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 AVALON SEXUAL ASSAULT CENTRE, ENDING VIOLENCE ASSOCIATION OF BRITISH COLUMBIA (EVA BC), INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN (IAAW), METROPOLITAN ACTION COMMITTEE ON VIOLENCE AGAINST WOMEN AND CHILDREN (METRAC), WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF) and WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF) (the "INTERVENER COALITION")

AUGUST 26, 2016

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I. INTRODUCTION

1. Pursuant to the terms upon which the Intervener Coalition was granted leave to intervene in this judicial inquiry ("Inquiry"), this submission first sets out two contextual considerations that should inform the Inquiry Committee's ("Committee") work: first, the history of sexual assault law in Canada; second, the experience of marginalized groups under that law. The Intervener Coalition next addresses how these contextual considerations should guide the conduct of a judicial inquiry. The Intervener Coalition proposes that they do so in three ways: first, with regard to the interpretation and application of the Canadian Judicial Council's Ethical Principles for Judges ("Ethical Principles"); second, in understanding the "public" in whose confidence the legitimacy of the judiciary depends; and third, in considering the test for removal of a judge under the *Judges Act*.[1]

2. The Intervener Coalition urges the Committee to approach its mandate with due appreciation for the historical, legal and social inequalities that have challenged, and continue to challenge, public perceptions of judicial impartiality and integrity in the application of sexual assault law. This Inquiry occurs at a time of heightened public concern about sexual assault and sexual harassment in a variety of contexts. Regardless of its outcome, the Committee's reasons in this Inquiry stands to enhance public confidence in the judiciary by demonstrating that the experiences of marginalized groups with the justice system will inform the assessment of judicial conduct.

3. The Intervener Coalition makes no submissions as to the merits or outcome of the present Inquiry.

II. RELEVANT CONTEXTUAL CONSIDERATIONS

4. The Intervener Coalition submits that a judicial inquiry into a judge's conduct related to the application of a particular area of law must be informed by an appreciation of the history and evolution of the legal rules, principles and doctrines in that area of law, and of the experiences of the public under it. In particular, such an inquiry must be informed by the principles of equality and fidelity to the rule of law.

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[1] RSC 1985, c. J-1

A. Reform of Sexual Assault Law in Canada

5. The law of sexual assault in Canada has undergone dramatic reform over the last 35 years, as legislators and the judiciary have recognized that the traditional common law principles governing both the substantive law and rules of evidence in sexual assault discriminated against sexual assault victims, the vast majority of whom are women and girls,[2] particularly Indigenous women and girls.[3]

6. The Intervener Coalition has had an opportunity to review the redacted version of the report prepared by Janine Benedet, dated August 5, 2016, and provided to it on August 12 ("Benedet Report"). The Intervener Coalition relies on the redacted report, and does not intend to reiterate the information in it.

7. Prior to the 1980s, sexual assault law discriminated against sexual assault complainants because its key legal principles were based on inaccurate and harmful stereotypes about women. As noted in the Benedet Report, major changes to sexual assault laws occurred in the 1980s, and further reforms were implemented in the 1990s.[4] These reforms sought to rid sexual assault law of the taint of discrimination and to restore public confidence in the operation of this area of the criminal justice system.

8. The Benedet Report identifies three such reforms to sexual assault law: the narrowing of the defense of consent, elimination of the doctrine of recent complaint, and adoption of strict limitations on inquiry into a complainant's prior sexual history.[5]

9. The reforms to sexual assault law regarding consent were intended to combat the inaccurate and damaging assumption that any woman who does not want sexual contact will clearly and unequivocally communicate her non-consent in ways understandable to her assailant.[6] The sexual assault reforms in the 1990s, in particular, emphasized that before it will operate as a defense, a sexual assault complainant's consent must be shown to be voluntary. The *Criminal Code* reforms set out a non-exhaustive list of circumstances in

[2] For instance, in 2007, only three percent of those charged by police with sexual assault offences in Canada were women, yet 86 percent of those victimized were women and girls. For 2012, police-reported data indicates that over 90% of the victims of sexual assaults were women while in nearly all incidents of sexual violence against women, the accused perpetrator was male. Perrault, S. (2013) Police Reported Crime Statistics in Canada, 2012. Component of Statistics Canada catalogue no. 85-002-X *Juristat*; Sinha M. (2013), Measuring Violence against Women: Statistical Trends. Component of Statistics Canada catalogue no. 85-002-X *Juristat*

[3] In 2014, for instance, Indigenous women, in particular recorded a sexual assault rate of 115 incidents per 1,000 population, much higher than the rate of 35 per 1,000 recorded by their non-Indigenous counterparts (General Social Survey 2014).

