



The Colonial Legacy: The Legal Oppression of Indigenous Women and Girls in Canada

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Abstract:

The problem of the missing and murdered Indigenous women and girls is one of the largest social problems plaguing Canadian society. These social problems have severely affected the women and girls of the Indigenous populations in Canada marginalizing many of them to the periphery of present day society. Unfortunately, the Canadian government under the conservative leadership, refused to recognize the trend as a social problem of the nation.¹ After much condemnation from the national population, and the international community, current Prime Minister Justin Trudeau officially launched the National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada. Based on the historical and legal proceedings, to what extent is the Canadian government at fault for the systematic oppression and discrimination towards Indigenous women? This paper will analyze in what ways the Indian Act has allowed for the systematic oppression and discrimination towards Indigenous women, in what ways is human trafficking a result of the socio-economic dynamic created by the Indian Act, and in what ways has the prejudice against Indigenous women continued into discrimination in front of the law. This paper will be looking at the problems, and how the legal measures in place are applied.

Résumé:

Le problème des femmes et des filles autochtones disparues ou assassinées est un des problèmes sociaux les plus importants affligeant la société canadienne. Ces problèmes sociaux ont gravement touché les femmes et les filles des populations autochtones au Canada, marginalisant beaucoup aux périphéries de la société d'aujourd'hui. Malheureusement, le gouvernement canadien sous le leadership conservateur, a refusé de reconnaître cette tendance en tant qu'un problème social de la nation. Après beaucoup de condamnation de la population nationale et la communauté internationale, le Premier Ministre actuel Justin Trudeau a officiellement lancé une Enquête nationale sur les femmes et les filles autochtones disparues et assassinées. Reposant sur les procédures historiques et judiciaires, dans quelle mesure le gouvernement canadien est-il responsable pour l'oppression et discrimination systémique envers les femmes autochtones ? Cet article analysera comment la Loi sur les Indiens a permis l'oppression et la discrimination systémique envers les femmes autochtones, comment le trafic des êtres humains est une conséquence de la dynamique socio-économique créée par la Loi sur les Indiens et comment le préjugé contre les femmes autochtones continue à discriminer devant le droit. Cet article regardera les problèmes et comment les mesures légales en place sont appliquées.

¹ "Tories in Review: Aboriginal Rights," *THIS Magazine*, October 2, 2015, <https://this.org/2015/10/02/tories-in-review-aboriginal-rights/> (accessed April 19, 2016).

Introduction

Centuries of colonial history and its legacy has shaped Canada into the nation that it is in 2016. Canada is often stereotyped as the polite and friendly country geographically situated to the north of the United States, which is now lead by a forward thinking Prime Minister. What much of the world, and even much of the Canadian population is unaware of is that Canada has a tainted history of violence and racism. Like other colonized nations, Canada was built on the destruction of Indigenous communities and the exploitation of resources for the economic benefit of the French and British empires. Unfortunately, this trend of destruction towards Indigenous communities has perpetuated social problems within the remaining Indigenous populations in Canada that continue into 2016.² These social problems have severely affected the women and girls of the Indigenous populations in Canada marginalizing many of them to the periphery of present day society. The Native Women's Association of Canada was able to document 582 cases of missing or murdered Indigenous women and girls, mostly from the last two decades.³

The problem of the missing and murdered Indigenous women and girls is one of the largest social problems plaguing Canadian society. Unfortunately, the Canadian government, under Prime Minister Stephen Harper and his conservative leadership, refused to recognize the trend as a social problem of the nation.⁴ After much condemnation from the national population, and the international community, current Prime Minister Justin Trudeau officially launched the National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada.

² Mark Kennedy, "Colonial Legacy Haunts Canada, Paul Martin Says," *Canada.com*, November 30, 2012, <http://o.canada.com/news/national/colonial-legacy-haunts-canada-paul-martin-says> (accessed April 18, 2016).

³ "Violence Against Indigenous Women And Girls In Canada: A Summary of Amnesty International's Concerns And Call To Action." *Amnesty International*. 2014, https://www.amnesty.ca/sites/amnesty/files/iwfa_submission_amnesty_international_february_2014_-_final.pdf (accessed April 19, 2016).

⁴ "Tories in Review: Aboriginal Rights," *THIS Magazine*, October 2, 2015, <https://this.org/2015/10/02/tories-in-review-aboriginal-rights/> (accessed April 19, 2016).

