

The Lived Experience of Discrimination: Aboriginal Women Who Are Federally Sentenced

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We have often said that the women inside have the understanding to help themselves, that all that is required is the right kind of resources, support and help. The money spent on studies would be much better spent on family visits, on culturally appropriate help, on reducing our powerlessness to heal ourselves. But the reality is that prison conditions grow worse. We cry out for a meaningful healing process that will have real impact on our lives, but the objectives and implementation of this healing process must be premised on our need to heal and walk in balance.

Lana Fox and Fran Sugar, 1990

Not only the most obvious layer of discrimination, but the most frequently cited, faced by Aboriginal women who are federally sentenced is their over-representation within the prison system.

Concurrently, as Fox and Sugar note, the relevance of the correctional system's goals when applied to Aboriginal women raises an even more pressing concern. The ongoing failure to rigorously consider the structure and impact of the system on Aboriginal women results in continued disadvantage and discrimination beyond the travesty of over-representation. It is no surprise the statistics regarding over-representation have continued to increase, as it remains true that there is a continuing need to advance our understanding of culturally appropriate opportunities and to make real those options. The continued failure to do so reinforces cultural, racial and gendered barriers, which are causally related to over-representation. Equally, this failure impedes access to the very goals that the Correctional Service of Canada espouses of "safe and humane custody and supervision" while offering opportunities for "rehabilitation".¹ These are the values the system is legislatively mandated to secure and redress should be available when an identifiable group is denied access to them.

The pattern that emerges from an examination of the numbers of Aboriginal women in prison tells an important story and demonstrates the first layer of systemic discrimination. In 2000, Aboriginal women comprised 23% of the federal prison population (Okimaw Ochi Healing Lodge, Undated: 2) when Aboriginal Peoples made

¹ See section 3 of the *Corrections and Conditional Release Act*. These goals are reinforced by the provisions in section 5, including:

- the care and custody of inmates;
- the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community
- the preparation of inmates for release;
- parole and statutory release supervision;
-

up only 2.8% of the general Canadian population according to figures provided by Statistic Canada.² This over-representation has been steadily rising since the Task Force on Federally Sentenced Women reported in 1990. Then, Aboriginal women comprised 15% of the federal prisoners (Okimaw Ochi Healing Lodge, Undated: 2).

In 1991, the Commissioners of the Aboriginal Justice Inquiry of Manitoba noted of over-representation:

... Aboriginal people constitute approximately 12% of the Manitoba population. Yet, Aboriginal people account for over one-half of the 1,600 people incarcerated on any given day of the year in Manitoba's correctional institutions.

This is a shocking fact. Why in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system (Hamilton and Sinclair 1991: 85).

The Commissioner's noted that to some degree both answers are correct³ and that it is systemic factors that are central to understanding patterns of discrimination which result in over-representation (85-87).

For federally sentenced women in the Prairie Region (Manitoba, Saskatchewan and Alberta) the fact of over-representation is even more disquieting. On May 24, 2000, 119 women were in federal custody in the region (Borrowman 2000, 1). Aboriginal women accounted for 67 of those inmates (53.6%). Therefore, within the Prairie Region the pattern of discrimination against Aboriginal women is more pronounced. Part of the explanation lies in the number of Aboriginal people who reside in the prairies. In Saskatchewan, the 1996 census determined that North American Indians were 11.4% of the population. However, this is not a full explanation.

Over-representation is not solely a correctional responsibility but the lack of programming that impacts negatively on both release potential and recidivism are clearly

² See <http://www.statcan.ca/english> or <http://www.csc-scc.gc.ca/text/faits/fact/08-02>.

³ The Commissioners of the Aboriginal Justice Inquiry caution:

We believe that both answers are correct, but not in the simplistic sense that some people might interpret them. We do not believe, for instance, that there is anything about Aboriginal people or culture that predisposes them to criminal behaviour. Instead, we believe that the causes of Aboriginal criminal behavior are rooted in a long history of discrimination and social inequality that has impoverished Aboriginal people and consigned them to the margins of Manitoba society (85).

factors. Factors prevalent in the earlier stages of the criminal justice system also contribute to the over-representation of Aboriginal prisoners in the prairies.⁴ These factors include by way of example: over-policing (Hamilton and Sinclair, 1991: 595-596) over-charging (102), an insensitive and uninformed legal professional (102, 364-368), sentencing (see the discussion in *R. v Galdue*) and structural barriers in the courts (Hamilton and Sinclair, 1991: 349-387). Remembering that over-representation is the result of systemic factors and not evidence of intrinsic Aboriginal criminality, then the systemic factors which lead to over-representation must be the source of our amelioration efforts. Keeping Aboriginal women out of prisons, therefore, must be the first priority.

Also essential to establishing discussion⁵ is an understanding of who Aboriginal peoples are. The term Aboriginal peoples, as defined in Canada's constitution, includes the Indian (registered and not), the Inuit and the Metis.⁶ None of these terms reflect the tribal identities of Aboriginal people, particularly the so-called Indians, who may be Mi'kmaq, Mohawk, Cree, Saulteaux, Dene and so on. Feminist historian Sally Roesch Wagner noted:

To fill the voids left by silence and misinformation, we begin with basic questions. For example, where did the name Indian originate? What we find is that *Indian* stands as a singular example of the arrogance of someone who believed he had the right – by virtue of a presumed cultural superiority – to name another group of people. One interpretation is that Christopher Columbus, not altogether a first-rate navigator, apparently thought he was in the Indies and deduced that the people greeting him must be Indians. Another version holds that he acknowledged the near-sacred state of the Native people he encountered with the name *in dios*. Whatever the reasons for the name, Columbus believed he had the right to name the people, as he believed he had the right to claim their land. Did it ever occur to him to ask them what they called themselves? Would he have had ears to hear their answer? Each successive wave of European conquerors and settlers played the naming game. They gave names of their choosing to Native nations (such as Sioux and Iroquois) and Christian names to indigenous children forced into their boarding schools in order to “Christianize and civilize” them (2001: 21-22).⁷

⁴ This is to say that the problem of over-representation is greater than the mandate of the Correctional Services of Canada.

⁵ The goal of this paper is *not* to establish the documentary basis on which a human rights complaint can be sustained. Rather, it strives to establish an appropriate framework for the analysis of that evidence as it pertains to Aboriginal women.

⁶ Although Canada's constitution may not be the most culturally accurate source for this definition, it is the legal one. For further concerns about naming see: Karlene Faith, *Unruly Women* (Vancouver: Press Gang Publishers), 186-189; and, Patricia Monture-Angus, *Thunder in My Soul* (Halifax: Fernwood Publishing), 2-3.

⁷ Dr. Wagner continues on the same page:

Actual identities of First Peoples are not reflected in common language despite the fact that understanding how Aboriginal peoples understand themselves is essential to efforts to ameliorate conditions which lead to imprisonment.

Returning to the statistics on over-representation, this point about the importance of identity is made clear. Available only for the prairie region are some more specific statistics about the Aboriginal population in federal prison. Of the 67 women serving a federal sentence in May of 2000, 53 identified as “North American Indian” while 14 identified as Metis and 3 as Inuit (Borrowman 2000: 1). The over-representation of First Nations women (that is “North American Indians”) is most pronounced in the prairies as they accounted for 47.1% of the federally sentenced women population and 79.1% of the Aboriginal offender population. Patterns of over-representation across Aboriginal people indicate that at least in the Prairie Region, the incarceration rates of First Nations women suggest that further study is essential so we understand why the representation is skewed in this particular way. Additionally, ameliorative efforts should be directed specifically to First Nation populations. AS the women are Cree, Saulteaux, Ojibwe and so on; it emphasizes the need to think beyond general naming categories.

Acknowledging Colonialism:

A white settler society is one established by Europeans on non-European soil. Its origins lie the dispossession and near extermination of Indigenous populations by conquering 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 white people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead or assimilated. European settlers thus *become* the original inhabitants and the group most entitled to the fruits of citizenship. A quintessential feature of white settler mythologies is, therefore, the disavowal of conquest, genocide, slavery, and the exploitation of the labour of peoples of colour. In North America, it is still the case that European conquest and colonization are

Self-naming is, of course, a critical part of the process of creating a diverse culture. The cultural change in names may happen in stages, as we work our way through levels of disrespect. Small animal and fruit names for women are no longer acceptable. We have given up saying “girl” in addressing a fifty-year-old woman and “boy” for a fifty-year-old African American man. “Nigger” and later “Negro” have both been dropped. The self-defined term “Black” proudly reclaimed the very physical characteristic that Euro Americans used as the basis for enslaving people. “African American” emerged later as a more appropriate term for establishing a nation of diversity.

Native American served to replace the conquering name, Indian, by clarifying who was here first. Some now prefer to use Native, indigenous, or First Nation. Others suggest another term, American Indian, to firmly hold the government to nation-to-nation treaties made with American Indian nations (22).

often denied, largely through the fantasy that North America was peacefully settled and not colonized .

Dr. Sherene Razack, 2002 (1-2).

Over-representation cannot just be understood as a peripheral tragedy, one in a continuing experience Aboriginal people would describe as colonialism.⁸ The Commissioners of the Aboriginal Justice Inquiry of Manitoba discussed the complexities of colonial relationships and their impact on today:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated. We believe that the overall weight of the evidence makes it clear that these factors are crucial in explaining the reasons why Aboriginal people are over-represented in Manitoba jails (86).

It is the legacy of colonialism that underlies the over-representation of Aboriginal peoples in the Canadian criminal justice system. The dilemma, however, is that current Canadian human rights regimes do not expressly acknowledge colonialism as a form of discrimination.

The gendered specificity of colonialism is an essential component to understanding the present day situation of Aboriginal women in prison which one legal scholar has called a "glaring sexual inequity" (Gibson 1990: 227). Kim Anderson in her ground-breaking work, *A Recognition of Being: Reconstructing Native Womanhood*, traces in detail the impact of colonial relations on Aboriginal women (2000: 58, 62-65, 68-71, 75-78, 83-85, 91-94, 97-98).⁹ Her concluding comments on the devastation colonialism has wrought demonstrates the reason why understanding colonialism must be

⁸ For a fuller discussion of the definition and impact of colonialism, please see: Patricia Monture-Angus, "Considering Colonialism and Oppression: Aboriginal Women, Justice and the "Theory" of Decolonization", 12:1 *Native Studies Review*, (1999), 63-94, Sherene H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" in Razack, 121-156, and; Winona Stevenson, "Colonialism and First Nations Women in Canada" in Dua 1999, 49- 80.

⁹ See also: Acoose, Janice, 1995. *Iskwewak Kah'KiYaw Ni Wahkomakanak: Neither Indian Princesses nor Easy Squaws* (Toronto: Women's Press); Allen, Paul Gunn, 1983. *The Scared Hoop: Recovering the Feminine in American Indian Tradition* (Boston: Beacon Press); Carter, Sarah, 1997. *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West* (Montreal: McGill-Queen's University Press); Cook-Lynn, Elizabeth, 1996. *Why I Can't Read Wallace Stagner and Other Essays* (Madison: University of Wisconsin Press) and in particular the article, "The Big Pipe Case"; Razack, Sherene, 1998. *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press); Solomon, Art 1994. *Eating Bitterness: A Vision Beyond Prison Walls* (Toronto: NC Press); and, Turpel, Mary Ellen, 1993. "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in *Canadian Journal of Women and the Law* 6, 174-192.

essential to understanding the discrimination Aboriginal women in prison experience. Anderson explains:

If Native women are constructed as “easy squaws” and are locked into this imagery through the behavior of individuals, they will continue to be rendered worthless in public institutions such as courtrooms or hospitals. If we treat Native women as easy or drunken squaws in the court system, we feed negative stereotypes that will further enable individuals to abuse Native females, and so on. Native female images are part of a viscous cycle that deeply influences the lives of contemporary Native women. We need to get rid of the images, the systems that support them and the abusive practices carried out by individuals (112).¹⁰

Colonialism must be understood as the foundation which results in many of the forms of discrimination and disadvantage Aboriginal people (including women) face today.

It is the fact of colonialism that Correctional Services Canada has historically failed to take meaningfully into account including the degree to which colonialism is also gendered.¹¹ One of the clearest examples is that of programming and cultural services. For example, if the tribal identities of women are not taken into account, then Elder services may not reflect accurately the needs of the women. Blackfoot teaching delivered to women housed in Cree territory may not be an appropriate choice.¹² As noted previously, CSC does not keep tribal specific statistics. This is indicative of their thinking on “Aboriginal issues”.¹³ At a minimum, providing relevant programming options is limited because of this missing information.

¹⁰ See also Volume II of the Aboriginal Justice Inquiry of Manitoba where the murder of Helen Betty Osbourne is carefully examined. The Commissioners’ conclude that racism was a key factor in her death.

