



Women's Legal Education and Action Fund
Fonds d'action et d'éducation juridiques pour les femmes



**Institute for the Advancement of Aboriginal Women (IAAW)
and the
Women's Legal Education and Action Fund (LEAF)**

Submission

**Independent Review of Circumstances Surrounding the
Treatment of “Angela Cardinal” in *R. v. Blanchard***

October 15, 2017

Together, the Women's Legal Education and Action Fund (LEAF) and the Institute for the Advancement of Aboriginal Women (IAAW) have significant insight, expertise, and experience with respect to the issues raised by the incarceration of the complainant “Angela Cardinal” in the matter of the Preliminary Inquiry in *R. v. Blanchard*.¹

IAAW has unique insight into the experiences of Indigenous women in Alberta, particularly the ways in which Indigenous women experience violence and the ways in which discriminatory beliefs and biases regarding Aboriginal women perpetuate systemic inequalities. This insight informs IAAW's advocacy and educational initiatives and its ongoing work to uphold the rights of Indigenous women in the province.

LEAF has particular expertise and experience in promoting and protecting women's substantive equality. To this end, LEAF has been an intervener in numerous appeals. LEAF has intervened in pivotal Supreme Court of Canada (SCC) *Charter* cases, including several cases dealing with the law of sexual assault. The legal interventions of LEAF complement IAAW's efforts to end gendered and racial discrimination within the criminal justice system in Alberta.

In our submission, we draw attention to the systemic issues framing the inhumane treatment of Angela Cardinal and offer policy recommendations intended to prevent the reoccurrence of such treatment. IAAW and LEAF submit that the social context of racism, colonialism, and sexism produce conditions of systemic and targeted forms of violence and abuse against Indigenous

¹ *R v Blanchard*, Preliminary Inquiry Transcript, ABPC, 2015, E-File No ECP17BLANCHARDL [*Blanchard Preliminary Inquiry Transcript*].

women. This context also increases Indigenous people's overrepresentation and unequal treatment in the criminal justice system, with particular implications for Indigenous women.

Ms. Cardinal's treatment must be viewed in this context: the context of ongoing colonial forms of inequality that causes the overrepresentation of Indigenous women in Canada's prison system and the disproportionate violent victimization of Indigenous women. An awareness of both Indigenous women's inequality and Canada's human rights obligations should be at the forefront of any decision making regarding Indigenous women in the criminal justice system, specifically with regard to Indigenous survivors of gendered violence. Alongside this broader context of systemic inequality, specific conditions persist in Alberta that account for the continuation of disproportionate criminalization and victimization of Indigenous women in the province.

At a time when the Government of Alberta is committed to implementing the *United Nations Declaration on Indigenous Peoples*² and when significant steps are being taken to address the social problem of sexual violence, we believe that it is imperative that Alberta Justice ensure that all Indigenous women complainants are treated with respect and dignity and in a manner that fully respects their rights.

The rights to equality and freedom from discrimination are enshrined in the *Canadian Charter of Rights and Freedoms*³ and the *Alberta Human Rights Act*.⁴ Canada is also a signatory to the *Convention to Eliminate All Forms of Discrimination Against Women (CEDAW)*.⁵ The Convention requires member states to take all necessary action to overcome all forms of gender bias, including gender-based violence.⁶

Notwithstanding these various human rights guarantees, as documented by ample comprehensive studies and reports,⁷ Indigenous peoples and Indigenous women specifically continue to experience significant discrimination, inequality, and violence.

In addition to our submission, we have read Professor Alice Woolley's June 14, 2017 letter to Minister Ganley concerning the incarceration of the *Blanchard* complainant.⁸ Professor Woolley provides an important analysis of the ethical questions raised by the treatment of the complainant in this case. IAAW and LEAF endorse this analysis.

Our submission is based upon our analysis of the following materials:

² *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [*UNDRIP*].

³ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, at s 15 [*Charter of Rights and Freedoms*].

⁴ *Alberta Human Rights Act*, RSA 2000, c A-25.5.

⁵ *The Convention to Eliminate All Forms of Discrimination Against Women*, 17 July 1980, 1249 UNTS 13, online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=en [*CEDAW*].

⁶ *Ibid*, Article 2. See also CEDAW General Recommendation 19: Violence Against Women, CEDAW 11th Sess, 1992, online: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>, which recognizes gender-based violence as a form of discrimination and imposes due diligence obligations on state parties to CEDAW.

⁷ See footnotes 10, 11, 12, 13, and 14.

⁸ Professor Alice Woolley, Letter to the Honourable Kathleen Ganley concerning "the Investigation by Roberta Campbell of the Incarceration of the Blanchard Complainant", (14 June 2017) [*Woolley*].

1. The transcript of the Preliminary Inquiry;
2. The trial decision of Mr. Justice Eric Macklin in *R. v. Blanchard*;⁹ and
3. Various CBC news reports on the treatment of the complainant in the Preliminary Inquiry in *R. v. Blanchard*.

CONTEXT OF INEQUALITY

Enough has been said and written about the devastating effects of the Canadian criminal justice system on both Aboriginal citizens and our nations. Despite this fact, little has been accomplished to do more than accommodate Aboriginal persons in the mainstream system. There has been no systematic change of Canadian justice institutions.

- Patricia Monture-Angus¹⁰

Indigenous women and girls continue to face extreme forms of marginalization in Canada.¹¹ As the Supreme Court of Canada has recognized, the history and contemporary manifestations of colonialism have contributed to material inequalities in the lives of Indigenous people:

[C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.¹²

⁹ 2016 ABQB 706 [*Blanchard*].

¹⁰ Patricia Monture-Angus, “Women and Risk: Aboriginal Women, Colonialism and Correctional Practice,” 19 *Can Wom Studies* 24 (1999), at 27.

¹¹ Committee on the Elimination of Discrimination Against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, (Geneva: Office of the High Commission of Human Rights, United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 2015); The Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, (Organization of American States: 2014), online: <https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>. [*IACHR Report*]; Canada, Special Committee on Violence Against Indigenous Women, *Invisible Women: A Call to Action, A Report on Missing and Murdered Indigenous Women in Canada*, (Ottawa: Special Committee on Violence Against Indigenous Women, 2014), online: <http://www.ourcommons.ca/DocumentViewer/en/41-2/IWFA/report-1>; Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia Canada*, (Human Rights Watch: 2013), online: http://www.hrw.org/sites/default/files/reports/canada0213webwcover_0.pdf. [*Human Rights Watch (HRW) Report*]; The Honourable Wally Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry*, (British Columbia: Missing Women Commission of Inquiry, 2012); Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, (Amnesty International: 2004), online: <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf> [*Amnesty International Report*].

¹² *R v Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*].

This inequality manifests in material ways for Indigenous women. As has been well documented, ongoing forms of marginalization result in severe economic and social deprivations, including high rates of poverty and unemployment, lower educational attainment, poor health, lack of access to clean water, and overcrowded, substandard housing.¹³ Systemic forms of discrimination also result in disproportionate, ongoing targeted violence against Indigenous women. IAAW and LEAF emphasize that the disproportionate level of violence that Indigenous women face is a product of colonial systems layered with discrimination and marginalization, which must be considered in any analysis of violent victimization experienced by Indigenous women.

Disproportionate Violent Victimization

In a context of inequality, discrimination, and racism, Statistics Canada reports that Indigenous women experience violent victimization at a rate 2.7 times that of non-Indigenous women.¹⁴ Specifically, Indigenous women are targeted for varying forms of violent attacks, including sexual assault (three times that of non-Indigenous women),¹⁵ physical violence (almost double that of non-Indigenous women),¹⁶ and domestic violence (three times that of non-Indigenous women).¹⁷ Indigenous women are also extremely overrepresented among murder victims. While Indigenous people are only 4.3% of the Canadian population, Indigenous women represented 24% of Canadian murder victims in 2015.¹⁸ In sum, Indigenous women and girls face targeted forms of violence and, as a result, are far more likely than other Canadian women and girls to experience violence, to be “disappeared,” or be killed.¹⁹

The root causes of the disproportionate violent victimization experienced by Indigenous women lie in colonial relations enacted through discriminatory laws and policies, such as the *Indian Act*, residential schools, and the ongoing treatment of Indigenous women by the criminal justice system. As Monture-Angus depicts, “every oppression that Aboriginal people have survived has been delivered up to us through Canadian law.”²⁰

¹³ Native Women’s Association of Canada and Canadian Feminist Alliance for International Action, University of Miami School of Law Human Rights Clinic, “Missing and Murdered Aboriginal Women and Girls in British Columbia, Canada: Briefing Paper for Thematic Hearing before the Inter-American Commission on Human Rights” (IACHR 144th Period of Sessions, 2012), online: <http://www.fafia-afai.org/wp-content/uploads/2014/09/3-IACHR-Canada-Briefing-Paper-March-28-2012.pdf>, at 18. *IACHR Report*, *supra* note 11 at para 78; see also, *Human Rights Watch Report*, *supra* note 11 at 28.