Based on the historical and legal proceedings, to what extent is the Canadian government at fault for the systematic oppression and discrimination towards Indigenous women? This paper will start by analyzing the ways in which the Indian Act has allowed for the systematic oppression and discrimination towards Indigenous women. The second section examines in what ways is human trafficking a result of the socio-economic dynamic created by the Indian Act. The third section looks at the ways that the prejudice against Indigenous women has continued into discrimination in front of the law. This paper will look at the problems, and at how the legal measures in place are applied.

Canada's Legal Structures

The common thought that Canada is a state that upholds human rights is not false. Canada has signed and ratified both national and international conventions for the protection of human rights. Domestically, Canada has the Charter of Rights and Freedoms which is contained within the Constitution Act, 1982. Internationally, Canada has signed and ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, Convention on the Rights of the Child (CRC) and its Optional Protocols. Additionally, Canada ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime on May 13, 2002. With this many conventions in place, it seems that Canada is very committed to preserving human rights. By having rules that go to a great extent to protect individuals, it is curious to see that systematic oppression and discrimination towards indigenous women continues to occur.

The Indian Act

To understand the foundations of this problem, the implications of the Indian Act of 1876 should be mentioned. Enacted in 1876, the Indian Act grants control to the Canadian Government over aspects of aboriginal life, including Indian Status, land, resources, wills, education, and band administration.⁵ Initially, the Indian Act was created to assimilate First Nations peoples into the societal norms and mores of the French and English colonizers. For example, Indian Status would be revoked from people who earned university degrees, or women who married non-status men.⁶ The Indian Act also allowed for residential schools to be run between 1879 and 1996. The residential schools were designed to erase Indigenous languages and cultures.⁷

This Act gave legitimacy to systematic ostracization of Indigenous peoples under the claim of granting land rights, and containing them onto reserve lands to assimilate the natives into the Christian ways.⁸ The legal status they were granted was similar to minors, which meant that those who qualified as Indians under the act were deprived of legal status of full citizenship.⁹ This legal step was in line with the primary aim of the act, to weaken the family structures. Leaving the reserve, and assimilating in to the British society would have been the only way to be granted full franchise. In essence, this Act gave the Indigenous Peoples of Canada two choices, be forcibly integrated into

⁵ Isabelle Montpetit, "Background: The Indian Act," *CBC News*, May 14, 2011, <http://www.cbc.ca/news/canada/background-the-indian-act-1.1056988> (accessed April 18, 2016).

⁶ Ibid.

⁷ Ibid.

⁸ Charlotte Cote, "Historical Foundations of Indian Sovereignty in Canada and the United States: A Brief Overview," *American Review of Canadian Studies* 31, no. 1-2 (2001).

⁹ E. Brian. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986).

the settler establishment,¹⁰ or remain as distinct and recognizable ethnic groups, and disappear.¹¹

This law has created a system of bands, is defined in the Act as “a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act.”¹² This grants the members of the band to exercise their powers in the way in which a municipal government would govern, however, the Minister of Indian Affairs still has absolute control over the group.¹³ The Minister has the final decision on the composition of the band council, “in the interest of the good government of the band.”¹⁴ Furthermore, there is a direct socio-economic effect that emerges from this law, seeing as the Indian Act was rooted in systematic oppression, aimed at suppressing the culture and livelihood of the Native peoples, apartheid like situations are ever present. There are unemployment rates of 25 percent, and the prohibition of borrowing loans by pledging land, which deprives them of significant development.¹⁵ With these measures in place, the culture and the family structure of Indigenous groups were put into jeopardy. People without their traditions, customs, beliefs, stories, literacy, and art are a broken society. Pride is difficult to foster and anger resides in the hearts of many. Survival as a respected group is made impossible.

¹⁰ Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990).

¹¹ Roger L. Nichols, *Indians in the United States and Canada: A Comparative History* (Lincoln: University of Nebraska Press, 1998).

¹² *Indian Act, R.S.C., 1985, c. I-5*. <http://laws-lois.justice.gc.ca/PDF/I-5.pdf>

¹³ Cote, “Historical Foundations of Indian Sovereignty in Canada and the United States: A Brief Overview.”

¹⁴ Helena Catt and Michael Murphy, *Sub-state Nationalism: A Comparative Analysis of Institutional Design* (London: Routledge, 2002).

