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First Nations, Métis, and Inuit Women's Health

Yvonne Boyer

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Native Law Centre • University of Saskatchewan

National Aboriginal Health Organization (NAHO)
220 Laurier Ave. West, Suite 1200
Ottawa, Ontario K1P 5Z9
website: http://www.naho.ca

Native Law Centre
University of Saskatchewan
101 Diefenbaker Place
Saskatoon, Saskatchewan S7N 5B8
website: http://www.usask.ca/nativelaw

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Executive Summary

This paper provides a historical account of some of the legislation, laws and policies that reflect important points in history that led to the current disparaging health status of Aboriginal women in Canada. Although Aboriginal women (and all Aboriginal people in Canada) have unique sets of constitutionally protected rights, the government has failed to protect these rights. If these rights were protected then Aboriginal women would enjoy a health status on par with the rest of the Canadian population. This is not the case. The government has a fiduciary obligation to protect Aboriginal rights through section 35 of the *Constitution Act, 1982.*[1] This paper provides an analysis of Aboriginal health as an Aboriginal right through section 35 of the *Constitution Act, 1982* and, through the entrenchment of section 35(4), Aboriginal and treaty rights are to be applied equally to men and women. The *Canadian Charter of Rights and Freedoms* guarantees individual rights to equality. These rights also encompass the individual rights to health to be standard and on par with other Canadians. Aboriginal peoples in Canada also carry these important *Charter* rights. However, in analyzing the guarantee and the placement of Aboriginal women's health in Canada, and viewing the statistics, it quickly becomes apparent that Canada is in breach of its constitutional obligations (including *Charter* breaches) toward Aboriginal women.

Canada's health policies and guidelines affecting Aboriginal women's health should be examined to ensure they reflect the fiduciary relationship between the Crown and Aboriginal peoples. The Framework for the Future in Part Six allows the reader to grasp some hope that the current situation can indeed be improved through heeding the words of the Elders and Aboriginal women leaders themselves and the implementation of the guidelines that the Supreme Court of Canada has stated properly characterize Crown/Aboriginal relations.

1. Introduction

Many Aboriginal[2] women's life experience continues to be one of violence, discrimination, inequality, sexual harassment and repression.[3] The resulting harmful health consequences for women affect not only their personal experiences but often impinge on the lives of their children, family and community members. In her keynote address The Honorable L'Heureux-Dubé of the Supreme Court of Canada spoke out about violence against women as an "an assault upon human dignity and a *constitutional denial* of any concept of equality for women." [4] (emphasis added)

Women's inequality in Canadian society was created and fortified with laws which were enacted to "protect" women: for example, laws on prostitution, contraception, abortion, sexual assault, obscenity and laws that regulate medical practice, and the provision of a wide range of health services.[5] The enactment and enforcement of the laws, legislation and policies has impacted the status of women in their communities. The aggregate of these laws have contributed to the perpetuation of women's inequality in the area of health care and services.[6]

Canada's institutions that claim to be value free continue to reflect a male construction of reality.[7] The implementation of colonialism through sets of male created and centered values has shaped institutions, laws, legislations and policies that have had a long-lasting negative effect on the health of Aboriginal women. Colonial laws and policies were developed that targeted the power of Aboriginal women as family anchors. For instance, the *Indian Act,* residential schools, sterilization laws, mental health laws, forced removal of children and enfranchisement were integral in attacking the essence of Aboriginal woman as caregivers, nurturers and equal members of the community.

This paper examines laws, legislation, and discriminatory policies that historically have affected Aboriginal women and continue to do so today. Building on Discussion Papers one and two in this Series, an analysis extends the constitutionally protected right to health for Aboriginal people in Canada to section 35(4) that provides equality for males and females. The equality provisions are examined in light of the historical setting of Aboriginal women's place of balance in early Aboriginal society and examined within the sphere of Aboriginal rights. The government's fiduciary responsibility to Aboriginal people is then advanced to determine if there has been a breach of these constitutionally protected rights. The paper concludes by providing an example of a framework for the future to assist the government and policy makers in effectively discharging their duties under the law.

2. Aboriginal Women in Traditional Society

Aboriginal law was given by the Creator through sacred ceremonies and is binding and unalterable. The promises and agreements encompass sacred principles, values and laws that are to govern every relationship and interaction. The law not only informs relationships among humans but with all ecological orders.[8] Accordingly, Aboriginal law has been described as:

> Powerful laws were established to protect and to nurture the foundations of strong, vibrant nations. Foremost amongst these laws are those related to human bonds and relationships known as the laws relating to *miyo-wîcêhtowin.* The laws of *miyo-wîcêhtowin* include those laws encircling the bonds of human relationships in the ways in which they are created, nourished, reaffirmed, and recreated as a means of strengthening the unity among First Nations people and of the nation itself. For First Nations, these are integral and indispensable components of their way of life. These teachings constitute the essential elements underlying the First Nations notions of peace, harmony, and good relations, which must be maintained as required by the Creator. The teachings and ceremonies are the means given to First Nations to restore peace and harmony in times of personal and community conflict. These teachings also serve as the foundation upon which new relationships are to be created.[9]

Aboriginal women commanded the highest respect in their communities as the givers of life and were the keepers of the traditions, practices and customs of the nation. It was well understood by all, that women held a sacred status as they brought new life into the world. Women were revered for their capacity not only to create new life but by extension the creation of new relationships with the Creator.[10] The *Report of the Royal Commission on Aboriginal Peoples* notes:

> She did not have to compete with her partner in the running of the home and the caring of the family. She had her specific responsibilities to creation which were different, but certainly no less important, than his. In fact, if anything, with the gifts given her, woman was perhaps more important …[11]

The newest members of the community were given the law of the Creator and were given responsibility to enter into new relationships in a "good way."[12] Women made integral decisions about family, property rights, and education.[13] Underlying principles of gender balance streamed through early Aboriginal society.[14] The issue of balance, however, is not to be construed or constructed as similar to the Eurocentric or feminist or western legal tradition understandings of "balance" as equating "equality." Aboriginal law is not ordered around Eurocentric values or perceptions of what is "balance" or "equality." Rather, for Aboriginal women, balance is understood as respecting the laws and relationships that Aboriginal women have as part of the Aboriginal law and ecological order of the universe. Professor Patricia Monture-Angus notes:

> … Aboriginal culture teaches connection and not separation. Our nations do not separate men from women, although we recognize that each has its own unique roles and responsibilities. *The teachings of creation require that only together will the two sexes provide a complete philosophical and spiritual balance. We are nations and that requires the equality of the sexes*.[15] (emphasis in original)

As a well-documented example, the Iroquoian culture is noted to be based upon the principles of balance and equilibrium, gender considered as only one component of balance:

> [E]quilibrium was the animating purpose behind "gendering," or the interaction between male and female energies that dictated the separation of social functions by gender … [T]he sexes functioned as cooperative halves. At once independent yet interdependent, they worked to create the perfect whole of society. In all the spheres – the social and the religious, the political and the economic – women did women's half and men did men's half, but it was only when the equal halves combined that community cohered into the functional whole of a healthy society.[16]

Unlike European culture imposed through colonization, Iroquoian culture was not centered on conflict or subordination. Iroquoian culture required that each gender had a role and that each gender was superior in their sphere of responsibility. Both gender roles were viewed as equal and necessary for the health and survival of the community.[17] Author Barbara Mann explains the importance of women in Iroquoian society:

> The *gantowisas* enjoyed sweeping political powers, which ranged from the administrative and legislative to the judicial. The *gantowisas* ran the local clan councils. They held all the lineage wampum, nomination belts and titles. They ran funerals. They retained exclusive rights over naming … They nominated all male sachems as well as all Clan Mothers to office and retained the power to impeach wrongdoers. They appointed warriors, declared war, negotiated peace and mediated disputes.[18]

The women controlled economy through the distribution of bounty and ruled the social sphere (social practices such as inheritance through the female line; female-headed households; pre and extra-marital sexual relations for women; female-controlled fertility; permissive child rearing; adoptions; trial marriages; mother-dictated marriages; divorce on demand; maternal custody of children on divorce and polyandry).[19]

The Report of the *Royal Commission on Aboriginal Peoples* reported on the traditional gender roles:

> [A]ccording to traditional teachings, the lodge is divided equally between women and men, and that every member has equal if different rights and responsibilities within

> the lodge … The lodge governed our relationship with each other, with other nations, and with the Creator and all of Creation.[20]

In Inuit society

> [t]here is agreement that women were traditionally responsible for decisions about children, food preparation and the running of the camp. While clear divisions of labour along gender lines existed, women's and men's work was equally valued. If a woman was a sloppy sewer, her husband might freeze; a man who was a poor hunter would have a hungry family. Everyone in the camp worked hard and everyone had a specific role based on their age, gender and capabilities.[21]

Leah Dorian comments on the role of Métis women and society as being "matrilineal and matriarchal, which resulted in the high status of women"[22] and these women held "social and political power that was unseen in the lives of contemporary European and Euro-Canadian women."[23]

The common thread running through all groups of Aboriginal society is that equality and gender balance was foremost, the men couldn't survive the harsh conditions without women and women could not survive without the male counterpart. Professor Emma LaRocque notes:

> Prior to colonization, Aboriginal women enjoyed comparative honour, equality and even political power in a way European woman did not at the same time in history. We can trace the diminishing status of Aboriginal women with the progression of colonialism. Many, if not the majority, of Aboriginal cultures were originally matriarchal or semi-matriarchal. European patriarchy was initially imposed upon Aboriginal societies in Canada through the fur trade, missionary Christianity and government policies.[24]

Many scholars suggest that all Aboriginal traditions were marked by equality between men and women, with patriarchy and male dominance introduced only through the European missionaries,[25] and institutionalized through the *Indian Act*.[26] These issues will be examined in the following section.

3. Colonization of Aboriginal Women's Health

Unlike the laws of Aboriginal nations based on respect and gender balance, the British common law developed through the legal traditions of the Romans, the Normans, church canon law and Anglo-Saxon law, traditions whereby married women were generally considered to be under the protection and cover of their husbands.[27] The common law viewed women as having no social or legal status, but as chattels[28] and dependent first on their fathers and then their husbands:[29]

> When a man and woman were married, that was just about the end of the wife (as a separate entity at least) for all practical and legal purposes … For centuries the married woman was one with idiots and children; she was not thought competent to manage the wealth, the land.[30]

British Jurist Sir William Blackstone describes the coverture doctrine:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law – french a *feme-covert* … under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture* …
>
> For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would only to be to covenant with himself … [31] (emphasis in the original)

Under coverture, a wife simply had no legal existence and was considered "civilly dead."[32] Claudia Zaher comments:

> Any income from property she brought into the marriage was controlled by her husband, and if she earned wages outside the home, those wages belonged to him. If he contracted debts, her property went to cover his expenses. *A man who killed his wife was guilty of murder and could be punished by death or imprisonment, but a woman who killed her husband was guilty of treason against her lord and could be punished by being drawn and burnt alive.* To put it most succinctly, upon marriage the husband and wife became one – him. Social norms, as reflected in the law, maintained that this was not only the natural way of things but also God's direct intent, quoting Genesis 3:16: "Your desire shall be for your husband, and he shall rule over you." [33] (emphasis added)

When North America was colonized, gender roles were redefined with the imposition of European laws. Some of the early impacts can be seen in the fur trade where the European

fur traders refused to deal with Aboriginal women.[34] The women's husband, father, or brother would make the sale or exchange of the fur, and therefore would receive the proceeds.[35]

Formal broad definitions of the term "Indian" came into affect in 1850 when the legislation governing Indians was created.[36] Section 3 of the *Indian Act* of 1876 states "[t]he term 'Indian' means "any male person of Indian blood reputed to belong to a particular band," "any child of such person," "any women who is or was lawfully married to such person."[37] An Aboriginal woman's rights were now completely dependant on the rights of her father or husband.

