

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

AND:

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF MANITOBA, DIRECTOR OF CRIMINAL AND PENAL
PROSECUTIONS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION
DES LUTTES CONTRE L'EXPLOITATION SEXUELLE (LA CLES), ASIAN WOMEN
FOR EQUALITY SOCIETY, ABORIGINAL WOMEN'S ACTION NETWORK (AWAN),
FORMERLY EXPLOITED VOICES NOW EDUCATING (EVE), CEASE: CENTRE TO
END ALL SEXUAL EXPLOITATION (CEASE), ASSEMBLY OF FIRST NATIONS, AD
IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, THE WOMEN OF THE
MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, NATIONAL INQUIRY
INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS,
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Part I – Statement of Facts Relevant to the Issue to Intervene

A. Overview of Position

1. In order to address the tragic epidemic of missing and murdered Indigenous women and girls in Canada, the rights and dignity of First Nations women and girls must be upheld and respected particularly in the justice system. In the view of the Assembly of First Nations, this Honourable Court's decision in *R v. Barton* is significant for several reasons, including: upholding the mandatory requirements of s. 276 of the *Criminal Code* to protect the equality and privacy rights of the victim; and reaffirming that claims of mistaken belief of consent are not based on inappropriate inferences about the complainant's prior sexual conduct; as well as the necessity for fair and balanced instructions to the juries regarding racial biases. This case also demonstrates again the many ways in which the criminal justice system fails Indigenous people and in particular fails to accord First Nation women and girls the dignity and respect to which they are entitled under First Nations law, the Constitution of Canada and international human rights law. The AFN encourages this Honourable Court to send a strong message to those responsible for the administration of justice, that the long-held stereotypes, prejudices and biases about Indigenous people resulting from and perpetuated by Canada's history of colonialism, hold no rightful place in Canada's legal system.

2. In order for the Canadian legal system to truly embrace the path to reconciliation with First Nations, this Honourable Court must require that the unique circumstances of First Nations women and girls is acknowledged by the court system and take judicial notice of the long historic pattern of discrimination that has targeted First Nations women in Canada. The AFN also asks the Court to interpret and apply the law in accordance with Articles 21(2) and 22(2) of *United Nations Declaration on the Rights of Indigenous Peoples* and Article VII of the *American Declaration on the Rights of Indigenous Peoples*¹ which states that Indigenous women have the right to the recognition, protection, and enjoyment of all human rights and fundamental freedoms provided for in international law, free of all forms of discrimination and that States must recognize that violence against indigenous peoples and persons, particularly women, hinders or nullifies the enjoyment of

¹ Article IIV American Declaration on the Rights of Indigenous Peoples, June 15, 2016 (AG/RE2867 (XLIV-0/14) found at: <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

all human rights and fundamental freedoms.²

3. The UN Declaration specifically recognizes the duty of States to take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.³ In the international law context, States have obligations to demonstrate their due diligence to prevent human rights violations.⁴ The court's treatment of Cindy Gladue's remains and the disregard shown to her family may be interpreted as such a human rights violation.

B. Statement of Facts

4. The Assembly of First Nations (AFN) adopts the Respondent's Statement of Facts and adds the additional facts enumerated below.

5. The AFN is a national organization representing more than 634 First Nations who have Treaties, inherent rights and title in their traditional territories.

6. This Court spoke to the long history of the denial of Indigenous peoples rights, in the *Sparrow*⁵ case, the first decision of this Court after Aboriginal and treaty rights were "recognized and affirmed" in the *Constitution Act, 1982*.⁶ This Court noted how British policy was based on respect for the rights of Indigenous peoples, as evidenced by the *Royal Proclamation of 1763*.⁷ However, in modern times these rights as legal rights have been systematically diminished by federal policy and processes to address this have been notoriously slow.

