



**FINAL SUBMISSIONS TO THE INQUIRY INTO  
MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS**

**Congress of Aboriginal Peoples,  
formerly known As the Native Council of Canada**

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## I. WHERE WE’VE COME FROM: BACKGROUND AND CONTEXT

### A. CAP History

[1] The Congress of Aboriginal Peoples (CAP) was first founded in 1971 as the Native Council of Canada (NCC). Originally established to represent the interests of Métis and non-status Indians, in 1993, the organization was reorganized and renamed as CAP. The Congress has extended its constituency to include all off-reserve status and non-status Indians, Métis and Southern Inuit Indigenous Peoples, and serves as the national voice for its provincial and territorial affiliate organizations.

[2] CAP’s Board of Directors is composed of the National Chief, the National Vice-Chief, the National Youth Representative, the National Elder Representative, and an elected representative from each of the affiliated provincial and territorial organizations (PTOs). CAP works collectively with its ten PTOs across Canada<sup>1</sup> to promote and advance the common interests, collective and individual rights, and needs of its constituents. The Congress’ mandate is to improve the socio-economic conditions of off-reserve status and non-status Indians and Métis living in urban or rural areas.

### B. CAP’s Constituency

[3] CAP arose as a representative for the “forgotten people” in response to the structural and systemic exclusion of Indigenous peoples in federal government policy; our constituency spans from coast to coast with diverse Indigenous identities. Over 70% of Indigenous peoples live off-reserve in Canada today,<sup>2</sup> and experience widespread discrimination. Off-reserve and non-status Indigenous peoples are amongst the most socially and economically disadvantaged groups in Canadian society,<sup>3</sup> an unfortunate reality deeply rooted in colonialism and its impacts. There are

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<sup>1</sup> CAP’s provincial and territorial affiliate organizations include: NunatuKavut, Native Council of Prince Edward Island, New Brunswick Aboriginal Peoples Council, Alliance Autochtone du Quebec, Native Council of Nova Scotia, Ontario Coalition of Indigenous People, Coalition of Indigenous Peoples of Saskatchewan, Indigenous Peoples Alliance of Manitoba, Aboriginal Congress of Alberta Association, North West Indigenous Council.

<sup>2</sup> See Statistics Canada, “Aboriginal peoples in Canada: Key results from the 2016 Census”, (Published in *The Daily*. Catalogue No 11-001-X, 2017) Online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>>.

<sup>3</sup> See *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101 at para 70, 371 DLR (4th) 725 [*Daniels FCA*].

severe and lasting damages to Indigenous peoples who are not recognized or registered. They experience poorer health, high rates of poverty and violence, and are over represented in the Canadian justice and correctional system.<sup>4</sup>

[4] In *Daniels v. Canada*,<sup>5</sup> the Supreme Court of Canada characterized Métis and non-status Indians as being in a “*jurisdictional wasteland with significant and obvious disadvantaging consequences.*”<sup>6</sup> At the Federal Court of Appeal in the same matter, Justice Phelan left the Federal Court’s findings of fact undisturbed and acknowledged that the consequences “*produced a large population of collaterally damaged people...*”<sup>7</sup> as a result of being “*deprived of programs, services and intangible benefits recognized by all governments as needed.*”<sup>8</sup> As part of document disclosure in the *Daniels* trial, a 1972 confidential memo to Cabinet showed that Canada was well aware that Métis and Non-Status Indians are “*far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are they are the most disadvantaged of all Canadian citizens.*”<sup>9</sup>

[5] Legislation has divided families and communities according to externally-created categories and destabilized the social and governance structures of communities. Indigenous peoples were prevented from defining who belongs to their communities according to their own traditions, continuing the cycle of extermination and assimilation. CAP seeks to ensure that all Indigenous peoples have substantively equal access to programs and services, and that our Indigenous and treaty rights, as guaranteed in Canada’s Constitution, are given equal protection regardless of residence or status under the *Indian Act*. CAP maintains the view of Harry Daniels:

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<sup>4</sup> Canada, “A Backgrounder on Poverty in Canada” (October 2016) at p 9-14. <online: <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html>>; Canada, Social and Aboriginal Statistics Division, *Aboriginal Children’s Survey, 2006: Supporting Data Tables* (Ottawa: Statistics Canada, 2006) at 137 <online: <https://www150.statcan.gc.ca/n1/pub/89-634-x/89-634-x2008005-eng.pdf>>.

<sup>5</sup> *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [*Daniels SCC*]

<sup>6</sup> *Daniels SCC* at para 14.

<sup>7</sup> *Daniels FCA* at para 70.

<sup>8</sup> *Daniels FCA* at para 70.

<sup>9</sup> Harry Daniels. *Gabriel Daniels, Leah Gardner, Terry Joudrey and the Congress of Aboriginal Peoples v Canada (The Minister of Indian Affairs and Northern Development and the Attorney General of Canada)*, at para 84, 2013 FC 6, at para 84.



We know who we are. We know the generations of discrimination we have endured; we don't need anybody to tell us who we are...We self-identify, just like everybody else in this country.<sup>10</sup>

### C. CAP and the Canadian Constitution

[6] CAP has effectively advocated for off-reserve and urban Indigenous populations. During constitutional talks, the NCC was a leader in negotiating for the “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada” in section 35 of the *Constitution Act*, 1982, and insisted that Aboriginal peoples be defined in section 35(2) to include Métis people.<sup>11</sup> CAP has also been also active in negotiations at constitutional fora, including the 1992 Charlottetown Accord and the Kelowna Accord. CAP has tirelessly fought against exclusion and prescription, and for self-determination and fairness.

[7] In 1999, former CAP President Harry Daniels joined with Leah Gardner, a non-status Anishnaabe woman, and Terry Joudrey, a non-status Mi'kmaq man, to launch what has become a defining and historic action, *Daniels v. Canada*. CAP and Gabriel Daniels, Harry Daniel's son, were the other named plaintiffs in the case. After a 17-year legal battle, in a unanimous decision, the Supreme Court of Canada confirmed that Métis and non-status Indians are Indians under section 91(24) of the *Constitution Act*, 1982.

[8] *Daniels v Canada* confirmed federal jurisdiction in relation to non-status Indians and Métis.<sup>12</sup> The broad implications of *Daniels v Canada* and Canada's failure to provide for its meaningful implementation are germane considerations in regards to the issues the Inquiry is tasked with examining. Exclusion is not legally permissible and it is harmful. Yet, such exclusions are woven into the colonial Canadian structures that disadvantage CAP's constituents more than any other group.<sup>13</sup>

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<sup>10</sup> Harry Daniels as quoted in Arthur J. Ray, *An Illustrated History of Canada's Native People* (Montreal: McGill-Queens University Press, 2011) at 322.

<sup>11</sup> See [Report of the Royal Commission on Aboriginal People: Perspectives and Realities](#), vol 4 (Ottawa: Supply and Services Canada, 1996) at 244 (Harry W. Daniels, who was instrumental as president of the Native Council of Canada, in negotiating the inclusion of section 35(2) in the Constitution Act, 1982, contends that it was intended to cover all Métis people and non-status Indians, regardless of where they lived in Canada).

<sup>12</sup> *Daniels SCC* at paras 33-35, 38 (“Since the federal government concedes that s. 91(24) includes non-status Indians, it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24)” at para 35).

<sup>13</sup> See *Daniels FCA* at para 70.



## **D. CAP and the National Inquiry into Missing and Murdered Indigenous Women and Girls**

[9] CAP has long-advocated for the safety and security of Indigenous women and girls living across Canada. We joined our voices with families and Indigenous organizations in calling for a National Inquiry. Throughout the Inquiry process as a party with standing, we participated in expert and institutional hearings, a working group of National Indigenous Organizations and provided input to both the research strategy and education guide.

[10] In 2017, CAP passed a resolution through our Annual General Assembly in support of the Inquiry's request for a two-year extension. When Canada decided to only allow an additional six months of the Inquiry's mandate, CAP raised concerns about impact that a shorter timeline would have for the families needing engage with the Inquiry and to determine lasting solutions. The Congress continues to support the needs and priorities of the families, survivors, and communities we serve - as we believe this is paramount to the success of this Inquiry.

## **II. THE ROLE OF A PARTY WITH STANDING BEFORE AN INQUIRY**

[11] The role of a party with standing in an Inquiry's proceedings is in the advancement and protection of the party's special interest and contribution to the inclusiveness and thoroughness of an Inquiry<sup>14</sup>. Standing is habitually granted where the party has an interest which is direct and substantially affected by the subject matter.<sup>15</sup>

[12] The role of a party with standing in an Inquiry's proceedings is to be responsive to the Inquiry's terms of reference and the subject matter of its investigation.<sup>16</sup> The primary objective is

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<sup>14</sup> See Ed Ratushny, *The Conduct of Public Inquiries: law, policy and practice* (Toronto: Irwin Law, 2009) at 186 [Ratushny].

<sup>15</sup> See National Inquiry into the Missing and Murdered Indigenous Women and Girls, *Legal Paths: Rules of Respectful Practice* at para 17, online: <[http://www.mmiwg-ffada.ca/wp-content/uploads/2018/01/Legal\\_Path\\_Rules\\_of\\_Respectful\\_Practice\\_2017-09-14\\_ENG.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2018/01/Legal_Path_Rules_of_Respectful_Practice_2017-09-14_ENG.pdf)> [Rules of Respectful Practice].

<sup>16</sup> Ratushny at 187 ("What is a "substantial and direct interest in the subject matter" for the purpose of granting standing? Obviously, the interest must be measured against the terms of reference, which represent the "subject matter" at 187).



to be helpful to the Inquiry in the discharge of its mandate, and, here, the party with standing may do so by making legal arguments.<sup>17</sup> CAP's submission advances legal arguments respecting the legal imperatives underpinning Canada's obligation to implement the Inquiry's recommendations with due diligence, in good faith and in a manner that upholds the Honour of the Crown, as well as offering specific recommendations for the Inquiry's consideration in drafting its final report.

### III. WHY WE MUST ACT: LEGAL IMPERATIVES

[13] The Inquiry's recommendations and findings are not optional. They cannot be ignored like so many recommendations before them<sup>18</sup> – they are legal imperatives arising from human rights, the *Canadian Charter of Rights and Freedoms*, and the honour of the Crown. CAP's interests in particular are protected by inherent and Treaty rights in section 35 of the *Constitution Act*, 1982.

#### A. Human Rights – International

[14] The incidence and rates of violence and disappearance of Indigenous women and girls in Canada unequivocally violates multiple and myriad human rights that Canada has pledged to uphold through binding international covenants. As such, under international law, Canada has a positive obligation to act to prevent such violations. The Inquiry is the mechanism Canada has chosen to determine how to meet those obligations. As such, Canada is not at liberty to disregard its recommendations or delay their implementation. To do so would amount to a conscious continuation of its human rights violations.

