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"HONOURING THE VICTIMS,
GIVING A VOICE TO SURVIVORS"

BRIEF SUBMITTED TO

NATIONAL INQUIRY INTO MISSING AND
MURDERED INDIGENOUS WOMEN AND GIRLS

Chaired by Chief Commissioner Marion Buller and
Commissioners Michèle Audette, Brian Eyolfson and Qajaq Robinson

BY

THE ASSEMBLY OF FIRST NATIONS QUÉBEC-LABRADOR (AFNQL)

ON

14 DECEMBER 2018

IN

WENDAKE, QUÉBEC

Writing:

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Note to the reader:

Please note that the masculine gender is used as a generic for the sole purpose of brevity.

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"The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."

John A. Macdonald, 1885

"It is the opinion of the writer that… the Government will in time reach the end of its responsibility as the Indians progress into civilization and finally disappear as a separate and distinct people, not by race extinction but by gradual assimilation with their fellow-citizens."

Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, 1931

"Education is the most powerful weapon which you can use to change the world."

Nelson Mandela

INTRODUCTION

Acknowledgements

As it did before the *Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec* (hereinafter "Viens Commission"), the AFNLQ would like to begin this brief by recognizing and commending the courage of the victims and survivors who shared their stories with the *National Inquiry into Missing and Murdered Indigenous Women and Girls* (hereinafter "National Inquiry"). The AFNQL is deeply touched by the testimonies shared by the survivors, victims, and their loved ones. The testimonies and stories, too often horrific and disturbing, shared before the two commissions of inquiry, confirm the magnitude of the problem and the challenges to be overcome in order to improve and rectify the situation in the most respectful manner for the first people, the First Nations.

The AFNQL would also like to thank all those who made the Commission's work possible. This includes the Commissioner, Chief Commissioner, the prosecutors, the various teams that comprise the National Inquiry, the witnesses, social and emotional interveners, and all those who, publicly or in the background, made possible the listening, openness, and dialogue that the National Inquiry's work has generated. The AFNQL would further like to acknowledge the professionalism and courtesy of the members of the National Inquiry team with whom it interacted. The impressive quantity of evidence produced, and the quality of that evidence, will certainly enable the Commissioners to submit numerous appropriate, high-quality recommendations.

The evidence leaves no doubt about the prevalence and persistence of discrimination and racism against First Nations throughout Canada. The problem is notorious, and the Crown attempts, too slowly, through often symbolic gestures, to apologize for the darkest episodes of genocide and forced assimilation.

The creation of this National Inquiry is the direct result of the overwhelming recognition of the legacy of ongoing action or inaction by the Crown for so many years, too many years. It is part of a movement to recognize and explore the most visible manifestations of the Crown's belligerent policies toward the members of Canada's First Nations, particularly toward its women and girls. Although the National Inquiry's work demonstrates a desire to move the relationship between the Crown and First Nations in the right direction, the evidence also reveals that it will take much more than recommendations to bridge the chasm left by genocide, the darkest side of Canada's history.

The evidence reveals the extent to which First Nations women and girls suffered, and continue to suffer, from juxtaposed governmental policies throughout history. The goal of these policies is perfectly illustrated by the words of former Prime Minister John A. Macdonald, who mentioned the importance of "taking the Indian out of the child" with the primary aim of solving "the Indian problem". We have long described the situation in terms of assimilation, but we now know that it is much more appropriate to talk about genocide. These women and girls are the survivors and victims of a racist and sexist system that continues to this day, and can only be stopped by the strongest, most worthy and just actions.

As it underscored in its closing arguments last November 26 in Calgary, the AFNQL invited the Commissioners to be bold, courageous and creative in developing the National Inquiry's final report and the recommendations it will necessarily contain. Some of the measures to help eradicate the systemic causes of violence against First Nations women, and to ensure their safety, may not be popular. Nevertheless, we must hope that the National Inquiry, through its report, will succeed in instilling some part of its courage and boldness into the Crown and its representatives, so that they can implement the essential reforms for much-needed and urgent change.

Overview

The AFNQL is in agreement with the National Inquiry's frame of reference; specifically, its success or failure will be measurable by the resolution of the following issues:

1. **Redress the wrongs suffered by the victims and survivors, whose courage and determination the AFNQL wishes to acknowledge and to whom it offers its fullest cooperation; and immediately adopt tangible measures to reduce the risks to which these victims and survivors are exposed; and**

2. **Recognize, denounce, and fight the systemic racism prevalent in Crown institutions and in the public**

The AFNQL will strongly support the implementation of any finding, thought, recommendation or course of action from the National Inquiry that would meaningfully advance the positive resolution of these issues.

In this regard, the AFNQL wants to express its fear that the National Inquiry's conclusions may ultimately only add to the pile of already-numerous reports, on one or another troubling aspect of the difficult relationship between First Nations and the Crown, the vast majority of whose recommendations still await implementation.

In the hope that the National Inquiry's final report can avoid the fate suffered by its predecessors, the AFNQL aims to formulate practical recommendations to the National Inquiry, centred on the three (3) areas described below.

1. The observation that, without political will and a change of attitude, the National Inquiry's work will be in vain.
2. The necessity of implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and of measures that can be taken while awaiting its implementation.
3. The role that the National Inquiry could play in facilitating victims' and survivors' access to the individual complaint procedure before the Committee charged with implementing the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

The AFNQL believes that Canada's inaction on the two (2) issues raised above stems from a lack of political will and commitment. To compensate for this lack, the AFNQL proposes that the National Inquiry turn to international law to amplify the voices of First Nations women and girls to the point that Canada can no longer ignore them.

PART I: THE PAST

The history of the genocide perpetrated by the Crown against First Nations must be acknowledged, documented, researched, explained and shared. Only at this price and on this condition can the relationship between the Crown and First Nations move forward and evolve positively on the path to reconciliation. In this regard, the AFNQL notes that in 2014, the Canadian government opened the *Canadian Museum for Human Rights*. But apart from a few exhibits generated as part of the *Truth and Reconciliation Commission'*s work between 2008 and 2015, the *Museum* contains no explicit reference or permanent exhibition concerning the violent relationship between the Crown and First Nations, and the abuses and major crimes that have characterized that relationship over the years.

The Crown could make a significant symbolic gesture by offering Canadians a permanent exhibition on the many forms that violations of the collective and individual rights of First Nations people in Canada have taken. Some of the National Inquiry's recommendations could point in that direction, and such gestures would contribute to honouring the memory of the women and girls who have disappeared or been murdered over the years in Canada.

It is important to note that Canada admits, to some extent, the harm done to First Nations. For example, the *Committee on the Elimination of Discrimination against Women*, in its inquiry of Canada regarding discrimination against First Nations women, has noted:

> 22. The Royal Commission on Aboriginal Peoples estimates that, since the beginning of the colonial period in the State party, from the time of first contact to confederation, the population of aboriginal peoples has decreased by 80 per cent. Some cultures, such as the Beothuck in Newfoundland, became extinct, whereas other peoples endured forced displacement from their traditional lands and assignment to small reserves in which maintaining traditional forms of sustenance was often impossible. The establishment of reserves was based on historical treaties, from 1701 to 1923, between the State party (and prior to that, the British Crown) and the aboriginal people.
>
> **23. The State party accepts that this system has created a legacy of cultural dislocation and tans-generational trauma and violence**. In its submission, the State party indicated that, beginning in the 1800s, the Government of the State party strengthened its assimilation efforts by establishing residential schools for indigenous children and obliging parents to send their children to them. **The educational experience of aboriginal**

> **children** has been marked, therefore, by the residential school system, which **has caused profound and long-lasting damage to generations of aboriginal children who grew up there, alienated from their cultures and language, and had devastating effects on the maintenance of their indigenous identity.** Many of the children were victims of physical and sexual abuse by residential school staff. **The intergenerational impact of the residential school system and foster or adoptive placements is directly linked to the disproportionately high rates of violence and abuse that aboriginal women and girls suffer today**, given that historically, the system has shaped aboriginal communities and resulted in the break-up of families and communities.[1]

We thus see the beginnings of an admission of guilt by Canada. The acknowledged harm is already enormous. This Commission must urge the Crown to continue to face its responsibilities, to admit its wrongdoings and to attempt to redress them in an appropriate manner, in order to contribute to this task, better described in *Daniels*:

> ***"As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought.*** *Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages for indigenous peoples remains robust. This appeal represents another chapter in the quest for reconciliation and reparation in these relations."* [**Our emphasis**][2]

The AFNQL stresses the unfortunate fact that the sample of events revealed before the Commission underrates the situation of systemic racism and discrimination that prevails against First Nations. Undeniably, First Nations people are still victims of persistent discrimination and of deep-rooted and endemic prejudice and stereotypes.

