CANADIAN JUDICIAL COUNCIL

**IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1)
OF THE *JUDGES ACT*
REGARDING THE HONOURABLE JUSTICE ROBIN CAMP**

SUBMISSIONS OF WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE AND THE BARBRA SCHLIFER COMMEMORATIVE CLINIC ("THE FRONT-LINE INTERVENERS")

August 26, 2016

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I. A Judge's Role Is "A Place Apart": At the Very Least, It Is a Place Where There Is No Room for Actions or Reasoning Based Upon Stereotypes, Myths or Prejudices

1. The role of the judge is unique. The Supreme Court of Canada has described the judge as having "a place apart" in our society.[1]

2. The Supreme Court of Canada commented extensively on the role of the judiciary and the critical importance of maintaining public confidence in the justice system in *Re Therrien*. In addition to the parties to the dispute, the Court noted "judges play a fundamental role in the eyes of the external observer". The Court stated:

> [t]he judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them.[2]

3. In occupying "a place apart," a judge is expected to display a commitment to equality and non-discrimination, and to demonstrate that he or she does not make decisions based on an attitude reflecting stereotypes, myths or prejudices. The conduct of judges must also reflect modern social norms and values that do not further disadvantage and harm marginalized groups.

4. When a judge displays conduct in the courtroom that is inconsistent with the expectations of the proper conduct of a judge, that judge imperils the reputation of the entire judicial system and public confidence in that system.

5. Pursuant to the Intervener Order, the submissions of the Front-Line Interveners (described below) address the following points:

   a. The current social context for sexual assault laws;

   b. The legal principles applicable to the Committee's mandate under the *Judges Act;*

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[1] *Therrien (Re)*, 2001 SCC 35, at para. 112.
[2] *Ibid.*, at para. 109.

c. The test and factors the Committee should apply in undertaking its mandate under the *Judges Act* ((b) and (c) are addressed under one section); and

d. The experience of vulnerable groups with the Canadian justice system.

II. The Interveners are Anti-Violence Front-Line Service Providers

6. Women Against Violence Against Women (WAVAW) and the Barbra Schlifer Commemorative Clinic (together, "the Front-Line Interveners") are direct service anti-violence organizations that share a common vision of ending violence against women. Core to the Interveners' mandate is challenging unequal barriers marginalized women face with access to justice and state institutions. The Front-Line Interveners provide a range of direct support services for sexual assault survivors.

7. WAVAW provides victim support services to women immediately after a sexual assault has occurred (a telephone crisis line, hospital accompaniment); during her healing process (free counseling); and during her pursuit of justice, which varies with each survivor but can involve communicating with the abuser, making a police report, assisting the survivor in telling her story to the media, or participating along with the survivor in the criminal justice system (e.g., by assisting her prepare a victim impact statement and by accompanying her to parole hearings).

8. The Schlifer Clinic is a specialized clinic for women experiencing violence, established in the memory of Barbra Schlifer, an idealistic young lawyer whose life was cut short by violence on the night of her call to the bar of Ontario on April 11, 1980. The Clinic is a multi-disciplinary, front-line service provider that offers a broad range of support services to women survivors of violence, including sexual violence. Since it was founded in 1985, the clinic has assisted over 55,000 women. The Clinic's services include legal representation in the areas of immigration and refugee protection, family, criminal and administrative law. The Clinic also provides group-based and individual counselling programs, employing diverse and culturally appropriate methodologies. The Clinic also offers language interpretation services, which provide language interpreters to a range of social service providers and others that are supporting or delivering services to women survivors of

violence. The Clinic serves women from ethno-racially and socio-economically diverse backgrounds, frequently from highly marginalized communities. Our clients experience multiple social inequalities, including poverty, homelessness, racism, and discrimination on the basis of religion, country of origin, newcomer status, mental health and disability.