[15] That the Canadian state's conduct with respect to the treatment of Indigenous women and girls violates international law is beyond dispute. This violation is well-canvassed and does not require much attention here. Briefly, the entities responsible for monitoring compliance with the

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<sup>17</sup> See *Rules of Respectful Practice* at 2.

<sup>18</sup> See e.g. “Legal Strategy Coalition on Violence Against Indigenous Women (LSC), LEAF: Women's Legal Education and Action Fund, online: <<https://www.leaf.ca/legal/legal-strategy-coalition-on-violence-against-indigenous-women-lsc/>> (“The LSC reviewed fifty reports containing over 700 recommendations. The reports dealt with aspects of violence and discrimination against Indigenous women and girls, including government studies, reports by international human rights bodies, and published research of Indigenous women's organizations. The LSC researchers found that only a few of the more than 700 recommendations in these reports have ever been fully implemented.”); *RCAP*; Manitoba, Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People* (Manitoba: 1999) vol 1 [*Manitoba Aboriginal Justice Inquiry*].

Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Elimination of Racial Discrimination (CERD), as well as the Inter-American Commission on Human Rights, the Special Rapporteur on the Rights of Indigenous People and the UN Human Rights Committee have all found the disproportionate prevalence of violence, murder and disappearance of Indigenous to be a violation of human rights and have called on Canada to take measures to protect Indigenous women and girls and hold perpetrators of violence accountable in order to fulfill its human rights obligations.<sup>19</sup> As stated by the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, the issue involves “*complex, multidimensional, and mutually reinforcing human rights violations ... which routinely exclude [Indigenous women and girls] from enjoying the rights otherwise guaranteed to citizens.*”<sup>20</sup>

[16] Canada’s breach of its international obligations has been noted by experts testifying before the Inquiry itself. Professor Brenda Gunn, qualified as an expert in international human rights as it relates to Indigenous people, noted that international human rights documents form normative obligations that exist for Canada, in addition to being within treaties to which Canada is explicitly a party.<sup>21</sup> She stated that “there is recognition that the prohibition of gender-based violence against women has evolved into a principle of customary international law.”<sup>22</sup> She summarized reports from international human rights bodies that establish that:

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<sup>19</sup> United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Canada*, UNCEDAWOR, 42nd Sess, UN Doc CEDAW/C/CAN/CO/7 (2008), 7 at 31; United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UNCEDAWOR, 2016, UN Doc CEDAW/C/CAN/CO/8-9, 8 at 26; United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Canada*, UNCERDOR, 80th Sess, UN Doc CERD/C/CAN/CO/19-20, (2012) 5 at 17; United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada: Canada*, UNCERDOR, 2017, UN Doc CERD/C/CAN/CO/21-23, 6 at 23; Inter-Am Comm HR, *Missing and murdered indigenous women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14. Online: <<http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf>>; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UNHRCOR, 27th Sess, UN Doc A/HRC/C/27/52/Add.23-2 (2014), 11 at 34; United Nations Committee Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UNHRCOR, 2015, UN Doc CCPR/C/CAN/CO/6, 3 at 9.

<sup>20</sup> United Nations Human Rights Office of the High Commissioner, News Release, “Canada must address root causes of extreme violence against indigenous women – Rights experts” (1 February 2016), online: OHCHR News and Events <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17004&LangID=E>>.

<sup>21</sup> May 16, 2018, Quebec City, Panel: International Human Rights Law as a foundation for the Inquiry’s Work and Recommendations, Part III, Vol. VI, 8:10-9:3; 12:11-15:5.

<sup>22</sup> May 16, 2018, Quebec City, Panel: International Human Rights Law as a foundation for the Inquiry’s Work and Recommendations, Part III, Vol. VI, 26:18-20.

Canada has failed to take sufficient measures to ensure that all cases of murdered and missing Indigenous women have been investigated and prosecuted, and that those failures constitute violations of human rights under both the Convention on the Elimination of Discrimination Against Women and the International Convention on the Elimination of all Forms of Racial Discrimination.<sup>23</sup>

[17] International bodies also note Canada's need to address gaps in the law on violence against women, gaps in its data collection to monitor performance, to develop a national action plan, address root causes in terms of economic, social and cultural rights, and to properly strengthen and resource service delivery – in short, many of the areas that the Inquiry is investigating.<sup>24</sup>

[18] International human rights obligations are at least part of the legal reason the Inquiry was called. CEDAW and the Special Rapporteur specifically called for a national inquiry on this issue,<sup>25</sup> and Canada held out the Inquiry as the action it was taking on this issue in its reviews by human rights monitoring bodies.<sup>26</sup>

[19] As such, Canada has a positive obligation to act. International human rights obligations bind the state to not only refrain from violating human rights directly, but also to prevent and eliminate their violation within their countries.<sup>27</sup> Professor Brenda Gunn called this obligation basic, a foundational principle of human rights:

[T]he basic obligation that relates to the situation of murdered and missing Indigenous women and girls is Canada's duty of due diligence to prevent, investigate, prosecute, punish and compensate. And so, this has

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<sup>23</sup> May 16, 2018, Quebec City, Panel: International Human Rights Law as a foundation for the Inquiry's Work and Recommendations, Part III, Vol. VI, 27:14-21.

<sup>24</sup> May 16, 2018, Quebec City, Panel: International Human Rights Law as a foundation for the Inquiry's Work and Recommendations, Part III, Vol. VI, 27:14, 31:18.

<sup>25</sup> United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UNCEDAWOR, 2016, UN Doc CEDAW/C/CAN/CO/8-9, 8 at 26; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UNHRCOR, 27th Sess, UN Doc A/HRC/C/27/52/Add.23-2 (2014), 11 at 34.

<sup>26</sup> United Nations Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by State parties under article 18 of the Convention – List of issues and questions in relation to the combined eighth and ninth periodic reports of Canada*, UNCEDAWOR, 2016, UN Doc CEDAW/C/CAN/Q/8-9/Add.1, 23 at 137 (please refer to question 17); United Nations Committee Against Torture, *Consideration of reports submitted by State parties under article 19 of the Convention pursuant to optional reporting procedure – Seventh periodic reports of States parties due in 2016: Canada*, UNCATOR, 2016, UN Doc CAT/C/CAN/7, 33 at 152 (please refer to question 24).

<sup>27</sup> See e.g. *Convention on the Elimination of All forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13 arts 2-5 (entered into force 3 September 1981) [CEDAW]. *International Convention on the Elimination of all Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 art 5 (entered into force 4 January 1969) [ICERD].



arisen in several different treaties, and is now quite foundational in this area.<sup>28</sup>

[20] Fulfilling these obligations requires prioritization and resourcing of these measures. “[W]here Canada has legal obligations to fulfill,” as it does here, “it means that when prioritizing budgets and engaging in certain activities that Canada is required to fulfill and address these areas, and others, of economic and social marginalization.”<sup>29</sup>

[21] Canada has thus been found to be in breach of its international obligations and elected in 2016 to call an Inquiry as the means by which to address the issue and meet its obligations. In the Terms of Reference for the Inquiry, Canada states that the purpose of the Inquiry is to make recommendations for effective action, and then commits to taking effective action to prevent and eliminate violence against Indigenous women and girls in Canada.

[22] Under these circumstances, Canada is not at liberty to disregard the Inquiry’s recommendations. The Inquiry is the vehicle by which Canada is meeting its legal obligations. Canada convened the Inquiry in order to identify the effective action it must pursue to address this issue. To disregard the Inquiry’s recommendations would be to consciously continue to violate the rights of Indigenous women and girls in a wilful and deliberate way, and its legal obligations and commitments at the international level.

### ***B. Canadian Charter of Rights and Freedoms***

[23] Several *Charter* rights are also implicated in the Inquiry’s mandate. Again, as the vehicle through which the Crown seeks to satisfy its *Charter* obligations, it cannot ignore the Inquiry and its recommendations. This is even more clearly the case given that the *Charter* rights at issue are constitutional obligations being breached in their application to Indigenous people, and thus invoke the honour of the Crown, which requires, at a minimum, that the Crown follow through on its promises.

[24] Sections 7, 12, and 15 of the *Charter* are potentially implicated in the issue of missing and

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<sup>28</sup> May 16, 2018, Quebec City, Panel II: International Human Rights Law as a foundation for the Inquiry’s Work and Recommendations, Part III, Vol. VI, 19:13-18 [Emphasis added].

<sup>29</sup> See May 16, 2018, Quebec City, Panel II: International Human Rights Law as a foundation for the Inquiry’s Work and Recommendations, Part III, Vol. VI, 24:4-7.

murdered Indigenous women. Section 7 provides that “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.” While it is often invoked in the sphere of criminal law, section 7 rights may be extended where there is “state action which directly engages the justice system and its administration”.<sup>30</sup> To date, section 7 has only successfully been invoked to restrict the State’s ability to deprive individuals or rights or liberties.<sup>31</sup> Arguing that *inaction* by the State that leads to a deprivation of life or liberty – in its failure to hold perpetrators of violence against Indigenous women and girls accountable – breaches of section 7 may be a novel argument, but is not a conceptual departure, particularly as such inaction is in the context of the administration of justice.

[25] Section 12 provides that “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” Treatment is defined as cruel and unusual when it outrages standards of decency or conscience, which the individual and the collective stories of missing and murdered Indigenous women clearly do.

[26] Providing greater elaboration in the standards involved for illegal treatment,<sup>32</sup> section 12 has a corollary in international law, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, to which Canada is a party and under which there is increasing recognition that gender-based violence against women may be considered torture in some circumstances.<sup>33</sup> The Committee that monitors compliance with the Convention has recognized that the principle of non-discrimination is fundamental to the interpretation and application of the Convention and that the “discriminatory use of mental or physical violence or abuse” is an important factor in determining whether a State has committed torture.<sup>34</sup> The Committee has emphasized States’ obligation to protect minority or marginalized individuals or populations who

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<sup>30</sup> See *New Brunswick (Minister of Health & Community Services) v G. (J.)* [1999] 3 SCR. 46 at para 66, 177 DLR (4th) 124, (SCC).

<sup>31</sup> See CED 4th (online) *Constitutional Law*, “Charter of Rights and Freedoms” (X.1.(e).(ii)) at §558.

<sup>32</sup> See *R. v Hape*, 2007 SCC 26 at para 55, 280 DLR (4th) 385 which notes that international legal obligations inform interpretation of the *Charter* [*Hape*].

<sup>33</sup> See May 16, 2018, Quebec City, Panel III: International Human Rights Law as a foundation for the Inquiry’s Work and Recommendations, Part III, Vol. VI, 43:6-10.

