

Missing and murdered Aboriginal Women in Canada: What to do?

Senator Serge Joyal

1. The Government of Canada has repeatedly refused over the years to order a National Inquiry identifying the causes of missing and murdered aboriginal women in Canada. This is in spite of Minority Reports from the House of Commons recommending such a decision in 2014¹ and after many questions being raised in the Senate² urging the Government to act on the issue.
2. By way of a response,³ the Government has announced that it will devote more funds to fight poverty among aboriginal peoples which, it has argued, should help to alleviate the plight of aboriginal women. This is hardly adequate.
3. Are aboriginal women and other Canadians, who are deeply affected by the Government's indifference and who share a genuine frustration and anger about this national tragedy, to remain so defenseless? Do they have no recourse other than renewed political pressure on Government?

¹ *Invisible Women: A Call to Action. A Report on Missing and Murdered Indigenous Women in Canada*, Report of the Special Committee on Violence Against Indigenous Women, March 2014, 41st Parliament, 2nd Session, 96 p.

² Questions to The Leader of the Government in the Senate: **Sen. Dyck**: June 19, May 13, April 3 & February 26, 2014; October 23 & 17, 2013; November 7 & October 23, 2012; November 2, March 8 & February 15, 2011; October 20, 2010; December 3, May 13, March 10, 2009 - **Sen. Lovelace Nicholas**: June 4 & February 26, 2014; November 21 & March 8, 2012; June 15 & April 21, 2010; November 27, 2008 - **Sen. Ringuette**: May 14, 2014 - **Sen. Moore**: May 13 & March 25, 2014 - **Sen. Mitchell**: March 25, 2014 - **Sen. Tardif**: March 25, 2014 - **Sen. Cordy**: February 26, 2014 - **Sen. Jaffer**: February 26, 2014; November 7, June 7 & March 28, 2012; November 2, 2011 - **Sen. Dallaire**: October 23, 2013 - **Sen. Munson**: October 23, 2013 - **Sen. Fraser**: November 21, 2012 - **Sen. Mercer**: November 21 & 7, 2012 - **Sen. Pépin**: February 15, 2011.

Speeches: **Sen. Cowan** on December 10, 2013 - **Sen. Lovelace Nicholas**: December 5, 2013 - **Sen. Dyck**: November 26, 2013.

Statements: **Sen. Cordy**: March 5, 2014 - **Sen. Jaffer**: October 23, 2013 - **Sen. Dyck**: December 5, 2013; June 28, 2012; October 21, 2009; December 2, November 26, 2008.

Inquiry - Missing and Murdered Aboriginal Women: **Sen. Cordy**: June 18, 2013 - **Sen. Jaffer**: May 30, 2013 - **Sen. Dyck**: April 24, 2013; December 4, 2012 - **Sen. Tardif**: March 7, 2013 - **Sen. Lovelace Nicholas**: March 7 & February 14, 2013; December 4, 2012 - **Sen. Jaffer**: March 7, 2013 - **Sen. Callbeck**: February 27, 2013 - **Sen. Fraser**: February 14, 2013 - **Sen. Cowan**: December 11, 2012.

³ Boutilier, Alex, "Conservatives reject inquiry for murdered missing aboriginal women", *Toronto Star (The star.com)*, Friday, March 07, 2014.

4. Is the protection of fundamental rights and freedoms enshrined in our *Charter* useless in the face of this tragedy? Must aboriginal women remain under the permanent threat of abduction or murder?
5. One would have expected that after the shameful episode of the Residential Schools, with its permanent scars inflicted on aboriginal people, the Government would be more compassionate. In light of the long history of its discriminatory policies, the Government should be deeply ashamed that it has done so little to address the tragedy of so many missing and murdered aboriginal women.
6. In light of the Supreme Court's recognition of the concept of the *Honour of the Crown*⁴, and by virtue of the *Fiduciary Duty* of the Canadian Government regarding the general living conditions of aboriginal peoples, how can the Government continue to be indifferent and to refuse to act in an honourable manner and do what is right? Why does it refuse to order a national inquiry? Why does it only provide answers "in a manner that shocks the conscience and outrages our standards of decency"⁵?
7. The security and the protection of the lives of all Canadians are guaranteed by Section 7 of the *Charter*:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Certainly this guarantee applies equally to aboriginal women.

8. In December 2013, the Supreme Court interpreted the scope of the protection of the security of the person enshrined in Section 7 of the *Charter*:

The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but

⁴ *R. v. Sparrow*, [1990] 1 SCR 1075, para. 49; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

⁵ *Canadian Doctors for Refugee Care v. Canada (Attorney General and Minister of Citizenship and Immigration)*, 2014 FC 651, para 11, p. 8.

qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7.⁶

9. Furthermore, given the sharp increase of missing and murdered aboriginal women in recent years⁷, is there not sufficient evidence that these women are subject to greater risk? Does the Government not have an obligation to ensure that aboriginal women benefit from the protection of the equality rights under Section 15 of the *Charter*? Section 15 of the Charter states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

10. Let's be straightforward: are the lives and security of aboriginal women as worthy of Government protection as the lives of white male Canadians?
11. Why are aboriginal women facing such indifference? Why do they lack political clout in raising this issue and pressing for a positive decision? As the Federal Court ruled recently on refugees: "it serves to perpetuate the historical disadvantage suffered by members of an admittedly vulnerable, poor and disadvantaged group."⁸
12. It is our profound conviction that the Canadian Courts cannot remain indifferent in front of such a blatant case of systemic negligence, one that is not specific to any one victim but rather to the class of victims as a group.⁹

⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72, par. 127, p. 1153.

⁷ - "Aboriginal females in Canada represent 4.3% of the overall female population (2011)"

- "There were 164 missing Aboriginal females as of November 4, 2013. They make up approximately 11.3% of the total number of missing females (1,455 total)."

