IN THE MATTER OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS

FINAL SUBMISSIONS OF THE PARTY, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

December 14, 2018

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I. Introduction

LEAF was granted regional and national standing by the order of the National Inquiry dated August 17, 2017.

These submissions are made pursuant to the National Inquiry's Consent Order of November 8, 2018.

Following a description of LEAF's work on sexual assault and violence against women, this brief examines the connection between inequality and violence. We emphasize that not just gender inequality but also the inequality of Indigenous peoples in the colonial state that is Canada, play interconnected and overlapping roles in causing such violence. These connections highlight the

need to consider not just the individual situation of the woman affected by violence, but also the collective rights of the group or groups to which she belongs.

In the next sections of the brief, LEAF will consider whether and to what extent it is possible to reconcile the individual and the collective perspectives in interpreting and applying *the Charter of Rights and Freedoms* (*Charter*) as a tool against violence experienced by Indigenous women. We begin by revisiting the question of colonialism and its effects, including its impact on the very law which we may be seeking to use to deal with violence against Indigenous women. Then, we look at the Constitution and the *Charter*, exploring ways in which to interpret and apply them to make them more effective against violence. Lastly, we have some specific recommendations to address particular persistent shortcomings of the legal system which make it an ineffective vehicle for addressing violence against Indigenous women.

II. The Women's Legal Education and Action Fund (LEAF)

Established after the 1982 patriation of the Canadian constitution, LEAF promotes the substantive equality of women through public education and law reform, and brings women's perspectives and knowledge to the interpretation of the guarantees of the *Charter of Rights* and Freedoms. Many of the founders of LEAF were deeply involved in the crafting of those guarantees. The history of section 15 of the *Charter* reflects the role and influence of Indigenous women in the campaign for strong protection of the substantive equality of women. In 1974, the Supreme Court of Canada ruled that the guarantee of equality before the law in the Canadian Bill of Rights assured only equality in the application of the law, rejecting the claims of Jeannette Corbiere Lavell and Yvonne Bédard that the *Indian Act* denied them

substantive equality.[1] The strong negative reaction to this finding informed the work of women during the drafting of the *Charter*. In its first decision interpreting section 15 of the *Charter*, the Supreme Court recognized that section 15 had been recrafted so as to avoid the narrow result in the Lavell and Bédard case, and that it guarantees substantive equality.[2] In fact, section 15 has four particular guarantees, of equality before and under the law, and of the equal protection and benefit of the law.

LEAF's thirty years of advocacy have included working alongside Indigenous women in Parliamentary committees and courtrooms, and also directly in coalition with them. In submissions to Parliament, and in the Courts, LEAF has advocated for equality in determination of status under the *Indian Act*, and restoration of full status to those denied it because they are descended through the female line.[3] In interventions at appellate courts, it has decried violence against Indigenous women both outside[4] and inside[5] the criminal law context. As part of an intervenor coalition including the Institute for the Advancement of Aboriginal Women, LEAF played a strong role in the Canadian Judicial Council inquiry into the behaviour of Justice

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[1] *Attorney General of Canada v. Lavell*, *Isaac et al. v. Bédard*, [1974] SCR 1349. The target of their submissions was the provision stripping Indian status from women who married non-status men, thus assuring that these women and their children could not receive any of the benefits of the Act, could not live on reserve (or, as Mary Two-Axe Earley pointed out, be buried on reserve), and would thus be separated from their families resident there. This "statutory excommunication", to use Justice Bora Laskin's phrase (at 1386. continued even after the woman was widowed or divorced. Neither she nor her children could ever regain status.

[2] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 170 per McIntyre J.

[3] LEAF Submissions to the Senate Standing Committee on Aboriginal Rights on Bill S-3: an Act to amend the Indian Act (elimination of sex-based inequities in registration), November 29, 2016; *McIvor v. Canada *Registrar of Indian and Northern Affairs),* 2009 BCCA 153; *Gehl v. Canada (Attorney General),* 2017 ONCA 319;Memorandum of Argument of the Interveners Womens Legal Education and Action Fund Inc. and Native Women's Association of Canada in *CHRC v. A.G. Canada [Matson]*, SCC Court file no 37208, October 5, 2017.

[4] *Norberg v. Weinrib*, [1992] 2 SCR 226.

[5] *R. v. Barton,* 2016 ABCA 68 and Factum of the Interveners Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund Inc. in *Barton v. The Queen*, SCC Court file No. 37769, Sept. 12, 2018.

Robin Camp, whose disrespect for both the Indigenous complainant in *R. v. Wagar*[6] and for the criminal law itself, led to a recommendation for his removal and then his eventual resignation from the bench.[7] With the Institute for the Advancement of Aboriginal Women, LEAF made submissions and recommendations to Alberta's Independent Review of Circumstances Surrounding the Treatment of Angela Cardinal, the Cree complainant in a sexual assault case, who was incarcerated and forced to testify in shackles in the preliminary hearing in *R v. Blanchard*,[8] treatment which the trial judge described as "appalling".[9]

LEAF has engaged in both law reform and litigation in order to enhance women's substantive equality by improving the criminal law system's response to sexual assault. LEAF significantly shaped the broad set of *Criminal Code* amendments enacted in 1992 after the Supreme Court of Canada struck down the Code's rape shield provision.[10] During yearly consultations on violence against women held from 1993 to 1998 by the Minister of Justice, LEAF and other groups drew attention to the popular defence strategy of trying to discredit and intimidate complainants by seeking access to their confidential records. As a direct result of LEAF's law reform proposals, Canada amended the *Criminal Code* to set out 22 privacy rights of complainants. In its 2017 submissions on Bill C-51, LEAF emphasized the need for a clear

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[6] *R. v. Wagar,* Provincial Court of Alberta at Calgary, hearing docket No. 130288731P1.

[7] Submissions of Avalon Sexual Assault Centre, Ending Violence Association of British Columbia (EVA BC), Institute for the Advancement of Aboriginal Women, Metropolitan Committee on Violence against Women and Children (METRAC), West Coast LEAF, and Women's Legal Education and Action Fund Inc. LEAF) ("the Intervenor Coalition") to Canadian Judical Council, In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp, August 26, 2016 ("Camp submissions").

[8] Institute for the Advancement of Aboriginal Women (IAAW), and the Women's Legal Education and Action Fund Inc. (LEAF), Submissions to Independent Review of Circumstances surrounding the Treatment of "Angela Cardinal" in *R. v. Blanchard*, October 15, 2017 ("Cardinal submissions").

[9] Cardinal submissions page 15, note 108.