7. In 2008, the Government of Canada acknowledged and apologized for the harms inflicted upon Indigenous peoples by the Indian Residential Schools system, whose central purpose was assimilation and has resulted in the many harmful effects experienced by generations of First

² In *Reference Re Public Service Employees Relations Act (Alta.)* [1987] 1 SCR 313 at 348-350, held that norms of international law provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions; See also *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 917.

³ Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples found online at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁴ Inter-American Commission on Human Rights OEA/Ser.L/V/II. Doc. 30/14, 21 December 2014, *Report of Missing and Murdered Indigenous Women in British Columbia, Canada at pages 72-80*.

⁵ *R v Sparrow*, [1990] 1 SCR 1075 at 1103-1105.

⁶ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35(1).

⁷ *Royal Proclamation (1763)*, RSC 1985, App II, No 1.

Nations people. In November 2010, Canada endorsed the *UN Declaration on the Rights of Indigenous Peoples*.⁸ Judicially, reconciliation has emerged as a means of breaking with the past approaches of assimilation, and non-recognition of First Nation rights.

8. For many years the AFN called for the establishment of a National Inquiry into Missing and Murdered Indigenous Women and Girls. The AFN continues to call upon all levels of government to address the systematic causes of all forms of violence, and to use a human rights framework and to work in partnership with First Nations to effectively address all forms of discrimination including sexual violence – against Indigenous women and girls in Canada, by addressing the underlying social, economic, cultural, institutional and historic causes which contribute to the on-going violence and particular vulnerabilities of Indigenous women and girls in Canada.

9. The AFN is guided by the Resolutions of its Chiefs-in-Assembly. Resolution 37/2014 “Support for Families First” directs the AFN to listen and support the voices of the families of Missing and Murdered Indigenous Women and Girls and adequately support the families and First Nations in their healing journeys.

Part II – Statement of Issues

10. The appeal raises the following issues, which are of great concern for all First Nations:

- 1) Whether the trial judge erred in his direction to the jury by allowing negative and prejudicial inferences to be made about the victim?
- 2) Whether the Crown prosecutor, defence counsel and trial judge’s continual labelling of the victim as a “prostitute” or “Native” had prejudicial effect on the jury’s decision?
- 3) Whether the Court of Appeal was correct in its finding that the procedures and considerations under s. 276 of the *Criminal Code* are mandatory and place obligations on the Crown, the defence and the trial judge to object to inclusion into evidence of the victims past sexual history?

⁸ Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (November 12, 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

Part III – Statement of Argument

A. Misdirection to the Jury

11. The Alberta Court of Appeal rightly stated its concerns regarding the jury system in circumstances where jurors cannot discharge their duties in a fair and impartial manner because the trial judge fails to perform a “gate keeper” role in ensuring that improper myths and stereotypes are not relied upon by the jury in making their decision. The Court of Appeal stated:

The verdict of a jury is the product of the reason and collective human experience of people taken from their busy lives to work together in an unfamiliar, yet vital enterprise. But juries consisting of 12 lay persons, cannot properly discharge their duties if the instructions they receive on the law are incorrect, inconsistent or non-existent on key legal issues of decisive significance. Nor is there any reasonable chance for jurors to discharge their duties impartially if trial judges fail to warn them about relying on improper myths and stereotypes when jurors have been implicitly or explicitly invited to do just that.⁹

12. The correct approach to directing jurors advanced by the Court of Appeal in this case is a contextual one, which promotes a fair and balanced method for directing jury to take into consideration the unique facts and circumstances of each case. This contextual approach is in contrast to the standardized and “boiler plate” directions to jurors, which often fail to properly caution jurors against basing their decisions upon negative inferences or biased and prejudicial beliefs. The contextual approach requires jurors to look beyond their own particular views to see the “big picture” of how the facts of a case are situated within the context of today’s societal realities.¹⁰ The failure to recognize important societal realities, in this case the circumstances of Indigenous women in Canada, results in a stagnant approach to the application of the Rule of Law and fails to incorporate appropriate modern day societal norms and values.¹¹

13. In *R v. Barton* the trial judge instructed the jury not to draw any negative inferences *against the accused* for being the type of person who “used” prostitutes. However, no caution was made to the jury about making negative inferences against the victim Cindy Gladue, because she was Indigenous women and a sex worker.

