

**Submission of the Canadian Feminist Alliance
for International Action**

to the

**United Nations Committee on the Elimination of
Racial Discrimination**

**On the occasion of its review of
Canada's 17th and 18th periodic reports**

under the

***Convention on the Elimination of all Forms of Racial
Discrimination***

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The **Canadian Feminist Alliance for International Action (FAFIA)** is an alliance of more than eighty Canadian women's organizations founded in February 1999. One of the central goals of FAFIA is to ensure that Canadian governments respect, protect and fulfill the commitments to women that they have made under international human rights treaties and agreements, including the *Convention on the Elimination of all Forms of Racial Discrimination*.

This submission is about the social and economic inequality of racialized women in Canada, in particular First Nations women, Black women or African-Canadian women, women of colour, immigrant and refugee women. As a broad alliance of women's organizations, FAFIA is committed to advancing the human rights of all women, and to combating racism and racist practices in Canada. The particular conditions and experiences of women who experience racism and racial discrimination are too often overlooked, both in accounts of the situation of women and in accounts of the situation of 'racial minorities.'

Women who experience the combined effects of race and sex discrimination are particularly disadvantaged. In Canada they live in poorer social and economic conditions than other women and than their male counterparts. Despite Canada's wealth and apparent commitment to human rights, their conditions are not improving. We hope to offer assistance to the Committee, by highlighting some steps that are necessary to advance the human rights of racialized and immigrant women in Canada.

Being able to use rights is especially important to women in Canada who are socially and economically disadvantaged by sex and race discrimination. Consequently, as an urgent matter, FAFIA wishes to bring to the attention of the Committee on the Elimination of Racial Discrimination, that the Government of Canada recently decided to cancel the Court Challenges Program. For Canadian women, the Court Challenges Program has provided the only access to the use of constitutional equality rights to challenge race and sex discrimination. The loss of this Program means that the constitutional right to equality is without practical meaning, except for those who are wealthy. The funding of the Court Challenges Program is slated to end on March 31, 2007. If it does, the right to equality will no longer be accessible to those who need it most.

I. The Court Challenges Program

In October 2006, the Court Challenges Program was cancelled by the Government of Canada. In the name of “efficiency” the Government of Canada eliminated the \$2.5 million budget for the Court Challenges Program, and government funding for the Program will end March 31, 2007. This cut was made at a time when the Government of Canada had a budget surplus. Canada has had budget surpluses for 8 years in a row; clearly money is not the issue.

Since 1978 the Court Challenges Program has provided modest funds to support test cases of national significance based on constitutional minority language or equality rights.

In its Report to the Committee on the Elimination of Racial Discrimination¹ Canada cites the Court Challenges Program as one of the means of ensuring that there are effective remedies for racial discrimination as required by Article 6 of the *Convention on the Elimination of all Forms of Racial Discrimination*. Canada states that in 2003 an independent evaluation of the Program found that it has been successful in supporting important court cases that have a direct impact on the implementation of equality rights and official language rights. Canada notes further: “The individuals and groups benefiting from the CCP are located in all regions of the country and generally come from official language communities or disadvantaged groups, such as Aboriginal people, women, racial minorities, gays and lesbians, etc. The Program has also contributed to strengthening both language and equality-seeking groups' networks.” In its Report to the Committee on the Elimination of Racial Discrimination, Canada states that the Program has been extended to March 31, 2009. This is no longer true.

Without the Court Challenges Program, the important rights of official language minority groups to education and government services in their primary language, and the rights of everyone to equality before and under the law and to equal protection and equal benefit of the law

¹ Committee on the Elimination of Racial Discrimination. Report of Canada. CERD/C/CAN/18. 5 April 2006. para. 80.

without discrimination, are only paper guarantees. Without financial assistance, the individuals and groups these rights are designed to protect cannot gain access the courts in order to enforce their rights. Without the Court Challenges Program, constitutional rights can be exercised only by those with deep pockets. Unequal access to constitutional rights must be a concern for all.

The amounts provided by the Court Challenges Program are a fraction of the full cost of a constitutional test case. Individuals and groups also contribute to these cases and lawyers carry out the legal work on a reduced fee scale or in some cases for free. Yet, the Court Challenges Program's contribution is vital – without it, these important rights are out of reach. Without Court Challenges Program funding, many worthy cases will never be launched and constitutional violations will be unchecked.

The Government of Canada has repeatedly informed United Nations treaty bodies that it funds the Court Challenges Program in order to meet its obligation to ensure equal access to the courts and to provide effective remedies under international human rights treaties. These United Nations treaty bodies have recognized the Court Challenges Program as a vital means of implementing treaty rights, and have praised Canada for it. Treaty bodies have encouraged Canada to extend the mandate of the Court Challenges Program so that it can cover test cases that challenge provincial laws and policies, as well as federal ones.² The cancellation of the Program stands in direct contradiction to the recommendations of United Nations treaty bodies to Canada.