¹⁵ Joan Kendall, "Circles of Disadvantage: Aboriginal Poverty and Underdevelopment in Canada," *American Review of Canadian Studies* 21, no. 1-2 (2001).

In 1951 and 1985, major amendments were made to the Indian Act. In 1951, the banning of traditional dances and ceremonies, as well as the pursuit of claims against the government was removed.¹⁶ Bill C-31, passed in 1985, created due to the Sandra Lovelace v. Canada case, was much more progressive. For over 100 years, Indian women who married a non-status man would lose their status, and her children would also be denied Indian status.¹⁷ This rule had to be changed so that the Indian Act was not violating Section 15 of the Canadian Charter of Rights and Freedoms, which was implemented into the Constitution through an amendment in 1982, under the Liberal government of Prime Minister Pierre Elliott Trudeau.¹⁸ Section 15 of the Canadian Charter of Rights and Freedoms states that “[e]very 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.”¹⁹ While this amendment was supposed to remove the discrimination of women for passing on Indian status, the discrimination to a less severe extent still remains. Status Indian women who lost their status by marrying a non-status man before 1985 can only pass on Indian status to their children, but not to their grandchildren, whereas men who marry a non-status woman can pass on the Indian status to their grandchildren.²⁰ Further, the bureaucratic process through which a woman would have to execute in order for her status to be reinstated is extremely difficult. One of these hurdles is that the documentation system of the Department of Indian and Northern Affairs is sufficiently inadequate to process

¹⁶ Bob Joseph, “21 Things You May Not Know about the Indian Act,” *CBC News*, April 14, 2016, <http://www.cbc.ca/beta/news/aboriginal/21-things-you-may-not-know-about-the-indian-act-1.3533613> (accessed April 21, 2016).

¹⁷ Bob Joseph, “Indian Act and Women’s Status Discrimination via Bill C31 and Bill C3,” *Indigenous Corporate Training Inc.*, July 9, 2012, <http://www.ictinc.ca/indian-act-and-womens-status-discrimination-via-bill-c-31-bill-c-3> (accessed April 21, 2016).

¹⁸ *Ibid.*

¹⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 . <http://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38>

²⁰ Bob Joseph, “Indian Act and Women’s Status Discrimination via Bill C31 and Bill C3”

the applications. The financial requirements for women to proceed with this process also prohibits many women from going through with the application.²¹ In 2011, Bill C-3 was adopted as another solution to the continued discrimination. Unfortunately, this Bill only continues the pattern of discrimination, as it states that “Grandchildren born before September 4, 1951 who trace their Aboriginal heritage through their maternal parentage are still denied status while those who trace their heritage through their paternal counterparts are not.”²²

Indian Status Case Study

The continued discrimination against women in regards to the passing of status can be seen in the case of *Gehl v Attorney-General of Canada*, and in *Lovelace v Canada*. The *Gehl v Attorney-General of Canada* was a domestic case. This was the second time Gehl protested her application for Indian Status. The Superior Court of Justice of Ontario ruled against granting Gehl Indian Status because the identity of her paternal grandfather, the side of the family from which she would be able to claim Indian Status was unknown. Gehl argued that her inability to register for Indian status is illegal discrimination because “the post-1985 registration regime is actually less generous to illegitimate offspring of status Indian mothers. As referred to above, under the pre-1985 scheme an illegitimate child of an Indian woman was considered an Indian unless the Registrar was satisfied that the father was not an Indian.”²³ The Crown’s argument can be summarized by Justice J. Stewart as “given the benefits received by status Indians, a positive presumption (that an unknown parent has status) may provide an incentive to individuals not to report the name of non-status father.”²⁴

²¹ Ibid.

²² Ibid.

²³ *Gehl v Attorney-General of Canada*, [2015] O.N.S.C. 3481

²⁴ Jody Porter, “Indian Act Does Not Violate Ontario Woman's Charter Rights, Court Rules,” *CBC News*, June 09, 2015, <http://www.cbc.ca/news/canada/thunder-bay/indian-act-does-not-violate-ontario-woman-s-charter-rights-court-rules-1.3103927> (accessed April 19, 2016).

