspects of discrimination. The Supreme Court

³³¹ The Honourable Wally Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Vol. I, (British Columbia: November, 2012) at 137-147.

³³² *Ibid*, at 151-152.

³³³ *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 40, [2011] 1 SCR 396 [*Whithler*].

³³⁴ *Quebec (Attorney General) v A*, 2013 SCC 5, at para 182, [2013] 1 SCR 61 [*Quebec v A*].

³³⁵ Oppal, *The Report of the Missing Women*, at 32.

notes that different factors will be relevant in different contexts.³³⁶ An analysis of the *Law* factors might demonstrate a breach of substantive equality in this case.³³⁷

1) Pre-existing Disadvantage³³⁸

As discussed above, Indigenous women are a historically disadvantaged group. As noted in *R v Ipeelee*,³³⁹ Indigenous persons often suffer from a history of oppression within Canadian society, including residential schools, socio-economic disadvantage, and over-representation within the criminal justice system.³⁴⁰ This disadvantage is heightened amongst Indigenous women. Indigenous women are particularly vulnerable to violence: the rates of homicide amongst Indigenous women are 7 times higher than the average rate.³⁴¹ In addition, Indigenous women form a disproportionately high number of sex workers, a population which is 60 to 120 times more likely to be murdered than the average woman.³⁴²

2) Correspondence³⁴³

The repeated failure to take meaningful steps to address systemic discrimination and violence against Indigenous women does not correspond to the reality of victimization that these women face. Instead, it ignores the vulnerability of these women to violence by failing to accommodate existent inequalities.

3) Ameliorative purpose³⁴⁴

As discussed above, it is unlikely that the state will succeed in arguing the impugned conduct has an ameliorative purpose. The complaint pertains precisely to the state's failure to countenance any such ameliorative purpose in their policies and programs. Recent state action, such as cutting funding to the Stolen Sisters Initiative, demonstrates that much recent state conduct exacerbates, instead of relieving, the disadvantage suffered by Indigenous women.

³³⁶ *Kapp*, *supra* note 310, at para 23.

³³⁷ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [*Law*].

³³⁸ *Ibid*, at para 63.

³³⁹ 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].

³⁴⁰ *Ibid*, see para 60.

³⁴¹ Human Rights Watch, *Those Who Take Us Away*, (2013: United States, Human Rights Watch) at 25.

³⁴² Oppal, *The Report of the Missing Women*, at 104. This figure reflects numbers for street prostitution.

³⁴³ *Law*, *supra* note 325, at para 69.

³⁴⁴ *Law*, *supra* note 324, at para 72.

4) Nature of the affected interest³⁴⁵

The state's conduct engages Indigenous women's fundamental right to life and security of the person. It causes psychological harm and places them at grievous risk of gender-based violence. These interests are so significant they are recognized domestically in section 7 of the *Charter*, and in international human rights documents including the *International Covenant on Civil and Political Rights*³⁴⁶ and the *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*.³⁴⁷

4.iii. International Law and the *Charter*

International human rights treaties, the jurisprudence of UN bodies and customary law impact the interpretation of the *Charter*. They are persuasive sources of *Charter* interpretation that, though they do not have direct application in Canada, can influence the context, scope and content of *Charter* rights. Please note this portion of our analysis is indebted to the Poverty and Human Rights Centre Law Sheet, *The role of International and Economic Rights in the Interpretation of Domestic Law in Canada*.³⁴⁸

International law informs the Court's reading of the *Charter* and forms an essential part of the contextual analysis in constitutional litigation. In *Reference re Public Service Employee Relations Act (Alta)*³⁴⁹ Dickson CJ asserted, "the various sources of international human rights law . . . must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions."³⁵⁰ The Supreme Court elaborated on the importance of international human rights law in *Charter* interpretation in *Baker v Canada*,³⁵¹ in which the court found the values reflected in this law informs the contextual approach to statutory interpretation.³⁵² In this way, relevant international documents are

³⁴⁵ *Ibid*, at

³⁴⁶ *International Covenant on Civil and Political Rights*, 19 September 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 march 1976) [ICCPR]

³⁴⁷ *Covenant Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 26 June 1987, 1465 UNTS 85, Can TS 1987 No 36 [CAT].

³⁴⁸ The Poverty and Human Rights Centre, *The Role of International Social and Economic Rights in the Interpretation of Domestic Law in Canada*, (2008). Online: http://www.cwp-csp.ca/wp-content/uploads/2011/07/2008_The_Role_of_International_Social_and_Economic_Rights_in_the_Interpretation_of_Domestic_Law_in_Canada.pdf

³⁴⁹ [1987] 1 SCR 313 [Re *Public Service Employee Relations Act*].

³⁵⁰ *Ibid*, at 348.

³⁵¹ *Baker*, *supra* note 276.

³⁵² *Ibid*, at para 70.

relevant to a *Charter* analysis even where they have not been incorporated into Canada, and therefore have no direct application.³⁵³

Charter guarantees must be presumed to provide at least the same level protection provided by international human rights documents ratified by Canada.³⁵⁴ With regard to the relationship between the *Charter* and international law, Dickson CJ concluded,

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter's* protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified³⁵⁵

On this reasoning, there is a presumption that Canadian governments do not intend to breach their international obligations in performing their legislative function. L'Heureux-Dubé emphasized this idea in *R v Ewanchuk*,³⁵⁶ concluding, "our Charter is the primary vehicle through which international human rights achieve a domestic effect" strengthens this argument.³⁵⁷

The Court has used international human rights law to interpret the scope and content of a number of *Charter* provisions. In *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*,³⁵⁸ the Supreme Court recognized collective bargaining processes as a part of Canada's guarantee of freedom of association by employing various sources of international human rights law as an interpretive tool.³⁵⁹ Similarly, the British Columbia Supreme Court employed sources of international human rights law in *McIvor v The Registrar, Indian and Northern Affairs Canada*³⁶⁰ to reach the conclusion that the s. 15 right to equality encompasses the right to be free from discrimination resulting from the transmission of Indian status from parent to child. The court held that:

As indicated by the concerns expressed by the CEDAW committee and the ICESCR Committee, lack of equal access to registration status not only affects interests in enjoyment of an adequate standard of living. Access to financial assistance for post-secondary education and health benefits, are benefits of registration status that are relevant to the equal enjoyment of an adequate standard of living.³⁶¹

³⁵³ The Poverty and Human Rights Clinic, *The Role of International Social and Economic Rights*, at 4.

³⁵⁴ *Ibid*, at 5.

³⁵⁵ *Reference Re Public Service Employee Relations Act (Alta)*, *supra* note 353, at para 59.

³⁵⁶ *Ewanchuk*, *supra* note 311.

³⁵⁷ *Ibid*, at para 73.

³⁵⁸ 2007 SCC 27 [2007] SCJ No 27.

³⁵⁹ The Poverty and Human Rights Clinic, *The Role of International Social and Economic Rights*, at 5.

³⁶⁰ [2007] BCSC 827 at para 183 [*McIvor*]

³⁶¹ *Ibid*, at para 282.

The influence of international human rights treaties extends to section 1 of the *Charter*. In *Slaight Communications Inc v Davidson*³⁶² upheld an arbitration award under section 1 of the *Charter*. The court determined that the award sought to protect the employee from unjust dismissal. Lamer J emphasized the importance of this objective in view of the guarantee of the right to work in article 6 of the ICESCR.³⁶³

A survey of the jurisprudence illustrates that international human rights documents, including treaties and case law, must inform the Court's analysis under section 7 and section 15 of the *Charter*. As discussed below, international human rights imposes an obligation on Canada to take due diligence to protect vulnerable cross-sections of the population from harm by state actors or third parties. In this way, it imposes positive obligations on the state to remedy persistent inequalities. The rights guaranteed in the *Charter* must at minimum provide equal protection. These obligations form a contextual backdrop in understanding the nature of the state actions and their duties towards Indigenous women.

4.iv. The *Charter*: Concluding Remarks

It may be possible to seek a declaration that the state's failure to provide adequate protection to Indigenous women violated section 7 and 15 of the *Charter*. Under a section 7 analysis, the claimant must demonstrate a deprivation of their right to life, liberty, or security of the person in violation of the principles of fundamental justice. In this case, victims of third party violence saw their right to life or security of the person violated. The harm perpetuated against these women caused profound psychological harm to their loved ones, thereby engaging their interest in security of the person. This conduct also caused a profound harm to Indigenous women who could be potential victims of violence as a result of the state's failure to act. The harm imposed on these women did not accord with the principles of fundamental justice. With respect to S. 15, these actions equally violated the victim's right to equality by creating a distinction on the prohibited grounds of race and sex that imposed a disadvantage, perpetuating negative stereotypes of Indigenous women and contributing to pre-existing disadvantage. These rights must be interpreted in light of the state's obligations under international law and the interpretation of these rights and obligations by international courts and tribunals.

³⁶² [1989] 1 SCR 1038 at 1056 [*Slaight*]

³⁶³ The Poverty and Human Rights Clinic, *The Role of International Social and Economic Rights*, at 6.