For example, the AFNQL is profoundly disturbed by the January 2017 report from the *Saskatoon Health Region* revealing that women, notably from First Nations, had undergone tubal ligation, without their consent, after childbirth.[3] This report recalls a shameful part of Canadian history, during which eugenic policies led to the forced sterilization of Indigenous women.

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[1] *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, March 30, 2015, paras 22 and 23. [**Our emphasis**]

[2] *Daniels c. Canada*, [2016] 1 RCS 99, para. 1.

[3] Saskatoon Health Authority, Dr. Yvonne Boyer and Dr. Judith Bartlett, "External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women," July 22, 2017, online [URL]: <https://www.saskatoonhealthregion.ca/DocumentsInternal/Tubal_Ligation_intheSaskatoonHealthRegion_the_Lived_Experience_of_Aboriginal_Women_BoyerandBartlett_July_22_2017.pdf>.

In her testimony of June 19, 2017, to the Viens Commission, Professor Suzy Basile eloquently presented the issues faced by Indigenous women. She presented a disturbing historical portrait of the treatment of First Nations women in Canada over the years. From nutritional experiments in the 1940s, to mistreatment in residential schools, to the raids and sale of Indigenous children from the 1960s to the 1980s, to the forced sterilization of at least 3,000 people between 1928 and 1973, to the exclusion of and discrimination against women entrenched in the *Indian Act*. Today, no one can seriously contest the extent and persistence of what Professor Basile justly terms the "double discrimination" of racism and sexism.

The abundant evidence of abuses and crimes committed against First Nations women and girls will enable the National Inquiry to further raise the curtain mentioned by the Supreme Court of Canada in *Daniels*. Let us simply hope that this exercise will be accompanied by a political will on Canada's part to explore concrete and effective solutions and reparations, so that the National Inquiry's work will not have been in vain.

PART II: THE FUTURE

Formulating recommendations at the close of the National Inquiry's or the Viens Commission's work is certainly not an easy task. The AFNQL could be tempted to make thousands of recommendations, or to make just one: **respect us!**

In fact, if this very simple recommendation were actually to be implemented in good faith, by all levels of federal and provincial governments, the situation of First Nations women and girls would already be drastically improved. The most urgent thing, therefore, is to change attitudes and mindsets.

Changing attitudes and mindsets

Unfortunately, recommendation and action lie worlds apart, at least as far as the machinery of government is concerned. Based on the many commissions of inquiry in the past and the multitude of recommendations that they formulated, one finding is clear: the only real driver of change is political will.

In reality, what we are dealing with before this inquiry commission is the colonial heritage that has left a heavy legacy of racism and discrimination against First Nations women and girls. What is needed, therefore, is not so much the formulation of recommendations, but immediate concrete, tangible actions that will enable First Nations women and girls to face the future with confidence, convinced that they will not relive the discrimination, prejudice, trauma and violence that their mothers and grandmothers endured.

Inducing the changes that will make such an undertaking possible is a colossal task. It will require educating and raising the awareness of the entire population. Crown institutions will also have to adjust and correct their approach. They will have to show courage and boldness, in addition to making decisions that risk being unpopular due to the prejudices entrenched in people's minds.

However, the evidence submitted to the National Inquiry shows that prejudice and lack of understanding continue to be so pervasive that the most urgent work is to change mindsets. These will obviously not change overnight, but the first step in the right direction depends on concrete actions that will promote and value the richness and diversity of First Nations, rather than trying to make them disappear and assimilate them. It is essential to realize that such actions represent a 180-degree turn from the generally prevailing attitudes among the Canadian population and in Crown institutions. Given that a degree of complacency and tolerance has set in regarding the racism and discrimination that First Nations suffer, it is crucial that the Crown, through its institutions and representatives, set the example.

We must end the gridlock caused by the interminable palavers that have been going on for decades, and that fuel prejudices and stereotypes about First Nations. Indeed, denying them the full measure and enjoyment of their rights also contributes to maintaining prejudice and racism. By stubbornly refusing to recognize the just and full extent of First Nations rights, by failing to respect those rights, and by being unwilling to honour their own commitments and obligations, the Federal and Provincial Crowns, by their actions or inaction, compromise their own honour and contribute to the maintenance of popular prejudices toward First Nations people.

Unfortunately, the AFNQL has noticed an obstinate and organized resistance by the Crown to allowing First Nations to fully enjoy their individual and collective rights. The AFNQL believes that it is important to point out how the Crown's conduct or attitude is contrary to international law.

This is why the AFNQL believes that the National Inquiry must exert its influence to push Canada to implement the UNDRIP.

Implementing the UNDRIP

The rights of Indigenous peoples receive special protection under international law, and several international bodies have examined the situation in Canada in this regard.

Since May 2016, Canada has boasted of its full support for UNDRIP. In 2018, the federal government even published its *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, in which it notably reiterates that it "will fulfil its commitment to implementing the *UN Declaration* through the review of laws and policies, as well as other collaborative initiatives and actions." It should be mentioned that these Principles were published without prior consultation with First Nations.

Independently of the Crown's position regarding *UNDRIP*, First Nations are in the process of asserting their ancestral, territorial treaty rights based on their inherent sovereignty and their right to self-government, as AFNQL Chief Ghislain Picard recently reaffirmed.[4]

Bill C-262, sponsored by NDP Member of Parliament Romeo Saganash, is a commendable effort to implement *UNDRIP*. It is currently in its third reading before the Senate. Article 4 of the Bill states Canada must take all necessary measures to ensure that federal

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[4] Chief Ghislain Picard, *Le Devoir*, "Nations au programme du prochain gouvernement," September 26, 2018, online [URL]: <https://www.ledevoir.com/opinion/idees/537645/la-souverainete-des-premieres-nations-au-programme-du-prochain-gouvernement>.

laws are compatible with *UNDRIP*. But in reality, Canada's actions seem to run counter to its words. Its refusal, to date, to harmonize its laws with *UNDRIP* may suggest it does not intend to really implement it.

We could speculate at length about the government's vacillation toward First Nations on this matter. The federal government's erratic legislative activity on UNDRIP makes it impossible to decipher the direction in which it wants to take its dialogue with First Nations about *UNDRIP*. Clearly, the concrete implementation of *UNDRIP* is long overdue, so the AFNQL must again insist, and hope that it will one day actually happens.

In July 2017, British Columbia Premier John Horgan announced he would govern the province in accordance with *UNDRIP* principles.[5] In that province, there is now a *Ministry of Indigenous Relations and Reconciliation* heading efforts to collaborate respectfully with Indigenous people, in accordance with *UNDRIP* and with the 94 calls-to-action contained in the final report from the *Truth and Reconciliation Commission*.

The AFNQL also cites its resolution 01/2010, which already, in 2010, called upon the governments of Quebec and Canada to recognize and promote *UNDRIP*. Eight years later, nothing has been done to recognize and implement *UNDRIP*. The close of this Commission's work is another opportunity to remind the Government of Quebec of the importance of adopting this *Declaration* and of actually implementing it.