The *Lovelace v Canada* was challenging the law that stripped Indian women of Indian status after marriage to a non-Indian man. This case challenged Article 3 of the International Convention on Civil and Political Rights²⁵ which states, “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant” and Article 27, which states “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁶

Ms. Lovelace was married and therefore her status was revoked before the ICCPR entered into force for Canada. The findings of the Human Rights Committee showed that the effects of losing cultural benefits from living on the reserve continued after the treaty entered into force.²⁷ The findings of this case resulted in the amendment of the Indian Act in 1985.

Trafficking of Indigenous Women and Girls

With this fundamental knowledge of the implications that the Indian Act has had on the Native populations of Canada over the past 140 years, the case of human trafficking of Indigenous women and girls can be considered. Indigenous women and non-Indigenous scholars alike recognize that Indigenous females in Canada are highly vulnerable to being trafficked due to a multitude of socio-economic issues such as racial discrimination, extreme poverty, unemployment, homelessness, mental health issues,

²⁵ UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, New York, 19 December 1966, *United Nations Treaty Series*, vol. 999, No. 14688, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

²⁶ *Ibid.*

²⁷ *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

suicide risks, substance abuse, difficult familial or institutional situations, and high rates of both physical and sexual abuse.²⁸ The colonial racist and sexist stereotypes of Indigenous women being dirty, promiscuous, and deviant in their femininity has remained in present day Canadian society, and these perceptions have made those who are the perpetrators of human trafficking feel that these women and girls are there to be taken advantage of.²⁹ Furthermore, stereotypes that devalue the life of an Indigenous person, and especially Indigenous women extend this phenomenon.

The residential school system also contributed to the mass sexual abuse of Indigenous children. Residential schools play another role in this trafficking phenomenon because the isolation of children from role models, and the removal of their native language and culture.³⁰ The continuous forced separation of families has perpetuated the trend of a lost identity. In the narrative of Indigenous women, colonialism is a fundamental factor which has influenced Indigenous female vulnerability to human trafficking. Statistically speaking, Indigenous women and girls are overrepresented among sexually exploited and trafficked individuals.³¹ Additionally, sexual violence in Indigenous communities has become so normalized that sexual exploitation is considered part of “normal life.” Studies suggest that between 25-50 percent of Indigenous people have experienced sexual violence in their youth.³² Poverty and homelessness is another large factor in being vulnerable to trafficking. The prospect of a better life, having emotional support, and a bed to sleep in are incentives that many young Indigenous girls would not pass up. The perpetrators of trafficking

²⁸ Robyn Bourgeois, “Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada,” *UCLA Law Review*, no. 62 (2015).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ “Sex Trafficking of Indigenous Women in Ontario.” *Native Women’s Association of Canada*. (2016): 1-21.

³² *Ibid.*

give earning quotas to girls, and often, girls bring their friend along, whereby recruiting them, to protect themselves.³³

There are multiple definitions of trafficking depending on the governing document that is referred to. The Palermo Protocol details the definition of human trafficking in Article 3(a) stating that it is:

the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.³⁴

This definition of trafficking is applicable to the diverse situations occurring around the world, and often prostitution and human trafficking are directly linked.³⁵ It is important to note however, that prostitution and human trafficking are not mutually exclusive. The over-representation of Indigenous women and girls within sex trafficking rings in Canada stems from the colonial violence, ongoing trauma, poverty, and scarcity of resources and information. It is estimated that Indigenous women make up 70 percent of visible, street based, survival sex workers³⁶. In large urban settings such as Vancouver, numbers reach nearly 90 percent.³⁷ Further, the median age of entry into prostitution is fourteen. Fourteen years old is far below the age of majority and the age of consent.³⁸ All underage girls who are prostituted are victims of sexual exploitation, given their inability to consent. Canadian research found that up to 95 percent of women involved in sex work reported that they are involved in prostitution involuntarily.³⁹

³³ Tavia Grant, "Missing And Murdered: The Trafficked," *The Globe and Mail*, February 10, 2016, <http://www.theglobeandmail.com/news/national/the-trafficked-sexual-exploitation-is-costing-canadian-women-their-lives/article28700849/> (accessed April 15, 2016).

³⁴ Ibid.