<sup>34</sup> United Nations Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States parties*, 2008, UN Doc CAT/C/GC/2., 6 at 20 [*UNCAT General Comment 2*].

are especially at risk of torture or ill-treatment, and has found that gender is a key factor in the forms of torture or ill treatment.<sup>35</sup> It has specifically connected murdered and missing Indigenous women in Canada to violations of the UN Convention against Torture, and has separately found that law enforcement officials who failed to provide adequate protection against racially motivated attacks is a violation.<sup>36</sup> The disproportionate violence against Indigenous women and girls clearly constitutes cruel and unusual treatment, and in some cases, torture.

[27] Section 15 is the *Charter's* equality provision, and is restated for convenience here:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[28] To show discrimination under section 15, a claimant must prove a distinction based on an enumerated or analogous ground such as race, and that the distinction's impact on the individual or group perpetuates disadvantage. It is discriminatory conduct that section 15 seeks to prevent, not the underlying attitude or motive of the conduct.<sup>37</sup> The disproportionate prevalence of violence against Indigenous women and girls most certainly perpetuates disadvantage. Section 15 is usually directed at express legislation or rules. Here it is State conduct or inaction in the administration of the law that is based on a racial distinction, which is no less egregious or deserving of rectification.

[29] Thus, the prevalence of violence and the disappearance of Indigenous women and girls constitute human rights violations under Canada's own human rights framework. Canada's obligation to address systemic violations is heightened by the particular group being affected here, Indigenous peoples.

[30] Courts have recognized that the honour of the Crown is at stake in all of its dealings with

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<sup>35</sup> *UNCAT General Comment 2* at paras 21-22.

<sup>36</sup> See May 16, 2018, Quebec City, Panel II: International Human Rights Law as a foundation for the Inquiry's Work and Recommendations, Part III, Vol. VI, 43:11-44:2.

<sup>37</sup> See generally CED 4th (online) *Constitutional Law*, "Charter of Rights and Freedoms – Equality Rights" ( X.1.(f)).

Indigenous peoples. This arises from the Crown's assertion of sovereignty over the Indigenous occupants of this land without conquest, and its resulting commitment to protect and act honourably towards those occupants. This is best explained by the Supreme Court itself:

The honour of the Crown arises “from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people”. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to “the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection”. This “Protection”, though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a “weaker” or “primitive” people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.<sup>38</sup>

[31] Regarding constitutional obligations in particular, the Supreme Court has long since made clear that the Crown must fulfill its constitutional promises in an honourable way. It first invoked this idea in 1990 in *Sparrow*, in the context of the constitutional recognition of Aboriginal rights in section 35 of the *Constitution Act, 1982*, stating:

That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified [under section 35].<sup>39</sup>

[32] The Supreme Court has reaffirmed the relevance of the honour of the Crown in the fulfillment of constitutional duties in subsequent cases. In *Manitoba Métis Federation v Canada*, decided in 2013, the Supreme Court found a violation of the honour of the Crown in the way that the government had implemented the 1870 *Manitoba Act*, particularly those sections that promised land grants to Métis children and which recognized their existing landholdings.<sup>40</sup> The process of allotting land to the Métis was subject to inordinate delay, and resulted in lesser holdings than originally envisioned.

[33] As a preliminary point, the Court restated the nature of Crown honour as a doctrine

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<sup>38</sup> See *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 66, 2013 CarswellMan 61 (quoting from Brian Slattery, “Understanding Aboriginal Rights” (1987), 66 Can. Bar Rev. 727, at p 753) [internal citations omitted] [*MMF*]; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550 [*Taku Tlingit*].

<sup>39</sup> See *R v Sparrow*, [1990] 1 SCR 1075 at para 75, 70 DLR. (4th) 385, [1990] 3 CNLR. 160 [*Sparrow*].

<sup>40</sup> *MMF* at paras 68, 73.

affecting existing obligations in a real and substantial way. It reaffirmed the statement in *Haida Nation* that the honour of the Crown “is not a mere incantation, but rather a core precept that finds its application in concrete practices” and “gives rise to different duties in different circumstances”.<sup>41</sup> Further, it “is not a cause of action itself; rather it speaks to how obligations that attract it must be fulfilled.”<sup>42</sup>

[34] The Court then re-established the Crown’s obligation to diligently implement constitutional promises:

75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.<sup>43</sup>

[35] The Crown’s honourable obligations in the context of the Constitution are further elaborated later in the decision, and are worth quoting in full on this point:

79 This duty has arisen largely in the treaty context, where the Crown’s honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, **the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations**: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, “the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians”: para. 51. But the duty goes further: **if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled**. Thus, in review proceedings under the *James Bay and Northern Québec Agreement*, the participants are expected to “carry out their work with due diligence”: *Moses c. Canada (Procureur général)*, 2010 SCC 17, [2010] 1 S.C.R. 557 (S.C.C.), at para. 23. As stated by Binnie J. in *Little Salmon*, at para. 12, “It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way.” This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.

80 To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left “with an empty shell of a treaty promise”: *Marshall*, at para. 52.<sup>44</sup>

[36] The Supreme Court requires that an obligation be owed specifically to Aboriginal peoples, which, of course, *Charter* promises are not. The Supreme Court may view the requirement that an Aboriginal group is the sole beneficiary rigidly; Justice Harry LaForme of the Ontario Court of

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<sup>41</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16 and 18, 3 SCR 511 [*Haida Nation*], aff’d 2013 SCC 14 (*MMF* at para 73).

<sup>42</sup> *MMF* at para 73.

<sup>43</sup> *MMF* at para 75.

<sup>44</sup> *MMF* at para 79-80.

Appeal was critical of its approach in *R v Kokopenace*:

The Supreme Court now appears to have retreated from this position [from *Haida*]. Instead, “not all interactions between the Crown and Aboriginal people” engage the honour of the Crown; more specifically, it will not be engaged by “a constitutional obligation in which Aboriginal peoples simply have a strong interest” or one “owed to a group partially composed of Aboriginal peoples” (*MMF*, at paras. 68 and 72).<sup>45</sup>

[37] However, with respect to the violence against and disappearance of Indigenous women and girls, it is well-documented that Aboriginal peoples are the sole victims of the rights violations. The obligations may not be owed specifically to them, but their violation is disproportionately experienced by them. All peoples are equal beneficiaries of *Charter* rights but Indigenous people experience those rights very differently. With full knowledge of this fact, it would be disingenuous to argue that Crown honour applies to obligations that explicitly target Indigenous people but not those whose breach does so.

[38] Moreover, essential humanity requires an extension of the State’s obligation of diligent implementation to the benefit of Indigenous women so they can equally access protections and benefits of the law. These are the promises made in our Constitution, and we all have a right to its equal protections, by its own terms.

[39] Crown honour requires diligent implementation of promises, and, at a basic level, the intent to keep promises.<sup>46</sup> Further, the delay in implementation is not an option, as is also made clear in *Manitoba Metis*:

82 Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a **persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown’s duty to act honourably in fulfilling its promise**. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.<sup>47</sup>

[40] Finally, the honour of the Crown also lays at the heart of reconciliation, an objective that is also at the heart of this Inquiry. In the words of former Chief Justice McLachlin,

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<sup>45</sup> *R v Kokopenace*, 2013 ONCA 389 at para 126, 115 OR (3d) 481; see also *R v Kokopenace*, 2015 SCC 28 at para 99, [2015] 2 SCR 398.

<sup>46</sup> See e.g. *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (Ont. C.A.); *MMF* at 75, 78.

<sup>47</sup> *MMF* at para 82 [emphasis added] (Further discussed at paras 101, 104, and 107).

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.<sup>48</sup>

[41] Canada has stated that the Inquiry is part of its efforts to achieve reconciliation.<sup>49</sup> As such, the honour of the Crown requires that the government work to diligently support its work and implement its recommendations. This is an obligation of the Crown regardless, as the continuing violation of *Charter* rights owed to Indigenous peoples requires concerted and diligent action, as will be identified by the Inquiry, pursuant to Crown honour and the rule of law.

### C. Inherent Rights, Section 35, *Constitution Act*, 1982

[42] Our final point concerning the legal issues relevant to the Inquiry’s recommendations concern how those recommendations must be structured and implemented. The inherent right of self-determination, which is universally recognized internationally as well as for Indigenous nations in Canada, requires a principled and inclusive approach to the beneficiaries or targets of Inquiry recommendations, one that transcends the limiting criteria of the *Indian Act* and current administrative structures.

[43] The right of self-determination is recognized for Indigenous nations and is uncontroversial in Canada. It is embodied in Article 1 of the Covenant on Civil and Political Rights and the identical Article 1 of the Covenant on Economic, Social, and Cultural Rights, which have been almost universally ratified.<sup>50</sup> Identical language has been expressly applied to Indigenous people at the international level in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples:

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<sup>48</sup> *Haida Nation* at paras 17 [internal citations omitted; emphasis added]; See also Evan Fox-Decent, “Fashioning Legal Authority from Power: See also The Crown-Native Fiduciary Relationship” (2006) 4 *New Zealand Journal of Public and International Law* 91 (for academic commentary on the rationale for the SCCs approach).

<sup>49</sup> See United Nations Committee Against Torture, *Consideration of reports submitted by State parties under article 19 of the Convention pursuant to optional reporting procedure – Seventh periodic reports of States parties due in 2016: Canada*, UNCATOR, 2016, UN Doc CAT/C/CAN/7, 33 at 156.

<sup>50</sup> *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 art. 1 (entered into force Jan. 3, 1976); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS art 1 (entered into force Mar. 23, 1976).

Indigenous peoples have the right to self-determination. This guarantees the right to freely determine their political condition and the right to freely pursue their form of economic, social, and cultural development.<sup>51</sup>

[44] Canada has recognized self-determination as an inherent right of Indigenous nations, and states as its first principle of its reconciliatory relationship with Indigenous peoples:<sup>52</sup>

The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.<sup>53</sup>

[45] A core requirement of self-determination is the ability to determine membership. This is one of the key areas in which colonialism and its legislation, in particular the *Indian Act*, has undermined Indigenous self-determination and identity. The definition of belonging captured in the treaties was abandoned and the *Indian Act* imposed definitions of indigeneity with the express intent<sup>54</sup> of reducing the Indigenous population, resulting in harmful exclusion, structural racism, and consequences that non-status people continue to experience today.

[46] Canada has made moves to alter the *Indian Act* criteria and devolve some authority over membership. Bill C-31 allowed Indian bands to determine their own membership. The federal government continues to determine status, however, and Indian status is the basis on which services are generally provided and, largely, political consultation conducted. The federal government continues to grapple with the *Daniels* decision, and has not provided decisive leadership in the area of recognizing the rights of non-status people. Some of the consequences of

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<sup>51</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) art 3.