Over the last decade, the Court Challenges Program has supported important cases where racial bias was challenged. Here are some examples:

- *R. v. S. (R.D.), [1997] 3 S.C.R. 484* was an important case about apprehension of bias on the part of a black female Nova

² *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, UN Doc. E/C.12/1993/5 at para. 28; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, UN Doc. E/C.12/1/Add.31 (1998) at para. 58; *Report of the Committee on the Elimination of Discrimination against Women*, 28th and 29th session, UNGAOR, 58th Sess., Supp. No. 38, UN Doc. A/58/38 (2003) at paras. 355-356; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, UN Doc. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (2006) at para. 13.

Scotia judge. Judge Sparks remarked in court that “police officers do overreact, particularly when they are dealing with non-white groups.”

The Supreme Court of Canada decided that Judge Sparks had not acted in a biased manner. By paying attention to the racial dynamic in the case, Judge Sparks was simply engaging in the process of contextualized judging. As a person familiar with the racial dynamic of Halifax, which has a large indigenous Black population, it was reasonable for Judge Sparks to apply this knowledge.

- *R. v. Williams*, [1998] 1 S.C.R. 1128 was a ruling of particular importance to those who have experienced the effects of racism within the Canadian justice system. The central issue in *Williams* was whether prospective jurors could be questioned about their racial bias to ensure a fair trial before an impartial jury.

The accused was an Aboriginal man charged with robbery. He requested permission to question potential jury members about their ability to judge evidence in the case free from racial prejudices and biases about “Indians”. He argued that such questioning was necessary in light of widespread racism in Canadian society.

The Supreme Court of Canada ruled that where there is a realistic potential of bias, it is reasonable for the accused to have the opportunity to challenge the impartiality of jurors.

- *Corbiere et al v. The Queen and Batchewana Indian Band*, [1999] 2 S.C.R. This case challenged *Indian Act* provisions that prohibited band members who do not live on reserve from participating in Band elections. The Supreme Court of Canada agreed that the *Indian Act* residency requirement violated the equality rights of Aboriginal band members living off reserve. In reaching this conclusion, the Court recognized that Aboriginal people living off reserve have suffered long-standing disadvantage in society, which was perpetuated by their being prevented from participating in the political governance of their communities. Members of the Court also recognized that Aboriginal women were particularly affected, due to the many barriers faced by women who have regained status under the *Indian Act* under the provisions of Bill C-31.

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 was initiated by a Jamaican-born woman, who worked illegally in Canada as a domestic worker for a number of years. After the birth of her fourth Canadian-born child, she became seriously ill. After undergoing treatment at a mental health facility for one year, she applied for landed immigrant status on humanitarian and compassionate grounds. Her application was denied and she was ordered deported. The Immigration Officer noted that she would be a “tremendous strain” on the social welfare system for the rest of her life.

In reviewing the fairness of the decision-making process, the Supreme Court of Canada found that the immigration official showed an impermissible bias against single mothers and women with a psychiatric history. Additionally, at least in the immigration context, the Court found that officials whose exercise of discretion has a serious impact on the lives of the people involved, must make “reasonable” decisions which take into consideration the values expressed in domestic and international human rights. In Ms Baker’s case this meant that when deciding whether she, as a mother, could remain in Canada on humanitarian and compassionate grounds, the Immigration Officer should have given very serious consideration to the impact of his decision on her children. Citizenship and Immigration Canada was ordered to reconsider Ms Baker’s application in light of this ruling. Ms Baker was granted permission to remain in Canada.

These are only a few examples of cases in which Court Challenges Program funding has permitted women and men who experience racism to challenge it. There are many more. For women and men in Canada who face racism, the Court Challenges Program is a vital institution. They cannot exercise their rights without it. Canada’s constitutional protection against racism and race discrimination is rendered meaningless by the cancellation of the Court Challenges Program.³

Currently, there are a number of cases in process that challenge the continuing sex discrimination in the *Indian Act*. These cases will not be able to proceed on appeal without the support of the Court Challenges

³ More information on the Court Challenges Program can be found on the FAFIA website at www.fafia-afai.org. See the open letter to the Prime Minister calling for reinstatement of the Program at www.fafia-afai.org/files/CCPMLetterE.doc.

Program. If they do not proceed, the rights of Aboriginal women will be forfeited.

The federal government should immediately restore funding to the Court Challenges Program so that women and men in Canada can continue to exercise their constitutional language and equality rights, and have access to the use of constitutional protections from racism and racial discrimination.

II. Social and Economic Conditions of Racialized Women

i. An Affluent Nation Fails to Correct Racial Inequality

Canada is one of the wealthiest countries in the world and is in an enviable financial situation. The Government of Canada recently recorded its eighth consecutive annual surplus. Canada also has the lowest debt burden of all G-7 countries.⁴

Canada has the resources, institutions and infrastructure necessary to eradicate poverty among racialized women, men and children and to provide racialized women and men in Canada with strong social foundations in the form of social programs and services to support their enjoyment of economic, social, and cultural rights.

However, in this decade Canadian governments have cut away programs and services that women rely on, introduced punitive and narrowed eligibility rules to control access to benefits, and made women's lives harsher. The poorest women, who are most likely to be racialized women, including Aboriginal women and African-Canadian women, single mothers, women with disabilities and women who are elderly, are the most harmed.⁵

Canada's wealth and prosperity and international stance on human rights belie the reality of human rights neglect at home. Louise Arbour, United Nations High Commissioner for Human Rights and former justice of the Supreme Court of Canada, recently made the following observation about Canada:

Despite our international standing, ...poverty and gross inequalities persist...in our own backyard. And so, the 'Human

⁴ Canadian Centre for Policy Alternatives, Press Release, *Getting the Most Bang for Our Bucks*, February 9, 2005:
<http://www.policyalternatives.ca/index.cfm?act=news&do=Article&call=1012&pA=B736455>.