[10] In the case of *R. v Seaboyer and Gayme*, [1991] 2 SCR 577. Submission of Women's Legal Education and Action Fund to The Legislative Committee of Parliament on Bill C-49, an Act Respecting Sexual Assault ("Bill C-49 submissions").

standard and sensitive judicial interpretation in determining whether an intoxicated or otherwise incapacitated woman has provided consent to sex[11], and encouraged governments to provide more legal and other assistance to complainants in preparing for and surviving sexual assault trials. LEAF has also intervened to provide its expertise in almost every Supreme Court of Canada case that has set precedent in the area of sexual assault against women.[12]

III. Inequality and Sexual Violence

The experience outlined above informs LEAF's submissions to the Inquiry. In its over thirty years of advocacy, LEAF has become convinced of the unmistakeable connection between inequality and sexual violence.

The courts have recognized sexual assault as a form of sexual inequality, committed primarily by men against women and girls.[13] Not only does sexual assault constitute inequality, it is encouraged or promoted by inequality. Risk factors for sexual assault, like poverty, youth, homelessness, isolation, and stereotyping on the basis of race and disability, are themselves indicia of inequality. The inextricable connection between inequality and violence was concisely stated by the Canadian Panel on Violence Against Women, in 1993: "…inequality increases

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[11] Submission to the House of Commons Standing Committee on Justice and Human Rights on Bill C-An issue it : An act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, October 25, 2017. It also took this issue up in its submissions to the NS Court of Appeal in *R. v. Al-Rawi*: Factum of the Interveners Women's Legal Education and Action Fund Inc. and Avalon Sexual Assault Centre Society, CAC No. 461056.

[12] See cases at fn 4, 5 and 10 above and the following cases: *Canadian Newspapers Co. v. Canada,* [1988] 2 SCR 122, *M(K) v. M(H),* [1992] 3 SCR 6; R. v. MLM, [1994] 2 SCR 356; *R. v. Whitley and Mowers,* [1994] 3 SCR 830; *O'Connor v. The Queen*, [1995] 4 SCR 411; *LLA v. Beharriell*, [1995] 4 SCR 536; *R. v. Ewanchuk*, [1999] 1 SCR 330; *R. v. Mills*, [1999] 3 SCR 668; *R. v. Darrach*, 2000 SCC 46*; R. v. Shearing*, [2002] 3 SCR 333*; R v. JA,* 2011 SCC 28*; R. v. DAI,* 2012 SCC 5; *R. v. NS, [*2012] 3 SCR 726.

[13] *R. v. Osolin,* [1993] 4 SCR 595 at paras. 165-166.

women's vulnerability to violence and limits their choices in all aspects of their lives. In turn, women cannot achieve full equality while they are subjected to violence in their daily lives."[14] Because of this intertwined relationship, the Panel adopted two goals as a basis of its strategic recommendations, achievement of women's equality and elimination of violence against women.[15] It recommended a national plan of action to achieve both goals, which was never put into place.

However, it is not just sexual inequality which is the matrix for violence against Indigenous women. As LEAF and the Institute for the Advancement of Aboriginal Women stated in their brief to the Angela Cardinal Review, "the social context of racism, colonialism, and sexism produce conditions of systemic and targeted forms of violence and abuse against Indigenous women."[16] The brief urged that the treatment of Angela Cardinal must be viewed "in 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."[17]

The LEAF/IAAW brief continues:

> 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

[14] The Canadian Panel on Violence Against Women, Final Report: Changing the Landscape: Ending Violence—Achieving Equality (Canada, Minister of Supply and Services, 1993), Part 5, page 3. ("Panel") The year of the report's publication, 1993, was the International Year of Indigenous People.
[15] Loc cit note 14.
[16] Cardinal Submissions pages 1-2.
[17] Cardinal Submissions page 2.

> the criminal justice system. As Monture-Angus depicts, "every oppression that Aboriginal people have survived has been delivered up to us through Canadian law."[18]

Amnesty International (Canada) has characterized violence against Indigenous women as a violation of their domestic and international human rights.[19] FIMI (Fora Internacional de Mujeres Indigenas) issued a report entitled Mairin Iwanka Raya (Indigenous Women Stand Against Violence)[20], prepared by Indigenous women from around the world. It makes very clear the need to consider violence against Indigenous women within the broader context of colonialism which LEAF and IAAW invoked in their brief to the Cardinal Review:

> For Indigenous women, gender-based violence is shaped not only by gender discrimination within Indigenous and non-Indigenous arenas, but by a context of ongoing colonization and militarism; racism and social exclusion; and poverty-Inducing economic and "development" policies. These phenomena are interactive and mutually reinforcing, as are the various aspects of identity that shape women's experience of violence, and their strategies of resistance.[21]

The terrible legacy of these experiences is sharply described:

> Indigenous peoples have fought for centuries against genocide, colonization, and forced assimilation, preserving their cultures and identities as distinct Peoples. The ongoing attack has left Indigenous communities among the poorest and most marginalized in the world, alienated from State policies and disenfranchised by national governments.[22]

The cumulative effect of these influences on the lives of Indigenous women, and their experience of violence, is described by FIMI using a term familiar in Canadian equality analysis: "for Indigenous women, who have long experienced violence and discrimination on the basis of multiple identities, the notion of "intersectionality" is not an arcane academic concept, but

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[18] Cardinal Submissions page 4, quoting Patricia Monture-Angus, Thunder in My Soul (Halifax: Fernwood Publishing, 1995) at 59.

[19] Amnesty International (Canada(Stolen Sisters, 2004. The chief researcher for this report was Haudenosaunee scholar Dr. Beverly Jacobs.

[20] FIMI, Mairin Iwanka Raya, A Companion Report to the United Nations Secretary-General's Study on Violence Against Women (2006) ("FIMI").

[21] FIMI page 6.

[22] Loc cit note 21.

daily lived reality."[23] It states, "Indigenous women commonly experience human rights violations at the crossroads of their individual and collective identities."[24]

FIMI takes a firm stand against the idea that focussing on the rights of Indigenous women is divisive, or at least secondary to the goal of securing Indigenous Peoples' collective rights to territory and self-determination. It states, "securing Indigenous women's human rights ---in particular, the right to freedom from violence *as defined by Indigenous women themselves*—is integral to securing the rights of their Peoples as a whole."[25]

IV. Individual and Collective

FIMI notes the relatively recent date for recognition of women's rights as human rights, namely the UN Fourth World Conference on Women, in Beijing in 1995.[26] It also notes the traditional emphasis of human rights on the individual, rather than the collective. It makes the following comment about the implications of that emphasis for the ability of Indigenous women to live free of violence:

> FIMI does not advocate supplanting individual rights with collective rights. Indeed, the protection of individual rights is critical to the enjoyment of all human rights and to defending women's right to a life free of violence in particular. Rather, FIMI calls for overcoming the dichotomy between individual and collective rights and recognizing collective rights as a necessary complement to individual rights, integral to safeguarding those individual rights recognized in international human rights law.[27]

[23] Loc cit note 21.
[24] FIMI page 8.
[25] FIMI page 7, emphasis in original.
[26] FIMI page 9.
[27] FIMI page 9.