³⁵ "Sex Trafficking of Indigenous Women in Ontario." *Native Women's Association of Canada*.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

There is a large culture of victim blaming in society, and in a similar way in which Indigenous women are blamed for high rates of violence and increased likelihood of being murdered by their partners, trafficked Indigenous women are often blamed for their own sexual exploitation.⁴⁰ This victim blaming attitude stretched all the way to the sphere of the federal government, who instead of addressing the systemic inequality and violence occurring within Indigenous communities, placed the focus on the behaviour of the victims, insinuating that their behaviour was the justification of exploitation.⁴¹

Canada has ratified twelve international human rights treaties, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, Convention on the Rights of the Child and its Optional Protocols. Additionally, Canada ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime in 2003, referred to as the Palermo Protocol. Moreover, the Canadian Charter of Rights and Freedoms has been enshrined in the Canadian Constitution since 1982, in addition to articles in the Canadian Criminal Code to protect against human trafficking. Together the ratification of these human rights treaties should be able to prevent the occurrence of human trafficking of Indigenous women and girls. Further, in Article 6 of the Palermo Protocol, the ways in which a state should proceed in order to assist and protect victims of trafficking in persons are stated. It outlines things such as the access to domestic legal or administrative systems, the implementation of measures that will contribute to the physical, psychological, and social recovery to victims of trafficking.⁴²

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized*

The Canadian Charter of Rights and Freedoms does not include many sections that would be applicable to the protection of women and girls in human trafficking situations, but Section 7 states 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” and Section 15 states that “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.”⁴³ In the Canadian Criminal Code, Articles 279.01, 279.011, 279.02, and 279.04, outline the criminality of trafficking of persons, trafficking of a person under the age of eighteen years, trafficking for material benefit, and exploitation.

However, Canada has ratified a number of international treaties that are more applicable to their role in the protection of Indigenous women and girls from falling into human trafficking rings. The Convention on the Elimination of All Forms of Discrimination against Women, to start, outlines the responsibilities of the states who ratify it. In Article 6, the Convention stipulates that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”⁴⁴ In the Convention on the Rights of the Child, Article 33 outlines that:

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the

Crime, 15 November 2000, *United Nations Treaty Series*, vol. 2237, No. 39574, <http://www.unhcr.org/protection/migration/4d52493b6/protocol-prevent-suppress-punish-trafficking-persons-especially-women-children.html>

⁴³ *Constitution Act, 1982*.

⁴⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, No. 20378, <https://treaties.un.org/doc/Publication/UNTS/Volume%201249/volume-1249-I-20378-English.pdf>.

relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.⁴⁵

Article 34 outlines that states parties shall take all appropriate measures to protect children from all forms of sexual exploitation and sexual abuse.⁴⁶ These measures must prevent children from the inducement or coercion to engage in any unlawful sexual activity, the exploitive use in prostitution, or pornographic performances and practices. Article 35 requires that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”⁴⁷ The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, also ratified by Canada, furthers the commitment to the protection of children from dangerous sexual circumstances.⁴⁸

In 2015, the CEDAW Committee released a report of the inquiry concerning Canada under Article 8 of the Optional Protocol to the CEDAW. Article 8 states that “if the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.”⁴⁹ In accordance with this article, the Committee must conduct a confidential and the cooperation of the State Party has to be present at all stages of the proceedings. The Committee has six months to report the findings of the inquiry to the State in question.⁵⁰ The goal of the visit by the

⁴⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, No. 27531, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

⁴⁹ UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, United Nations, Treaty Series, vol. 2131, No. 20378, <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>.

⁵⁰ Ibid.

CEDAW Committee was to collect further information on the fulfilment of the responsibilities of the State party

(a) To prevent violence against aboriginal women, protect them and investigate the cases of missing and murdered aboriginal women; (b) To prosecute and punish the perpetrators of violence against aboriginal women and the disappearances and murders of Aboriginal women; (c) To provide redress to aboriginal women who are victims of violence and to the families of missing and murdered aboriginal women.⁵¹

This report found that the Canadian government's follow up of the recommendations to address the problem has been limited as this was not the first report which recommended Canada to address the issue. The CEDAW Committee has stressed that the situation of missing and murdered Indigenous women and girls Canada must be assessed through cases from both prior and following the ratification of the Optional Protocol of CEDAW in 2003 to assess whether there are systematic violations of the Convention.