¹¹ Advocating a gendered approach to colonialism is not without controversy. This is because such an approach appears to contradict the teachings of Aboriginal nations. As was explained to the Task Force on Federally Sentenced Women:

Our dissatisfaction with the mandate also extends to the artificial (but perhaps necessary) distinction between men and women. As previously discussed in this chapter, Aboriginal culture teaches connection and *not* separation. Our nations do not separated 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* (22. Emphasis added).

¹² There are Aboriginal laws (specific to the different nations that reside in the territories now called Canada), that govern the conduct of guests in other’s territories. Historically, CSC has not considered these requirements in providing Elder services to prisoners. Some of the difficulties with the provision of services over the years can be traced to this lack of knowledge (and the lack of respect for Indigenous ways).

¹³ This is in fact the name of the Aboriginal sector at National Headquarters. To construct the realities of Aboriginal people into a box titled “issues” inappropriately problematizes Aboriginal Peoples. This problematization should be seen as a form of perpetuating discrimination as it results in a form of victim blaming.

The knowledge of over-representation is more damaging than the impact on individuals serving those sentences. The experiences of individuals in the correctional system when those experiences follow the patterns of colonialism familiar to Aboriginal people¹⁴ demonstrate that the collective is equally impacted. This is a further reason it is essential to acknowledge colonialism. As the second chapter of *Creating Choices* records:

Not only can we not separate the Aboriginal and the woman, it is important to understand we also share a common Aboriginal history. That common history is the history of racism, oppression, genocide, and ethnocide. It is one further way in which we are distinct. This shared history impacts on Aboriginal federally sentenced women in two ways. First, as the racism of prisons or the criminal justice system has largely been ignored or vanished, the situation of Aboriginal women as participants in Canadian society cannot be understood by prison administrators or correctional bureaucrats. It is these individuals who have historically controlled the administration of criminal justice. This has left Aboriginal federally sentenced women in an impossible situation. The people who hold the key to their release, they cannot trust. This lack of trust is not the sole responsibility or failure of individuals (prisoners or correctional employees) but a systemic failure to address racism (18).

Therefore, the fact of over-representation impacts on more than the women incarcerated, but on Aboriginal people generally. This is often unaccounted in the discussions about discrimination in the criminal justice system.

In this way, prison does impact on Aboriginal peoples generally in a much more profound way that principles such as deterrence take account. This example demonstrates how important it is to account for the colonial impact and the way historical events reproduce present day devastations on Aboriginal peoples. Colonialism has created the climate of distrust where Aboriginal people see this is not a system of justice, which equally represents them. This is the first layer surrounding the individualized discrimination Aboriginal women face while incarcerated. Rather than disturbing historic colonial outcomes,¹⁵ the opportunity to challenge outcomes of earlier colonial imposition is lost in favour of perpetuating the colonial relationship. Although some may experience this as a harsh conclusion, it is not. In 1991, The Commissioners of the Aboriginal Justice Inquiry of Manitoba wrote:

¹⁴ See, for example, the writings of Aboriginal women collected in *Tightwire* (the publication of the prisoners at the Prison for Women). These writings often described as “political” are one way the women have talked about both their colonization and their de-colonization.

¹⁵ For a fuller discussion please see: Patricia Monture-Angus, “Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice”, David Long and Olive Dickason (editors), *Visions of the Heart: Canadian Aboriginal Issues*, Second Edition, (Toronto: Harcourt Brace, 1999).

In examining the court system in Manitoba, we are struck by the fact that there clearly exists a distinguishable, separate justice system for Aboriginal people. Indeed, the rhetoric that surrounds the equality of the justice system evaporates as one examines the way the courts deal with Aboriginal people. It is a system administered by non-Aboriginal people. The laws which the courts apply are alien to Aboriginal people, the adversarial approach employed by the courts does not reflect Aboriginal values, and the sanctions these courts apply are ineffective in terms of deterring accused or others from further involvement.

The court system appears to view Aboriginal people and their communities with a mixture of disdain and disregard. The province's senior courts never hold hearings in their communities, while the courts that do travel there appear to want quite literally to "get out of town before the sun goes down." As a result, cases are either rushed through without due preparation and consideration, or are delayed from month to month.

In short, the current court system is inefficient, insensitive and, when compared to the service provided to non-Aboriginal people, decidedly unequal (249).

Accepting that colonialism is the central experience which leads to the inequality of Aboriginal peoples in the Canadian criminal justice system, of which over-representation is but one example, permits the more specific examination of discrimination against Aboriginal women in the Canadian correctional system.

Women in Prison: Historical Context:

It is racism, past in our memories and present in our surroundings that negates non-native attempts to reconstruct our lives. Existing programs cannot reach us, cannot surmount the barriers of mistrust that racism has built. Physicians, psychiatrists and psychologists are typically White and male. How can we be healed by those who symbolize the worst experiences of our past? (Aboriginal Parolee) (CSC 1990: 10).

In order to understand the forms and extent of the discrimination Aboriginal women who are federally sentenced experience, it is necessary to understand the experiences of federally sentenced women as they define it. Aboriginal women's experience is both gendered and racialized. Often these two grounds of discrimination cannot be distinguished¹⁶ in the examination of specific acts, policies or programs. Race

¹⁶ The courts have historically had difficulty dealing with these questions of intersectionality. See for example, *Canada (Attorney General) v Lavell and Bedard*, [1974] 1 S.C.R. 1349 (S.C.C.). For commentary and analysis see the discussion in Patricia Monture-Angus, "Aboriginal Women and the Application of the Charter" in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), 131-151 and "Seeking my Reflection: Law and Constitutional Change" also in *Thunder*, 152-168.

(including colonialism) and gender are not discrete categories but overlapping and independent experiences.

The Task Force on Federally Sentenced Women is equally part of the historical knowledge required to come to terms with the forms of discrimination Aboriginal women are confronted with both on the way to prison and during their incarceration. It should be unnecessary to further document forms of discrimination that have already been acknowledged by government. Our energies should rather be devoted to securing remedial action. The report and related documents of the Task Force on Federally Sentenced Women, therefore, serves as the framework for the following discussion.

The understanding of discriminatory experience and its impact on Aboriginal women must also be expanded to include an analysis of the promises¹⁷ extended in the report of the Task Force on Federally Sentenced Women, *Creating Choices*. The report has been described as re-emphasizing:

... the need for Aboriginal specific programs for Aboriginal women. Historically, incarcerated women are at a disadvantage. These disadvantages include;

- * the geographic dislocation from their families, cultures and communities;
- * the stricter than necessary classification in terms of security of some women and the associated lack of significant opportunity for movement to other institutions or lower security facilities;
- * and the enhanced disadvantaged situation of Aboriginal Federally Sentenced Women who are not only removed from their culture, and are removed from their communities but over-represented in the population of Federally Sentenced Women in Canada (Okimaw Ohci Healing Lodge, Undated: 2).

¹⁷ I have purposefully chosen to characterize the reforms advanced by the TFFSW as promises. Involving women, particularly incarcerated women, actively in the research and reform agenda carries a different set of commitments to outcome. Madame Justice Arbour also noted:

Through its recent initiatives, the Correctional Service has recognized that decades of neglect and *ill-adapted correctional policies borrowed from models designed for men, have failed to produce the substantive equality to which women offenders are entitled*. Women's corrections should be the flagship of the Correctional Service for many reasons. For one thing, the momentum for reform is already in place and it merely needs to be sustained and expanded. The chances of success for a progressive correctional experiment are highest in women's corrections. Very few women commit crimes. This should be a badge of entitlement to reward, rather than a recipe for neglect and deprivation (1996: xii. Emphasis added).

The promise of the Task Force report must be understood, at minimum, as another sight where disappointment and disadvantage characterizes the experiences of both women prisoners and their advocates. This disappointment, although not necessarily discrimination in and of itself, is one of the serious consequences of the failure to remedy the multiple places where discrimination does impact the lives of Aboriginal women prisoners. This collateral damage should be visible in any plan to remedy the discrimination Aboriginal woman prisoners confront.

The report on which this analysis is built must be understood as a different kind of report even though the degree to which it is progressive has been called into question (Hannah-Moffat and Shaw, 2000: 30-39; Hannah-Moffat, 2001: 141-160). The first chapter of the TFFSW report offers the views of the women who were federally sentenced and participated in the consultations in 1989. This alone differentiates it from earlier reports as women prisoners not only have the opportunity to speak but to speak first. The report is also distinguishable from earlier reports on the situation of federally sentenced women as the work of the Task Force expressly followed feminist principles. Essential to feminist methodology is the inclusion of the voices and the involvement of federally sentenced women. In the opening paragraph of the report, the Task Force demonstrates these feminist principles and the degree to which a different standard was set:

These words and those of all other federally sentenced women who spoke to us in person or through their letters, provided Task Force members with a balance and a touchstone. Whenever we were tempted to put our words and ideas before those of the women living through a federal sentence, their voices focused us on the meaning of our actions and the urgent need for caring (CSC 1990: 5).

This must be seen as the standard to which subsequent action (including the investigation by the Canadian Human Rights Commission) and achievement is measured against. It is still the relevant standard that our efforts today must be measured against.

The feminist principles of the Task Force on Federally Sentenced Women are also a touchstone for this discussion. Not only do they establish the standard for the inclusion of prisoners' voices in the work, but it also must influence the way the present violation of the rights of prisoners who are women (and Aboriginal)¹⁸ is considered. Seen within

¹⁸ For discussions on intersectionality which offer particular racialized understandings, please see: Carol A. Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" in Conference Proceedings, National Association of Women and the Law, 1999; "Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour," 43 *Stanford Law Review* (1991), 1241; "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* (1989), 139; Mary Eaton, "Patently Confused: Complex Inequality and *Canada v Mossop*," 1 *Rev. Cons. Stud.* (1994), 203; Patricia Monture-Angus, "A First Journey in Decolonized Thought: Aboriginal Women and the Application of the Canadian Charter", in *Thunder*, 131-151 and "Constitutional Renovation: New Relations or Continued Colonial Patterns?" in *Thunder*, 152-168; "Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender" in Comack; and, Sherene Razack, 1998. *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms*(Toronto: University of Toronto Press).

the appropriate historic context, *the report must itself be seen as a remedy for disadvantage and discrimination faced by incarcerated women*. This is the context in which the report is most frequently discussed (see, for example, Arbour, 1996: 199, 223, 229; Hannah-Moffat and Shaw, 2000: 11). The essential question is not really about the degree to which the rights of women who are prisoners (including Aboriginal women) have been violated, but rather the degree to which the repeated attempts to remedy the discrimination against women in federal prison has been successful.

A further task is then accomplished by an examination of the promises set out in *Creating Choices*. It is one way to examine the degree to which remedies have been secured. This must include an analysis of the degree to which the report has been implemented.¹⁹ As the report did not purposefully include a set of recommendations,²⁰ this is a complex task. It is a task that the Canadian Human Rights Commission should engage its resources to ensure a full analysis is available for their consideration and to the public.

Centralizing the work of the TFFSW in this analysis requires understanding that a further consideration demands our attention. The TFFSW, perhaps, did not get it right. In fact, Karlene Faith comments:

Good faith and compromises for the feminist reformers typify the work and recommendations of the Task Force on Federally Sentenced Women. To most of the non-governmental participants, the report was a compromise and bottom-line position, not the visionary document that the CSC now describes it to be. In retrospect, a number of participants have indicated that the mandate, recommendations and subsequent consequences, intended and unintended, have exacted far too great a toll (Faith and Pate, 2000: 141).

The sacrifices that lead to the 1990 Task Force report have increased in subsequent years as implementation efforts have failed to secure all the intended benefits.

Treating the promises of the TFFSW as central in this analysis requires us to reflect on both the history, which led to, and the climate in which the TFFSW was mandated. In 1981, a federal human rights complaint was launched against the Correctional Service of Canada by a group of “feminist reformers frustrated with the lack of progress securing human conditions for women to serve their sentences”(Hannah-Moffat 2001: 135). After a year long investigation, the CHRC upheld:

¹⁹ A full examination of this question will require the Canadian Human Rights Commission to secure information from the Correctional Service of Canada which may not be fully available to activists, advocates and academics. It is a broad question and some of the answer also lies beyond the scope of this paper. See the discussion in Stephanie Hayman, “Prison Reform and Incorporation: Lessons from Britain and Canada” in Hannah-Moffat and Shaw, 41 at 45.

²⁰ This choice was made to deny the opportunity to pronounce that the majority of the report had been implemented, when really only 51% of a long list of recommendations had been dealt with.

... the complaint by Women for Justice and declared that ‘federal female offenders were discriminated against on the basis of sex, and that in virtually all programs and facility areas, the treatment of federal women inmates was inferior to that of men’. The CHRC said that the state had a legal and moral obligation to provide women with programs and facilities ‘substantively equivalent’ to those provided to male inmates (Hannah-Moffat 2001: 135-136).