¹⁴ Tina Hotton Mahoney, Joanna Jacob and Heather Hobson, “Women in Canada: A Gender Based Statistical Report: Women in the Criminal Justice System” Catalogue No 89-503-X (Ottawa: Statistics Canada, 2017), online: Statistics Canada <http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14785-eng.pdf>, at 8 [*Mahoney et al*].

¹⁵ *Ibid* at 8.

¹⁶ *Ibid*, at 8.

¹⁷ *Ibid* at 16.

¹⁸ *Ibid* at 24.

¹⁹ *Human Rights Watch Report*, *supra* note 11 at 25; Amber Dean. *Remembering Vancouver’s Disappeared Women: Settler Colonialism and the Difficulty of Inheritance* (Toronto: University of Toronto Press, 2015).

²⁰ Patricia Monture-Angus, *Thunder in my Soul* (Halifax: Fernwood Publishing, 1995) at 59.

Our submission is that racism, sexism, and colonialism in Canadian society have created a system in which Indigenous women are over-policed, over-criminalized, face targeted forms of violence, and endure systemic discrimination in all areas of the criminal justice system.²¹

Over-criminalization

While experiencing disproportionate levels of violent victimization, Indigenous women are also over-policed and over-criminalized. Indigenous people, and particularly Indigenous women and girls, constitute a vastly disproportionate number of incarcerated persons relative to their population.

The SCC documented this crisis in both *R. v. Gladue*²² and in *R. v. Ipeelee*. In *Ipeelee*, the Court held:

Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, “Locking Up Natives in Canada” (1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989.²³

Since the decisions in *Gladue* and *Ipeelee*, this problem has only gotten worse. As Julian Roberts and Andrew Reid write:

In the period between 2000–01 to 2014–15, Aboriginal persons accounted for one quarter of remand admissions. Echoing findings with respect to sentenced admissions, the over-representation of Aboriginal persons in the remand admission statistics has become worse over the past decade. Thus, in 2004–05, 16% of remand provincial/territorial admissions were Aboriginal, rising to the 25% statistic reported a decade later. As of 2014–15, the most recent year for which correctional data are available, Aboriginal Canadians represented a disproportionate number of admissions to provincial, territorial, and federal custody. While they constituted only approximately 4% of the general population, they accounted for almost 30% of all sentenced admissions to custody (federal and provincial/territorial combined).²⁴

²¹ As investigations by Human Rights Watch and Amnesty International have found, police have often failed to properly respond to complaints by Indigenous women and these failures are a fundamental underlying cause of the national crisis of Missing and Murdered Indigenous Women. *Amnesty International Report, supra* note 11 at 17-19; *Human Rights Watch Report, supra* note 11 at 66-72.

²² [1999] 1 SCR 688 [*Gladue*].

²³ *Ipeelee, supra* note 12 at para 57.

²⁴ Julian V Roberts and Andrew Reid, "Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story." (2017) 59 *Can J of Criminology & Criminal Just* 313 at 332.

The statistics are especially dire in regard to Indigenous women and girls. Indigenous women in sentenced custody increased from 18% in 2000/2001 to 37% in 2014/2015, despite constituting 4% of the female population.²⁵ The representation of Aboriginal women in remand, sentenced custody, and other forms of incarceration also increased in the period of 2001-2015.²⁶ Further, in 2008-2009 Indigenous female youth were 6% of the Canadian female population yet 44% of the female youth in custody. The percentage of Indigenous girls in prison seems to be continuously growing.²⁷

According to Human Rights Watch (HRW), these numbers may not capture the full extent of the crisis produced by assumptions of criminality among Indigenous women in Canada. Indigenous women make up a larger proportion of the temporary detention population, including women in the “drunk tank” who are not charged. In its research, HRW found that, “women, girls, advocates, and service providers reported that the police appeared to target Indigenous people for public intoxication arrests. In some reported incidents, the police abused their discretion by detaining people who were not intoxicated.”²⁸ Drawing on a recent Saskatchewan report, HRW further documents “entrenched and institutionalized stereotyping of Indigenous women by the police.”²⁹

LEAF and IAAW submit that such over-policing and overrepresentation in the prison system is a product of the same root causes that lead to Indigenous women’s disproportionate experiences of violent victimization. Indigenous women are over-criminalized as a direct result of the ongoing colonization of Indigenous peoples, including the loss of their lands to confiscation, industry, environmental degradation, and militarization, as well as systemic inequality and targeted discrimination against them.

The Supreme Court of Canada recognized the roles played by inequality and discrimination in 1999 in *R. v. Gladue*:

The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.³⁰

The Court stated that “the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic

²⁵ *Mahoney et al*, *supra* note 14 at 39.

²⁶ *Ibid* at 39.

²⁷ *IACHR Report*, *supra* note 11 at para 88.

²⁸ *Human Rights Watch Report*, *supra* note 11 at 48.

²⁹ Human Rights Watch, *Submission to the Government of Canada: Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence*, (Human Rights Watch: 2017), online: https://www.hrw.org/sites/default/files/supporting_resources/canada_saskatchewan_submission_june_2017.pdf.

³⁰ *Gladue*, *supra* note 22 at para 65.

conditions.”³¹ In *R. v. Ipeelee* the Court further recognized that Canada’s colonial history specifically contributes to the overrepresentation of Indigenous people in the criminal justice system.³²

The Manitoba Aboriginal Justice Inquiry of 1991 outlined reasons for the overrepresentation of Indigenous people in the criminal justice system, pointing to factors such as colonization, poverty, cultural differences, unemployment, and under-education. The Inquiry found that the criminal justice system has failed to reflect Indigenous norms and values around crime and punishment: “Systemic discrimination based on cultural factors can arise from differing concepts of crime and justice, conceptual misunderstandings and communication difficulties.”³³

In summary, Indigenous women are overrepresented in the prison population for many of the same reasons they face heightened experiences of violent victimization. In the words of the Inter-American Human Rights Commission on Missing and Murdered Indigenous Women in BC (IACHR), “[t]he story of how so many Aboriginal women came to be locked up within federal penitentiaries is a story filled with a long history of dislocation and isolation, racism, brutal violence as well as enduring a constant state of poverty.”³⁴

Stereotyping of Indigenous Women Complainants

Indigenous women are unfairly stigmatized within the justice system and consequently face misunderstanding, discrimination, neglect, and misrepresentation in the courtroom.³⁵ For example, Indigenous women become the expected and perceived “offender”: their experiences of violence are thereby constituted as a normalized part of their lives. Indigenous women who use drugs are particularly perceived and classified as offenders, a socially constructed identity laden with notions of dangerousness.³⁶

It is well recognized that people “may hold and apply ... negative stereotypes without being conscious of doing so.”³⁷ More specifically, “Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.”³⁸ The application of stereotypes about particular groups – including those facing intersecting inequalities based on sex, racism, Indigeneity, and poverty – is a clear violation of Indigenous women’s s. 15 *Charter* equality rights.³⁹ Where the application of stereotypes by actors in the justice system impedes the safety

³¹ *Ibid* at para 68.

³² *Ipeelee*, *supra* note 12 at para 77.

³³ Manitoba Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba, The Justice System and Aboriginal People*, vol 1 (Winnipeg: The Inquiry, 1991), at c 4 [*Manitoba AJI*].