9. Collectively, the services provided by the Front-Line Interveners became necessary as a result of the increasing recognition in the 1970s that sexual assault offences were power based crimes that were the direct result of women's unequal status in society. There was also a recognition that not only were women more susceptible to violence as a result of their unequal status in society, but there were serious failures of the criminal justice system in responding appropriately to sexual assaults. These failings of the criminal justice system were widely acknowledged to be due to the myths, prejudices and stereotypical thinking relating to sexual offences against women.[3]

10. As a result of the activism of groups like the Front-Line Interveners,[4] significant law reforms to the sexual assault laws were enacted to reduce the further victimization of women who sought justice through the legal system, as described in the Affidavit of Janine Benedet filed in these proceedings.

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[3] Topolniski J's judgment in *R v JR*, 2016 ABQB 414, at paras. 15-16, 24-26.

[4] In 1988 and 1991, the Schlifer Clinic participated in two landmark constitutional cases concerning the *Charter* rights and interests of sexual assault survivors (*Canadian Newspapers Co v Canada (Attorney General),* [1988] 2 SCR 122, and *R v Seaboyer; R v Gayme,* [1991] 2 SCR 577). Since that time, the Clinic has been granted standing as an intervener and has otherwise participated in numerous proceedings in the Ontario and Federal courts as well as at the Supreme Court of Canada. For example, in 2012, the Clinic initiated a *Charter* challenge to the recent amendments to the *Criminal Code* and *Firearms Act* (eradicating the long-gun registry), arguing that women's rights to security of the person and gender equality under the *Charter* were violated by the registry's destruction and that changes to gun-control laws would increase the risk to women in situations of domestic violence (*Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140). In 2012, the Clinic intervened at the SCC in *R v NS*, 2012 SCC 72, in support of a woman's right to testify at a sexual assault trial while wearing her niqab. In 2014, the Clinic intervened at the SCC in *R v Quesnelle*, 2014 SCC 46, on the privacy rights of sexual assault complainants, particularly those most heavily documented as a result of their marginalization and multiple experiences of inequality. In 2015, the Clinic intervened in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 6, on the scope of harms considered by the humanitarian and compassionate provision in Canada's immigration legislation, relied on by women who experience violence to remain in Canada when these experiences have not been properly accounted for through the refugee process or regular immigration streams. In 2015, the Clinic also participated in a Federal Court challenge to the Designated Country of Origin regime in Canada's immigration legislation, arguing that it failed to consider what safe means to identified groups with intersecting vulnerabilities to state neglect and harm, such as women who experience violence and gay, lesbian, and trans people.

11. The Front-Line Interveners represent voices of those who will be absent from the hearing room in this proceeding; namely, the voices of women who experience the discrimination that the rape shield laws and other laws are intended to protect, and who experience the effects of prejudice and discrimination when it is revealed in our judiciary.

12. The collective experiences of the Front-Line Interveners has been that negative societal attitudes towards women and sexual assault claimants in particular, is reflective of, and underpins the continuation of, negative attitudes towards women in general. Therefore, how claimants are treated in the criminal justice system is not just an issue that affects sexual assault survivors but one that affects the treatment more generally of all women in our society.

III. The Current Social Context of Sexual Assault Law and the Importance of Eradicating all Vestiges of Rape Myths

13. An important part of the social context in *R v Wagar* is the pervasive manner in which rape myths infected the justice system in the past. Over four decades of reform of substantive laws and rules of evidence have been devoted to eradicate these myths.[5] The social significance of a judge, in the highest position of authority, relying on rape myths and being oppositional to four decades of law reform, should be of central concern to the Inquiry Committee.

14. Rape myths are beliefs about sexual assault that serve to deny or justify male sexual violence, often by blaming the victim and/or exonerating the perpetrator. They often include sexual objectification, trivializing rape, blaming women for rape, justifying the abuser's conduct, denying the widespread incidence of rape, and refusing to acknowledge the harm caused by sexual violence.

15. Rape myths impact groups of women differently. In the experience of the Front-Line Interveners, detailed in the Affidavit of Amanda Dale in these proceedings, rape myths have a particularly harmful impact on women with intersecting experiences of inequality. They result in young women, women of color, Indigenous women, immigrant women,

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[5] See, e.g., *R v Ewanchuk*, per L'Heureux-Dube J, at paras. 94-96.

impoverished women, prostituted women, and trans-identified women to be more likely targeted for sexual violence since they are particularly vulnerable to being disbelieved or blamed for the violations they experience.

