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FONDS D'ACTION ET D'ÉDUCATION JURIDIQUE POUR LES FEMMES

USING THE LEGAL SYSTEM TO ADVANCE EQUALITY FOR INDIGENOUS WOMEN, GIRLS, AND 2SLGBTQQIA PEOPLE

Executive Summary

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LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform and public education using the *Canadian Charter of Rights and Freedoms*.

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Part I: Acquiring Foundational Knowledge

Indigenous women, girls, and 2SLGBTQQIA (two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual) people carry significant and sacred roles in their communities.[1] Actions and structures of colonialism have targeted this demographic in unique ways, often serving to fuel violence against them and seeking to erase Indigenous identities and cultures. This paper explores the possible pathways for using the legal system to advance the rights of Indigenous women, girls, and 2SLGBTQQIA people. The discussion that follows should be treated as a starting point – it is not exhaustive nor a substitute for building relationships with Indigenous peoples, which all Canadians are called to form.

There are three distinct groups of Indigenous/Aboriginal peoples in Canada: First Nations, Inuit, and Métis. Indigenous peoples have been in the territory now known as Canada since time immemorial, but have incurred deliberate attacks on their populations and lands by colonial actors. Understanding the history between Indigenous peoples and Canada is critical to this work, as it helps to contextualize the modern challenges facing Indigenous peoples. The National Inquiry into Missing and Murdered Indigenous Women, Girls, and 2SLGBTQQIA ("**MMIWG2S**") concluded that the violence towards this demographic amounts to genocide. The National Inquiry found that although Indigenous women, girls, and 2SLGBTQQIA people have distinct backgrounds, "what connects all these deaths is colonial violence, racism and oppression." This violence also manifests through the justice system.

Part II: Review of Litigation

A wide range of areas are covered by case law which seek to advance the rights of Indigenous women, girls, and 2SLGBTQQIA. Central among them are legal challenges to the

[1] National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place – Executive Summary of the Final Report", 2019, online at pp. 5, 23.

Indian Act, which has deployed a scheme that passes Indian Status differently based on gender, and has been subject to decades of legal challenges. Indigenous children's rights have also been a focal point of litigation efforts. A landmark decision in *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2, found that Canada has racially discriminated against First Nations children on reserves and in Yukon by underfunding child welfare services. Canada has been subject to a series of non-compliance orders related to this ruling and filed for judicial review of the compensation ordered.

The case law also reveals that *Charter* violations and discrimination in the criminal justice system are rampant. Case law in this area covers the actions of police, conditions in prisons, and sentencing (including the use of mandatory minimum penalties). The application of *R v Gladue*, [1999] 1 SCR 688, which provides considerations for sentencing, offers helpful commentary on the systemic forces that fuel the over-representation of Indigenous peoples in the criminal justice system. In *R v Ipeelee*, 2012 SCC 13, Canada's top court recognized that this overrepresentation is "intimately tied to the legacy of colonialism."

The case law has explored several other topics including education, housing, health, and identity. There is also a body of case law on the experiences of discrimination in the workplace and when accessing services and benefits. There are judicial decisions that grapple with the application of Indigenous laws in Canada, which is an important area for future work. Moreover, the use of class actions is gaining momentum as a forum to advance the rights of Indigenous peoples.

COVID-19 has posed additional challenges for Indigenous peoples, where access to clean water, poverty, and overcrowding of housing have put these communities at greater risk of contracting and spreading the virus. The pandemic has also facilitated the isolation of Indigenous women, girls, and 2SLGBTQQIA, causing increased experiences of violence. Deaths from drug overdoses have also heightened.

Part III: Recommended Approaches

Central to this work is recognizing that Canada's justice system is unrecognizable to many Indigenous peoples. Its frequent exclusion of Indigenous knowledge and treatment of Indigenous peoples have often inflicted harm on Indigenous peoples. When using the legal system to advance the rights of Indigenous women, girls, and 2SLGBTQQIA people, there are a number of recommended approaches that can be adopted to reduce harm.

Legal actors have been urged to build cultural competency, including by the Truth and Reconciliation Commission and the National Inquiry into MMIWG2S. Building a culturally competent legal profession is essential to addressing the historic and ongoing distrust that many Indigenous peoples have of lawyers and the legal system. Canada's legal processes have often been designed and deployed to cause further trauma, which strikingly differs from Indigenous laws which often focus on repairing relationships and promoting healing.

Building cultural competency requires learning, including from Indigenous peoples, and taking the time needed to form meaningful relationships. A distinctions-based approach built from a recognition that there are unique identities and experiences between and among First Nations, Inuit, and Métis, should be adopted in this work. Lawyers should ensure that the legal work to be performed stems from the desire of the individual, community, or nation, where the client's priorities are pursued. Lawyers must detail options, explain the legal issues at play, breakdown legal processes, and describe their role at each stage of the case. This will remove the mystery that Indigenous peoples often encounter when they interact with the law, and helps to foster trust. Legal work should be conducted with Indigenous peoples, rather than for them. Legal actors must also recognize their biases by considering their knowledge about Indigenous peoples and where this knowledge comes from. Lawyers are generally advised to "slow down, talk less, listen more, and take their time." Humility is important in this work.