Today there is a consensus on the implementation of *UNDRIP*. Quebec would benefit from joining this movement. For example, the Quebec Bar Association, in its April 19, 2018, brief to the Viens Commission, made recommendations to this effect.

For the AFNQL, the primary objective is the full, unreserved implementation of *UNDRIP*. Unfortunately, as the Government of Canada seems to be dragging its feet on this project, its implementation may take some time. In these situations, it is useful to explore the discrepancies between Canadian laws (in their broadest sense) and *UNDRIP* provisions.

To do so, the AFNQL recommends that the Canadian government legislate so that:

1. judges be explicitly required to interpret any Canadian law, regulation, policy or government directive in a manner that ensures their compliance with *UNDRIP* to the fullest extent possible, and

2. in any case where a judge is unable to interpret a law, regulation, policy or directive in a manner that ensures compliance with *UNDRIP*, that judge has the power to issue a "declaration of incompatibility" and, thereby, leave it to the Canadian government to correct the situation or not.

The idea is to create a dialogue between Parliament and the judicial system, including Canadian judges, who must interpret and apply Canadian law in their daily work. By allowing judges to declare Canadian law incompatible with *UNDRIP*, it would be possible for Canada to assess the potential impact that the implementation of *UNDRIP* would have on Canadian law.

That said, one of the main obstacles to the incorporation of *UNDRIP* is the unknown effect it would have on Canadian law. The power of judges to issue declarations of incompatibility would allow Canadian legislation that is incompatible with *UNDRIP* to be identified and corrected, and would give Parliament free rein to legislate to resolve such incompatibilities one by one. A government responsive to the courts could thus harmonize Canadian law with *UNDRIP* little by little, until the adoption of *UNDRIP* becomes no more than a simple formality.

The concept presented here is not new. The United Kingdom, rather than incorporating the *European Convention on Human Rights*, has given similar powers to its judges via the *Human Rights Act, 1998.*[6] This legislation has been enormously successful in terms of English constitutional and administrative law, and has allowed English law to be gradually harmonized with the *European Convention* despite the reticence of the British to adopt the Convention.

The AFNQL therefore invites the National Inquiry to make these recommendations to the Canadian government.

***Facilitating access for victims to the* Committee on the Eradication of Discrimination against Women**

This recommendation is rooted in the AFNQL's profound desire to ensure that First Nations people who have been victims, for example, of abuse or crimes can receive the appropriate reparations. In fact, as stated in the terms of reference of the National Inquiry's mandate, it is not empowered to "resolve individual cases or to rule who is legally responsible."[7]

As a result, even if the National Inquiry did manage to make exemplary recommendations, and even if these were implemented in a satisfactory manner, this exercise,

[6] *Human Rights Act 1998*, c. 42.
[7] *Interim Report: Our Women and Girls Are Sacred, The National Inquiry into Missing and Murdered Indigenous Women and Girls 2017, p. 21.*

which looks toward the future and could ultimately be considered a form of collective reparation, risks bringing only a relative degree of relief to the victims of the abuses and crimes reported to the Commission. The *Committee on the Elimination of Discrimination against Women* also deplores the lack of clarity and depth of the National Inquiry's mandate, and the lack of access to justice for Indigenous women who are victims of discrimination, both in Canadian and international courts.[8]

The *Committee on the Elimination of Discrimination against Women* has moreover noted the shortcomings and gaps left by the National Inquiry as regards the victims' cases.[9] To prevent their shocking and tragic experiences from being used as a tool and then ultimately forgotten, individual complaints made under the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) would offer victims what the Commission and the Inquiry have to a certain extent failed to address, namely the resolution of individual cases.

In fact, one way to exert political pressure on the Federal Crown is to engage international bodies, such as the *Committee on the Elimination of Discrimination against Women*. This *Committee* has already had difficult interactions with Canada. Among other things, conclusions regarding Canada's violation of *CEDAW* provisions were already previously reported in the inquiries and observations of this Committee in 2015 and 2016.[10]

Some international legal avenues have already been explored with limited success. Others, such as individual complaints or communications, have yet to be exploited. As the latter are cases of single victims who, we recall, will not obtain satisfaction from this Commission

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8 *Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/Can/CO*/8-9, November 25, 2016, paras 8, 14-15, 26-28 and 58.

9 *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, 30 March 2015, paras 217 (a) and 220 and *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/Can/CO/8-9, 25 November 2016, paras 26-28 and 58.

10 *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, 30 March 2015, paras 217 (a) and 220 and *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/Can/CO/8-9, 25 November 2016, paras 26-28 and 58.

of inquiry, the AFNQL believes it is necessary to offer this individual complaint procedure to the victims and survivors who want to challenge Canada through the *Committee on the Elimination of Discrimination against Women*. Clearly, this option should be supported by the necessary resources, for access to practical services such as drafting and presentation of such recourse, from start to finish.

Under the circumstances, such recourse is justified to the extent that the above-mentioned documents emanating from the *Committee on the Elimination of Discrimination against Women*, the 2015 report in particular, show that Canada is an "international delinquent" in terms of the protection of First Nations women and girls. Consider, for example, the evidence submitted to the National Inquiry concerning the violations of Article 2 of *CEDAW*, which reads as follows:

> ***Article 2***
>
> The State Parties condemn all types of discrimination against women, agree to continue pursuing by all appropriate means and without delay a policy to eliminate discrimination against women and, to that end, commit to:
>
> a) Include in their national constitution or any other appropriate legislation the principle of gender equality, if not already the case, and to ensure by legislation or any other appropriate means the effective application of that principle;
>
> b) Adopt legislation along with other appropriate measures, including sanctions if necessary, banning all discrimination against women;
>
> c) Establish judicial protection of women's rights on an equal footing with men, and guarantee, through national courts and other public institutions, effective protection for women against all discriminatory actions;
>
> d) Refrain from any discriminatory action or practice against women to ensure that public authorities and institutions comply with this obligation;
>
> e) Take all appropriate measures to eliminate discrimination against women by individuals, organizations and businesses;

f) Take all appropriate measures, including legislative, to amend or rescind any law, regulatory provision, custom or practice that constitutes discrimination against women;

g) Rescind all criminal provisions that constitute discrimination against women.

What emerges from the 2015 investigative report is the existence of a clear discrepancy between the prevailing situation on the ground in Canada and the obligations it undertook in ratifying *CEDAW*. It should be noted in passing that Canada was rebuked by the *Committee* when it tried to use its federalism as an excuse.[11] In the end, the *Committee* found that Canada had violated Articles 1, 2(c)(d)(e)(f), 3 and 5(a), read in conjunction with Articles 14(1) and 15(1) of *CEDAW*.[12]

The "First Nations women of Val-d'Or" had, for their part, the dubious honour of a mention in a report of the 15th session of the UN Permanent Forum on Indigenous Issues, held May 9-20, 2016, to serve , along with their sisters from the northeast of India and Sepur Zarco, Guatemala, as an example of the specific phenomenon of systemic police brutality, violence and discrimination suffered by Indigenous women.[13]

The *Committee* 's characterization of these violations as "grave", according to Article 8 of the *Additional Protocol*, further widens the discrepancy mentioned above.[14]

On November 25, 2016, nearly a year and a half after the release of the investigative report of March 30, 2015, the *Committee on the Elimination of Discrimination against Women* issued its observations after receiving Canada's reports on the status of women in its territory.[15] This observations report includes numerous sections focusing on First Nations women and girls, in which Canada is blamed for failing to implement the recommendations formulated by the *Committee on the Elimination of Discrimination against Women*. The blame focuses in particular on the measures necessary to address the allegations concerning First Nations women and girls who have disappeared, as this is precisely the object of the National Inquiry's mandate. In reading the observations of November 25, 2016, it is clear that the situation of First Nations women and girls in Canada remains problematic in many respects, and that the country continues to fail in its task of ensuring an environment free of discrimination and racism.