INTERNATIONAL LAW

1. International Human Rights Treaties

It may be possible to file a complaint to an international body regarding Canada's failure to take steps to protect missing and murdered Indigenous women. Under international law, Canada has an obligation to respect, protect and fulfill human rights. This includes a duty to refrain from directly or indirectly infringing on a person's human rights, and to ensure that laws do not have an adverse effect on a group in violation of their rights. Finally, Canada has an obligation to take all steps to promote persons human rights and ensure that every person is able to enjoy their human rights. This includes providing effective remedies where human rights are breached.³⁶⁴

Despite Canada's ostensible commitment to human rights treaties, administering bodies have expressed concerns that Canada has failed to discharge its duties towards Indigenous women. These failures include refusing to take due diligence to protect from Indigenous women and girls from violence, failing to take steps to prevent poverty, and other forms of social exclusion and marginalization. This section lays out these criticisms and provides a summary of the relevant provisions of international human rights treaties.

1.i. The Universal Declaration of Human Rights

The UDHR was adopted by the United Nations General Assembly in 1948. It enshrines a person's most fundamental and inalienable rights, including the right to be free from discrimination,³⁶⁵ to life and security of the person,³⁶⁶ to be free from torture or cruel and degrading treatment,³⁶⁷ to equal treatment under the law,³⁶⁸ to social security³⁶⁹ and to a basic standard of living.³⁷⁰ The rights enshrined in this document form the basis for subsequent human rights covenants and declarations.

³⁶⁴ Melinda Buckley, *Violence Against Women*, *supra* note 175, at 35-36.

³⁶⁵ UDHR, *supra* note 13, art. 2.

³⁶⁶ *Ibid*, art. 3.

³⁶⁷ *Ibid*, art 5.

³⁶⁸ *Ibid*, art 7.

³⁶⁹ *Ibid*, art 22.

³⁷⁰ *Ibid*, art 25.

1.ii. The International Covenant on Economic, Social and Cultural Rights³⁷¹

The ICESCR recognizes the inalienable rights of all persons, and asserts that these rights cannot be realized without protecting and promoting individuals' social, economic, and cultural rights.³⁷² Adopted by the General Assembly in 1966, Canada acceded to the ICESCR in 1976. The UN Committee on Economic, Social and Cultural Rights (CERD) administers the ICESCR.

The ICESCR provides that all persons are entitled to the rights guaranteed in the Covenant without discrimination on the basis of race, colour, sex, and birth or birth status, among other grounds.³⁷³ Further, it specifically guarantees the equal right of men and women to the enjoyment of the rights enumerated in the covenant.³⁷⁴ This includes the right to work,³⁷⁵ the right to adequate food, housing and clothing,³⁷⁶ the right to be free from hunger,³⁷⁷ and the right to highest attainable standard of mental and physical health.³⁷⁸ The ICESCR obligates states to take positive measures to ensure these rights are fulfilled.³⁷⁹ Additional measures must be taken to avoid the economic exploitation of children and young persons.³⁸⁰

The CERD has expressed concerns regarding the social and economic marginalization of Indigenous peoples in Canada. It notes,

The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings required major repairs and lacked basic amenities.³⁸¹

³⁷¹ *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3, Can TS 1976 no. 46, 6 ILM 360 (entered into force 3 January 1976) [ICESCR]

³⁷² *Ibid*, Preamble.

³⁷³ *Ibid*, art. 2(2).

³⁷⁴ *Ibid*, art. 3.

³⁷⁵ *Ibid*, art. 6.

³⁷⁶ *Ibid*, art. 11.1.

³⁷⁷ *Ibid*, art. 11.2.

³⁷⁸ *Ibid*, art. 12.1.

³⁷⁹ *Ibid*, arts. 11.1, 11.2, and 12.

³⁸⁰ *Ibid*, art. 10.3.

³⁸¹ Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada, 10/12/98, E/C.12/1/Add.31.

In addition to these concerns, Canada's continues to deny adequate social assistance to Indigenous girls living in poverty raises concerns regarding its obligations under article 10.³⁸² Canada's ongoing failure to take positive steps to ameliorate living conditions of Indigenous peoples suggests it may be in breach of its obligations under the ICESCR.

1.iii. International Covenant on Civil and Political Rights

The ICCPR recognizes and asserts that a person cannot realize their basic freedoms without guarantees enabling him or her to participate in civil and political processes without fear. These rights are fundamentally interconnected with a person's social, cultural, and economic rights.³⁸³ Like the ICESCR, the ICCPR was adopted by the United Nations General Assembly in 1966 and came into force in Canada through accession in 1976.

The ICCPR provides that all persons are entitled to the rights included in the Covenant without discrimination as to race, colour, sex, and birth or birth status, among other grounds.³⁸⁴ The state has a positive obligation to undertake measures to ensure rights guaranteed in the Covenant are realized,³⁸⁵ and to provide an effective remedy where those rights are violated.³⁸⁶ The covenant specifically provides that all persons enjoy political and civil rights regardless of sex.³⁸⁷ These guarantees include the right to life,³⁸⁸ the right not to be subjected to torture or cruel and degrading treatment,³⁸⁹ and the right to security of the person.³⁹⁰

The Human Rights Committee, which implements the ICCPR, noted the disproportionate number of Indigenous women suffering violent deaths in Canada, the lack of statistical evidence regarding

³⁸² Canada's failure to address and ameliorate the systemic poverty of Indigenous girls breached its obligations under the UN Convention on the Elimination of all forms of Discrimination Against Women: See FAFIA, *No Action, No Progress: FAFIA's Report on Canada's Progress in Implementing the 2008 CEDAW Committee Recommendations* (Ottawa: February, 2010) at 4.

³⁸³ ICCPR, *supra* note 350, Preamble.

³⁸⁴ *Ibid*, art. 2.1.

³⁸⁵ *Ibid*, art. 2.2.

³⁸⁶ *Ibid*, art. 2.3.

³⁸⁷ *Ibid*, art. 3.

³⁸⁸ *Ibid*, art. 6.

³⁸⁹ *Ibid*, art. 7.

³⁹⁰ *Ibid*, art. 9.

violence suffered by Indigenous women, and the reported failure of police to adequately respond to the threats faced by these women, in contravention of its obligations under arts. 2, 3, 6 and 7.³⁹¹

1.iv. Covenant Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

The CAT was adopted in 1984 and ratified by Canada in 1987. This covenant expands on the right to be free from torture guaranteed under art. 7 of the ICCPR.³⁹²

Under the CAT, Canada has an obligation to take effective legislative, administrative and judicial means to prevent acts of torture³⁹³ or cruel, inhumane or degrading treatment.³⁹⁴ Where there are reasonable grounds to believe an act of torture took place, the state must undertake a prompt and impartial investigation.³⁹⁵ Any person who complains of being subjected to torture has the right to be heard by competent authorities and have the case investigated.³⁹⁶

The Committee on the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment noted Canada's failure to address the disappearances of Indigenous women, the disproportionate rates of violence and spousal homicide, and the state's failure to properly investigate, prosecute and punish the perpetrators. In addition, the Committee criticized Canadian attempts to refuse responsibility for the violence suffered by Indigenous women, writing,³⁹⁷

[T]he Committee regrets the statement by the delegation that the issues on violence against women fall more squarely within other bodies' mandate and recalls that the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in acts of torture or ill-treatment committed by non-State officials or private actors.³⁹⁸

³⁹¹ Human Rights Committee, Concluding Observations on Canada's 5th review, April 2006, CCPR/C/CAN/CO/5

³⁹² CAT, *supra* note 351, Preamble.

³⁹³ *Ibid.*, art. 2.

³⁹⁴ *Ibid.*, art. 16

³⁹⁵ *Ibid.*, art. 12

³⁹⁶ *Ibid.*, art. 13

³⁹⁷ Committee on the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Concluding Observations on Canada's 6th Review, June 2012, CAT/C/CAN/CO/6.

³⁹⁸ *Ibid.*

1.v. The Convention on the Rights of the Child³⁹⁹

Adopted in 1989, the CRC was ratified by Canada in 1991. The CRC both reaffirms the equal and inalienable rights of all people as asserted by the Universal Declaration of Human Rights and asserts the special circumstances of children.⁴⁰⁰

The CRC provides that all rights enumerated in the CRC are guaranteed to all children regardless of race or gender.⁴⁰¹ It recognizes a child's inherent right to life and requires states ensure the survival and development of the child to the maximum extent possible.⁴⁰² This includes an adequate standard of living.⁴⁰³ A child has the right to be free from economic exploitation⁴⁰⁴ or sexual exploitation.⁴⁰⁵ The CRC obligates states to take all appropriate measures to ensure the implementation of the treaty and the protection children's rights, including economic and social rights.⁴⁰⁶

The Committee on the Rights of the Child notes that vulnerable women and girls, including Indigenous women, face high levels of violence and maltreatment.⁴⁰⁷ Regarding the sexual exploitation of Indigenous girls, the Committee expresses concern about the number of Indigenous girls involved in child prostitution who have gone missing or were murdered, and whose disappearances have not been investigated.⁴⁰⁸

1.vi. Convention on the Elimination of Racial Discrimination

Adopted in 1965, the CERD was ratified by Canada in 1970. The convention recognizes histories of colonialism and racial segregation, and resolves to adopt all necessary measures to eliminate racial

³⁹⁹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990) [CRC]

⁴⁰⁰ *Ibid*, Preamble.

⁴⁰¹ *Ibid*, art. 2.

⁴⁰² *Ibid*, art. 6.

⁴⁰³ *Ibid*, art. 27.

⁴⁰⁴ *Ibid*, art. 32.

⁴⁰⁵ *Ibid*, art. 34.

⁴⁰⁶ *Ibid*, art. 4.