A conciliator was appointed. It has been reported that the “remedies ultimately negotiated and subsequently implemented, resulted in few substantial changes” for women prisoners (LEAF, 1989: 10). Remedial issues clearly remained a central focus of concern after the complaint was closed.

The passing of the *Canadian Charter of Rights and Freedoms* in 1982, offered another opportunity for feminist reformers to call into question the treatment of federally sentenced women. In 1987, LEAF began to prepare a *Charter* case concerning the treatment of federal female prisoners. The case was postponed as an act of “good faith” upon the establishment of negotiations to mandate a federal task force to examine the problem of discrimination against women in prison (Hannah-Moffat 2001: 136-137). If indeed, the TFFSW did not fully remedy the discrimination considered in the forestalled litigation, then that act of good faith was misplaced.

The case preparation work completed by LEAF provides some detail regarding the nature of women’s treatment and the concerns about the treatment of women prisoners. This information demonstrates the consistency in the patterns of discrimination against women prisoners and this must impact on our plans for remedy. In 1988, the Inmate Committee at the Prison for women were visited by LEAF. The Committee was asked for a list of priority issues. The following list was produced:

- 77 mothers in prison;
- 78 health issues, in particular the treatment of women who slash and the general lack of appropriate counseling;
- 79 transfers;
- 80 case management and the unavailability of sensitive staff and case managers. Presently they have neither the time nor inclination to deal with their caseload responsively and responsibly;
- 81 gradual release programs;
- 82 segregation;
- 83 sentencing.

These same concerns continue to dominate the discussions about the difficulties women in prison face from the time of the first CHRC complaint through the Task Force to the present. The only concern that has been to some degree ameliorated is that of geographic and cultural isolation.

Sisterhood was also asked to document their concerns. However, given the times, the intersectionality of racial, cultural and gendered issues was still largely unexamined by all parties involved. Their concerns of Aboriginal women paralleled the concerns reported by the Inmate Committee. Sisterhood also raised concerns about the high rate of maximum-security classifications among Aboriginal women; that “the general attitude of guards towards Native inmates is very poor”, especially the case managers; and, the way in which rules and policies about cultural practices were always evolving and never were consistent (LEAF, Minutes of Meeting with Sisterhood, March 7, 1988: 2-3). Specifically Sisterhood requested the following improvements:

- (1) Many of the women would prefer to do their time closer to home, provided provincial institutions are improved. They would like to see guidelines for a minimum standard of custodial care and service delivery for federally sentenced women serving their time in provincial prisons.²¹
- (2) They would like more frequent visits from Elders, and are content to have Elders come who are nearby even though the women come from several different tribes.
- (3) They would like more sweat lodges.
- (4) They would like more Native women involved in the delivery of programs and services at the institution.
- (5) They would like resources to be made available for more family visits and phone calls.
- (6) They would like to see group therapy sessions made available with a female therapist, for survivors of physical and sexual abuse (4).

At a subsequent meeting the Sisterhood was asked what their top priority concerns were. They responded that the priorities were “discrimination within the system of security classification”, “mothers in prison” and “access to cultural and spiritual items and events” (LEAF, Minutes of Meeting with Sisterhood, April 11, 1988: 3).

The degree that concerns of women prisoners are so consistent over the last two decades demonstrates the degree to which male focused correctional practices, services, programs and policies fail to meet the needs of women. The women’s concerns provide a

²¹ Although this recommendation focussed on provincial institutions, there is still no female offender Commissioner’s Directive (CD) which parallels CD 702 on Aboriginal offenders. CD 768 addresses the mother-child program. The Aboriginal specific CD makes only one mention of women, as follows:

39. All Executive Committee submissions pertaining to offender management, including programs and services, shall contain an analysis in relation to male and female Aboriginal offender needs.

template for the remedial action that is required. Although some of the issues surrounding geographical dislocation may have been ameliorated with the opening of the new regional institutions, it is unclear the degree to which this is true. These issues have not been studied by either CSC or external researchers and it remains open to speculation the degree to which the new regional system ameliorates dislocation.

One example illuminates this concern. At Prison for Women, prisoners received compensation to assist with family contact given their geographic isolation (especially compared to male prisoners). This included financial assistance for family visits as well as monthly contact by phone. These accommodations are not available to the women in the new facilities. However, women particularly women whose families are poor (statistically, in the Canadian population, this number is likely to include more Aboriginal than non-Aboriginal women), could still be serving their sentences hundreds of miles from home. Because of the lack of research, it is not known how much the diminishing of geographical impacts on women has truly ameliorated their situations post- Task Force. It is entirely possible that absent the financial assistance, family visitation has decreased since the opening of the new facilities.

Family visits are not the only consideration required to determine if the situation of federal women prisoners has improved post-Task Force. There were some unforeseen consequences of the closure of Prison for Women. At P4W, there was an active national as well as local core of volunteers who attended family days and ceremonies such as pow wow at the prison. Prison for women drew these individuals together, albeit unintentionally, on a regular basis.²² This no longer exists. This is the first consequence. Native Sisterhood an organization of women prisoners, primarily Aboriginal, was active within the prison. Sisterhood no longer has the profile it had at the Prison for Women within the new facilities.²³ This is the second consequence.

There is also a third significant consequence. On Monday nights, a number of people from “the streets” attended sisterhood meetings. This created a number of positive outcomes. The involvement of women supporters was causal in the activism that brought forward the federal commitment to examine the situation of women prisoners. This factor has been dissipated as a result of the building of several regional facilities for women. Many of the present facilities, but especially the Okimaw Ochi Healing Lodge are not in an urban centre. Saskatchewan Penitentiary as well as the Lodge suffers from a lack of volunteers who attend the prisons (Morin 1999: Section 5, page 5). These are the unforeseen consequence of the plan articulated in *Creating Choices*. They are

²² In fact, it was this group of visitors and volunteers along with national women’s associations such as LEAF and CAEFS, who were able to advocate on behalf of the women and were closely associated with the demand for legal review of the treatment of women.

²³ Luana Ross, in her research conducted in a Montana women’s facility found that “unity was perceived as a threat by prison staff and they continually worked to split the cohesiveness of Native prisoners. One solution was to transfer native prisoners to maximum security” (36). As an unintended consequence, the new institutions, which operate without the same kind of Sisterhood as Prison for Women, have covertly negated this unity amongst Native women.

consequences that have been largely unexamined in the literature or in the policy reviews of the Correctional Service. They beg the question: has the experience of incarceration been improved since 1990? Or has the discrimination against women and their disparate treatment in prison merely become less visible?

The Task Force: Community Involvement in Corrections:

I think the best way to help is pre-release planning. We need grants and jobs and housing. We need a gradual taste of what it is like to be back on the street. We need pre-release planning for Natives (Aboriginal Prisoner) (CSC 1990: 12).

Both the lack of programming and the relevancy of the programs offered to women has long been a concern for incarcerated women and their advocates. Madame Justice Arbour noted in 1996 that “the most common concerns about Prison for Women after its inception were the inappropriateness of one central facility and the lack of useful programs” (241). Of these two central concerns, the concern with programming can be traced back through the reports to the 1938 document produced by the Archambault Commission. The TFFSW was also concerned about issues of programming and offered a number of specific alternatives intended to provide a remedy. Central to this plan was the involvement of the community in meeting women’s needs and providing services.

The Task Force plan was intended to radically change not only the women’s experience of programs for women while incarcerated but it was equally aimed at changing release options. Programming and the creation of positive release options were viewed as integrally connected. The central component of this objective was to connect women to positive resources in the community *before* their release. The Task Force explained:

The Task Force discussed the issue of in-house versus external resources. The provision of resources by community agencies or individuals was considered important to maintain the link between women and the community. Community agencies are in a better position to ensure that programs are continually revitalized and updated. Workers in community agencies are often well connected to programs from other areas not directly connected to corrections. They can therefore more easily plan a multi-dimensional programming strategy and facilitate continuity for the women upon release (CSC 1990: 106).

The members of the Task Force attempted to disrupt classic control patterns within the women’s institution by challenging the private nature of institutions by inviting in the public. The degree to which this strategy was effective is an essential consideration and it demonstrates the degree to which corrections has (or has not) entered a new era in corrections. The degree to which prisons remain closed and isolated from public scrutiny is a mechanism by which any real change in correctional philosophies can be gauged.

One of the most serious flaws in CSC's implementation, even recognizing the associated costs, is the degree to which community has not been involved in resourcing²⁴ the institutions. As Monture and Braun (2001) found, staff members are now delivering programs and the women do not experience this positively. Hannah-Moffat and Shaw note the government refused to involve community in the implementation plans and that there has been a failure to provide funds to develop community services (2000: 22). As a prisoner at EIFW commented during her interview:

The thing about "Solutions"²⁵ is that they have two staff members that are guards and they run the program. They read out of a book, ya know, like they don't know how we're feeling. They said, "I can't understand how you feel." How can you understand how we're feeling? You're not an addict. You never used so they can't sit there and say to us, "Well we know how you feel." Why? Because you read a book? So that's a big, big issue (74).

Equally important to the recognition that staff delivery of the programs is problematic is the fact that the majority of staff remain to be non-Aboriginal. This means that the chance that programs are culturally relevant for Aboriginal women is less likely. Hannah-Moffat and Shaw note the government refused to involve community in the implementation plans and that there has been a failure to provide funds to develop community services (2000: 22). If the feminist community is left feeling excluded, then the Aboriginal women's community is at least doubly marginalized (that is at least race and gender, but also geographic isolation, culture, education and language).

There is a larger, more complex issue embedded in this discussion on implementation. In some ways Aboriginal involvement has been more welcomed in the establishment of the Healing Lodge than in other areas of reform suggested by the Task Force. However, it should not be prematurely concluded that the implementation of Aboriginal specific components of *Creating Choices* has been successful. Perhaps, it is politically more difficult to exclude Aboriginal women. After discussion the exclusion of feminist groups from the implementation phase, researcher Stephanie Hayman noted:

So why did this not happen to the Aboriginal partners? Or has it, but in a more oblique way? The failure to fully implement *Creating Choices* is nowhere more apparent than at the Healing Lodge because of the disproportionate number of Aboriginal women who are classified as maximum security and therefore ineligible for transfer to the Healing Lodge. Thus those most in need of the transformative possibilities of Aboriginal justice are confined at P4W or within men's institutions, in conditions far removed from the openness of the Healing Lodge... (47).

²⁴ Please note the Task Force believed that "resources" was a better concept than programs (at page 104).

²⁵ This is the name of the program.

This larger issue has a direct impact on the degree to which women are able to access programming as well as their experience of the programs they are offered.

This concern about how incarcerated women experience programming has been central in the research of Elizabeth Comack. A significant barrier to meeting women's needs is the distrust that exists between staff and inmates. "Because the staff work within the regulated framework of power and control, many of the women felt that they could not trust staff" (2000: 122). This conclusion was reached after the research created the space for the women to tell their own stories. As Luana Ross has noted: "One way in which imprisoned women can resist oppression and facilitate social change is by telling their own stories (1994: 1). Power disparities in relationships between staff and inmate is an essential consideration in measuring if in fact change has occurred post-TFFSW.

Not only have the promises of the Task Force been often breached (both in spirit and intent) but the process CSC has selected to implement the report has significantly contributed to the nature of the problems women prisoners presently confront. Speaking of her experiences as Executive Director of Canadian Association of Elizabeth Fry Societies, Kim Pate wrote:

... it has been an incredible struggle to have the voices of the women heard, much less incorporated, in the planning process. In addition, we have witnessed the appropriation of feminist language, ideas and principles. This has also happened in conjunction with the continuing decontextualizing of women's experiences and life situations. Furthermore, the CSC has developed a distressing trend toward the conversion of women's needs into criminogenic factors. For instance, they have commissioned researchers to study the women in prison for linkages between self-injury and violent offending. Given that approximately half of the women in prison are in for offences involving violence, most of which is reactive and/or defensive in nature, and many self-injure while in prison, obviously it is possible to link these two factors in women's lives. Given the clearer and more consistent linkages between histories of sexual and physical abuse and self-injury, however, it seems irresponsible to do research that does not at least contextualize such realities (Faith and Pate, 2000: 140-141).

In my view, the TFFSW was able to achieve some success (which I would define as movement away from closed punishment models of imprisonment) because long time feminist and Aboriginal prison activists were involved (including women who had served federal sentences).