⁵ Social Watch. 2005. Report on Canada:
http://www.socialwatch.org/en/informeImpreso/pdfs/canada2005_eng.pdf/

Poverty Index' tells a ... story, ...last year Canada could manage only a 12th place ranking out of the 17 OECD countries listed, a distressingly consistent pattern since the UNDP's rankings began. Other reports, studies and indicators, from home and abroad, reveal that First Peoples, single parent families headed by women, persons with disabilities and many other groups continue to face conditions in this country that threaten their fundamental economic, social, civil, political and cultural human rights, the birthrights of all human beings under international law.⁶

We submit that Canada has not only failed to fulfill its obligations under Articles 2 and 5(e) of the *Convention on the Elimination of Racial Discrimination* during the period under review, it has also moved backwards.

Federal, provincial and territorial governments should develop strategies and mechanisms for ensuring that laws, policies and decisions regarding resource allocation and resource sharing among jurisdictions, contribute to the realization of Convention rights.

ii. The Poverty of Racialized Women in Canada: A Snapshot

The rate of poverty among racialized women and their overall economic inequality is surprising, if not shocking, in a country as wealthy as Canada.

More women than men are poor in Canada.⁷ Particular groups of women have shockingly high poverty rates. Aboriginal women,⁸ immigrant women,⁹ and women of colour,¹⁰ are disproportionately poor, both when compared to other Canadian women, and to their male counterparts. In 2000 36% of Aboriginal women,¹¹ 23% of immigrant women,¹² and 29% of women of colour¹³ lived in poverty.

⁶ Louise Arbour, UN High Commissioner for Human Rights, LaFontaine-Baldwin Symposium 2005 Lecture, Quebec City, March 4, 2005: <http://www.lafontaine-baldwin.com/speeches/2005>.

⁷ *Women in Canada 2005* at 143.

⁸ *Ibid.* at 199.

⁹ *Ibid.* at 228.

¹⁰ *Ibid.* at 254.

¹¹ *Ibid.* at 200.

¹² *Ibid.* at 228.

¹³ *Ibid.* at 254.

In 2003 38% of families headed by single mothers lived in poverty. Some of these groups intersect. For instance, Aboriginal and Black women are more likely to be single mothers than other women.

UN treaty bodies have repeatedly expressed concern about the high poverty rates among women in Canada, and among racialized women and single mothers in particular. (CESCR 1993, para. 13, CEDAW 1997, para. 342; CESCR 1998, paras. 28, 33, 54; HRC 1999, para. 20; CEDAW, 2003, 358).

Federal, provincial and territorial governments should immediately adopt new and rigorous anti-poverty measures that will reduce the persistently high rates of poverty among racialized women and single mothers.

iii. Inequality in the Labour Force

Racialized women also do not enjoy equality in the workforce. Women as a group still enter, and work in, a sex-segregated labour force where they do not enjoy equality with men in access to jobs, remuneration, or benefits. The conditions of racialized women tend to be worse.

Aboriginal women and other racialized women are more likely to have higher unemployment rates, and lower earnings than other women and than their male counterparts, even when they have comparable educational qualifications, or better ones. They are disproportionately employed in Canada's low-paid work sector and in "precarious" work.

Employed Aboriginal women are disproportionately represented in low-paying occupations 'traditionally' held by women. In 2000 60% of employed Aboriginal women worked in sales, service or administration jobs, and were twice as likely to work in these low-paying positions than Aboriginal men.¹⁴ In 2001 only 7% of Aboriginal women held managerial positions.¹⁵

While immigrant women are highly educated compared to other Canadian women, their educational attainment does not provide them with higher incomes and better employment.¹⁶ Immigrant women are

¹⁴ *Women in Canada 2005* at 198-199.

¹⁵ *Ibid.* at 199.

¹⁶ *Ibid.* at 104 and 139.

more likely than their native-born counterparts to have completed university, and are more likely to have an advanced university degrees, such as a Masters or Ph.D.¹⁷ Despite this, immigrant women are less likely to be employed than native-born women,¹⁸ and once employed are more likely to be concentrated in 'traditional' female jobs. In 2001 46% of immigrant women were employed in sales or service positions, clerks or administrators.¹⁹ Immigrant women are also over-represented in the low-paid manufacturing sector, and underrepresented in management, and the professions compared to their male counterparts, and native-born women.²⁰ The credentials of immigrant women, obtained in other countries, are often not recognized in Canada, contributing to unemployment and underemployment. They are encouraged to settle in rural areas of Canada, but they do not have adequate settlement services there and face discrimination in employment.