The alarming experiences of Indigenous peoples in the criminal justice system emphasize the importance of cultural competency when practising in this area, which requires additional considerations. *Gladue* instructs judges to give attention to the unique

circumstances of Indigenous peoples, and Gladue reports and submissions are an important tool for criminal cases. When Gladue reports are used, Indigenous offenders feel more engaged with the process. Lawyers should ask their clients if there is any content that they do not want shared in open court, and explore alternative options for presenting this information. Indigenous courts with specialized knowledge and programming also exist, though their availability ranges across the country. Sentencing circles are a form of restorative justice, which is gaining momentum in Canada. These circles focus on "rebalancing the relationship damaged by the offence," and powerfully demonstrate the operation of Canadian and Indigenous laws simultaneously.

There are also numerous ways to transform legal spaces. Lawyers can take active roles in facilitating court proceedings in a manner that accommodates Indigenous peoples, inspire the legal profession to become more culturally competent, build relationships with Indigenous peoples, and engage in ongoing education and training on related topics. The ability of the legal system to cause harm is well known: the residential schools settlement and the case of Cindy Gladue provide important teaching moments for the legal profession. Harm reduction approaches guide lawyers to understand the implications of legal action, the importance of fostering inclusion and accessibility when cases are pursued, and to recognize when not to act and to instead share other available supports.

Lawyers can reduce harm by promoting cultural safety (fostering a space where all Indigenous peoples feel safe); sovereignty (working on a basis of non-interference by respecting that the client knows what is best for them); reclamation (listening and reflecting on Indigenous stories and experiences, and acknowledging how you may be complicit in supporting colonial structures); and self-determination (honouring the client's agency and restoring power back to Indigenous peoples and communities). Lawyers have the responsibility to not cause trauma to Indigenous peoples. Practises for trauma-informed lawyering are explored in this paper, and include adopting a client-centred approach, focusing on relationships, and embracing the strength of Indigenous peoples throughout this work.

Part IV: Settler-Allyship

Allyship goes beyond the approaches detailed above, and involves taking an active role in confronting and transforming the systems of oppression that fuel harmful realities for Indigenous peoples. Allyship goes beyond the trend of the day, and instead is part of a life-long commitment. Critical to allyship is a tremendous amount of learning, which includes Indigenous perspectives on history, Indigenous traditions and cultures, and the ways that systems of oppression and assimilation continue today.

Allyship is about recognizing that the challenges confronting Indigenous peoples have been shaped by the colonialism, racism, and sexism which continue to operate in Canada. These are Canadian issues – not Indigenous ones. Legal professionals play a critical role in challenging power structures and systemic issues. Central to allyship is building meaningful partnerships with Indigenous peoples, communities, and nations, which identify the talents of each participant and embrace Indigenous knowledge. Allies are called to work in solidary with Indigenous peoples, where "allies walk beside, not in front." Respectful allies – not saviours – are sought in this work.

Allies can play an important role in advocacy to heighten Indigenous representation, voices, and work to address the critical issues of today. In allyship, how issues are framed, the way the narrative is crafted, how Indigenous identities are constructed, how history is portrayed, and whether settler-colonial positions are challenged should all be considered and impact the transformative potential of the work.

There are various principles offered in this paper to guide partnerships, including embracing Indigenous self-determination – where Indigenous women, girls, and 2SLGBTQQIA people "actively construct solutions that work for them, according to their own experiences." Indigenous peoples, representation, knowledge, and laws, all help to advance self-determination. The *United Nations Declaration on the Rights of Indigenous Peoples* is an important tool in this work.

Self-determination encompasses a “recognition of Indigenous peoples’ own political and legal institutions.” This is about Indigenous peoples maintaining their own institutions, as well as Canadian institutions creating space for these institutions. This includes Indigenous laws, which are invaluable mechanisms for navigating conflict and repairing relationships. Indigenous laws exist in conjunction with the common law and civil law. The operation of Indigenous law and Canadian law simultaneously is possible, as evidenced by the use of sentencing circles in Canada.

Self-determination is also advanced through the inclusion of Indigenous peoples in the body politic. This is about Indigenous peoples “determining their relationship with the state.” Indigenous peoples are under-represented in Canadian governments and courts across the country. There are widespread calls for an Indigenous judge to be appointed to the Supreme Court of Canada, which would help “to recognize Indigenous legal traditions as a founding legal system in Canada.” Indigenous peoples must also be extended the right to participate in decision making in areas that impact their future. This includes the implementation of the standard of free, prior, and informed consent. Indigenous women, girls, and 2SLGBTQQIA must be included in these pursuits of self-determination, to ensure that they address the full impacts of colonialism and are an authentic expression of the vision of Indigenous peoples. Addressing the ongoing consequences of colonialism and building authentic relationships are foundational to the pursuit of reconciliation in Canada. Allies are called to reflect and act in order to move forward in a good way.