In 1906 the *Indian Act* was amended to define a "person" as an individual *other* than an Indian.[38] An amendment to the *Indian Act*, re-defining the term, was not made until 1951.[39] The restrictions that affected women as legal "non-persons" and denied their entry into medical schools and the legal profession would be applied to both Indian men and women from 1869 until voluntary and involuntary enfranchisement was repealed in the *Indian Act* in 1985.[40] A brief synopsis of the *Indian Act* reads:

> Status soon came to have other implications. Status Indians were denied the right to vote, they did not sit on juries, and they were exempt from conscription in time of war (although the percentage of volunteers was higher among Indians than any other group). The attitude that others were the better judges of Indian interests turned the statute into a grab-bag of social engineering over the years.[41]

Assimilation was the goal in attempting to colonize Aboriginal peoples, and the *Indian Act* proved to be a useful tool. Education played a large role in this assimilation project. It was also integral in annihilating Aboriginal women's societal place as family anchor. Residential schools were a product of the *Indian Act* of 1876, which allowed the Minister of Indian Affairs to control education for Indians. The residential school experience entailed a separation of the children from almost all family members. Parents were not allowed to visit their children in residential schools.[42] If children were allowed to return home at all, they were only sent home for two months out of the year.[43] Parents lost parenting skills and the children forgot how to live in a family – the family unit was broken. The insufficient health care facilities, inadequate diets and poor sanitation contributed to the spread of disease, suffering, near-starvation, and death of students in residential schools. One of the diseases that were largely spread in residential schools was tuberculosis, which ultimately reached epidemic levels.[44] The intergenerational effects of the loss of parenting skills (for both children and parents) and ill health resulting from the disease-ridden residential schools can be seen on the streets of any Canadian city,[45] and through the current statistics on Aboriginal women's health.

Besides the starvation and disease experienced in residential school systems, physical, mental and sexual abuse was rampant.[46] The effect of the residential school experience on Aboriginal people has been devastating. Aboriginal peoples were severed from traditional practices including medicinal practices. The residential schools forbade the use of Aboriginal languages (a way of life when much of the information relating to health could only be communicated with Indigenous languages). Traditional gender roles were obliterated as women lost their respected roles in the community, patriarchy and paternalism became the dominant feature of Aboriginal society.[47] The family unit was annihilated.

The *Indian Act*, residential schools and other assimilation projects not only redefined gender roles but also caused acute traumatization to the health and social fibre of Aboriginal people. Sákéj Youngblood Henderson describes a source of colonialism as Eurocentrism being a "dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans."[48] The intent behind colonization was to subjugate, by force if necessary, take possession of the land, assimilate the people through forced religious indoctrination, and promote adherence to Western society's norms, rules, organization, and ways of living and thinking.

Sharlene Razack describes a "white settler society" as one that is established by Europeans on non-European soil. In its origins lay the dispossession and near extermination of Indigenous populations by Europeans. As it evolves, a white settler society continues to be structured by a racial hierarchy. In the national mythologies of such societies, it is believed that European people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead, dying or assimilated. European settlers thus become the inhabitants most entitled to the fruits of new lands, unimagined wealth, power, human (slavery) and natural resources.[49] In addition, an imperial vocabulary developed in the nineteenth century with words and concepts such as "inferior" or "subject races," "subordinate peoples," "dependency," "expansion," and "authority."[50] Razack explains "[a] quintessential feature of white settler mythologies is therefore, the disavowal of conquest, genocide, slavery,[51] and the exploitation of the labour of peoples of colour. In North America, it is still the case that European conquest and colonization are often denied; largely through the fantasy that North America was peacefully settled and not colonized."[52] Taiaiake Alfred and Jeff Corntassel comment on the global effects of colonization:

> There are approximately 350 million Indigenous peoples situated in some 70 countries around the world. All of these people confront the daily realities of having their lands, cultures, and governmental authorities simultaneously attacked, denied, and reconstructed by colonial societies and states. This has been the case for generations.

> But there are new faces of empire that are attempting to strip Indigenous peoples of their very spirit as nations and of all that is held sacred, threatening their sources of connection to their distinct existences and the sources of their spiritual power: relationships to each other, communities, homelands, ceremonial life, languages, histories … These connections are crucial to living a meaningful life for any human being.[53]

The results are measured in losses of cultural identity, marginalization and health status that fall well below that of mainstream Canadians. There has been a denigration of Aboriginal women's roles in contemporary society due to the impact of colonization and as a result, "the cultural and social degradation of Aboriginal women has been devastating."[54]

Several generations of Indian Act governance, and in particular, the discriminatory provisions regarding inter-marriage, have left many Aboriginal women without a voice while they have attempted to use the equality provisions in the Charter to access reasonable participation[55] to health services.

3.1 Harms resulting from the Colonization

As noted earlier, Aboriginal womanhood has been described as once being a sacred identity that was maintained through a knowledge system of balance and harmony. Women were politically, socially and economically powerful and held status in their communities and nations related to this power.[56] Aboriginal women were closely linked to the land, and because land acquisition became the goal of the colonizers, Aboriginal women became the target. Aboriginal women have been portrayed as "drunken squaw, dirty Indian, easy and lazy."[57] Through various laws, regulations, policies and Christian edicts,[58] this demeaning and demoralizing portrayal became the identity of the Aboriginal woman in Canada,[59] forcing them into an oppressed position in society, which are mitigating factors as to their poor health of today.

Although not limited to the following areas, much harm against Aboriginal women has been committed through legislation, laws and policies. Besides the damages from the *Indian Act* and residential schools, government imposed physical harms have affected all women but because of their disadvantaged place in Canadian society, Aboriginal women have been particularly affected. Some of these issues will be examined below.

3.1.1 Forced Sterilization

The history of the Eugenics movement began in nineteenth century England, with Sir Francis Galton, (1822–1911) cousin to Charles Darwin. The term eugenics derived from the Greek

"well born" or "good breeding" and devolved into eugenic policies that spread to the United States, Canada, and several European countries, and later gained infamy in Germany.[60] A policy of involuntary surgical sterilization (a blatant breach of the Genocide Convention[61]) was carried out on Aboriginal women in Canada and the United States.

In the United States, a 1974 study of the Indian Health Services by the Women of All Red Nations (WARN) revealed "as many as 42 percent of all Indian women of childbearing age had by that point been sterilized without their consent."[62] These estimates were confirmed by a General Accounting Office (GAO) investigation of four IHS facilities that examined records *only* for 1973 –76 and that concluded that "during this three-year sample period, 3,406 involuntary sterilizations (the equivalent of over a half-million among the general population) had been performed in just these four hospitals."[63]

In Alberta, 2,800 people were sterilized between 1929 and 1972, under the authority of the province's *Sexual Sterilization Act.*"[64] Although many provinces considered the idea of eugenics, British Columbia and Alberta were however, the only provinces legislating in favor of eugenics.[65] Alberta sterilized ten times more people than did British Columbia.[66] Both provinces have historically had a high Aboriginal population.

The *Sexual Sterilization Act* was intended to stop "mental defectives" from having children. The Eugenics Board was comprised of four people who were mandated to authorize sterilization in Alberta.[67] The Act initially required the consent of patients unless they were "mentally incapable," in which case "the consent of the next of kin had to be obtained."[68] In 1937, the Act was amended to ensure that consent was no longer required by patients or the next of kin if the patient was considered "mentally defective."[69] The 1937 amendment also targeted "individuals incapable of intelligent parenthood."[70] Aboriginal peoples were easy targets for the new amendment especially with regard to being thought to be incapable of intelligent parenthood. In 1988 the Alberta government destroyed many of the 4,785 files created by the Eugenics Board. The government of Alberta maintained 861 of those files. Professor Dr. Jana Grekul reviewed them and commented:

> *[M]ost noticeably over-represented were Aboriginals* (identified as "Indian," "Métis," "half breeds," "treaty" and "Eskimo"). While the province's Aboriginal population hovered between 2% and 3% of the total over the decades in question. Aboriginals made up 6% of all cases represented.[71] (emphasis added)

She further concluded:

> [F]ew exceptions particularly in the 1930's [8 %] more women than men appeared before the Board … [72]

> We found that people were being referred to the board for reasons related to their social class, gender, and ethnicity, and there was no genetic condition for them to be considered for sterilization.[73]

In October 1989, Leilani Muir discovered that she had been sterilized and brought "legal action against the Government of Alberta for wrongful confinement and for wrongful sterilization" and won.[74] In Ms. Muir's case "a single IQ test" had been enough to deem her a mentally defective and therefore a candidate for sterilization.[75] Upon Ms. Muir's physical examination and discovery that she had been sterilized her doctor reported that her insides "looked like she had been through a slaughterhouse."[76]

With the uncovering of the Muir case, the Government of Alberta's response was a proposition to override the *Charter* using section 33 to limit the compensation to victims; this was met with a massive public outcry.[77] The Government of Alberta finally apologized in 1999 and offered several individuals and groups the option to settle out of court.[78] For Aboriginal women the impact on health and the stigma of having been wrongfully institutionalized and sterilized is insurmountable.[79] Further, Aboriginal women have been subjected to long-standing forms of abuse through government-imposed experiments in the correctional system and elsewhere.[80]

3.1.2 The Aboriginal Woman is Legislated as "Prostitute"

Historians have established that prostitution occupied a central place in social reform initiatives during the late nineteenth and early twentieth centuries. Authors Carolyn Strange and Tina Loo question *why* prostitution became a social problem at this exact moment.[81]

> Even though Scottish and French men started families with Aboriginal women during the fur trade, some Europeans began to propagate myths that such women were somehow more promiscuous in nature. These notions made it easier for all men to unfairly blame or victimize Aboriginal women for their problems …[82]

Stoler documents how and why specific sexual arrangements, like concubinage, were favored by colonial elites over intra-racial marriage and prostitution at various historical moments, only later to be condemned and replaced by other conjugal relations. Colonial administrators deemed sexual relations between Native women and white men to be acceptable during the fur-trade era, only to be censured and replaced by prostitution in later periods. Stoler further notes that

the "regulation of sexual relations was central to the development of particular kinds of colonial settlements and to the allocation of economic activity within them."[83]

The first Canadian statute that dealt with prostitution was passed in Lower Canada in 1839.[84] In the late-nineteenth century, prostitution was seen as a social evil and a racial problem. The "Native woman as prostitute" was identified as the new social problem and reported through sensational headlines such as "Indian Girl Sold for 1000 Blankets."[85] Government officials at the federal, provincial and local levels implemented various legal and non-legal regulatory techniques to manage prostitution. Indian Agents, missionaries, and local officials openly condemned both intra and inter-racial prostitution, many also emphasized the need for more "stringently applied laws."

By 1879, a series of provisions relating to prostitution were added to the *Indian Act.* These sections of the *Indian Act* underwent several revisions, each adding more force to the legislation. The *Indian Act* of 1879[86] focused on punishing individuals who kept houses of prostitution. However, these sections were repealed and replaced in 1880 and again in 1884. The 1880 law prohibited the keeper of any house from allowing Indian women who were believed to be prostitutes on their premises. The 1884 Act extended the provisions of the earlier legislation from "keepers of houses of prostitution," to include any Indian woman or *man* keeping, frequenting, or found in a "disorderly house or wigwam."[87] The law was changed again in 1887, so that keepers and inmates of houses of prostitution would be equally liable to a fine of $100 or six months imprisonment. These new provisions were aimed at eliminating intra-racial prostitution only. The *Indian Act* criminalized Native women for practicing prostitution and punished Aboriginal men for "pimping" and "purchasing" the services of prostitutes; however, few attempts were made to punish non-Aboriginal men. In 1892, with the enactment of the *Criminal Code of Canada,* the federal government removed all of the prostitution sections from the *Indian Act* and inserted them into the *Criminal Code*. Consequently, many Aboriginal women who were arrested for prostitution-related offences were banished from cities and towns and were forced back to their reserves if, indeed, their communities accepted them back.