Women of colour in Canada are also a well-educated population. In 2001 21% of women of colour had a university degree, compared to 14% of other women, and young women of colour have a disproportionate share of advanced degrees.²¹ Despite this women of colour are ghettoized in low-paying administrative, clerical, sales, and service jobs,²² and have lower employment earnings than other women,²³ and their male counterparts.²⁴ A large proportion (21%) of women of colour also reported that they are discriminated against in finding employment, and in their places of employment.²⁵

Immigrant and racialized women are disproportionately employed in the 'precarious' 'non-standard' work sector, working in part-time, temporary, and casual jobs. Their access to unionization, benefits, job security, and pensions is poor.²⁶

¹⁷ *Ibid.* at 223.

¹⁸ *Ibid.* at 224.

¹⁹ *Ibid.* at 225.

²⁰ *Ibid.* at 225.

²¹ *Ibid.* at 246.

²² *Ibid.* at 251.

²³ *Ibid.* at 252.

²⁴ *Ibid.* at 253.

²⁵ *Ibid.* at 254.

²⁶ Chaykowski, R. 2005. *Non-standard Work and Economic Vulnerability*. Canadian Policy Research Network. http://www.cprn.org/documents/35591_en.pdf ; Vosko, L. 2002. *Rethinking Feminization: Gendered Precariousness in the Canadian Labour Market*. <http://www.genderwork.ca/modules/precarious/papers/vosko.2002.rethinking.pdf>.

Governments in Canada should develop aggressive and multi-pronged strategies to eliminate sex and race discrimination in the labour force. All governments should improve basic labour standards and human rights protections and enhance enforcement. Steps should be taken immediately to improve the access of racialized and immigrant women to unionization, benefits and job security.

iv. Pay Equity at the Federal Level – Racialized Women and Men

Women who work in full-year, full time employment make 71% of the income of men, regardless of age or education.²⁷ Racialized women and men also experience wage discrimination. The federal government appointed a Pay Equity Task Force in 2001²⁸ because federal sector employers and unions agreed that the existing pay equity law, which has been in place for twenty-five years, is ineffective and in need of a major overhaul. After thorough study and consultation with all parties, the Pay Equity Task Force reported in May 2004. Because of the extensive evidence of wage inequities experienced by racialized women and men, the Task Force recommended that, in addition to improving the law to ensure that women receive equal pay for work of equal value, a new federal pay equity law should establish a process for eliminating wage discrimination against members of 'visible minorities' and Aboriginal people as well.

The Task Force recommended: 1) a new pro-active pay equity law that requires employers to review pay practices, identify gender-based and race-based wage discrimination gaps, and develop a plan to eliminate pay inequities within a specific time frame; and 2) a Pay Equity Commission and a Pay Equity Tribunal to administer new pay equity laws.

However, the Government of Canada announced in October 2006 that it would take no action on these Task Force recommendations,²⁹ despite the fact that hundreds of local, provincial and national women's and human rights organizations have requested their

²⁷ *Women in Canada 2005* at 133.

²⁸ Government of Canada. 2004. Pay Equity Review.

<http://www.justice.gc.ca/en/payeqsal/6025.html>

²⁹ John Ivison. National Post. "Tories plan to police pay equity on gender: Caucus divided by Labour Minister's proposal." October 31, 2006.

<http://www.canada.com/nationalpost/news/story.html?id=def7ad68-1959-43d6-b4e2-f501d3862937&k=73262&p=2>.

immediate implementation,³⁰ as did the Parliamentary Committee on the Status of Women. The old law remains in place and the Government of Canada promises only to send out inspectors.

The federal government should immediately implement the recommendations of the Pay Equity Task Force, including the recommendations directed to addressing wage discrimination for visible minorities and Aboriginal persons.

v. The Live-In Caregiver Program (LCP)

Women from developing countries, particularly the Philippines, come to Canada as temporary workers to participate in Canada's Live-In Caregiver Program (LCP). These women are allowed into Canada, subject to conditions that are not imposed on other skilled workers. The conditions infringe their right to equal treatment without discrimination based on sex and race.

There are two conditions associated with the temporary immigration status under the LCP that potentially lead to abuse and a violation of workers' rights. First, the possibility of gaining permanent resident status is directly tied to, and conditional upon, a good work record. Second, the LCP requires foreign domestic workers to live in the homes of their employers. This live-in requirement produces extra pressures and restrictions on the work and life of a domestic worker and creates oppressive power dynamics in the relation between employer and employee. Live-in caregivers experience non-payment or under-payment of wages, unremunerated overtime work, lack of food, privacy, or proper accommodations, and violence and abuse.³¹

The live-in requirement has been widely criticized. The combined effect of temporary migrant status and the compulsory live-in requirement for these workers create circumstances that promote economic, physical and psychological exploitation.

³⁰ National Association of Women and the Law. 2006. *The Time for Pay Equity is Now!*: <http://www.nawl.ca/lob-pay.htm>.

³¹ National Association of Women and the Law. 2001. Brief on the Proposed *Immigration and Refugee Act* (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration, at 24-25, <http://www.nawl.ca/brief-immig.htm>; Intercede, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, including the Impact of Family Separation, Experienced by Women in the Live-In Caregiver Program* (Toronto: Intercede, 2001) at 36-58. http://www.cwhn.ca/search/pubRecord.htm?ObjectId=102598&category=Refugee%20Women&batch_start=30&batch_count=10.