³⁴ *IACHR Report*, *supra* note 11 at para 88.

³⁵ Colleen A Dell and Jennifer M Kilty, “The creation of the expected Aboriginal woman drug offender in Canada: Exploring relations between victimization, punishment, and cultural identity” (2013) 19 *International review of victimology* 51 [*Dell et al.*].

³⁶ *Ibid* at 53.

³⁷ *Radek v Henderson Development (Canada) and Securiguard Services (No 3)*, 2005 BCHRT 302 at para 142 [*Radek*].

³⁸ *Ibid* at para 482, *Peel Law Association v Pieters*, 2013 ONCA 396 at paras 111-115.

³⁹ *R v Kapp*, 2008 SCC 41; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 36; *Quebec (Attorney General) v A*, 2013 SCC 5 at para 326.

and security of women, or deprives them of their liberty and autonomy, the s. 7 *Charter* right to life, liberty and security of the person is also violated.⁴⁰

As recently recognized by the Alberta Court of Appeal in *R. v. Barton*:

Despite our society's recognition of individual autonomy and equality, there still remains an undeniable need for judges to ensure that the criminal law is not tainted by pernicious and unfair assumptions, whether about women, Aboriginal people, or sex trade workers.⁴¹

The Court of Appeal recommended that juries be warned that “certain assumptions people make about people of different races or gender, including generalizations about Aboriginal women, are unsound and unfair. Everyone in this country is entitled to have their actions assessed as an individual and not on the basis of assumptions attributed to them because of their gender, race or class.”⁴²

It is not only jurors who are susceptible to stereotypical thinking. Judges too may need to shake off their unconscious bias. The Canadian Judicial Council's Inquiry Committee into the conduct of former judge Robin Camp accepted that “survivors of sexual assault, and marginalized women generally ... are entitled to a judiciary that rejects sexual myths and stereotypes and understands and respects equality.”⁴³ As recognized by the Canadian Judicial Council's *Ethical Principles for Judges*, “Judges ... should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.”⁴⁴ Others in the justice system, including Crown prosecutors and defence counsel, are also susceptible to stereotypical thinking about complainants in sexual assault cases.⁴⁵

In spite of the need to reject such stereotypical thinking, “Indigenous women continue to suffer from damaging racialized stereotypes of sexual availability and discriminatory beliefs denying their rights to bodily integrity and respect.”⁴⁶ As recognized by the IACHR, “prevalent attitudes of discrimination – mainly relating to gender and race – and the longstanding stereotypes to which they have been subjected, exacerbate their vulnerability”.⁴⁷ Moreover, “... the stereotype of the ‘drunken squaw’ persists in law and in society. Aboriginal women are regarded as without

⁴⁰ *Charter of Rights and Freedoms*, *supra* note 3 at s 7: “Everyone has 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.”

⁴¹ *R v Barton*, 2017 ABCA 216 at para 1 [*Barton*].

⁴² *Ibid* at para 162.

⁴³ Canadian Judicial Council Inquiry Committee, *Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council in the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* (29 November 2016) at para 252 [*CJC Camp Report*].

⁴⁴ *Ibid* at para 285, citing Canadian Judicial Council, *Ethical Principles for Judges*.

⁴⁵ Ruthy Lazar, “Negotiating sex: The legal construct of consent in cases of wife rape in Ontario, Canada” (2010) 22 *Can J of Women & L* 329; Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51 *Osgoode Hall LJ* 427; Factum of the Intervenor Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund in *R v Barton*, Alberta Court of Appeal, Court of Appeal File Number #1503 0091A, 2016 [*IAAW/LEAF Barton Factum*].

⁴⁶ Submission of the Intervener Coalition, Canadian Judicial Council in the Matter of an Inquiry Pursuant to S. 63(1) of the *Judges Act* Regarding Justice Robin Camp, August 16, 2016, at para 20 [*Submission of the Intervener Coalition*].

⁴⁷ *IACHR Report*, *supra* note 11, Executive Summary at 12.

feelings, sexually promiscuous, immoral and inherently violable.”⁴⁸ Colonial gendered violence and ongoing violent victimization of Indigenous women becomes naturalized in this context.

Stereotypes also persist to suggest that “Aboriginal people are unhealthy and have a fatalistic disinclination to do anything about their health and other problems”, that they are lazy and disorganized, and that they are drug and alcohol abusers.⁴⁹ However, “many of the chronic health conditions which are prevalent in the Aboriginal community can cause deficits in balance, gait, or appearance and can contribute to the likelihood that a non-aboriginal person would perceive them to be ‘suspicious’, or appear to be intoxicated or stoned, or simply unable to respond quickly to questioning.”⁵⁰

It is evident that these stereotypes were at play in the treatment of Angela Cardinal in the preliminary inquiry in the *Blanchard* case. Assumptions were made by the Crown, defence, and court about her state of sobriety, whether she was using drugs, her willingness to appear in court without being incarcerated, and her ability to testify, resulting in a deprivation of her liberty and equality rights. These deprivations also have broader, systemic impacts upon Indigenous women who experience colonial gendered violence. As the Coalition of Interveners in the Camp Inquiry argued:

Judges whose conduct perpetuates sexual stereotypes and rape myths fail to respect and promote the principle of equality. They also compound the original trauma of the sexual assault for survivors. They provide a basis for the fears of sexual assault complainants that the justice system, including the courts, may not treat them with the dignity and respect afforded to victims of other crimes, which dissuades them from coming forward to report. More generally, any suggestion that rape myths and stereotypes are legally acceptable contributes to a climate in which women, and particularly marginalized women, face unequal and unacceptable risks of being subjected to sexual violence.⁵¹

THE TREATMENT OF ANGELA CARDINAL

Angela Cardinal, a Cree woman, was 28-years-old at the time of the Preliminary Inquiry. She did not have adequate housing and had spent time living in Edmonton’s river valley, a circumstance she described as one that “takes a lot out of you.”⁵² A support worker from the Bissell Centre who assisted the complainant at the Preliminary Inquiry on June 5, 2017 testified that many homeless people stay up all night walking because it is too dangerous to sleep.⁵³ Ms. Cardinal suffered from regular sleep deprivation and lack of food.⁵⁴ As the trial judge found, her behaviour on June 5, 2015, was most likely caused by fatigue, given her situation as a homeless

⁴⁸ Factum of the intervenor the Women’s Legal Education and Action Fund in *R v JA*, Supreme Court of Canada, Court File Number 33684, 2016 at para 29, online: http://www.leaf.ca/wp-content/uploads/2011/05/Factum_Finale_JA_Filed_SCC.pdf

⁴⁹ *Radek*, *supra* note 37 at para 135, based on the expert evidence of Dr Bruce Miller.

⁵⁰ *Ibid* at para 83, based on the expert evidence of Dr Bruce Miller.

⁵¹ *Submission of the Intervener Coalition*, *supra* note 46 at para 50.

⁵² *Blanchard Preliminary Inquiry Transcript*, *supra* note 1 at 826, line 33.

⁵³ *Blanchard*, *supra* note 9 at 182.

⁵⁴ *Ibid* at 170.

woman.⁵⁵ Like many Indigenous women, Ms. Cardinal experienced severe social and economic marginalization.

Ms. Cardinal had suffered a horrific attack at the hands of Lance Blanchard. She was asleep in the foyer of the accused's building when she was awakened by the accused who grabbed her hair and dragged her up the stairs into his apartment. Blanchard tore Ms. Cardinal's clothes off, groped, stabbed and slashed her, and slammed her head against the floor. The accused tried to tie her up with electrical cords. The complainant attempted to escape, but could not open the apartment door because the blood from her wounds made the doorknob too slippery. Throughout the attack, Ms. Cardinal displayed incredible fortitude – "feisty resistance" in the words of the trial judge.⁵⁶ She was able to dial 911 by throwing a portable phone across the room and shouting to the operator while Blanchard continued to attack her. She would later describe feeling disgusted, disempowered and afraid for her life.⁵⁷ It is plainly obvious that Ms. Cardinal would likely experience significant trauma as a result of this attack, and that this trauma would be easily re-triggered by being in the courtroom with the accused while she recounted his attempt to kill her.