Indian Agents and missionaries emphasized that stronger marriage laws and the abolition of Indigenous marriage customs[88] were necessary for the protection of Native women, the prevention of prostitution, and the preservation of white settlement in the province. Traditional ceremonies, such as the potlatch, were blamed for causing prostitution. The potlatch was seen as the "ultimate sign of degradation, as it symbolized the depravity, savagery, and primitiveness of Native peoples."[89]

3.1.3 Aboriginal Women "Vanish"

In October 2004, Amnesty International released the *Stolen Sisters Report (Report)*.[90] This report was commissioned partly in response to the fact that over five hundred Aboriginal women have been murdered or gone missing over the past twenty years, according to estimates by the Native Women's Association of Canada (NWAC).

The *Report* highlights a 1996 Canadian government statistic which revealed that Aboriginal women between the ages of 25 and 44 with status under the *Indian Act*[91] are five times more likely than all other women of the same age to die as the result of violence.[92]

Amnesty International's research posits that decades of government policies have been a major factor negatively affecting generations of Aboriginal women and children. Social strife, decades of involuntary uprooting of women and children, and lack of economic and educational opportunities within many Aboriginal communities have contributed to a steady growth in the number of Aboriginal people living in predominately non-Aboriginal towns and cities. The *Report* suggests that the same historical legacy has also contributed to a heightened risk of violence for Aboriginal women in urban centers in Canada. Many women now face desperate circumstances in Canadian towns and cities, a situation compounded by sexist stereotypes and racist attitudes towards Aboriginal women and girls and general indifference to their welfare and safety. The resulting vulnerability of Aboriginal women has been exploited by Aboriginal and non-Aboriginal men to carry out acts of extreme brutality against Aboriginal women.[93]

Despite the number of Aboriginal women who have been murdered or gone missing, their fate has not been adequately addressed by Canadian authorities, including the police and the public. Across the country, Aboriginal people face arrest and criminal prosecution in numbers that far outweigh the size of the Aboriginal population. The Manitoba Justice Inquiry suggested that many police have come to view Aboriginal people not as a community deserving protection, but as a community from which the rest of society must be protected.[94]

In conducting its research, Amnesty International interviewed a number of police officers, the majority of whom stated that they handle all cases the same and do not treat anyone differently because they are Aboriginal.[95] These statements, however, can be contrasted to the accounts of families. Many families reported that police did little when they reported a sister or daughter missing. Police response was that the majority of people who are reported missing have voluntarily "gone missing," that many choose to run away or have chosen to break off ties with their families.[96] Regardless of the circumstances, this does not justify incidents where, despite

the serious concern of family members that a missing sister or daughter was in serious danger, police failed to take basic steps such as promptly interviewing family and friends or appealing to the public for information. Muriel Venne, founder of the Institute for the Advancement of Aboriginal Women, noted that hundreds of aboriginal women have been killed or have gone missing across the country – yet it has been largely met with indifference."[97]

According to Statistics Canada there were 408,140 women who self-identified as Aboriginal in the 1996 Canadian Census.[98] The *Report* confirms that five hundred First Nations women went missing between 1995 and 2005. If Canadian women in general disappeared at that rate, 17,500[99] would have gone missing in the same period, a number equal to the population of a small city. A loss of that magnitude, about 875 women per year would surely have triggered a massive response from the public, from police and from all levels of government. How is it that so many Aboriginal women can disappear with hardly anyone taking notice?

Colonization, racism, the *Indian Act*, residential schools, laws, policies and regulations that have subjugated Aboriginal women to a lifetime of violence, poverty and degradation have created the crisis in Aboriginal women's health today. The current grim health statistics follow in the next section.

3.2 Aboriginal Women's Health Today

If one manages to escape death by violence or "disappearance," many, if not most Aboriginal women can expect to experience a variety of health problems. For instance, Health Canada offers a glimpse into the health statistics on Aboriginal women:

- Life expectancy for Aboriginal women is 76.2 years vs. 81.0 for non-Aboriginal women.
- Aboriginal women experience higher rates of circulatory problems, respiratory problems, diabetes, hypertension and cancer of the cervix than the rest of the general female population.
- Diabetes is three times as prevalent in Aboriginal communities as in the general population. Most Aboriginal diabetics are women (approximately 2 to 1).
- Aboriginal women represent a higher percentage of cases of HIV/AIDS than non-Aboriginal women (15.9% vs. 7.0%). Within female Aboriginal AIDS cases, 50% are attributed to IV drug use, in comparison to 17% of all female cases.
- The birth rate for Aboriginal women is twice that of the overall Canadian female population. Aboriginal mothers are younger – about 55% are under 25 years of

age (vs. 28% for the non-Aboriginal population) and 9% are under 18 years of age (vs. 1% for the non-Aboriginal population).

- The mortality rate due to violence for Aboriginal women is three times the rate experienced by all other Canadian women. For Aboriginal women in the 25 to 44 age cohort, the rate is five times that for all other Canadian women.

- Women are often the victims of family dysfunction which result from the alcohol or substance abuse. Hospital admissions for alcohol related accidents are three times higher among Aboriginal females than they are for the general Canadian population.

- Over 50% of Aboriginal people view alcohol abuse as a social problem in their communities. Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) have emerged as a health and social concern in some First Nations and Inuit communities.

- Suicide rates remain consistently higher for the Aboriginal population than for the general Canadian population as a whole in almost every age category. Over a five year span (1989 – 1993), Aboriginal women were more than three times as likely to commit suicide as were non-Aboriginal women. [100]

The Supreme Court has recently noted that the government's role in health care has expanded to become a safety net that ensures that the poorest people have access to basic health care services.[101] Health Canada's statistics show that there is an alarming gap between the government's role in health care and the disproportionate health status of Aboriginal women today. Aboriginal people also face extreme poverty. The Supreme Court of Canada has not been heeded when the government creates or neglects to create policies and laws that affect Aboriginal women's health. The following section will provide an analysis of the constitutional status of Aboriginal rights to health and the equality provisions found in the *Constitution Act, 1982*. The section concludes with an examination of the government's role in relation to discharging it fiduciary obligations in regards to Aboriginal women's equality rights.

4. The Constitution, Aboriginal Rights, Equality Provisions

A constitution has been described as "a mirror reflecting the national soul"[102] that must recognize and protect the values of a nation.[103] To ensure the values of the nation are appropriately protected from violations, the Constitution was bestowed legal supremacy over all laws. Canada's Constitution carries the highest power in Canadian law. Section 52(1) reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[104]

In addition to legal supremacy, the Constitution is a melding and merging of previous philosophy and past legal developments as established under the original *British North America Act*.[105] Upon the entrenchment of section 35 Aboriginal and treaty rights in the 1982 constitutional document, Aboriginal and treaty rights in their original form were included in the new constitutional regime. That is, the original constitutional documents that created Canada as a legal entity with the addition of the 1982 amendments (in this instance, section 35),[106] extended constitutional protection and the rule of law to these rights. Aboriginal rights are derived from Aboriginal knowledge, heritage, and law[107] and as such a relationship was then forged with the old British prerogative regime.[108] This integrated the powers from the original documents and rule of law into section 35 of the *Constitution Act* thereby transferring the same royal prerogative powers that created the *British North America Act* in 1867. (Conversely, it also recognized Aboriginal and treaty rights in their full form in existence at the time (in recognition of women's place in Aboriginal society)). These prerogative powers were then extended to section 35 Aboriginal and treaty rights.[109] Section 35(1) reads:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. [110]

The rights captured within section 35 and read through a constitutional supremacy framework provide an important structure to understand equality rights for Aboriginal women both within the *Charter* context, but most notably within section 35(4). In addition to the protection of individual equality rights, the rights referred to in section 35(4) encompass the collective rights of Aboriginal society as a whole within the bundle of Aboriginal rights.[111]

The *Constitution Act, 1982*, section 35(1), accorded constitutional status to "existing" Aboriginal and treaty rights. For the purpose of section 35(1) these rights are those that were not extinguished before April 17, 1982. Prior to 1982, Aboriginal rights did exist and were recognized under common law. They did not have constitutional status and Parliament could extinguish/regulate those rights at any time. However, the Supreme Court has confirmed that the regulation of an Aboriginal activity by specific imperial treaty, act, or legislation does not amount to its extinguishment but affirms the continuity of an Aboriginal right. The government has a positive fiduciary obligation to protect Aboriginal rights through section 35 of the *Constitution Act.*

4.1 Aboriginal Women's Equality Rights as Individuals

The *Canadian Charter of Rights and Freedoms*[112] is Part 1 of the *Constitution Act, 1982* (sections 1 to 34) and outlines the rights and freedoms that **individual** Canadians possess. For instance, it addresses the right to vote; the right to life, liberty and security of the person; equality rights;[113] legal rights of persons accused of crimes; language rights; and, protection of multicultural heritages. The *Charter* also outlines freedoms, including freedom of conscience; freedom of religion; freedom of thought, belief and opinion; freedom of expression, including freedom of the press; freedom of peaceful assembly; and freedom of association.

In 1985, when the *Charter* came into effect, the conception of equality articulated through the equality provisions in section 15 was that the effect of the law would be to give substantive equality to all members of a group. Putting into place the concepts of equality and non-discrimination that underlie section 15 of the *Charter* requires an approach that focuses on the effects of a law on those affected by a distinction. Unanimous judgments under Supreme Court Chief Justice Dickson in 1989 and upheld in later judgments respect the same principle of substantive equality (equality of result), not just formal equality (equality of treatment). The notion of formal equality (equal treatment) was rejected.[114] This is important because it affirms that the issue of equality should not be construed in the Eurocentric or feminist or western legal tradition understandings of "balance" as equating "equality." Aboriginal law is not ordered around Eurocentric values or perceptions of what is "balance" or "equality." Rather, for Aboriginal women, balance is understood as respecting the laws and relationships that Aboriginal women have as their place in Aboriginal society (and laws) and the ecological order of the universe.

Aboriginal people in Canada not only possess section 35 rights individually and collectively but they also possess the individual-based rights identified in the *Charter*. Moreover, the equality provisions in section 15 of the *Charter* do not invalidate Aboriginal or treaty rights.[115] In relation

to *Charter* rights, the Royal Commission on Aboriginal Peoples remarked:

> The Canadian Charter of Rights and Freedoms applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. Nevertheless, by virtue of sections 28 and 35(4) of the Constitution Act, 1982, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.[116]

Section 35(4) has rarely been used to advance the equality rights of Aboriginal women.[117] Often the rights that Aboriginal people collectively possess to gender equality/balance are viewed as non-existent, created by statute or "given" to Aboriginal women post-contact. This analysis transforms the issue into one of strictly a *Charter* application and displaces it from an Aboriginal context with the underlying message that Aboriginal women do not have Aboriginal rights to equal treatment that produces equal results in health. This type of analysis is not correct or useful when examining the Aboriginal rights to equality for women recognized in section 35(4).