⁴⁰⁷ Committee on the Rights of the Child, Concluding Observations on Canada's 3rd and 4th review, October 2012, CRC/C/CAN/CO-3-4, at para 46.

⁴⁰⁸ *Ibid*, at para 48.

discrimination and prevent racist doctrines.⁴⁰⁹ It guarantees the right to equality before the law regardless of ethnic origin, particularly with regard to security of the person.⁴¹⁰

The Committee on the Elimination of All Forms of Racial Discrimination notes the continuation of elevated levels of violence towards Indigenous women and girls, despite certain limited state efforts. Among other recommendations, the Committee calls for the Canadian government to facilitate access to justice and investigate, prosecute, and punish those responsible.⁴¹¹

1.vii. Declaration of the Rights of Indigenous Peoples

The United Nations General Assembly adopted UNDRIP in 2007. The Canadian government was one of four states that voted against UNDRIP. However, in 2010, the Canadian government issued a statement endorsing the Declaration. UNDRIP recognizes the history of injustices perpetuated against Indigenous peoples, including colonialism and the dispossession of lands. It expands upon the assertion of the right to self-determination, the fundamental equality of all peoples, and the right to be free from discrimination manifest in the ICESCR, ICCPR, and the UDHR.

UNDRIP provides that rights of Indigenous people are guaranteed without discrimination⁴¹² and are guaranteed equally to men and women.⁴¹³ The Declaration provides that particular attention must be paid to the special needs of certain groups, including women.⁴¹⁴ In addition, it obligates the state to take measures in conjunction with Indigenous peoples to ensure that women and children enjoy protection from violence.⁴¹⁵

1.viii. Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW was adopted by the United Nations General Assembly in 1979. Canada ratified the document in 1981. The document expands upon the equality rights guaranteed in the ICESCR, the UDHR, and

⁴⁰⁹ CERD, *supra* note 297, Preamble, art. 2.

⁴¹⁰ *Ibid*, art. 5.

⁴¹¹ Committee on the Elimination of Racial Discrimination, Concluding Observations on Canada's 19th and 20th review, March 2012, CERD/C/CAN/CO/19-20, para 17.

⁴¹² UNDRIP, *supra* note 298, art. 2.

⁴¹³ *Ibid*, art. 44.

⁴¹⁴ *Ibid*, art. 22.1.

⁴¹⁵ *Ibid*, art. 22.2.

the ICCPR. It emphasizes that the eradication of all forms of racism and colonialism is essential to the achievement of equal rights of men and women.⁴¹⁶

CEDAW obligates governments to pursue policies, including legal protection for the rights of women and instituting programs to minimize violence or discrimination against women, in order to ensure women's equality.⁴¹⁷ The Convention requires states take all appropriate measures to suppress all forms of trafficking of women and the exploitation of the prostitution of women.⁴¹⁸ States must take unique problems encountered by rural women into account and take all appropriate measures to ensure the equal application of CEDAW with regards to these women.⁴¹⁹

In 2008, the Committee on the Elimination of Discrimination Against Women found Canada in breach of its international obligations under CEDAW. The Committee identified two central areas that required attention: first, the persistent failure to provide adequate social assistance to Indigenous women and girls living in poverty, and second, the endemic violence against Indigenous women and girls.⁴²⁰ Women living in poverty are more vulnerable to violence and exploitation, and therefore these two forms of discrimination are fundamentally linked.

The Canadian government established several initiatives to address discrimination against Indigenous women in Canadian society. Programs included regional task forces charged with reviewing and re-investigating cold files of missing women. Although these are important steps, as of 2009 the mandate of these task forces did not include an analysis of the systemic problems in law enforcement and the administration of justice that perpetuate discrimination against Indigenous women.⁴²¹ This raises questions regarding their efficacy in addressing violence towards Indigenous women.

Having initiated these programs, the Canadian government stopped providing financial assistance to non-governmental organizations targeting racialized and gender based violence. Specifically, the government stopped funding the Sisters in Spirit initiative, which tracked the number of murdered and missing women, although the Committee commended this effort. The police do collect data on missing

⁴¹⁶ CEDAW, *supra* note 296, Preamble.

⁴¹⁷ *Ibid*, art. 2.

⁴¹⁸ *Ibid*, art. 6.

⁴¹⁹ *Ibid*, art. 14.

⁴²⁰ FAFIA, *No Action, No Progress: FAFIA's Report on Canada's Progress in Implementing the 2008 CEDAW Committee Recommendations* (Ottawa: February, 2010) at 4.

⁴²¹ *Ibid*, at 22.

persons. However, as the Human Rights Watch notes, “[t]he absence of race-disaggregated data will obscure the racial dimensions of the violence and inhibit efforts to identify discrimination.”⁴²² Canada’s failure to adopt appropriate measures to address violence against Indigenous women may be found to violate its obligations under CEDAW.

1.ix. International Human Rights Treaties: Concluding Remarks

Under international human rights law, Canada has obligations to protect Indigenous women from violence, taking measures to ensure that their basic rights are not infringed by state law and policy or by the actions of third parties. Canada must ensure that state law does not have a discriminatory impact on Indigenous women, whether directly or indirectly. State policy must be gender sensitive, with attention to the need to prevent violence against women. Despite Canada’s ratification of these treaties, it has failed to take the necessary steps to ensure the protection of Indigenous women’s rights. International human rights committees have highlighted these failures on an international stage. Launching a complaint may provide an additional means of holding the Canadian government politically accountable for its failure to act.

2. Due Diligence: Jurisprudence

International human rights jurisprudence establishes a standard of due diligence that the state must apply in addressing violence against women. Under this standard, a state will be held responsible for failing to act with due diligence to prevent, investigate and offer reparations for violence against women by state actors or third parties. Moreover, a failure to prosecute and convict perpetrators of violence against women is equivalent to committing the acts under the law. The state must therefore address the structural, social and cultural context that produces gender-based violence and provide sufficient access to judicial protection and remedies. Certain groups of women may be particularly vulnerable to violence, recognizing that vulnerability may result from the intersection of multiple grounds of discrimination. The state owes a heightened duty towards these groups.

⁴²² Human Rights Watch, *Those Who Take Us Away*, 81.

The state's duty to prevent violence is contingent on the state's knowledge of a real and imminent danger towards a particular individual or group and a reasonable possibility of preventing that danger. However, not every risk to life imposes a positive duty on the state. A number of factors can mitigate against this obligation, including the unpredictability of human conduct and operational decisions with regard to resources and priorities. Where the state is under a positive obligation, the claimant has the burden to establish state knowledge. This section provides a survey of international jurisprudence relating to the standard of due diligence relevant to violence against missing and murdered Indigenous women.

2.i. *María da Penha Maia Fernandes v Brazil*⁴²³

In this case, the Inter-American Commission on Human Rights (IACoMHR) considered whether the Brazilian state was guilty for under Articles 1 (the State's obligation to respect the rights set forth in the Convention) 8 (the right to a fair trial), 24 (the right to equal protection) and 25 (the right to judicial protection) of the American Convention on Human Rights; Articles II (right to equality) and XVIII (right to a fair trial) of the American Declaration on the Rights and Duties of Man; and Articles 3, 4, 5 and 7 of the Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará). The IACoMHR found the Brazilian state guilty and ordered remedial action.

2.i.a. Facts

The plaintiff was involved in a highly abusive relationship whereby her husband had physically assaulted both herself and her daughters on multiple occasions throughout the marriage.⁴²⁴ In 1983, the plaintiff was shot by her husband while sleeping and rendered paraplegic in addition to other physical and psychological harm.⁴²⁵ When she returned home from the hospital one week later, he attempted to electrocute her in a bath tub.⁴²⁶ The couple subsequently separated and the plaintiff, who had suffered a complete loss of independence due to her injury, received neither the financial assistance nor the alimony stipulated in the order to help cover necessary medical expenses.⁴²⁷

⁴²³ (2001), Inter-Am Comm HR. No 54/01, Case 12.051.

⁴²⁴ *Ibid* at paras 8 – 9.

⁴²⁵ *Ibid*.

⁴²⁶ *Ibid*.

⁴²⁷ *Ibid* at para 11.

The public prosecutor brought a criminal action against the husband, but the case remained idle for 8 years before the accused was eventually found guilty and sentenced to ten years in prison.⁴²⁸ Defence counsel filed an appeal on the grounds that the case had exceeded the statutory limitation period and the Court considered, thereby staying the previous decision.⁴²⁹ The public prosecutor brought a second criminal action against the husband, who was again found guilty and charged with ten years in prison.⁴³⁰ Before Defence Counsel's second appeal was heard, the plaintiff, the Center for Justice and International Law (CEJIL) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) brought the case before the Inter-American Commission on Human Rights.

2.i.b. Reasoning

The IAComHR begins by criticizing the unwarranted delays and failure to guarantee due diligence at institutional and legal levels of the case: not only did police fail to conduct an adequate investigation until 8 years after the attempted murder (i.e. the time of the first trial in 1991), but judges permitted long wait times and irregular appeals.⁴³¹ Here, procedural inefficiency and unfairness resulted in a state of effective impunity as the plaintiff risked becoming statutorily barred from compensation due to the impending 20 year limitation period.⁴³² Upon considering such negligence against a broader context of a failure to prosecute and convict perpetrators of domestic violence, the IAComHR noted a pattern of discrimination that equated to reproducing and “condoning” systemic violence against women in a manner that was inconsistent with its international obligations to prevent such misconduct before and after the fact.⁴³³

In response, the IAComHR ordered remedial action by way of formal recommendations: that criminal proceedings be brought against the husband, that an investigation be undertaken regarding the unwarranted delays in prosecuting the case, that the victim be compensated, and that the judicial reform

⁴²⁸ *Ibid* at paras 12 – 13.