<sup>52</sup> Note: CAP remains concerned about the government's approach to the reconciliatory relationship as we were not consulted on the government's ten principles for working with Indigenous Peoples. We also note that the tenth principle on a distinctions-based approach has not been applied in an inclusive manner for non-status and off-reserve peoples.

<sup>53</sup> See Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" Ottawa: Department of Justice, 2018) at 5, online: <<https://www.justice.gc.ca/eng/csjsj/principles-principes.html>>.

<sup>54</sup> See e.g. *House of Commons Debates*, 4th Parl, 2nd Sess, (2 April 1880) at 1989 (Sir John A MacDonald) ("Disguise it as we may, wherever there is an Indian settlement the whites in the vicinity are very naturally anxious-when they see the slovenly, unfarmer like way in which the Indian lands are cultivated especially if the lands be very good-to get rid of the red men, believing, and perhaps, truly, that the progress of the locality is retarded by them, and that the sooner they are enfranchised, or deprived of their lands, and allowed to shift for themselves, the better. I dare say it -would be better if the Indians were to disappear from the continent, the Indian question would cease to exist.")

these strictures were discussed by experts before the Inquiry, and will be elaborated below.

[47] The right of self-determination and the remediation of harmful past exclusion demands a principled and inclusive approach to the populations targeted by the Inquiry's recommendations.

[48] As will be discussed further below, limiting programs to status or on-reserve Indians or implementation through existing bureaucratic structures that restrict their programming based on status and presence on a reserve would reinforce existing divisions and disadvantage, and continue to undermine the right of self-determination. Canada must start recognizing CAP and its ability to determine their own membership, along with its PTOs, as they are today, and must cease its practice of dividing and limiting Indigenous peoples and political entities. An inclusive approach to the question of who is Indigenous must inform the Inquiry's recommendations and the government's actions that follow.

#### **IV. REMEDIAL OPTIONS: THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* AND INTERNATIONAL LAW**

##### **A. Under the *Canadian Charter of Rights and Freedoms***

[49] The broad remedial guideposts under sub-section 24(1) of the *Charter*<sup>55</sup> are grounded in that which is "appropriate and just". Section 24(1) does not create a special type of *Charter* remedy. Rather, any remedy must be situated within the existing Canadian legal framework.<sup>56</sup>

[50] A five-fold test was established by the Supreme Court in *Doucet – Boudreau v Nova Scotia (Minister of Education)*<sup>57</sup> in its determination of what an "appropriate and just" remedy could be:

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<sup>55</sup> Sub-section 24(1): Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

<sup>56</sup> *R v Mills*, [1986] 1 S.C.R. 863, [1986] S.C.J. No. 39 at 952-53.

<sup>57</sup> 2003 SCC 62, 2003 CarswellNS 375 [*Doucet-Boudreau*].

- a. **It must be a meaningful remedy for the applicant:** it must “vindicate the rights and freedoms of the claimant”. A remedy that is “ineffective” or “smothered in procedural delays and difficulties” is not a “meaningful vindication of the right”.<sup>58</sup>
- b. **Legitimacy within our constitutional democracy:** a remedy “must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary.”<sup>59</sup>
- c. **A remedy that “invokes the power and functions of a Court”:** must pay attention to the role and precedents of Court. A remedy cannot be crafted that is unrelated to or steps outside of a Court’s function.<sup>60</sup>
- d. **Fairness to the Respondent:** the remedy cannot impose undue hardship on the Respondent. This means that “the remedy should not impose substantial hardships that are unrelated to securing the right.”<sup>61</sup>
- e. **Flexibility and evolution:** remedies can evolve. The Court notes that “that evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.”<sup>62</sup>

[51] Types of remedies under the *Charter* include:

- a. **Declarations:** *Eldridge v BC*<sup>63</sup> notes that declarations are preferred to injunctive relief as “there are myriad options available to the government that may rectify the unconstitutionality of the current system”.<sup>64</sup>

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<sup>58</sup> *Doucet-Boudreau* at para 55.

<sup>59</sup> *Doucet-Boudreau* at para 56.

<sup>60</sup> *Doucet-Boudreau* at para 57.

<sup>61</sup> *Doucet-Boudreau* at para 57.

<sup>62</sup> *Doucet-Boudreau* at para 59.

<sup>63</sup> *Eldridge v BC* ([1997] 3 SCR 624 at para 96 [*Eldridge*]).

<sup>64</sup> *Eldridge* at para 96.



- b. Suspended Declarations:** One example is found in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, wherein the Court suspended the effect of the impugned provision for a year.
- c. Permanent Injunctive Relief**
- d. Mandatory Orders:** In *Doucet-Boudreau*, the Supreme Court determined that the trial judge had the power to order Nova Scotia to use its best efforts to open French language schools.
- e. Ongoing supervision:** *Doucet-Boudreau* also upheld the trial judge's determination that he had supervisory jurisdiction to hear reports on Nova Scotia's progress with respect to opening the French language schools as part of his Order.
- f. Interim costs:** *British Columbia (Minister of Forests) v Okanagan Indian Band*<sup>65</sup>, established that if a *Charter* challenger is impecunious and there are "special circumstances" at play, the Court has "narrow" jurisdiction to award interim costs.
- g. Other interim remedies:** these include interlocutory stays of provisions, decisions or orders.
- h. Damages:** *Mackin v New Brunswick (Minister of Finance)*<sup>66</sup> notes that "it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded".<sup>67</sup> *Canada (Attorney General) v Hislop*<sup>68</sup> adds to this that damages are appropriate when "bad faith, unreasonable reliance or conduct that is clearly wrong"<sup>69</sup> is apparent.

## **B. Under International Law**

[52] Despite challenges associated with enforceability when compared to *Charter* remedies,

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<sup>65</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371

<sup>66</sup> *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 [*Mackin*].

<sup>67</sup> *Mackin* at para 179.

<sup>68</sup> *Canada (Attorney General) v Hislop*, 2007 SCC 10 [*Hislop*].

<sup>69</sup> *Hislop* at para 117.



international law obligations do give way to the availability of remedies. As stated above, international law forms normative, and sometimes customary, obligations on states that are parties to a particular international instrument.

[53] CEDAW, for example, has an Optional Protocol which allows for individuals or groups to submit complaints to a Committee whose competence is recognized by all States that are parties to the Optional Protocol.<sup>70</sup> Canada ratified this Optional Protocol on October 18, 2002. While the Optional Protocol stipulates that all domestic remedies must be exhausted prior to lodging a complaint,<sup>71</sup> the Committee can initiate inquiries – including visiting the subject State Party – and provide recommendations to which a State Party may respond within 6 months.<sup>72</sup> The Committee also provides follow up inquiries after sending out its recommendations.

[54] The Optional Protocol has seen success. In 2004, a Roma woman, alleged that she was sterilized without proper and informed consent after undergoing a C-section in Hungary. The Committee found that Hungary was in breach of CEDAW and recommended that it compensate the Complainant and amend the *Public Health Act*, which had a provision that allowed for sterilization without the normal information procedures if it was appropriate in the circumstances. Hungary both compensated the Complainant and amended the *Public Health Act* to ensure that informed consent was mandatory.<sup>73</sup>

[55] CERD provides a similar mechanism and remedy to Complainants. Article 14 of CERD provides that individuals or groups can lodge a complaint with CERD's Committee if a State Party has violated any of the principles set out in CERD.<sup>74</sup> As with CEDAW's Optional Protocol, the Committee has the power to make recommendations to the State Party if it has recognized the Committee's competence. Canada did so in 1966, although the Committee's complaint mechanism was not effective until 1982 when the required number of State Parties recognized its

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<sup>70</sup> *Convention on the Elimination of all Forms of Discrimination Against Women*, 1 March 1980, 1249 UNTS 13 (Entered into force 3 September 1981, ratification by Canada 10 December 1918) at Article 1 and Article 2 [CEDAW].

<sup>71</sup> CEDAW at Article 4

<sup>72</sup> CEDAW at Articles 7-10.

<sup>73</sup> Anna Wilkowskaw-Landowska, "Coercively Sterilized Romani Woman Will Receive Compensation" *Rewire.News* (12 June 2009) <online:<https://rewire.news/article/2009/06/12/coercively-sterilized-romani-woman-will-receive-compensation/>>.

<sup>74</sup> CERD at Article 14

competence.<sup>75</sup>

[56] Interestingly, CERD contains a provision that allows State Parties to first appoint a domestic body to oversee the complaint before the Committee will have jurisdiction, although a State Party can bypass this step.<sup>76</sup> While the complaint mechanism under CERD is optional, its political effect is still relevant. In 2018, Palestine filed the first interstate complaint under CERD, alleging that Israel has implemented policies and practices aimed at displacing Palestinian people.<sup>77</sup> The Committee's recommendations and reports on this complaint have yet to be released, but Palestine's complaint illustrates that international law, while lacking specific enforcement mechanisms of domestic law, provides political remedies that can help guide domestic action.

[57] Moreover, Canadian courts are increasingly willing to look to Canada's international law obligations to inform the Crown's duty under Canadian law. In *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, the Canadian Human Rights Tribunal noted that:

...international instruments and treaty monitoring bodies [...] view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality.<sup>78</sup>

[58] Noting that Canada's international and domestic law obligations often overlap, the Tribunal concluded that "Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric."<sup>79</sup>

[58] This viewpoint has also been expressed by the Supreme Court of Canada. In the early days of *Charter* litigation, the Court looked to international human rights law to underpin the interpretation of various *Charter* rights. In 1987's *Reference Re Public Service Employee Relations*

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<sup>75</sup> Alexandra R. Harrington, "Don't Mind the Gap: The Rise of International Complaint Mechanisms Within International Human Rights Treaties" (2012) 22:153 *Duke J of Comparative and Intl L*, 153 at 166 [Harrington].

<sup>76</sup> Harrington at 167 referring to *CERD* at Article 14(2).

<sup>77</sup> Oliver Holmes "Palestine files complaint against Israel under anti-racism treaty" *The Guardian* (23 April 2018) <online: <https://www.theguardian.com/world/2018/apr/23/palestinians-file-complaint-against-israel-under-anti-racism-treaty>>.

<sup>78</sup> *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* 2016 CHRT 2 at para 453 [*Family Caring Society*].

<sup>79</sup> *Family Caring Society* at para 454.