Through the lack of action on the part of the Canadian Federal Government, it can be seen that many human rights are being violated, especially the right to life, liberty, and security. When Indigenous women and girls are lured into trafficking rings, it is caused by multiple factors that have created a snowball effect so terrible, that anything is better than the life they know. The conditions on reserves are dire, as explained in the Bourgeois article; there are high rates of poverty, and unemployment, and low rates of education.⁵² The conditions on the reserves violate Article 28 of the Convention on the Rights of a Child (CRC) regarding the right to education.⁵³ The lack of action regarding the protection of Indigenous women and girls is violating Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which states that

⁵¹ UN General Assembly, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/CAN/1, 2015, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf.

⁵² Robyn Bourgeois, "Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada".

⁵³ UN General Assembly, *Convention on the Rights of the Child*.

“Everyone has the right to liberty and security of a person.”⁵⁴ Article 19 of the Convention on the Rights of a Child, which asserts

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child⁵⁵

as well as Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

Discrimination Before the Law

The discrimination of Indigenous women continues before the law and justice system. The Indigenous population is disproportionately represented in the prison system. Indigenous women make up 36 percent of female population in the Canadian prison system, yet only 4 percent of the female population of Canada.⁵⁶ There are reports by the Human Rights Watch documenting Royal Canadian Mounted Police officers violating Indigenous women and girls when altercations occur. Such violations include “young girls pepper-sprayed and tasered; a 12-year-old girl attacked by a police dog; a 17-year-old punched repeatedly by an officer who had been called to help her; women strip-searched by male officers; and women injured due to excessive force used during arrest.”⁵⁷

⁵⁴ UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 19 December 1966, United Nations Treaty Series, vol. 999, No. 14688. <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

⁵⁵ UN General Assembly, *Convention on the Rights of the Child*.

⁵⁶ “Violence Against Indigenous Women And Girls In Canada: A Summary of Amnesty International’s Concerns And Call To Action.” *Amnesty International*.

⁵⁷ “Those Who Take Us Away,” Human Rights Watch, February 13, 2013, <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-Indigenous-women> (accessed April 20, 2016).

The Cindy Gladue cases can illustrate further how Indigenous women are disregarded before the law; and how often the perpetrators of the crime are not held accountable for their actions. By looking at the cases of *R. v. Barton*, 2011,⁵⁸ *R v Barton*, 2013,⁵⁹ *R v Barton*, 2015,⁶⁰ and *R. v. Barton*, 2016,⁶¹ it can be argued that even after death, the rights of Indigenous women who have been murdered are not respected and the violation of the right to a fair trial occurred as exemplified by the case of Cindy Gladue, an Indigenous woman and sex worker who died at age 36. According to the autopsy, “she died as a result of blood loss due to a perforating sharp injury to the vagina – likely a stab wound caused by a knife.”⁶² Mr. Bradley David Barton hired the services of Ms. Gladue for two nights and they stayed at a hotel, as Mr. Barton was travelling. Barton testified to inserting his fist into Ms. Gladue on both nights. Barton claimed that the sex was consensual. On the second night, Ms. Gladue went to the bathroom, and never returned. The next morning, he found her body in the bathtub and called 911. During the trial, the Crown called for the evidence, Ms. Gladue’s vagina, to be presented to the jury, as the autopsy photos were not deemed clear enough.⁶³ This request goes against most Indigenous concepts of respect and honour of the deceased.⁶⁴ In the end, the jury decided to acquit Mr. Barton of first-degree murder.

Under Article 14 of the International Covenant on Civil and Political Rights, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁶⁵ It can be argued that Ms. Cindy Gladue was not

⁵⁸ *R. v. Barton*, 2011 ABQB 492

⁵⁹ *R v Barton*, 2013 ABQB 673

⁶⁰ *R v Barton*, 2015 ABQB 159

⁶¹ *R. v. Barton*, 2016 ABQA 68

⁶² *R v. Barton*, 2011 ABQB 492

⁶³ Chris Purdy, “Prosecutors to Appeal Acquittal in Cindy Gladue Murder Case,” *The Globe and Mail*, April 2, 2015, <http://www.theglobeandmail.com/news/alberta/alberta-prosecutors-to-appeal-acquittal-in-cindy-gladue-murder-case/article23763166/> (accessed April 19, 2016).

⁶⁴ Leena Minifie, “Cindy Gladue Case: A Reminder the Justice System Is Broken for Aboriginal Women | Ricochet,” *Ricochet*, April 2, 2015, <https://ricochet.media/en/381/cindy-gladue-case-a-reminder-the-justice-system-is-broken-for-aboriginal-women> (accessed April 18, 2016).