⁴²⁹ *Ibid* at para 14.

⁴³⁰ *Ibid* at para 17.

⁴³¹ *Ibid* at paras 39, 40, 60.

⁴³² *Ibid* at paras 32, 44.

⁴³³ *Ibid* (“ The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women” at paras 55 – 56).

process be expanded to include domestic violence awareness training in addition to special mechanisms for victims of domestic violence.⁴³⁴

2.i.c. Notes

In response to the decision, the Brazilian government ratified federal law no. 11.340 (informally known as the “Maria da Penha law”) regulating domestic violence through the institution of special courts, stricter sentencing and other safety outlets for the prevention and relief of violence against women, including police stations and women’s shelters. Although the law has been highly successful in terms of increased prosecutions, judgments and convictions, limited financial resources have restricted its application to larger cities whose rural counterparts are not subject to equal benefits.

2.ii. González et al. (“Cotton Field”) v Mexico⁴³⁵

In *Cotton Field*, the claimant argued the Mexican state was guilty of discrimination and of failing to protect the victims or to enforce an adequate investigation into their abductions and murders under Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 19 (Right of the Child) and 25 (Right to Judicial Protection) of the *American Convention on Human Rights* in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, together with failure to comply with the obligations arising from Article 7 of the *Convention on the Prevention, Punishment and Eradication of Violence against Women* (“The Convention of Belém de Pará”). The court found the Mexican state found guilty and remedial action ordered.

2.ii.a. Facts

According to a CEDAW Inquiry conducted in 2005, over 4,500 women had disappeared in the Mexican region of Ciudad Juárez since the 1990s, although inadequate criminal and forensic investigations suggested that the statistics were likely higher.⁴³⁶ While more men had been murdered than women, female fatalities were increasing at twice the rate as their male counterparts and female

⁴³⁴ *Ibid* at para 61.

⁴³⁵ (2009), Inter-Am Court HR, Preliminary Objection, Merits, Reparations and Costs [*Cottonfield*].

⁴³⁶ United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, CEDAW, 32nd Sess, UN Doc /C/2005/OP.8/MEXICO (2005) 1 at paras 73 – 76.

deaths and disappearances were explicitly linked to gender violence, with at least one third of victims posited to have been sexually assaulted prior to death.⁴³⁷ Moreover, the victim profile involves “young women of humble origins” (e.g. maquila workers, students and low level employees) whose vulnerable statuses subject them to being “abducted and kidnapped, and then either raped and murdered or made to ‘disappear.’”⁴³⁸ Based on these premises, the Inquiry concluded that the epidemic represented a grave and systemic human rights violation linked to an institutional and societal climate of impunity where government and criminal justice agencies had failed to adequately reprimand police officers or address a deeply entrenched culture of patriarchy underlying the offences.⁴³⁹

The CEDAW Inquiry was followed by litigation at the Inter-American Court of Human Rights (IACHR) after the Inter-American Commission of Human Rights (“the Commission”) brought a joint application on behalf of representatives for three of eight deceased women found sexually abused in a cotton field outside of Ciudad Juárez.⁴⁴⁰ According to the evidence of the case, in the interim period between the disappearance and discoveries of their bodies the family members who notified public authorities were faced with debasing value judgments and no concrete action beside the reception of statements.⁴⁴¹

Specifically, the Commission alleged that the Mexican state was internationally responsible for “the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, in spite of full awareness of the existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance [...]; the lack of due diligence in the investigation of the homicides [...], as well as the denial of justice and the lack of an adequate reparation.”⁴⁴²

2.ii.b. Reasoning

The Convention of Belém de Pará defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere” and requires state authorities to exercise due diligence to prevent,

⁴³⁷ *Ibid* at paras 35 – 37.

⁴³⁸ *Ibid* at para 38.

⁴³⁹ *Ibid* at paras 24 – 26.

⁴⁴⁰ *Cottonfield*, *supra* note 439 at para 1.

⁴⁴¹ *Ibid* at para 227.

⁴⁴² *Ibid* at para 2.

punish and eliminate this violence.⁴⁴³ The Court found that although the Mexican state had launched various legal, institutional, policy and infrastructural initiatives relating to the eradication of sexualized violence specifically and best practices towards victims of crime more generally, these measures were necessary but ultimately insufficient for minimizing the risk factors targeting women based on national and international status reports deeming them “ineffective” and “[fostering] a climate of impunity.”⁴⁴⁴

That said, the Court holds that a state cannot be held indeterminately liable for every human rights violation committed between private individuals within its jurisdiction.⁴⁴⁵ Notably, the duty to prevent sexualized violence is contingent upon the state’s awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger.⁴⁴⁶ In order to apply this analytical lens to the Mexican state’s course of in/action, the Court divides the timeline into “two crucial moments:” (1) prior to the disappearance of the victims and (2) before the discovery of the bodies.⁴⁴⁷

With regards to (1), the Court found that the Mexican state’s failure to prevent the disappearance did not per se engage its international responsibility on the grounds that although it was aware of the generally vulnerable position of women, especially young women from humble backgrounds in Ciudad Juárez, such knowledge could not be established for the real and imminent danger facing the specific victims in the case.⁴⁴⁸

In terms of (2), however, the Mexican state was aware of a real and imminent danger that the victims would be sexually abused and murdered once the disappearances were reported.⁴⁴⁹ Here, the Mexican state failed to meet a strict and binding standard of due diligence applied in the context of systemic violence against women.⁴⁵⁰ Specifically, public authorities breached a duty to investigate, that is, “an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective” whereby “as soon as State authorities are aware of the fact, they should initiate, ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the

⁴⁴³ *Ibid* at para 253.

⁴⁴⁴ *Ibid* at para 273.

⁴⁴⁵ *Ibid* at para 280.

⁴⁴⁶ *Ibid*.

⁴⁴⁷ *Ibid* at para 281.

⁴⁴⁸ *Ibid* at para 292.

⁴⁴⁹ *Ibid* at para 283 – 286.

⁴⁵⁰ *Ibid*.

pursuit, capture, prosecution and eventual punishment of all the perpetrators of the facts, especially when public officials are or may be involved.”⁴⁵¹ The investigative irregularities in conjunction with the lack of human treatment afforded to the victim’s next of kin was largely credited to gender discrimination as the state failed to discharge both negative duties from sex stereotyping and positive duties to protect the rights of the girls.

In response, the IACHR made a comprehensive remedial order. At the micro investigative level, the Court ordered new investigations, restitution for families, investigation of public officials and improved strategies for preventing the abduction and murder of women and girls.⁴⁵² At the macro societal level, the Court ordered educational programs for public officials and the general public pertaining to human rights and gender/ sex stereotyping. At both levels, the objective was to institutionalize a gender perspective into public policy.⁴⁵³

2.ii.c. Notes

While the Court refrains from using the term “femicide” as it is not a domestically or internationally binding legal instrument, it does employ the term “gender-based murders of women” to convey virtually the same meaning and definition, that is, “the extreme form of gender violence against women, resulting from the violation of their human rights in the public and private sphere, comprising a series of misogynous conducts that can lead to the impunity of the State and society and may culminate in the homicide or other forms of violent death of women.”⁴⁵⁴

2.iii. Valentina Rosendo Cantú and Others v Mexico⁴⁵⁵; Inés Fernández Ortega and Others v Mexico^{456 457}

In this case, the claimants argued the Mexican state was guilty under Articles 5 (Right to Humane Treatment) and 11 (Right to Privacy) of the American Convention in relation to Article 1 (Obligation to Respect Rights) thereof together with failure to comply with the obligations arising from Article 7 of the *Convention on the Prevention, Punishment and Eradication of Violence against Women* (“The

⁴⁵¹ *Ibid* at paras 289 – 290.

⁴⁵² *Ibid* at para 602.

⁴⁵³ *Ibid*.

⁴⁵⁴ *Ibid* at para 140.

⁴⁵⁵ (2010), Inter-Am Court HR, Preliminary Objection, Merits, Reparations and Costs [*Cantú*].

⁴⁵⁶ (2010), Inter-Am Court HR, Preliminary Objection, Merits, Reparations and Costs [*Ortega*].

⁴⁵⁷ Due to the similarity in facts and evidence, the testimonies, expert reports and judgments of both cases were incorporated for the sake of procedural efficiency.

Convention of Belém de Pará”) and Articles 1, 2 and 6 of the Inter-American Convention to Prevent and Punish Torture. The court found the Mexican state guilty and ordered remedial action.