Many survivors of sexual violence experience the trial process as re-traumatizing. Sexual assault reporting rates remain extremely low at just 5%⁵⁸ and one of the most common reasons for not making a police report is lack of confidence in the criminal justice system.⁵⁹ Forced to appear at the Preliminary Inquiry with only two-days' notice, Ms. Cardinal was given no time to mentally prepare for the ordeal of having to confront the accused. The transcript is filled with examples of the complainant expressing the psychological impact of testifying. As described by the trial judge, on the first day she testified, Ms. Cardinal "was clearly distraught, in her words panicking."⁶⁰ Despite her fatigue and distress, she managed to answer a number of questions about her background,⁶¹ the events prior to the attack,⁶² her interactions with the accused before the assault,⁶³ as well as about the assault.⁶⁴

Ms. Cardinal's distress clearly became overwhelming at the point when the Preliminary Inquiry judge referred to her as "Ms. Blanchard," the name of the accused.⁶⁵ While this might be excused as a slip of the tongue, we believe that Judge Raymond Bodnarek's confusion of the complainant with the accused was not only extremely upsetting, it was also reflective of the discriminatory myths about Indigenous women described above. It also mirrors former Justice Camp's conduct

⁵⁵ *Ibid* at 182-184.

⁵⁶ *Ibid* at para 249.

⁵⁷ See, for example, *Blanchard Preliminary Inquiry Transcript*, *supra* note 1 at 697, line 26.

⁵⁸ Samuel Perreault, *Criminal Victimization in Canada*, Catalogue no 85-002-X (Ottawa: Statistics Canada, 2014), at 25, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.pdf>>.

⁵⁹ Melissa Lindsay, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, Catalogue no J2-403/2014E-PDF (Ottawa: Department of Justice Canada, 2014) at 13, online: Justice Canada, Research and Statistics Division <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_19/rr13_19.pdf>.

⁶⁰ *Blanchard*, *supra* note 9 at para 229.

⁶¹ *Blanchard Preliminary Transcript*, *supra* note 1 at 358-359.

⁶² *Ibid* at 464-471.

⁶³ *Ibid* at 469-470.

⁶⁴ *Ibid* at 471-86.

⁶⁵ *Ibid* at 473, line 19.

in the now famous case of *R. v. Wagar*,⁶⁶ in which he repeatedly referred to the Indigenous complainant as “the accused.”⁶⁷ The treatment of Ms. Cardinal during the Preliminary Inquiry appeared to be informed by discriminatory assumptions about Indigenous women’s inherent dangerousness, their criminality, immorality, and drunkenness.

These assumptions were evident in the Court’s response to Ms. Cardinal’s dissociative behaviour on the first day of the Preliminary Inquiry. As described by the Crown Prosecutor, Ms. Patricia Innes, Ms. Cardinal was “curled up on the benches outside, literally unwilling to interact.”⁶⁸ Rather than appreciating that this behaviour might be the result of the trauma of confronting the accused, combined with extreme fatigue, Ms. Innes instead characterized the complainant as an addict, reporting that the victim support worker had stated that Ms. Cardinal’s “presentation ... is consistent with someone who is coming down off of methamphetamine.”⁶⁹ This assertion that she was an addict created further stigmatization of Ms. Cardinal and facilitated her treatment as an obstruction to the prosecution of her attacker. As Colleen Dell and Jennifer Kilty have demonstrated, “Aboriginal women who use drugs are characterized as offenders, a socially constructed identity laden with stigma and notions of dangerousness.”⁷⁰ This characterization in turn excludes them from being seen as “legitimate victims.” Dell and Kilty contend:

State responses to the victimization of Aboriginal women generally and drug users specifically often fail to recognize them as legitimate, let alone ideal victims, in spite of their lengthy histories of intersecting trauma and victimization.⁷¹

Throughout the Preliminary Inquiry, Ms. Cardinal was treated as an offender requiring supervision and punishment, rather than as a citizen undertaking the onerous responsibility of reporting and testifying against a dangerous perpetrator, or as a victim deserving of support and compassion. She was treated as a “problem”, an obstruction to the smooth prosecution of a serial offender, and arguably as an object—an instrument to be produced to testify then shelved for further use, regardless of her human suffering.

Despite the fact that Ms. Cardinal was compliant and never refused to testify, she was ordered remanded under s. 545(1)(b) of the *Criminal Code*,⁷² a provision that allows for a Preliminary Inquiry judge to order the detention of a witness who, “having been sworn, refuses to answer the questions that are put to him, without offering a reasonable excuse for his failure or refusal.”

⁶⁶ *R v Wagar*, Provincial Court of Alberta at Calgary bearing Docket No. 130288731P1 [*Wagar*].

⁶⁷ *R v Wagar*, *ibid*, Trial Transcript, (Alberta: June 5, 6, 10, August 1, 6, September 9, 2014), at page 432, lines 5 and 16, page 433, line 20, page 437, line 9, page 442, line 41, page 443, line 6, page 446, line 41, page 450, line 34 [*Wagar Transcript*].

⁶⁸ *Ibid* at 488, lines 7-8.

⁶⁹ *Ibid* at 492, line 8.

⁷⁰ *Dell et al*, *supra* note 35 at 53.

⁷¹ *Ibid*, at 53.

⁷² *Criminal Code*, RSC 1985, c C-46, s 545:

545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence ...

(b) having been sworn, refuses to answer the questions that are put to him, without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may...commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

This section is very rarely used. In her application in this case, Crown Prosecutor Ms. Innes sought to justify the incarceration of the complainant in the following manner: Ms. Cardinal was “a flight risk” and had presented “in a condition unsuitable for testifying.”⁷³ Ms. Innes later added that Ms. Cardinal was “not answering the questions that are put to her.”⁷⁴ Yet, according to the trial judge, the assertion that Ms. Cardinal was a “flight risk” was based upon a “mistaken belief” about her having gone missing on the previous night.⁷⁵ Even this erroneous belief was steeped in prejudice and disregard for Ms. Cardinal’s humanity: she explained to police that she wanted to stay with her own mother—an utterly understandable impulse before a difficult trial—rather than stay alone in a motel. Beyond misapprehending the facts, Ms. Innes failed to provide any case law or legal argument justifying the complainant’s detention.

In the assessment of Professor Steven Penney, the detention of the complainant on these terms was “unlawful”:

But even if she did constitute a genuine flight risk, it wouldn’t matter. The provision does not authorize detention to prevent absconding. Of course, witnesses may be jailed for contempt if they refuse to comply with a properly-served subpoena or other court order, but they cannot be detained prospectively because of a concern that they may not come to court.⁷⁶

Although Janice Johnston of the CBC has reported on other instances of sexual assault complainants being detained during trials in Edmonton,⁷⁷ Professor Penney has written that he was unable to find even a single case where s. 545(1)(b) was used to jail a witness on the basis of a purported “flight risk.”⁷⁸ In every other reported case involving the incarceration of a preliminary inquiry witness under s. 545(1)(b), the witness clearly refused to testify or to answer a question, usually after the judge gave a warning about the consequences of such a refusal.⁷⁹ The assertion that Ms. Cardinal was a “flight risk” was never even substantiated. She had certainly not refused to testify. There were no efforts to canvass reasonable explanations (such as fatigue, hunger, trauma) for the complainant’s difficulties testifying on June 5, 2015 or to address her acute suffering without humiliating, terrifying, and oppressing her further by shackling her, forcing her to travel and sleep near her perpetrator, and jailing her.

In fact, as the trial judge observed after Ms. Cardinal returned from having spent the weekend in the Edmonton Remand Centre, “once the complainant was rested and fed, she was clear, coherent, lucid and responsive.”⁸⁰ Ms. Cardinal even apologized to the Court for her outbursts,

⁷³ *Blanchard Preliminary Inquiry Transcript*, supra note 1 at 495, lines 34-35.

⁷⁴ *Ibid* at 498, lines 40-41.

⁷⁵ *Blanchard*, supra note 9 at para 230.

⁷⁶ Steven Penney, “Unlawful Remand: The Wrongful Jailing of a Sexual Assault Victim” 2017 Faculty of Law Blog, University of Alberta; online: < <http://ualbertalaw.typepad.com/faculty/2017/06/unlawful-remand-the-wrongful-jailing-of-a-sexual-assault-victim-.html>> [*Penney*].