The FIMI report has some clear implications for Canadian legal thinking on the issue of violence against Indigenous women, particularly as we consider how to move forward with a multi-faceted analysis, and proposed actions, to curb and provide redress for such violence.

The Supreme Court of Canada has recognized that Canada has a long history of systemic discrimination against Indigenous peoples.[28] Yet, that recognition in itself has not meant that an individual alleging violation of equality rights can use that systemic discrimination as an element of proof of the individual claim. Each element of that individual claim must be meticulously made out with facts relevant to that distinctive individual.[29] Practically speaking, the collective harm is considered irrelevant and unhelpful to the proof of the individual claim, no matter how much the individual's life may have been affected by the systemic discrimination. Similarly, the Supreme Court has said that courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools.[30] However, taking judicial notice does not elevate such matters into cogent elements of proof in an individual claim of inequality.

At best, systemic discrimination is regarded as a contextual factor in individual cases arguing inequality under section 15 of the *Charter*, to be weighed in after the essential facts relating to the individual have been found. Sometimes, as in Moore, the significance of systemic discrimination is dismissed altogether.[31] The full dimensions of the Supreme Court's distaste for

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[28] *R. v. Ipeelee*, 2012 SCC 13; *R. v. Williams*, [1998] 1 SCR 1128; *R. v. Gladue,* [1999] 1 SCR 688.
[29] *R. v. Hamilton (and Mason),* [2004] O.J. No. 3252.
[30] *R. v. Ipeelee,* 2012 SCC 13 at para 60.
[31] *Moore v. British Columbia (Ministry of Education)*, [2012] 3 SCR 360 per Abella J. at paragraph 58. This argument is more fully developed in Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence," 38 NJCL 89.

the systemic discrimination argument may be seen in *R. v. Kokopanace*, in which an Aboriginal accused challenged the absence of on-reserve residents from the jury roll in Ontario.[32] Moldaver J. for the majority acknowledged that the "distressing history of estrangement and discrimination suffered by Aboriginal peoples…[is a]…pressing social problem."[33] However, the majority held that the *Charter* right to a fair trial "cannot be used to dictate to the government how it should – let alone *must* – resolve important policy questions of this nature.[34] The majority also found that the Ontario government "was not required to address systemic problems contributing to the reluctance of Aboriginal on-reserve residents to participate in the jury process."[35]

In its analysis, then, the Supreme Court characterizes systemic discrimination as a policy problem, not a legal one. Moreover, it is a policy problem which the government may address, or not, at its discretion.

One might suggest that at least the Court's recognition of systemic discrimination and the wrongs of the colonial state would have some influence on the behaviour of actors in the legal system. However, a disturbing array of inquiries and reports show that police and judges and officials deploy stereotypes and slurs against Indigenous people in court and in carrying out police duties, regardless of the Supreme Court's "official" acceptance that patterns of systemic discrimination are wrongful. Recommendations from a number of sources to address these problems have not been implemented. LEAF's approach to addressing deficient judicial

[32] *R. v. Kokopanace*, [2015] 2 SCRE 398.
[33] *Kokopanace*, at paras. 64-65.
[34] *Kokopanace*, at para. 192.
[35] *Kokopanace*, at paras 93-95.

conduct is set out in the recommendation section. Unfortunately, it has also been documented that police, judicial and official misbehaviour in this regard transcends the verbal and involves other forms of violence and mistreatment.[36]

The total disconnect in the Supreme Court's legal analysis between individual equality claims and systemic equality against the group to which the individual belongs complicates the task of finding remedies for violence against Indigenous women. One necessary line of inquiry is to find a reinterpretation of the *Charter*, particularly section 15, which requires a court to take into account (and not to merely observe) the systemic discrimination against Indigenous peoples. Another is to look for ways, outside of *Charter* analysis in individual cases, to reverse and redress the systemic discrimination against Indigenous peoples in Canadian law and practice. Important to both lines of inquiry is to begin with a focussed analysis of the legacy and continuing practice of colonialism, particularly its influence on the law itself.

V. Colonialism

The descriptions of aspects of colonialism which follow draw on the work of the Aboriginal Circle of the Canadian Panel on Violence Against Women. LEAF uses this source in order to emphasize an important point. The Panel reported in 1993, 25 years ago. Aboriginal women

[36] 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; 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.

[36]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). And see Cardinal Submissions.

worked hard to get into the process of the Panel as equal participants, and their contributions were illuminating. Yet, nothing came of this work, despite the trenchant nature of the observations. This treatment of the groundbreaking work of the Aboriginal Circle is a sad example of the lengthy official disregard for the issue of violence against Indigenous women, even after its causes are analysed and solutions proposed.

The vulnerability of Indigenous women reflects the fact that they are denied the protection and benefit of the law; indeed, could be regarded as being outside the rule of law itself. But what law? As Patricia Monture points out, it is the law of the colonizer:

> 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.[37]

The Aboriginal Circle comments on the distinction between the Aboriginal perception of law and that of the mainstream Canadian justice system:

> Canadian justice is a foreign and complex system rooted in concepts of crime and punishment. Aboriginal concepts of crime, punishment and justice focus on the "resolution of disputes, the healing of wounds and the restoration of social harmony." Further, the Aboriginal perception of law focuses on atonement to the individual who was wronged, not on punishment of the offender to "pay a debt to society." There is little consideration of the victim in the Canadian justice system. Other Aboriginal philosophies in conflict with the Canadian justice system are those of non-interference, non-competitiveness, emotional restraint and sharing.[38]

[37] "Women and Risk: Aboriginal Women, Colonialism and Correctional Practice," (1999) 19 Can. Wom Studies 24 at 29.
[38] Panel, page 167 footnote omitted.

The Aboriginal Circle pointed out that Aboriginal people are subject to two legal systems, neither of which serve Aboriginal women well. [39] One such system is "the same laws as other Canadians", which itself is actually two systems, described as "one for whites and one for "Indians"".[40] The differential application of Canadian law to Indigenous peoples accounts for their sky high rates of criminalization and incarceration on the one hand[41], and, on the other, withholding the protection and benefit of the law from those who need it, whether during domestic crises[42] or when they experience crime and human rights violations.[43] The second legal system identified by the Aboriginal Circle is the law prescribed by the *Indian Act*. The shape of life for those subject to the *Indian Act* is, in fact, drawn from the patriarchal and class-ridden structure of Victorian England. While the *Indian Act* does not apply to all Indigenous peoples, it has provided a legislative home for these patriarchal ideas since Confederation, rendering them difficult to change; from that home, their influence radiates throughout government policy and public actions affecting all Indigenous peoples, whether directly subject to the Act or not.[44]

[39] Panel, page 167.
[40] panel page 167.
[41] High Risk, at pages 77-78.
[42] There was no federal law (and thus no law at all) applicable to disputes about possession and occupation of matrimonial homes on reserves from 1986, when the Supreme Court rules provincial law inapplicable, until 2013, despite many calls for this gap in the rule of law to be repaired. It was finally closed with the Family Homes on Reserves and Matrimonial Interests and Rights Act, S.C. 2013, c.20 See High Risk, at page 84.
[43] The effect of the SCC decision in Lavell and Bédard was to exempt the Indian Act from the 1977 Canadian Human Rights Act, an exemption which stayed in place for just over 30 years in spite of widespread calls nationally and internationally for its removal. It was finally lifted by An act to amend the Canadian Human Rights Act, S.C. 2008, c.30 See High Risk, at page 86.
[44] High Risk at pages 69-72.