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11 *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, March 30, 2015, paras 194-195, 212.

12 *Ibid.* para. 211-215.

13 *United Nations Economic and Social Council*, UN Permanent Forum on Indigenous Issues, Report on the work of the fifteenth season, May 9-20, 2016, para. 35.

14 *Ibid.* para. 214.

15 *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/Can/CO/8-9, November 25, 2016, para. 27.

It should be noted in passing that, according to that same document, Canada was required to provide the *Committee on the Elimination of Discrimination against Women* with a follow-up report by November 25, 2018, which it has not yet done (para. 58).

The severity of the findings of the *Committee on the Elimination of Discrimination against Women*, regarding Canada and the persistence of this country's violations, thus amply justify individual complaints against Canada by victims and survivors of *CEDAW* violations. Such recourse is provided in Article 2 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "Optional Protocol").[16] This *Optional Protocol* came into force in Canada on January 18, 2003, such that the *Committee on the Elimination of Discrimination against Women* has been competent since that date to receive individual complaints against Canada.

Who can make complaints?

According to Article 2 of the *Additional Protocol*, individual complaints "can be submitted by individuals or groups of individuals or on behalf of individuals or groups of individuals falling under the jurisdiction of a State Party [...]." Given the flexibility of this Article, it is entirely conceivable that the National Inquiry may itself file individual complaints before the *Committee on the Elimination of Discrimination against Women* on behalf of First Nations women or girls who want to make a complaint against Canada. The National Inquiry would thus act on behalf of any group of victims or survivors. In reality, individual complaints by victims and survivors are a logical continuation of a process whereby those victims and survivors have told their stories to the Commission, but the Commission is powerless to offer them the reparations they are entitled to. Supporting those victims and survivors through the next steps that could enable them to obtain satisfaction one day, is one of the many aspects of the National Inquiry's work. These individual complaints, through which the voices of First Nations women and girls will be heard, will allow them to use international law to eliminate the violence done to women (sub-theme 1(d)), will allow them to establish the facts relating to each victim or survivor in greater detail, as is moreover their right (sub-theme 4(b)), will allow them to explore gender-specific forms of justice (sub-theme 5(b)), will allow the determination of how victims and survivors exercising their rights will contribute to dismantling colonial violence (sub-theme 5(d)).

As the National Inquiry had previously requested intervener status before the Supreme Court of Canada on June 28, 2018, in the case *Barton* v *R.*, (case n^{o} 37769), and the Supreme Court granted it that status on August 2, 2018, it is entirely logical to conclude that it has the required legal interest to represent First Nations women and girls who want

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[16] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, AGNU 54/4, article 2.

to submit individual complaints to the *Committee on the Elimination of Discrimination against Women*. In fact, the National Inquiry, given the evidence it has heard in its work, is probably the best placed to submit such complaints, as this evidence allows it to provide *CEDAW* with evidence of the violations suffered by the victims and survivors it has heard.

Regardless of whether or not the National Inquiry chooses to support victims who wish to submit individual complaints to the *Committee on the Elimination of Discrimination against Women*, it can also help First Nations women and girls who want to appeal to the *Committee*, by raising in its report the issue of whether or not domestic remedies exist for those who have suffered, or are still suffering, systemic violence. Indeed, those victims and survivors who choose to avail themselves of the opportunity to submit complaints against Canada will have to demonstrate, to the *Committee*'s satisfaction, that there exists no effective domestic remedy in Canada for the *CEDAW* violations of which they are victims. There exists a requirement to have exhausted all domestic remedies, which Party States will use against the authors of complaints.

Is the requirement to have exhausted domestic remedies enforceable against victims and survivors?

The requirement to have exhausted domestic remedies is stated in Article 4(1) of the *Optional Protocol*, the *Committee on the Elimination of Discrimination against Women* having to ensure that all domestic remedies have been exhausted before examining the merits of a complaint.[17] This rule thus establishes a necessary condition for a complaint's admissibility by the *Committee*, as do also Articles 67 and 72(4) of its *Rules of Procedure*.[18] The domestic remedies exhaustion condition can be used as a defence by the State Party and may be explicitly or implicitly waived by it.[19]

However, if the *Committee* concludes that domestic remedies have not been exhausted, it must nonetheless determine if either of the two available exceptions apply to this

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[17] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, AGNU 54/4, art. 4(1); CEDAW Committee, Communication No. 11/2006, *Constance Ragan Salgado v UK*: "In accordance with [article 4(1)], the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted…."

[18] *Rules of Procedure of the Committee on the Elimination of Discrimination against Women*, HRI/GEN/3/Rev.2, art. 67, 72(4) [*Rules*].

[19] Inter-American Commission of Human Rights, Report 98/06[1], Petition 45-99, *Rita Ortiz v Argentina* (October 21, 2006), para. 27, *citing* Inter-American Court of Human Rights, *Viviana Gallardo et al*, Advisory Opinion, Decision of November 13, 1981 (Ser. A), No. G 101/81, para. 26: "[U]nder the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means."

requirement; specifically, it must be demonstrated that the remedies available under domestic law (i) have been unreasonably prolonged or (ii) are unavailable or would plainly be ineffective.[20]

i) The remedies available under domestic law are unreasonably prolonged

The question of whether a remedy has been unreasonably prolonged must be assessed in terms of the particular circumstances of each case. Human rights defence organizations have not, as yet, adopted general guidelines regarding procedural delays, preferring to rely on assessments made on a case-by-case basis.[21] The factors to be assessed when determining whether a delay is acceptable or not include, notably, that the delay in question be: attributable to the State, due to an active obstruction, negligence or inactivity;[22] attributable to the victim's conduct; (un)reasonable given the nature and gravity of the violation, the complexity of the case and its criminal/civil nature;[23] or likely to adversely impact the effectiveness of the reparations sought by the victim.

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[20] CEDAW Committee, Communication No. 8/2005, *Kayhan v Turkey*: "*Article 4…precludes the Committee from declaring a communication admissible unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief*. " [our underlining]; Communication No. 2/2003, *A.T. v Hungary*: the Committee was not "precluded" by Article (1) from considering the communication.

[21] Inter-American Commission on Human Rights, Report No. 96/06, Petition 4348-02, *Capote et al v Venezuela* (October 21, 2006) para. 72: "[the Commission] does not have hard-and-fast rules as to what period of time would constitute an 'unwarranted delay'. Instead, the Commission examines the circumstances of the case and does a case-by-case assessment to determine whether there has been an unwarranted delay.... To determine whether an investigation (in a criminal case) has been carried out 'promptly,' the Commission takes a number of factors into account, such as the time that has passed since the crime was committed, whether the investigation has moved beyond the preliminary stage, the measures the authorities are adopting, and the complexity of the case. "

[22] Inter-American Commission on Human Rights, Report No. 31/06, Petition 1176-03, *Silvia Arce et al v Mexico* (March 14, 2005) paras 26-28: "on the date of the acceptance of the present complaint, eight years have elapsed since the day on which Silvia Arce disappeared and that this event was reported to the competent authorities.... to date the events that were reported have not been completely clarified nor has it been determined whether responsibility has been imputed to public officials, as reported by the petitioners.... [T]he State has not provided specific information about progress in this investigation in particular that would clarify the facts and punish those responsible.... [the Commission] finds, for the purpose of admissibility, that there has been unwarranted delay in taking decisions by the Mexican jurisdictional bodies regarding the events reported."