⁷⁷ Janice Johnston, “‘Great unfairness’: 2 more sex assault cases where victims were jailed to ensure their court testimony” *CBC News Edmonton*, (28 Jul 2017) online: CBC news <http://www.cbc.ca/news/canada/edmonton/edmonton-victims-sexual-assault-custody-alberta-1.4226601>

⁷⁸ *Penney*, supra note 76.

⁷⁹ *Ibid*.

⁸⁰ *Blanchard*, supra note 9 at para 183.

explaining that she was angry about having been called Ms. Blanchard.⁸¹ Despite her cooperation, and her repeated protests and requests that she be unshackled and not jailed, she remained in the Edmonton Remand Centre until the end of her testimony on June 10, 2015.

IAAW and LEAF are concerned about the serious violations of Ms. Cardinal's s. 7⁸² and s. 11(d)⁸³ Charter rights throughout the Preliminary Inquiry. The remanding of the complainant was not done according to law and violated basic norms of due process.⁸⁴ As Professor Woolley has also emphasized, Ms. Cardinal was deprived of her liberty without proper representation.⁸⁵ The duty counsel who was brought in to represent Ms. Cardinal failed to object to her incarceration at the outset, instead simply requesting that she be placed in a medical unit.⁸⁶ When Ms. Cardinal was returned to the Edmonton Courthouse on Monday, June 8, 2015, her counsel reported that she was agitated because she had been transported with the accused. Rather than advocating on Ms. Cardinal's behalf, she conceded, "This probably reinforces my friend's suggestion that she remain in custody until the Court has concluded her involvement, shall we say."⁸⁷

At several points during her examination and cross-examination, Ms. Cardinal forcefully objected to her own incarceration: "I'm the victim here, and look at me, I'm in shackles. This is fantastic. This is a great frickin – this is a great system."⁸⁸ She emphasized that she had "been obliging the whole way" and asked to be released, so that she could stay with her mother.⁸⁹ Ms. Cardinal attempted to set the record straight, insisting that she had never gone missing. Despite her cooperation and her commitment to reappear, Judge Bodnarek ordered the complainant returned to remand, paternalistically justifying this exceptional order in the following terms: "In order to get you back here and to keep you in good shape so that you can testify, you're in much better shape today than you were on Friday, by far."⁹⁰

Here punishment is confused with care, and Ms. Cardinal's incarceration is justified as if it were for her own good.⁹¹ This suggests a carelessness of the agents of the justice system towards depriving someone in Ms. Cardinal's situation of her liberty. Even if there were legitimate concerns about whether she would return to testify if released, no consideration was given to less coercive measures that could have supported Ms. Cardinal's reappearance in court. In instances

⁸¹ *Blanchard Preliminary Inquiry Transcript*, supra note 1 at 638, lines 11-12.

⁸² *Canadian Charter of Rights and Freedoms*, supra note 3, s 7.

⁸³ *Ibid*, s 11(d):

11. Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

⁸⁴ *Penney*, supra note 76.

⁸⁵ *Woolley*, supra note 8 at 12.

⁸⁶ *Blanchard Preliminary Inquiry Transcript*, supra note 1 at 499, line 41 to 500 line 1.

⁸⁷ *Ibid* at 532, lines 32-33.

⁸⁸ *Ibid* at 640, lines 22-23.

⁸⁹ *Ibid* at 676, line 13.

⁹⁰ *Ibid* at 677, lines 3-5.

⁹¹ On benevolence and colonial gendered violence see Julie Kaye, *Responding to Human Trafficking: Dispossession, Colonial Violence, and Resistance among Indigenous and Racialized Women*, (Toronto: University of Toronto Press, 2017) at 16; Sherene Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism*, (Toronto: University of Toronto Press, 2017) at 10.

of an offender, the Supreme Court of Canada's decision in *Ipeelee*⁹² clearly demands that courts consider alternatives to incarceration. This should have further informed Judge Bodnarek's treatment of Ms. Cardinal, who was victimized by a life-threatening attack. Assigning a support worker or her own legal counsel to accompany her would have preserved her liberty, while also providing her with the needed supports to testify.

Alberta's *Victims of Crime Act*⁹³ requires criminal justice actors to treat victims with "courtesy, compassion and respect," to ensure their "safety and security... at all stages of the criminal justice process," and to take "all reasonable measures to minimize inconvenience." Moreover, under the *Canadian Victims Bill of Rights*,⁹⁴ complainants are entitled to be "treated with courtesy, compassion and respect, including respect for their dignity." The *Bill* acknowledges that consideration of the rights of victims is in the interest of the proper administration of justice and legislates the rights of victims, including, the right to security, the right to be free from "intimidation and retaliation," and the right "to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under this Act and to have those views considered." Ms. Cardinal's rights as a victim, and especially as an Indigenous woman facing violent victimization, were violated by the actions of criminal justice actors. In addition to being forcibly confined in the medical unit of the Edmonton Remand Centre, she was inexplicably forced to testify in shackles,⁹⁵ for which there appears to be no justification. During court adjournments, she was handcuffed, shackled and held in cells, at times in proximity to the accused.⁹⁶ On at least two occasions, she was transported in the same van as the accused.⁹⁷ This treatment was so exceptional and egregious that, after the CBC broke the story,⁹⁸ it was picked up by international media outlets.⁹⁹

It is striking how very little compassion was shown to this young woman during the Preliminary Inquiry. While the Crown arranged for an Elder to provide support for Ms. Cardinal, there was no effort made to ensure that this Elder was Cree or appropriate for the complainant's background and needs.¹⁰⁰ It appears as though this effort was a means of ensuring Ms. Cardinal's return to the courtroom, rather than a recognition of the significant harms she had suffered and need for support in her decision to testify.¹⁰¹ Likewise, the Crown supported the complainant's request to testify behind a screen, but only because she appeared distracted by the accused and was having difficulty answering questions that were put to her: "This is a case where she's not focusing as a witness."¹⁰² At several points during the complainant's examination and cross-

⁹² *Supra* note 12.

⁹³ RSA 2000, c V-3, s 2.

⁹⁴ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

⁹⁵ *Blanchard*, *supra* note 9 at para 235.

⁹⁶ *Ibid* at para 221, 235.

⁹⁷ *Ibid* at para 235.

⁹⁸ Janice Johnston, "I'm the victim and I'm in shackles: Edmonton woman jailed while testifying against her attacker", *CBC Edmonton* (5 June 2017) online: CBC News < <http://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-judge-edmonton-1.4140533>>.

⁹⁹ "Canada pledges investigation into why rape victim was held in jail with attacker", *The Guardian* (6 June 2017) online: CBC News < <https://www.theguardian.com/world/2017/jun/06/alberta-sexual-assault-victim-jail-investigation>>.

¹⁰⁰ *Blanchard Preliminary Inquiry Transcript*, *supra* note 1 at 488, 492.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at 624, line 34.

examination, she was admonished by Judge Bodnarek, who told her to stop swearing,¹⁰³ not to burp in the courtroom,¹⁰⁴ and to “just keep your head behind the screen.”¹⁰⁵ Even though Ms. Cardinal was being called upon to relive a gruesome attack in minute detail, the Crown and the judge rarely encouraged her (for example, “Take your time;” “I know this must be difficult”). At one point, it seemed very clear that Ms. Cardinal needed a break and that she was probably hungry, having only eaten a sandwich that day.¹⁰⁶ But even then, she was asked “So would a break help you focus...?”¹⁰⁷

In sum, rather than being treated as a rights-bearing legal subject entitled to dignity and respect, Ms. Cardinal was subjected to harshly punitive treatment. In fact, it appears as though she was objectified and reduced to a mere instrument of the prosecution. The Crown aggressively pursued the prosecution of an accused with a long history of violence and Ms. Cardinal became a casualty of this process. We agree with the trial judge who characterized the treatment of Angela Cardinal as “appalling.”¹⁰⁸

A SYSTEM IN CRISIS: CONTEXTUALIZING THE TREATMENT OF INDIGENOUS WOMEN IN ALBERTA IN RELATION TO PROVINCIAL COMPARATIVES

We need to understand the treatment of Angela Cardinal within a context of ongoing colonial relations. The dehumanization she experienced is not isolated, but is instead symptomatic of the criminal justice system’s treatment of Indigenous women. It is imperative to acknowledge the important recommendations of the Royal Commission on Aboriginal Peoples¹⁰⁹ and of the Truth and Reconciliation Commission,¹¹⁰ as well as of provincial inquiries, such as the Manitoba AJI,¹¹¹ the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform¹¹² and the Ontario Juries Report.¹¹³ Alberta’s commitments under international law, including under *UNDRIP* and the *CEDAW*, must inform the effort to reframe the relationship between Indigenous women and the criminal justice system in Alberta.