Until waves of reform in the twentieth century, the legal thinking imported into Canada from Great Britain did not see women as persons.[45] Women had no right to vote or own property and no right to the custody of their children. This negative idea of the rights and roles of women is not only the underpinning of Canadian treatment of all Indigenous women, but has also been used as the model for the "Indian" society created by the *Indian Act*. Under that legislation, small bands of registered (or status) Indians live on small plots of land called reserves; until the late twentieth century, women were not allowed to play a role in governance of the bands. Eligibility to be registered as an Indian passed down the male line only; a woman who married someone who was not eligible for registration lost her own status. The couple's children, with no status father, never acquired status. Without status, a person could not share in either the resources or the life of the band on reserve, and would be separated from her or his family still resident on reserve. Women who lost status by reason of marriage were excluded from receiving benefits under Treaty, as were their children. The discrimination against women and those claiming status through the women's line of descent is still a strong feature of the *Indian Act*, thanks to the requirement introduced in 1985 that a person must have two status parents in order to claim "full" status. This requirement continues to privilege the male in determinations of status; if the mother cannot, or for good reasons will not, name the child's father, the child could receive partial or even no status under the 1985 rules.[46]

By contrast, the Aboriginal Circle provided these descriptions of the traditional role of women:

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[45] *Edwards v. Attorney General of Canada*, [1930] AC 124 (JCPC) on appeal from Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867, [1928] SCR 276 {"Persons case").

[46] See footnote 3.

> Aboriginal women held a position of authority in the family, clan and nation. Traditional societies universally recognized the power of women to bear life. It was believed that women shared the same spirit as Mother Earth, the bearer of all life, and she was revere as such....By virtue of her unique status, the Aboriginal woman had an equal share of power in all spheres.[47]
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> Traditionally, Inuit women's skills were essential to the daily existence of their families in one of the world's most challenging environments. Inuit women were decision makers, providers of shelter, clothing and food, experts in health and social issues, spiritual leaders and primary educators of children and youth.[48]
>
> Métis women walked in two worlds. Their language was a blend of European and Aboriginal languages. Their way of life embraced both Aboriginal and white customs, enriched by the bringing together of two cultures and passed on to their children. The Métis nation was born from the strength of Aboriginal women, and their nation's survival depended on them.[49]

The influence of the colonizer's mind-set on provisions dealing with rape and sexual assault is crystal clear. The law of sexual assault, developed and administered entirely by men, treated rape more like an offence committed by one man against another man's property instead of as an offence against the person of the woman. The law of sexual assault reflected the suspicion that women's accusations of rape were likely to be fabricated, requiring that the complaint be made soon after the event, and that the complainant's account be corroborated. Myths and stereotypes about women abounded in the legal system: a woman cannot be raped against her will; if she wants to prevent a rape she can; rapes are committed by strangers and not by friends or family; women fabricate stories of sexual assault out of fantasy or spite; if a woman does not fall apart emotionally after an assault, it did not occur; women who contract for sex for money have asked for it and cannot be raped; women consent to sex and change their

[47] Panel, at 144.
[48] Panel at 103.
[49] Panel at 144.

minds, or cry rape after the fact to avoid the consequences of their actions.[50] Judges' behaviour and comments in contemporary cases like Wagar, Edmonston[51] and Barton show that even though women have won changes to the criminal law in an effort to exclude the impact of these stereotypes, they still loom large in the legal system of today.

As LEAF and its fellow Coalition members pointed out to the Canadian Judicial Council panel in the Camp Inquiry, sexual assault law was founded on the perception that the only victims of sexual assault who will be acknowledged in this legal order are "chaste women of good social standing who fought back and immediately called the police". This paragon would also, of course, be white.[52] This ideal construct explains a lot about the ineffectiveness and irrelevance of sexual assault law for most women, who do not meet this list of Victorian requirements. We also see that it is totally at odds with how Indigenous women came to be seen during the settlement of Canada. During an earlier period, Indigenous women had "underwritten the success of the fur trade by opening up valuable social and political networks and skill sets to the European traders."[53] However, the settlement era put a premium on requiring that Indian women conform to the identity of the Victorian wife found in the *Indian Act*, and on protecting the white Victorian family against what was seen as the uncontrolled and threatening sexual licence of Indigenous women. The woman who strayed outside the Victorian family structure imposed on her by the *Indian Act* was viewed as a dangerous and degraded personage: the

[50] Bill C-49 submissions at pages 7-9.
[51] *R. v. Edmonston*; *R. v. Brown*, [2005] Sask CA 7. In Edmonston and Brown the trial judge referred to the 12-year old Aboriginal complainant as “Ms.”, and to the three men in their twenties who had assaulted her as “the boys”. In Wager, Justice Camp asked the Aboriginal complainant why she hadn’t kept her knees or her ankles together, and referred to her throughout as “the accused.” The Court in Barton frequently referred to Ms. Gladue as a prostitute and made other derogatory references to lifestyle and the fact that the act which resulted in her death had been for pay.
[52] Camp submissions at para 15.
[53] High Risk at 81 and sources quoted therein.

squaw. The stereotype of the squaw is described by Métis scholar Emma Laroque as a being without a human face who is lustful, immoral, unfeeling and dirty.[54] The prejudice against women underlying the rape and sexual assault laws thus combined with the stereotyping of Indigenous women to render them an entire class of persons who could not, and would not, benefit from protections against sexual violence.

The Royal Commission on Aboriginal Peoples describes Canada as an example of settler colonialism.[55] Settler colonies practise "internal colonization", where "the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that Indigenous peoples refuse to surrender."[56] Tully asserts that the colonizer aims to resolve this contradiction in the long term "by the complete...disappearance of the indigenous peoples as free peoples with the rights to their territories and governments".[57] One strategy for accomplishing this objective is for Indigenous peoples to become "extinct in fact" through mortality and assimilation.