An uneasy partnership was negotiated between these factions – government and activist -- during the course of the Task Force (and it was necessary to often re-negotiate this alliance). Unfortunately, from a change perspective, this level of outsider involvement was not maintained through the implementation process. This has been a costly exclusion, which has resulted in a number of consequences including the re-

entrenchment of male correctional philosophies in the new women's facilities.²⁶ A British researcher, Stephanie Hayman, concluded: "To allow CSC's perspective to be the sole interpretation of the vision outlined in *Creating Choices* would be a betrayal of the federally sentenced women themselves (51).

For Aboriginal women, their exclusion is even more costly. First, the exclusion of Aboriginal women's voices in a system that is predominately dominated by Euro-Canadian voices denies the specifics of racial, linguistic and cultural experiences. Second, as there are few Aboriginal staff in the employ of Correctional Services excluding the voice of Aboriginal women prisoners is to doubly exclude the specifics of race and culture (including language). This is the corresponding under-representation of Aboriginal people within the justice system that was first documented in the Aboriginal Justice Inquiry of Manitoba (106-107). This under-representation of Aboriginal people from positions of power within the system is marked even at an institution like the Okimaw Ochi Healing Lodge where few of the senior staff positions have been consistently held by Aboriginal people and more disturbingly by Nekaneet community members. Therefore, the consequence of excluding the voices of Aboriginal women prisoners and community activists is acute.

The degree to which the Task Force has positively influenced programming options for Aboriginal women is questionable. A review of the programs at the Healing Lodge indicates that core programming is most frequently offered. Little Healing Lodge specific programming has been developed. The Lodge identifies that: "Core programs requires under the Corrections Canada Release Act (sic) are mandatory and are presented in an Aboriginal and gender sensitive manner" (4). The degree to which women would agree about the sensitivities of core programs is questionable. This is yet another area where insufficient research is available.²⁷

In the research conducted by Braun and Monture, it was clear that there were significant programming deficits for Aboriginal women at Edmonton Institution for Women. One of the women interviewed at EIFW, commented on Elder services:

I mean here you got the Elder but there's only two of them, so it's hard. There's just one person and I mean there's so many people who need to talk to them. At times you kind of feel guilty when you see that they're over-worked. It's really hard to meet with them because when you hear their time is always taken by everybody, you just kind of leave it at that (67).

²⁶ For example, at the Healing Lodge we have seen the secondment of a male second in command, the closing of the front desk, security gates, restrictions in movement and the addition of many other static security measures.

²⁷ This lack of research knowledge (upon which CSC should be basing decisions) exposes another form of discrimination as well as disadvantage that women face. Because of the small numbers of women prisoners, research in their interests is often not funded. It is part of an institutional pattern of discrimination.

Acknowledging the needs and value of Aboriginal traditions and practices but under-researching these services appears to have a negative consequence in that the women are denied the full benefit of those services. As the denial can be self-induced (because they want to be true to their culture and respect the Elder's time), this borders on taunting the women. Second, support for core programs and other specialized programs, which could be enhanced through Elder involvement, is a lost opportunity.

At EIFW, the exclusion of Aboriginal traditions and cultures extends to programming as well. Braun and Monture reported:

Several women at EIFW believed that significant gaps existed in the area of Aboriginal specific programs... [A]t EIFW the Aboriginal programming is more general in nature and is comprised of counseling and support services from the Elder and Native Liaison Officer, and also the weekly Sweat Lodge ceremonies. This points to a deficiency in Aboriginal cultural and spirituality at EIFW that is unacceptable, particularly in light of the over-representation of Aboriginal women at this institution. Thus, a major theme derived from 6 out of 10 women at EIFW is their exacerbation at the lack of Aboriginal –specific programming. As Jenny explains:

A lot of women I find use the Elder as resource, meet with her quite regularly. As far as programming goes, I was really, really shocked to see that there was nothing here, absolutely nothing Aboriginal-based in the lines of programming. I find it very sad because the population [pause], there are so many Aboriginal people in the system... that should be putting off the trigger in somebody's mind. Okay why is the population so many Aboriginal people and what can we do to change that. That doesn't seem to be the concern and I find that sad (66).

Consistently, across time, concerns have been raised about the adequacy of programs for women. The idea of program relevance and benefit is of greater concern for Aboriginal women.

The critique of programs offered at the Healing Lodge focuses on the needs the women themselves feel they have. Core programming has not met these needs. Delaney told the researchers about her own journey to heal:

That would be really good to have abuse programs. I would like to go someplace else... because those are the kind of programs I need. I have already come so far and have dealt with so much already with my addictions and stuff and now I'm kind of stuck and I can't move. There's a lot of other things behind my addictions and everything too that I need to deal with (Monture and Braun, 2001: 69).

Sarah also indicated that existing addiction's program offered at the Lodge did not meet her needs for the same reasons:

I've taken a lot of substance abuse, but I think what they really need here is a program regarding trauma and abuse, to do with your past sexual history when you grew up (Monture and Braun, 2001: 69).

These kinds of concerns that the women have raised demonstrate the degree to which programming has not kept pace with the journey these women have undertaken. Because the women live in a restricted environment and do not have free choice, then it is especially important to meet the needs they identify as essential to their well being.

The concern with programming as a failure to implement the ideas in *Creating Choices* which is documented here is contrary to how the government views its accomplishments since the Task Force.

The Correctional Service of Canada (CSC) has played a leading role in developing and implementing ground breaking initiatives to advance Aboriginal Corrections over the past decade. The CSC Commissioner's Directive, Aboriginal Programs (1995) contains five policy objectives involving individual rights of Aboriginal offenders and their cultural practices. It directed that Aboriginal-specific programs be implemented, replacing regular existing initiatives or in addition to existing programs, when the circumstances deemed it necessary. Conditions where a replacement program was regarded as appropriate included situations involving language becoming an interfering factor, and differences in cultural approaches to learning becomes too large a hurdle to overcome (Canadian Criminal Justice Association).²⁸

This difference in opinion identifies the chasm that exists between what advocates perceive as successful implementation and the positive publicity CSC has created around the 1990 Task Force report. The manipulation of public opinion which conceals discriminatory treatment, should it occur, is a serious matter.²⁹

The situation of Aboriginal women at maximum-security facilities and their access to programs is one of the most pressing concerns that exist for federally sentenced women. In a study conducted for CSC in 1999, Morin comes to some very disturbing conclusions. In the study titled, "Federally Sentenced Aboriginal Women in Maximum-security: What Happened to the Promises of "Creating Choices?", she writes:

²⁸ See the paper "Aboriginal Peoples and the Criminal Justice System" at <http://home.istar.ca/ccja/angl/index.shtml>, page 5.

²⁹ An interesting research project could compare, using contextual analysis, the media coverage of certain events at Saskatchewan Penitentiary with the inquiries the CSC conducted.

Withholding programs is used as punishment against FSAW³⁰ to get them to conform and obey CSC staff. This authority based programming and interaction aimed at controlling the prisoner results in non-cooperation by FSAW, who believe program availability and permission to participate should be available to all prisoners and not conditional on staff perceptions. FSAW are frustrated because correctional staff recognize only their negative behavior and not the positive. Because programs are withheld or delayed, FSAW cannot address their Correctional Plans and remain incarcerated longer, many until their statutory release dates. CSC needs to monitor their prisons to ensure they are providing the required programming to prisoners. An essential requirement is that institutions allow FSAW to take programs, not withhold programs and not delay the implementation of programs (1999: Section 4, page 1).

It has already been noted that Aboriginal women are over-represented within the maximum-security women's population. Particularly, this has been true at Saskatchewan Penitentiary where Aboriginal women have generally comprised at least 90% of the female offenders housed there. When staff perceptions are allowed to taint access to program choices, then the question must be asked regarding the degree to which racial stereotypes influence those staff perceptions. The withholding of programs is an act which can not only reinforce those stereotypes but can also act as a self-fulfilling prophecy when women respond negatively to the denial of their needs.³¹ In recent years, this has generated some very negative press coverage. That negative press coverage (which characterizes women as dangerous and violent) can then be used to further justify the imposition of more male-based control mechanisms being placed on women.

Morin's study is the only comprehensive look at Aboriginal women in maximum-security since the TFFSW reported. Her findings of the interviews with 17 Aboriginal women comprehensively document the discrimination maximum-security women face and the concerns include:

- * 100% of the Aboriginal women identified the need for more contact with Elders. Elder counseling must be made available on a

³⁰ Federally Sentenced Aboriginal Women.

³¹ The negative use of the power CSC has over women prisoners is *not* a new phenomenon. In 1988, Sisterhood reported to LEAF:

The administration tends to provoke conflict situations to justify its security tactics. In January, a woman was transferred from PC to the general population. Before the transfer, the women in the area to which she was to be transferred expressed concern for her safety. They made it clear an incident may occur. Following her transfer an assault did in fact occur. The institution was locked up for ten days. A similar incident in a male institution would probably result in lockup for no more than 24 hours (Minutes of LEAF Meeting with Sister, March 7, 1988: 3).

full-time basis *and be recognized in the Correctional Plan*. Elder intervention must also be available when disagreements arise.

- * 13 of the Aboriginal women (76%) indicated security levels are not explained to them. In order for the Aboriginal women to work on lowering their security level, reasons for changes in security levels must be explained, as well as deciphering how the Correctional Plan relates to increase or decrease security levels.
- * 100% of the Aboriginal women stated that Aboriginal *ceremonies need to be recognized as part of the Correctional Plan* (for their healing effects in dealing with the Aboriginal women).
- * 100% of the Aboriginal women stated that programs facilitated by Correctional Officer II's (CO2's) do not work. CO2's as facilitators only creates anger and animosity among prisoners.
- * 10 of the Aboriginal women (58%) stated that *Aboriginal culture needs to be treated with respect*. Some women reported that time limits have been put on the ceremonies. It was reported that food offerings from ceremonies have been thrown in the garbage when it is to be respected and burned.
- * 100% of the Aboriginal women stated that there is a lack of communication between management, the primary worker and the prisoner. When this occurs, *it is the Aboriginal women that get blamed for being manipulative*. This displacement of authority is oppressive.
- * 13 of the Aboriginal women (76%) stated that CSC needs to ensure that core programs are available in all institutions. Completion of core programs: "Cognitive Skills", "Anger Management", "Substance Abuse" are required in the Correctional Plan to lower security levels but are not provided in some institutions.
- * 13 of the Aboriginal women (76%) stated they were not given a chance. *An application for transfer to the Healing Lodge was never processed...*
- * 15 of the Aboriginal women (88%) stated they had taken steps to reduce their security levels but were not supported by staff for various reasons
- * 13 of the Aboriginal women (76%) stated that CSC needs to *hire more Aboriginal staff* who practice their culture and are not judgmental.

- * 13 of the Aboriginal women (76%) indicated they had controlled their behavior and had requested programs but staff did not respond to their needs or provide the programs (1999: Section 5, 1-3. Emphasis added).

This long list of research findings demonstrates the degree to which Aboriginal women experience discrimination in maximum-security facilities. The discrimination is multi-faceted and is apparent in relationships between staff and prisoners, in program denial, in accessing culturally relevant programs,³² in securing lower security levels and transfers, and in respect for who they are as Aboriginal women. They are a reproduction of the kinds of concerns that used to be raised about the segregation unit at the Prison for Women.

Morin's research also provides some conclusions which focus on another institution where women are housed. Women housed at the Regional Psychiatric Centre (RPC) saw the need for increased Native Liaison services and Elder involvement both practically and in the respect the institution accords to these services (1999: Section 5, page 3). Programming concerns including the lack of programs were central issues raised by the women at RPC. They also noted the shortcoming in liaison and Elder services (1999: Section 5, page 4). The concerns for services are identical at Springhill (1999: Section 5, page 4). At all the institutions the women wanted more access to sports and yard space, as well as more access to sweat lodge grounds (1999: Section 5, page 4). The lack of re-integration options including contact with family was also a central theme which emerged from the interviews (1999: Section 5, page 5). The research also documented that 4 women reported being denied access to the telephone to contact the Correctional Investigator (1999: Section 5, page 4).

Studies in the United States have looked closely at the issues of race and gender discrimination in women's correctional facilities. Ross (1994) reports:

Previous work (Kruttschnitt, 1983) suggests that the race of the prisoner affects treatment by prison staff. Native women in this prison claimed race influenced the white guards' treatment of them. For example, Agnes, a Native woman, told me that the prison's administration had pegged her as a *troublemaker* and, because of this, most guards treated her harshly. Agnes viewed both the labeling and subsequent treatment as racist. Agnes said that some guards purposely baited her in order to lock her up in maximum security (24).

Further, this researcher found clear connections between racial labeling and prison response to Native women:

³² After the filing of the Canadian Human Rights complaint, the Warrior Program was offered to women at Saskatchewan Penitentiary.