16. The legal system's hostile treatment of sexual assault cases is unique and in marked contrast to its response to other crimes. Sexual assault complainants are subjected to scrutiny to which no other victim or witness who comes before the criminal courts is subjected. Rather than focus on the actions of the perpetrator, the legal system has improperly emphasized the victim's character, behavior and reputation. The persistent myth that women are at fault for their own rapes, because of their dress, or intoxication, or 'flirtatious' behavior, or sexual power of influence over the accused (who could not control himself), or their failure to adequately protect themselves from the rape, underlies this persistent focus on the actions of the woman, rather than those of the accused.

17. Starting in the 1970s, sweeping and progressive laws were adopted in an effort to remove the effect of intrinsic sexist attitudes that resulted in stereotypical and discriminatory thinking in the criminal justice system, which legislators recognized had severely disadvantaged and stigmatized sexual assault victims, making a successful prosecution extraordinarily difficult.

18. These changes are detailed in the Affidavit of Janine Benedet and include the enactment of section 276 of the *Criminal Code,* which included: restrictions on evidence of the complainant's sexual activity; the clear statement from the Supreme Court of Canada with respect to the meaning of consent (in which the Court put the onus on the person seeking consent to be responsible for his actions and for the manner in which the consent is obtained); and the stipulation under section 273.2 that the accused cannot rely on a mistaken belief in consent defence unless he took reasonable steps to ascertain consent.[6]

19. Despite the fact that the laws have changed to counteract and eliminate the myths and stereotypes that provided the basis for the former sexual assault laws, some societal attitudes that justify, tolerate, normalize and minimize sexual violence against women and girls

[6] *R v Ewanchuck*, [1999] 1 SCR 330. at para. 31; see also *R v JR*, 2016 ABQB 414, at paras. 15-16.

persist. Normalizing sexual violence against women is discriminatory and is a form of violence against women in itself.

20. When rape myths are relied on by a person with authority and power in our society, such as a judge who should occupy a 'place apart', the discriminatory impact is more pronounced and the normalizing effects of those discriminatory views in society are far-reaching. As stated by the Alberta Court of Queen's Bench, "[t]he judiciary is responsible for ensuring that impartiality is not compromised by these biased assumptions."[7]

> Judges are expected to have an understanding of the social factors and societal goals which underpin the legislative reforms that the Courts are tasked with applying. In the case of sexual assault law, over a period of three decades, Parliament specifically intended to modernize sexual assault law to recognize the social problem of sexual assault of women and children (expressing "grave concern"), and of the need to respect the *Charter* rights of complainants, as well as accused, in the criminal justice process. Parliament's intention to root out discriminatory beliefs about sexual assault survivors from the criminal justice system was made explicit in both the preambles to Bill C-49 and C-46. Over twenty years after the enactment of these amendments to the criminal code, it is a basic requirement that judges fully accept and appreciate the social facts of women's inequality that drove the amendments to sexual assault law and to apply those laws consistent with their purpose. To expect anything less of judges has profound impacts for an affirmative standard of consent, and, in the end, women's safety and equaltiy. If our society expects all persons to respect women's sexual autonomy and integrity and an affirmative standard of consent, our judges above all must be expected to understand, communicate and apply the law of sexual assault in a manner attentive to the social context which underpins it, without bias or discrimination.

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[7] *R v JR*, 2016 ABAB 414, para 25.

IV. The Committee's Mandate Under the *Judges Act* Requires the Committee to Determine, Among Other Things, Whether a Judge Has Demonstrated a Commitment to Equality

21. This Inquiry Committee has been convened under s.63(3) of the *Judges Act*, RSC 1985 c. J-1, as a result of a request made by the Minister of Justice and Solicitor General for the Province of Alberta. The Inquiry Committee is required to conduct an inquiry into whether Mr. Justice Camp has become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in paragraphs 65(2)(a) to (d) of the *Judges Act* and should be removed from office.