*Act*, the dissenting judgement of Chief Justice Dickson relied heavily upon human rights norms. Discussing international law on freedom of association, he wrote:

A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.<sup>80</sup>

[59] Chief Justice Dickson, as he was then, also relied on this same paragraph in his judgement in *Slaight Communications v Davidson*.<sup>81</sup> In 2007, the Supreme Court also relied on Chief Justice Dickson's words in *R v Hape*, noting that the Supreme Court will look to international law obligations to assist in interpreting the *Charter*.<sup>82</sup> Quoting Dickson's point, the Court notes that,

whenever possible, [the Supreme Court] has sought to ensure consistency between its interpretation of *Charter*, on one hand, and Canada's international obligations and the relevant principles of international law, on the other.<sup>83</sup>

[60] The codification of international law obligations is also gaining strength in provincial legislation. Manitoba, for example, has passed a statute called *The Path to Reconciliation Act*, which sets out that the Government of Manitoba will be guided by the principles enunciated in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>84</sup> Passed in 2016, the effect of this statute remains to be seen. Regardless, while international law on the whole is norm-driven<sup>85</sup> rather than remedy based, the above examples illustrate that Canada's international law obligations do have an effect on the remedial outcomes related to the issues in this Inquiry.

## V. WHAT WE KNOW: THE INQUIRY PROCESS AND CONTENT

### A. Procedural Considerations

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<sup>80</sup> *Reference Re Public Service Employee Relations Act*, [1987] 1 SCR 313 at p 349.

<sup>81</sup> [1989] 1 SCR 1038.

<sup>82</sup> *Hape* at paras 53-55.

<sup>83</sup> *Hape* at para 55.

<sup>84</sup> *The Path to Reconciliation Act*, CCSM 2016, c.5.

<sup>85</sup> See, for example, the Special Rapporteur on the rights of indigenous peoples which states its normative framework exists within, *inter alia*, the United Nations Declaration on the Rights of Indigenous Peoples.

[61] The Inquiry was borne from the spirits of our stolen sisters and the fierce advocacy of their families, experiencing deep pain and loss, who rightfully refused to accept denial, delay, blaming and “sociology”<sup>86</sup> as legitimate justifications for their pain and suffering. They had long since identified the undeniable existence of intertwined systemic racism as the root cause of the urgent and growing crisis of missing and murdered Indigenous women.

[62] The Inquiry took care to create an environment around the proceedings that CAP views as responsive, at least in part, to the needs of the families and people engaged by the work of the Inquiry. The Inquiry’s focus on trauma-informed approaches contributed favourably to the quality of the information received, the comfort of those providing the information and all those engaged by the very difficult work facing the Inquiry. The presence of health staff, their kindness and openness, the Commissioners’ thoughtful engagements and personal interest, and the overwhelming sense of the space being a safe one for the sharing of deep-seated emotions was remarkable and should all be recorded as a best practice. In the words of Barack Obama, “[w]e can enforce the law by recognizing essential humanity”<sup>87</sup>. We genuinely believe the Inquiry did the best it could, in the circumstances it faced, to accomplish that overarching goal.

[63] CAP does wish to note that, despite best efforts, the imposition of formal procedural rules created a court-like atmosphere that was uncomfortable and intimidating at times, and resembled a colonial setting. Also, CAP was concerned about the lack of after care available for participants.

[64] Cultural competency was also a welcomed adaptation to the habitual nature of Inquiry proceedings. The presence of medicines in hearing rooms, other traditional markers of culture, the presence of indigenous languages and translation, the family centered arrangement of hearing rooms, elder’s rooms, the availability of food and water – all contributed to an overdue sense of belonging and comfort in proceedings that evoke painful lived experiences and subject matter.

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<sup>86</sup> See Alex Boutilier, “Native Teens’s slaying a ‘crime’, not a ‘sociological phenomenon,’ Stephen Harper says” *Toronto Star* (21 August 2014), online: [https://www.thestar.com/news/canada/2014/08/21/native\\_teens\\_slaying\\_a\\_crime\\_not\\_a\\_sociological\\_phenomenon\\_stephen\\_harper\\_says.html](https://www.thestar.com/news/canada/2014/08/21/native_teens_slaying_a_crime_not_a_sociological_phenomenon_stephen_harper_says.html).

<sup>87</sup> See “Transcript: Obama’s Speech At the 2018 Nelson Mandela Annual Lecture” *NPR* (17 July 2018) online: <https://www.npr.org/2018/07/17/629862434/transcript-obamas-speech-at-the-2018-nelson-mandela-annual-lecture>.

[65] Concerns about procedural fairness arose from challenges directly related to limitations that, in practical terms, restricted the Inquiry's core mandate. The Inquiry attempted to address those challenges in their request for an extension of two (2) years. The very short and restricted timeline for completion of the Inquiry's work directly resulted in procedural short circuits, including: delayed document disclosure, lack of responsiveness, broad and imprecise qualification of expert witnesses and last-minute adaptations that redirected efforts towards accommodating those adaptations, instead of work related to advancing the Inquiry's mandate. Moreover, there was a lack of support for community-based organizations that were not represented by legal counsel to navigate the application and hearing processes, likely simply due to time and resources restrictions.

[66] More substantively, there was also a concern about the lack of youth voices on the expert and institutional panels. Examining the situation of Indigenous girls is a core mandate of the Inquiry, and yet youth voices were largely only indirectly heard. A number of the experts spoke to their experience in their youth,<sup>88</sup> and LGTB2S were represented by youth voices,<sup>89</sup> but Indigenous girls were not directly quoted or represented in the expert/knowledge keeper phase of the proceedings. Again, we believe this is something that could have been addressed if the Inquiry had been granted its requested extension.

[67] In calling for an Inquiry, CAP also advocated for investigation of the issue of missing and murdered Indigenous men and boys. While acknowledging the mandate of the Inquiry was limited to the scope of women and girls and that further work is needed for understanding the vulnerabilities of men and boys to particular kinds of violence, CAP notes that thematic areas identified in our summary of the evidence may also be relevant to men and boys.

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<sup>88</sup> See e.g. May 30, 2018, Calgary, Panel II: Health Services, Part II, Vol. III (attended by Jackie Anderson and Christine Duhaime); May 31, 2018, Calgary, Panel II: Health Services (continued), Part II, Vol. IV (attended by Jackie Anderson and Christine Duhaime); October 17, 2018, St. John's, Panel III, Mixed Parts II & III, Vol XVII (attended by Dr. Robyn Bourgeois and Leanna Moon Perrin).

<sup>89</sup> See e.g. September 12, 2018, Iqaluit, Panel II: Indigenous People's Resilience, Mixed Part II & III, Vol III (attended by Jasmine Redfern and TJ Lightfoot); September 13, 2018, Panel III: Decolonizing Practices (continued), Mixed Part II & III, Vol IV (attended by Jasmine Redfern and TJ Lightfoot).

## B. Summary of Evidence

[68] The institutional and expert testimony heard by the Inquiry touched upon and was relevant to CAP's constituency of off-reserve and urban Indigenous peoples in myriad and overlapping ways. One overarching narrative is that Indian status is a colonial construct that is still being used to the detriment of our communities, and that self-determination, including determining membership and rebuilding other internal processes and protocols, will have spillover benefits into other areas. Another is that violence and discrimination are experienced by Indigenous people regardless of their residency on or off reserve, that off reserve challenges differ in significant ways from on reserve challenges, and that government services for Indigenous people are still, in general, focused specifically on the on-reserve, status Indian population.

[69] This section will detail the themes from the expert testimony that are relevant to CAP in order to support the recommendations we put forward in the following, final section. These themes are overlapping and mutually supported, and are presented in no significant order.

### 1. Colonial Disruption of Membership Determination

[70] Several experts touched, directly and indirectly, on the idea that Indigenous rules and practices of membership determination and regulation have been displaced by the *Indian Act* and other colonialist legislation that do not reflect Indigenous values.

[71] Fay Blaney, a knowledge keeper and qualified expert in Indigenous women's studies and feminism, *inter alia*, discussed the disruptive effect of the *Indian Act* on social organization and structures, particularly noting that it instituted a patriarchal system of governance on many formerly-matriarchal societies. She called the current structures internalized colonialism and not reflective of Indigenous values and traditional practice.<sup>90</sup> Mary Ellen Turpel-Lafond, expert in law, legal and investigative practice, especially in child welfare, testified that the status provisions of the *Indian Act* destabilised matrilineal systems, families, and attachment, further noting that the *Indian Act* was more generally an attempt to subvert Indigenous governance and destroy First

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<sup>90</sup> May 14, 2018, Quebec City, Panel I: Recognizing and Fulfilling National and Domestic Human Rights, Part III, Vol. IV, 105:6 – 107:22.

Nations.<sup>91</sup>

[72] Albert McLeod, knowledge keeper with life experience in traditional and ceremonial Indigenous practice and gender identification, *inter alia*, discussed this displacement in the context of two-spirit people. He has found that, prior to contact, there was a principle of non-interference with identity, based on the idea that it is not our place to interfere with what the Creator has made.<sup>92</sup> Colonization imposed hetero-normativity in violation of previous norms of inclusiveness and tolerance.

[73] Val Napoleon and Hadley Friedland, qualified as experts in Indigenous law and legal theory and engagement with Indigenous law, respectively, discussed the displacement of Indigenous law by colonialism more generally and the challenges in recovering it.<sup>93</sup> TJ Lightfoot and Jasmine Redfern, who testified about health policies, sexual violence, youth issues and suicide prevention through a LGBT2S and Indigenous perspective, called refusal to accept some individuals as Indigenous continued colonial violence.<sup>94</sup>

[74] Two experts discussed specifically how their nations had lost the ability to determine membership. Tuma Young, qualified as an expert in Mi'kmaq legal principles and systems, notes that membership regulation was explicitly taken away from the Mi'kmaq in 1985, and is an example of a direct conflict in Indigenous and non-Indigenous law.<sup>95</sup> Dawnis Kennedy Minnawaanagogiizhigook, an expert qualified to teach Anishinabe law in Western institutions through cultural-based methods, stated that in Anishnaabe law, a child had a right to belong and there were rules respecting children borne of mixed-First Nation heritage, which were clearly displaced.<sup>96</sup>

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<sup>91</sup> October 4, 2018. Winnipeg, Panel IV: A Voice for Children and Youth, Mixed Part II & III, Vol XIII, 264:9-269:21.

<sup>92</sup> June 11, 2018, Toronto, Panel I: Intersections between Racism and 2SLGBTQ issues, Part III, Vol. III, 54:4 - 55:14; 67:5 – 71:3.

<sup>93</sup> August 22, 2017, Winnipeg, Day I: Indigenous Laws & Decolonizing Perspectives, Part III, Vol. I, 88:2-89:15.

<sup>94</sup> September 13, 2018, Institutional and Expert / Knowledge Keeper Hearings, Panel III: Decolonizing Practices, Mixed Part II and III, Vol. IV, 28:2-29:19.