Not only do Canadian employers benefit from the undervalued labour of live-in caregivers, but Canada has reaped economic and political benefits from facilitating a supply of migrant women to furnish inexpensive, private child care to a certain segment of Canadian parents.

The federal government's refusal to grant domestic workers permanent residency immediately and to remove the live-in requirement from the criteria for the LCP program violates Article 5(e)(i) of the *Convention*.

The Government of Canada's own policy paper on immigration and refugee protection legislation, issued in 1998, recommended the removal of the live-in requirement in the LCP. The CEDAW Committee in its 2003 *Concluding Comments* recommended that the live-in requirement be removed and that permanent resident status for domestic workers be facilitated.³²

To date there is no change.

The federal government should immediately remove the live-in requirement from the Live-In Caregiver Program and facilitate access to permanent resident status for domestic workers.

vi. Violence Against Immigrant, Refugee, and Racialized Women

Half of Canadian women (51%) have been victims of at least one act of physical or sexual violence since the age of 16. Further, of all victims of crimes against the person in 2000, females made up the vast majority of victims of sexual assaults (86%), criminal harassment (78%) and kidnapping/hostage-taking or abduction (67%).³³

Women who face intersecting forms of discrimination, such as Aboriginal women, women of colour, and immigrant women, are at a higher risk of violence. Aboriginal women are three times more likely than non-Aboriginal women to experience spousal violence.³⁴ Further, Aboriginal women, women of colour and immigrant women have a

³² CEDAW 2003, paras. 365-366.

³³ Status of Women Canada, *Fact Sheet: Statistics On Violence Against Women In Canada* (Ottawa: Status of Women Canada, 2005) at 1.

³⁴ Canada, Statistics Canada. 2006. Measuring Violence Against Women: Statistical Trends 2006
<http://www.statcan.ca/english/research/85-570-XIE/85-570-XIE2006001.pdf>.

more difficult time accessing services when they are victims of violence. There is a complex set of issues, attitudes, barriers and gaps in service that make immigrant and racialized women uniquely vulnerable when faced by domestic violence.³⁵ Immigrant and refugee women may have very limited access to information and counseling. They may also be reluctant to call the police in an emergency because they fear consequences for their immigration status, and ability to stay in the country.

Only 57 per cent of Canadian shelters for battered women offer services that are sensitive to cultural differences. Further, women who have difficulty speaking the official language where they live face enormous barriers in accessing services and dealing with the justice system. For Aboriginal women who live in rural and remote areas of Canada, there is often no shelter or anti-violence service that is accessible.

When services and the justice system fail, women find it even more difficult to escape abuse.³⁶ During the last decade, combating violence against women and improving the conditions of women who are victims of violence have become increasingly difficult.³⁷

Over the 1995 – 2005 period, some provincial governments have cut funding to women's shelters and transition houses, resulting in many shelters and transition houses and front line services being

³⁵ Canadian Council on Social Development, *Nowhere to Turn? Responding to Partner Violence Against Immigrant and Visible Minority Women*, Dr. Ekuwa Smith, 2004: <http://www.ccsd.ca/pubs/2004/nowhere/index.htm>; Chinese Canadian National Council Toronto Chapter. "A Study of Community Services for Female Chinese Victims of Domestic Violence":

www.ccnctoronto.ca/downloads/discussion%20paper%20rev%20dec%201.doc; Chinese Family Services of Ontario, "Cultural Implications for Chinese Who are Abused": www.projectbluesky.ca/english/cultural/chinese.html; Federal-Provincial-Territorial Ministers Responsible for the Status of Women, "Assessing Violence Against Women: A Statistical Profile" Status of Women Canada, 2002: http://www.swc-cfc.gc.ca/pubs/0662331664/200212_066231664_e.pdf;

Yasmin Jiwani, "Intersecting Inequalities: Immigrant Women of Color, Violence and Health Care," FREDA Centre for Research on Violence Against Women: www.harbour.sfu.ca/freda/articles/hlth02.htm; Linda MacLeod and Maria Shin. "Isolated, Afraid and Forgotten: The Service Delivery Needs and Realities of Immigrant and Refugee Women Who are Battered." National Clearinghouse on Family Violence, Health and Welfare Canada, 1990.

³⁶ CRIAW *Fact Sheet on Violence* at 2.

³⁷ Canadian Association of Sexual Assault Centres, *Canada's Promises To Keep: The Charter and Violence Against Women*, Report of CASAC LINKS, a five year research and community development project (CASAC: Vancouver, 2004).

underfunded and struggling to meet the demands of the women who need them.³⁸

Status of Women Canada's 2003 *Fact Sheet: Statistics On Violence Against Women* notes that "in ... April 17, 2000, 89 shelters turned away 476 people (254 women and 222 children). More than 7 in 10 of these shelters (71%) turned women and children away because the shelter was full."³⁹ In other words, shelter capacity has grown in Canada since the first shelters opened 27 years ago, but it remains inadequate, despite findings from independent researchers of the "crucial necessity of shelter availability as a tool against violence against women."⁴⁰

Governments at all levels should increase their strategies for protecting women from violence, provide adequate funding and resources to women-run front line anti-violence services, shelters and transition houses, and ensure that funding and services are adequate to address the specific needs of racialized women, and of Aboriginal women in rural and remote areas.⁴¹

III. Aboriginal Women

Aboriginal women still do not enjoy equality before the law in Canada. They do not enjoy the same rights as Aboriginal men with respect to passing on their Indian status to their children and grandchildren. Nor do Aboriginal women living on reserve enjoy the same rights to the division of matrimonial property as their Aboriginal and non-Aboriginal counterparts who live off reserve.⁴² Also, s. 67 of the *Canadian Human*

³⁸Morrow, M., Hankivsky, O., & Varcoe, C. 2004. "Women and violence: The effects of dismantling the welfare state". *Critical Social Policy*, 24(2).