[4] Benedet Report at pp. 7-10

[5] Benedet Report at pp. 8-10, pp. 18-20

[6] Benedet Report at pp. 18-19, pp. 18-20

which consent is not considered to be voluntary, including situations of incapacity or where there is an abuse of trust, power or authority. These reforms also required that, before an accused could rely on the defense of honest but mistaken belief in consent, the circumstances had to show that there was an "air of reality" to that belief.[7] The effect of these reforms was to move the law on consent away from permitting an accused to rely on his subjective belief that the complainant had not said "no," and towards requiring some evidence that she had said "yes."[8]

10. This reform to the law of consent was critical, as it directly confronted and displaced the sexist assumptions embedded in the former law that women want forced sexual activity, and that it is legally acceptable for a man to force himself on a woman based on such a belief. These assumptions ignored the exercise of power and dominance that characterizes sexual assault, and disregarded the fact that fear of harm during a sexual assault can influence the conduct of the individual being assaulted. By effectively requiring a sexual assault complainant to physically resist, exposing herself to additional harm in order to counter a defense of honest but mistaken belief, the former law treated women's decisions about sexual activity as inherently lacking credibility as compared to those of men.

11. The law now emphasizes that consent must be voluntary and expressed; silence or submission do not evidence consent:

> Lack of resistance to sexual advances could have very different meaning for the two interacting individuals. It might be *[sic]* reflect reactions such as shock, confusion, shame, fear of repercussions or refusal, and others...some may engage in sex for fear they will be raped if they don't participate voluntarily. It is important to understand the unique dynamics, distinct emotional trauma, and realities of sexual assault.[9]

12. A second important reform was the abolition of the common law doctrine of recent complaint.[10] This doctrine was premised on the demeaning and inaccurate myth that a woman who had actually been assaulted would raise the alarm against her assailant as soon as possible. It treated sexual assault complainants as women inherently lacking credibility. The doctrine did not apply to victims of crimes other than sexual assault, and was not grounded in any objective or evidence-based understanding of how individuals experience

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[7] *R v. Osolin*, [1993] 4 SCR 595
[8] Benedet Report at pp. 19-20; *R v. Ewanchuk*, [1999] 1 SCR 330 at paras. 47-51
[9] *R v. Ururyar*, 2016 ONCJ 448 at paras. 404-410
[10] See Benedet Report at pp. 5, 8, 21; *R v Batte* (2000), 49 OR (3d) 321 (CA) at paras. 140-141, 145

sexual assault. Factors such as trauma, harm and fear – of their assailants and of what is entailed in reporting an assault – often prevent victims from making what the law considered to be "timely" complaints. Previous experiences of colonialism, trauma, cultural and religious mores, geographic isolation, and stigmatization also contribute to delayed reporting.[11]

13. As a result of the abolition of the doctrine of recent complaint, it is now impermissible to draw an adverse inference about a complainant or discredit her account based on a stereotype that she should have reported her assault in a timely manner.[12] Judges applying the current law may refer to the actual impact of trauma on sexual assault complainants in order to elucidate the anti-discrimination purposes of the reforms. For example, in *R. v. Uruyar*, the trial judge wrote:

> Too often we have preconceptions, and misconceptions about how we believe a person who has been sexually assaulted to behave... Understanding responses to sexual assault is critical for those whose expectation of "normal" responses to a traumatic event may not be evident in an individual complainant...those who have experienced sexual assault develop varying coping strategies that not only differ by individual by [sic] may also differ within the same individual by day.[13]

14. The third reform discussed in the Benedet Report is the "rape shield" law, which ended the extensive inquiry into a sexual assault complainant's prior sexual history that was permitted by the common law.[14] The two myths described by Professor Benedet had especially damaging effects on Indigenous women, who were widely perceived as immoral and sexually available simply because they were Indigenous. Since these reforms, the Supreme Court has affirmed that excluding misleading evidence, encouraging more reporting of sexual offenses, and protecting the security and privacy of complainants are part of ensuring the integrity of the trial process.[15]

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[11] Despite being the most serious offence measured by the General Social Survey, only 5% of sexual assaults were brought to the attention of the police in 2014, a proportion not significantly different from that recorded a decade earlier (8%). Unlike other crimes of violence, it is for the most part unreported. Moreover, of the cases that are reported, a disproportionate number go unsolved. The Auditor General Report (2004) further identifies significant disparities within and between law enforcement jurisdictions in responding to sexual violence. Similar disparities emerge in the court system, including documented instance of rape myths. As Benoit et al. (2014: 8-9) write: "Claire L'Heureux-Dubé, former justice of the Supreme Court of Canada, has identified a list of rape myths and stereotypes that skew the legal treatment of sexual assault claimants and therefore conviction rates." The Missing Women Inquiry in British Columbia specifically identifies the barriers faced by Indigenous women in reporting experiences of sexualized violence.