2.iii.a. Facts

The Mexican state of Guerrero, a significant proportion of which comprises marginalized and poor Indigenous communities, hosts a strong military presence intended to combat high rates of crime.⁴⁵⁸ Here, the Indigenous population is extremely vulnerable as they remain targeted by historically oppressive racist and colonial practices and linguistic, cultural and financial barriers minimize access to justice.⁴⁵⁹ Specifically, a sexualized form of “institutional military violence” impacts Indigenous women who “continue to suffer the consequences of a patriarchal structure that is blind to gender equity, particularly within institutions such as the armed forces or police, whose members are trained to defend the nation, and to combat or attack criminals, but who are not sensitized to the human rights of the community and of women.”⁴⁶⁰ To illustrate, 6 alleged cases of rape attributed to soldiers were reported from 1997 – 2004, all of which were tried in military court and none of which provide evidence of punishment or compensation.⁴⁶¹

On February 16th, 2002, Valentina Rosendo Cantú, a 17-year-old Indigenous member of the Me’phaa community, was bathing at a stream near her house when eight soldiers and a civilian detainee surrounded her and questioned her about a criminal gang in the area while threatening her with a weapon.⁴⁶² After responding that she did not know “because of the fear that they do something to her,” a soldier hit her in the stomach with a weapon and rendered her unconscious.⁴⁶³ Upon regaining consciousness, a soldier threatened to kill her and everyone in her town if she did not answer his questions whereupon two soldiers proceeded to sexually assault her.⁴⁶⁴

When she arrived home, she told her sister-and-law and husband what had occurred and her husband went into town to file a complaint with the local authorities.⁴⁶⁵ In the days that followed, the couple travelled 8 hours by foot from their remote mountain village to seek medical assistance for the blows to

⁴⁵⁸ *Cantú*, *supra* note 459 at para 70; *Ortega*, *supra* note 460 at para 78.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Cantú*, *supra* note 459 at para 71; *Ortega*, *supra* note 460 at para 79.

⁴⁶¹ *Ibid.*

⁴⁶² *Cantú*, *supra* note 459 at paras 72 – 73.

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid* at para 74.

her abdomen but did not report rape.⁴⁶⁶ On February 27, 2002, the couple filed a complaint “against members of the Mexican Army [...] for violating human rights” before the National Human Rights Commission (NHRC) and were informed on March 7th about the admission of the complaint and initiation of preliminary investigations and corresponding proceedings.⁴⁶⁷ That day, the Mexican League for the Defence of Human Rights also filed a complaint before the Commission for the Defence of Human Rights for the state of Guerrero (CODDEHUM) for “alleged violations [...], which consist of torture, wounds and rape by members of the army” whereupon the Secretary of National Defence issued a press release stating that “members of the Mexican Army and Armed Forces, engaged in a permanent campaign against drug trafficking in the state of Guerrero, did not at said time or location carry about an there were still no records for the criminal complaint of the rape of the victim in the Public Prosecutor’s office and, after facing much hesitancy, was able to convince the office that “it was necessary to take on the complaint.”⁴⁶⁸

On March 25th, 2002, Inés Fernández Ortega, a 25-year-old Indigenous member of the Me’phaa community, was at home with her four children when eleven Mexican soldiers approached her home in Barranca Tecoani, state of Guerrero.⁴⁶⁹ Three of these soldiers entered her home without her consent and demanded where her husband went to “steal meat.”⁴⁷⁰ When she hesitated to respond due to her low fluency in Spanish and fear for her safety, the soldiers proceeded to aggressively point their rifles at her and corroborate in detaining, sexually assaulting and torturing her⁴⁷¹. Afterwards, the three soldiers left the house and exited the premises with their colleagues outside⁴⁷²

When her husband returned home that evening, the plaintiff told him what happened and he visited the headquarters of the Organización del Pueblo Indígena Me’paa en Ayutla de los Libres (Organization of Indigenous Me’Paa People in Ayutla of los Libres, hereafter “the Organization”) to report the incident.⁴⁷³ Two members contacted the Inspector General of the Commission for the Defence of Human Rights of Guerrero (hereafter “the Inspector”) in order to submit the complaint. The plaintiff was subsequently taken to a local doctor who merely prescribed painkillers.⁴⁷⁴

⁴⁶⁶ *Ibid* at para 75.

⁴⁶⁷ *Ibid* at para 76.

⁴⁶⁸ *Ibid* at para 77.

⁴⁶⁹ *Ortega, supra* note 460 at para 81.

⁴⁷⁰ *Ibid* at para 81.

⁴⁷¹ *Ibid* at para 82..

⁴⁷² *Ibid*.

⁴⁷³ *Ibid* at para 84.

⁴⁷⁴ *Ibid*.

The next day, the plaintiff, her husband and two members from the Organization contacted the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende (hereafter “the Public Prosecutor”) in order to file a grievance relating to the facts.⁴⁷⁵ In response, the public prosecutor launched a preliminary investigation whereby an agent informed the plaintiff that he “did not have time to receive the complaint” when she indicated that the perpetrators had been soldiers and publicized the facts to other public employees.⁴⁷⁶ In addition, the agent sent a request to the district forensic physician asking him to examine the plaintiff as soon as possible and to submit a medical gynecological report of the injuries, but the absence of a female doctor delayed the examination until March 25th and the lack of required chemical supplies postponed the test results until April 5th when the plaintiff asked the Public Prosecutor to require the hospital doctor to issue a medical report on the method and results of her examination.⁴⁷⁷ It was not until July 9th that a chemistry expert was able to provide a testimony confirming the presence of seminal liquid and sperm cells in the laboratory samples, however by August 1 the Forensic Chemistry Coordinator of the Office of the Attorney General for Justice informed the Military Prosecutor’s office, which had declared itself competent to continue the investigation, that the samples obtained were no longer in the biological records as they had been “used up during the tests” and were thus no longer available for the purpose of the investigation.⁴⁷⁸

2.iii.b. Inter-American Commission on Human Rights

Upon considering the cases, the IACommHR) indicated that the sexual assaults committed by members of the state military against members of the civilian population constituted a grave violation of human rights under Articles 5 (Right to Humane Treatment) and 11 (Right to Privacy) of the American Convention.⁴⁷⁹ Not only does rape compromise the physical, psychological and moral integrity and dignity of the victim, but it also invades the victim’s personal and sexual space and violates her autonomous decision-making capacity.⁴⁸⁰ In cases of the rape of Indigenous women, pain and suffering is intensified since “they do not know the language of their attackers and of the authorities that intervene [,and] also owing to the repudiation of their community as a result of the facts.”⁴⁸¹ In

⁴⁷⁵ *Ibid* at para 85.

⁴⁷⁶ *Ibid*.

⁴⁷⁷ *Ibid* at paras 86 – 87.

⁴⁷⁸ *Ibid* at para 88 – 89.

⁴⁷⁹ *Cantú*, *supra* note 459 at paras 2 – 3; *Ortega*, *supra* note 460 at paras 2 -3.

⁴⁸⁰ *Cantú*, *supra* note 459 at paras 80 – 81; *Ortega*, *supra* note 460 at paras 90 – 91.

⁴⁸¹ *Cantú*, *supra* note 459 at para 89; *Ortega*, *supra* note 460 at para 90.

addition, it indicated that the sexual assaults constituted a torture since it met 3 requisite criteria: i) it was an intentional act that inflicted anguish and physical and psychological suffering; ii) it was committed with a purpose and iii) by a public official.⁴⁸² The Inter-Am Comm HR proceeded to submit to the Inter-American Court of Human Rights (hereafter Inter-Am Court HR) an application against the Mexican state.

The plaintiffs and their representatives agreed with the IACommHR, adding that the rape of the plaintiffs had clearly been proven and that the absence of additional probative evidence was exclusively the responsibility of the state's failure to conduct an effective investigation, requesting the Court to further declare the state responsible under Article 7(b) (applying due diligence to prevent, investigate and impose penalties for violence against women) of the Convention of Belém de Pará and Articles 1 (general obligation to punish torture), 6 (obligation to make torture a criminal offence with severe penalties under domestic law) and 8 (obligation to open ex officio an impartial criminal investigation into an alleged act of torture) of the Inter-American Convention to Prevent and Punish Torture.⁴⁸³

The Mexican state's defence was largely based on insufficient evidentiary proof that would bar allegations of direct or indirect international responsibility.⁴⁸⁴

2.iii.c. Reasoning

Noting that rape constitutes a "special type of violence, which is generally characterized as taking place in the absence of persons other than the victim and the aggressor or aggressors," the Court confirmed the occurrence in both cases based on the statement of the plaintiffs, military presence in the area on the day of the incident, expert evidence and loss of evidence in state custody and other persuasive elements (e.g. psychological trauma suffered by the victims).⁴⁸⁵ The Court proceeded to decide how these occurrences ought to be classified from a judicial point of view, drawing on international case law and the *Inter-American Convention to Prevent and Punish Torture* to determine whether the rapes could be subsumed in the crime of torture.⁴⁸⁶ Although the rapes met the criteria in that they were intentional as a deliberate act committed through the application of force, caused severe physical and

⁴⁸² *Cantú*, *supra* note 459 at para 81; *Ortega*, *supra* note 460 at para 91.

⁴⁸³ *Cantú*, *supra* note 459 at para 82; *Ortega*, *supra* note 460 at para 92.

⁴⁸⁴ *Cantú*, *supra* note 459 at para 85; *Ortega*, *supra* note 460 at para 95.

⁴⁸⁵ *Cantú*, *supra* note 459 at para 89; *Ortega*, *supra* note 460 at para 100.