Native women believed that their behavior was misinterpreted by white staff, and that this led to the prescribing of drugs. Several Native women talked about what an alien environment prison was compared to the familiarity of life in Native communities. The way Native women chose to respond to this was to become quiet and observe how things were conducted. These women said that their behavioral reaction, one of quietness, was misinterpreted by the prison psychologist as a type of suppression of their anger and bitterness. Agnes clearly believed that because the prison did not know how to relate to Native Americans they then wanted to control them... (28).³³

Equal devotion needs to be given to these issues in Canada beyond the level of research knowledge that presently exists.

The opportunity to receive culturally relevant programming options is frequently denied to Aboriginal women at all institutions. The discrimination embedded in program options cannot be viewed as an isolated phenomenon. Respect for women's culture and traditions is often absent. It is connected to the policy choices in the area of security classification. These choices reinforce male-based structures on women prisons.

Security/Risk:

To be a woman and to be *seen* as violent is to be especially marked in the eyes of the administration of the prisons where women do time, and in the eyes of the staff who guard them. In a prison with a male population, our crimes would stand out much less. Among women we (Aboriginal women) do not fit the stereotypes and we are automatically feared, and labeled as in need of special handling. The label violent begets a self-perpetuating and destructive cycle for Aboriginal women within prisons (Aboriginal Parolee) (CSC 1990: 14).

In her examination of certain events at the Prison for Women, Madam Justice Arbour noted the reasons, which justify a different understanding of classification that is woman-centred. In 1996 she wrote:

³³ In the article Ross, Agnes continues in her own words:

So, in order for white society to deal the Native American, they give them a type of dependent. And, I fought with this when I first got here because they told me that they felt I should go on antidepressants. So I said – and this was a psychologist talking to me – I said, “My sentencing papers say that one of the conditions are that I deal with my alcohol problem. I have an alcohol problem.” And, I said, “So now I’m dealing with it. I’m going to groups and participating, but yet you people are telling me that I need antidepressants. You’re going to take me off one dependent and put me on another, so when I leave here I’m going to have two dependents.” I said: “That don’t make sense, so this is your rehabilitation to me? This is what you’re offering me?” (28)

Women offenders have some things in common with men offenders from their respective regions. But they have a lot more in common with each other as women than they do with their regional male counterparts. Their crimes are different, their criminogenic factors are different, and their correctional needs for programs and services are different. Most importantly, the risks that they pose to the public, as a group, is minimal, and at that, considerably different from the security risk posed by men (228).

Equality is, therefore, sometimes measured by differential treatment especially when the groups are not similarly situated.³⁴

The classification of women by security rating scales is perhaps the window through much of the discrimination against women flows into the structure and systems of the prison. It is through the structure and construction of security that male-dominated patterns of crime and violence are superimposed on the women. This is a long standing finding of researchers, advocates and prisoners themselves. Although the form of classification has changed over time, the women still experience this aspect of incarceration negatively. Justice Arbour, under the heading “A History of Excessive Security”, noted:

The continued use of one central facility meant that a large portion of the women’s prison populations was over-classified because the Prison for Women in Kingston was constructed as a maximum-security building supported by maximum-security staffing and services.

Since the closure of the Prison for Women, it has become apparent that it is not solely issues of geography or a single national women’s prison which drive the over-classification of women. The continuation of this phenomenon ensures that under the new system maximum-security women are housed in conditions that are equivalent to conditions in segregation units in male prisons.

This acknowledgement of the continued over-classification of women is especially important for Aboriginal women who are again over-represented at the maximum level of security rankings. The Task Force noted that the security classification scales, practices and policies developed for men were problematic in their application to women. This replicated the findings of both the Chinnery Report (1978) and the Needham Report (1978). The 1990 report noted:

Initially, Task Force members supported the concept of woman-based criteria for classification as suggested by previous studies but ultimately came to the conclusion that assessment to gain better

³⁴ See the first Supreme Court of Canada decision which commented on the substance of section 15, *Andrews v Law Society of B.C.*, [1989] 2 W.W.R.289 at 303. For a fuller discussion of the court’s reasoning see Dale Gibson, *The Law of the Charter* (Toronto, Carswells: 1990), 70-87.

understanding of a woman's needs and experiences is a more appropriate than classification. This conclusion is based on the Task Force *perception that classification maintains the focus on security and on assigning a securing rating for the women* (CSC 1990: 112. Emphasis added).³⁵

This is one of the areas where the foundational principle articulated in *Creating Choices* have been skewed and are now unrecognizable. Needs and experiences of federally sentenced women have been conflated in such a way that these concepts are no longer distinguishable. This is an absolute obstacle to securing a meaningful equality for women prisoners and should be considered as a specific form that discrimination takes.

It is security classification that shapes the experience of a women's incarceration by determining the kind of facility she will be housed in. Maximum-security women no longer have access to the regional facilities envisioned by the TFSSW (nor will they have real access once maximum-security units are opened at those facilities). By this quality of classification alone, a women's experience of incarceration is more marked by her security level than is a man's. Medium security men's institutions do not, unlike women's facilities, have cottage accommodations and men are housed in the traditional cell at medium institutions.³⁶ Therefore, women face a unique consequence and are denied gender based accommodations as a result of the application of the security rating scale.

The number of women housed at a maximum-security level and the conditions of their confinement since the Task Force on Federally Sentenced Women is an important consideration in understanding the way the patterns of discrimination have shifted since the Task Force.³⁷ Women were once confronted because they were housed in a multi-level facility where secure classification conditions were dominant. Today, these women are singled out for differential treatment in separate facilities where the conditions of their confinement are closer to segregation units in male facilities (with less access to programming) than they were at P4W.

³⁵ This has not happened as is demonstrated by the comments of Kim Pate, quoted earlier in the text.

³⁶ Women also face conditions of confinement that are more severe than men do when housed in medium security facilities. These include: razor wire, the "eye-in-the sky", frequent strip searches, limits on movement, placement in the enhanced unit versus segregation; to name a few. These factors evidence the way women in medium security facilities face a few benefits, which obscure the harsher treatment, they receive when compared to men with the same security classification.

³⁷ The response of the Correctional Service of Canada to the incidents, which occurred during the opening periods of the new regional facilities, were driven by security concerns. The response was to re-classify and transfer the women. The incidents experienced during the initial change period were both predictable and preventable. But the institutional response was directed at women prisoner not the systems responsibility to those women during a difficult period of change in their lives (more difficult for some who have challenges in their lives such as FAE/FAS). Dramatic change is different for many people. It is more difficult for those living in total institutions.

Morin notes that between December 1997 and February 1998, the number of maximum-security women fluctuated between 40 and 50 women and at least 40% of those were Aboriginal (Morin 1999: 1). CSC reports that:

As of January 14, 1997, data for institutional security level was available for 212 female offenders, and revealed that 34% (72) were designated 'minimum-security', 49% (103) were 'medium security', and the remaining 17% were 'maximum-security'. (Blanchette 1997: 1).

In January of 1999, the number had decreased to below 30 and later that summer to 25. Twenty-four percent of the 25, were Aboriginal women (Morin 1999: *Nota Bene*, page 1). It is interesting to note the way in which the number of women classified as maximum-security varies over time. Perhaps, this indicates the arbitrary nature of the application of the custody rating scale. It is an area that requires further analysis with further attention devoted to the representation of Aboriginal women in this population.

In the research project conducted for CSC by Monture and Braun in 2001, they found:

Maximum-security ratings were earned by 15.3% of the Aboriginal women and only 4.5% of the non-Aboriginal women. At medium security, Aboriginal women accounted for 67.8% while non-Aboriginal women were 52.3% of this population. Non-Aboriginal women were significantly more likely to be classified as minimum-security comprising 43.2% of that population while Aboriginal women accounted for only 17.0%.

Only 12.1% of the women serving their sentence in the community are Aboriginal (CSC 2000b: 1). It is clear that a pattern of disadvantage for Aboriginal women results from the application of the custody rating scale. This is a familiar pattern of discrimination. (2001: 46-47).

The conditions of confinement for maximum-security women discloses the one form of the discrimination against them and for Aboriginal women this discrimination is compounded by their over-representation.

It is not just numbers thought that delineates the pattern of discrimination. Morin examined the experience of federally sentenced women classified as maximum-security in 1998. Her research identified that there are serious concerns about racism and discrimination in the federal prison system.³⁸ Federally sentenced Aboriginal women

³⁸ In the United States, Dr. Luana Ross summarized her research experience in a women's correctional facility in Montana, she stated:

The racism was direct, indirect and institutionalized. Prison staff and white prisoners made racist comments to me and Native prisoners about *Indians* and *Indian* culture. Direct and subtle racism not only contributed to the low self-esteem of Native prisoners, discriminatory practices added to an already stressful environment (36).

prisoners indicate that “identifying themselves as Aboriginal did more harm than good” (Section 4: 1). Equally disturbing the women indicated that programming and staff interaction were often “aimed at controlling the prisoner” which results in non-cooperation (Section 4: 1). This environment is likely causal in the difficulties the institution has had with maintaining the safety of both staff and inmates. Many of the realities the women described demonstrate that the five key principles of the TFFSW were not experienced by maximum-security prisoners (Morin 1999: Section 5, page 4). This is a further failure to realize the potential in *Creating Choices* and results in the conclusion that women are still being denied a remedy in a male-defined system.

The differential access of women to minimum-security facilities is a parallel concern which demonstrates women face disadvantage at all security levels. Men have access to minimum-security institutions where women by in large do not and never have had. Presently, money used for building more secure facilities for a few women at the regional facilities would be better spent providing minimum-security options for women and allowing the existing facilities the opportunity to develop options for women who have high needs. Thus, a realistic opportunity for housing women presently at maximum-security would be created at the regional facilities as they are presently constructed. Women also face conditions of confinement that are more severe than men do when housed in medium security facilities and this demonstrates the potential in seriously examining this option.

That the security classification of women is problematic, both legally and practically, is not a new idea. In early 1989, LEAF completed work on the development of a *Charter* case about the treatment of inmates at the Prison for Women. One of their central conclusions on the source of discrimination is explained as follows:

It is impossible to examine the availability of and access to, educational and vocational opportunities without investigating the security problems peculiar to P4W. Because the entire institution functions as a maximum-security prison, programs outside are more difficult to access, even for those at the lower end of the security classification scale. The security related obstacles facing women who do wish to participate in programs available to them at male institutions act as a disincentive to involvement. Then the fact that few women express an interest in these programs, or maintain their commitment to them, forms the basis for future correctional policy decisions not to expand the program inventory (LEAF 1989: 3).

LEAF’s analysis clearly pointed to security classification as a component of the discrimination women face.

The Report of the TFFSW took steps to eradicate the discrimination women confront based on the application of a tool developed on a male population and these steps have had little long term impact as CSC continues to step toward correctional

philosophy that is security based. Thus, despite the new facilities, we are returned to a point in time where the conclusions drawn by LEAF regarding discrimination now equally apply to the new regime. The degree to which security concerns, since the building of the new facilities, mask differences between women and men must be a part of the analysis on discrimination women presently face. This must include an analysis of the differential impact of the regime of security classification on women and especially on Aboriginal women.³⁹ This conclusion is affirmed by the work conducted by LEAF where it is concluded that:

Predictably the situation is more acute for Native women. They often receive more restrictive security classifications despite the fact that their offence or past institutional behavior is comparable to that of a non-Native who is classified as low security risk. The Native woman is punished further when her participation in Native Sisterhood meetings is not recognized as serving a rehabilitative function by those assessing her eligibility for early release. Security classification is, therefore, an incident of racial discrimination (LEAF 1989: 3).

Since the Task Force, conditions for women at maximum-security have become more severe. As the women housed in maximum-security facilities are predominately Aboriginal women, this demonstrates the fact that racial discrimination is often embedded as a woman's primary experience of incarceration. This will impact on *all* Aboriginal women in prison as the knowledge that they are more likely to be classified as maximum-security will follow them in their thoughts throughout their various placements during their sentence.

Security has been intensified at each of the federal regional facilities since they were opened. These measures include fences, razor wire, repeated strip searching (a practice which has a differential impact on women) and security cameras. These actions cause the new facilities to be more like maximum-security institutions than originally intended by the Task Force. Thus, the present security regime coupled with the continued adherence to a classification system, which was developed for men amount to incidents of gender and racial discrimination.⁴⁰ The impact of this reality is far-reaching. Stephanie Hayman concluded:

Yet while *all* the maximum-security women remain unprovided for, members of TFFSW remain to some extent responsible and that is perhaps the uncomfortable price they must pay for having had the courage to redraw the boundaries in the first place (50)

³⁹ See the preliminary discussion in Patricia Monture-Angus, *Aboriginal Women and Correctional Practice: Reflections on the Task Force on Federally Sentenced Women* in Hannah-Moffat and Shaw, 52-59.