These strategies had a devastating impact on Indigenous women. Not only murder of the women themselves, but the destruction of their capacity to reproduce, undeniably promote the extinction in fact of Indigenous peoples. Researchers have uncovered forced sterilization practices in many Canadian provinces and territories[58], affecting all of Canada's Indigenous

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[54] High Risk at 71 quoting Emma Laroque in AJI 1991, at 479.
[55] Royal Commission on Aboriginal Peoples, Report (1991) vol 1 part 1, 105.
[56] James Tully, “The Struggles of Indigenous Peoples For and Of Freedom,” in Duncan Ivison, Paul Patton and Will Saunders, eds., Political Theory and the rights of Indigenous Peoples (Cambridge UK, Cambridge UP, 2000) at39 Cited in High Risk, at page 78.
[57] Tully 40, cited in High Risk at page 78.
[58] Karen Stote, An Act of Genocide, Colonialism and the Sterilization of Aboriginal Women (Halifax & Winnipeg, Fernwood Publishing, 2015); Dr. Yvonne Boyer and Dr. Judith Bartlett, External Review: Tubal Ligation in the

peoples. The Truth and Reconciliation Commission was also told of the practice.[59] These accounts make clear that enforced sterilization is not a thing of the past.

A key element of Canadian policy has been the residential school. Thousands of Indigenous children were taken, often by force, from their parents and communities to schools run by religious denominations, where they were forbidden to speak their own language or practice their own religion, and suffered many forms of abuse. Being a residential school survivor, or having one in her family, has been identified as an important risk factor in vulnerability to sexual assault, as has separation from one's family.

After legislative changes made provincial child welfare laws applicable to Indigenous people, another form of child capture took place: the "Sixties Scoop", when children were removed from their families and communities and put up for adoption, mostly to non-Indigenous families. The rates of child apprehension among Indigenous communities are still disproportionately high.

Sterilization and the removal of children both aimed, with devastating effect, at one of the fundamental roles of Indigenous women, the raising and education of children. Taking away Indigenous women's role with respect to the birthing, raising and educating of children has a stark modern analog: the display in court during the Barton trial of the complainant's preserved sexual organs. This shocking deprivation of the complainant's dignity echoes what

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Saskatchewan Health Region: The Lived Experience of Aboriginal Women, July 22, 2017 for the Saskatchewan Health Region.

[59] Kristy Kirkup, "TRC heard concerns about Indigenous coerced sterilization: Senator Sinclair", the Canadian Press, November 22, 2018, http://www.theglobeandmail.com/politic.

has been happening to Indigenous women over decades of colonialism: their reduction to sexual functions only, detached from her family and community.

The residential school was intended as a tool of assimilation. The *Indian Act* itself is a powerful engine of assimilation, statutorily removing women and their children from their families, their communities, and their identity. It cannot be denied that the practices of "extinction in fact" practised by the settler colonists of Canada has devastating, and disproportionate, effect on Indigenous women.

And what of the land, this coveted prize of the colonizer? As women were reduced, so too the land, Mother Earth, was reduced by colonialism, literally to the vanishing point. By means of treaties, the Crown secured most of the Aboriginal land across Canada, leaving in its place small reserve communities unable to sustain themselves by means of the traditional hunting and gathering practices which required a larger land base. Efforts to find other sources of income, like farming, were often undermined by the provision to them of inferior tools and seed, or by the actions of Indian Agents forbidding them to attend local markets to sell their crops. In recent years, Canada has had to acknowledge that it often fell short of honouring its promises to provide reserve land; the Treaty Land Entitlement program in western Canada aimed at providing to Treaty signatories the land which was promised but never actually delivered. Similarly, Canada has had to acknowledge its frequent misdealing with land: in 2008, there was established a Specific Claims Tribunal to hear and determine cases alleging abuse of specific land rights[60]. Up to that time, Canada dealt with such claims at its entire discretion. Even when

[60] *Specific Claims Tribunal Act,* SC 2008, c 22.

reserves were properly granted in the first place, they were often relocated to free up land for development or settlement, or merged with other reserves, causing further dislocation.

Where land had not been ceded by Treaty, Canada resisted claims to it, denying the Aboriginal interest in such land until the landmark decision of *Calder et al. v. Attorney General of British Columbia* [61] in 1973. After that time, a long slow process of negotiating modern Treaties was undertaken. It is as yet incomplete.

In 2013, the Supreme Court of Canada recognized that the government of Canada had not acted in accord with the honour of the Crown towards the promises of land for Métis children made in the Manitoba Act, 1870[62]. Many of them had received inadequate scrip rather than land.[63] This decision was shortly followed by *Daniels v. Canada (Indian Affairs and Northern Development)*[64], holding that the Métis are a responsibility of Canada under section 91(24) of the Constitution Act, 1867. The Court noted caustically that until that time, neither the federal nor the provincial governments had been willing to accept jurisdiction over the Métis, leaving them "deprived of programs, services and intangible benefits recognized by all governments as needed."[65]

After World War II, Canada took drastic steps to reconfigure the northern lands which had been home to the Inuit for thousands of years. The government undertook a massive resettlement program to bring Inuit families from small hunting camps to a few permanent settlements,

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[61] *Calder v Attorney General of British Columbia,* [1973] SCR 313.
[62] SC 1870, c.3.
[63] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 SCR 623.
[64] [2016] 1 SCR 99.
[65] *Daniels*, at para. 13-14.

creating new and larger communities dependent on social welfare programs,[66] and often with inadequate housing. In "one of the most extreme demonstrations of paternalism and exploitation of the Inuit"[67], the government uprooted families from Inukjuaq (Port Harrison) in northern Quebec and Pond Inlet and Arctic Bay, Northwest Territories. They were taken to the High Arctic to create the new communities of Grise Fiord and Resolute Bay. There, the climate was harsher than any previously experienced by the families; there was no vegetation, no signs of animals, no wood for housing, no fresh water nearby, and no ready source of food. Canada alleged that the relocation had occurred because of lack of diminishing game stocks; others, however, believed that the move was made to establish Canada's sovereignty in the High Arctic at the height of the Cold War.[68]

The land ceded to Canada, or appropriated by it, was never paid for.

Dispossession, poverty and dislocation are the legacies of Canada's actions Vis-à-vis Indigenous traditional lands.

These factors are prominent among those cited as reasons for taking Indigenous children into children's aid society care. These factors, and the reactions to them, figure prominently among the risk factors for sexual abuse and predation against Indigenous women. And these factors are among the reasons given for not remedying other aspects of Canadian colonialism.

In particular, calls for reform of the *Indian Act* to remove sex discrimination against women and those descended from the female line are often met with the objection that Bands could not

[66] Panel, at 106.
[67] Panel at 107.
[68] Panel at 107.

afford to have all these additional people return to them, and to reserves, given their limited resources and inadequate supplies of housing. These objections do not invariably come from Bands; many are all too aware that the *Indian Act* is depriving them of a population of status Indians who could legally hold their reserves. However, if Canada had provided proper compensation for lands taken or ceded in the past, or if land were still available as a resource, these issues would not be such a barrier to the restoration of equality. Importantly, there would be resources available for education, language and culture, and improvement of housing stock and amenities, to service returning members.