[23] Inter-American Commission on Human Rights, Report No. 21/06, Petition 2893-02, Admissibility, *Workers Belonging to the Association of Fertilizer Workers (FERTICA) Union v Costa Rica* (March 2, 2006) para.37: "the Commission believes that petitioners availed themselves of all the necessary remedies to deal with this delay of justice, which is unwarranted in view of the failure to demonstrate the level of complexity alleged by the State to explain the average of 10 years delay in justice;" Report No. 88/06, Petition 1306-05, *Nueva Venecia Massacre v Colombia* (October 21, 2006) paras 26-27: "As a general rule, a criminal investigation must be conducted rapidly, in order to protect the victims' interests, preserve the evidence and even safeguard the rights of any person who becomes a suspect in the course of the investigation…while every criminal investigation has to comply with a number of legal requirements, the rule of prior exhaustion of local remedies must never lead to a halt or delay that would render international action in support of a defenceless victim ineffective. " *citing the* Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987 (Ser. C) No. 1 para. 93.

ii) The remedies available under domestic law are inadequate or insufficient to redress the alleged violations

The adequacy of a remedy depends on the type of relief it provides and its relevance to the nature of the needs stemming from the alleged violations. The body of case law relating to the availability of remedies for human rights violations consistently demonstrates that a **civil action for damages does not constitute an appropriate redress when criminal proceedings are necessary to remedy a violation, but the State Party has not initiated such proceedings**.[24]

Facts that indicate that a remedy is not effective include: its inability to redress specific types of violations, for reasons such as, but not limited to, procedural complexity, the existence of widespread human rights violations, and the national justice system's overall inability to meet international standards, either in general or in protecting specific rights.[25]

Grave or widespread violations of human rights

Although victims of widespread violations of women's human rights may choose to seek the Committee's intervention under the inquiry procedure established in Article 8 of the *Protocol*, they are at liberty to opt for the complaint procedure in order to benefit from its greater capacity to compensation relief that is proportional to the specifics of the individual harm suffered. In such a case, evidence of the gravity and/or extent of the violations submitted in support of an argument that the supposedly available remedies are generally ineffective—or available only in theory—is a way of circumventing the requirement to exhaust remedies.

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[24] Human Rights Committee, Communication No. 1159/2003, *Sankara v Burkina Faso*, Views adopted 28 March 2006 para.6.4: "The effectiveness of a remedy also depended […] on the nature of the alleged violation. In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties…;" CERD, *Sefic v Denmark*, Communication No. 32/2003, UN Doc. A/61/18 (2006), para.6.2: "The complaint […] alleged the commission of a criminal offence and sought a conviction […] The same objective could not be achieved by instituting a civil action, which would result only in compensation for damages awarded to the petitioner. "; Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988 (Ser. C) No. 4, para. 64: "If a remedy is not adequate in a specific case, it obviously need not be exhausted […] For example, civil proceedings […] such as a presumptive finding of death based on disappearance […] is not an adequate remedy for finding a person. "

[25] Donna J Sullivan, OP-CEDAW Technical Papers No. 1, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, IWRAW Asia Pacific, p14, online: <http://www.karat.org/wp-content/uploads/2012/01/IWRAW_Sullivan.pdf> [OP-CEDAW Technical Papers No.1].

In cases of grave or widespread human rights violations, we can presume that the State is aware of such violations, if they are sufficiently widespread or have been made public. In such cases, the State's inability to prevent the abuses and respond to them displays its inability or reticence to remedy the situation, despite the notifications it has received and the opportunity for doing so. The main purpose of the rule to first exhaust existing remedies—enabling the State to correct the violations—does not apply to such circumstances. An exception to the rule may be invoked based on evidence corroborating the occurrence of grave or widespread violations of the type being contested in a complaint, on the grounds that the extent and/or gravity of the violations demonstrate that there are in general, under domestic law, no effective remedies offering a reasonable likelihood of success. In such situations, the general ineffectiveness of the existing remedies exempts the complainant from having to show the ineffectiveness of specific remedies hypothetically available in the context of a particular case.[26]

The *African Commission on Human and Peoples' Rights* (ACHPR) has taken the view that the existence of widespread human rights violations eliminates the obligation of exhaustion. In these cases, the Commission explained that the States concerned had been informed of those violations, were fully aware of their gravity, including the large number of victims, and that they had been widely publicized at the national and international level.[27]

The ACHPR Commission separately concluded that the large number of victims involved in situations of massive violations rendered the "avenues of redress or means of relief nonexistent in practice"[28]. In cases of grave and massive human rights violations, the same Commission took the view that the exhaustion condition does not apply:

> [l]iterally in cases where it is unrealistic or undesirable that the complainant to bring each individual complaint before the national courts. There are a large number of victims. Due to the gravity of the human rights situation and the large number of people involved, it is practically impossible to resort to remedies that may exist before national courts.[29]

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[26] *Ibid* pp 14-15.

[27] African Commission on Human and Peoples' Rights, Communication Nos. 25/89, 47/90, 56/91 & 100/93, *World Organization Against Torture and Others v Zaire*, Ninth Annual Activity Report (1995-1996), para. 55; Communications Nos 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v Sudan*, Thirteenth Annual Activity Report (1999-2000), para. 33.

[28] [*our translation*] African Commission on Human and Peoples' Rights, Communications Nos. 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association v Mauritania*, Thirteenth Annual Activity Report (1999-2000) para. 85.

[29] [*our translation*] African Commission on Human and Peoples' Rights, Communication No. 275/2003, *Article 19 v Eritrea*, Twenty-Second Annual Activity Report (2006-2007), para. 71, *citing* Communications Nos. 16/88, 25/89, 47/90, 56/91, 100/93, 27/89, 46/91, 49/91 & 99/93 [ACHPR, *Article 19 v Eritrea*].

The fulfilment of this condition, in itself, releases the complainants in the case from the obligation to justify the absence of attempts to obtain legal redress via the domestic courts. Nonetheless, leaving nothing to chance, we dwell below on other cases that may trigger the exception to the exhaustion of remedies rule.

Indeed, the *Committee on the Elimination of Discrimination against Women* has already concluded, regarding violence against First Nations women and girls, that due to its scale and severity, and the fact that this violence continues to create suffering and pain to this day, and because of Canada's continued failure to adopt the necessary measures to put an end to it, in view of the gravity of the negative consequences of that violence on First Nations women and girls, that the violations of *CEDAW* by Canada should be characterized as grave, pursuant to Article 8 of the *Additional Protocol*.[30]

This conclusion of the *Committee on the Elimination of Discrimination against Women*, which is based on evidence it has gathered in the course of its investigation, thus releases the authors of complaints concerning the violations identified in this report from having to demonstrate the exhaustion of domestic remedies. In light of the notorious nature, persistence and gravity of Canada's violations of *CEDAW*, it would be totally unacceptable for Canada to be able to avoid these violations by claiming that domestic remedies exist to obtain appropriate reparations and, more difficult still, to put an end to discriminatory practices and racism that have existed for decades.

A flawed justice administration system

Similarly, it is possible to prove that a country's domestic justice systems do not respect international standards and that the existing remedies are ineffective, both overall and with regards to specific categories of remedies.[31]

In a series of cases against Turkey, the *European Court of Human Rights* (ECHR) declared that the rule of exhausting domestic remedies is not applicable when the State's official tolerance of recurring violations is demonstrated. In such circumstances, the dysfunction of the system of administration of justice exempts the victims from the obligation to exhaust domestic remedies.[32]

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[30] *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, 30 March 2015, para. 214.

[31] OP-CEDAW Technical Papers No.1, *supra* note 6 p. 15.

[32] ECHR, Akdivar et al v Turkey, Judgment of September 16, 1996, Reports of Judgments and Decisions 1996 IV p. 1210; Aksoy v Turkey, Judgment of December 18, 1996, Reports of Judgments and Decisions 1997 VIII, p. 2693. The Court considered these cases to be exceptions to the exhaustion of remedies requirement based on special circumstances rather than exceptions based on the demonstration of administrative practices hindering access to justice.