4.2 Aboriginal Women's Collective Equality Rights

The focus of section 35(4) is the application of Aboriginal and treaty rights pertaining equally to both males and females. These rights are collective and were specifically and thoughtfully enacted to address the collectivity of Aboriginal and treaty rights noted in section 35. Section 35(4) reads:

> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[118]

When assessing whether an activity is an Aboriginal right, the courts use certain criteria and principles of interpretation. Aboriginal rights are *sui generis* in nature. *Sui generis* is a Latin term meaning "of its own kind," "unique or peculiar."[119] The Supreme Court of Canada has long since recognized the unique nature of Aboriginal rights as not being recognizable within the common law[120] and therefore has described them as a unique class of rights.[121]

> The sui generis concept is employed to discard those notions of the common law that have not been "sensitive to the Aboriginal perspective itself on the meaning of the rights at stake." As such, the doctrine can be characterized as part of the common law – that attempts to leave behind much of the common law.[122]

Noting that the *sui generis* nature of Aboriginal rights demands a unique approach to the treatment of evidence, which accords due weight to the perspective of Aboriginal peoples, the Supreme Court of Canada in *R. v. Van der Peet* developed a test to identify an existing Aboriginal right within the meaning of section 35 of the Constitution *Act, 1982*. In order for an activity to be an Aboriginal right, the activity must be a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group asserting that right. In order for a practice to be integral, it must have been of "central significance" to the society and must be a "defining characteristic" and "one of the things which made the culture of the society distinctive."[123] The practices, customs and traditions, which constitute Aboriginal rights, are those that can be rooted in the pre-contact societies of the Aboriginal community.[124] Practices that developed "solely as a response to European influences" do not qualify as an Aboriginal right.[125] The existence of the right has to be specific to a definable Aboriginal group and the right in issue must be distinctive in relation to that society.[126]

It is important to note that the *Van der Peet* test which the courts use to determine whether Aboriginal rights exist is based on male gendered activities (hunting and fishing) in specific locations. In this context, the Courts are looking for specific rights attached to these activities. Professor Brian Slattery provides an analysis of the rights examined in *Van der Peet* as generic rights, which should be applied in a general application. Using Slattery's analysis, the *Van der Peet* test may be applied when examining gender balance as an Aboriginal right within the sphere of generic Aboriginal rights. Slattery explains:

> Generic rights are rights of a standardized character held by all aboriginal groups that meet certain basic criteria. The basic contours of a generic right are determined by the common law rather than aboriginal practices, customs and traditions. So the abstract dimensions of the right are identical in all groups where the right arises, even if it may take somewhat different concrete forms in practice.[127]

Generic rights are the same rights that Aboriginal peoples have to conclude treaties with the Crown; maintain and write their own laws and customs; and the generic right to self-government.[128] Upon closer examination, Professor Slattery concludes that the right recognized by the Supreme Court in *Van der Peet* is not so much a specific right as it is actually a generic right, recognizing that an Aboriginal group has the right to engage in practices that are based on customs and traditions that formed a central and significant part of its ancestral culture. The generic right then gives rise to a series of specific rights that must be proved individually that differ from group to group. The generic right is a right of "uniform dimensions, held by all aboriginal groups."[129]

The basic contours of generic Aboriginal rights are established by the common law. At the abstract level, these rights are uniform and do not vary from group to group. Nevertheless, at the concrete level, generic rights may assume a range of particular forms that vary from group to group, in accordance with their distinctive histories, cultures and preferences.[130]

The generic rights test in *Van der Peet*, which determines that Aboriginal rights be adjudicated on a general basis, is appropriate in relation to Aboriginal peoples in the context of gender-balanced activities. Accordingly, the appropriate question becomes what generic rights are available for issues of Aboriginal women's health? To answer this question, the historical development of Aboriginal rights provides a framework for the analysis.

The legal concept of Aboriginal rights rests on the recognition that when Europeans arrived in North America, Aboriginal peoples were already there. As early as 1832, in *Worcester v. State of Georgia*,[131] the Chief Justice of the United States Supreme Court commented that the origins of Aboriginal claims to land and their right to self-governance lay in the relationship that evolved between their pre-existing rights as "ancient possessors" of North America and the assertion of sovereignty by European nations. This finding, that Aboriginal societies were here first and have unique rights, has been quoted with approval by the Supreme Court of Canada. In *Calder*, Judson J. noted that "the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had for centuries. This is what Indian title means …"[132] It is this prior occupancy by Aboriginal peoples, then, which is the foundation of Aboriginal rights.[133] As a result, the existence of Aboriginal rights is not dependent upon treaties or Crown grants,[134] presumed grant or prescription,[135] or on legislative enactments, executive orders or judicial declarations;[136] rather, Aboriginal rights are based on the historic occupation and use of ancestral lands by Aboriginal peoples.[137] The source of these Aboriginal rights resides in or is derived from Aboriginal knowledge, language, and laws.[138] Accordingly, the source of Aboriginal women's health rights must be rooted within Aboriginal knowledge, language, and laws. As such, any Aboriginal women's right to health must also be protected.[139] As noted by the Supreme Court of Canada in *Delgamuukw v. British Columbia*,[140] when the British sovereign asserted jurisdiction over Aboriginal lands, these Aboriginal legal regimes and their peoples were thereby protected.

Throughout North America and particularly in Canada, women traditionally held important social, economic, political and cultural roles. It has often been stated that as historians, healers, life givers and transmitters of culture, women's rights and well being were essential to the survival of Aboriginal peoples. Fundamental to the growth of the Aboriginal nation was the health and strength of the women. The evidence concerning gender equality and healing systems practiced

by Aboriginal peoples demonstrates that such ceremonies and practices were a distinct and integral part of Aboriginal societies.[141] Essential to Aboriginal societies was the maintenance of good health and a balance of male and female roles. Aboriginal peoples have complex and diverse societies, which include medical and healing traditions that pre-date European contact. The inherent right to health and health care practices have been said to be simply one manifestation of a broader-based bundle of Aboriginal rights[142] and therefore within Slattery's analysis of the nature of generic rights.

Certain practices around equality between males and females in relation to health are practices integral to all Aboriginal peoples as part of their unique and distinctive societies. These customs reflect the varied and distinctive cultures of the Aboriginal societies and are unique to these specific groups. Sákéj Youngblood Henderson expressed that,

> [t]he Supreme Court acknowledged that these cultural rights arise within a system of beliefs, social practices and ceremonies of Aboriginal people. They are traced back to their ancestral Indigenous order and their relationship with ecology.[143]

The rights within the practices and traditions reflect the distinctive cultures of Aboriginal groups. These practices operated before the assertion of British sovereignty in treaties or proclamations and they existed before the introduction of British common law.[144] These practices are unique to Aboriginal people, they existed in 1982 when section 35 was enacted, and are, therefore, recognized and affirmed in their "full form."

The test articulated by the Supreme Court in *R. v. Sparrow*[145] further supports the existence of gender equality within the bundle of Aboriginal rights. In *Sparrow,* the Supreme Court of Canada stated that the interpretation of Aboriginal cultures must be done in a sensitive manner, respecting the way that Aboriginal peoples view their rights. Evidence concerning women's roles in ceremonies and healing practices demonstrates that such ceremonies, practices and rites of passage were integral to the existence of Aboriginal society.[146] Similarly as noted earlier, the status that women held within these societies was also integral to the existence of the Aboriginal society and supports the existence of an Aboriginal right to equality for males and females within the bundle of Aboriginal rights as constitutionalized in section 35(4)).

Within the analysis of the sphere of constitutionally protected section 35(4) rights, Slattery's generic rights test, *Van der Peet*, and *Sparrow*, it may be said that gender balance in relation to health is a section 35(4) protected Aboriginal right. Upon the finding of this right, the question then becomes whether violations to the right can be justified. The fiduciary obligations, which

flow from the Constitution, government responsibilities and the law, will be now examined to determine these answers.

4.3 Fiduciary Obligations

The entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982* placed restraints on the exercise of governmental power in relation to these rights. The *Sparrow* decision is one of the most important cases dealing with the restriction of Crown interference on Aboriginal and treaty rights.[147] In *Sparrow*, the court extended the concept of an enforceable statutory fiduciary obligation to a comprehensive constitutional fiduciary obligation that applies to virtually every facet of the Crown-Aboriginal relationship.[148] The Court further describes the Crown/Aboriginal fiduciary relationship as "trust-like rather than adversarial":

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[149]

The Supreme Court of Canada in *Sparrow*[150] found that the source of the fiduciary obligation stemmed from the rights identified in section 35 of the *Constitution Act, 1982*, and that the words "recognition and affirmation" used in section 35 "incorporate the fiduciary relationship and import some restraint on the exercise of sovereign power." The Court added:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[151]

The Supreme Court of Canada has made it clear that not only must the federal government reconcile its power with its duties to Aboriginal peoples but also all government action must comply with the Constitution and must be justified before the government infringes or denies an Aboriginal right. The courts must balance the Crown's constitutional fiduciary obligations with the Crown's justification for the infringement. In this sense, the fiduciary obligation concept polices the line between respect for Aboriginal and treaty rights and the government's exercise of its powers.

It is clear, then, that the fiduciary duty places an obligation on the government to consider certain factors before they take any action that could infringe Aboriginal rights. Lamer C.J. in *R. v. Van der Peet*[152] was clear that when the possibility of infringement exists, certain principles must guide the Crown's actions. He noted that because of the fiduciary relationship, the "honour of the Crown" is at stake in all dealings the Crown has with Aboriginal peoples. Consequently, section 35 rights, treaties, any statutes or constitutional provisions that protect the interests of Aboriginal peoples must be given a "large and liberal" interpretation and any doubt or ambiguity regarding what falls within section 35 rights must be resolved in favor of Aboriginal peoples as beneficiaries of these rights.[153] Aboriginal rights cannot be extinguished and may be infringed only if the requirements of the *Sparrow* justification test are met.[154] This prohibition applies to federal and provincial legislation.[155] Certain positive duties are imposed upon the federal and provincial governments because of this fiduciary relationship.

Further, the obligation to consult with Aboriginal peoples arises out of the trust-like relationship that exists between the Crown and the Aboriginal peoples and the concomitant fiduciary duty owed by the federal and provincial Crown to Aboriginal peoples. This fiduciary duty is incorporated in section 35(1) of the *Constitution Act, 1982. Sparrow*, *Delgamuukw*, *Haida Nation v. British Columbia (Minister of Forests)*[156] and subsequent decisions have held that the Crown has a fiduciary duty to Aboriginal peoples when a government decision or action may have the effect of interfering with an Aboriginal or treaty right, which obligation requires the Crown to consult with the affected Aboriginal peoples.[157]

In *R. v. Marshall*,[158] the Supreme Court repeated and affirmed the significance of the "honour of the Crown." The honour of the Crown as determined by the courts holds that all legislative action and policy that might infringe Aboriginal or treaty rights must meet the stringent tests set out in their judgments. In *Haida* the Supreme Court of Canada held that "[t]he government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[159] The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[160] The Court elaborated on the principle of "honour of the Crown" and held that "the honour of the Crown gives rise to different duties in different circumstances," specifically where there are discretionary controls over specific Aboriginal interests then the honour of the Crown must give rise to the fiduciary duty.[161] The Supreme Court is also clear that all government departments must show sensitivity and respect when dealing with Aboriginal rights.[162] Although Aboriginal health is largely governed through policy, the honour of the Crown requires that Aboriginal rights be "determined, recognized and respected"[163] and to conclude agreements that reflects inherent rights.[164]

Consulting with Aboriginal people to accommodate their interests becomes critical when dealing with such crucial issues as Aboriginal women's health.

In April 2004, Health Minister Pierre Pettigrew announced:

> We have a profound duty to improve the health status of Aboriginal people. That is one of the reasons why the prime minister hosted a [Canada-Aboriginal roundtable] on Aboriginal issues yesterday … We know we must do more to achieve better outcomes for Aboriginal men, women and children … The government has a fiduciary responsibility [to Aboriginals], as you know.[165]

While the government recognizes that it has fiduciary responsibilities, Aboriginal and treaty rights are entrenched in the Constitution and the law is clear that certain guidelines must be adhered to when interfering with Aboriginal and/or treaty rights, it is evident that the disregard of these rights has created a vast inequality of status of health for Aboriginal women in Canada.

Health policies that affect Aboriginal women must reflect the constitutional protection of Aboriginal and treaty rights; to continue to disregard these rights is a continuing breach of governmental fiduciary responsibility.