[12] *R v WR*, [1992] 2 SCR 122; *R v DD*, [2000] 2 SCR 275

[13] *R v Ururyar*, *supra* at paras 417-418

[14] Benedet Report at pp. 9-10

[15] *R v Seaboyer*, *R v Gayme*, [1991] 2 SCR 577 at para. 27; *R v Darrach*, [2000] 2 SCR 443 at paras. 23-25; Elaine Craig, Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions (2016), 95 Cdn Bar Rev. 2 at 7

15. Prior to these reforms, doctrines governing sexual assault law were founded on an inaccurate and damaging perception that only chaste women of good social standing who fought back and immediately called the police could be victims of rape. The vast majority of sexual assault victims do not conform to this stereotype, particularly if their identities include characteristics such as racialization, Indigeneity, age, disability, sexual orientation and gender identity, and/or are shaped by conditions of poverty. The reform of this aspect of sexual assault law expressly recognized that the law had failed sexual assault victims by denying them equal benefit and protection of the law. The Preamble to the 1992 amendments to the sexual assault provisions of the *Criminal Code* stated that the reforms were intended to "promote and help ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Charter* by changing the law to remove discriminatory myths that denied sexual assault complainants equal protection and benefit of the criminal justice system."[16]

16. As noted in the Benedet Report, however, empirical research demonstrates that rape myths, and the discriminatory beliefs upon which they are based, continue to permeate the criminal justice system.[17]

17. The Intervener Coalition submits that the Committee must approach its mandate with due regard for the context and purpose of reforms to sexual assault law. The context and purpose of these reforms demonstrate that legislators, the judiciary and the public have underscored the need to interpret and apply the law of sexual assault in ways that affirm the dignity, equality and right to bodily integrity and safety of all sexual assault complainants.

B. The Experience of Sexual Assault for Marginalized Groups

18. Gender is not the only characteristic affecting complainants' experiences of the law of sexual assault. The idealized "virtuous woman" upon whom the now-discredited sexual assault doctrines were premised was herself a product of a socio-economic reality that is even more resistant to change than legal doctrines. As documented in the Benedet Report, sexual assault has a disproportionate impact on individuals who are marginalized because of

[16] Preamble to the 1992 amendments: *An Act to Amend the Criminal Code* (Sexual Assault) (Bill C-49) SC 1992, c. 38
[17] Benedet Report at p. 21

discriminatory stereotypes based on characteristics such as race, Indigeneity, disability and sexual orientation.[18]

19. Indigenous women and racialized women, young women, women with disabilities, and women living in poverty continue to experience disproportionate levels of sexual violence despite the reform of sexual assault law.

20. This is particularly true for Indigenous women. Statistics Canada's 2014 General Social Survey on Victimization ("GSS") concluded that "violent victimization rates were especially high among Aboriginal females." Indigenous women had a recorded sexual assault rate of 115 incidents per 1,000 population as compared to non-Indigenous women's rate of 35 per 1,000. Indigenous women continue to suffer from damaging racialized stereotypes of sexual availability and discriminatory beliefs denying their rights to bodily integrity and respect.[19]

21. Women with disabilities also experience high rates of sexual violence. One Canadian study suggests that 39% to 68% of women with mental disabilities will be sexually assaulted before they reach the age of 18. Women with certain disabilities are stereotyped as non-sexual beings and therefore not "real targets" of sexual assault, whereas women with other disabilities are stereotyped as being sexually promiscuous.[20]

22. In *R. v. DAI*, the Supreme Court of Canada recognized that "those with mental disabilities are easy prey for sexual abusers."[21] It recognized that this sexual abuse often went unpunished because people with mental disabilities were precluded from testifying based on the presumption they did not understand the concept of truth. The Court wrote that setting too high a bar for the testimonial competence of those with mental disabilities jeopardizes one of the fundamental aspects of the rule of law, namely, that the law be enforceable. Allowing discriminatory attitudes to pervade the law of sexual assault

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[18] Benedet Report, p. 18
[19] Statistics Canada, 2014 General Social Survey on Victimization ("GSS")
[20] Fran Odette, "Sexual Assault and Disabled Women Ten Years after Jane Doe", in Elizabeth Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 173-174, 180-181; Janine Benedet & Isabel Grant, "Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases" (2012), 50 Osg. Hall LJ 1 at 8-9; Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Beliefs" (2007), 52 McGill LJ 243
[21] *R v DAI*, 2012 SCC 5 at para. 66, per McLachlin CJ

effectively immunizes an entire category of offenders from criminal responsibility and further marginalizes already marginalized individuals.[22]