22. For the purpose of this Inquiry, the Front-Line Interveners submit the subsections (c) and (d) are most relevant. Those subsections read as follows:

> 65...
>
> (2) Where in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
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> ...
>
> (c) having failed in the due execution of that office, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

23. The Front-Line Interveners submit two essential aspects are essential to the judicial function. First, judges must display impartiality, independence, integrity, and a commitment to equality and non-discrimination. These qualities are the essence of a judge's role and position. Second, public confidence in a judge must never be eroded. Judges require the respect and faith of the communities they serve to be effective. Public confidence is critical to the administration of justice.

24. Thus, in determining whether or not the judge has failed in the due execution of the office of

a judge (s.65(2)(c)) or has been placed in a position, by his or her conduct or otherwise, incompatible with the due execution of the office of a judge (s.65(c)(d)), the Front-Line Interveners submit, the Inquiry Committee should apply the following test:

a. whether the judge has failed to display the qualities expected of a judge including impartiality, independence, integrity and a commitment to equality and non-discrimination (impartiality is understood here as refraining from having or acting upon discriminatory views and beliefs); or

b. whether public confidence in the judiciary has been eroded by the conduct, statement or reasons of the judge".

25. For the purpose of these submissions, the Front-Line Interveners focus their submissions on the vital importance of a judge demonstrating a commitment to equality and non-discrimination.

26. The Front-Line interveners submit that in assessing the judge's commitment to equality and non-discrimination, the following factors should be considered:

a. whether the impugned conduct was in or out of court;

b. whether the impugned conduct was inadvertent or willful;

c. whether the impugned conduct was a singular incident or repeated;

d. whether the impugned conduct perpetuates disadvantage of vulnerable groups;

e. whether the impugned conduct demonstrates an attitude that is wholly inconsistent with societal values;

f. whether the impugned conduct demonstrates an inability to empathize with persons who come from backgrounds that are very different from his or her own;

g. whether the impugned conduct demonstrates a failure to understand the social context in which legal disputes arise;

h. whether the impugned conduct demonstrates a failure to set aside any personal opinions and maintain an open mind;

i. whether the impugned conduct demonstrates a fundamental disrespect for laws designed to protect disadvantaged groups;

j. whether the judge engaged in, or persisted with, the impugned conduct despite having been educated about the issues as a lawyer, in the course of becoming a judge, or by the counsel appearing before the Court; and

k. whether the impugned conduct appears in the reasons for judgment, especially if there was a reserve period before judgment that provided the judge an opportunity to read and reflect on the law and social context.

A. The Commitment to Equality and Non-Discrimination

27. The Canadian Judicial Council has published "Ethical Principles for Judges" which the Front-Line Interveners submit provide guidance as to conduct expected of a judge. The conduct expected of a judge can also be delineated from Canadian Judicial Council decisions sanctioning improper behavior.

28. Commitment to equality is central to judicial function. Ethical Principle 5 directs judges to:

a. conduct themselves and proceedings before them so as to assure equality according to law;

b. treat all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination;

c. strive to be aware of and understand differences arising from, for example, gender; and

d. disassociate themselves from and disapprove of statements which are sexist.

29. Further, as reflected in the Commentary attached to the Ethical Principles, there is an obvious relationship between equality and impartiality. Judges are advised that they:

a. should not be influenced by attitudes based on stereotype, myth or prejudice;[8] and

b. should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone.[9]

30. Maintaining public confidence is vital for "the effectiveness and proper functioning" of the justice system and "promotes the general welfare and social peace by maintaining the rule of law."[10] There is a direct relationship between judges failing to demonstrate the conduct expected of a judge and the erosion of public confidence. As stated in the Commentary:

> Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence.... judicial independence and judicial ethics have a symbiotic relationship. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

31. The Supreme Court of Canada has noted that "the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself."[11]

32. There is no doubt that a judge who breaches the commitment to equality and non-discrimination imperils public confidence. The Commentary warns that "[a] judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived".[12]