5. Conclusion

The federal government recognizes that it has fiduciary duties towards Aboriginal people in general,[166] however, the nature and scope of these duties remains undefined. The source of these obligations stems from early treaties, the fiduciary relationship between the Crown and Aboriginal people and the *Constitution Act, 1982*.[167] Positive duties are bestowed upon the federal and provincial governments because of these fiduciary duties. When exercising the duties the honor of the Crown must be upheld, the Crown must provide full disclosure of its intentions to infringe Aboriginal and treaty rights, meaningful consultation is required with the affected group and justification must be advanced before any infringement is undertaken.[168]

Using the test of outcomes, one has to look at the unequal health outcomes for Aboriginal women to see the disparities in health status in comparison to the rest of the Canadian population. These outcomes reveal that the government has failed in its fiduciary obligations to Aboriginal women in Canada. Given the equality provisions in section 35(4) and those found in the *Charter*, one must surely expect that Aboriginal women are entitled to the same standards of health as other Canadians.

The Supreme Court of Canada has affirmed that fiduciary obligations limit the activities and policies of the federal or provincial Crown toward Aboriginal peoples.[169] The Court has held that "historical policy on the part of the Crown is … incapable of, in itself, delineating" aboriginal and treaty rights and "[t]he nature of government regulations cannot be determinative of the content and scope of an existing Aboriginal right."[170]

The Supreme Court of Canada is clear on the principles it has articulated in that laws, legislation and policies must be created to safeguard individual's liberty, security and fundamental justice.[171]

The Court recently examined health care issues and provided direction on the principles of fundamental justice: that is, that rules that endanger health arbitrarily[172] do not comply with the principles of fundamental justice:[173]

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts.
>
> …

> The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, *between the measure that puts life at risk and the legislative goals* (emphasis added).[174]

Despite these clear directives, the federal government continues to determine the scope of Aboriginal and treaty rights to equality and health for women without the input or meaningful participation of the Aboriginal peoples.

Ironically, the federal government's policy recognizes and affirms the government's unique constitutional obligations to Aboriginal peoples but fails to implement these obligations to certain existing Aboriginal and treaty rights. Instead, Canada's health policies and guidelines affecting Aboriginal peoples' health should be examined to ensure they reflect the fiduciary relationship and other guidelines that the Supreme Court of Canada has stated properly characterize Crown/Aboriginal relations. The following section provides an example of a framework for the future.

6. Framework for the Future

In December 2004, the National Aboriginal Health Organization (NAHO), First Nations and Inuit Health Branch (FNIHB) of Health Canada and the Bureau of Women's Health and Gender Analysis (Bureau) co-hosted an Aboriginal Women's Health Roundtable Planning Meeting that drew representatives from Native Women's Association of Canada (NWAC), Pauktuutit Inuit Women's Association, the Métis National Council (MNC), and the Assembly of First Nations (AFN).[175] This planning meeting led to the Aboriginal Women's Roundtable that was held on April 25 –27, 2005 in Ottawa.[176] Key messages resulting from these two events follow.

At the December 2004 planning meeting, the Assembly of First Nations (AFN) recalled and reaffirmed the preamble of the AFN Charter noting that the equality of men and women has always been a guiding factor and that both must be involved in the struggle for an equitable society through the building and strengthening of partnerships. The AFN Women's Council is deeply concerned that First Nations women are among the poorest in their communities and targets of discrimination, not only by the broader society but also by First Nations communities. The Council affirmed that the policies and laws of Canada have actively oppressed First Nations women and diminished traditional roles and responsibilities and compromised the respect for First Nations women in communities.

The impact of colonization and assimilation strategies aided in altering First Nations traditional values and social structures often replacing or enforcing the colonizers cultural values on First Nations societies. First Nations women's roles and responsibilities in the decision making process throughout North American societies were strategically targeted in the goal of assimilation and loss of culture. The impact of colonization on First Nation's women was particularly debilitating. The *Indian Act* continues to perpetuate paternalistic views in eliminating First Nations status and membership. The AFN Women's Council recognizes the need for the application of culturally sensitive teachings and tools that will be instrumental in solving issues of women's oppression.[177]

Beverly Jacobs, President of the Native Women's Association of Canada (NWAC) added that the issues that affect Aboriginal women are all similar or the same and the health issue is just not a *health* issue. She noted "Elders teach that boxes are created that sets limits in that all issues must be considered as it affects women's complete and holistic health." In referring to the NWAC Background Document, Ms. Jacobs elaborated on each of the policy areas that were identified as health concerns for Aboriginal women such as: human rights; violence, sexually

transmitted infections, including HIV/AIDS; sexual and reproductive health services; jurisdiction and control; improving access and integration; building capacity and sustainability; and the broad determinants of health. NWAC is in the process of defining what the health models on gender-based analysis and culturally appropriate care mean. Ms. Jacobs further added that "community based supportive structures are required for strong families and healthy child development. The violence must be reduced and a holistic plan developed by the women to address this issue. Male leaders must be called upon to address these issues alongside the women."[178]

Pauktuutit, the Inuit Women's Association advocates on behalf of the work and principles of equality of Inuit women. This involves holding governments responsible for implementing their commitment. Their representative noted:

> Inuit women do have expertise to share in areas such as birthing and traditional values in health, unfortunately their wisdom is not being utilized. The Elders must be involved and to help address the gaps in health information, such as capacity building in many areas such as Community Health Representative training, cultural safety issues, culturally-relevant resources.

Pauktuutit recommended that work be done in the following areas: capacity building, public education and gender- based analysis.[179]

The Métis National Council (MNC) noted that the four key issues MNC faces are "jurisdiction wrangling; (provincial programming – is very hodgepodge across the country); no Métis-specific health programming; inadequate, unreliable, inflexible funding programs (sustainability issues) and lack of Métis-specific data." MNC stated that their areas of health focus include: HIV/AIDS, diabetes, early childhood development and an Aboriginal Health Reporting Framework and data collection. The MNC action plan includes four key areas: adaptation of current programming to address jurisdiction issues; capacity building in areas of policy and programming, including health human resources; input into policy making process and broad determinants of health approach, women's health being a key detriment in children's health.[180]

Bernice Downey, Chief Executive Officer of the National Aboriginal Health Organization elaborated upon the work that NAHO has undertaken in relation to the health of First Nation, Inuit and Métis women. Ms. Downey added that it is crucial that men and boys are included in when developing any type of gender equality framework.[181]

Guidance from the Elders was sought at the three-day event held at the April 2005 Aboriginal Women and Girls Health Roundtable. Solutions and next steps were developed. The following "Summary of Recommendations for Action" was recorded:

- Equitable participation of women in decision making;
- Emphasize and expand community-based research models and program and service models;
- Develop a range of policies to address gaps and issues identified;
- Develop a communications plan that disseminates information in clear, simple, effective, culturally relevant and appropriate language and in a timely manner, using a multi-media approach (FAQ Sheets, Communiqués to community health centers, radio stations, Aboriginal newspapers, Internet emailing, website posting, etc.);
- Develop a knowledge transfer plan relating to information, research, bringing people together to share and exchange knowledge through networking, partnerships/collaboration, including Traditional Knowledge Transfer;
- Promote midwifery and in-community birthing;
- Involve Elders broadly and promote the integration and protection of traditional knowledge into health practice and training;
- Increase health career training programs, including apprenticeship programs on traditional healing practices especially in smaller communities;
- Develop funding policies that address equity concerns;
- Increase health promotion programs and resource materials in communities on a range of women's health issues; and
- Develop an Aboriginal women's health action plan.[182]

Speaking on behalf of the federal government, the Honourable Carolyn Bennett, Minister of State for Public Health stated that "health is the most important project in this country for Aboriginal women and girls." Minister Bennett assured participants of her commitment to closing the gaps and achieving the goals necessary to ensure fairness through "real measurable differences in social determinants of health. … Addressing the gaps and achieving these goals means looking at what we need to know in terms of research, what needs to change in terms of policy, and what needs to be done in terms of baseline education."[183]

During the three-day event, significant progress was made by a unified group of First Nations, Inuit, and Métis women towards

- Creating a shared definition of holistic health and wellness through the lifespan;
- Identifying specific health priorities of First Nations, Inuit, and Métis women and girls; and
- Recommending a full range of gender-based action steps relating to research, policy, and program/service delivery that respond to those health priorities.[184]

It was concluded that the next step arising from the Aboriginal Women and Girls' Health Roundtable was to move forward on the development of an Aboriginal Women and Girls' Health Action Plan by taking measures to

- Broadly disseminate the final written report and appendices from this Roundtable to a range of Aboriginal and other stakeholders, including participants, governments, policy makers, and health authorities.
- Create a clearing house as a process for a national communications strategy to share information on health issues and activities.
- Continue to share "Best Examples" of health models that work, and disseminate this information at all levels: locally, among First Nations, Inuit, and Métis, and with all levels of government.
- Hold follow-up regional gatherings through NAHO with Elders, community workers, researchers, non-governmental organizations, and political organizations.
- Develop an Aboriginal-specific gender-based analysis framework and related training opportunities.[185]

Notes

1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Constitution Act*].

2 This paper uses the term Aboriginal people as a collective name for the original people in Canada. This term is also used as per s.35(2) of the *Constitution Act, ibid.* The term "aboriginal peoples of Canada" in the *Constitution Act* refers to the "Indian, Inuit and Métis." The terms First Nation, Indian and Aboriginal are used interchangeably. The terms First Nations, Métis and Inuit are used interchangeably with the term Aboriginal where applicable. The term Native is used where it is historically applicable.

3 Canadian Association of Elizabeth Fry Societies reports that 80% of all women are incarcerated for poverty related offences, 90% of Aboriginal and 82% of all women in prison are survivors of incest, rape or physical assault. The number of women increased 200% in the past 15 years. (Canadian Association of Elizabeth Fry Societies, "Women Don't Belong in Cages" *Canadian Association of Elizabeth Fry Societies*, online: Canadian Association of Elizabeth Fry Societies <http://www.elizabethfry.ca/poster.htm> (accessed March 5, 2006)).

4 Honourable Claire L'Heureux-Dubé, "Relationship Recognition: The Search for Equality" *Discussion Forum on Relationships and the Law* (July 7, 2000), online: The Law Reform Commission <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/seminar01.01>.

5 Sheilah L. Martin, "Legal Controls on Human Reproduction in Canada: A History of Gender-biased Laws and the Promise of the Charter" (University of Toronto, 1991) at 3.75.

6 This fundamental inequality is exacerbated by the fact that health care services are and have been provided through a male centered perspective in its approach to women's health. Substantive rights continue to elude women in the area of health, although changes in Canadian laws in the past few decades have alleviated some of the more contentious health-related legal controls on women.

7 Professor Ann Scales notes that men have had the power to "to create the world from their own point of view, and then, by a truly remarkable philosophical conjure, were able to elevate that point of view into so-called 'objective reality'." Further, "in law, the issues that preoccupy women are all issues that emerge out of a male-defined version of female sexuality. Abortion, contraception, sexual harassment, pornography, prostitution, rape, and incest are 'struggles with our otherness' that is, struggles born out of the condition of being other than male." (Ann Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as an Oxymoron?" (1989) 12 Harv. Women's L.J. 25 in Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women" (1990–1991) 4 Canadian Journal of Women and the Law 440 at 441.)

8 H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan* (Calgary: University of Calgary Press, 2001) at 7.

9 *Ibid.* at 15.

10 Aboriginal Midwifery Education Program, "AMEP Elder Advisory Meeting Summary" *Aboriginal Midwifery Education Program* (September 30 and October 1, 2005), online: Aboriginal Midwifery Education Program <http://www.amep.ca/downloads/AMEP%20Elder%20Advisory%20Meeting%20Summary.pdf> (accessed March 5, 2006) [AMEP].