23. Young women and adolescents experience disproportionately high rates of sexual violence. Statistics for 2009 indicated that the rate of sexual assault against women aged 15 to 24 is nearly twice the rate for women aged 25 to 34, and is over 3.5 times the rate for women aged 35 to 44 and 45 to 54.[23]

24. Homeless persons are almost twice as likely to be victims of violent crime, including sexual assault.[24]

25. With respect to sexual orientation, the U.S. Centre for Disease Control's National Intimate Partner and Sexual Violence Survey (NISVS) for 2010 revealed that approximately 1 in 8 lesbian women (13%), nearly half of bisexual women (46%) and 1 in 6 heterosexual women (17%) have been raped in their lifetime.[25]

26. Inadequate attention to the experiences of such marginalized groups to sexual assault may be a factor in the troubling statistics demonstrating that sexual assault reporting rates have continued to decrease. In 2004, Statistics Canada reported that only 8% of the 460,000 Canadian women who were victims of sexual assault that year reported the crime to the police, as compared to the 10% reporting rate to which Parliament referred when enacting *Criminal Code* amendments over ten years earlier. Ten years later, the GSS found that only 5% of sexual assaults were reported to police in 2014.

27. The Intervener Coalition submits that judicial interpretation and application of sexual assault laws and, by extension, this Committee's consideration of what it means to act judicially when conducting a sexual assault trial, should be informed by an appreciation of the experiences under these laws of individuals whose identity is shaped by multiple characteristics historically associated with discrimination or marginalization.

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[22] *R v DAI*, *supra* at para. 67, per McLachlin CJ
[23] Samuel Perreault & Shannon Brennan, Criminal Victimization in Canada, 2009. Component of Statistics Canada catalogue no. 85-002-X *Juristat*
[24] Benedet Report at p. 40
[25] NISVS: An Overview of 2010 Findings on Victimization by Sexual Orientation (www.cdc.gov/violencepreventions/nisvs)

28. The concept of "intersectionality" or intersecting grounds of disadvantage, has been judicially recognized.[26] It calls attention to oppressions that arise from a combination and interrelationship of grounds of discrimination and disadvantage that cumulatively produce an experience distinct from that of any one form of discrimination on its own. Intersectional approaches highlight the complexity and individualized experience of discrimination occurring along many axes of identity by recognizing the individual's place within historical, social and political contexts. An intersectional analysis of substantive areas of law can expose deeply entrenched inequalities in legal rules and their application, and lead to more equal benefit and protection of the law.[27]

29. In the present context, an intersectional analysis provides a robust understanding of how multiple characteristics associated with marginalization increases not only a woman's likelihood of experiencing sexual violence, but also the ways in which her experience will be received and assessed by the authorities.[28]

30. For example, a young, Indigenous, homeless woman's characteristics of age, sex, ancestry and socio-economic status will negatively affect her experience of sexual assault and sexual assault law at all stages of engagement with the criminal justice system. She will face an increased susceptibility to being assaulted in the first place. If and when she reports an assault, her treatment throughout the process will reflect doubts about her credibility and her viability as a witness. That experience cannot be divorced from the intersection of racism, sexism and other forms of marginalization resulting from both contemporary, systemic forms of racism and sexism, and the legacy of the residential school system, colonial and neo-colonial attitudes about her worth and humanity, the impact of losing traditions and the dislocation of her community.

31. Canadian courts have accepted that systemic racism exists within the criminal justice system and that it affects both those accused of crimes and the victims of crime.[29] This systemic racism must be considered in light of other systemic inequalities in society, such as those associated with poverty, disability and sexual orientation, and how these inequalities

[26] *Withler v. Canada (Attorney General)*, 2011 SCC 12; *Djubok v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 497; *Inglis v. BC (Minister of Public Safety)*, 2013 BCSC 2309

[27] See Hon L. Smith and W Black, "The Equality Rights" (2013) 62 *Supreme Court L. Rev. (2d)* 301; D. Reaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 *Osgoode Hall L.J.* 113

[28] For an example of an intersectional analysis of race and gender in sexual assault law, see K. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour", (1991) 43 *Stanford L. Rev.* 1241

[29] *R v. Williams*, 1998 1 SCR 1128 at para. 54; *R v Gladue*, 1999 1 SCR 688 at para. 65; *R v Ipeelee*, 2012 SCC 13 at paras. 60, 71

are reflected in the criminal justice system. "Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights."[30]