33. In its *Inquiry into the Conduct of Mr. Justice Jean Bienvenue,* a Judicial Council Inquiry Committee recommended that Justice Bienvenue be removed from the bench after a trial in which he displayed an anti-Semitic and sexist attitude. The Inquiry Committee pointed to the following improper conduct:

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[8] Commentary 3
[9] Commentary 4
[10] *Re Therrien*, para 110.
[11] *Moreau-Bérubé v New Brunswick* 2002 SCC 11, para 58
[12] Commentary 2

a. he said that "millions of Jews were eliminated without pain and died without suffering in the gas chambers;"[13]

b. he spoke with an officer of the court "about the accused's colour and sexual orientation;"[14]

c. he criticized the jury for their verdict;[15] and

d. in sentencing the accused he stated that when women "decide to degrade themselves, they sink to depths to which even the vilest men would not sink" and went on to discuss "the Delilahs, the Salomes, Charlotte Corday, Mata Hari…".[16]

34. The Inquiry Committee concluded that if Mr. Justice Bienvenue were to preside over a case, having demonstrated a breach of the principle of equality and non-discrimination, a reasonable and informed person would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.[17]

35. The Judicial Council also formally expressed its concern to Manitoba Court of Queen's Bench Judge Robert Dewar because of his use of stereotypes. Although he did not show a disrespect for the rule of law, he had commented on the complainant's tube top and suggested "sex was in the air." The Council referred to remarks he made that showed "a lack of appreciation and sensitivity toward victims of sexual assault" and which could "perpetuate negative stereotypes about women".[18]

B. Factors to Consider upon Breach of the Equality and Non-Discrimination Principle

36. As noted above in the introduction to this section, once a breach of the equality and non-discrimination principle has been established, to determine the seriousness of the breach, the Front-Line Interveners submit the Inquiry Committee should consider the following factors:

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[13] P. 54
[14] *Ibid.*
[15] Pp. 45-46
[16] Pp. 48-49
[17] p. 61
[18] Letter to complainants from Chief Justice Wittmann

a. *Whether the impugned conduct was in or out of court*

If the breach occurred in the course of conducting the case, or in the judge's reasons, the breach should be treated as serious.

b. *Whether the impugned conduct was inadvertent or wilful*

If the breach was deliberate and wilful and not inadvertent, the breach should be treated as serious.

c. *Whether the impugned conduct was a singular incident or repeated*

If the judge repeatedly breached the principle of equality and non-discrimination, the breach should be treated as serious.

d. *Whether the impugned conduct perpetuates disadvantage of vulnerable groups*

If the effect of the breach is to cause already vulnerable groups to be further disempowered, the breach should be treated as serious as such prejudiced attitudes impede access to justice by women who have intersecting oppressions.

e. *Whether the impugned conduct demonstrates an attitude that is wholly inconsistent with societal values, paticularly those expressed by Parliament as underpinning the criminal law of sexual assault*

As stated by the Court of Queen's Bench of Alberta in *R v JR*, "There is no place for sexual stereotyping in sexual assault cases and no inference should be drawn about a complainant's credibility on how a victim of sexual assault is to react to the trauma: [references omitted]. Put simply, the criminal justice system must not allow myths and stereotypes about sexual assault victims to influence outcomes."[19]

[19] *R v JR*, 2016 ABAB 414, para 24.

Where a judge's comments reflect, promote and reinforce outdated and discredited ideas about violence against women and women's equality rights and freedoms, the breach should be treated as serious.

f. *Whether the impugned conduct demonstrates an inability to empathize with persons who come from backgrounds that are very different from his or her own*

If the judge's comments reveal the judge is unable to stand in the shoes of others with experiences very different to his or her own, or who face multiple inequalities, without engaging in stereotypical thinking, the breach should be treated as serious.

g. *Whether the impugned conduct demonstrates a failure to understand the social context in which legal disputes arise*

If, for example, the judge's comments reveal a failure to appreciate that sexual assault is a power-based crime, and that the laws that govern the prosecution of sexual assault are designed to protect women from the very discrimination that causes the crime itself to occur, the breach should be treated as serious.