⁶⁵ UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*.

given a fair trial. The jury was composed of nine men and two women, none of whom were Native, which could have influenced their decision in acquitting Mr. Barton. First Nations lawyer, Will Willier stated that “Juries are supposed to be a cross-section of your peers from society, so what has transpired here is that we have nine men, two women, one Asian person and one black person, but no aboriginal people so they don't really understand or empathize or identify with Cindy Gladue. Had they identified or understood her better, the verdict may have been different.”⁶⁶ Further, the fact that the Crown asked for Ms. Gladue's flesh be presented to the jury, seems like an unnecessary violation of privacy. The defendant's lawyer, Dino Bottos stated, “It's believed to be the first time human tissue has been presented as evidence in a Canadian trial.”⁶⁷ He opposed the use of the body part, arguing that it was too disturbing and the jury would be strongly affected by being presented with such evidence.⁶⁸

There is a long standing trend of racism towards Indigenous people, as well as a very high chance that this internalized racism influenced the verdict. It is difficult to understand how the court came to the decision because Alberta has many legal precedents concerning sexual assault and statutory rape.⁶⁹ The racist tendencies seem to limit these legal precedents in such a way which does not extend to Indigenous women. Further, statistics show that Alberta courts have a history of ruling in favour of white men over underage or underprivileged women.⁷⁰ Moreover, Gladue had a double

⁶⁶ Kim Wheeler, “Cindy Gladue Case: Not Guilty Verdict Prompts Rallies Calling for Appeal” *CBC News*, March 31, 2015, <http://www.cbc.ca/news/aboriginal/cindy-gladue-case-not-guilty-verdict-prompts-rallies-calling-for-appeal-1.3016603> (accessed April 21, 2016).

⁶⁷ Chris Purdy, “Prosecutors to Appeal Acquittal in Cindy Gladue Murder Case.” *The Globe and Mail*, April 2, 2015, <http://www.theglobeandmail.com/news/alberta/alberta-prosecutors-to-appeal-acquittal-in-cindy-gladue-murder-case/article23763166/>

⁶⁸ *Ibid.*

⁶⁹ Leena Minifie, “Cindy Gladue Case: A Reminder the Justice System Is Broken for Aboriginal Women | Ricochet.”

⁷⁰ *Ibid.*

dehumanization factor against her, being involved in the sex trade, and being an Indigenous woman.⁷¹

Conclusion

The colonial legacy has been profoundly detrimental to the Indigenous populations of Canada. These great nations and societies with complex and proud social systems have been destroyed in the quest for control. Through systematically oppressive laws dictated by the Indian Act, there has been a negative spiral within Native communities due to the restriction of access to resources, the negative effect of residential schools, and the countless limitations that have been imposed upon communities. While Canada has signed and ratified multiple international conventions for human rights, as well as having many basic human rights enshrined in the Canadian Charter of Rights and Freedoms within the Canadian Constitution, the federal government is not delivering the protection as dictated in the documents to indigenous women and girls. The problem of the human trafficking of indigenous women and girls seems to be increasing as resources on reserves diminish, and the general quality of life on reserves remains abysmal. The Canadian civil society is mobilizing to demand answers about the devastating number of indigenous women and girls who are missing, or have been murdered. Hundreds of years of damage cannot be readily repaired. The psyche of the Indigenous population has been fractured. The racist behaviour from the colonizers has remained deeply embedded in present day society. This racism is reflected in the attitudes towards Indigenous people in the justice systems. Education to curb the trend of racism is absolutely necessary to begin to turn the citizens to see the injustices that have been perpetrated onto the Indigenous people. There is an enormous amount of work that needs to be done with the new Liberal government, the

⁷¹ Ibid.

commencement of the Truth and Reconciliation talks, and the adoption of the United Nations Declaration on Rights of Indigenous Peoples. The acknowledgement of the problem has occurred, and it is now time for the governments to take action on their promises of ameliorating the conditions under which Canadian Indigenous people live. This can happen through more equitable legislation, the empowerment of indigenous people, dispelling the negative myths around the cultures and personalities of indigenous peoples, and the launch of more dedicated investigations into injustices against indigenous women. If a great and sustained effort is put forth it is hopeful that our Indigenous people, and especially the girls and women may begin to seek a bright, fair and respectful future.

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