32. Academics have argued that despite reforms to criminal law, perceptions that the criminal justice system itself is still tainted by discriminatory attitudes and that sexual assault complainants will not be treated with the dignity, care and compassion afforded to other victims of crime are responsible for very low reporting rates. As Holly Johnson writes:

> ...widespread discriminatory attitudes toward sexual violence and the way these attitudes play out for women and for criminal justice processing of these cases continue to minimize women's experiences, exonerate violent men, and distort public understanding of this crime.[31]

33. Johnson also reports that women who do disclose they have been sexually assaulted are often confronted with skepticism, doubt and outright blame for provoking or not resisting the attack. Some of the myths women face include that "women lie about being raped; that women are not reliable reporters of events; that women are prone to exaggerate; and that women falsely report having been raped to get attention."[32] Thus, the success of legislative reforms intended to foster women's equality within and access to the criminal justice system has been impaired by the persistence of discriminatory stereotypes in criminal justice processing of sexual assault cases.[33]

34. The same stereotypes also persist in some judicial reasoning. Emma Cunliffe's analysis of several sexual assault cases demonstrates that "substantive equality reasoning has not yet infused judicial approaches to fact determination in sexual assault cases, and that individual complainants are not yet fully protected against the operation of myths and stereotypes when consent or credibility are at stake."[34] Judges have also called attention to this problem:

> 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 trauma... Put simply, the criminal justice

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[30] *R v Ewanchuk*, *supra* at para. 69 (per L'Heureux-Dubé J).
[31] Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Sheehy, *supra* at 617
[32] Odette, "Sexual Assault and Disabled Women 10 Years after Jane Doe", in Sheehy, *supra* at 174
[33] Johnson, *supra* at 622; *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Gen. Div.) at para. 13; Benedet Report at 41
[34] Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality" (2012) 57 Sup Ct L Rev (2d) 295 at paras. 2 and 11

> system must not allow myths and stereotypes about sexual assault victims to influence outcomes.
>
> The judiciary is responsible for ensuring that impartiality is not compromised by these biased assumptions... Regrettably, that did not occur in this case. The trial judge's finding about the complainant's post-incident conduct is not the only instance of prohibited stereotypical reasoning (of how the complainant should have been expected to react.)[35]

35. The Committee on the Elimination of Discrimination Against Women (CEDAW), the body of independent experts that monitors implementation of the *Convention on the Elimination of All Forms of Discrimination Against Women*, to which Canada is a signatory, also noted in its 2015 report that judicial stereotyping persists in signatory countries:

> Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.[36]

36. The Intervener Coalition submits that appreciation of the actual experiences of sexual assault complainants with this aspect of the criminal justice system, including their greater vulnerability to sexual assault, the history of their unequal treatment by the authorities, the continued under-reporting of sexual assault as compared to other offenses, and the evidence of the persistence of discriminatory stereotypes must inform the Committee's deliberations in this matter.

III. HOW CONTEXT INFORMS JUDICIAL INQUIRIES

A. Principles Applicable to the Committee's Mandate

37. In reviewing judicial conduct, the Judicial Council and the inquiry committees it constitutes are "responsible for preserving the integrity of the whole of the judiciary." The focus is not on the individual judge whose conduct is impugned, or even the individuals appearing before the judge at the time of the misconduct. The key consideration, rather, is ensuring judicial integrity is maintained and that public confidence in the judiciary as a

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[35] *R v JR*, 2016 ABQB 414 at paras. 24-25; see also *R. v. Ururyar*
[36] CEDAW General Recommendation No 33, "General recommendation on women's access to justice"

whole is not eroded by the improper judicial conduct.[37] This regime for the review of judicial conduct is essential to maintain public confidence in the judiciary.[38]

38. The Intervener Coalition submits that the central concern of the Committee must be with promoting public confidence in the judiciary, which is necessarily a forward-looking inquiry.

39. In assessing the judicial conduct at issue in this Inquiry, the Committee will be informed by the Ethical Principles, which articulate fundamental social principles that the public expects will guide judicial conduct. The Intervener Coalition has identified four Ethical Principles of particular importance in this Inquiry: "Judicial Independence", "Integrity", "Equality" and "Impartiality". The Intervener Coalition submits that these principles must be interpreted in light of the history of sexual assault law in Canada and the experience of marginalized groups under that law, as set out below.

40. An independent judiciary is essential to the rule of law in a democratic society. The independence of the judiciary is a constitutional right of litigants; it assures them that judges will determine the cases that come before them without actual or apparent interference from anyone.[39]

41. "Judicial Independence" emphasizes that an independent judiciary is "indispensable to impartial justice under law", and that judges should "uphold and exemplify judicial independence". In particular, it recognizes that high standards of judicial conduct are the source of public confidence upon which judicial independence depends. Judicial independence and the rule of law depend on public confidence in the judicial system, and in turn, public confidence in the judicial system depends upon adherence to the rule of law.