11 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength* (Ottawa; Supply and Services Canada, 1996), Vol. 4, "Historical Position and Role of Aboriginal Women: A Brief Overview," quoting Osennontion (Marlyn Kane), online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sjm2_e.html> (accessed March 5, 2006) [RCAP]. See also, Tsi Non:we Ionnakeratstha (the place they will be born) Ona:grahsta' (a Birthing Place) Six Nations Maternal & Child Centre, Brochure, "Six Nations Maternal Brochure" (2005):

> From Iroquois traditions, women were always regarded with special status and honor because of the ability to bring forth life to this earth. In motherhood terms, she was an intricate part in the CIRCLE OF LIFE, since they are the source from whence a land is people. The circle has four main cycles; from baby to adolescent; from middle age to Elder, she as to

bear the responsibility of upholding the cultural values and traditions from generation to generation.

12 AMEP, *supra* note 10 at 2. The Aboriginal Midwifery Education Program, Elder's Advisory Group created the Vision Statement for the newly formed Aboriginal Midwifery Education Program "Through the Practice of Midwifery, we will again raise the sacredness of new life."

13 Canada, Indian and Northern Affairs, "Aboriginal Women: Meeting the Challenges," online: Indian and Northern Affairs <http://www.ainc-inac.gc.ca/ch/wmn/index_e.html> (accessed March 5, 2006).

14 Canada states that many First Nations were primarily matriarchal societies:

> Prior to European colonization efforts, many First Nation societies were matriarchal in nature. Missionaries and other Church officials discouraged matriarchal aspects of First Nation societies and encouraged the adoption of European norms of male dominance and control of women. According to the customary law of the Mohawk nation for example, the matrimonial home and the things in it belong to the wife and women traditionally have exercised prominent roles in decision-making within the community. (Martha Montour, "Iroquois Women's Rights with respect to matrimonial property on Indian Reserves" [1987] 4 Canadian Native Law Reporter 1; Robert A. Williams, "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 4 Ga. L. Rev. 1019.)

Quoted from "The Historical Context" (23 April 2004), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/matr/his_e.html> (accessed March 5, 2006).

15 Patricia Monture-Angus, "The Lived Experience of Discrimination: Aboriginal Women Who are Federally Sentenced & The Law: Duties and Rights" (*Submission of the Canadian Association of Elizabeth Fry Societies (CAEFS) to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women, (2002)* online: <http://www.elizabethfry.ca/submissn/aborigin/4.htm> at 6 (accessed March 5, 2006).

16 Barbara A. Mann, *Iroquoian Women: The Gantowisas* (New York: Peter Lang 2000) at 60 [Mann].

17 M. Annette Jaimes & Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America in M. Annette Jaimes, ed., *The State of Native America: Genocide, Colonialization, and Resistance* (Boston: South End Press, 1992) 311–44.

18 Mann, *supra* note 16 at 117.

19 *Ibid*. at 241.

20 RCAP, *supra* note 11, quoting Marilyn Fontaine.

21 *Ibid.*, quoting Martha Flaherty.

22 Leah Dorion, "Emerging Voices of Métis Women" *The Virtual Museum of Métis History and Culture*, online: Gabriel Dumont Institute <http://www.metismuseum.ca/resource.php/01269> (accessed March 5, 2006).

23 Sharon Blady, "Les Métissess: Towards a Feminist History of Red River," in Jill Oakes and Rick Riewe, eds., *Issues in the North*, vol. II, Occasional Publication # 41 (Calgary: Canadian Circumpolar Institute and the Department of Native Studies, University of Manitoba, 1997) at pp. 179–86. See also, Jennifer S. H. Brown, *Strangers in the Blood: Fur Trade Company Officials in Indian Country* (Vancouver: University of British Columbia Press, 1980); Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society in Western Canada* (Winnipeg: Watson and Dwyer, 1980); Diane Payment, "'La vie en rose'? Métis Women at Batoche 1870–1920," in Christine Miller and Patricia Chuchryk, eds., *Women of the First Nations* (Winnipeg: University of Manitoba Press, 1997) at pp. 19–32; Jacqueline Peterson, "Prelude to Red River: A Social Portrait of the Great Lakes Métis" (1978) 25:1 Ethnohistory at pp.41–67; Maria Campbell, *Halfbreed* (Toronto: McClelland and Stewart, 1973).

24 Emma D. LaRocque, *Violence in Aboriginal Communities* (Ottawa: National Clearinghouse on Family Violence, Health Canada, 1994) at 73.

25 Lilianne Ernisetine Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: the Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters 1982–1987* (Saarbrucken: Verlag breitenbach Publishers, 1991).

26 Donna Greschner, "Aboriginal women, the constitution and criminal justice" (1992) U.B.C.L. Rev. (Special Edition) 338–59; P.A. Monture-Okanee & M.E. Turpel, "Aboriginal peoples and Canadian criminal law: Rethinking justice" (1992) U.B.C.L. Rev. (Special Edition) 239–77.

27 Claudia Zaher, "When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture" (2002) 94.3 Law Libr. J. at 460, online: <http://www.aallnet.org/products/2002-28.pdf> (accessed March 5, 2006) [Zaher].

28 *Black's Law Dictionary* defines "chattel" as "movable or transferable property; esp., personal property" (*Blacks Law Dictionary*, 7th ed. (St. Paul Mn.: West Group, 1999).

29 Zaher, *supra* note 27.

30 A.M. Sinclair, *Introduction to Real Property Law*, 3rd ed. (Toronto: Butterworths, 1987) at 21. There were exceptions to coverture. For instance, the *Feme Sole Trader Laws* enacted in the early eighteenth century allowed women who were abandoned or widowed the right to petition to transact business as a single women with the full protection of the law. See for instance, *Hearle and others v. Greenbank and others*, [1558–1774] All E.R. Rep. 190; *Magdalene College, Cambridge Case*, [1558–1774] All E.R. Rep. 236; *Lord Hastings v. Douglas*, [1558–1774] All E.R. Rep. 576.

31 1 William Blackstone Commentaries 442.

32 1848 Seneca Falls Declaration of Sentiments, reprinted in Joan Hoff, *Law, Gender and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991) 383, app. 2.

33 Zaher, *supra* note 27.

34 Early Canadiana Online, "Aboriginal Women's Issues," online: Canada in the Making <http://www.canadiana.org/citm/specifique/abwomen_e.html> (accessed March 5, 2006).

35 A telling painting by John Lambert created in 1810 during the British era of the fur trade entitled "Indian and his Squaw" depicts the status of Aboriginal women at that time. The painting is of a woman with a child on her back, standing near her husband "an Indian" who is without pants, clearly drunk and unwashed. See online: Early Canadiana Online <http://www.canadiana.org/citm/imagepopups/c014488_e.html> (accessed March 5, 2006).

36 See the term "Indian" as defined in *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42, s.5.

37 *Indian Act, 1876*, S.C. 1876, c.18.

38 *Indian Act 1906,* S.C. c. 81, s. 2(c). For a general discussion of the effect of this section, see *Atkins v. Davis* [1917] 38 O.L.R. 548 (Ont. S.C.A.D.).

39 See, for example, *R. v. Point*, [1957] 22 W.W.R. 527, in which the court held that "the accused, on the evidence, is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c.149, and being an Indian is a person (definition *Indian Act*, s.2(1)(g)) and being a person is subject to the application of sec. 44(2) of the *Income Tax Act*."

40 See Jim West, "Aboriginal Women at a Crossroads," online: First Nations Drum <http://www.firstnationsdrum.com/Fall2002/PolWomen.htm> (accessed March 5, 2006). The main focus of the bill was to make the *Indian Act* conform to s.15 of the *Canadian Charter of Rights and Freedoms*. Since 1985, all status Indians are registered under s.6 of the *Indian Act*. A person must prove that he/she has two parents entitled to Indian status, he/she would then be registered under s.6(1). If a person has only one parent of Indian status, they are registered under s.6(2). Those individuals registered under s.6(2) must marry a status Indian to pass the status on to their children. Section 6(2) thus creates a half Indian with its second-generation cut-off clause. They are the growing numbers of "Ghost People" wrote Pam Paul, in her analysis of Bill C-31 entitled "The Politics of Legislated Identity" prepared for the Atlantic Policy Congress of First Nations Chiefs in September 1999. "Currently, the "Ghost People" are children of the Bill C-31, 6(2) reinstates. However, in one or two years when the children born after 1985 who are registered under s.6(2) reach child-bearing age, and out-parent with a non-status person, the rise in the numbers of "Ghost People"

will grow." Unstated paternity is on the rise also, with implications that on a national level, during the study period of this report, about 4,480 children with unstated fathers have failed to "qualify" for Indian registration. This results in registration under s.6(2) or a denial of registration and loss of associated entitlements, benefits and privileges. See also, Canada, *Factors Contributing to Unstated Paternity*, Four Directions Project Consultants (January 20, 2003), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/ra/uncp_e.pdf > (accessed March 5, 2006).

41 Bill Henderson, "Notes on the Indian Act," online: <http://www.bloorstreet.com/200block/sindact.htm> (accessed March 5, 2006).

42 Canadian Broadcasting Corporation, "Abuse Affects the Next Generation" (April 2, 1993), online: CBC Archives <http://archives.cbc.ca/IDC-1-70-692-4008/disasters_tragedies/residential_schools/clip6> (accessed March 5, 2006) [Abuse].

43 Abuse, *ibid.* Officially, residential schools operated in Canada from 1892 until 1969. At one time there were 88 schools operating in Canada. Although the Government of Canada officially withdrew in 1969, a few of the schools continued operating throughout the 1960s, 70s and 80s. Akaitcho Hall in Yellowknife did not close until the 1990s. These schools were run through a partnership between the federal government and the churches. An estimated 100,000 to 150,000 First Nation, Métis and Inuit children attended residential schools. Thousands of former students have come forward to claim that physical, emotional, and sexual abuse were rampant in the school system and that little was ever done to stop it or to punish the abusers. (Assembly of First Nations, *Residential School Update* (Ottawa: Assembly of First Nations, 1998) [AFN Update].

44 R.G. Ferguson, *Studies in Tuberculosis* (Toronto: University of Toronto Press, 1955) at 6 cited in G. Graham-Cumming, *Health of the Original Canadians, 1867–1967*, Med. Ser. J. Can. 23, 115–166 [Graham-Cumming]. By 1929 the Indian death rate in this area was 20 times greater than for the non-Aboriginal population (Graham-Cumming at 134).

45 Regarding the health of the pupils, the report states that 24 per cent, of all the pupils which had been in the schools were known to be dead, while at one school on the File Hills reserve, which gave a complete return, to date *75 per cent were dead at the end of the 16 years since the school opened.* (emphasis added) (P.H. Bryce, *The Story of a National Crime – Being a Record of the Health Conditions of the Indians of Canada from 1904–1921* (Ottawa: James Hope and Sons, 1922) cited in M. Lux, *Medicine That Walks: Disease, Medicine, and Canadian Plains Native Peoples: 1880–1940* (Toronto: University of Toronto Press, 2001) at 192.)

46 "The first claim against the federal government and the churches for abuse in residential schools was filed in 1990. By 1996, 200 such claims had been received. In 2003 there were about 12,000." (Canadian Broadcasting Corporation, "We are Deeply Sorry" (January 7, 1998), online: CBC Archives <http://archives.cbc.ca/IDC-1-70-692-4011/disasters_tragedies/residential_schools/clip9> (accessed March 5, 2006)). See also, The Aboriginal Healing Foundation, www.ahf.ca (accessed March 5, 2006).

47 Besides scores of litigation claims, on November, 23, 2005 the Assembly of First Nations and the Government of Canada announced that an agreement in principle had been made toward a fair and lasting resolution of the legacy of Indian residential schools. $1.9 Billion has been set aside for the direct benefit of former Indian residential school students. The Government also announced that eligible former Indian residential school students 65 years of age and older will soon be able to apply for an advance payment of $8000 (Canada, Indian Residential Schools Resolution Canada, News Release, November23, 2005, online: <http://www.irsr-rqpi.gc.ca/english/news.html> (accessed March 5, 2006)).

48 J. Sákéj Henderson, "Postcolonial Ghost Dancing: Diagnosing European Colonialism" in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) 57 at 58.