The legacy and continuing practices of colonialism underpin the systemic discrimination against Indigenous peoples which has been recognized by the Supreme Court of Canada. Attacking this systemic discrimination cannot be done effectively by means of case-by-case litigation. Since 1985, at least three landmark cases have attacked aspects of the continuing discrimination in the status determination provisions of the *Indian Act*: McIvor, Descheneaux, and Gehl. Each was successful. In her ruling in Descheneaux,[69] Madam Justice Masse of the Quebec Superior Court lamented that so many particular attacks had been necessary, and urged that Parliament undertake a thorough reform of the Act:

> In the 2010 Act, Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case.
>
> When Parliament chooses not to consider the broader implications of judicial decisions by limiting their scope to the bare minimum, a certain abdication of legislative power in favour of the judiciary will likely take place. In such cases, it appears that the holders of legislative power prefer to wait for the courts to rule on a case-by-case basis before

[69] *Descheneaux v. Canada (Procureur Général),* 2015, QCCS 3555, [2016] CNLR 175.

> acting, and for their judgments to gradually force statutory amendments to finally bring them in line with the Constitution.
>
> From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.
>
> First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.[70]

Even as the National Inquiry was proceeding, the government of Canada had embarked upon a consultation process concerning its intention to enact rights recognition legislation, aimed at establishing a new starting point for Crown-Indigenous relations. Rather than having to litigate their entitlement to certain rights, Indigenous peoples would be able to start their dealings with government at the point where the government recognized the rights and the discussion was to concentrate on what needed to be done in order to implement them. The consultation process has not yet resulted in legislation. However, the process so far reveals at least one crucial omission from the government's plan: it does not recognize that Indigenous peoples have a right to appropriate redress for the loss of their land, whether that be by way of money or new land. Without that crucial element, the dismantling of colonialism becomes even more difficult.

[70] *Descheneaux v. Canada (Procureur Général),* 2015, QCCS 3555, [2016] CNLR 175 at paras 238-241.

VI. The Constitution and Charter of Rights

LEAF wishes to make two basic points with respect to the Constitution and *Charter of Rights*. The first is that the present approach to the *Charter*, particularly section 15, needs to be improved in order to make it a more effective instrument against the inequality of women. These improvements, discussed below, include changes to the way the section is interpreted, enactment of legislation bringing international human and Indigenous rights instruments directly into Canadian law so that they are available to deploy against discriminatory practices here, and improved measures to ensure that legislation and government policy are made in accordance with the *Charter*.

The second point is that even all of these improvements will not necessarily reach, or reach effectively, one of the principal reasons for the continuing violence and discrimination against Indigenous women: the resistance of police and government authorities to make changes in practice that will enable them more effectively to vindicate the rights of women and Indigenous peoples. We illustrate this point with reference to the case brought by Jane Doe against the Metropolitan Toronto Commissioners of Police.

(a) Interpretation of the Constitution and Charter

(i) Section 28 and Subsection 35(4)

Early in 1981, the government of Canada released its revised version of the *Charter of Rights*. Concern over continuing shortcomings in the draft resulted in a national conference being held on February 14, 1981, at which women called on Canada to insert in the *Charter* a clause that

would affirm the equality of women and men. The clause which resulted from this process is now section 28 of the *Charter*:

> Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

When the Constitution Act, 1982 was patriated from Great Britain, it contained a short version of what is now section 35. That section had not appeared at all in the original draft of the Constitution tabled by the Prime Minister in 1980, but was won after strenuous lobbying and campaigning, in Canada, Great Britain and the United Nations, by Indigenous peoples. The 1982 version contained what is now subsections (1) and (2) of section 35. The present subsections (3) and (4) were developed in consultations with Indigenous representatives during 1983 and 1984. Women were involved in those discussions only because other groups gave them seats in their delegations; the Native Women's Association, national organization representing women's interests, was formally excluded from the talks. However, women nonetheless managed to secure inclusion into the final version of section 35 what is now subsection (4).

The full text of section 35 is:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis people of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty right referred to in subsection (1) are guaranteed equally to male and female persons.

The language of subsection 35(4) is modelled after that of section 28. There has been little or no judicial commentary on section 28 since 1982, and initial hopes that it would be a decisive women's rights provision have thus been disappointed. Nor has there been any illuminating judicial commentary about subsection 35(4).

LEAF suggests that it is well past time for these sections to be given a significant place in interpreting women's rights. This is important not just for individual cases, but also because governments are to abide by the Constitution and *Charter* in the first place, rather than wait for their actions to be corrected after lengthy litigation.

Section 28 and subsection 35(4) should, then, be taken as fundamental proclamations of the equality of men and women under the constitution. Of particular significance to Aboriginal women is the statement of their equality in Treaties and Aboriginal rights. The determination of whether something is an Aboriginal right depends on analysis of circumstances between contact and the assertion of British Crown sovereignty, both dates well before passage of the *Indian Act* with its negation of women's traditional roles and responsibilities. Similarly, all but a few of the historic treaties predate the enactment of the *Indian Act*. There is a very respectable argument that the guarantee in subsection 35(4) rehabilitates the traditional equality of women in Indigenous societies from the devastation wrought by the *Indian Act*.

This is an argument that Canada and other governments should take seriously in determining policy and legislation with respect to Indigenous women.

(ii) Section 15 of the Charter

Contemporary section 15 jurisprudence gives little or no meaning to the four particular guarantees in section 15, of equality before and under the law, and the equal protection and benefit of the law. Rather, it focuses on the hinge term "discrimination", located after those four guarantees are enunciated, and develops a jurisprudence on section 15 that draws heavily on the jurisprudence from human rights cases. This emphasis on the human rights jurisprudence is one of the reasons why the Supreme Court has failed to account for systemic discrimination.

LEAF would like to see the Court turn in its analysis to consideration of all four of the guarantees in section 15, before proceeding to consider whether discrimination on a prohibited ground has occurred, and before turning to analyse under section 1 whether any justification exists for the legislation or practice which has been found to offend section 15.

In cases of violence against Indigenous women, the most promising part of section 15 is the guarantee of the equal benefit and protection of the law. Criminal law provisions against sexual assault could be classified as a benefit or protection of the law; so, too, could police investigation and charging practices in these crimes. The application of stereotypes, and investigative decisions based on bias and stereotype would be reachable under this guarantee. So, too would be police decisions not to take a report about a missing person, or many of the other questionable police practices which have been reported in the context of violence against Indigenous women.

The initial analysis fully employing the guarantee of equal benefit and protection of the law (or any of the other guarantees of section 15 would then be followed by the analysis of whether the treatment has been with discrimination.