h. *Whether the impugned conduct demonstrates a failure to set aside any personal opinions and maintain an open mind*

If the judge shows reliance on personal beliefs and opinions rather than, and contrary to, established law on sexual assault, the breach should be treated as serious.

i. *Whether the impugned conduct demonstrates a fundamental disrespect for laws designed to protect disadvantaged groups*

If a judge demonstrates a fundamental disrespect for laws that have been in place for decades, which reflect and acknowledge the need to protect women, the breach should be treated as serious. As recently stated by the Court of Queen's

Bench of Alberta in *R. v. JR*, "[c]onsent in the context of sexual activity is not a difficult concept."[20]

j. Whether the judge engaged in, or persisted with the impugned conduct despite having been educated about the issues as a lawyer, in the course of becoming a judge, or by counsel appearing before the Court

If a judge has had the opportunity to have been educated about these issues either through their legal education, experience as legal counsel, time served on the bench, or through legal counsel for the parties to the proceeding, and yet persists with the impugned conduct, the breach should be treated as serious.

k. Whether the impugned conduct appears in the reasons for judgment, especially if there was a reserve period before judgment that provided the judge an opportunity to read and reflect on the law and social context

A judge's final opportunity to address the case in a considered way is in the reasons for judgment. When discriminatory conduct is present in the reasons, and particularly following reading and reflection over the course of a reserve, the capacity of a judge to embrace and act in accordance with their non-discriminatory mandate is seriously called into question.

37. The Front-Line Interveners submit that answering these questions will assist in determining whether the impugned conduct threatens the integrity of the judiciary as a whole, such that the judge would be unfit to occupy a judicial post.

V. The Experience of Vulnerable Groups with the Canadian justice System: The Context that Renders Judicial Stereotyping, Prejudices and Biases Against the Victims of Sexual Assault so Serious

38. Given the important role a judge holds in society, the experience of vulnerable groups with the justice system shows that if judicial stereotyping and biases are permitted, this will undermine confidence in the system in a number of serious ways:

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[20] *R v JR*, 2016 ABAB 414, para 15.

a. it leads to fewer victims reporting sexual assaults and fewer victims of sexual assault participating in the criminal justice system;

b. it leads to fewer prosecutors being willing to prosecute sexual assaults;

c. it leads to the failure of the criminal justice system to act as a deterrent to sexual offenders;

d. it leads to the perpetuation of disadvantage against immigrant women, and diverse applicants in general; and

e. it imperils the public's confidence in the justice system.

A. Allowing Stereotyping and Biases to Infect the Criminal Justice System Leads to Fewer Victims Reporting Sexual Assaults and Fewer Victims of Sexual Assault Participating in the Criminal Justice System

39. Fewer than 10 per cent of sexual assault victims come forward.[21] Survivors of sexual violence say one of the main reasons for not reporting is a lack of confidence in the criminal justice system.[22]

40. The judicial mishandling of sexual assault crimes puts women at a unique disadvantage in the criminal justice system, decreasing the rate of reporting sexual assault and increasing the rate at which victims withdraw their voluntary participation in the system.[23] Judicial thinking plays a critical role in a victim's perception of whether or not she was the victim of a crime, and whether she believes she will receive some measure of justice in the legal system. Many survivors report depression, anxiety, post-traumatic stress - related symptoms and other problems as a result of their participation in the justice system. Many survivors describe participation in the justice system as one of "revictimization". In the experience of front-line service providers, "revictimization" refers to the experience of being repeatedly subjected to prejudiced and discriminatory views about the assault in the course of the criminal process.

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[21] *Moreau-Bérubé v. New Brunswick (Judicial Council)* 2002 SCC 11, para

[22] Melissa Lindsay, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, Department of Justice Canada, Research and Statistics Division, 2014, at pp. 13, 20-27; available online at: file:///C:/Users/c.maxwell/Desktop/DOJ%20study%20on%20sexual%20assault%202014.pdf.