³⁹ SWC *Fact Sheet On Violence Against Women* at 4.

⁴⁰ *Walking on Eggshells*. The report makes this recommendation about shelters: Funding for women's shelters needs to be restored and enhanced. The definition of need for emergency shelter needs to be more broadly defined to include women who are recovering from a history of abuse, even if this abuse is currently not on-going.

⁴¹ In CEDAW 2003 Concluding Comments at paras. 369-370, the CEDAW Committee expressed its concern about the inadequate funding for women's crisis services and shelters.

⁴² *Indian Act*, R.S.C. 1970, c. I-6, Section 20; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Report of the Royal Commission on Aboriginal Peoples*, volume 4, *Perspectives and Realities* (Ottawa: Government of Canada) at 51-53.

Rights Act denies them the right to make complaints of sex discrimination against Band Councils.⁴³

This discriminatory treatment of Aboriginal women at law affects their enjoyment - and the enjoyment of their children and grandchildren - of their right to culture, ancestral lands, the benefits of land claims, and other social and economic benefits provided to Indians.

The Government of Canada has failed to correct the overt discrimination against Aboriginal women, despite recommendations from the Royal Commission on Aboriginal Peoples and the Canadian Human Rights Act Review Panel, and repeated recommendations from UN treaty bodies.⁴⁴

i. Current Inequities from Historical “Marrying-Out” Provisions

The *Indian Act* continues to discriminate against Aboriginal women who lost their status prior to 1985 because of “marrying-out” provisions. Prior to 1985, section 12(1)(b) of the *Indian Act* stipulated that Aboriginal women lost their Indian status if they married non-status men. By contrast, status Indian men who married non-status women retained their status and, additionally, were able to confer that status on their wives and children. Under this provision, many Aboriginal women lost their status. In 1985, Bill C-31 was enacted to amend the *Indian Act* so that marriage has no effect on the Indian status of either spouse, and to provide for re-instatement of women who had lost their status because of s. 12(1)(b), and others who lost status because of enfranchisement provisions.

However, the current *Indian Act* continues to discriminate against Aboriginal women. Women who married non-Indians prior to 1985 and have had their status reinstated under the new provisions are able to pass status on to their children, but not to their grandchildren. By comparison, men who married non-status Indians prior to 1985 did not need to be reinstated, and nor did their children, who had status from birth. As a result, their grandchildren will have status. Thus, while the legislation has changed, it continues to favour descent through the male line and perpetuates the inequities experienced by Aboriginal women.

⁴³ The *Canadian Human Rights Act* Review Panel recommended removing section 67 from the *Canadian Human Rights Act* in June 2000. See *Promoting Equality: A New Vision*, at 130.

⁴⁴ CESCR, 1998 at para. 29; HRC, 1999 at para.9; CEDAW 2003 at paras 361-362; HRC 2005 at para.22; CESCR 2006 at para. 11(d).

The 1985 *Indian Act* amendments also allow Indian Bands to control their own membership through the establishment of membership codes. Initially, these membership codes must include Aboriginal women and children who have had their Indian status reinstated. However, Bands may then change their codes to exclude reinstates. By 1997, approximately 40 per cent of Indian Bands had adopted their own membership codes, and some are discriminatory. The Canadian government has chosen not to intervene in disputes about band membership stating that these are questions between individuals and their respective bands.⁴⁵

The majority of those who had their Indian status restored under the new provisions were women. Most of them continue to live off-reserve, though for some it is not by choice. Lack of on-reserve housing and band resistance to crowding, and fears that services, such as health care and education, will not be able to support "new" members make women reinstates unwelcome on some reserves. Thus, women are prevented from moving back to their community and enjoying the rights that flow from their Indian status.⁴⁶

Women who have had their Indian status reinstated are still being denied the right to participate in the negotiation of self-government agreements, and to benefit monetarily and otherwise from settlements of land claims. In short, reinstates are still subject to discrimination that affects their participation in Band governance and community life, and in their access to benefits, including education, health, child care, and housing. Women who dispute Band decisions are vulnerable to threats and violence.

The Government of Canada has failed to act to remove the sex discrimination from the *Indian Act*, or to intervene when Indian Bands implement membership codes that discriminate against Aboriginal women. The Government of Canada is also currently opposing constitutional challenges by Aboriginal women to the discriminatory provisions of the *Indian Act*.⁴⁷

The federal government should immediately amend the *Indian Act* to remove the continuing discrimination against Aboriginal

⁴⁵ First Perspective, *Indian Status Issue Looming Crisis Say Native Groups*, April 30, 2005 online: First Perspective: http://www.firstperspective.ca/story_2005_04_30_native.html.