⁴⁸⁶ *Cantú*, *supra* note 459 at paras 107 – 110; *Ortega*, *supra* note 460 at paras 117 – 120.

mental suffering as the victims were coerced into a position of extreme vulnerability an humiliation and had the purpose of punishing the victim's lack of response to questioning by way of intimidation, degradation and control, the Court found that the cases were more appropriately treated as an act of rape than torture and that the standing domestic laws surrounding torture imposed adequately strict sentencing.⁴⁸⁷

That said, the aforementioned findings in conjunction with the Prosecutor's subsequent negligent investigation was sufficient evidence for the Court to hold that the state had violated the personal integrity, dignity and private life of the victims and their next of kin (specifically, her husband and children) under Articles 5 and 11 of the American Convention in relation to Articles 1, 2 and 6 of the Inter-American Convention to Prevent and Punish Torture and Article 7 of the Convention of Belém de Pará, both in terms of immediate racism, subordination and discrimination by state organs and latent resistance, silence, harassment, fear and re-victimization by her community.⁴⁸⁸ In addition, the Court held that the state had violated the rights to judicial guarantees and protection as well as to access to justice without discrimination under Articles 8 and 25 of the American Convention.

In response, the Court made a remedial order including requirements that the state carry out the criminal investigation with due diligence and in a reasonable amount of time, adopt legislative reforms to remodel the Military Code of Justice and to remedy victims of institutional military violence in accordance with international standards, carry out a public act of acknowledgement of its international responsibility with regards to the facts of the case, implement measures to guarantee prompt and adequate medical and psychological treatment for victims, integrate a gender and human rights perspective into training for military personnel and other employees and invest resources into improving the quality of life of Indigenous persons, women and girls in the state of Guerrero.⁴⁸⁹

2.iii. Notes

Since the sentences were issued in 2010, the Mexican state and, in particular the federal government, have been reluctant to comply with the remedial orders aimed compensation for the gross violations of human rights committed by the military force at the individual, family, collective, structural and community level, despite the allocation of 30 and 31.5 million pesos in the Federal Expenditure Budget

⁴⁸⁷ *Cantú*, *supra* note 459 at para 120 – 122; *Ortega*, *supra* note 460 at paras 130 – 132.

⁴⁸⁸ *Cantú*, *supra* note 459 at paras 131, 139; *Ortega*, *supra* note 460 at paras 138, 149.

⁴⁸⁹ *Cantú*, *supra* note 459 at para 295; *Ortega*, *supra* note 460 at para 308.

for the implementation of judgments of the IACHR in 2011 and 2012, respectively.⁴⁹⁰ The lack of substantive progress reflects general enforceability issues with international judicial bodies.

2.iv. Goecke v Austria⁴⁹¹

In this case, the claimant argued that the Austrian state was guilty of discrimination against women under Articles 1, 2, 3 and 5 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The court found the Austrian state found guilty and remedial action ordered.

2.iv.a. Facts

The victim, an Austrian national of Turkish descent, lived with her husband and their two daughters in Austria. The relationship was highly abusive: from 1999-2002, the plaintiff was subjected to psychological and physical abuse and despite the facts that the police were called to the family home numerous times in response to reports of death threats, disturbances, disputes and batteries and that the husband breached interim injunction and weapon prohibitions orders, the police prosecutor denied requests for detention with no explanation.⁴⁹²

On December 5, 2002, the public prosecutor stayed all court proceedings against the husband on the alleged grounds that there was insufficient evidence to prosecute him for causing bodily harm and making criminally dangerous threats.⁴⁹³

On December 7, 2002, the victim phoned a police emergency call service but to police officer was sent to the premises to respond to the call.⁴⁹⁴ That day, her husband shot and killed her in front of her two daughters, surrendering to police shortly thereafter.⁴⁹⁵

⁴⁹⁰ Tlachinollan Centro De Derechos Humanos e la Montaña, “Inés Fernández Ortega and Valentina Rosendo Cantú: the journey to comply with the rulings of the Inter-American Court of Human Rights” (August 2012) <http://www.tlachinollan.org/Descargas/Informative-memo-Ines-and-Valentina-2012_EN.pdf> at 1 -2.

⁴⁹¹ (2007), United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Communication No. 5/ 2005.

⁴⁹² *Ibid* at paras 2.1 – 2.9.

⁴⁹³ *Ibid* at para 2.10.

⁴⁹⁴ *Ibid* at para 2.11.

⁴⁹⁵ *Ibid* at para 2.12.

The perpetrator was tried and found guilty of murder, but was successful with a mental disorder defence as the Court determined that he committed the homicide under the influence of a “paranoid jealous psychosis” after the victim claimed he was not the father of “all her children.”⁴⁹⁶ He is now institutionalized for life at a mental health establishment.

The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice brought the application before the CEDAW Committee on behalf of the victim, arguing that the Austrian state had failed to protect the deceased from domestic violence, having not taken effective measures to protect the victim’s right to personal security and life by not recognizing the perpetrator as a dangerous offender due to failed communication between multiple levels of the police force in particular and inadequate domestic laws targeting domestic violence more generally.⁴⁹⁷

In response, the Austrian state argued that the existing domestic legal framework was adequate and that it was challenging to ascertain that the perpetrator was a dangerous offender or which spouse was instigating as the victim had been uncooperative with assisting state authorities.⁴⁹⁸

2.iv.b. Reasoning

The CEDAW Committee found that the Austrian state had failed to exercise due diligence to protect the victim’s right to life and physical and mental integrity.⁴⁹⁹ In terms of the police, there was a failure to effectively respond to the victim’s calls for help when the information available to public authorities suggested that they knew or ought to have known that she was in serious danger, especially since the perpetrator had demonstrated a potential for extreme violence.⁵⁰⁰ With regards to the state, the existing legal framework for domestic violence, though comprehensive in terms of legislative, criminal and civil law remedies, awareness-raising, education and training, shelters, counselling for victims and work with perpetrators, lacked the institutional teeth to render these outlets either binding or accessible.

⁵⁰¹ Notably, the Committee found that a state party can be responsible for acts of violence committed

⁴⁹⁶ *Ibid* at paras 2.12, 4.9 – 4.10.

⁴⁹⁷ *Ibid* at para 1.

⁴⁹⁸ *Ibid* at paras 8.19 – 8.20.

⁴⁹⁹ *Ibid* at para 12.3.

⁵⁰⁰ *Ibid* at para 12.1.4.

⁵⁰¹ *Ibid* at para 12.1.2.

by a non-state party (i.e. a private individual) where that state fails to prevent violence or provide compensation.⁵⁰²

On these grounds, the Committee found that the Austrian state had violated its international obligations under Articles 2 and 3 of CEDAW in relation to Article 1.⁵⁰³ The Committee made several recommendations, including that the Australian state improve its implementation and monitoring of relevant domestic laws and ensure that criminal and civil remedies are accessible to victims of domestic violence.⁵⁰⁴

2.v. Jessica Lenahan (Gonzales) v United States of America⁵⁰⁵

In this case, the court considered whether the US state was guilty of violating its obligations in accordance with state law and principles of international human rights to effectively protect and compensate victims of domestic violence. In doing so, the court discussed whether the obligation not to discriminate contained in Article II of the American Declaration requires member States to act to protect women from domestic violence, understanding domestic violence as an extreme form of discrimination. If yes, the scope and content of this legal obligation in the context of the internationally recognized due diligence principle together with the obligations to protect the right to life and to provide special protection contained in Articles I and VII of the American declaration must be decided. In determining whether the public authorities in this case met the relevant legal obligations, the court asked whether the public authorities knew or ought to have known that the victims were in a situation of imminent risk of domestic violence, and whether the authorities undertook reasonable measures to protect them from these acts. The court found the American state guilty and ordered remedial action.

2.v.a. Facts

Jessica Lenahan (the applicant), a woman of Indigenous and Latin American descent residing in the town of Castle Rock, Colorado (the respondent), had filed for divorce against Simon Gonzales after he had consistently demonstrated violent behavior toward himself and others.⁵⁰⁶ In 1999 the plaintiff's three daughters were abducted and murdered by her estranged husband after the police force in Castle

⁵⁰² *Ibid* at para 12.1.1.

⁵⁰³ *Ibid* at para 12.3.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ (2011), Inter-Am Comm HR, No. 80/11.

⁵⁰⁶ *Ibid* at para 18.

Rock, Colorado repeatedly failed to enforce her domestic violence restraining order against him.⁵⁰⁷ In 2005, the plaintiff brought a Fourteenth Amendment due process claim in *Town of Castle Rock v Jessica Gonzales* whereby the Supreme Court found that the police had no constitutional duty to enforce her restraining order despite state laws mandating arrests for violations of restraining orders and she was thereby left without a remedy.⁵⁰⁸

The plaintiff, represented by the University of Miami School of Law Human Rights Clinic, the ACLU Women’s Rights Project and Human Rights Program, and the Columbia Law School Human Rights Clinic proceeded to file a petition before the Inter-American Commission on Human rights arguing that the US government had violated her rights when the police failed to protect herself and her daughters and when the Supreme Court failed to compensate her with a remedy.⁵⁰⁹ Specifically, she challenged the American doctrine of sovereign immunity that government generally has no duty to protect individuals from private acts of violence.⁵¹⁰

The state countered that the plaintiff had submitted an inaccurate evidentiary record in that her failure to characterize the perpetrator’s actions as a “violation of restraining order” or an “abduction” negated the claim that the police knew or ought to have known of real and immediate risk.⁵¹¹ In addition, the state maintained that both the police investigation and the subsequent trial had been conducted competently and fairly.⁵¹²

2.v.b. Reasoning

2.v.b.i. Legal obligation to protect women from domestic violence under Article II of the American Declaration

The Commission found that under longstanding jurisprudence of the inter-American human rights system, the American Declaration is recognized as a source of legal obligation for all Organization of

⁵⁰⁷ *Ibid* at para 24.