<sup>95</sup> August 22, 2017, Winnipeg, Day I: Indigenous Laws & Decolonizing Perspectives, Part III, Vol. I, August 22, 2017, Winnipeg, Day I: Indigenous Laws & Decolonizing Perspectives, Part III, Vol. I, 197:5-15.

<sup>96</sup> August 23, 2017, Winnipeg, Day II: Indigenous Laws & Decolonizing Perspectives, Part III, Vol. II, 204:15-205:3.

[75] This testimony supports CAP’s long-asserted belief in the need to end harmful exclusions and tackle the *Indian Act* criteria for membership. It also reinforces the conclusions of the previous section, that self-determination requires a more inclusive approach to membership, driven by communities themselves. Nothing less is demanded in order to fully decolonise.

## 2. Debilitating Effects of Exclusion from Community

[76] Several experts and knowledge keepers also made the point that exclusion from community has wide-ranging and serious effects on an individual’s well-being.

[77] Dr. Janet Smylie, knowledge keeper and expert qualified in Indigenous health, found that in the knowledge systems of both Cree Métis and Western medicine, community connection had a fundamental connection to well-being.<sup>97</sup> The “sense of being connected to something larger,” in terms of the web of family, community and land, has myriad health impacts, assisting in overcoming depression and trauma.<sup>98</sup> It is important to establishing early relationships that create love, security and belonging in infants that Dr. Smylie has put at the centre of her work in Indigenous health.

[78] The idea of disconnection from land, community and culture undermining well-being was reiterated by other experts. Amy Hudson, knowledge keeper and expert in sociology, racism and the impacts on the communities of NunatuKavut, discussed it in the specific context of the Inuit of Labrador.<sup>99</sup> Jackie Anderson, director of the shelter Ma Mawi Wi Chi Itata Centre in Winnipeg, and Christine Duhaimé described the importance of cultural and community restoration in healing the victims of sexual exploitation, describing the success of their rural traditional healing lodge outside of Winnipeg.<sup>100</sup> Josie Nepinak, Executive Director of the Awo Taan Healing Lodge

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<sup>97</sup> September 11, 2018, Iqaluit, Panel II: Indigenous Peoples’ Resilience, Mixed Parts II and III, Vol. II, 122:16-123:16.

<sup>98</sup> September 11, 2018, Iqaluit, Panel II: Indigenous Peoples’ Resilience, Mixed Parts II and III, Vol. II, 122:16-123:16.

<sup>99</sup> June 12, 2018, Racism Panel, Day 2, Part III, Vol. IX, 152:24 – 182:4 (PowerPoint presentation from Amy Hudson on Inuit Women and Racism in Labrador)

<sup>100</sup> May 30, 2018, Calgary, Panel II: Health Services, Part II, Vol. IV, 85:1 -23; 102:9-23, 141:2-7. See also 87:23-88:24; 141:2-16.

Society in Calgary shelter echoed that sentiment, describing Awo Taan's successful healing approach as being attentive to Indigenous knowledge and placing culture at the center.<sup>101</sup>

[79] Jasmine Redfern discussed the intersection of loss of community and challenges of having an LGBT2S identity, noting that often moving to an urban environment makes it more difficult to claim one's heritage, which causes confusion and pain.<sup>102</sup> Fay Blaney discussed the centrality of land to spirituality, and how exclusion from this land can have profound effects on self-esteem and well-being.<sup>103</sup>

[80] As a specific manifestation of exclusion, it was pointed out by several experts that banishment from the community used to be an extreme form of punishment. Both Fay Blaney and Dalee Sambo Dorough, an expert qualified in the development and evolution in international human rights standards, note the practice of banishment as the ultimate penalty, and state it was basically fatal – separation from community was disastrous.<sup>104</sup>

[81] It is unequivocal that a lack of access to community and kin has debilitating impacts on Indigenous peoples. Denial of Indian status often amounts to lack of access, to community as well as land, based on colonial-era criteria rather than identity and community recognition. Community restoration and individual well-being, in general as well as in healing processes, require inclusive, non-colonial membership determination processes.

### **3. Vulnerability of Those Without Community**

[82] On a related note, experts focussed on the vulnerability of Indigenous peoples away from or without an Indigenous community, both from a cultural and safety perspective. As one example, Indigenous women off reserve have more difficulty accessing section 84 of the *Corrections and*

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<sup>101</sup> May 31, Calgary, Panel II: Health Services (continued), Part II, Vol IV, 197:16-198:20; 200:3-201:13.

<sup>102</sup> September 13, 2018. Iqaluit, Panel: III: Decolonizing Practices (continued). Mixed Part II and III, Vol. IV, 29:2-19.

<sup>103</sup> May 15, 2018, Quebec City, Panel I: Recognizing & Fulfilling National & Domestic Human Rights, Part III Vol V, 163:12-21.

<sup>104</sup> May 16, 2018, Quebec City, Panel II: International Human Rights Law as a Foundation for the Inquiry's Work and Recommendations, Part III, Vol VI, 299:24-300:1; May 15, 2018, Quebec City, Panel I: Recognizing & Fulfilling National & Domestic Human Rights, Part III, Vol V, 274:6-9.

*Conditional Release Act*, which allows for community release from prison, as it is more difficult for them to corral the disparate services they require to qualify.<sup>105</sup> Nakuset, the Executive Director of the Native Women's Shelter of Montreal described the fractured nature of services for urban Indigenous people,<sup>106</sup> making assistance more difficult and increasing vulnerability.

[83] Jackie Anderson noted the extreme vulnerability of people arriving in cities from more rural or remote reserves, who are often explicitly targeted by traffickers or those involved in sexual exploitation.<sup>107</sup> Tanya Talaga, expert qualified in the area of journalism and writing on Indigenous issues with an Indigenous perspective, discussed the acute vulnerability of teenagers who leave their communities to attend high school in urban centers, particularly noting the seven such students who have disappeared in Thunder Bay since 2001.<sup>108</sup> Kassandra Churcher, Executive Director of the Canadian Association of Elizabeth Fry Societies, testified that Indigenous women face the risk, amongst other things, of being criminalized in an urban setting after moving from a smaller community.<sup>109</sup> The Honourable Kim Beaudin, who gave opinion evidence on gang member rehabilitation in Saskatoon, made clear the risks of being coopted into gangs in cities in Manitoba and Saskatchewan.<sup>110</sup>

[84] Vulnerability is magnified for LGBT2S people. TJ Lightfoot and Jasmine Redfern discussed the impact that moving to the city has on Indigenous LGBT2S youth; many need to choose between being LGBT2S or Indigenous and suffer from a loss of identity. Fallon Andy, expert in gender education and state violence, discussed two-spirit people who leave their

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<sup>105</sup> September 19, 2018, Quebec City, Mixed Institutional & Expert Hearings, Panel II: Custodial Issues for Women, 275:9-23 (Testimony of Patricia Tate, who gave opinion evidence on access to spiritual services for Indigenous people who are experiencing correctional issues).

<sup>106</sup> May 31, 2018, Calgary, Panel II: Health Services (continued), Part II, Vol IV, 91:3-22.

<sup>107</sup> May 30, 2018, Calgary, Panel II: Health Services, Part II Vol III, 96:24-98:23; see also Oct 15, 2018, St John's, Panel I, Mixed Part II & III, Vol XV. 251:252:18 (Assistant RCMP Commissioner Joanne Crampton testimony regarding the particular vulnerability of transitioning to urban spaces to access essential services, noting that Indigenous women are targeted often within minutes of entering a city). See also May 31, 2018, Calgary, Panel II: Health Services (continued), Part II, Vol IV, 95:24-96:7 (Nakuset testimony).

<sup>108</sup> June 13, 2018, Toronto, Panel III: Media, Journalism and Film, Part III Vol. X, 117:24-118:17; 54:22-55:16 (this exchange on the topic of the seven fall feathers, continues until 96:4).

<sup>109</sup> September 19, 2018, Quebec City, Mixed Institutional & Expert Hearings, Panel II: Custodial Issues for Women, Vol V, 167:19-168:11.

<sup>110</sup> September 18, 2018. Quebec City, Panel II: Criminal Justice Oversight and Alternative Programs", Mixed Part II & III, Vol VI, 95:17-101:16.

communities with high expectations, and end up in shelters or on the street in urban areas.<sup>111</sup>

[85] Thus, not only are connections to culture and community important for health and well-being, the removal from community poses unique vulnerability challenges.

#### 4. Support Structures Based on Status

[86] Despite the vulnerability recognized above, expert testimony made it abundantly clear that government programs still make decisions on funding and governance based on status.

[87] This is clearly the case in health care. Valerie Gideon, the director of the First Nation and Inuit Health Branch (FNIHB), acknowledged that most FNIHB programming was for First Nations only, with the exception of residential school program.<sup>112</sup> Further, the FNIHB attempts significant consultation with First Nations, but only through the Assembly of First Nations, which represents status Indians; Gideon expressly stated that they leave questions of representation to the internal processes of these institutions.<sup>113</sup> In the post-*Daniels* context, they are consulting with the Métis National Council and have made no determinations regarding Métis entitlement to programming; non-status Indians were not discussed at all.<sup>114</sup> At the date of this submissions, CAP has not been consulted despite its leadership role as a primary Plaintiff in advancing the *Daniels* matter from trial to the Supreme Court. Notably, Naomi Metallic testified that *Daniels* plus the *Caring Society* cases by the Human Rights Commission<sup>115</sup> means that equal obligations with respect to service delivery are owed to Métis and non-status Indians.<sup>116</sup>

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<sup>111</sup> June 11, 2018, Toronto, Panel I: Intersections between Racism and 2SLGBTQ issues, Part III, Vol. III, 199:20-200:4.

<sup>112</sup> May 30, 2018, Calgary, Panel II: Health Services, Part II Vol III, 165:13-19.

<sup>113</sup> May 31, 2018, Calgary. Panel II: Health Services (continued), Part II, Vol IV, 85:6-9.

<sup>114</sup> May 31, 2018, Calgary. Panel II: Health Services (continued), Part II, Vol IV, 51:10-52:21, 72:16-24

<sup>115</sup> *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, 2010 CarswellNat 2036; *Family Caring Society; First Nations Child & Family Caring Society of Canada and Canada (Attorney General)*, Re 2016 CHRT 10; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4.

<sup>116</sup> May 15, 2018, Quebec City, Panel I: Recognizing & Fulfilling National & Domestic Human Rights, Part III, Vol V, 327:3-18.