¹⁰³ *Ibid* at 881, lines 11-12.

¹⁰⁴ *Ibid* at 847, lines 8-9.

¹⁰⁵ *Ibid* at 843, line 11.

¹⁰⁶ *Ibid* at 916.

¹⁰⁷ *Ibid* at line 30.

¹⁰⁸ *Blanchard, supra* note 9 at para 387.

¹⁰⁹ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996), online: <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

¹¹⁰ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 3-4, online: [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls to Action_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls%20to%20Action_English2.pdf) [*TRC Calls to Action*].

¹¹¹ *Manitoba AJI, supra* note 33.

¹¹² Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, *Final Report: Legacy of Hope and Agenda for Change* (Saskatchewan: Commission on First Nations and Métis Peoples and Justice Reform, 2004) online: < <http://www.justice.gov.sk.ca/justicereform/> > [*Saskatchewan Commission Report*].

¹¹³ Hon Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Ottawa: Ministry of the Attorney General, 2013), online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html [*Iacobucci Report*].

The Manitoba AJI was formed in response to the death and subsequent criminal justice system treatment of Helen Betty Osborne, as well as the death of John Joseph Harper who was killed by Winnipeg police. Osborne, a Cree woman from Norway House First Nation, was killed in 1971 and only after 16 years was one of her four attackers charged and convicted for her death. Headed by then Associate Chief Justice Alvin Hamilton and Judge Murray Sinclair, the commissioners stated in their report, “the justice system has failed Manitoba’s Aboriginal people on a massive scale.”

The still largely unanswered recommendations provided by the Manitoba AJI in 1999 have particular relevance in their application to Alberta and the treatment of Angela Cardinal. There are far too many parallels between the criminal justice system’s treatment of Osborne and Cardinal, as well as that of other Indigenous women in Alberta, such as Cindy Gladue.¹¹⁴ As the Aboriginal Justice Inquiry suggests: “It is clear that Betty Osborne would not have been killed if she had not been Aboriginal.” Many observed similar stereotyping and discrimination in the dehumanizing treatment of Cindy Gladue, who was referred to as “prostitute,” “Native girl”, and “Native woman” throughout the trial, including by the Crown Prosecutor.¹¹⁵ Such descriptors draw on stereotypical assumptions about Indigenous women and criminality.

Framed by systemic factors, the Manitoba AJI also attributes the criminal justice system’s mistreatment of Indigenous people to the specific beliefs and actions of individuals involved in the system:

A significant part of the problem is the inherent biases of those with decision-making or discretionary authority in the justice system. Unconscious attitudes and perceptions are applied when making decisions. Many opportunities for subjective decision-making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not "benefit" from discretionary decision making, and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences.¹¹⁶

Like the Manitoba AJI, the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform was prompted by concerns regarding the treatment of First Nations and Métis people by the justice system, particularly following the police-related deaths of Lawrence Wegner and Rodney Naistus.¹¹⁷ This report was published at a time that coincided with the

¹¹⁴ Pamela Palmater, “Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous women and Girls in the National Inquiry,” (2016) 28 Can J of Women & L 253; Sherene Razack, “Gendering Disposability,” (2016) 28 Can J of Women & L 285; Julie Kaye, “Reconciliation in the Context of Settler-Colonial Gender Violence: How do we Reconcile with an Abuser?” (2016) 53 Canadian Review of Sociology 461 [Kaye]. Also see, Lucinda Vandervort, “Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in *Edmondson, Kindrat and Brown*,” Chapter 6, in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice & Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) at 113-153; Tracey Lindberg, Priscilla Campeau, and Maria Campbell, “Indigenous Women and Sexual Assault in Canada” Chapter 5, in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice & Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) at 87-111.

¹¹⁵ *IAAW/LEAF Barton Factum*, *supra* note 45.

¹¹⁶ *Manitoba AJI*, *supra* note 33 at c 4.

¹¹⁷ *Saskatchewan Commission Report*, *supra* note 110.

inquiry into the death of Neil Stonechild following police-practices of so-called “Starlight Tours”, now widely condemned. The report documents widespread distrust of the justice system among Indigenous peoples, in a context of ongoing institutionalized racism.

Similarly, the Ontario Juries Report underscored that “the relations between justice system and First Nations have reached the crisis stage.”¹¹⁸ In response to the Report, the Ontario Ministry of the Attorney General formed an Indigenous Justice Division.

In Alberta, the circumstances of the treatment of Ms. Cardinal occurred in a context where Indigenous women continue to face blatant forms of hostility and discriminatory treatment within the criminal justice system.

Each of the inquiries emerged in a context of ongoing colonial relations and domination, and were spurred by cases that mobilized collective concern about the treatment of Indigenous people by the criminal justice system. Although a Task Force on the Criminal Justice System in and its Impact on the Indian and Metis People of Alberta made some important recommendations in 1991,¹¹⁹ Alberta has yet to hold a comprehensive review of the criminal justice system. However, a number of cases have emerged in recent years that have spurred calls for such a review, particularly since many of the recommendations of the Task Force have gone unanswered and since the Task Force was unable to tackle the systemic review necessary to address the unequal treatment of Indigenous women by Alberta’s criminal justice system.

The legacy of colonization and ongoing forms of systemic inequality continue to result in targeted violence against Indigenous women. The growing number of violent deaths of Indigenous women in Alberta alone cries out for deeper inquiry and systemic solutions. The inhumane treatment of Cindy Gladue in *R. v. Barton*,¹²⁰ the mistreatment of the Indigenous complainant in *R. v. Wagar*,¹²¹ leading to a recommendation to remove former judge Robin Camp from the bench, and the discriminatory treatment of Angela Cardinal together point to the urgent need for a wider review and systemic changes of the criminal justice system in Alberta.

Recent cases have revealed what Indigenous women have been arguing for many years. Of particular note, Bradley Barton was charged with first degree murder in the death of Cindy Gladue. As Kaye indicates, the *R. v. Barton* case left many Indigenous women wondering, “How can we reconcile with a state that continues to perform violently against us? How can we reconcile with an abuser?”¹²²

The *R. v. Barton* case was heard by Justice Rob Graesser and an 11-person jury comprised of nine men and two women – none of whom identify as being Indigenous – at the Court of Queen’s Bench of Alberta from February 17, 2015 until March 18, 2015.¹²³

¹¹⁸ *Iacobucci Report*, *supra* note 110 at 368.

¹¹⁹ Alberta Government, *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Alberta: Solicitor General of Canada and the Solicitor General of Alberta, 1991) at 1-8, online: <https://open.alberta.ca/publications/1369434>

¹²⁰ *Barton*, *supra* note 41.

¹²¹ *Wagar*, *supra* note 66.

¹²² *Kaye*, *supra* note 112 at 464.

¹²³ *R v Barton*, 2015, *Court of Queen’s Bench of Alberta*

After conducting an autopsy on June 23, 2011, Dr. Graeme Dowling preserved a portion of the deceased's pelvic region.¹²⁴ Arguing the tissue was “real evidence” – relevant and material to the trial proceedings – the Crown sought [and was granted permission] to have the preserved tissue shown to the jury.¹²⁵ These actions of the Court dehumanized Cindy Gladue and resulted in the re-victimization of her family. The actions outraged Indigenous women, who mobilized collective protests against such normalization of continued violence against Indigenous women.