[23] Linda Coates, and Allen Wade. "Telling it like it isn't: obscuring perpetrator responsibility for violent crime", *Discourse and Society* 15. no. 5(2004) 3-30

The experiences of survivors of discrimination and revictimization affect whether individuals are willing to report to law enforcement, cooperate in investigations, or participate in prosecutions.[24]

41. One role of the judge is to reassure victims that these discriminatory views have no place in the courtroom. Where judges do the opposite, women's worst fears are validated, and victims of sexual assault are further discouraged from reporting and participating in the criminal justice process.

42. Many victims are afraid to expose themselves to a system they do not trust and that may further invade their privacy and cause additional trauma. Victims often refrain from reporting to the police because they fear the police may blame or disbelieve them. Conduct by judges which supports the myths that women who report sexual assault are lying or are otherwise at fault for the violence they have suffered further undermines victims' faith in the justice system.[25] These problematic attitudes perpetuate the notion that women are responsible for preventing sexual violence, and erase perpetrator responsibility.[26] As a result, access to justice is denied to victims of sexual assault.

B. Allowing Stereotyping and Biases to Infect the Criminal Justice System Leads to Fewer Prosecutors Being Willing to Prosecute Sexual Assaults

43. Prosecutors face a formidable task in achieving convictions when confronting judges with biases. Sexual assault cases may already be difficult to prove as alcohol or drug-facilitated sexual assaults may involve impaired memory and observation as well as biases against intoxicated victims. Rather than try to overcome the misconceptions and challenges, prosecutors may decide not to prosecute. [27]

C. Allowing Stereotyping and Biases to Infect the Criminal Justice System Leads to the Failure of the Criminal Justice System to Act as a Deterrent to Sexual Offenders

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[24] *Ibid.* See also, e.g., the testimony of Mandi Gray in *R v Ururyar*, 2016 ONCJ 448, at paras. 132, 139.
[25] Lindsay, *supra*, at p. 24, Linda Coates, "Telling it like it isn't: obscuring perpetrator responsibility for violent crime", *Discourse and Society* 15. no. 5(2004) 3-30
26 Linda Coates, "Telling it like it isn't: obscuring perpetrator responsibility for violent crime", *Discourse and Society* 15. no. 5(2004) 3-30
[27] Lori Haskell. *First stage trauma treatment: A guide for mental health professionals working with women.* (Toronto Centre for Addiction and Mental Health, 2003).

44. When the criminal justice system is found incapable of responding adequately to a complaint of sexual assault because myths and stereotypes lead to victims being disbelieved, victims do not report, sexual assault offenders are not caught, arrested, or prosecuted, and offenders are more likely to reoffend. It influences and promotes a climate of impunity that these behaviours as normal and accepted in society.[28]

45. Research shows that not only do a high number of offenders reoffend, but also that repeat offenders commit the vast majority of sexual assaults. Mishandling these cases, therefore, allows serial offenders to reoffend without detection.[29]

D. Allowing Stereotyping and Biases to Infect the Justice System as a Whole Leads to the Perpetuation of Disadvantage against Immigrant Women and Women of Diverse Backgrounds Generally

46. The concerns noted above in relation to the presence of stereotyping and biases on the bench not only pertain to the criminal justice system, but can impact many other types of proceedings, as well as the justice system as a whole. Sexual assault is not an isolated experience, seen only by the trier of fact in a criminal proceeding. It is unfortunately a common experience, so ubiquitous it has been classified by the United Nations as a Global Pandemic.[30] This means that women from all walks of life, from all parts of the world, may have sexual assault experiences that are material to their legal proceedings in any area of law.

47. An example of proceedings where the presence of stereotyping and bias is of great concern is immigration proceedings. Immigrant women in particular face cultural stereotyping that trivializes their experiences of violence due to intersecting inequalities based on ethnicity, religion, race, and immigration status. In the context of immigration and refugee cases,

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[28] Linda Coates, "Telling it like it isn't: obscuring perpetrator responsibility for violent crime", Discourse and Society 15. no. 5(2004) 3-30

[29] Judith Herman, *Trauma and recovery: The aftermath of violence – from domestic abuse to political terror.* (New York, Basic Books, 1992).