⁹ *R v. Barton*, 2017 ABCA 216 at para 1.

¹⁰ As evidence in cases such as *R v. Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC) and *R v. KGB*, [1993] 1 SCR 740, 1993 CanLII 116 (SCC).

¹¹ *Barton* supra note 6 at para 8.

14. The trial judge's failure to perform a fair and balanced "gate keeper" role for the jury resulted in the failure to instruct the jury to refrain from making negative inferences about Cindy Gladue's character. As with the trial judge's instructions regarding the accused, the jury should have also been cautioned about making inferences regarding Cindy Gladue as an Indigenous woman and sex worker that she consented to all forms of sexual interaction. As the Court of Appeal stated, the act of labelling Cindy Gladue as a "prostitute" or "Native" violated her equality and privacy rights:

The sting of this warning was that if Barton's actions were somehow viewed as discrediting Barton, it was because prostitute, including Gladue, should be regarded as discreditable. That was the message left with the jury. It was false and prejudicial. To caution the jury on the stigma and potential prejudice only from the perspective of Barton's character and reputation did not counter the stigma and potential prejudice to Gladue's rights to equality and privacy and the state's interest in a fair trial from Gladue being labelled a prostitute.¹²

15. In addition to violating Cindy Gladue's equality and privacy rights and undermining the State's interest in a fair trial, the AFN submits that the trial judge's actions further eroded First Nations' confidence in the jury system and the legal system as a whole. If a court is more preoccupied with ensuring that no negative inferences are drawn about a non-Indigenous accused's character or reputation, that it willingly violates an Indigenous victim's equality and privacy rights and allows the jury to make prejudicial conclusions about the victim, how then, do First Nation people have faith that the legal system in Canada is fair and unbiased? Beyond the specific issues which must be addressed in this case, there is also the overarching issue of how First Nation people are treated when they come into contact with the criminal justice system.

B. Section 276 of the *Criminal Code of Canada*

16. Section 276 of the *Criminal Code of Canada*, or what is known as the "rape shield" law, is a mandatory provision which prohibits the perpetuation of "twin myths" relating to sexual assault that (a) prior sexual conduct can be indicative of consent being present at the time of the offence and that (b) prior sexual history can impact upon complainant's credibility.¹³ Section 276 relates to instances of sexual assault and does not make mention of instances of homicide, however the

¹² *Barton* supra note 6 at para 130.

¹³ *Barton* at para 89 and 92; see also *R v. Seaboyer*; *R v. Gayme*. [1991] 2 SCR 577, 1991 CanLII 76 (SCC).

Court of Appeal in this case correctly interpreted that s.276 applies in “in proceedings in respect of an offence” which would include homicide.¹⁴ The Court noted that s.276 works to prohibit evidence of a prior sexual activity with the accused or others unless a judge determines that evidence of specific instances of sexual activity, is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.¹⁵

17. Section 276 is a “mandatory and structured decision-making process” when the defence wishes to adduce evidence of prior sexual conduct.¹⁶ A decision regarding admissibility of sexual conduct evidence is a question of law in accordance with section s. 276.5 of the *Criminal Code* and as the Court of Appeal noted “So too is the failure to comply with the mandatory procedures in section 276.”¹⁷ Section 276’s mandatory protections are of even greater importance in circumstances, like the case at bar, where the defence advances an argument of mistaken belief of consent and the victim has died. The Court of Appeal states unequivocally that:

Indeed it is all the more important to prevent evidence about the victim’s past sexual conduct from compromising the fair trial process when the victim has died at the hands of the accused – and the only one left to testify as to the circumstances is the accused. This is especially so where the defence advanced includes the accused’s alleged mistaken belief in consent to the very sexual activity that caused the victims death. Requiring compliance with section 276 ensures that a claim of mistaken belief cannot be based on misleading evidence about prior sexual conduct from the jury is invited to draw improper inferences.¹⁸

18. Both the Crown and the trial judge made reference to Cindy Gladue’s past sexual history and both chose to ignore the mandatory requirements of section 276 by continually referring to Cindy Gladue as the “prostitute”. The Court of Appeal is clear that the mandatory provisions of section 276 cannot be waived by the Crown or the trial judge and that the duty to uphold the mandatory provisions of section 276 is the ultimate responsibility of the trial judge.¹⁹

¹⁴ *Barton* at para 96.

¹⁵ *Barton* at para 91.

¹⁶ *Supra* para 92; see also *R v. Seaboyer*; *R v. Gayme* supra at note 10.

¹⁷ *Barton* at para 95.

¹⁸ *Barton* at para 108.

¹⁹ *Barton* at para 111.

19. The question remains why the Crown prosecutor and trial judge chose not to object when Cindy Gladue's past sexual history was brought into evidence. At trial, Cindy Gladue was referred to as the "prostitute" no less than 25 times by witnesses, the Crown prosecutor, the defence counsel and the trial judge.²⁰ As a result, as the Court of Appeal points out, that one word "prostitute" in the minds of the jurors had the effect of ushering in all of Cindy Gladue's past sexual conduct, whether "real or imaginary".²¹

20. The failure on the part of Crown and ultimately the trial judge to object is significant, as it is yet another example of how Indigenous women and girls are deemed by those within the criminal justice system as less worthy of protection under the law. The courts in Canada have long recognized that the potential for racial prejudice against visible minorities in the justice system is a notorious social fact that is indisputable. The Court of Appeal makes this very point by referencing *R v. Spence*, which recognized that often times jurors, due to underlying biases, may consciously or subconsciously consider certain people less worthy under the law.²² Regardless of the intentions or motives of the Crown prosecutor and the trial judge, their failure to object when the victims past sexual history was brought into evidence clearly had a prejudicial effect on the jury and imbued the trial judge's direction to the jury with negative inferences regarding Cindy Gladue.

C. The Effect of Labelling the Victim as "Prostitute" or "Native"

21. Throughout the trial, the Crown prosecutor, and defence counsel repeatedly made reference to Cindy Gladue as a "prostitute" or the "Native girl" or "Native woman" in front of the jury without censure or caution. This not only allowed Cindy Gladue's sexual history into evidence, it allowed the jury to draw negative assumptions about her life and her worthiness of protection under the law. Cindy Gladue was more than a "victim", "Native" or "prostitute" she was a mother, daughter, friend, family member and above all she was a human being worthy of the same dignity and respect as all others, in life and in death. Of the many failures of the justice system that the Court of Appeal addresses in its decision, the lack of respect and dignity shown to Cindy Gladue because she was an Indigenous woman is perhaps the most troubling of all.

22. The Court of Appeal correctly found when instructing the jury, the trial judge failed to caution the jury about making negative inferences from the terminology used by the officers of the

²⁰ *Barton* at para 123.

²¹ *Ibid.*

²² *Barton* at para 126; see also *R v. Spence*, [2005] 3 S.C.R. 458 at para 5.

court throughout the trial. Instead the trial judge chose to provide the jury with a standard caution, which in no way countered the negative stereotypes and prejudices that the labels “Native women” and “prostitute” would inevitably invite in the minds of the jurors. The Court of Appeal stated:

This standard caution in the final instructions was not wrong in itself. But it was inadequate to counter the stigma and potential bias and prejudice that arose from the repeated references to Gladue as a “prostitute”, “Native Girl” and “Native Women”. Those references implicitly invited the jury to bring to the fact finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment.Add to this that because Gladue was labelled a “Native” prostitute – who was significantly intoxicated – the jury would believe she was even for likely to have consented to whatever Barton did and was even less worthy of the law’s protection.²³