Fortunately, it is no longer required that a claimant under section 15 show that her or his treatment is different, in the essential respect, from that of a mirror comparator. Thus, she could compare the treatment which she received to treatment which good police practice requires in this type of situation; the experience of Indigenous women across the country leaves little doubt that she could succeed in showing that her treatment fell below appropriate standards.[71]

An important addition to the present approach of the Supreme Court would be to interpret the term "discrimination" in section 15 to include systemic discrimination. Thus the guarantee would provide relief where the claimant could show that systemic discrimination is implicated in the denial to her of the equal protection or benefit of the law. In any such analysis, however, problems of proof could be a hurdle, since the plaintiff bears the burden to show violation of section 15 in all its aspects before the government is called upon to show justification under section 1 of the *Charter*. It would be very difficult for a plaintiff to marshall all the evidence to show systemic discrimination in policing. However, there are now locations where reports have shown policing to be affected by systemic discrimination, including Vancouver's DTES, northwestern British Columbia and Thunder Bay. These would be available to persons in these locations to use in their section 15 claims. It would be reasonable to expect a plaintiff's section 15 analysis to establish a prima facie case that systemic discrimination had played a role in the

[71] *Withler v. Canada (Attorney General)*, 2011 SCC 12.

treatment she received (possibly drawing on one of the existing government reports) and then turn to the government to rebut that presumption, either in the section 15 case itself or under section 1. It is the government, after all, that would have access to the evidence necessary to deal with this allegation.

By adopting this enhanced approach to section 15 it becomes possible to follow the course of action recommended by FIMI, of keeping the human rights focus on the individual, but also providing a meaningful way of taking into account the situation of the collective or collectives to which she belongs.

(iii) Enactment of legislation to bring international human rights instruments into Canadian law

The protection of section 15 would be greatly enhanced if Canada were to pass legislation bringing into Canadian law the provisions of significant international conventions, like the CEDAW[72] and the UN DRIP[73]. Their guarantees would then form part of the "law" whose protection and benefit a person is seeking in a section 15 case. Even more desirable, the legislation could provide that the provisions of these conventions, once installed in Canadian law, could be accessed directly, without the need either of a *Charter* case or a proceeding under an Optional Protocol to the Convention.

Canada was one of only four countries in the world to persist in reservations about the UNDRIP, reservations which were finally given up by means of a statement in the United Nations General Assembly in May of 2016 by Minister Carolyn Bennett. In May, 2018, the

[72] Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with s.27(1).
[73] United Nations Declaration on the Rights of Indigenous Peoples, adopted 13th December 2007.

House of Commons gave third reading to private member's bill C-262, incorporating the UNDRIP into Canadian law, introduced by MP Romeo Saganash. Passage by the Senate remains necessary.

(iv) Making the legislature and government Charter-compliant

The *Charter* was not intended to be applied only in litigation. Rather, it was always intended that it should apply to government action, including legislation, from the outset. In order for this to be accomplished, it is necessary for the public to know whether the government has received any *Charter* advice about a particular measure, and, if so, what it is. Such transparency runs counter to the principle of confidentiality which shrouds Cabinet dealings. Even where there is a formal requirement for advice to be provided, the secrecy requirement means that it can be ignored at the government's will. The secrecy it also makes it more difficult to get an idea of how the government is interpreting certain sections of the *Charter*, or what it considers to be an acceptable standard of *Charter* compliance.

Ideally, *Charter* advice rendered to the government should be made public, and even subject to discussion at legislative committees during second reading of a bill, or in other committee proceedings like investigations into particular subject-matters. Such open discussion would allow others to bring forth interpretations of the *Charter* for committee and public consideration. It might result in changes to the legislation. In any event, such discussion would be an illuminating record for any court later considering a case alleging violation of the *Charter*.[74]

[74] *Vriend v. Alberta*, [1998] 1 SCR 493.

(b) Resistance to Implementing Charter-Compliant Behaviour

As pointed out by the National Inquiry in its Interim Report, a vast number of inquiries and inquests have made recommendations concerning how to curb violence against Indigenous women, but these have not been implemented.

This resistance to change is a serious obstacle to dealing effectively with the epidemic of violence, and to securing *Charter*-compliant behaviour from those who are responsible for dealing with it. It is a deeply rooted problem, perhaps more deeply rooted in some sectors than in others.

The Toronto case of Jane Doe provides an excellent example of police resistance to scrutiny of their behaviour in a case of sexual violence. In August 1986, Ms. Doe was the fifth woman assaulted by an offender styled "the balcony rapist", because he targeted women living alone in apartments, in a particular area of downtown Toronto, reaching them by means of their balconies. The Toronto police were familiar with the behaviour pattern of the rapist, and the area in which he was operating. However, they issued no warning to women in the neighbourhood. When Jane Doe was raped, she sued Toronto police, alleging, among other grounds, violation of her rights under section 7 and section 15 of the *Charter*. The failure to warn was an important but not the only element of her case.

Jane Doe instructed her counsel to draft her statement of claim in language accessible to ordinary people, not legal jargon, and this was done.[75] The Toronto police then brought a motion to strike her claim because it did not show a cause of action. This motion was initially

[75] Elizabeth Sheehy, "The Victories of Jane Doe," in Sexual Assault in Canada: Law, Legal Practice and Women's Activism (University of Ottawa Press, 2012), Appendix A ("Victories") The account of Jane Doe's case is drawn entirely from Dr. Sheehy's chapter.

heard by a judge of the Ontario High Court of Justice, who dismissed it in 1989[76] Then, the police appealed that decision to the Divisional Court, which affirmed the decision in 1990.[77] A further police appeal to the Ontario Court of Appeal was dismissed without reasons.

Finally, the matter went to trial before Madam Justice McFarland, who rendered judgment in favour of Jane Doe in 1998, twelve years after her rape.[78] The Toronto police were dissuaded from appealing her decision to the Court of Appeal, and the City Council commissioned its Auditor General to perform a review of the investigation of sexual assaults by the Toronto Police Service, published in 1999.[79] In 2004, the Auditor General issued a further report, which documented compliance with the 1999 recommendations[80]; this review contradicted claims by Chief Fantino of the Toronto Police that all the 1999 recommendations had been implemented. In 2012, Jane Doe was reported by Elizabeth Sheehy as saying that "many of the Auditor-General's recommendations remain dormant to this day."[81]

Jane Doe had the support of her own feminist "audit committee" as she fought to have the Auditor's recommendations implemented. This group is reminiscent of the local committees that formed after the publication of the Report of the Royal Commission on the Status of Women[82] to work in each province for implementation of its recommendations. Given the observations of FIMI about the importance of Indigenous women defining violence as they see it, and working against it, LEAF considers that it would be a useful initiative for funding to be