42. The Ethical Principles underscore that judicial independence and the rule of law depend on public confidence in the judicial system:

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[37] *Re Therrien*, 2001 SCC 35 at para. 58, Gonthier J.; *Moreau-Bérubé, supra* at paras. 58-59

[38] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 (CanLII), [2002] 1 S.C.R. 249 (*"Moreau-Bérubé)* at paragraphs 58-59

[39] *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56 at page 69; *Gratton v. Canadian Judicial Council*, 1994 CanLII 3495 (FC), [1994] 2 F.C. 769 (T.D.) at page 782, cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 at paragraph 329

> 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.... 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.[40]

43. As the Ethical Principles recognize, judicial independence includes fidelity to law. Fidelity to law does not mean a judge cannot err in the interpretation or application of the law, or question the continued soundness or validity of legal rules or doctrines. Fidelity to law does, however, require respect for the law: a judge must interpret and apply the relevant legal principles conscientiously, based on an objective and informed understanding of them. Judicial disrespect for law occurs when a judge demonstrates antipathy towards the law.[41]

44. Public confidence in the judiciary depends upon judges adhering to the rule of law; the public needs to see that laws are not just words on a page. The public and those who work in the legal system, such as Crown and defence counsel, must be able to rely upon judges to apply and uphold the law. The direct consequence of judicial disrespect for the law is erosion of public confidence in the justice system and therefore the rule of law.

45. In sexual assault cases, judicial disrespect for or antipathy towards the law has especially harmful consequences for the rule of law. This is because of the long history of systemic discrimination that has been embedded in substantive sexual assault law and the treatment of sexual assault complainants. The fact that lawmakers have expressly acknowledged this problem and acted to correct it, coupled with the evidence that it persists in the operation of the criminal justice system and in the underreporting of these offenses, reveals that public confidence in this aspect of the justice system needs to be enhanced.

46. A judge's disdain or disrespect for current sexual assault law and an unwillingness to give it full application and effect in favour of reaffirming now-discredited discriminatory myths and stereotypes undermines the rule of law and the principle of judicial independence, and as a consequence, public confidence in the judicial system. Since judges hold positions of public trust and authority, such conduct fosters public perceptions that current sexual assault law is not worthy of respect.

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[40] "Judicial Independence", Commentary, para. 5
[41] "Judicial Independence", Commentary, para. 3

47. The value of "Integrity" states: "Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary." Thus, like judicial independence, judicial integrity also emphasizes the centrality of public confidence in the justice system. It requires judges to conduct themselves so as to be "above reproach in the view of the reasonable, fair minded and informed person".[42] Thus, the task of the Committee in a particular inquiry "requires consideration of first, how particular conduct would be perceived by reasonable, fair minded and informed members of the community and second, whether that perception is likely to lessen respect for the judge or the judiciary as a whole."[43]

48. "Equality" requires that judges conduct themselves "so as to assure equality according to law". This principle requires judges to carry out their duties without discrimination, to be aware of, and understand, differences arising from such characteristics as gender, race, sexual orientation or disability, and to disassociate themselves from comments that are sexist, racist or otherwise.[44]

49. The principle of equality is also essential to maintaining public confidence in the judicial system. The Commentary notes that conduct that is based on stereotype, myth or prejudice or otherwise shows insensitivity to, or disrespect for, persons or groups, would tend to imply that persons before the court would not be afforded equal consideration and respect. It is incumbent upon judges to avoid discriminatory myths and stereotypes in exercising the duties of their office, so as to "ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge."[45]

50. Judges whose conduct perpetuates sexual stereotypes and rape myths fail to respect and promote the principle of equality. They also compound the original trauma of the sexual assault for survivors. They provide a basis for the fears of sexual assault complainants that the justice system, including the courts, may not treat them with the dignity and respect afforded to victims of other crimes, which dissuades them from coming forward to report. More generally, any suggestion that rape myths and stereotypes are legally acceptable

[42] "Integrity", Principles, para. 1
[43] "Integrity", Commentary, para. 3
[44] "Equality", Principles, paras. 1, 2, 4
[45] "Equality", Commentary at paras. 3 and 4

contributes to a climate in which women, and particularly marginalized women, face unequal and unacceptable risks of being subjected to sexual violence.