23. What is significant about the above quote is that it lays bare the fact that the labelling of Cindy Gladue as a “Native” gave the jury implicit permission to determine that she was less worthy of protection under the law. It is a striking acknowledgement of long held racist and dangerous stereotypes that Indigenous women and girls are sexually “available for the taking”. In 2017, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination (CERD) discussed in its periodic report of Canada the growing concern regarding the alarming rates of missing and murdered Indigenous women and girls in Canada recommending that Canada establish an independent review mechanism for unsolved cases of missing and murdered indigenous women and girls where there is evidence of bias or error in the investigation.²⁴

24. The Court of Appeal sharply rebuked the argument that the fact that Cindy Gladue was a sex worker was relevant to the defence’s case and should be automatically brought into evidence. The Court stated:

To those who would immediately say ‘of course it is relevant that she was a prostitute’, our answer is this. A decision that sexual conduct evidence is admissible

²³ *Barton* at para 128.

²⁴ United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, CERD/C/CAN/CO/21-23, 13 September 2017.

requires compliance with s. 276. Parliament has called for a careful consideration of underlying assumptions according to a set of stated factors.²⁵

Section 276 was intended to replace quick conclusions based on false logic and discriminatory thinking about who consents, who tells the truth and what is relevant with a careful and structured analytical process designed to balance evidence in the search for the truth, notably by excluding misleading evidence in support of illegitimate inferences. Everyone in Canada, including sex workers, is entitled to that protection.²⁶

25. Examples of racial bias, dehumanizing treatment and cultural insensitivity was evidenced throughout the trial and was not only limited to the labelling of Cindy Gladue as a “prostitute” or “Native”, it was also evidenced by the *Crown’s insistence*, and the trial judge’s decision to allow her preserved body tissue to be admitted into evidence and shown to the jury.²⁷ This decision was made without any regard for the cultural sensitivities or beliefs of Cindy Gladue’s family. While the cultural beliefs of Indigenous peoples across Canada are varied, many ascribe to the belief in the sacredness of human life as well as the sacredness of the human body in life and in death. It is questionable if Cindy Gladue had been non-Indigenous, whether such an indignity to her body would have been allowed in court, or whether the concerns of her family would have been so carelessly disregarded by the court.

26. The AFN submits that all individuals whether they be the accused, witnesses or victims of crime are entitled to be treated with the same dignity and respect under the law, and that Indigenous people who come into contact with the criminal justice system should not be prejudiced because of their race or gender. This Honourable Court has in a number of cases, acknowledged the detrimental effects of widespread racism against Indigenous people within the criminal justice system.²⁸ The AFN further submits that it is this Honourable Court’s duty to send a strong message to all individuals responsible for the administration of justice, that it is simply unacceptable to treat Indigenous people as less worthy of protection under the law.

27. In its attempt to fully understand the issues of this case, the Court of Appeal chose to hear evidence from joint intervenors regarding the circumstances of Indigenous women and girls in Canada. It is the AFN’s position that in criminal law cases involving Indigenous people, it is crucial

²⁵ *Barton* at para 119.

²⁶ *Barton* at para 120.

²⁷ *R v. Barton*, 2015 ABQB 159.

²⁸ *R v. Williams* [1998] 1 SCR 1128; *R v. Gladue* [1999] 1 SCR 688; *R v. Ipeelee*, 2012 SCC 13.

that the courts seek guidance in understanding the history as well as the current circumstances of Indigenous people in Canada.