[88] Policing programs are similarly focused on reserve communities. Brenda Lucki, the RCMP Commissioner, testified that there is training on policing in an Indigenous context for all cadets and serving officers and local courses once officers are placed, there was no training specifically targeting off-reserve Indigenous communities.<sup>117</sup> Daniel Bellegarde, Director of the Association of Police Governance, testified that the First Nations Policing Program, which enables self-administered policing or the placement of First Nations officers within RCMP to work in their communities, are exclusively reserve-based.<sup>118</sup> While in the corrections system, Patricia Tate, from the Elizabeth Fry Society in Saskatoon, testified that non-status Indigenous women can be excluded from ceremony and other cultural supports.<sup>119</sup>

[89] Cindy Blackstock, expert qualified in the areas of social work with knowledge in Indigenous theory, child engagement and the identification and remediation of structural inequalities affecting First Nations children, youth and families, also testified about deficiencies in funding for child welfare amongst non-status First Nations. The decision of the Human Rights Commission in *Caring Society* established the right of First Nations children to equal access to services, but the government is interpreting this only to apply to status First Nations children. Blackstock noted that all First Nation children should be able to access services as needed, free from adverse discrimination.<sup>120</sup>

[90] Thus, though self-determination is recognized as a right that Indigenous people have, government structures continue to reflect colonial categorizations of Indigenous peoples to the detriment of non-status and off-reserve Indigenous people in general. Recommendations to address violence and disappearance must be aware of these distinctions and consciously attempt to overcome them, or else knowingly continue to undermine the self-determination and the well-being of non-status and off-reserve Indigenous people.

## 5. More Resources for Off-Reserve Indigenous People Required

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<sup>117</sup> June 26, 2018, Regina, Panel I: Recruitment, Training & Policing in Indigenous Communities (continued), Part II Vol VII, 112:18-25.

<sup>118</sup> June 25, 2018, Panel I: Recruitment, Training & Policing in Indigenous Communities, Part II, Vol VI, 119:10-20.

<sup>119</sup> September 19, 2018, Quebec City, Panel III Custodial Issues for Women, Mixed Part II & III, Vol VIII, 84:14-21.

<sup>120</sup> May 13, 2018, Toronto, Panel II: Media, Journalism & Film, Part III. Vol X, 252:13-20

[91] It was accepted by various experts that more resourcing was required for service provision to Indigenous people in general, and to off-reserve people in particular.

[92] Underfunding occurs through the social services sectors. The Director of the First Nations and Inuit Health Branch explicitly noted that more resources were needed for off-reserve communities, adding that the Minister agreed with her and was prioritizing better reach into urban areas.<sup>121</sup> Naiomi Metallic, qualified as an expert in law and policy as it relates to Indigenous peoples, cited a study in New Brunswick that a leading cause of departures from reserve communities were problems on those reserves, including inadequate housing and services; if off-reserve populations are also neglected in terms of services, this is compound neglect.<sup>122</sup> Cindy Blackstock, while she did not have a mandate to address issues affecting non-status Indians and Inuit, noted that they are also at risk and need to be covered by equal funding per the *Caring Society* decision, from which they are currently being excluded. She believes the government mandate needs to be expanded and would like to see a First Nations citizenship approach, amongst other things, to achieve self-determination.<sup>123</sup>

[93] Funding must not only be available; it must also be sustainable. Urban shelter operators described constant need for funding and the need to re-apply every year, applying to any and all grants on short-term bases that risk the sustainability of programming and support.<sup>124</sup> The Winnipeg Chief of Police, Danny Smyth, noted how much time his partners who operate Indigenous services in Winnipeg spend fundraising, and recommended sustainable funding for those who have assisted in the “transformative change” of the police force in the past 15 years.<sup>125</sup> Mary Ellen Turpel-Lafond reiterated this call in the field of child welfare, noting the cost savings of doing things the right way.<sup>126</sup>

[94] The deficit in resources extends to policing. Retired Chief Clive Weighill, past President

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<sup>121</sup> May 30, 2018, Calgary, Panel II: Health Services, Part II, Vol. IV, 74:10-25, 236:16-239:21.

<sup>122</sup> May 14, 2018, Quebec, Panel I: Recognizing & Fulfilling National & Domestic Human Rights, Part III, Vol IV, 212:7-25.

<sup>123</sup> October 3, 2018, Winnipeg, Panel: II: Dr. Cindy Blackstock, Mixed Part II & III, Vol XII, 61:2-64:9, 147:16-25.

<sup>124</sup> See May 31, 2018, Calgary, Panel II: Health Services, Part II, Vol IV, 96:19- 102:12 (Nakuset); 169:4-173:2 (Josie Nepinak).

<sup>125</sup> October 18, 2018, St John’s, Panel IV, Mixed Parts II & III, Vol XVIII, 62:10-22.

<sup>126</sup> October 4, Winnipeg, Panel IV: A voice for Children and Youth, Mixed Part II & III, Vol XIII, 264:9-269:21.

of the Canadian Association of Chiefs of Police specifically contrasted the amount of funding provided on reserve versus off reserve for policing, despite the majority of the population being off reserve. It is worth quoting him on this point in full:

The federal government spends a lot of money on-reserve, justifiably so, for First Nations, but they give very, very little money for First Nations people living in urban areas.

You know, we heard figures of up to 60 percent of Indigenous people living in urban centers now. They're not living on a First Nation. Yet, there's very little funding that comes along, so we're asking for the federal government to start to look at urbanization and funding.<sup>127</sup>

[95] Compounding these issues generally is the issue of the undercounting of Indigenous peoples in urban areas, about which Dr. Janet Smylie testified. Based on extensive research and modelling new methods to identify people, she found that urban Indigenous people are undercounted in traditional census counts by a factor of at least two in cities.<sup>128</sup> Thus, current funding is likely based on lower numbers than reality. Moreover, the reasons for undercounting – the fact that Indigenous people in cities move around and demonstrate distrust of providing information to government agencies – reveals the dire need for such funding, for things like housing.<sup>129</sup>

[96] The need for increased funding for programs off-reserve is acute and amply demonstrated by Inquiry experts, without exception. This is reflected in our recommendations to the Inquiry below.

## **6. Racism Regardless of Status**

[97] The Inquiry undertook a deep and insightful look at the underlying causes of racism that is highly relevant to the CAP's constituency.

[98] The Racism panel, and particularly Jesse Wenthe, who testified on Indigenous inclusion in film and broadcasting, traced the portrayal of Indigenous people in mainstream history, and provided a compelling overview of the dehumanization, reductivism and stereotyping of Indigenous

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<sup>127</sup> June 27, 2018, Regina, Panel II: Developing and Fostering Relationships with Indigenous Communities, Families and Survivors of Violence, Part II, Vol VIII, 61:20-62:5.

<sup>128</sup> September 12, 2018, Iqaluit, Panel II: Indigenous Peoples' Resilience, Mixed Parts II and III, Vol. III, 30:1-31:20.

<sup>129</sup> September 12, 2018, Iqaluit, Panel II: Indigenous Peoples' Resilience, Mixed Parts II and III, Vol. III, 32.

people throughout history that has led to the conscious and unconscious racism of modern times.<sup>130</sup> This idea was reiterated by Ellen Gabriel, who also spoke of the centuries of dehumanization that have led to current racist attitudes.<sup>131</sup> Jesse Wenté describes the process as follows:

I think the big issue is one of dehumanization. And that over the courses of time, without authentic representations and with false representations being the norm, Indigenous people have struggled to be human on Turtle Island. And when you're not human, it becomes much easier to assert violence, oppression and neglect. It becomes much easier to ignore these things in the community. It becomes much easier to accept what wouldn't be acceptable in your own community if you don't think other people are human.<sup>132</sup>

[99] This process was echoed by two family physicians who appeared before the Inquiry. Dr. Barry Lavallee, who was a qualified expert in anti-Indigenous racism, Indigenous health and medical education, elaborated on this in the health care system, stating that dehumanization of Indigenous peoples occurs in health care as well as policing and justice sectors, and that medical school “reinstalls racist attitudes and the use of stereotypes goes on.”<sup>133</sup> Dr. Janet Smylie testified about how humans “in-group and out-group people based on their appearance,” which leads to implicit or unconscious race preference bias.<sup>134</sup>

[100] Others were more colloquial in their assertions. Dr. Amy Bombay, psychological expert on the effects of stress and trauma on well-being, stated that skin colour is a predictor of lateral violence.<sup>135</sup> The Honourable Kim Beaudin put it most clearly when discussing police practices:

They don't ask you if you have a status card, or a Métis card, or, you know, whatever. They don't say, “Oh, we are going to treat you different because you are a First Nations person from that reserve,” or a Métis person from that community. It doesn't matter. They just see you and it is all visual kind of things, and where you are in terms of the community.<sup>136</sup>

[101] This discussion of racism makes clear that the relationship between racism and Indian status is not direct and exclusive. Racism is triggered by racial recognition, which can happen by

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<sup>130</sup> June 13, 2018, Toronto, Panel III: Media, Journalism & Film, Part II, Vol X, 11:23-13:21.

<sup>131</sup> September 21, 2018, Quebec City, Panel V: Indigenous Rights and Grassroots Activism, Mixed Parts II & III, 76:1-12.

<sup>132</sup> June 13, 2018, Toronto, Panel III: Media, Journalism & Film, Part II, Vol X, 32:21-33:5.

<sup>133</sup> June 12, 2018, Toronto, Panel Intersections between Racism and 2SLGBTQ Issues. Part III, Vol IX, 53: 7-14; 65:11-13.

<sup>134</sup> September 11, 2018, Panel I: Inquit Perspective Panel, Mixed Parts II & III, Vol II, 188:9-20.

<sup>135</sup> October 2, Winnipeg, Panel I: (continued), Mixed Part II & III, Vol XI, 34:1-13.

<sup>136</sup> September 18, 2018, Quebec City, Panel II: Criminal Justice Oversight and Alternative Programs, Mixed Part II & III, Vol VI, 202:12-23.

viewing a status card or by someone's appearance. Non-status Indigenous peoples are thus equally susceptible to it, and thus equally deserving of measures to combat it.

## 7. Value in Restoring Membership Determination

[102] The final theme we would like to draw out of the institutional and expert hearings builds upon some of the others, but is distinct and important. It is that restoring nations' ability to determine their own membership has wide-ranging benefits.