[30] Wolrd Health Organization - Violence against women: a 'global health problem of epidemic proportions' available at [http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/]

which form upwards of 85 per cent of the Federal Court's caseload,[31] erosion of public confidence in the justice system is an acute concern. Immigration and refugee matters are the only applications to come before the Federal Court which must first obtain leave before proceeding to a hearing. There is no requirement for the judge deciding leave to issue written reasons, and there is no appeal from a decision to refuse leave. From an accountability perspective, this is particularly problematic if the public may reasonably have concerns about a judge's ability to determine cases in an impartial and unbiased manner. In short, in the absence of written reasons, there is no way of knowing whether the judge's decision is based on myths and stereotyping.

48. In cases of gender-based persecution in refugee matters, Federal Court jurisprudence acknowledges that when the Immigration and Refugee Board fails to properly assess whether a risk of sexual violence constitutes gender-based persecution, the decision will be set aside.[32] Problematic attitudes around sexual violence and women's equality by judges sitting on the Federal Court therefore disadvantage applicants facing gender-based violence. More broadly, adjudicating impartially in the immigration and refugee context requires the decision-maker to let go of implicit assumptions about what constitutes a "reasonable" person in the applicant's circumstances – taking into account the vast differences that exist in culture, language, level of formal education, privilege and power, and acknowledging the lasting effects of pre-existing trauma. A judge who has shown an inability to overcome their own particular biases when determining whether an individual has acted reasonably calls into question his ability to adjudicate matters involving applicants from diverse backgrounds who regularly come before the Federal Court.

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[31] See, e.g., Jon B. Gould *et al,* "A Refugee from Justice? Disparate Treatment in the Federal Court of Canada," *Law & Policy* 32: 4 (October 2010), pp. 454-486, at p. 459; available online: http://ssrn.com/abstract=1670374.
[32] See, e.g., *Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559.

VI. Conclusion: Allowing Stereotyping and Biases to Infect the Criminal Justice System Imperils the Public's Confidence in the System

49. The experience of the Front-Line Interveners is that women who are considering reporting sexual assault or who are assessing their ongoing participation in the criminal justice process, repeatedly seek guidance as to how they will be perceived. They come to the Front Line Interveners knowing that stereotypes and myths may well shape and prevent their access to justice. They most often do not see the legal system as a remedy for their harm. Judicial conduct that validates and reinforces those concerns has a profound negative impact on the women the Front Line Interveners serve, day in and day out.

50. Given the decades of efforts to address the use of stereotypes and biases in sexual assault proceedings, including years of law reform, judicial education, opportunities for sensitivity training, and judges being disciplined in the past, where serious breaches of the principle of equality and non-discrimination occur, public confidence in the system as a whole demands a robust response. There continues to be a lack of confidence in the criminal justice system among women survivors of sexual assault, including a pervasive concern that participants are not treated fairly by the justice system and are re-victimized by the process and by criminal justice professionals.[33]

51. From the perspective of the Front Line Intervenors, where a serious breach of the principle of equality and non-discrimination is found to occur, public confidence will rarely, if ever, be restored with more sensitivity training: personal recognition of "insensitive" conduct without an acknowledgment of its discriminatory and offensive nature does nothing to redress the stereotypical attitudes underlying such conduct. Moreover, the appearance of justice on the ground is not linked to a single judge's experience, but depends on a robust systemic approach that rejects rape myths. For the Front Line Interveners, where judges are found to continue to harbour the stereotypical thinking that led to three decades of legal reform and where they commit serious breaches of the principle of equality and non-discrimination,

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[33] Melissa Lindsay, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, Department of Justice Canada, Research and Statistics Division, 2014, at pp. 13, 20-21; available online at: file:///C:/Users/c.maxwell/Desktop/DOJ%20study%20on%20sexual%20assault%202014.pdf.

removal from the bench is most likely required to preserve public confidence. Holding judges accountable for their conduct is a vital aspect of maintaining public respect for judges and confidence in the justice system.

ALL OF WHICH IS RESPECFTULLY SUBMITTED THIS 26TH DAY OF AUGUST 2016

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