28. The history and legacy of colonialism in Canada permeates almost all aspects of Canadian law and the legal system. Many of the root causes of the epidemic of missing and murdered Indigenous women and girls in Canada can be traced back to the assimilationist objectives which were codified in Canada's law and policies. It is an undeniable truth that long standing systematic biases and racist views still held by Canadian society continue to deny Indigenous women and girls fundamental rights to safety, security and equal protection under the law. However, as noted by the Court of Appeal, the criminal law must continue to evolve and respect the rights and dignity of Indigenous people, as the Court concluded, "we live in a society where *every* individual's life, liberty and security of the person have equal value and where *every* individual's autonomy has meaning. It is a society where the criminal law must reflect and respect *every* individual's rights and dignity."²⁹

Part VI – Costs

29. The AFN does not seek costs and asks that it not be subject to any costs orders.

Part V – Nature of Order Sought

30. The AFN takes no position on the specific outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: September 13, 2018



Stuart Wuttke & Julie McGregor
Assembly of First Nations

²⁹ *Barton* para 312, [emphasis added].

Part VI – Table of Authorities

A. Primary Sources

Jurisprudence	Paragraphs
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> [1999] 2 SCR 917, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1717/index.do	2
<i>Reference Re Public Service Employees Relations Act (Alta.)</i> [1987] 1 SCR 313 at 348-350, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/205/index.do	2
<i>R v. Barton</i> , 2017 ABCA 216, https://www.canlii.org/en/ab/abca/doc/2017/2017abca216/2017abca216.html?resultIndex=5	11, 12, 14, 16, 17, 18, 19, 20, 22, 24, 28
<i>R v. Barton</i> , 2015 ABQB 159, https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb159/2015abqb159.html?autocompleteStr=barnton&autocompletePos=3	25
<i>R v. Gladue</i> [1999] 1 SCR 688, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1695/index.do	26
<i>R v. Ipeelee</i> , 2012 SCC 13, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8000/index.do	26
<i>R v. KGB</i> , [1993] 1 SCR 740, 1993 CanLII 116 (SCC), https://beta.canlii.org/en/ca/scc/doc/1993/1993canlii116/1993canlii116.html	12
<i>R v. Khan</i> , [1990] 2 SCR 531, 1990 CanLII 77 (SCC), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1928/index.do	12
<i>R v. Seaboyer</i> ; <i>R v. Gayme</i> . [1991] 2 SCR 577, 1991 CanLII 76 (SCC), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/783/index.do	16, 17
<i>R v Sparrow</i> , [1990] 1 SCR 1075 at 1103-1105, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do	6
<i>R v. Spence</i> , [2005] 3 S.C.R. 458 at para 5, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2253/index.do	20
<i>R v. Williams</i> [1998] 1 SCR 1128, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2074/index.do	26

B. Secondary Sources

Source	Paragraphs
Article IV American Declaration on the Rights of Indigenous Peoples, June 15, 2016 (AG/RE2867 (XLIV-0/14) found at: https://www.oas.org/en/sare/documents/DecAmIND.pdf .	2
Article 22, <i>United Nations Declaration of the Rights of Indigenous Peoples</i> (A/RES/61/296), found online at: http://www.un.org	2, 3
Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (November 12, 2010), online: http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142 .	7

<p>Inter-American Commission on Human Rights OEA/Ser.L/V/II. Doc. 30/14, 21 December 2014, <i>Report of Missing and Murdered Indigenous Women in British Columbia, Canada at pages 72-80</i>, https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf</p>	<p>3</p>
<p>United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, CERD/C/CAN/CO/21-23, 13 September 2017, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhstz6Kqb8xvweVxiwlinyzEnrSQTaImuyoLPtH1p%2B%2FBoA9aSpHnHOaSTR3D%2BGaG21xFo2B95JnqHNgalSwJoOiSGBGOUk6xxJIGD9T1UIIq2pb%2BLbXWwAtxJ%2FiP6NJCzvYQ%3D%3D</p>	<p>23</p>

C. Statute

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Royal Proclamation (1763), [RSC 1985, App II, No 1](#).