51. "Impartiality" stresses that judges "must be and should appear to be impartial." Impartiality includes a judge's demeanour in treating everyone before the court not only with courtesy and respect, but also without the suggestion of prejudgment. Judicial impartiality is closely related to judicial independence, but is a separate and distinct requirement, and relates to the need to not only act in an unbiased manner, but also appear to be unbiased:

> Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word impartial...connotes absence of bias, actual or perceived....[46]

52. Judicial impartiality and equality are intertwined:

> Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. 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.[47]

53. Statements made by a judge that are insulting, improper or suggest prejudgement damage the appearance of impartiality, which not only affects the particular litigants before the court, but the confidence of the public at large in the judiciary generally.[48]

54. Consideration of all of these Ethical Principles demonstrates that the central concern of the Committee must be with promoting public confidence in the judiciary. While judges must be seen to act independently, which excuses errors of law, it does not permit disrespect for the law. Acting with judicial integrity and impartiality requires conducting oneself in a manner that attracts public respect and engenders public confidence in fair treatment. More specifically, judges have a positive obligation to understand differences arising from characteristics such as gender, race and disability in order to ensure that they do not engage in stereotyping and thereby undermine public confidence in an impartial judiciary that accords everyone equal protection and benefit of the law.

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[46] *R v Valente*, [1985] 2 SCR 678 at 685; "Impartiality", Commentary at para. A.2
[47] "Equality", Commentary at para. 2
[48] "Impartiality", Commentary at para. B.1

B. Public Confidence and the Reasonable Person

55. In assessing the impact of judicial conduct on the public confidence, the Committee must consider who is the "public" and who are the "reasonable" persons that comprise it? The Intervener Coalition submits that these concepts, so central to judicial legitimacy, must encompass all of the characteristics that equality and human rights law, the Constitution and the Ethical Principles recognize as important facets of individual identity. Equality law has taught us that abstract legal concepts such as the "reasonable person" conceal hidden norms of gender, race and other social characteristics.[49] Applying a "public confidence" or "reasonable person" test without consciously adverting to the socioeconomic and sociocultural norms that they tend to represent is especially problematic in the context of a judicial inquiry because it may lead an inquiry committee to overlook some of the very stereotypes against which the Ethical Principles caution.

56. The Intervener Coalition submits that an effective way to expose hidden stereotypes in the context of a judicial inquiry is to expressly acknowledge that the "public" whose confidence in the judiciary must be promoted, and the "reasonable person" whose perception of judicial impartiality must govern, includes members of the constituency most directly affected by the impugned judicial conduct. This is not to say that the Committee must put itself in the shoes of a sexual assault complainant with the characteristics of the complainant in the trial that has occasioned the present complaint. Rather, the "public" in whose confidence the legitimacy of the judiciary rests includes sexual assault complainants with diverse socioeconomic and sociocultural characteristics. Where, as here, there is a well-documented lack of public confidence in an area of law and the justice system responsible for administering it, the Intervener Coalition submits that it is particularly important that the Committee carry out its mandate cognizant of the need to restore and promote the confidence of this marginalized sector of the public in this area of law.

57. With respect to the "reasonable, fair-minded and informed person" from whose perspective a judge's integrity and impartiality must be assessed, the Intervener Coalition submits that application of this concept must include awareness of and commitment to

[49] See for example., Wilson J.'s approach to revealing the implicitly gendered "reasonable person" in the law of self-defence in *R v Lavallee*, [1990] 1 SCR 852 at paras 33 and 34; *Egan v Canada*, [1995] 2 SCR 513 at 546, per L'Hereux-Dubé, dissenting: "...it would be ironic and, in large measure, self-defeating to the purposes of s. 15 to assess the absence or presence of discriminatory impact according to the standard of the "reasonable, secular, able-bodied, white male." See also *Law v Canada*, [1999] 1 SCR 497 at para. 61 (recognizing implicit biases in some applications of the "reasonable person" standard).

principles of gender and other forms of equality and knowledge of the history of sexual assault law reform, under-reporting and persistent stereotyping of sexual assault complainants.

58. As the Supreme Court of Canada wrote in *R v RDS*:

> Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.[50]

59. Thus, the "informed and reasonable observer" must include the perspective of survivors of sexual assault, and marginalized women generally, as they are entitled to a judiciary that rejects sexual myths and stereotypes and understands and respects equality. All women are entitled to access to justice and to a fair and balanced justice system that promotes the principles of substantive equality.