49 See, on the Doctrine of Discovery, Robert A. Williams, *The American Indian in Western legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990); Robert A. Williams, "Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous peoples' right to Self-Determination" (1991) 8 Ariz. J. Int'l & Comp. L. 51; for Papal Bulls and their

effects, see James Muldoon *The Americas in the Spanish World Order, The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994); James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World 1250–1550* (Philadelphia: University of Pennsylvania Press, 1979).

50 E.W. Said, *Culture And Imperialism* (New York: Vintage Books, 1994) at 9.

51 See also, Peter C. Newman, *Caesars of the Wilderness* (Markham: Viking, 1987) at 21, quoted in Jack Weatherford, *Native Roots: How the Indians Enriched America* (New York: Fawcett Columbine, 1991) at 274–275:

> With the shortage of white women in the western and northern British colonies in Canada, men practiced a lively commerce in female Indian slaves. Although not recognized by the government, men bought and sold women, or even leased them for a certain number of years. They trafficked in Indian and mixed-blood women for cash, to repay gambling debts, and to trade for horses and rum…Sometimes Indian or mixed girls as young as nine or ten years of age were sold in this trade.

52 S.H. Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 1–2 in P. Monture-Angus, *supra* note 15. S.H. Razack, "Gendered Racial Violence and Spatialized Justice: The murder of Pamela George" in Sherene H., ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 121–156 [Razack].

53 Taiaiake Alfred & Jeff Corntassel. "Being Indigenous: Resurgences Against Contemporary Colonialism." Government and Opposition, 2005. online: <http://www.wasase.org/pdfs/goop_166.pdf> (accessed March 5, 2006).

54 Status of Women Canada, "Traditional Roles of First Nations Women," online: First Nations Women, Governance and the *Indian Act*: A Collection of Policy Research Reports <http://www.swc-cfc.gc.ca/pubs/pubspr/066231140X/200111_066231140X_8_e.html>.

55 T.S. Palys, "Prospects for Aboriginal Justice in Canada" (Draft paper, Simon Fraser University, 1993), online: <http://www.johnco.com/nativel/abojust.htm> (accessed March 5, 2006). See also "Aboriginal Women in Canada and the Law," online: University of Saskatchewan <http://www.usask.ca/nativelaw/awomen.html> (accessed March 5, 2006).

56 See for example, Mann *supra* note 16.

57 K. Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press 2000) at 99 in Pertice Moffitt, "Colonialization: A Health Determinant for Pregnant Dogrib Women" (2004) 15:4 Journal of Transcultural Nursing 323–30 (2004) at 325.

58 See, for example, F. Pannekoek, "The Churches and the Social Structure in the Red River Area 1818–1870" (Ph.D. Thesis, Queen's University 1973) at 154–90.

59 In Thunder Bay Ontario, a First Nations woman miscarried her child and the hospital shipped it to her in a Purolator package. She received the decomposed fetus forty days later. Canadian Broadcasting Corporation, "Family wants answers after fetus returned in cardboard box" (21May 2004), online: CBC News <http://www.cbc.ca/stories/print/2004/05/19/Canada/unbornchild040519> (accessed March 5, 2006).

60 Many countries enacted various eugenics policies and programs, including, promoting differential birth rates; compulsory sterilization, marriage restrictions, genetic screening, birth control, immigration control, segregation, and extermination, online: Wikipedia the Free Encyclopedia, Eugenics <http://en.wikipedia.org/wiki/Eugenics> (accessed March 5, 2006).

61 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Article Two Text: U.N.T.S. No. 1021, vol. 78 (1951), at 277. Canada signed the Genocide Convention on November 28th 1949 and ratified the Convention on September 3rd 1952.

62 M. Annette Jaimes & Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America" in M. Annette Jaimes, ed. *The State of Native America: Genocide, Colonization, and Resistance* (Boston: South End Press, 1992) at 311–44.

63 *Ibid*. at 326.

64 *Sexual Sterilization Act*, S.A. 1928, c.37.

On March 21, 1928 the *Sexual Sterilization Act* became law in Alberta. Five years later Germany did the same.

65 Jana Grekul et al, "Sterilizing the 'Feeble-minded': Eugenics in Alberta, Canada, 1929–1972" (2004) 17:4 Journal of Historical Sociology 359 [Grekul].

66 Grekul, *ibid.*

67 Grekul, *ibid.* at 363.

68 Grekul, *ibid.*

69 Grekul, *ibid.*

70 Grekul, *ibid.*

71 Grekul, *ibid.* at 375.

72 Grekul, *ibid.* at 371.

73 Wanda Vivequin, "Prof Reveals Eugenics Machine" *Express News* (July 18, 2003), online: Express News <http://www.expressnews.ualberta.ca/article.cfm?id=4594> (accessed March 5, 2006).

74 James Horner, "The Sterilization of Leilani Muir" *Canadian Content* (February 1999), online: Canadian Content <http://www.canadiancontent.ca/issues/0299sterilization.html> (accessed March 5, 2006) [Horner].

75 Horner, *ibid*.

76 *Ibid*.

77 See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 4th ed. 1997) at 36/3, 36/8 [Hogg].

78 Canadian Broadcasting Corporation, "Alberta Apologizes for Forced Sterilization" (November 9, 1999), online: CBC News <http://cbc.ca/cgi-bin/templates/view.cgi?/news/1999/11/02/sterilize991102> (accessed March 5, 2006).

79 For case in law in this area see, *Base v. Hadley*, [2006] N.W.T.J. No. 3, [2004] N.W.T.J. No. 23, [2001] N.W.T.J. No. 44. See also, Canadian Broadcasting Corporation, "Sterilized woman sues Stanton hospital" (August 2, 2004), online: CBC North <http://north.cbc.ca/regional/servlet/View?filename=aug02stantonsuit02082004 > (accessed March 5, 2006). See also, *D.E. (Guardian ad litem of) v. British Columbia*, [2005] B.C.J. No. 1145, 2005 BCCA 289, [2005] B.C.J. No. 492, [2003] B.C.J. No. 1563 where 18 people who were sterilized make an application that superintendents of the hospital abused their public office in recommending sterilizations.

80 For instance, in the 1960s women imprisoned at the Kingston Prison for Women were subjected to LSD experiments. These experiments had devastating consequences and long-term effects on the generations of women to follow. See, Elizabeth Fry Society, "LSD Experiments at the Prison for Women A letter to the Correctional Service Commissioner" Elizabeth Fry Society (March 3, 1998), online: <http://www.elizabethfry.ca/eLSD.html> (accessed March 5, 2006). See also Elizabeth Fry Society, "Another Bad Trip: CSC Malingering in LSD Compensation Case" *Annual Report 2000* (2000), online: Elizabeth Fry Society <http://www.elizabethfry.ca/areport/ar2000e/page20.htm> (accessed March 5, 2006). In 1998, Solicitor General Andy Scott's incredulous response was "…How much informed consent in a circumstance like that can you really believe exists? Why women?" (Prison Activist, "Solicitor General's response to LSD experiments" Ottawa Citizen (March 4,1998) online: Prison Activist Organization <http://prisonactivist.org/pipermail/prisonact-list/1998-April/001617.html> (accessed March 5, 2006). Also, Prison Activist, "LSD Tests Kingston Prison for Women 60's" Ottawa Citizen (February 28, 1998) online: Prison Activist Organization <http://prisonactivist.org/pipermail/prisonact-list/1998-March/001335.html> (accessed March 5, 2006).

81 Carolyn Strange & Tina Loo, *Making Good: Law and Moral Regulation in Canada*, *1867–1939* (Toronto: University of Toronto Press, 1997) at pp. 63–69.

82 Early Canadiana Online, "Aboriginal Women's Issues" online: Canada in the Making <http://www.canadiana.org/citm/specifique/abwomen_e.pdf> at para. 5 (accessed March 5, 2006). See

also, Early Canadiana Online "Acts of the Parliament of the Dominion of Canada relating to criminal law and … "*1876 Indian Act* online: Early Canadiana <http://www.canadiana.org/ECO/PageView/9_02041/0056> at 55 (accessed March 5, 2006).

83 Ann Laura Stoler, "Making Empires Respectable: The Politics of Race and Sexual Morality in Twentieth-Century Colonial Cultures," in Anne McClintock, Aarnir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (Minneapolis: University of Minnesota Press, 1997) at 347. See also, Renisa Mawani, "The 'Savage Indian' and the 'Foreign Plague': Mapping Racial Categories and Legal Geographies of Race in British Columbia, 1871–1925" (Ph.D. Thesis, University of Toronto, 2001), online: <http://www.collectionscanada.ca/obj/s4/f2/dsk3/ftp04/NQ58938.pdf> (accessed March 5, 2006).

84 See Constance Backhouse, "Nineteenth Century Prostitution Law: Reflection of a Discriminatory Society" (1985) 8.35 Social History/Histoire Sociale 387–423 especially note 4.

85 See National Archives of Canada, RG 10, Reel 10 193c, Volume 3816, File 57,045 for a collection of newspapers detailing prostitution involving Aboriginal women.

86 For a clear discussion of these developments see *The Historical Development of the Indian Act*, 2nd ed., (August 1978). Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs, especially chapter five.

87 This statement presumes that Wigwams were "disorderly" by definition.

88 At the same time, the courts struggled with Aboriginal custom law, see for instance, *Connolly v. Woolrich and Johnson* (1867), 11 L.C. Jur. 197, 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Q.S.C.); *R v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211, 2 C.N.L.C. 368 (N.W.T.S.C.); *R v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.); *Re: Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.); *Ex-Parte Cote* (1971), 3 C.C.C. 2(d) 383 (Sask. Q.B.); *Manychief v. Poffenroth* (1994), [1995] 3 W.W.R. 210, [1995] 2 C.N.L.R. 67 (Alta. Q.B.).

89 Mawani, *supra* note 83 at 167. Mawani also cites historian Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884- 1951" (1992) 73:2 Can. Hist. Rev. 125-165.

90 Amnesty International, "Stolen Sisters Discrimination and Violence Against Indigenous Women in Canada - A Summary of Amnesty International's Concerns" (4 October 2004) online: Amnesty International <http://web.amnesty.org/library/Index/ENGAMR200012004> (accessed March 5, 2006) [Stolen Sisters].

91 *Indian Act*, R.S.C. 1985, c.I-5.

92 Canada, Indian and Northern Affairs, "Aboriginal Women: A Demographic, Social and Economic Profile," online : Health Canada <http://www.hc-sc.gc.ca/hl-vs/pubs/women-femmes/abor-auto_e.html> (accessed March 5, 2006).

93 Razack *supra* note 52, Stolen Sisters, *supra* note 90. See also, *R. v. Kummerfield*, [1997] S.J. No. 149, *R. v. Edmondson*, [2005] Sask. D. Crim. 270.90.65.00-03; [2005] Sask. D. Crim. 250.90.65.00-03; [2005] Sask. D. Crim. 260.80.25.00-01; [2005] Sask. D. Crim. 260.30.32.80-01. See also *R. v. Pickton*, [2002] B.C.J. No. 2830.

94 Paul Chartrand & Wendy Whitecloud, "The Aboriginal Justice Implementation Commission Final Report" *Reports* (29 June 2001), online: Reports <http://www.ajic.mb.ca/reports/final_toc.html> (accessed March 5, 2006).

95 Stolen Sisters, *supra* note 90.

96 *Ibid*.

97 Edmonton Sun, "Wake-up Needed-Says Advocate" (21 November 2005) online: Edmonton Sun <http://www.edmontonsun.com/News/Edmonton/2005/11/21/1316363-sun.html> (accessed March 5, 2006).

98 Statistics Canada, "Population By Aboriginal Groups and Sex, Showing Age Groups for Canada, 1996 Census- 20% Sample data" (18 December 2001) online: Statistics Canada <http://www.statcan.ca/english/census96/jan13/can.htm> (accessed March 5, 2006). The statistics were only

collected for status Indians and have not been recorded for non-status Indian, Métis and Inuit women who have "disappeared." Considering this fact, the statistics will likely be much higher.