⁴⁶ Report of the Royal Commission on Aboriginal Peoples, Volume 4, Perspectives and Realities (Ottawa: Government of Canada, 1996), "Chapter 2: Women's Perspective," pages 43-50.

⁴⁷ See, for example, *McIvor v. Attorney General of Canada*, (B.C.S.C. No. A941122).

women who married out and against those whose Indian status is derived from female ancestors.

ii. Section 67 of the *Canadian Human Rights Act*

Section 67 of the *Canadian Human Rights Act* currently provides that: "Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*."

This section was originally passed in order to protect decision-making by Band Councils and to prevent non-Aboriginal persons from claiming that the provision of Aboriginal-specific benefits discriminated against them.

However, section 67 has had the effect of immunizing Band Councils from challenges when their decisions are discriminatory. Currently, some Band Councils deny services and access to benefits, such as band housing, to Indian women who lost their Indian status because they "married out" and who regained their Indian status under Bill C-31 in 1985. These women cannot seek a remedy for this discrimination under human rights legislation, because section 67 bars their complaints.

The Native Women's Association of Canada says about section 67:

That section proclaims that the Government of Canada and the government's creations, the Band Councils, are permitted to discriminate at will against Aboriginal people on the basis of race, gender, and other characteristics, as long as their discrimination has a formal connection to the *Indian Act*. It proclaims that Aboriginal people are entitled to less protection of their human dignity than are other Canadians.⁴⁸

The *Canadian Human Rights Act* Review Panel recommended removing section 67 from the *Canadian Human Rights Act* in June 2000. The Panel stated that the *Canadian Human Rights Act* should apply to self-governing Aboriginal communities, until such time as an Aboriginal human rights code applies, as agreed by the Federal and First Nations governments.⁴⁹

⁴⁸ *Canadian Human Rights Act* Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) at 130.

⁴⁹ *Ibid.* at 132.

In 2003, the Government of Canada introduced a bill that included repeal of s. 67, but Parliament was dissolved before it could be passed and no further steps to remove s. 67 from the legislation have been taken. As it exists now, s. 67 of the *Canadian Human Rights Act* violates Article 2(1)c) and Article 6 of the *Convention on the Elimination of all Forms of Racial Discrimination* by denying Aboriginal women equal protection of anti-discrimination law, which they need in order to gain access to band-provided social services and economic benefits to which they are entitled.

The federal government should immediately repeal section 67 of the *Canadian Human Rights Act*.

iii. Aboriginal Women's Right to Property and Culture

Under the Canadian Constitution, provincial law governs the division of marriage assets upon marriage breakdown; typically, each spouse gets an undivided one-half interest in all family property, irrespective of who holds title. However, the federal government has jurisdiction with respect to laws governing Aboriginals and Aboriginal land. Thus, with respect to the division of on-reserve property upon marriage breakdown, a court is governed by the federal *Indian Act*, which contains no provisions for distribution of matrimonial property upon marriage breakdown.⁵⁰

The federal government does not provide for fair division of matrimonial property or the possibility of temporary exclusive possession of the matrimonial home upon marriage breakdown for on-reserve Aboriginal women. More specifically, the federal government has failed to ensure adequate housing for on-reserve Aboriginal women and their children by denying them protections available to off-reserve women and children.

While the land possession system in the *Indian Act* does not prohibit women from possessing reserve property, the cumulative effect of a history of federal legislation which has denied Aboriginal women property and inheritance rights has created the perception that women are not entitled to do so. As a result, men frequently hold the Certificate of Possession rather than women. And until recently, federal law required that Aboriginal women reside on their husbands' reserve; thus, many women continue to reside in homes to which they would have no possessory claim upon marriage breakdown.

⁵⁰ *Indian Act*, R.S.C. 1970, c. I-6, Section 20.

Provincial family relations statutes typically provide that each spouse is entitled to an undivided half-interest in all family assets, regardless of which spouse holds title to such assets, upon an order for dissolution of marriage. Property used for a family purpose, for example, the matrimonial home, is such a family asset. These provisions, however, are not applicable to reserve lands. In 1986, the Supreme Court of Canada held that, as a result of the federal *Indian Act*, a woman cannot apply for one-half of the interest in the on-reserve properties for which her husband holds Certificates of Possession. At best, a woman may receive an award of compensation to replace her half-interest in such properties. Since possession of on-reserve land is an important factor in individuals' abilities to live on reserve, denial of interest in family on-reserve properties upon dissolution of a marriage is a serious disadvantage to Aboriginal women.⁵¹

Provincial legislation provides for interim exclusive possession of the matrimonial home by one of the spouses upon marriage breakdown. This law is essential to ensuring the safety and security of women and their children in situations of spousal abuse. The *Indian Act* provides no protection to women who are victims of spousal abuse, in spite of the fact that Aboriginal women are particularly vulnerable to this kind of abuse. Land and housing are in short supply on reserves. Thus, if her husband holds the Certificate of Possession, an Aboriginal woman must choose between remaining in an abusive relationship and seeking off-reserve housing, removed from family, friends, and community support networks.⁵²

The Standing Senate Committee on Human Rights made recommendations to the federal government on this issue in 2003, requesting the federal government to ensure that Aboriginal women living on reserves would enjoy the same protections afforded by provincial family law.⁵³

The Native Women's Association of Canada (NWAC) attempted to move the issue forward by challenging the constitutionality of the government's failure to ensure the equal division of matrimonial

⁵¹ *Indian Act*, R.S.C. 1970, c. I-6, Section 20; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Report of the Royal Commission on Aboriginal Peoples*, volume 4, *Perspectives and Realities* (Ottawa: Government of Canada) at 51-53.