⁴⁰ An American study, by Luana Ross, verifies this conclusion. Ross states: "... the study concluded that control was exerted in this prison over the prisoners not only as women but also as Native Americans" (2)

There is in fact a legal duty to ensure that security is implemented in a balanced way. Section 28 of *the Corrections and Conditional Release Act* (hereinafter *CCRA*) provides:

Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is *one that provides the least restrictive environment* for that person (emphasis added).

This section in fact creates a positive legal duty for the Correctional Service of Canada to comply with. Reasonable steps must be taken to ensure the environment is the least restrictive. This positive duty must also be understood as a gendered duty, one that must be read with sections 4(h)⁴¹ and 77(a)⁴² to demand that the situation of women be specifically considered. In fact, all the duties in the *CCRA* must be read alongside the specific directions to women and Aboriginal Peoples.

Although the *CCRA* requires that all inmates be assigned a classification of maximum, medium or minimum (see section 30), this does not foreclose the opportunity to think creatively around issues of classification for women. The focus of the Task Force on the real needs of women rather than male-modeled scales of classification is certainly not outside legal possibility. More importantly if section 28 which requires the assignment of security classifications results in discrimination against women and inordinately against racialized women (including Aboriginal women), then this section contravenes the *Canadian Human Rights Act* and the *Charter* to the extent that it is discriminatory.*

⁴¹ Section 4(h) appearing under the heading of “Principles” states:

that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal (*sic*) peoples, as well as to the needs of other groups of offenders with special requirements;

⁴² The relevant sections of the *CCRA* read:

76. The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community.

77 Without limiting the generality of section 76, the Services shall

(a) provide programs designed particularly to address the needs of female offenders;
and,

The Law: Duties and Rights

Systemic Factors:

My objective in bringing forward recommendations on various aspects of corrections that have been touched upon by this inquiry is to assist the correctional system in coming into the fold of two basic constitutional ideas, towards which the rest of the administration of criminal justice strives: the protection of individual rights and the entitlement to equality (Madam Justice Arbour 1996: xi-xiii).

As pointed out so succinctly in the report of the Arbour Inquiry, the response of Correction's Canada has been insufficient to ensure that federally sentenced women do not experience discrimination while incarcerated. It is essential to understand the causes of this failure which range from structural and systemic factors to administrative intransigence.⁴³ For Aboriginal women, the situation is more complex as the way in which discriminatory experiences intersect and overlap is paramount.

The Task Force on Federally Sentenced Women recognized that women's experience of incarceration was a specific example of the disadvantaged position of women in Canadian society (TFFSW 1990: 16). The difference is that women in prison are not free (Hannah-Moffat, 2001: 191). Understanding this difference means understanding the lack of power women in prison possess because of their incarceration. This makes the violation of rights and impairment of equality a most serious issue. Incarceration creates a group of women vulnerable to victimization because they do not have power and live in institutions isolated from public scrutiny. The violation of a group's rights because of their vulnerability to victimization makes that violation a very serious matter. I believe Madame Justice Arbour understood this relationship between power and the violation of rights.

Incarceration is not the only reason that women lack power. Women in and out of prison also lack power because they are women, because of economic realities and issues that result from disrespect for their racial, linguistic, and cultural heritages. Sometimes women's sexual choices, mental health and disability also impact on the power a woman (or groups of women) possesses. It is impossible to simply view women as women, even as a group of incarcerated women without considering their position(s) within the social hierarchy (Collins 2000: 45-47). This is particularly true for Aboriginal women who are also incarcerated, as the disadvantage they experience is multi-layered.

⁴³ As LEAF noted in 1989:

As we gathered evidence, we were struck by the disparity between the "official story" as published by the government and the "unofficial story" as told by the women now at P4W." (LEAF, 1989: 6)

In the academic literature, the diversity of experience of women is often discussed as concerns about the way in which reality is male-defined while being disguised as objective. Sherene Razack explains:

The legal test cases that constitute feminism applied to law in Canada are fundamentally projects of naming, of exposing the world as man-made. Men, Ann Scales writes, have had the power to organize reality, “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’.” Women working in law find themselves demystifying that reality and challenging its validity in court, substituting in the process their own description of reality. In law, the issues that preoccupy women, Scales notes, 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 (Razack 1990-91: 441).

These issues which Scales and Razack⁴⁴ identify as preoccupying women also play a causal role in the labeling of women as criminal. Systemic factors, therefore, first influence who will be incarcerated.

In a system of corrections that is defined by men, with men as the norm and on male patterns of criminality (that is the propensity to do harm), these stereotypes of women’s sexuality also profoundly influence the way women are treated in such a system. For Aboriginal women, this relationship is also influenced by their racialization. The research of Fran Sugar and Lana Fox completed for the Task Force on Federally Sentenced Women evidences this. They conclude:

Our understandings of law, of courts, of police, of the judicial system, and of prisons are all set by lifetimes defined by racism. Racism is not simply set by the overt experiences of racism, though most of us have known this direct hatred, have been called “dirty Indians” in school, or in foster homes, or by police or guards, or have seen the differences in the way we were treated and have known this was no accident. Racism is much more extensive than this. Culturally, economically, and as Peoples we have been oppressed and pushed aside by Whites. We were sent to live on reserves which denied us a livelihood, controlled us with rules that we did

⁴⁴ In the legal sphere, Critical Race Theorist, Kimberle Crenshaw explains:

The Critics principal error is that their version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent. Black people do not create their own oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism (1998: 1356-57).

not set, and made us dependent on services we could not provide for ourselves (9-10).

As demonstrated by Sugar and Fox, the hope that can be held out for the correctional system's ability to provide rehabilitative⁴⁵ opportunities for Aboriginal women is currently minimal. This hope is dashed as a result of the system's failure to acknowledge systemic factors, especially the race and culture of the women.

The way that gender must be taken account alongside the diversity of Aboriginal experience of oppression is not necessarily the same as the way gender must be taken account for other racialized groups. In particular, the experience of colonial relations on this continent will always be a factor for Aboriginal women. Listing race, ethnic origin and/or gender as discrete grounds of discrimination can be problematic for the claims Aboriginal women would wish to make. In writing about the impact of the *Charter of Rights and Freedoms* on the lives of Aboriginal women, I commented:

I am particularly concerned with silencing along the lines of race (more appropriately culture) than gender. I do not mean to be constructing a hierarchy of "isms" nor do I intend this to be perceived as exclusionary. It merely reflects that my voice is the voice of a Mohawk woman (mother and law professor). *It is only through my culture that my women's identity is shaped.* It is the teachings of my people that demand we speak from our own personal experience. That is not necessarily knowledge which comes from academic study or books (1996: 29, emphasis added).

Understanding Aboriginal women's claims of discrimination under rights instruments requires a creativity and consciousness of the diversity of experience that Aboriginal women as members of distinct nations possess. Equally as women and as racialized, colonized persons, Aboriginal women are stereotyped inappropriately in the criminal justice processes and this must remain a concern as our gaze is turned to the legal rules which define discrimination.

Multiple sources of discriminatory outcomes have been difficult for both administrators and legal officials to address. The inclination has been to address multiple grounds of discrimination in an additive or cumulative way. Rather, experiences of multiple sources of discrimination are most often interdependent, overlapping and intersectional. The challenge is to approach and resolve these issues by addressing the way gender is racialized or race is gendered as this is the way it often feels to those subjected to multiple forms of discrimination. This will require bringing a degree of creativity to the legal regimes which are intended to protect us from discrimination. We are also challenged because, at present, our understanding is more theoretical than real (Alyward 1999b: 5).

⁴⁵ This is clearly a correctional word. In the community(s) people would talk about living in a good way, walking in balance and healing. If the understandings of Aboriginal peoples are heeded, then these are different goals.

Intersectionality is a relatively new legal concept as women and more particularly racialized women have been excluded from the institutions where law is practiced and theorized.⁴⁶ Carol Alyward traces the origins of this concept commenting:

The first analysis of 'intersectionality' in the context of race/sex and class oppression was put forward by American Critical Race theorist Kimberle Crenshaw. Crenshaw examined how sex, race and class combine to oppress Black women and other women of colour in a social order based on race and sex oppression. Mary Eaton, crediting Crenshaw with the 'coining' of the phrase intersectionality, defines it as "intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one for of discrimination standing alone..." (1999b: 7)

The point of intersectionality is *not* that a combination of grounds of discrimination operating on an individual simultaneously makes sex discrimination worse. It in fact makes the intersection a unique and distinct experience of racialized women (Eaton 1994: 230-31). It is distinct because only Aboriginal women experience it and not all other women or even all other racialized women. It is distinct and therefore not an experience shared by Aboriginal men. It requires more than an acknowledgement of analogous grounds as it is more than the addition of those "water-tight" compartments (Eaton 1994: 203).

Yet, understanding intersectionality is also insufficient in developing a complete understanding of how systemic factors impact on Aboriginal women. Discrimination Aboriginal women experience might be compound as opposed to intersectional. Compound discrimination has shared elements across groups with the same characteristics. Carol Alyward explains;

... the difference between intersectional discrimination and compound discrimination is that in an intersection discrimination case, the discrimination is distinct in that it is based on (in the case of Black women) being a Black woman. The discrimination experienced will *not* be experienced by Black men or by White (or even all) women regardless of race. On the other hand, in the case of compound discrimination the discrimination will be experienced by Black men and White (and other) women regardless of race only it will be intensified (or present an added burden) for Black woman (1999b: 15).

As Mary Eaton points out, compound discrimination is "double whammy" (1994: 231). In a case where discrimination is compound, the either or choice endemic in the

⁴⁶ That is to say for those of us who live this multiplicity of discrimination, the swath cut by our experiences of intersectionality is obvious.

analogous grounds approach denies the additive impact of the experience of being both Aboriginal and female.⁴⁷

In the prison context, the way in which Aboriginal women have recently been labeled (both covertly and overtly) as violent is an excellent example of the way discriminations intersect. When compared to male violence, Aboriginal women's crimes do not stand out as excessively violent.⁴⁸ But within a women's population they do. Especially as the patterns of Aboriginal women's crime differ from those of other women. As the public perception of female prisoners as dangerous has been shifted in the last few years, it is essential to consider the notion of "women as dangerous". It is a suspect category.

In particular, the (re)actions to women at Saskatchewan Penitentiary and the media coverage of the hostage takings, has potentially resulted in a less sympathetic public image of women prisoners than existed at the time of the TFFSSW. At that time, *Creating Choices* built significantly on the public perception that women prisoners were *not* dangerous in the way men were/are. The degree to which this stereotype or characterization of women as dangerous, particularly when racialized, is not accurate must be examined.⁴⁹

A review of the case law involving Aboriginal claimants demonstrates that the scope of the issues litigated are predominated by cases involving hunting and fishing infractions⁵⁰ and Aboriginal title. Only several cases address criminal justice issues.⁵¹ Fewer Still address correctional matters.⁵² Cases involving Aboriginal women as litigants are almost singularly about the political rights of Aboriginal women.⁵³

The ideological foundations of the Canadian legal system were not crafted with any intent to address the experiences of Aboriginal women. This is apparent in the way the courts have often attempted to address the experience of Aboriginal women as mere

⁴⁷ See Carol Alyward for the concise definitions of intersectional, compound and overlapping discrimination (2000: 19-20).

⁴⁸ In the previous discussion on the historical context of women in prison, the comments of an Aboriginal parolee regarding the ascription of violent behavior to Aboriginal women is an excellent example of the complexities of the experience.

⁴⁹ An analysis of the media coverage against the Service's investigations of the recent hostage takings and other incidents at Saskatchewan Penitentiary Women's Unit will more than likely demonstrate this points.

⁵⁰ The fact that women's activities focussed on gathering and agriculture, it is interesting to note that these claims are not proceeding alongside the hunting and fishing claims.

⁵¹ *Gladue* and *Williams* would be the most obvious examples.

⁵² The decision in *Butler v The Queen* (1983), 5 C.C.C. (2d) 356 is an interesting but early example. Particular attention should be paid to the form of denial made by CSC (358).

⁵³ See for example the NWAC cases and *Lavell and Bedard*.

“double discrimination”.⁵⁴ As other authors have noted this additive approach to discrimination does not fully or accurately describe the lived experience of racialized women⁵⁵ and therefore, cannot hope to remedy the situations they would wish to grieve. More accurately, the experience is described as “discrimination within discrimination” or intersectionality. The experiences of the women are based on their concurrent experiences of being women and being Aboriginal.

More recently, Canadian courts are coming to a more sophisticated application of the *Charter* to individual Aboriginal litigants.⁵⁶ L’Heureux-Dubé wrote:

... in the case of equality rights affecting Aboriginal people and communities, legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachments and background of all Aboriginal *women* and men (*Corbiere* 1999: paragraph 67. Emphasis added).