[103] Culture can be transformative in healing and rehabilitation processes as well. As noted above, Dr. Janet Smylie notes that the restoration of community means the restoring of relationships, with important health benefits. The Honourable Kim Beaudin discussed the value of community and culture in the gang member rehabilitation process. The program provides new kinship relations, and includes a "culture camp" allowing for reconnection with community and culture that is integral to the healing journey.<sup>137</sup> Dr. Amy Bombay testified about how factors related to cultural identity and community are "particularly protective in buffering against the negative effects of residential schools and other aspects of colonization." Further, high cultural pride leads to lower depressive symptoms. She stated:

The importance of people hearing about their family and community history and how that has often served as kind of a spark for healing and seeking out healing.<sup>138</sup>

[104] Membership determination is integral to self-determination, and to overcoming colonization. Professor Brenda Gunn notes that self-determination is the starting point for human rights.<sup>139</sup> Dalee Sambo Dorrough notes that self-determination is an essential foundational right.<sup>140</sup> Dr. Robyn Bourgeois, expert in philosophy and sociology, particularly Indigenous feminism, testified that the solution to the exploitation and prostitution of Indigenous women was in the recognition of the nationhood of Indigenous nations, honouring their right to self-determination,

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<sup>137</sup> September 18, 2018, Quebec City, Panel II: Criminal Justice Oversight and Alternative Programs, Mixed Part II & III, Vol VI, 90:21-95:2; 112:17-113:23.

<sup>138</sup> October 1, 2018, Winnipeg, Panel I: Cora Morgan, First Nations Children's Advocate Office, Mixed Part II & III, Vol X, 140:19-21. 147:4-6.

<sup>139</sup> May 16, 2018, Quebec City, Panel II: International Human Rights Law as a Foundation for the Inquiry's Work and Recommendations, Part III, Vol VI, 57:11-12.

<sup>140</sup> May 16, 2018, Quebec City, Panel II: International Human Rights Law as a Foundation for the Inquiry's Work and Recommendations, Part III, Vol VI, 259:15-23.



and undoing the *Indian Act*.<sup>141</sup> Her fellow panellist, Leanna Moon Perrin, despite having very different views about the role of colonization in prostitution and its proper regulation in Canada, agreed that asserting our natural laws within our communities and with our own values is the way forward.<sup>142</sup>

[105] Taken together, the themes that have emerged from the institutional and expert hearings at the Inquiry reinforce several key messages that CAP has long maintained. First, that we are trapped in colonial structures regarding Indigenous status, structures that were originally designed for our ultimate demise as distinct peoples. Second, that continuing to discriminate on the basis of status is detrimental, counterproductive to addressing the issue of missing and murdered Indigenous women and girls as well as being a violation of human rights.

[106] In essence, violence does not start or end with status or reserve boundaries, and neither can the solutions to it. We must look beyond status and reserve residency to find solutions, and be alive to the idea that those disconnected from community and culture may present specific vulnerabilities that must be addressed as a matter of legal and moral obligation.

## **VI. WHAT WE MUST DO IMMEDIATELY: STATE OBLIGATIONS AND THE RIGHTS OF INDIGENOUS WOMEN AND GIRLS**

### **A. Community-Building and Citizenship Determination Processes**

[107] As discussed at length above, self-determination is both an Indigenous right recognized by Canada, and a path to improving the healing and health of Indigenous communities in myriad ways. Community exclusion has negative health and social impacts, perpetuates colonialism and discrimination, and increases excluded people's vulnerability and marginalization.

[108] CAP thus recommends a proactive approach to a community building and a citizenship process: a gradual, consensual repeal of the *Indian Act* and alignment of governance around

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<sup>141</sup> October 17, 2018, St John's, Panel III, Mixed Parts II & III, Vol XVII, 36:8-39:1.

<sup>142</sup> October 17, 2018, St John's, Panel III, Mixed Parts II & III, Vol XVII, 84:10-12, 88:24-89:8.



Nations, however they now exist, which is alive to the concentrations of off-reserve Indigenous populations. This process must aim to restore community membership determination in recognition of pre-colonial traditions, their evolution, and human rights.

[109] Moreover, this process must be executed and implemented in a way that supports Indigenous women's full participation at all levels of decision-making, in recognition of the matrilineal nature of many pre-colonial societies and equality rights.

[110] Supporting and targeting the self-determination of Indigenous peoples will have the added advantage of empowering Indigenous leaders that fully and legitimately serve as the representatives of their people.

### **B. Substantive Equality in Resourcing Services**

[111] Expert and institutional testimony made abundantly clear that funding for services for Indigenous peoples is woefully inadequate. CAP thus echoes the calls by other parties with standing and experts at the hearing for substantive equality in funding for Indigenous services.

### **C. Inclusive Approach to Resourcing**

[112] Off-reserve and non-status Indigenous peoples continue to be marginalized even from this substandard funding, by being excluded from services and service structures altogether, as noted above. This is neither appropriate nor, in light of *Daniels*, legal. CAP has long called for government policies at both federal and provincial levels to address jurisdictional issues and resulting barriers to Indigenous women and girls' access to services and supports, including along status and residence lines.

[113] CAP thus calls for resourcing to not only be substantive but also inclusive. Substantively equal resourcing must address Métis and non-status Indian inequalities and needs aggravated because of this neglect. This includes a meaningful and diligent implementation of the *Daniels* decision, ending the structured exclusion of CAP's constituency that has divided families and communities.

## D. Area-Specific Recommendations

[114] The foregoing recommendations are foundational, and must permeate all recommendations coming from the Inquiry. Recommendations in each of the following, specific areas must be implemented in partnership with inclusive and representative Indigenous leadership, substantively equal and adequate resources, and inclusion of all Indigenous peoples, including off-reserve and non-status peoples, in systems and responses.

[115] CAP has long advocated for Indigenous controlled social, health, and education systems that are responsive to the needs of women and girls in urban settings and are able to better respond to the holistic needs of Indigenous women, girls, and their families.

### 1. Child welfare services

[116] All Indigenous children must have access to needed services regardless of residence and status. This is abundantly clear from the *Daniels* and the *Caring Society* cases.<sup>143</sup>

[117] CAP thus advocates for a reorientation of child family services around families in CAP's constituency, refocusing on community-based programs for new parents and families at risk and consulting Indigenous leadership on assessment tools and practices. In all programs, the benefits and effectiveness of cultural and community restoration must be considered and targeted.

### 2. Justice and corrections

[118] The Inquiry heard that *Gladue*<sup>144</sup> principles are not being universally or even commonly used in judicial proceedings, particularly where individuals do not “look” Indigenous.<sup>145</sup> This deeply troubles CAP as a form of extremely detrimental exclusion without justification. CAP recommends:

- The development of a national approach in the corrections system to *Gladue* report-writing as a tool of restorative justice and to reduce the over-incarceration of Indigenous peoples,

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<sup>143</sup> For a full list of these cases, see footnote 115.

<sup>144</sup> *R. v. Gladue*, 1999 1 SCR 688.

<sup>145</sup> September 19, 2018, Quebec City, Panel III: Custodial Issues for Women, Mixed Part II & III, Vol VII, 101:16-22 (Diane Sere spoke about the difficulty of accessing *Gladue* in courts and cultural programming in institutions because she did not look Indigenous); See also September 18, 2018, Panel II: Criminal Justice Oversight and Alternative Programs, Mixed Part II & III, Vol VI, 120:12-25 (Hon. Kim Beaudin's comments on *Gladue* use).



including women and girls. Decision-making within corrections institutions must be consistent with the spirit and intent of *Gladue*;

- Implementing traditional Indigenous restorative justice measures as a means of decreasing the high number of incarcerated Indigenous men and women;
- The end of the use of solitary confinement in corrections facilities and a national review of policies for inmates that are not maintained in the mainstream inmate population with particular attention to the over-representation of Indigenous offenders in these conditions;
- The development of training for employees at all levels of the justice and corrections systems in cultural-competence and *Gladue* principles; and
- The inclusion of non-status Indigenous and Métis individuals in policies and practices with respect to entitlement to *Gladue* and cultural accommodation practices within the prison system.

### **3. Police services**

[119] CAP calls for non-discriminatory and non-victim blaming approaches to police investigation and legal remedies for Indigenous women who experience violence and the families and friends of our sisters who have gone missing.

[120] In light of the continued focus of police training on reserve communities, CAP also calls for cultural competency and consultation training targeting off-reserve Indigenous communities, and more support for Indigenous-led resources for off-reserve community-based policing. Police must be aware of the acute vulnerabilities of the off-reserve Indigenous population, be resourced to address these vulnerabilities, and take into account some of the best practices heard by the Inquiry.

### **4. Health**

[121] In light of the ongoing focus of health programming on reserves and Indigenous peoples with status, federal and provincial health authorities must recognize their equal obligation to service delivery to off-reserve and non-status populations. Moreover, health authorities must recognize the effectiveness of cultural and community restoration in health programming for Indigenous people, regardless of status.

[122] Medical service providers must offer culturally competent, culturally safe and non-discriminatory services for Indigenous clients regardless of status and medical personnel must



take mandatory training on delivery of culturally appropriate programs and services and non-discrimination.

[123] Finally, CAP calls for greater representation in research for all urban Indigenous women's health concerns at every stage of their life. CAP is calling for more research by, for, and with urban Indigenous women and girls, particularly in research that is community led, reflects women's voices, and examines the specific needs of urban Indigenous women.

## **5. Housing**

[124] CAP calls for a specifically-funded strategy, led by off-reserve Indigenous organizations in all present and future federal housing programs specifically targeting Indigenous people living off-reserve, in recognition of their acute vulnerabilities. The strategy must be responsive to patterns of homelessness, needs for affordable housing, emergency housing and shelters, and student housing in both urban and rural settings.

[125] CAP further calls for an assessment of the housing needs of Indigenous women across their life span toward a comprehensive plan to end homelessness. This assessment and the plan itself must involve Indigenous women, regardless of status, and aim to supply culturally safe housing that is to the greatest extent possible designed by and for Indigenous women.

## **6. Leadership Development**

[126] CAP calls for building the capacity of Indigenous women and girls to be empowered leaders and agents of change capable of strengthening and contributing to the development of their communities.

[127] CAP calls for building Indigenous-based mentorship programs to help future generations reflect upon current issues faced by Indigenous women and girls and develop their analysis and cultivate their leadership capacities to carry on the work.

[128] CAP calls for more leadership programs to enable Indigenous women to strengthen their leadership capacities in order to contribute to change in their communities within a culturally safe

environment of sharing between women.

## VII. CONCLUSION

[116] CAP maintains that the National Inquiry's recommendations and findings are not optional. The government must be compelled to action by the legal imperatives arising from human rights obligations, the *Canadian Charter of Rights and Freedoms*, its duty of diligence to implement constitutional promises, and the overarching precept of the honour of the Crown. All Indigenous Peoples, including off-reserve and non-status peoples and their leadership, must be full partners in the implementation of responses to the systemic issues behind the Canadian tragedy of Missing and Murdered Indigenous Women and Girls.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "R. Bertrand", written over a horizontal line.

Robert Bertrand, National Chief

The Congress of Aboriginal Peoples