⁵² *Ibid.*

⁵³ Standing Senate Committee on Human Rights. 2003. *A Hard Bed to Lie In: Matrimonial Real Property on Reserve*. <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf>

property. The Government of Canada disputed NWAC's standing to bring the case into court, claiming that there is no Aboriginal right to remain secure in the community after marriage breakdown.

The federal government has recently undertaken a new study of this issue, but no concrete steps have been taken yet. Aboriginal women have not had the same rights as non-Aboriginal women with respect to matrimonial property for at least two decades.

The government's failure to protect the rights of Aboriginal women upon the dissolution of marriage is incompatible with the *Convention* and specifically with Article 5(d)(iv), which provides that State Parties will prohibit any discrimination with respect to the right to own property.

The federal government should take immediate steps to ensure that Aboriginal women living on reserve benefit from the same rights and protections with respect to matrimonial property as those afforded to non-Aboriginal women by provincial family law.

iv. Poverty and Violence

Aboriginal women are a very vulnerable group in Canada. They are among the poorest women in Canada. They are marginalized in the labour force, mainly working in lower paid and unstable jobs, with higher unemployment rates and lower incomes.⁵⁴ They do not have the same level of educational attainment as non-Aboriginal women.⁵⁵ Their life expectancy is lower.⁵⁶ They experience more violence.⁵⁷

More than 500 Aboriginal women have gone missing or been murdered over the last 15 years. There has been no recognition of this as a massive human rights violation. In 1996 Indian and Northern Affairs Canada reported that, "Aboriginal women with status under the *Indian Act* and who are between the ages of 25 and 44 are five times more likely to experience a violent death than other Canadian women in the same age category."⁵⁸ The lack of protection of Aboriginal women's human rights and their economic and social marginalization permit the cycle of racialized and sexualized violence to continue.

⁵⁴ *Women in Canada 2005* at 198-199.

⁵⁵ *Ibid.* at 196.

⁵⁶ *Ibid.* at 190, 192.

⁵⁷ *Ibid.* at 195.

⁵⁸ *Aboriginal Women: A Demographic, Social and Economic Profile*, Indian and Northern Affairs Canada, Summer 1996.

All levels of government need to design and implement comprehensive and co-ordinated measures to address the inequality of Aboriginal women with respect to income, health, the attainment of education, employment and just conditions of work. These measures should be designed in consultation with Aboriginal women's organizations. Resources should be allocated specifically to support the advancement of Aboriginal women, including equal resources for Aboriginal women's organizations to participate on a footing of equality in the negotiation of self-government and other agreements affecting their lives.

Recommendations

- **The federal government should immediately restore funding to the Court Challenges Program so that women and men in Canada can continue to exercise their constitutional language and equality rights, and have access to the use of constitutional protections from racism and racial discrimination.**
- **Federal, provincial and territorial governments should immediately adopt new and rigorous anti-poverty measures that will reduce the persistently high rates of poverty among Aboriginal women, women of colour, immigrant women and single mothers.**
- **Governments in Canada should develop aggressive and multi-pronged strategies to eliminate sex and race discrimination in the labour force. All governments should improve labour standards and human rights protections and enhance enforcement. Steps should be taken immediately to improve the access of racialized women to unionization, benefits and job security**
- **The federal government should immediately implement the recommendations of the Pay Equity Task Force, including the recommendations directed to addressing wage discrimination for visible minorities and Aboriginal persons.**
- **The federal government should immediately remove the live-in requirement from the Live-In Caregiver Program**

and facilitate access to permanent resident status for domestic workers.

- **Governments at all levels should provide adequate funding and resources to women-run front line anti-violence services, shelters and transition houses, and ensure that funding and services are adequate to address the specific needs of Aboriginal, racialized and immigrant women, and of Aboriginal women in rural and remote areas.⁵⁹**
- **The federal government should immediately amend the *Indian Act* to remove the continuing discrimination against Aboriginal women who married out and against those whose Indian status is derived from female ancestors.**
- **The federal government should immediately repeal section 67 of the *Canadian Human Rights Act*.**
- **The federal government should take immediate steps to ensure that Aboriginal women living on reserve benefit from the same rights and protections with respect to matrimonial property as those afforded by provincial family law.**
- **All levels of government need to design and implement comprehensive and co-ordinated measures to address the inequality of Aboriginal women with respect to incomes, health, the attainment of education, employment and just conditions of work. These measures should be designed in consultation with Aboriginal women's organizations. Resources should be allocated specifically to support the advancement of Aboriginal women, including equal resources for Aboriginal women's organizations to participate on a footing of equality in the negotiation of self-government and other agreements affecting their lives.**

⁵⁹ In CEDAW 2003 Concluding Comments at paras. 369-370, the CEDAW Committee expressed its concern about the inadequate funding for women's crisis services and shelters.