99 *Ibid.*

100 Health Canada, The Bureau of Women's Health and Gender Analysis: "The Health of Aboriginal Women" (1999) online: Canadian Government Publishing Directorate <http://www.hc-sc.gc.ca/hl-vs/women-femmes/fi-if/index_e.html> (accessed March 5, 2006).

101 *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791 at para 56 [*Chaoulli*].

102 Cheffins & Tucker, *The Constitutional Process in Canada* (2d ed., 1976) at 4 cited in P.W. Hogg, *Constitutional Law of Canada*, 4th ed.(Scarborough: Carswell, 2002) at 1-1.

103 Hogg, *ibid.* at 1-1.

104 *Constitution Act, 1982*, *supra* note1.

105 The *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3 (*B.N.A. Act, 1867*).

106 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. The *British North America Act*, *supra* note 105 was the original name of the legislation that provided for the formation of the Dominion known as Canada. The distribution of legislative powers between the federal and provincial governments was set out at ss.91 and 92 of the *B.N.A. Act, 1867*. "Indians, and Lands reserved for the Indians" fell within the legislative authority of the Parliament of Canada pursuant to s.91(24) of the Act. The *Constitution Act, 1982* (enacted as Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11), which came into force on April 17, 1982, amended the name of the *British North America Act, 1867* to the *Constitution Act, 1867*. The Parliament of Canada continues to have legislative authority over "Indians, and Lands reserved for the Indians."

107 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146 [Van der Peet] held that Aboriginal rights are practices, traditions or customs existing prior to European contact and an integral part of the distinctive society. Building upon the *Van der Peet* analysis, the Supreme Court stated in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, [2001] 3 C.N.L.R. 122 at para. 12 that "integral" requires the right to be of central significance, at the core of the identity, and a defining feature that are vital to the life, cultural and identity of the Aboriginal nation.

108 M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 205 [*Indigenous Knowledge*].

109 *Ibid.*

110 Section 4 of the *Constitution Act, 1982* was added by the *Constitutional Amendment Act, 1983*.

111 Battiste, *supra* note 108 at 65–72.

112 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

113 *Ibid.* at s.15 "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

114 *Benoit v. Canada*, [2002] 2 C.N.L.R. 1 at para. 366. *Lovelace v. Canada*, [2000] 1 S.C.R. 950, [2000] 4 C.N.L.R. 145 at para 60. See also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19 at para. 94.

115 Professor Peter Hogg explains the advantages that s.35 rights possess being situated outside of the *Charter* rights. For instance, s.35 is not subject to s.1 of the *Charter* "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"; they are not subject to legislative override through s.33 nor are the rights effective only against government action through s.32. Because s.35 is outside of the *Charter* provisions, these rights are not enforceable through s.24 of the *Charter*. Section 25 further provides that the *Charter* must not "derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." (Hogg, *supra* note 77 at 27–35.)

116 RCAP *supra* note 11.

117 Interestingly, in 1983, lawyer Doug Sanders commented on what s.35(4) means:

Section 35(4) was added guaranteeing treaty and aboriginal rights equally to men and women. This provision was supposed to end the sexual discrimination in the Indian Act, but it was written by the lawyers from the Department of Justice in such a way that it is not aimed at rights under legislation. No one knows what the section means. (Doug Sanders, "The FMCs: What Was Offered?" (1983), online: Saskatchewan Indian Cultural College <http://www.sicc.sk.ca/saskindian/a87sum30.htm> (accessed March 5, 2006).)

118 *Constitution Act*, *supra* note 1 at s.35(4).

119 *Blacks Law Dictionary*, *supra* note 28, *s.v.* "sui generis." "Rights that are *sui generis* do not fit into categories of French or English law" (J. Woodward, *Native Law* (Toronto: Carswell, 2002) at 5–7).

120 For instance see, *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, [1996] 2 C.N.L.R. 25; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 [*Delgamuukw*].

121 J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 American Indian Law Review 37.

122 J. Borrows & L. Rotman, "The Sui Generis Nature of Aboriginal Rights" (1997) 36(1) Alta. L. Rev. 9 at 26–27.

123 *Van der Peet*, *supra* note 107 at para. 55.

124 *Ibid*. at para. 60–62.

125 *Ibid*. at para. 73.

126 *Ibid*. at para. 69–72.

127 Brian Slattery, "New Developments of the Enforcement of Treaty Rights" (Paper presented to the Canadian Aboriginal Law Conference, Vancouver, 2002) [Slattery, Treaty Rights]. However, in *Sawridge Band v. Canada*, [2006 1 C.N.L.R. 292 at paras. 285–299, Russell J. cautions that Slattery's analysis of claims to self government under s.35(1) may not be understood as a generic right in relation to the right to self government.

128 *Ibid.* at 213–15.

129 *Ibid.*

130 *Ibid.* at 211–15.

131 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 542–43 and 559. See also, *Van der Peet*, *supra* note 107 at para. 30.

132 *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, 7 C.N.L.C. 91 at 103. See also *Roberts v. Canada*, [1989] 1 S.C.R. 322, [1989] 2 C.N.L.R. 146 at 156, where it was asserted that while Aboriginal title pre-dated colonization by the British and survived British claims of sovereignty, the Aboriginal right of occupation and possession continued only as a "burden on the radical or final title of the Sovereign." How the Sovereign achieved sovereignty, in the absence of conquest or submission, was not discussed.

133 *Van der Peet*, *supra* note 107 at para. 30.

134 *The Wik Peoples v. Queensland* (1996), 187 C.L.R. 1 at para. 51 (H.C. Aus.).

135 A.W.B. Simpson, *A History of The Land Law*, 2d ed. (Oxford: Oxford University Press, 1986) at 107–8; R.E. Megarry & H. W. R. Wade, *The Law of Real Property*, 5th ed. (London: Stevens & Sons Limited, 1984) at 849–50.

136 *Van der Peet*, *supra* note 107 at para. 112.

137 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [Slattery, Aboriginal Rights], B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L. J. 681 [Slattery, Sovereignty]; Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 110–16 and 181–83 [McNeil, *Aboriginal Title*].

138 *Indigenous Knowledge*, *supra* note 108 at 212.

139 As noted earlier, s.35(1) of the *Constitution Act, 1982* provides the framework for the conciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

140 *Delgamuukw, supra* note 120 at paras. 133–34.

141 RCAP, *supra* note 11 at 348. Selected contemporary writings capture understandings of Aboriginal women in the community, however, earlier writings regarding Aboriginal women were undertaken by non-Aboriginal men. As such, Aboriginal women were portrayed as wanton or undesirables or often not mentioned by the authors of the material. This created a vacuum that ultimately portrayed Aboriginal nations based on hierarchal notions where women were viewed as excluded from participation or decision making of the community. The denigration of Aboriginal women's status in the community via the colonizers lens has left the inaccurate and mistaken impression that Aboriginal women's health was not worthy of historical significance.

142 *Indigenous Knowledge*, *supra* note 108 at 212–15.

143 *Ibid.* at 212–13.

144 Slattery, "Aboriginal Rights," *supra* note 137 at 737–38; Slattery, "Sovereignty," *supra* note 137 at 681–703; McNeil, *Aboriginal Title*, *supra* note 137 at 110–16 and 181–83.

145 *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 at 182–83 [*Sparrow* cited to C.N.L.R.].

146 See for example, Nunavut Arctic College "Interviewing Inuit Elders," online: <http://www.nac.nu.ca/publication/index.html>, especially Volume 4: Cosmology and Shamanism and Volume 5: Health Practices (accessed March 6, 2006).

147 See also, *Blueberry River Indian Band*, *supra* note 120.

148 L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 3 [Rotman].

149 *Sparrow*, *supra* note 145 at 180

150 *Ibid.* at 180–81. See also, James Youngblood (Sákéj) Henderson; Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) at 343. In *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] 4 C.N.L.R. 161 at para. 92 [*Marshall*], the Supreme Court repeated and affirmed the significance of the "honour of the Crown." The strong statements in *Sparrow*, *supra* note 145 at 181 and 187 and *Marshall* suggest that all government departments must show sensitivity and respect when dealing with Aboriginal rights. They suggest that all legislative action and policy that might infringe Aboriginal or treaty rights must meet the tests set out in *Sparrow*, such as the duty to consult.

151 *Sparrow*, *supra* note 145 at 181. If the Supreme Court noted that these powers must be read with together with s.35(1), then it follows that all subsections of s.35 would be included.

152 *Van der Peet*, *supra* note 107.

153 *Ibid.* at paras. 23–25.

154 *Ibid.* at para. 28.

155 *R. v. Côté*, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26 at para. 74:

> The text and purpose of s.35(1) do not distinguish between federal and provincial laws which restrict aboriginal and treaty rights, and they should both be subject to the same standard of constitutional scrutiny.

See also Lord Denning in *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, Ex Parte Indian Association of Alberta*, [1982] Q.B. 892, [1981] 4 C.N.L.R. 86 at 97 (Engl. C.A.):

> As a result of this important constitutional change, I am of [the] opinion that those obligations which were previously binding on the Crown simpliciter are now to be treated as divided. They are to be applied to the Dominion or Province or territory to which they relate, and confined to it.

See also, *Gitanyow First Nation v. Canada* (1999), 66 B.C.L.R. (3d) 165, [1999] 3 C.N.L.R. 89 (B.C.S.C.), and *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666, [1999] 4 C.N.L.R. 1 (B.C.C.A.) [*Halfway River*].

156 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, [2005] 1 C.N.L.R. 72 [*Haida*].

157 For a fuller discussion on the duty to consult see Yvonne Boyer, "First Nations, Métis and Inuit Health Care: The Crown's Fiduciary Obligation," *Discussion Paper Series in Aboriginal Health, No. 2* (National Aboriginal Health Organization and Native Law Centre, 2004) [Fiduciary Obligation].

158 *Marshall*, *supra* note 150 at para. 92.

159 *Haida*, *supra* note 156 at para. 16.

160 *Ibid.* at para 35. See also *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 at 71 (B.C.S.C.), *per* Dorgan J.

161 *Haida*, *supra* note 156 at para 18.

162 *Marshall*, *supra* note 150 para. 32.

163 *Haida, supra* note 156 at para. 25.

164 *Ibid.* at para. 26.

165 Pierre Pettigrew, "Windspeaker News," Windspeaker Website, online: <http://www.ammsa.com/windspeaker/topnews-June-2004.html> (accessed March 5, 2006).

166 Fiduciary Obligation, *supra* note 157.

167 *Ibid. at* 35.

168 *Ibid.*

169 See for instance, L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.R. 735.

170 *Sparrow*, *supra* note 145 at 176.

171 In *Chaoulli supra* note 101 the Supreme Court evaluated the government's role in developing social policy that may infringe *Charter* rights and noted that the courts are the "last line of defence" when governments make promises and do not take positive action but rather "focus the debate on a sociopolitical philosophy" (at para. 89) and further stated that "[i]nertia (by the government) cannot be used as an argument to justify deference" (at para. 97).

172 *Ibid.* at 129.

173 *Ibid.* at 133.

174 *Ibid.* at 131.

175 Meeting Report of Aboriginal Women's Health Roundtable Planning Meeting, December 3, 2004, on file at National Aboriginal Health Organization, Ottawa.

176 NAHO & Health Canada, "Aboriginal Women and Girls' Health Roundtable," Final Report (2005). Seventy representatives from First Nations, Métis, Inuit and Health Canada attended the three-day event held in April 2005.

177 *Supra* note 175.

178 *Ibid.*

179 *Ibid*.

180 *Ibid.*

181 *Supra* note 176 at 7.

182 *Ibid.*

183 *Ibid.* at 6.

184 *Ibid.* at 21.

185 *Ibid.*

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