C. The Committee's Assessment of Judicial Conduct

60. The recognized test for removal of a judge is:

> Whether the alleged conduct is so manifestly and profoundly destructive of judicial impartiality, integrity and independence that the confidence of litigants or of the public in its justice system would be undermined, rendering the judge incapable of performing the duties of his office.[51]

61. As stated by Justices L'Heureux-Dubé and McLachlin in *R v RDS*:

> Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was

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[50] *R v RDS*, [1997] 3 SCR 484 at para. 94
[51] *Moreau-Bérubé*, *supra* at para. 51

> predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.[52]

62. The test requires the Committee to determine how the conduct under scrutiny will affect the public's perception of that judge's exercise of impartiality and its confidence in the operation of the justice system in that area of law in the future:

> Gonthier J. noted in *Therrien, supra*, at para. 147...that "before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office." In making such a determination, issues surrounding bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence.[53]

63. The question before the Committee is not whether the particular judge is likely to repeat the conduct. It may be obvious from what the judge says or from other circumstances that this will not happen. The Committee's task is to consider the future consequences arising from what has occurred. The judge's intention, whether in engaging in the conduct or in expressing regret for it, is not relevant in this context. Just as in human rights law, where intent is not an element of proof of discrimination, the central concern is with the impact of the conduct on a marginalized group.[54] Here, the Committee must consider the impact of the conduct on the perceptions of litigants who may appear before the judge in the future and on the public's perception of the judiciary.

64. With respect to the perceptions of litigants, the Committee may ask itself whether the reasonable, fair-minded and informed person who appears before the judge perceives that he or she will receive an impartial hearing from an arbiter who demonstrates respect for the law and whose judgment is not compromised by pre-judgment or discriminatory stereotypes. With respect to public perception, the Committee may ask itself whether the judge's conduct evidenced bias or impartiality, or created an apprehension of bias or perception of

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[52] *R v RDS, supra* at para. 120
[53] *Moreau-Bérubé, supra* at para. 51
[54] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at pp. 173-176; *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd.*, [1985] 2 SCR 536 at 551; *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219 at 1233-1235

impartiality, such that the judge "could no longer expect to enjoy the public trust in a fair and independent judiciary."[55]

65. Evidence of actual bias or evidence that the judge does not acknowledge the conduct as inappropriate is a factor to consider. However, the absence of such evidence is of limited relevance because public confidence in the fair administration of justice is undermined where the public perceives the judge's conduct as partial and undermining equality before and under the law.

66. It is also relevant to consider whether a judge's conduct in respect of sexual assault law has the effect of re-introducing and re-enforcing the very harms and biases that Parliament and the courts have attempted to correct. The outcome of this Inquiry itself will have an impact on public perception on the law of sexual assault, as well as the values of women's equality and access to justice.

67. As noted earlier, the stated purpose of the sexual assault law reforms was to promote and help ensure the full protection of the equality rights guaranteed by s. 15 of the *Charter*. The courts, and the judges who preside in them, play a vital role in ensuring that equality guarantees are promoted and enforced. These equality guarantees are aimed at improving the position of marginalized groups within Canadian society. When the judiciary is perceived to be condoning conduct that demonstrates antipathy to equality, there is a clear and significant negative impact on public confidence, bearing in mind that the "public" includes those groups most vulnerable to sexual assault and therefore most likely to experience judicial conduct of a sexual assault trial.

68. For sexual assault survivors, any continued judicial reliance on discriminatory myths and stereotypes, and more importantly, any affirmation that such conduct is acceptable under the Ethical Principles, will provide an objective foundation for their fears that the criminal justice system is still biased against them, and that they are not equally protected under the law. More generally, this is a time of heightened public concern about sexual assault and sexual harassment and debates about these issues have revealed the persistence of discriminatory assumptions about the sexual availability of women based on characteristics such as age, Indigeneity, disability, sexual orientation and socioeconomic status.

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[55] *Moreau-Bérubé, supra* at para. 70

69. In this context, the Committee's conduct of this inquiry, its reasons and its recommendations will attract considerable public attention, providing an invaluable opportunity to clarify the role of the judiciary in relation to the rule of law in an area where lawmakers have expressly reformed the law to rid it of long-standing discriminatory doctrines. The Committee can have a significant impact on public perceptions about the extent to which sexual stereotypes are acceptable in the context of judicial reasoning. Thus, the outcome of this Inquiry will have a broad impact on the conduct of sexual assault trials in the future, and contribute to society's discussions about gender equality and how the justice system responds to sexual assault and complaints.

IV. CONCLUSION

70. The Intervener Coalition respectfully submits that, whatever the outcome of this inquiry, the Committee should ensure that the public, including those who may experience sexual assault, can be confident that judges will act and be seen to act independently and impartially, with integrity and fidelity to law, in providing the complainant, the accused, counsel and witnesses with equal protection and equal benefit of the law of sexual assault.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 26th day of August, 2016.

Per: _____

Nitya Iyer and
Alison J. Gray
Counsel for the Intervener Coalition

V. TABLE OF AUTHORITIES