Following Barton's acquittal, Kaye described the violation of Cindy Gladue by Alberta's justice system:

Although those who knew Cindy had hoped for justice following her horrific death in June 2011, they received no solace from a system that further violated her body and allowed the man on trial for her death to walk free.

...

The justice system responded to her assault with its own measure of violence. In an act of complete and unprecedented dehumanization, her sexual organs — human remains — were brought into the court, covered in a paper towel. The court referred to this portion of her body as a “specimen.” A portion of a woman's body ... was paraded through the Canadian criminal court system. The very system that dispossessed Indigenous women from their land and that continues to criminalize their lives at staggering and ever-increasing rates.¹²⁶

The acquittal of Barton was successfully appealed with the intervention of Indigenous women and feminist-led legal expertise. LEAF and the IAAW intervened on the grounds that the instructions to the jury violated the laws of consent and failed to apply the available legal protections intended to protect sexual assault victims in the trial process.

Our Breaking Point, a public resource booklet created alongside the family of Cindy Gladue, further documents the dehumanization of Cindy Gladue by an accused violent offender and by the criminal justice system responding to her violent victimization and death. As Muriel Stanley Venne underscores, “[the] courts have never been kind or considerate of Indigenous women. The trust that should be a cornerstone of this relationship has been mostly absent and often violent.”¹²⁷

Of note, on March 25, 2015 the IAAW, Awo Taan Healing Lodge, Stolen Sisters and Brothers Awareness Movement, Aboriginal Commission on Human Rights and Justice, and Mikisew Cree First Nation unanimously passed a resolution in response to the treatment of Cindy Gladue by the justice system in Alberta. The resolution calls for “a full review of the Criminal Justice System's treatment of Aboriginal people and in particular Aboriginal women and girls in

¹²⁴ *R v Barton*, 2015 ABQB 159 [*Voir Dire*]

¹²⁵ *Ibid.*

¹²⁶ Julie Kaye, “Justice for Cindy Gladue demands an Appeal of Recent Verdict”, *Edmonton Journal* (26 March 2015) online: The Edmonton Journal <http://edmontonjournal.com/opinion/opinion-justice-for-cindy-gladue-demands-an-appeal-of-recent-verdict>.

¹²⁷ Institute of Advancement for Aboriginal Women, *Our Breaking Point: Canada's Violation of Rights in Life and Death*, 2015, online: <http://www.iaaw.ca/wp-content/uploads/2016/10/ourbreakingpoint-cindygladue.pdf>, at 22.

Canada.” The resolution further demands “the creation of an Aboriginal Women’s Commission with full authority to counter the racism and prejudice as it exists within the Courts and Canadian society.”¹²⁸

The dehumanizing treatment of another Indigenous woman victimized by sexual assault in Alberta underlines the urgent and compelling nature of this resolution. In *R. v. Wagar*,¹²⁹ former Justice Robin Camp treated existing sexual assault law with disdain and reproduced widely discredited myths and stereotypes of sexual assault claimants through now infamous statements, such as asking a 19-year-old Indigenous woman, who was homeless at the time of the assault, “Why couldn’t you just keep your knees together?”¹³⁰ The judge also referred to the complainant as “the accused” throughout the trial and made derogatory remarks to the Crown prosecutor.

The Canadian Judicial Council issued a Notice of Allegations that further detailed remarks made by Justice Camp during the trial, including:

“why didn’t [the sexual assault complainant] just sink [her] bottom down into the basin so he couldn’t penetrate [her]” (page 119 lines 10 to 11).¹³¹

“if she skews her pelvis slightly she can avoid him” (page 394 line 13).¹³²

“Sex and pain sometimes go together [...] that’s not necessarily a bad thing” (page 407 lines 28 to 29).¹³³

Further, as the Judicial Council Inquiry Committee found:

[T]hroughout the Trial Justice Camp made comments or asked questions evidencing an antipathy towards laws designed to protect vulnerable witnesses, promote equality, and bring integrity to sexual assault trials. We also find that the Judge relied on discredited myths and stereotypes about women and victim-blaming during the Trial and in his Reasons for Judgment.¹³⁴

A panel of the Canadian Judicial Council held an inquiry reviewing the conduct of Justice Camp in 2016. The Inquiry drew a submission from a national feminist coalition (including LEAF and IAAW) arguing that sexual assault victims must be “confident that justices will act and be seen

¹²⁸ Institute for the Advancement of Aboriginal Women (IAAW), Awo Taan Healing Lodge, Stolen Sisters and Brothers Awareness Movement, Aboriginal Commission on Human Rights and Justice (ABCHRJ), and Mikisew Cree First Nation, *Resolution: To Seek Justice for Cindy Gladue*, 25 March 2015, at 1.

¹²⁹ *Wagar*, *supra* note 66.

¹³⁰ *Wagar Transcript*, *supra* note 67, at 119, lines 10-11.

¹³¹ Canadian Judicial Council, “In the matter of an Inquiry Pursuant to s 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp: Notice to Justice Robin Camp (Pursuant to s 64 of the *Judges Act*, s 5(2) of the Canadian Judicial Council Inquiries and Investigations By-laws, 2015 and section 3.6 of the *Handbook of Practice and Procedure of CJC Inquiry Committees*)” (2016) online: https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-05-02%20Notice%20Allegations.pdf, at 3 [*Notice to Justice Camp*]; *Wagar Transcript*, *supra* note 67, at 119, lines 14-15.

¹³² *Notice to Justice Camp*, *supra* note 130, at 3; *Wagar Transcript*, *supra* note 67, at 407, lines 28-29.

¹³³ *Notice to Justice Camp*, *supra* note 130, at 3; *Wagar Transcript*, *supra* note 67, at 407, lines 28-29.

¹³⁴ *CJC Camp Inquiry Committee*, *supra* note 43, para 18.

to act independently and impartially, with integrity and fidelity to law, in providing the complainant, the accused, counsel and witnesses with equal protection and equal benefit of the law of sexual assault.”¹³⁵ The Canadian Judicial Council has since recommended the removal of Justice Camp from office, citing his “condescending, humiliating and disrespectful”¹³⁶ treatment of the complainant and the corresponding damage caused to public confidence in the judicial system.

It is clear that the treatment of Ms. Cardinal occurred in a context in which relations between Indigenous women and the criminal justice system are in crisis. The need for independent examination is further evidenced by the Alberta Crown Attorneys’ Association’s quick and condemnatory reaction to public concerns about institutionalized racism producing the treatment of Angela Cardinal. Moreover, over “50 fellow prosecutors” in Alberta made a visible display of support for the Crown counsel responsible for requesting the incarceration of Angela Cardinal, Patricia Innes.¹³⁷

Overall, the contextual factors outlined here show the deeply flawed relationship between the criminal justice system in Alberta and Indigenous women. Indigenous women are underprotected and over-criminalized. Indigenous women are disproportionately victimized by violent crime, yet rather than protecting them, the criminal justice system disproportionately targets them as “criminals.” It is incumbent on actors in the criminal justice system to consider this context in their engagement with Indigenous women and to take proactive decisions to break this cycle.

REDRESSING SYSTEMIC INJUSTICES: RECOMMENDATIONS

As we have demonstrated, as a result of colonization, racism, and sexism, Indigenous women are much more likely to experience poverty, social dislocation, violence, and over-criminalization. The inhumane treatment of Angela Cardinal is not an isolated instance of injustice, but is instead symptomatic of the mistreatment of Indigenous women by the criminal justice system. There are links between the incarceration of Ms. Cardinal during the Preliminary Inquiry in *Blanchard*, the dehumanizing treatment of Cindy Gladue in the *Barton* case, and former judge Robin Camp’s humiliation of the complainant in *Wagar*. While Alberta Justice must take decisive action to prevent another complainant in Ms. Cardinal’s circumstances from being shackled and jailed, without a thorough examination of systemic issues and a commitment to strategic responses, the mistreatment of Indigenous women will continue. Below we offer policy recommendations that address these systemic issues, as well as the more specific harms experienced by Ms. Cardinal.

1. Initiate an Alberta Indigenous Justice Inquiry

¹³⁵ *Submission of the Intervener Coalition*, *supra* note 36, at 70.