This reasoning supports the argument that proof of flaws in the administration of justice with regard to women's human rights—such as a general refusal by the police to apply existing legal protections to women—demonstrates the general ineffectiveness of the remedies available under the country's legal system. The evidence provided, to corroborate the existence of a set of widespread flaws in the administration of justice, may therefore avoid the necessity to demonstrate ineffectiveness in this case.[33] Such flaws in the administration of justice were also identified by the *Committee on the Elimination of Discrimination against Women* in its report.[34] It is clear that the Canadian courts have, to date, failed to offer First Nations women and girls an environment free of racism and discrimination.

Necessity of criminal proceedings

In cases where the State must take criminal measures to fulfil its obligation to respect and ensure a fundamental right—such as the right to life and personal security—human rights organizations have clearly stated that civil remedies were not appropriate in the circumstances and cannot be considered potentially effective in demonstrating that remedies had been exhausted [35] In the case of a violation of the right to life and personal integrity, effective recourse requires a police investigation, criminal prosecution and penalties (when applicable), over and above compensation.[36] In addition, in cases involving prosecutable domestic crimes, if the State does not proceed with the investigation

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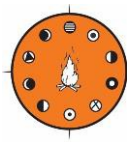
[33] OP-CEDAW Technical Papers No.1, *supra* note 6 p. 16.

[34] *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, March 30, 2015, paras 147, 169-172, 180.

[35] Inter-American Commission on Human Rights, Report No. 32/06, Petition 1175-03, *Paloma Angelica Escobar Ledezma et al v Mexico* (March 14, 2006) para.30: "Once a publicly prosecutable crime has been committed, the State is obliged to pursue and promote the criminal proceedings to their final consequences. Consequently, in the instant case, that burden cannot be transferred to the petitioner. "; Inter-American Commission on Human Rights, Report No. 14/06, Petition 617-01, *Raquel Natalia Lagunas and Sergio Antonio Sorbellini v Argentina* (March 1, 2006) para.46: "The State claim that the petitioners did not bring a civil suit for damages and injuries carries no weight since a civil suit cannot remedy the irregularities in the criminal investigation and cannot guarantee that the facts of the case will be solved and criminal responsibilities assigned. "; Committee on the Elimination of Racial Discrimination, Communication No. 34/2004, *Gelle v Denmark*, UN Doc. A/61/18 (2006) para.6.6: " It follows that the institution of civil proceedings…cannot be considered an effective remedy that needs to be exhausted…insofar as the petitioner seeks a full criminal investigation."

[36] Human Rights Committee (HRC), *Chonwe v Zambia*, Communication No. 821/1998 (2000); HRC, *Atachahua v Peru*, Communication No. 540/1993 (1996); HRC, *Vicente et al v Colombia*, Communication No. 612/1995 (1997); HRC, *Bautista v Colombia*, Communication No. 563/1993 (1995); Inter-American Court of Human Rights (IACHR), *Paniagua Morales et al v Guatemala*, (the White Van Case) (Merits), Judgment of March 8, 1998 (Ser. C) No. 37; IACHR, *Genie Lacayo v Nicaragua* (Merits), Judgment of January 29, 1997 (Ser. C) No. 30; IACHR *Blake v Guatemala* (Merits), Judgment of January 24, 1998 (Ser. C) No. 36; IACHR, *Bámaca Velásquez Case*, Judgment of November 25, 2000 (Ser. C) No. 70; European Court of Human Rights (ECHR), McCann et al v UK, Judgment of September 27, 1995 (Ser. A) No. 324; ECHR, *Mentes et al v Turkey*, Judgment of November 28, 1997, Reports of Judgments and Decisions 1997-VIII; ECHR, *Aksoy v Turkey*, Judgment of December 18, 1996, Reports of Judgments and Decisions 1996-VI; ECHR, *Aydin v Turkey*, Judgment of September 25, 1997, Reports of Judgments and Decisions, 1997-VI.



and prosecution, complainants cannot be expected to first exhaust existing domestic remedies.[37] This is precisely the situation that prevails in Canada.

In *Goekce v Austria* and *Yildrim v Austria*, the complainants contested the fairness and effectiveness of the State party's protective measures, in order to satisfy the exhaustion of remedies requirement, and as an argument on the merits. In these complaints, the complainants argued that the State Party's existing legal and administrative measures (for the prevention and prosecution of domestic violence) were inadequate, as criminal justice personnel had not acted with the required diligence by failing to investigate violence committed against the deceased victims and then to prosecute the perpetrators.

In its opinions on the two above-mentioned complaints, this Committee noted that, in terms of complaints relating to domestic violence—with regard to the State party's obligations to exercise reasonable diligence to protect its citizens (in accordance with general recommendation No. 19)—the remedies envisaged for admissibility were as follows: to investigate the crime; to punish the perpetrator; and to provide compensation.

Additionally, in both these cases, the Committee also found that the constitutional procedure did not constitute an effective remedy in the sense of the exhaustion condition, as it was unlikely to provide effective relief to the victims or their families.[38]

Inaccessibility of domestic legal remedies

Remedies that are inaccessible to the victim are *ipso facto*, necessarily inadequate and/or ineffective. Inaccessibility is therefore recognized in human rights case law as a limitation on the exhaustion rule and constitutes grounds for exemption from the application of the rule under the *Optional Protocol*. Facts that may indicate that a remedy is not accessible include, among others: direct action by the State or third parties, tolerated by them and preventing the exhaustion of remedies;[39] certain personal characteristics specific to the

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[37] ACHPR, *Article 19 v Eritrea*, *supra* note 10 para. 72: "whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards."

[38] CEDAW OP Committee, *Goekce (deceased) v Austria*, Communication No. 5/2005, August 6, 2007, UN Doc. CEDAW/C/39/D/5/2005 para.73; *Yildrim (deceased) v Austria*, Communication No. 6/2005, October 1, 2007, UN Doc. CEDAW/C/39/D/6/2005 para. 73.

[39] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29,1988, (Ser. C) No. 4 (1988) para.68: "[the exhaustion requirement need not be met where] there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those

victims such as their age, mental incapacity, linguistic competence or indigence, which prevent the victim from exercising their right to counsel, as the case may be, and from paying legal costs.[40] This issue of victims' ability to access remedies, particularly the high costs preventing effective access to justice, has also been raised by the *Committee on the Elimination of Discrimination against Women*.[41]

The burden of proof to meet the remedy-ineffectiveness standard

The test of the effectiveness of available remedies is objective.[42] The complainants have to demonstrate that the available domestic remedies do not offer a reasonable chance of success, in the light of the evidence submitted in the broader context surrounding a given case.[43]

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remedies become a senseless formality"; African Commission on Human and Peoples' Rights, Communication No. 97/93, *Modise v Botswana*, Tenth Annual Activity Report (1996-1997) paras 20-21.

[40] Committee Against Torture, Communication No. 238/2003, *Z.T. v Norway*, UN Doc. A/61/44 (2006) para.8.1- 8.3: "the Committee noted that a pre-condition of effectiveness, however, was the ability to access the remedy.... In the present case, the complainant had since been denied legal aid. Had legal aid been denied because the complainant's financial resources exceeded the maximum level of financial means triggering the entitlement to legal aid, and he was thus able to provide for his own legal representation, then the remedy of judicial review could not be said to be unavailable to him. Alternatively, in some circumstances, it might be considered reasonable, in the light of the complainant's language and/or legal skills, that he/she represented himself or herself before a court. In the present case, however, it was unchallenged that the complainant's language and/or legal skills were plainly insufficient to expect him to represent himself, while, at the same time, his financial means, as accepted by the State party for purposes of deciding his legal aid application, were also insufficient for him to retain private legal counsel. If, in such circumstances, legal aid was denied to an individual, the Committee considered that it would run contrary to both the language of [Article 22(5)], as well as the purpose of the principle of exhaustion of domestic remedies and the ability to lodge an individual complaint, to consider a potential remedy of judicial review as 'available. "

[41] *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, March 30, 2015, para. 180.

[42] African Commission on Human and Peoples' Rights, Communication 135/94, *Kenya Human Rights Commission v Kenya*, Ninth Annual Activity Report (1995-1996) para.16.