- "There were 1,017 Aboriginal female victims of homicide during this period, which represents roughly 16% of all female homicides - far greater than their representation in Canada's female population."

Source: RCMP, *Missing and Murdered Aboriginal Women: A National Operational Overview*, 2014 <http://www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf>.

⁸ *Canadian Doctors for Refugee Care v. Canada (Attorney General and Minister of Citizenship and Immigration)*, 2014 FC 651 (2014 FC 651), para. 13, p. 8.

⁹ See *Lee Rumley v. British Columbia* 2001 SCC 69.

13. There have already been many convincing studies of the discrimination which aboriginal people face in the police and criminal justice system.
14. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* ordered by the *Royal Commission on Aboriginal Peoples* produced in 1996 provided a comprehensive analysis that has not lost any of its compelling force. It remains relevant to this day.
15. Jurists who reviewed the status of the Criminal law in relation to aboriginal people have underlined the sensitivity of the Court regarding the underlying racism in the Criminal Justice System: “Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. [...] There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system”.¹⁰
16. Not only do aboriginal people face a particular challenge within the criminal justice system, they also face a preliminary hurdle in relying on a police investigation after becoming victims of crime.
17. Since Canadian Courts are well aware of the underprivileged condition of aboriginal people in the police and justice system, we have concluded on the necessity to seek from the Courts an order to investigate the plight of missing and murdered aboriginal women.
18. There is a useful legal precedent in the case of *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1997), quoted in the Report *Missing Women Commission of Inquiry* (June 2012).
19. In its decision, the Ontario Court of Justice (General Division) underlined “the known failures of the police department to handle sexual assaults in an effective manner” (Section 15 of the *Charter*, rights to equality under the law). The decision also stated

¹⁰ John J. Burrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, fourth edition, Lexis-Nexis Canada, 2012, p. 1068.

“that systemic discrimination existed within the police force, which impacted adversely on all women”.¹¹

20. To strengthen our position for a Court order regarding the present tragedy, the Court recognised that “the general pattern of poor investigations of sexual assault cases constituted a violation of women’s rights to equality and freedom from discrimination”:

[...] Because among adults, women are overwhelmingly the victims of sexual assault, they are and were disproportionately impacted by the resulting poor quality of investigation. The result is, that women are discriminated against and their right to equal protection and benefit of the law is thereby compromised as the result.¹²

21. With respect to the right to security (Section 7 of the Charter, cited earlier), the Ontario Court of Justice did not hesitate to conclude that the police had deprived the plaintiff of her right to security by “failing to take any steps to protect her or other women like her”.¹³

22. There is a legal link between women’s rights to equality and the obligation of governments to take positive measures to protect women from violence, since police forces are under government control.

23. It is essential to underscore that as far as police operations are concerned, civil liberties and fundamental human rights remain at stake in their decision-making.

24. The obligation of the Canadian Government in relation to missing and murdered aboriginal women imposes and demands a duty to investigate the causes why so many cases are unresolved.

25. The Canadian Government has an additional responsibility because it has signed international conventions and legal instruments that bind it regarding this national tragedy.

¹¹ Research Report prepared for the *Missing Women Commission of Inquiry, Violence against Women: evolving Canadian and international legal standard on police duties to protect and investigate*, June 2012, p. 25.

¹² Research Report prepared for the *Missing Women Commission of Inquiry*, p. 26.

¹³ Research Report prepared for the *Missing Women Commission of Inquiry*, p. 26.

26. The international obligations subscribed by Canada not only command it to protect women from violence, abduction and murder, but also to effectively investigate these crimes to prevent them from reoccurring.
27. The *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW)¹⁴ defines Canada's international obligations to protect women from violence and outlines the investigative duties to be undertaken by police. The ethnicity of aboriginal women is a factor that has to be considered in the overall conditions that contribute to their marginalisation in the effort to solve such crimes. Ultimately, Courts have the responsibility to review police actions and government indecision or inaction. They also have the obligation to review policies and related laws to ensure that they are consistent with the international norms to which Canada has subscribed.¹⁵
28. Moreover, the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) at Article 22(2) states that:
- States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.¹⁶
29. The *Native Women's Association of Canada* (NWAC) is well aware of the supplementary initiatives taken to give practical effect to the Government's obligations.
30. The Canadian Government has three fundamental obligations: 1) to protect individuals and groups of women from known threats or risks of violence; 2) to do due diligence in preventing, investigating, punishing and providing remedies for acts of violence against aboriginal women (in other words undertaking all means necessary to achieve the

¹⁴ Canada became a signatory to CEDAW in 1981.

¹⁵ The *Vienna Declaration and Programme of Action* (1993), the *Declaration on the Elimination of Violence Against Women* (1993), and the *Beijing Platform for Action* (1995).

¹⁶ On November 12, 2010, the Government of Canada formally endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* in a manner fully consistent with Canada's Constitution and laws. Press Release, "Canada Endorses The United Nations Declaration On The Rights Of Indigenous Peoples", Aboriginal Affairs and Northern Development Canada website, <http://www.aadnc-aandc.gc.ca/eng/1292354321165/1292354361417>.

objective of security of life¹⁷; and 3) to fulfill the human rights of aboriginal women in the particular context that defines their social, economic and cultural life.

31. For all of the reasons explained above, a legal proceeding in a Federal Court initiated by a victim(s) and/or a concerned party to obtain a declaration ordering the Canadian Government to establish a National Inquiry to investigate the plight of missing and murdered aboriginal women is the avenue recommended by Senators Serge Joyal, James Cowan and Lillian Dyck and supported by the independent Senate Liberal Caucus.

¹⁷ See the updated *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*, UN General Assembly, March 2011.