⁵⁰⁸ *Ibid* at paras 37 – 40.

⁵⁰⁹ *Ibid* at paras 43 – 44.

⁵¹⁰ *Ibid* at para 41; see *DeShaney v Winnebago County* 489 US 189, 109 S Ct 998 (1989) (The Due Process Clause does not impose a special duty on the state to provide services to the public for protection against private actors if the state did not create those harms: “The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means” at para 10).

⁵¹¹ *Ibid* at paras 44 – 49.

⁵¹² *Ibid*.

American States (OAS) members, flowing from the human rights obligations under the OAS Charter.⁵¹³ Respecting the Declaration involves exercising both negative and positive duties that extend to the conduct of non-state actors in the prevention and eradication of violence against women as an integral facet of the State's duty to eliminate both direct and indirect forms of discrimination.⁵¹⁴

2.v.b.ii. The American Declaration, the Due Diligence Principle and Domestic Violence

The Commission found that there is international consensus that the scope and content of domestic legal obligations towards violence against women such as the American Declaration must be interpreted against the evolving law and practice forming the due diligence standard including, but not limited to, the following principles:

1. First, that a state may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women that extends to the actions of private individuals under certain circumstances;
2. Second, that there is a link between discrimination, violence against women and due diligence as the state's duty to address violence against women also involves measures to prevent and respond to structural, social and cultural conditions that perpetuate the problem;
3. Third, that there is a link between the duty to act with due diligence and an obligation to guarantee access to justice in terms of judicial protection and remedies; and
4. Fourth, that domestic and international systems have identified certain groups of women as being particularly vulnerable based on such factors as age and ethnicity or race⁵¹⁵

The commission noted that while OAS members are not bound to follow the judgments of international supervisory bodies like the American Declaration, their jurisprudence can provide constructive insight into the interpretation and application of legal obligations and standards relevant to domestic and international human rights systems.⁵¹⁶

2.v.b.iii. *Response of the public authorities in this case*

a) The authorities' knowledge that victims were in a situation of risk

⁵¹³ *Ibid* at para 115.

⁵¹⁴ *Ibid* at paras 117 – 119.

⁵¹⁵ *Ibid* at paras 126 – 127.

⁵¹⁶ *Ibid* at para 135.

The Commission found that the issuance of a restraining order and its terms affording police broad powers “to use every reasonable effort to protect the alleged victim and the alleged victim’s children to prevent further violence” signified that the public authorities knew that the plaintiff and her daughters risked suffering harm in the absence of police protection.⁵¹⁷

b) Measures undertaken to protect the victims

In the context of this knowledge of risk and the corresponding need for protection, the state was legally obligated to ensure effective response which it failed to do when the police mishandled the multiple calls that the victim made throughout the evening and morning of the incident in question and when the judiciary subsequently failed to compensate her with a due remedy.⁵¹⁸ In sum, “the state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order at issue; failures to protect which constituted a form of discrimination in violation of Article II of the American Declaration.”⁵¹⁹

In response, the Commission issued multiple recommendations both specifically aimed at compensating the plaintiff (e.g. investigations into the details of her daughters’ deaths and the failures relating to the non-enforcement of her restraining order as well as remedies to herself and her next of kin) and generally directed at reforming the legislative structure surrounding the implementation of restraining orders.⁵²⁰ Interestingly, the Commission concluded that it would monitor progress until full compliance had been attained.⁵²¹

2.v.c. Notes

Scholars note that by framing domestic violence as a human rights violation, the case effectively challenged and pressured policymakers to re-think the current approach to domestic violence in the U.S.⁵²²

⁵¹⁷ *Ibid* at paras 140 – 143.

⁵¹⁸ *Ibid* at paras 146 – 159.

⁵¹⁹ *Ibid* at para 160.

⁵²⁰ *Ibid* at para 215.

⁵²¹ *Ibid* at para 127.

⁵²² See e.g. Bettinger-López, “Human Rights at Home: Domestic Violence as a Human Rights Violation” (2008) 40 *Colum HRL Rev* 19 at 21.

2.vi. **Osman v United Kingdom**⁵²³

In this case, the court considered whether the British state was guilty for failing to exercise a positive duty under Article 2 of the European Convention to protect life by and through the law. The court found the British state not guilty, ruling that although Article 2 of the European Convention involves a positive duty, the appropriate standard for police investigation is that of “real and immediate risk,” which was not met in this case.

2.vi.a. *Facts*

The applicant’s son had been stalked by an obsessive teacher who eventually killed her husband in a joint attack on father and child.⁵²⁴ Although the family had notified public authorities of eight trespasses on private property and three death threats leading up to the incident, the police failed to launch an official investigation.⁵²⁵ After failing in an action for police negligence at the domestic level, she filed an application to the European Court of Human Rights (ECHR).⁵²⁶

The applicant argued that the police had failed to investigate what was conclusive evidence that the lives of her child and family were at risk by an unstable, obsessive, disturbed and dangerous individual.⁵²⁷ Specifically, no records of police visits to the school or to the family home after multiple reports suggested a casual approach that disregarded strong direct and circumstantial evidence that the perpetrator was the author of an ultimately fatal campaign of harassment and intimidation threatening the security of the family.⁵²⁸ Moreover, there had never been any follow up into the police’s failure in this respect.⁵²⁹

Based on these alleged facts, the applicants submitted that the public authorities had failed in the circumstances to comply with their positive obligation under Article 2 of the Convention.⁵³⁰

⁵²³No. 87/1997/871/1083, [1998] ECHR.

⁵²⁴*Ibid* at para 56.

⁵²⁵*Ibid* at para 104.

⁵²⁶*Ibid* at paras 98 – 99.

⁵²⁷*Ibid* at para 104.

⁵²⁸*Ibid* at para 105.

⁵²⁹*Ibid*.

⁵³⁰*Ibid* at para 106.

The respondent countered that while Article 2 of the Convention may impose a positive obligation on the public authorities of a contracting state to take preventative measures to protect the life of an individual posed by another private individual, this obligation could only arise in exceptional circumstances where there is a known risk of a real, direct and immediate threat to that individual's life and where the authorities have assumed responsibility for his or her safety.⁵³¹ Here, it must be established that there is a causal link between the failure to take the preventive action of which the authorities are accused and that that action would have been likely to have prevented the incident in question and that failure to take preventive action amounted to gross dereliction or willful disregard of their duty to protect life.⁵³²

2.vi.b. Reasoning

The ECHR finds that Article 2 involves a positive duty subject to the difficulties involved in policing modern societies, the unpredictability of human conduct, the operational choices which must be made in terms of priorities and resources and other provisions of due process.⁵³³ Accordingly, not every claimed risk of life can mandate positive duty as doing so would impose an impossible or disproportionate burden on public authorities.⁵³⁴

Where a public authority has allegedly breached such a positive duty to protect, the onus is on the claimant to establish “that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁵³⁵

In the present case, the applicant failed to show that the police breached this standard of care, having failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the family members were at risk.⁵³⁶ Police inaction in response to notice, although “missed opportunities” were nonetheless consistent with the presumption of innocence and of restraining to use powers of arrest, search and

⁵³¹ *Ibid* at para 107.

⁵³² *Ibid.*

⁵³³ *Ibid* at para 116.

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid* at para 121.

seizure in the context of a reasonably held discretionary view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.⁵³⁷

2.vii. M.C. v Bulgaria⁵³⁸

In this case, the European Court of Human Rights (ECHR) considered whether the closure of a rape investigation by a member state on the premise of insufficient proof of physical force without also considering whether the victim was subjected to forceful circumstances constitutes a violation of the right to be free from torture, inhumane or degrading treatment and the right to respect for private life under Articles 3 and 8 of the European Convention on Human Rights, respectively. The court found the Bulgarian state guilty and awarded damages.

2.vii.a. Facts

The plaintiff, a 14-year-old citizen of Bulgaria, was allegedly raped by two men.⁵³⁹ Bulgarian criminal law defines rape as “sexual intercourse with a woman ... who was compelled by force or threats.”⁵⁴⁰ The investigation into the plaintiff’s allegation was closed by the public authorities due to an absence of proof of physical force sufficient to warrant prosecution.⁵⁴¹ The plaintiff subsequently filed an application for damages.

2.vii.b. Reasoning

The ECHR found that when a member state closes a rape investigation on the premise of insufficient proof of physical force without also considering whether the victim was subjected to forceful circumstances, that member state has not met its obligations under the European Convention on Human Rights.⁵⁴²

⁵³⁷ *Ibid.*

⁵³⁸ No. 39272/98, [2003] ECHR.

⁵³⁹ *Ibid* at paras 9 – 10.

⁵⁴⁰ *Ibid* at para 74.

⁵⁴¹ *Ibid* at para 111.

⁵⁴² *Ibid* at para 166.

Here, public authorities violated the Convention when they required proof of physical resistance in a rape case and failed to investigate circumstances that could have been sufficiently coercive to vitiate the plaintiff's consent under the recognized due diligence standard in international law.⁵⁴³ In particular, this due diligence standard applies "above and beyond" regular procedures where victims of sexualized violence are children or other vulnerable groups.⁵⁴⁴ This reflects a wide recognition that even in the absence of physical force, coercive circumstances can make sexual intercourse non-consensual as required in prosecutions for rape.⁵⁴⁵

2.viii. Kell v Canada⁵⁴⁶

In this case, the claimant argued the Canadian state was guilty of discrimination against women under Articles 1, 2, 14, 15 and 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The court found the Canadian state guilty and ordered remedial action.