[43] Human Rights Committee, Communication No. 437/1990, *Patiño v Panama*, para.5.2; Human Rights Committee, Communication No. 511/1992, *Lansman et al. v Finland*, Views adopted October 14, 1993, para.6.3; Human Rights Committee, Communication No. 1095/2002, *Gomaritz v Spain*, Views adopted August 26, 2005, para.6.4; Human Rights Committee, Communication No. 1101/2002, *Alba Cabriada v Spain*, Views adopted November 3, 2004, para.6.5; Human Rights Committee, Communication No. 1293/2004, *Maximino de Dios Prieto v Spain*, Views adopted July 25, 2006, para.6.3; Inter-American Commission on Human Rights, Report No. 26/06, Petition No. 434-03, *Isamu Carlos Shibayama et al. v United States*, para.48, Annual Report of the Commission 2006; Inter-American Commission on Human Rights, Report 104/05, Petition 65/99, *Victor Nicholas Sanchez et al. v United States*, para.67, Annual Report of the Commission 2005; Inter-American Commission on Human Rights, Report No. 51/00, Petition 11.193, *Gray Graham v United States*, para.60, Annual Report of the Commission 2000; Inter-American Commission on Human Rights, Report No. 108/00, Petition 11.753, *Ramón Martinez Villareal v United States*, para.70, Annual Report of the Commission 2000; Inter-American Commission on Human Rights, Report No. 19/02, Petition 12.379, *Mario Alfredo Lares-Reyes et al. v United States*, para.61, Annual Report of the Commission 2002.

Exhaustion of domestic administrative remedies

As regards remedies under administrative law, the Human Rights Committee explained that the expression *domestic remedies* must be understood as meaning primarily legal remedies,[44] but also administrative remedies.[45] Similarly, the *European Commission of Human Rights* (ECHR) and the *Inter-American Commission on Human Rights* (IACHR) interpret domestic remedies as including certain types of administrative remedies.[46] The question of whether an administrative remedy is of the type that must be exhausted is determined, once again, on the basis of the criteria of availability, adequacy, and effectiveness. To this effect, the remedies provided by certain administrative courts and tribunals in matters of human rights discrimination—of a general nature or specifically relating to employment—may fall within the scope of the requirement to exhaust domestic remedies. Failure to attempt administrative options may be raised, on a case-by-case basis, if the bodies concerned enjoy the necessary independence, if the decisions they make are enforceable, if their procedure is consistent with the law of the land, and, of course, if the available remedies are adequate in the circumstances, in terms of the relief sought.[47]

For example, the IACHR has previously concluded that the complaint procedure provided by the National Human Rights Commission of Mexico does not constitute an effective remedy in the sense established in its case law, due to the structure of the commission in question, whose power consists solely of issuing recommendations that are not legally binding.[48]

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[44] Human Rights Committee, *Sankara v Burkina Faso*, Communication No. 1159/2003, 28 March 2006 para. 6.4.

[45] *Ibid* para. 8.6: the term "domestic remedies not only refers to judicial but also to administrative remedies"; Human Rights Committee, Communication No. 1403/2005, *Gilberg v Germany*, July 25, 2006, para. 6.5: "in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies"; Committee Against Torture, Communication No. 238/2003, *Z.T. v Norway*, para. 8.1 (published in UN Doc. A/61/44 (2006)): "[J]udicial review, in the State party's courts, of an administrative decision to reject asylum was, in principle, an effective remedy."

[46] Chittharajan Felix Amerasinghe, *Local Remedies in International Law*, 2nd ed (Cambridge UK: Cambridge University Press, 2004), at 314, footnotes 17-21; Pieter van Dijk et al, *Theory and Practice of the European Court of Human Rights*, 4th ed (Oxford: Hart Publishing, 2007) at 133.

[47] Inter-American Commission on Human Rights, Report No. 60/03, Petition 12.108, *Reyes et al v Chile* (October 10, 2003) para. 51: "[w]ith respect to the administrative remedy argued by the State, the Commission finds that it is not an adequate or effective remedy in this case"; John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, 53rd sess, UN Doc. A/CN.4/514 para. 14: "[a]dministrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule."

[48] Inter-American Commission on Human Rights, Report No. 36/05, Petition 12.170, *Colmenares Castillo v. Mexico* (March 9, 2005), para. 36: "the [Inter-American Commission] has previously ascertained that administrative remedies such as lodging a petition or complaint with the National Commission on Human Rights, for instance, 'is not a suitable remedy for the alleged human rights violations described in the instant case ...[since] it is not effective in the sense established by the case law of the Inter-American system, for which reason the petitioner(s) under no obligation to exhaust it before having access to the international protection provided for in the American Convention.'" Citing Report No. 73/99, Petition 11.701, *Ejido "Ojo de Agua" v. Mexico* (May 4, 1999), paras. 15-16: "It should be highlighted that the law creating the Mexican ombudsman, in force since June 30, 1992, itself provides in Article 6, paragraph III that the CNDH has the

In contrast, the *African Commission on Human and Peoples' Rights* (ACHPR) has taken the view that the domestic remedy specified in Article 56 (5) of the African Charter implies remedies by courts in the country's judicial system.[49] The Commission has found that proceedings before a national human rights commission do not satisfy the exhaustion condition, noting that this procedure could be considered as a preliminary amicable settlement and should, in principle, be followed by an action before the courts.[50]

In the case of violation of the right to life and personal security, the IACHR has taken the view that administrative remedies were inadequate, as such violations necessitated State criminal prosecutions.[51]

Thus, regarding human rights violations, case law indicates that the condition of domestic remedies exhaustion applies primarily to judicial remedies—because they are regarded as the most effective—but that, in certain circumstances, if certain administrative remedies should prove to be available, adequate and effective, it may then be necessary to exhaust them.

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authority to "submit non-binding, autonomous public recommendations, as well as petitions and complaints to the respective authorities"... Based on the foregoing, the Commission concludes that lodging a petition or complaint with the CNDH is not a suitable remedy for the alleged human rights violations described in the instant case"; Report No. 45/96, Petition 11.492, *Lara Preciado v. Mexico*, (October 16, 1996), para. 24: "the National Human Rights Commission ...is a quasi-judicial body that issues recommendations, which are therefore not legally enforceable."; Report on the Situation of Human Rights in Mexico, OEA Ser.L/V/II.100, Doc.7 rev.1, September 24, 1998, para. 117: "[t]he National Human Rights Commission is structured like the office of an ombudsman, hence it does not in any way replace the agencies with jurisdiction, i.e. the courts, which are entrusted with procuring and imparting justice. The CNDH is an independent body with responsibility for overseeing the public authorities. It has the power to receive complaints from the people against public authorities, except in political matters. Therefore, it is not competent to hear electoral disputes. Its decisions are not binding, since they are issued in the form of recommendations; hence they have moral force but are not compulsory."

[49] African Commission on Human and Peoples' Rights, Communication 221/98, *Cudjoe v Ghana*, Twelfth Annual Activity Report (1998-1999), para. 13; Communication No. 275/2003, *Article 19 v Eritrea*, Twenty-Second Annual Activity Report (2006-2007), para.70: "[b]y sending the writ to the Minister of Justice, the Complainant cannot claim they were attempting the exhaustion of domestic remedies as Article 56(5) requires the exhaustion of legal remedies and not administrative remedies."

[50] African Commission on Human and Peoples' Rights, Communication 221/98, *Cudjoe v Ghana*, Twelfth Annual Activity Report (1998-1999), para. 13.