¹³⁶ Canadian Judicial Council, *In the Matter of s 63 of the Judges Act, Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice*, 8 March 2017, online: https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2017-03-08%20Report%20to%20Minister.pdf, at para 23.

¹³⁷ Janice Johnston, “Incredibly damning allegation’: Angela Cardinal case ignites feud between prosecutors, justice minister” *CBC News Edmonton* (21 June 2007), online: CBC News <http://www.cbc.ca/news/canada/edmonton/angela-cardinal-kathleen-ganley-crown-prosecutors-1.4169582>

An Alberta Indigenous Justice Inquiry is needed to examine the treatment of Indigenous people in relation to the criminal justice system in Alberta, with specific attention to the treatment of Indigenous women. To facilitate this review, the Attorney-General should establish a division substantially composed of Indigenous women to review the criminal justice system in Alberta. The division will require adequate resourcing and capacity to:

- 1) Conduct a review of the criminal justice system in Alberta, particularly the treatment of Indigenous women;
- 2) Implement the systemic changes necessitated by compliance with *UNDRIP* and *CEDAW*;
- 3) Work alongside an Indigenous Human Rights Commission to ensure appropriate monitoring and implementation of the needed systemic changes;
- 4) Meet the TRC Calls to Action goal of eliminating the overrepresentation of Indigenous people in the criminal justice system, including overrepresentation in the areas of violent victimization as well as in custody statistics;
- 5) Establish changes necessitated by Indigenous knowledge frameworks;
- 6) Implement any additional recommendations and systemic changes that emerge from the Indigenous Justice Inquiry.

2. Create a Monitoring Body

The division created to conduct an Inquiry will work alongside an Indigenous Human Rights Commission, with a section devoted to the rights of Indigenous women, to form a monitoring body with the ability to track Indigenous interactions within the criminal justice system in Alberta. The Commission should be comprised of Indigenous human rights groups and organizations led by Indigenous women.

Given some of the limitations of the Alberta Human Rights Commission, particularly in relation to Indigenous human rights, the Aboriginal Commission on Human Rights and Justice (ABHRJ) can be drawn upon to serve this purpose. With increased capacity and a complimentary section specifically led by Indigenous women, the ACHRJ could serve as the foundation for a monitoring body of the criminal justice system in Alberta.

In addition to monitoring the outcomes of the Alberta-based inquiry, such a monitoring group is necessary to facilitate systemic human rights changes, such as the implementation of *UNDRIP*, *CEDAW*, and the TRC Calls to Action in Alberta's justice processes, particularly in relation to providing detailed monitoring of the elimination of the overrepresentation of Indigenous people in custody. As the treatment of Angela Cardinal suggests, such monitoring is needed in relation to Indigenous women experiencing violent victimization as well as Indigenous women who are identified as "offenders" within the system, especially since such designations of victim/offender overlap.

3. Relocate Victim Services to the Community

To address the systemic inequalities evident in the treatment of Angela Cardinal, victim support services provided by Indigenous-led, community organizations require significant strengthening and increased capacity. The provision of victim services

frequently falls to the community in practice, yet the community too often faces shortfalls in terms of resource allocation. Further, when situated within the office of the Attorney General, programs designed to uphold the rights of victims do not have the necessary independence to support victimized individuals as well as represent their interests in contexts where they can be re-victimized by systemic forms of inequality and biases. The treatment of Angela Cardinal points to the need to relocate victim services to Indigenous-led community organizations, particularly Indigenous-led women's organizations.

Funding and capacity building for Indigenous-led organizations in Alberta are required to strengthen necessary advocacy and support for victimized individuals that come into contact with the criminal justice system in Alberta as well as supports for victimized individuals to seek justice through Indigenous legal orders. A number of existing models provide an important basis to build such supports in Alberta, including the Office of Child and Youth Advocate Alberta.

4. Include a Practice Memoranda Specific to the Issue of Detainment, Remand or Incarceration of Sexual Assault Complainants

The Attorney-General should add a practice memoranda specific to the issue of Detainment, Remand or Incarceration of Sexual Assault Complainants to Alberta's *Crown Prosecutor's Manual*. This practice memoranda should include:

- i. A policy requiring that Crown prosecutors obtain leave of the Attorney-General prior to requesting a court to exercise its authority to arrest, detain, or remand a complainant in a sexual assault case under any provision of the *Criminal Code*;
- ii. A policy stipulating that a sexual assault complainant must not be detained unless there are legal grounds for the detainment and unless all other measures to assist and support their appearance as a witness have been exhausted. Other measures should include the provision of financial and other supports necessary to facilitate the witness' appearance, such as temporary lodging and meals;
- iii. A policy establishing greater transparency and accountability in the extraordinary circumstance in which a sexual assault complainant has been arrested or incarcerated in order to compel their testimony in a sexual assault trial – this should include some form of public reporting requirement;
- iv. An explicit protocol obligating the Crown to ensure that in the extraordinary circumstance in which a sexual assault complainant has been arrested or incarcerated, they receive properly resourced state-funded legal representation throughout the duration of their detainment.

5. Include a General Sexual Assault Policy in the *Crown Prosecutors' Manual*

The Attorney General should amend the *Crown Prosecutors' Manual* to add a Sexual Assault Policy section, as has already been done in other provinces such as Nova Scotia and Ontario. This section should include substantive directions to Crown Prosecutors responding to the specificities of addressing the treatment of sexual assault complainants, and compelling the protection of complainants' equality and privacy rights.¹³⁸ This policy

¹³⁸ Nova Scotia's policy could provide a model: Nova Scotia Public Prosecution Service, "Sexual Offences: Practice Note," *Crown Attorney Manual: Prosecution and Administrative Policies for the PPS*, online: https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/SexualOffences-PracticeNote.pdf.

should also include specific content regarding Indigenous complainants developed in collaboration with Indigenous organizations in the province such as IAAW.

6. Amendment of Section 2, *Victims of Crime Act*

The Government of Alberta should revise the language of s. 2 of the *Victims of Crime Act* (the provision stipulating the principles that are to govern the treatment of victims by Crown prosecutors) to explicitly reflect elements of the above noted additions to the *Crown Prosecutors' Manual*.

7. Independent Legal Representation for Sexual Assault Complainants

The Government of Alberta should provide funding for independent legal advice for sexual assault complainants and, in instances of death and MMIWG, legal supports for families of murdered women and girls. There are similar initiatives being implemented in other provinces. Ontario,¹³⁹ Newfoundland,¹⁴⁰ and Nova Scotia¹⁴¹ have all initiated pilot projects in collaboration with Justice Canada, committing funding for four hours of independent legal advice to sexual assault complainants to allow them to understand the criminal process and to answer specific questions about their cases. The Government of Alberta should explore the potential for federal-provincial collaboration in this area.

8. Implement *Truth and Reconciliation Commission of Canada: Calls to Action on Justice*¹⁴²

The Government of Alberta, the Law Society of Alberta and Alberta law schools should implement the *Truth and Reconciliation Commission Calls to Action on Justice*. The implementation of the following Calls to Action, in particular, would help to address the systemic issues identified in this submission:

- 27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal– Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.
- 28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti- racism.

¹³⁹ Ontario, “Free Legal Advice for Survivors of Sexual Assault: Ontario Launches Pilot Program in Toronto, Ottawa and Thunder Bay”, *Ontario Newsroom News Release*, (28 June 2016), Online: Ontario Newsroom <https://news.ontario.ca/mag/en/2016/06/free-legal-advice-for-survivors-of-sexual-assault.html>

¹⁴⁰ Terry Roberts, “Free legal advice to survivors of sexual assault through N.L. pilot program”, *CBC News*, (25 April 2017) online: CBC News <<http://www.cbc.ca/news/canada/newfoundland-labrador/sexual-assault-legal-advice-1.4084187>>

¹⁴¹ Nova Scotia, “Province Expands Services to Protect Women and Address Sexual Violence”, *Nova Scotia Department of Justice* (7 March 2017) Online: Nova Scotia <https://novascotia.ca/news/release/?id=20170307009>.

¹⁴² *TRC Calls to Action*, *supra* note 109 at 3-4.

- 30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
- 31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
- 32. We call upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.
- 38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.
- 40. We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.