⁵⁴ The best example of the problems that arise remains to be *Canada (Attorney General) v Lavell and Bedard*, [1974] 1 S.C.R. 1349 (S.C.C.).

⁵⁵ Of Black women’s experience in the United States, Patricia Hill Collins writes:

Ideology refers to the body of ideas reflecting the interests of a group of people. Within U.S. culture, racist and sexist ideologies permeate the social structure to such a degree they become hegemonic, namely, seen as natural, normal, and inevitable. In this context, *certain assumed qualities that are attached to Black women are used to justify oppression*. From the mummies, jezebels, and breeder women of slavery to the smiling Aunt Jemimas on pancake mix boxes, ubiquitous Black prostitutes, and ever-present welfare mothers of contemporary popular culture, negative stereotypes applied to African-American women have been fundamental to Black women’s oppression (2000: 5. Emphasis added).

For a discussion of the impact on Aboriginal women in Canada, see: Janice Acoose, *Iskwewak-Kah’ Ki Yaw Ni Wahkomakanak: Neither Indian Princesses nor Easy Squaws* (Toronto: Women’s Press, 1995) and for the very real impact of these factors on the lives of dispossessed Aboriginal women see: Warren Goulding, *Just Another Indian: A Serial Killer and Canada’s Indifference* (Calgary: Fifth House, 2001). The women who were John Crawford’s victims share with imprisoned women many of the same social experiences as imprisoned Aboriginal women.

⁵⁶ As Kent McNeil points out: “there is no doubt that the rights and freedoms guaranteed by the Charter are available to Aboriginal individuals as against the federal, provincial and territorial governments” (2001: 216). Should Aboriginal governments control justice powers, it is less certain that the *Charter* would apply. Individual litigation which relies on the *Charter*’s section 15 includes: *Corbiere v Canada* [1994] 1 C.N.L.R. 71 (F.C.T.D.), [1999] 3 C.N.L.R. 19 (S.C.C.); *Native Women’s Association v Canada*, [1995] 1 C.N.L.R. 47 (S.C.C.), [1992] 4 C.N.L.R. 71 (F.C.A.), [1992] 4 C.N.L.R. 59 (F.C.T.D.); *R. v Daniels*, , S.C.C. leave denied [1992] 1 S.C.R. vii, [1990] 4 C.N.L.R. 51 (Sask. Q.B.), [1991] 4 C.N.L.R. 113 (Sask. C.A.); *R. v Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.); *R. v Punch*, [1986] 2 C.N.L.R. 114 (N.W.T.S.C.); and *Sawridge Band v Canada*, [1995] 4 C.N.L.R.121 (F.C.T.D.).

The Corbiere case was a challenge to sections of the *Indian Act* which prohibited off-reserve band members from voting. The prohibition was not gender specific. The court acknowledged, however, the colonial history where Indian women were more likely to loose status and thereby be exiled from their community. The gender discrimination was not express in the impugned section of the *Indian Act* but embedded in historic practice and thereby the operation of the section. It is encouraging that the justices in *Corbiere* were able to acknowledge the impact on Indian women of a combination of factors.

Within the prison context, the Task Force on Federally Sentenced also understood the complexity of the impact of these systemic factors and attempted to take steps to respond to it:

The mandate of this Task Force was to review federal policies about sentenced women *as women*: a task that previously has not been undertaken in the numerous reports completed on the Prison for Women. Previously, women were mere add-ons to the male system of federal incarceration. In the 1980's, this has been recognized as both unrealistic and paternalistic. Control over women's future, over women's choices, must rest within women's own experience. Likewise, adding-on Aboriginal women to the review of women serving federal sentences amounts to the same mistake as tacking women onto the tails of a system designed by, for and about men. This does not mean that a separate Task Force on Aboriginal women should have been struck. It is merely recognizing that control over our future as Aboriginal Peoples and our choices as Aboriginal women, must rest within Aboriginal communities, and with Aboriginal women (TFFSW 1990: 17-18).

One of the critical questions that must drive the analysis of ongoing discrimination against women in prison is: to what degree has the implementation of the Task Force recommendations met with the standards set out in that report. Without implementation strategies that centre women's experiences, they will remain mere add-ons to a male correctional system.

Of exceptional importance with respect to standards is the conclusion reached by Madame Justice Arbour:

The changes to the Prison for Women, unfortunately, did not occur in time to prevent several suicides, hunger strikes, self-slashings, and major incidents. By the late 1980's, it became evident to many observers that the problems created by accommodating the female offender in correctional systems governed by men and oriented towards the male offender were not producing desirable results. Thus, instead of striving for formal equality, reformers pushed for a dramatic shift in correctional philosophy: one which stressed the commonalties shared by women as an historically disempowered and marginalized group.

Creating Choices testifies to that important shift towards the substantive equality which had been alluded to several years earlier in the often quoted *MacGuigan Report* which condemned the Prison for Women stating that it was “unfit for bears” (1996: 247-248).

This standard, substantive equality, would require CSC to have contemplated gender specificity. These gender considerations must also be prefaced on the understanding that the discrimination women, including prisoners, face often originates in multiple, overlapping and intersecting grounds. This requires moving the knowledge of multiple source discrimination beyond the theoretical and to the level of lived experience.

The Corrections and Conditional Release Act:

A guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and human dignity. The administration of criminal justice does not end with the verdict and the imposition of a sentence. Corrections officials are held to the same standards of integrity and decency as their partners in the administration of the criminal law.

Madame Justice Arbour, 1996 (xi)

Two years following the release of the Task Force on Federally Sentenced, new federal legislation established new rules for how the federal prison regime would be operated. The considerations of the Task Force did not consider that possibility nor were they provided with any information regarding the intention to repeal the *Penitentiary Act*.⁵⁷ Therefore, it is essential to review the work of the Task Force against the new legislation to determine if any conflict with the recommended plan of *Creating Choices* exists.

The *Corrections and Conditional Release Act (CCRA)* does honour the advancements in social and legal thought which have their origins in the ideological shift towards a rights based paradigm. Sections in the new legislation which replaced the *Penitentiary Act* such as the one which requires the minimal interference with the liberty of a prisoner are but one example. Whatever the measure of improvement, certain provisions of the *CCRA* are apparently absent consideration of the intersectionality the experiences of racialized women would require. This has a very particular impact on Aboriginal women and causes a pressure toward reinforcing their status as an add-on within an add-on.

The *CCRA* contains sections which are gender specific and Aboriginal specific. The principles contained in section 4 of the Act provide:

⁵⁷ Personal experience of the author who was a member of the working group on the Task Force on Federally Sentenced Women.

that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

The problem with these sections of the Act are simple, the sections do not expressly contemplate the situation of women who are also Aboriginal.⁵⁸

Therefore, understanding intersectionality points to one area in which the *Corrections and Conditional Release Act* is wanting. There are several examples of this difficulty. First, the provisions found in section 77(1) which requires that CSC “provide programs designed particularly to address the needs of female offenders” and those found in section 80⁵⁹ which is the parallel requirement for “aboriginal offenders” do not acknowledge the very real needs of prisoners who are both Aboriginal and female. Female offender programs may not be culturally relevant and likewise, Aboriginal offender programs may not consider the very real gender differences. Aboriginal women, therefore, are treated as Aboriginal or women but never both at the same time.

The second example of the failure to consider Aboriginal women as both Aboriginal and women is the implementation of section 81⁶⁰ of the CCRA. This creative section permits Aboriginal communities to take responsibility for the “care and custody” of offenders. Although I applaud the space this section creates in corrections for Aboriginal communities, I also note that no proposals have been successfully brought forward which focus specifically on women.⁶¹ Such proposals are essential to providing

⁵⁸ The acknowledgement in the last paragraph regarding “other groups” is not certain and clear. Depending on the decision maker, Aboriginal women might or might not be included in the catch-all “other groups”.

⁵⁹ It reads:

Without limiting the generality of section 76, the Service shall provide programs designed particularly to address the needs of aboriginal offenders.

It should be noted that the section relies on the word “shall” which is not permissive.

⁶⁰ Section 81 reads:

(1) The Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of services.

(2) Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services for a non-aboriginal offender.

(3) In accordance with any agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an aboriginal community, with the consent of the offender and of the aboriginal community.

equality of access to community for Aboriginal women and CSC must be seen to carry a positive duty to ensure those proposals are realized.

Although the legal framework does provide potential for the recognition and affirmation of women's difference, these areas of potential are not being realized. This potential is more difficult to reach for Aboriginal women. Issues of intersectionality are not reflected in the provisions of the *CCRA* nor have the areas, such as section 81, where hopes could be grounded received sufficient support to secure that potential.

Despite the philosophical advancements reflected in the opening sections of the *CCRA*, the new standards contained in the Act do not guarantee a shift in correctional practice. The degree to which Aboriginal women have equal access to an experience of incarceration that meets these standards must be a consideration central to attempts to remedy the gendered difficulties in the legislation.

Prison Management: Positive Duties:

As Madame Justice Arbour pronounced: “the very values that the law... seeks to uphold and vindicate, such as honesty, respect for the physical safety of others, respect for privacy and human dignity” (xi) have been more slowly embraced by Canada's penal system than by other sectors of the justice system. This is of special relevance for all women who are “othered”⁶² in multiple ways. For this analysis to form, it is essential to examine the degree to which Canada's regime of individual rights protection offers hope for amelioration of Aboriginal women's claims of discriminatory treatment.

Under the heading “Women Inherit Programs and Facilities Designed for Men” the Task Force noted:

These practical problems exist within a broader policy problem. Correctional management strategies are developed within a White male context and then applied to both men and women. At best, once a policy or initiative is developed, its differential impact on women is assessed.

⁶¹ There are a number of factors that will influence this outcome. First, the numbers of federally sentenced women returning to many regions (that is those outside the prairie region) will be so small, a “program” based response will not be viable. The solution will require creativity (often a scarce commodity in communities where far too frequently we survive crisis to crisis). Second, as documented elsewhere, colonialism has resulted in a patriarchal ordering of many First Nations communities. These relationships are more complex than mere political sexism but the results none-the-less are that the needs of women and the violence in our communities is often overlooked. Third, women are more likely to be disenfranchised from their communities (due to legal discriminations found in now repealed sections of the *Indian Act* on membership and the continuing lack of matrimonial property law regimes which apply on reserve). The increased rate of urbanization of First Nations women has not led the CSC to develop “re-connection” programs which would be of central benefit to First Nations women. Whatever the factors are that lead to the exclusion of women's initiatives under section 81, the fact is that CSC has not been proactive enough in ensuring that the needs of women are met in the community.

⁶² See the discussion in Patricia Hill Collins, *Black Feminist Thought* (New York Routledge), 70-72).

Therefore, any adjustment usually nominal, is made at the end. A good example of this philosophical or management perspective, is the Correctional Service of Canada policy on federally sentenced women. This policy states that in addition to general policies, programs and services applicable to all offenders, strategies will be developed to meet the special need of women (CSC 1990: 79).

This 1990 acknowledgement of the “special needs of women” is key to understanding that a positive duty rests with CSC regarding the programming and policy options they have pursued for women. However, recognizing that women have “special needs” is insufficient to understanding the full scope of the duty that rests with CSC. The duty requires that CSC ensure that the experiences of incarceration for women are non-discriminatory. This is not only affirmed by section 15 of the *Canadian Charter of Rights and Freedoms* but by various provisions of the *Corrections and Conditions Release Act*.

Characterizing the needs of women as “special” is in fact part of the problem. Women’s difference is marginalized when their needs based on legitimate experiences of gender are not taken into account. This situation develops because women are numbered so few in the federal prison system but also because their difference is viewed as unusual or special. For Aboriginal women, this is the point at which their experiences of oppression are narrowly labeled double disadvantage. It is difficult to answer to these needs without specifically consider women’s difference. CSC develops new programs and only then considers the differential impact on women. This does not address the particularized discrimination of women as the gendered consideration comes too late in the program development process. Rather it operates to reinforce and perpetuate difference.

Difference, then, must be translated into options (from programs to release) for women that are meaningful. As LEAF prepared their Charter argument more than a decade ago they established:

LEAF plans to argue that sex equality requires that women are entitled to the same programs and facilities as men to the extent that their needs are the same, as well as programmes and facilities that meet women’s particular needs. This is not a theory that is based on “special treatment” or “reasonable accommodation” for women, but instead one that requires a re-examination of existing standards so that the prison system is designed to meet the unique needs of women just as it now addresses many unique needs of men. (LEAF, 1989: 19)

This is the standard that must drive the analysis of the discrimination that women presently face when federally incarcerated. The work of the TFFSW took the initial steps at establishing a plan that attempted to meet the needs of women. With this report and the more than ten years of experience, we are well situated to meet the legal obligation of non-discrimination.