[51] Inter-American Commission on Human Rights, Report No. 75/03, Petition 42/02, *Cañas Cano et al v Colombia* (October 22, 2003), paras 27-28: "[t]he Commission considers that the facts alleged by the petitioners in this case involve the alleged violation of such fundamental rights as the right to life and the right to humane treatment. As these are indictable offences under domestic law, it is the State itself that must investigate and prosecute them. Therefore, it is the development of this criminal law process that the Commission must consider in order to determine whether local remedies have been exhausted, or indeed whether the corresponding exceptions apply....[T]he Commission has held that the contentious-administrative jurisdiction is exclusively a mechanism for supervising the administrative activity of the State, aimed at obtaining compensation for damages caused by the abuse of authority. In general, this process is not an adequate mechanism, by itself, to make reparation for human rights violations and hence need not be exhausted when, as in the present case, there is another means for securing redress for the harm done and the prosecution and punishment that the law demands."

In this case, given the nature and seriousness of the violations, it is unrealistic to think that national or provincial human rights commissions can offer adequate remedies. The objective gravity of the violations and the difficulties that victims and survivors face in accessing all the forums, whether administrative or judicial, are such that these commissions offer no remedies likely to put an end to discrimination and to offer satisfactory compensation to victims and survivors.

The exhaustion of extraordinary remedies

In the case of extraordinary remedies, it is not their characterization as "extraordinary" that determines whether they have to be exhausted, but whether they offer the possibility of an effective and adequate remedy.[52] The Human Rights Committee, as well as other human rights defence organizations, have occasionally taken the view that certain extraordinary remedies constituting adequate and effective means of enforcing rights are subject to the exhaustion rule, including certain constitutional actions.[53] The key criteria are that the decisions resulting from these types of remedies must be based on legal principles and not on the discretionary power of the decider, and the remedy must have the power to produce the result for which it was designed.

However, and more importantly for us, the IACHR has taken the view that, even if in certain cases, such extraordinary remedies might be suitable for handling human rights violations, the only remedies that must be exhausted are those whose function in the country's legal system is appropriate to provide protection and/or redress the infringement of a right. Such remedies are, in principle, ordinary and not extraordinary.[54]

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[52] *Nielsen v Denmark* Case, Application No. 343/57 (1958-9), 2 Yearbook of the European Convention on Human Rights, p. 438; *Lawless* Case, Application No. 332/57 (1958-9), 2 Yearbook of the European Convention on Human Rights, pp. 318-322.

[53] Human Rights Committee, Communication No. 1403/2005, *Gilberg v. Germany*, Decision adopted July 25, 2006, para. 6.5: "in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author" *citing* Communication No. 1003/2001, *P.L. v. Germany*, Decision adopted October 22, 2003, para. 6.5; Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, Decision adopted November 2, 2004, para. 7.2; Human Rights Committee, Communication No. 322/1988, *Rodríguez v. Uruguay*, Views adopted July 19, 1994, para. 6.2; European Commission of Human Rights, Nielsen v. Denmark, Application 343/57, Report of the Commission, pp. 36-37; *X v. Federal Republic of Germany*, Application 27/55, 1 Yearbook of the European Convention on Human Rights, p. 138; *X v. Federal Republic of Germany*, Application 254/57, 1 Yearbook of the European Convention on Human Rights, p.150; *X v. Federal Republic of Germany*, Application 605/59, 3 Yearbook of the European Convention on Human Rights, p.296; *A. et al v. Federal Republic of Germany*, Application 899/60, 5 Yearbook of the European Convention on Human Rights, p.136; *X. and Y. v. Austria*, Application 2854/66, 26 Collections p.54; *X v. Austria*, Application 1135/61, 11 Collections p. 22; *X v. Austria*, Application 2370/64, 22 Collections, p. 101; *Soltikow v. Federal Republic of Germany*, Application 2257/64, 27 Collections, p. 24; *X. v. Federal Republic of Germany*, Application 4046/69, 35 Collections, p. 115.

This issue of the exhaustion of domestic remedies has previously been commented on by the *Committee on the Elimination of Discrimination against Women*, in its communication 19/2008, a complaint by Cecilia Kell against Canada.[55] In that case, the *Committee* concluded that the non-exhaustion of domestic remedies could not be held against Kell, due to the fact that those remedies were not reasonably likely to have afforded her the appropriate relief. It should be noted in passing that the question of domestic remedies was raised in a completely different way in Kell's case, in that she was subject to persecution by her partner in the context of a housing access program. Apart from the fact that this case was settled in 2012, i.e., before the *Committee on the Elimination of Discrimination against Women* had issued its 2015 investigative report concluding that there was a pattern of grave violations against First Nations Women and Girls, it is interesting to note that the *Committee* dismissed Canada's objection that domestic remedies had not been exhausted, due to the socioeconomic conditions in which Ms. Kell lived and the fact that she was a First Nations woman living in a violent situation.[56] There is no doubt that had the question of exhaustion of domestic remedies been considered today, with the benefit of the reports and observations issued by the *Committee* since, that Canada would not be able to bring this defence against Ms. Kell.

As regards the situation of victims and survivors, we should also consider that the creation of the National Inquiry constitutes no less than an admission of Canada's powerlessness to solve the problem of discrimination against First Nations women and girls. The *Committee on the Elimination of Discrimination against Women* further mentions in its report that Canada seems to create such commissions whenever public or governmental institutions have been found to have failed, but also criticizes Canada for its lack of diligence in implementing the recommendations made by such Commissions in the past.[57] Furthermore, in its observations of November 25, 2016, the *Committee on the Elimination of Discrimination against Women* blames Canada for still not having created satisfactory mechanisms for offering appropriate investigations and remedies to First Nations women and girls who have suffered the violence described in its reports and observations on Canada.[58]

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54 Inter-American Commission on Human Rights, Report No. 51/03, Petition 11.819, *Domínguez Domenichetti v. Argentina* (October 22, 2003), para. 45.

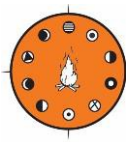
55 Kell. C. Canada, Communication 19/2008, February 28, 2012.

56 *Ibid.* para. 7.4

57 *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, March 30, 2015, paras 110 and 183.

58 *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/Can/CO/8-9, November 25, 2016, para. 27.

Ultimately, given the large number of victims and the fact that Canadian law offers them no effective redress, it would be appropriate to give victims access to a mechanism that can handle individual cases and decide on the reparations they are entitled to. With this in mind, AFNQL proposes that the Commission, insofar as possible, support access to international means of redress for First Nations women and girls who believe that the violations they have been subjected to must be denounced before an international body, one likely to help them move forward on the road to healing.



CONCLUSION

In its research plan, the National Inquiry outlines two parallel lines of investigation: a road and a river that converge in a place of reconciliation.

The road refers to acquired knowledge and the river represents a supple approach, illuminated by the knowledge acquired by the National Inquiry throughout its work.

Will these two converging lines meet? Will the National Inquiry succeed in creating this place of reconciliation where First Nations and the Crown can finally move forward on the road to reconciliation?

For the AFNQL, going through international bodies could enable it to progress towards reaching that zone of reconciliation. Unfortunately, the wounds are too serious, the violations too severe and persistent, to believe that a process bound by a framework whose financing and mandate are defined by the Crown will be able to fully satisfy First Nations women and girls. They have suffered violence for too long, and in many cases, have justifiably lost all confidence in Crown institutions, which are still plagued by currents of systemic discrimination and racism.

This divide and lack of trust therefore justifies calling on international bodies and facilitating the efforts of those wishing to appeal to them. Support can be offered through recommendations for necessary resources for the victims, or through recommendations concerning pertinent evidence of the violations suffered by the victims and survivors, and the lack of effective recourse in Canada to put an end to these violations and obtain appropriate reparations.

The contempt, racism, and discrimination that have too long characterized the relationship, despite all the good faith that the Crown might show, explain the mistrust and doubt with which First Nations people view the Commission's work. Despite everything, the AFNQL is hopeful. Hopeful that the Commission will have the creativity and daring to make bold recommendations that can move things forward. Hopeful that the Crown will have the courage to implement the most desirable of those recommendations. And that one day a bridge will be built across the chasm of mistrust.