2.viii.a. Facts

Cecilia Kell ("the applicant") is an Indigenous Canadian woman residing in the Rae-Edzo community in the Northwest Territories.⁵⁴⁷ In 1989, the applicant returned to Rae-Edzo from college but opted to leave her three children with relatives outside of the community until she secured housing and became financially stable.⁵⁴⁸ The same year, she began a common-law relationship with her now deceased partner.⁵⁴⁹

In 1990, when an Indigenous housing scheme was launched, she informed her partner that she wanted to register and provide a home for herself and her children. Without informing her, he applied in his name only for a unit from the Rae-Edzo housing authority but was rejected because he was neither a member of the community nor Indigenous.⁵⁵⁰ The applicant proceeded to apply in both their names and was accepted such that the couple became co-owners.⁵⁵¹

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid* at para 150.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ (2012), United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Communication No. 19/2008.

⁵⁴⁷ *Ibid* at 11.

⁵⁴⁸ *Ibid* at para 2.1.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid* at para 2.2.

⁵⁵¹ *Ibid* at para 2.3.

Over the next three years, the relationship became highly abusive, a situation that was exacerbated when the applicant attained a job and financial independence.⁵⁵² In 1993, the applicant's name was removed off the lease without her knowledge or consent at her partner's request, and in 1995 he evicted her from the apartment.⁵⁵³

For ten years, the applicant struggled to reclaim her property rights in the Canadian legal system. In 1995, she brought an action against her partner before the Supreme Court of the Northwest Territories for assault, batter, sexual assault, intimidation, trespass to chattels, loss of use of her home and payment of rent and attendant expenses and filed a declaration that her partner had been aided and abetted by the Government of the Northwest Territories to obtain housing through fraudulent means.⁵⁵⁴ Her legal aid lawyer advised her to follow the eviction notice and pursued a settlement. During this time, her partner became fatally ill with cancer and the action was delayed.⁵⁵⁵ In 1996, the applicant brought a second action against her partner's estate and the Northwest Territories Housing Corporation.⁵⁵⁶ At this point, she had been through 4 legal aid lawyers, and was forced to appeal against the denial of legal coverage to the Legal Services Board when she was denied a fifth.⁵⁵⁷ Her partner's estate and the Housing Corporation successfully brought actions against her to strike her statement of claim and dismissal of her action "for want of prosecution" on the grounds that the applicant had not diligently pursued her claim.⁵⁵⁸

By the time she brought a third action focused exclusively on leasehold title and property possession, legal aid was no longer an option and she acted as a self-represented litigant.⁵⁵⁹ Not only did the trial judge dismiss her action on summary judgment, but he also assigned her costs of all three actions given that each sought the same relief.⁵⁶⁰

⁵⁵² *Ibid* at para 2.4.

⁵⁵³ *Ibid* at para 2.5.

⁵⁵⁴ *Ibid* at para 2.7.

⁵⁵⁵ *Ibid*.

⁵⁵⁶ *Ibid* at para 2.8.

⁵⁵⁷ *Ibid* at para 2.9.

⁵⁵⁸ *Ibid* at para 2.10.

⁵⁵⁹ *Ibid* at para 2.11.

⁵⁶⁰ *Ibid* at para 2.12.

Contending that she had exhausted all domestic remedies, the applicant argues that she was the target of discrimination based on her gender, marital status and cultural heritage in her dealings with the Housing Corporation, the Rae-Edzo Housing Authority and the Legal Services Board.⁵⁶¹

In response, the respondents counter (i) that the facts that form the subject matter of the communication occurred prior to the entry into force of the Optional Protocol of the Convention; (ii) that the author failed to exhaust all available domestic remedies; and (iii) that the communication is manifestly ill-founded or not sufficiently substantiated.⁵⁶²

2.viii.b. Reasoning

The Committee finds that Canadian state guilty on all counts. Drawing on the concept of intersectionality whereby multiple social locations coalesce to produce experiences of oppression and privilege, the Committee holds that the applicant's position as a female Indigenous victim of domestic violence ought to have informed the scope of the Canadian state's obligation towards the applicant at all stages of her struggle to reclaim her property rights.⁵⁶³ First, the state not only failed to protect her, but also contributed to her harm, when her name was covertly removed from her lease.⁵⁶⁴ Second, the state failed to protect her in light of her negative reception by the Legal Services Board, thereby denying her equal access to justice by way of judicial remedies.⁵⁶⁵

In response, the Committee issued several formal recommendations. With respect to the applicant specifically, the Committee recommends that Canada provide her with an equivalent standard of housing to that which she enjoyed through the Housing Commission and financially compensate her for her material and moral damages.⁵⁶⁶ In terms of the legal and social structure more generally, the Committee advises that the state recruit and train more Indigenous women to provide legal aid to women in their communities and to review its legal aid system to ensure that female Indigenous victims of domestic violence can effectively access justice.⁵⁶⁷

⁵⁶¹ *Ibid* at para 2.14.

⁵⁶² *Ibid* at para 4.2

⁵⁶³ *Ibid* at para 10.2.

⁵⁶⁴ *Ibid* at para 10.3.

⁵⁶⁵ *Ibid* at para 10.5

⁵⁶⁶ *Ibid* at para 11.

⁵⁶⁷ *Ibid*.

2.viii.c. Notes

In its mandatory six month follow-up on the Committee hearing, the Canadian government begins by underscoring that it “maintains its position that the author’s communication was not admissible, and that even if it was admissible, Canada did not violate the rights of the author as protected by the Convention.”⁵⁶⁸ The state remains vague in terms of its progress with the applicant, noting only that it continues its efforts to begin negotiations and will provide an update at an appropriate time.⁵⁶⁹ In contrast, the state is more specific regarding general advancements in three structural areas, including: (i) improvements at the Housing Corporation through alliances with local housing organization and equitable policies towards victims of domestic violence⁵⁷⁰; (ii) legal protections for common law spouses through equal division of family property pursuant to the NWT *Family Law Act*⁵⁷¹; and (iii) family violence preventative measures through territorial and federal legislation and policy.⁵⁷²

2.ix. Concluding remarks: the due diligence standard

A survey of international human rights jurisprudence produces an outline of the standard of due diligence as obligating the state to act promptly and efficiently, take effective judicial action, and take adequate preventative measures. This duty is heightened with regards to particularly vulnerable groups. While the police may have a positive obligation to protect individuals from harm at the hands of private parties, this is not always the case, and is highly dependent on circumstances. Moreover, while the existence of a duty to take due diligence to protect women from violence is undisputed, the content of this duty remains somewhat vague. States maintain discretion in the measures they adopt. A government’s use of discretion may violate its international obligations with regards to a single individual. However, breaches are largely linked to systemic inequality and misconduct. The court will assess these facts in a contextual analysis to determine the content of the due diligence requirement.

⁵⁶⁸ Canada, *Follow-up Submission of Canada to the Views of the Committee on the Elimination of Discrimination against Women on the Communication of Cecilia Kell.*, No. 19/2008 (Ottawa: 2012) at para 4.

⁵⁶⁹ *Ibid* at para 63.

⁵⁷⁰ *Ibid* at para 11, 12.

⁵⁷¹ *Ibid* at para 15.

⁵⁷² *Ibid* at para 16.

CONCLUSION

In Canadian society, Indigenous women suffer disproportionate rates of violence and poverty. Canada's failure to address these inequalities and provide a meaningful remedy is in violation of its obligations under international law and the *Charter*. This memo has discussed various legal means of addressing state and police failure to protect and investigate murdered and missing Indigenous women. A survey of domestic and international law presents numerous possibilities. Under provincial and federal human rights codes and police acts, it is possible to file a complaint and seek damages. Alternatively, these documents provide a basis for establishing a duty of care owed towards individual Indigenous women, which the police breached. On this ground, it may be possible to sue for negligent misrepresentation, or if intentional and malicious misconduct can be established, misfeasance. In addition, evidence of police negligence resulting in a serious risk of bodily or psychological harm could support a section 7 or 15 claim. To do so, it must be possible to establish that the state acted arbitrarily, inconsistent with the purpose of its grant of power; failed to take due diligence; or violated the norm of substantive equality. The interpretation of the protection offered under the *Charter* must be informed by Canada's international human rights law obligations.

Under international treaties, Canada has a duty to protect Indigenous women from violence, and ensure a basic level of political participation and economic sustenance. In discharging this duty, the government must monitor its policy and legislative decisions to ensure they do not directly or indirectly perpetuate discrimination against women. The state must take steps to ensure programs and initiatives are in place to address those systemic inequalities that result in racialized and gender-based violence. In this way, Canada has an obligation to promote a climate in which Indigenous women's rights are protected.

Table of Authorities

LEGISLATION

- Canadian Human Rights Act*, RSC, 1985, c. H-6.
- Civil Code of Québec* S.Q. 1991, c. 64.
- Code of Professional Conduct and Discipline Regulations*, PEI Reg EC142/10
- Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS.1982 no. 31, Ga Res. 34/180 (entered into force 9 January 1982).
- Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990).
- Covenant Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 26 June 1987, 1465 UNTS 85, Can TS 1987 No 36.
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