As the issues of the legal rights of female prisoners is considered, it is prudent to remember the watershed decision regarding administrative decision making of the Supreme Court of Canada in *Martineau v Matsqui Institution Disciplinary Board*. Dickson J. (as he was then), opined:

In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the boards' decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. *The rule of law must run within penitentiary walls* (622. Emphasis added).

This decision was rendered in 1979 and caused a revolution in the status of the prisoner whenever a person's liberty interest was at stake. Prior to *Martineau*, prisoners were felt to have lost all of their rights as a result of their criminal convictions and subsequent incarceration. *Martineau* establishes that the rule of law, including a duty of fairness, arises in the violation of a prisoner's liberty interest. Decided before the passage of the *Charter*, the *Martineau* adhesion to the rule of law and the dignity of the human being has subsequently been enhanced.

It is from this position, one that acknowledges how inexperienced the legal system is with acknowledging prisoner rights, that the application of *Charter* standards must be considered. The standards that the *Charter* and the court decisions made in this area establish are particularly relevant to considerations made under human rights law. Obviously these instruments deal with many of the same issues, but one basic difference should be kept in mind. The process under human rights provisions is meant to be more accessible and less formal. Despite my concern with the enumeration of grounds as an effective manner to resolve the discrimination Aboriginal women confront, I believe that the *Charter* (and human rights codes) does remain an important instrument in securing "safe and humane" custodial conditions for all women, but especially for Aboriginal women.

In 1990, at trial, counsel for Carol Daniels successfully argued under section 7, 12, 15 and 28 of the *Charter* that transferring an Aboriginal woman from the prairies to the Prison for Women was discriminatory. The Crown, in fact, conceded the section 15 argument (52). The court affirmed that section 7 guarantees an individual "life, liberty and security of the person" applied to prisoners as well. Given the number of suicides of Aboriginal women at the prison in Kingston, the court found that section 7 was also violated (54). The provision in section 12 against cruel and unusual punishment was also found to be violated. The court ordered that the sections of the *Penitentiary Act* which would cause Carol Daniels to be transferred to Kingston to be of no force or effect to the extent that they are inconsistent with the *Charter* (57). This case was appealed by the Crown successfully.

Daniels does demonstrate that it is not unreasonable to think that courts will find the rights of women (and their different experience of corrections) to be a violation of the *Charter*. *Daniels* also demonstrates that the unique circumstances that Aboriginal women face when institutionalized are subject to review. This all points to the need for the duty to honour *Charter* protections is owed to inmates. It is a duty that must be acknowledge and acted upon by CSC.

In the first section of this paper a number of structural difficulties were discussed, many of which would amount to *Charter* violations. This is where it is important to remember the cost of litigation as well as the difficulties inmates would have contacting experienced counsel (as there are very few people who practice prison law in this country). Although *Charter* litigation is feasible theoretically, in practical terms it is unrealistic to think this a likely occurrence.⁶³ The likelihood that the most disenfranchised of all people in Canada, Aboriginal people, will have the resource to launch *Charter* actions demonstrates the importance of human rights regimes in resolving outstanding grievances. This, in addition, is further reason that CSC should be seen to have a positive and proactive duty.

The Constitutional Rights of Aboriginal Peoples:

As Justice L'Heureux-Dubé indicated in the *Corbiere* decision (quoted earlier), the constitutional rights of Aboriginal people are a consideration for the courts when the validity of a statute is questioned. In that case, the issue was a section of the *Indian Act* which prohibited off-reserve band members from voting in elections. In this case, the degree to which statutory requirements in the *CCRA* that guarantee gender equality are *not* given practical meaning creates a similar situation that allows judicial review. If constitutional provisions attach to statutory interpretation by courts then logically they must also be taken into account by a human rights review.

As the courts have continued to develop the protections afforded in section 35(1) of Canada's Constitution (1982), it has become clear that the Crown owes to Aboriginal people⁶⁴ a fiduciary duty. In the first case to examine the nature of the constitutional rights of Aboriginal peoples, Justice Dickson opined:

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 (*Sparrow* 1990: 181, emphasis added).

⁶³ The paucity of prison cases since the passage of the *Charter* is demonstrated by the handful of cases which have been handed down by the Canadian Supreme Court. See *Cunningham, Steele, Weatherall and Winters*. Note that all the litigants in these cases are men.

⁶⁴ In law, it remains unclear if this relationship extends to the Metis or is First Nation specific. This presents a difficulty for litigation under the fiduciary for federally sentenced Aboriginal women, some of whom are Metis or "non-status" people.

It is the fiduciary relationship that is the mechanism that ensures this reconciliation is achieved.

The general nature of the Crown's fiduciary duty to First Nations is considered by Leonard Rotman who concludes that "equality and mutual respect" grounds the relationship (1996: 13) He describes:

The Crown-Native fiduciary relation has its origins in the interaction between the groups in the immediate post-contact period. During the formative years, which roughly covers the period from contact until the removal of France as a major colonial power in North America in 1760-1, Crown-Native relations were based on mutual need, respect, and trust. Furthermore, when the fiduciary character of these relations was crystallized, the participants conducted themselves on a nation-to-nation basis. Consequently, the nature of the Crown's fiduciary obligations is founded on the mutually recognized and respected sovereign status of the Crown and aboriginal peoples (1996: 13).

Because the nature of this relationship is based on a corrected view of history and an acknowledgment that the relationship is based on mutual respect, it challenges the colonial pattern which replaced the agreed upon relationship. The fiduciary relationship, therefore, provides a unique opportunity to challenge the colonial underpinnings of the relationship between the criminal justice system and First Peoples.⁶⁵ After all, as Rotman notes, the relationship is grounded in equality and, therefore, is important as a concept for

⁶⁵ It is prudent to remember the findings of the Aboriginal Justice Inquiry of Manitoba:

Also, it is clear that while Aboriginal peoples have many of the same legal problems as non-Aboriginal people, and some unique ones as well, they do not turn to the legal system to resolve them. This is so even where Aboriginal peoples reside in communities where courts are readily accessible.

When they do engage the legal system, or become engaged by it, the manner in which their problems are dealt with often is out of tune with their unique position as Aboriginal people. As a result, they have come to mistrust the Canadian legal system and *will avoid it when possible*. Even when they do have to deal with it, we find that they simply minimize their exposure to it. This can take the form of inappropriate guilty pleas, failure to attend court appearances and a perpetual passivity that manifests itself in an apparent air of indifference about what happens to them in court...

The methods used by the Canadian legal system to resolve conflicts – particularly- the adversarial system – are incompatible with traditional Aboriginal culture and methods of conflict resolution. Additionally, courts are not always a good forum for the resolution of many of the conflicts involving Aboriginal people and, indeed, can be counter-productive. This has to be considered along with the fact that there is an unwillingness by Aboriginal people to utilize the justice system to resolve personal legal problems as they arise, particularly those of a civil or family nature. Because there are few, if any, alternatives to the use of court in Aboriginal communities, many such conflicts go unresolved (252-253. Emphasis added.).

Aboriginal women who are federally sentenced as it reinforces the nature of the duty the Crown generally owes.

The unique⁶⁶ fiduciary relationship between First Peoples and the Crown first appears in the legal discourse in the Supreme Court of Canada decision in the *Guerin* decision. Although the case involved a claim to Aboriginal title which pre-dated the constitution, the reasoning of the court in this decision is essential to understanding the duty owed by the Crown. Justice Dickson expounded:

The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms... The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal (1984: 344).

In the case of an imposed criminal justice system, the promises made in treaty or the objectives of a justice system form this necessary backdrop for the determination of the breach.⁶⁷

The basic nature of the fiduciary relationship is actually quite simple. As McLachlin J. expressed (writing in dissent) in *Van der Peet* while summarizing the findings in both *Sparrow* and *Guerin*:

The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well (1996: 280).

As Leonard Rotman notes, the existence of a fiduciary relationship does not require property to be the central aspect of the relationship (1996: 105).⁶⁸

What is really at the heart of the fiduciary duty is the power one holds over another individual. There is no relationship where the power one holds over another is

⁶⁶ The court's note this relationship is "sui generis".

⁶⁷ Such a complex analysis is the scope of this paper.

⁶⁸ See also *Norberg v Wynrib*, [1992] 2 S.C.R. 226. This case demonstrates that property does not have to be the grounding relationship. In this case a doctor traded prescription drugs for sex rather than assisting Ms. Norberg (a First Nation's woman, incidentally) in receiving drug treatment. The doctor was found to have breached the fiduciary relationship owed to his patient.

greater than the relationship between guard and prisoner. McLachlin J., in *Blueberry River* summarizes:

Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other... (1987: 63).⁶⁹

For women prisoners the consideration of the duty owed to them by the federal Crown alongside the failure to remedy obvious and known circumstances of discrimination provides a legal opportunity that has yet to be fully considered in litigation. For Aboriginal women, the strength of the fiduciary duty owed is enhanced by this opportunity. After all, it is a constitutionally protected right which rests on the fiduciary duty of the Crown.

There has been little work completed to date on the specific scope of the fiduciary obligation owed by the Crown to First Peoples and the regime that is called human rights.⁷⁰ However, as the Canadian Human Rights Commission is an arm's length branch of the federal Crown, it is interesting to consider the duty the Commission owes to Aboriginal women and if indeed the Commission is also under a fiduciary obligation. The central question is simple: what is the duty of the Crown to First Nations when the criminal justice system is involved?

The constitutional right to the exercise of a fiduciary duty to First Nations is very important in the examination of the rights of Aboriginal women in prison. As was noted at the beginning of this discussion, the real issue is not whether the Correctional Service has violated the rights of women including Aboriginal women. Since the first human rights complaint launched in the 1980s, the issue is much more of a case of the continued failure to remedy what has been repeatedly recognized as a breach of the human rights of women prisoners. As Justice Dickson noted in *Guerin*, unconscionability was at the heart of the decision. In this case, it is equally (if not more so) repugnant to continue to ignore the violation of women's rights and fail to provide earnest remedy.

The repeated failure to provide a remedy for what has become a blatant and ongoing discrimination should attract serious attention. If litigated, punitive damages would be warranted. In *Guerin*, the court awarded a substantial sum – more than several million dollars – in damages. The case for punitive damages would be strengthened by the recognition that the situation of women prisoners has been found wanting in report after report. The narrower range and quantum of damages available to a human rights body compared to a court, is a further valid consideration. It should emphasize the need for the CHRC to act creatively.

⁷⁰ Please see the videotape of the talk to the CHRC by Patricia Monture-Angus on National Aboriginal Day, June 21, 2001. See also Patricia Monture-Angus, "The Experience of the Fiduciary Relationship: The First Nations and the Crown" prepared for the Law Commission of Canada, 2001.

Conclusion

AS LEAF concluded in 1989, a “discrete issue approach is not practical” (4). LEAF understood that the issues of programming in its broadest sense, geographic dislocation and discrimination against Native women overlapped significantly. It is the combination of these experiences and incidents that leaves the most indelible mark on the women’s experience of incarceration. A discrete issues approach also denies the crux of the issues which remains to be the ongoing failure of at least two decades to remedy those well-documented “discrete issues”.

LEAF, in fact, came to this conclusion:

For decades, recommendations for reform have sought to address the disparity between the treatment afforded male inmates and their female counterparts. More recent reports reaffirm and repeat earlier recommendations, pointing to the government’s intransigent stance (5).

For many members of the Task Force the unwillingness to resolve the controversial issues which surrounded the very opening of the Prison for Women and continued across the decades and reports, was a factor that drove many decisions that were made. The need to come to an agreement about a plan for the closure for the Prison for Women rather than just a recitation of the possible options was seen as the way clear to reach a better situation for federally sentenced women. More than a decade after the Task Force on Federally Sentenced Women, it is clear that for many women, but especially for maximum-security women the opportunity to build a better future has been lost.

If Aboriginal people are to come to the Canadian system of laws and see those structures as anything but oppressive then the difficult task of confronting ongoing and historic imposition must be addressed. There is an opportunity before us to step up to this challenge of remedying ongoing failures to justly treat Aboriginal women while incarcerated. Perhaps the Commissioners of the Aboriginal Justice Inquiry of Manitoba say it best:

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination, it is merely “laundered” racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.

Whatever legal niceties may be made as to how to classify the discrimination that is going on, whether it offends the *Charter* or not, the point is that Aboriginal people are experiencing adverse impacts. The justice system should be trying to find ways to alleviate these adverse impacts.

A century of paternalism and duplicity in government policies has had disastrous consequences. Canada's original citizens have lost much of their land and livelihood, family life has been ruptured, and community leadership and cohesion have broken down. These policies have left many Aboriginal people not only impoverished, but also dependent and demoralized. These government policies must also be held ultimately responsible for a good portion of the high rates of Aboriginal crime, which are the almost inevitable result of social breakdown and poverty (109-110).

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