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[76] *Doe v. Metropolitan Toronto Board of Commissioners of Police,* (1989), 58 DLR (4th) 396.
[77] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,* (1990), 74 OR (2d) 225 (Div Ct.).
[78] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 30 OR (3d) 487 (HCJ).
[79] Auditor General, City of Toronto, Jeffrey Griffiths, Review of the Investigation of Sexual Assaults -- Toronto Police Service, 1999.
[80] Jeffrey Griffiths, Auditor's Follow Up Review, 2004.
[81] Victories, page 39.
[82] Royal Commission on the Status of Women in Canada, Report, Ottawa, 1970.

made available to Indigenous women's groups across the country to work on their own anti-violence agenda, suited to local or regional circumstances. This should be core, multi-year funding, not just project grants, so that the work of the committees could build in effectiveness. Another method of securing compliance with recommendations emerges from the very recent release of the report on Thunder Bay police investigation of recent deaths, including those of numerous Indigenous youth. The Report, Broken Trust, was prepared by the Office of the Independent Police Review Director, and released in December 2018[83]. Among its recommendations was that the Thunder Bay police initiate a peer review process in which sudden death and homicide investigations are overseen by external investigators, which process would continue for three years. Although the report's recommendations were non-binding, Alvin Fiddler, Grand Chief of the Nishnawbe Aski Nation, is reported to have said "At the end of a three-year time period, if Indigenous people in this community still do not feel safe -- if they still fear for their safety and well-being -- then the province needs to seriously consider establishing a new police service in this city."[84]

If the recommendations of this National Inquiry, and other suggestions for ending the violence against Indigenous women and girls, are not to be ignored as were the recommendations of the Canadian Panel on Violence and its Aboriginal Circle, made 25 years ago, it is crucial that means be found to overcome the resistance of police, government and other authorities.

[83] Office of the Independent Police Review Director (OIPRD), Broken Trust, December 12, 2018.
[84] Jennifer Yang and Wendy Gillis "Broken Trust", Toronto Star, December 13, 2018, page A1.

Recommendations

1. That the National Inquiry review the recommendations of the Canadian Panel on Violence Against Women, and the findings of its Aboriginal Circle, and bring forward those it feels are relevant, incorporating them into its own recommendations.

2. That all actors in the legal and political systems recognize the unmistakable connection between inequality and violence. Not just gender inequality, but "the social context of racism, colonialism, and sexism produce conditions of systemic and targeted forms of violence and abuse" against Indigenous women and girls.

3.That it be recognized that "Indigenous women commonly experience human rights violations at the crossroads of their individual and collective identities,"; the concept of intersectionality is a "daily lived reality" for Indigenous women and girls.

4. That both the individual and collective dimensions of violence against women and girls be recognized, and the Inquiry endorse the principle that securing Indigenous women's human rights -- in particular, the right to freedom from violence *as defined by Indigenous women*

themselves -- is integral to securing the rights of their Peoples as a whole.

5.That decision-makers in all sectors overcome the dichotomy between individual and collective rights and recognize collective rights as a necessary complement to individual rights, integral to safeguarding those individual rights.

6.That methods of interpreting the Constitution and the Charter be developed which permit recognition of both the individual and collective dimensions of violence against Indigenous women and girls.

7. For example, section 28 of the Charter and subsection 35(4) of the Constitution Act, 1982, should be given full substantive effect, to assure that women are regarded as equal to men in all respects. In particular, it should be recognized that subsection 35(4), recognizing women's equality with respect to Aboriginal and Treaty rights, rehabilitates the pre-contact equality of women in their societies, displacing the reduced view of women installed in, and perpetrated by, the Indian Act. Canada and other governments should take this substantive meaning seriously in determining policy and legislation with respect to Indigenous women.

8. The four guarantees in section 15 of the Charter, namely equality before and under the law and the equal benefit and protection of the law, should be given full effect in the interpretation and application of the Charter.

9. The term "discrimination" in section 15 of the Charter should be interpreted so that it includes systemic discrimination, in particular the systemic discrimination against Indigenous peoples which has been recognized by the Supreme Court of Canada.

10. To overcome the burden on the claimant of proving systemic discrimination in her individual Charter case, the findings of systemic discrimination made by inquiries should be permitted to be adduced as prima facie proof that systemic discrimination exists. The government can then be called upon to rebut that proof, either in section 15 or in section 1.

11. Governments should enact legislation importing into Canadian law (including provincial and territorial law) the provisions of international human rights instruments, like the CEDAW and the UNCRIP. Accordingly, the Senate should pass bill C-262, a private member's bill introduced by Romeo Saganash to install the UNDRIP in the law of Canada, and passed by the House of Commons in May 2018.

12. Monitoring bodies drawn from Indigenous-led groups should be established to study and report on the progress in implementing international human rights guarantees in Canadian law.

13. Charter advice rendered to government should be made public and even subject to discussion at legislative committees during second reading of a bill, or study of a particular subject matter. Such open discussion would allow others to bring forth interpretations of the Charter for committee and public consideration, and provide a useful record for any court later considering a case alleging violation of the Charter.

14. Means should be implemented to overcome the resistance of police, government and other authorities to changes in law, practice, and policy that will eliminate violence against Indigenous women and girls.

15. For example, core, multi-year funding should be provided to Indigenous women's groups across the country to work on their own anti-violence agenda, suited to local and regional circumstances.

16. As recommended by LEAF to the Angela Cardinal review, a monitoring body drawn from Indigenous-led organizations could monitor Indigenous interactions with the criminal law system.

17. Funding should be provided for independent legal advice and representation for sexual assault complainants and for the families of Indigenous women and children who have gone missing or been murdered.

18. The Calls to Action on Justice of the Truth and Reconciliation Commission of Canada should be implemented by federal, provincial and territorial governments, law schools, and bodies concerned with the regulation of lawyers.

19. Means should be developed, through improved selection procedures, in-service education, and use by Attorneys-General of their right to complain to the Canadian Judicial Council, to root out use of stereotypes, outmoded thinking and ignorance of the law by judges hearing sexual assault cases and other matters involving Indigenous women and girls.

20. The government of Canada should remove from the Indian Act all discrimination against women and those descended through the female line, including the requirement that a person have two status parents in order to have "full" status and its concomitant requirement that the father of the child be identified.

21. In order to remove possible objections to such amendment of the Indian Act based on First Nations' lack of resources to accept returning members, the government of Canada should acknowledge that its taking of Indigenous land requires that redress be provided.

22. In particular, the government's recognition of rights initiative should include means to compensate for the substantial loss caused by the taking of Indigenous land, whether through financial compensation or new land, or some combination thereof.

23. The government should also be prepared to shoulder the costs to Indigenous nations of the amendments to the Indian Act required to redress discrimination against women and those descended through the female line.

All of which is respectfully submitted,

"Mary Eberts"

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