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Women's rights and minorities' rights in Canada. The challenges of intersectionality in Supreme Court jurisprudence

by

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Abstract

After a discussion of the impact of the principle of equality, entrenched in the Charters approved in Canada since the 1867 British North American Act, this essay then focuses on the related Supreme Court's adjudications. A brief analysis of the case-law concerning gender equality is followed by the discussion of cases of Aboriginal and Muslim women with the aim of assessing whether intersectionality represents for these groups of women a source of double discrimination. Brief concluding remarks discuss the challenges deriving from the different options for accommodating the principle of equality with cultural rights.

Keywords

Canada, Supreme Court, principle of equality, gender equality, Aboriginal women, Muslim women

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1. Introduction: framing intersectionality in the Canadian context

In the Fall of 2017 the eyes of the world turned on Canada for two, seemingly unrelated, instances: the first was the occasion of the New York 'He for She' meeting (20 September 2017), where Canadian Prime Minister Justin Trudeau spoke passionately in favour of gender equality, declaring his willingness to raise feminist sons. Then, on 18 October 2017, Quebec approved Bill 62, 'An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies' actually prohibiting face-covering in public places, with a (not-so-implicit) reference to the Islamic veil. These events suddenly interrelate when we underline that they both deal with historical discrimination against women, and that both of them apparently wanted to support women's emancipation. Nevertheless, behind this theoretical support, one should ask what kind of feminism had Trudeau in mind when he advertised his willingness to raise his sons as feminists as well as whether prohibiting the veil is a real tool for achieving women's emancipation.

Answering these questions is impossible without first recognizing that for a long time feminism has been a white, middle-class, heterosexual, Christian-formed, and able-bodied prerogative unable to tackle the fact that 'gender does not exist in isolation but intersects with other identities like race or class, as well as embedded in practices and representations which, basically, refer to the organizing system of power relation in society' (Bonifacio 2012: 3).

In reality, the idea of gender intersectionality has only slowly developed among scholars since Crenshaw's seminal article demonstrated how Black women have been discriminated against by US Courts, failing to understand that specific issues concern this group of women because of both race *and* gender, and that specific remedies should therefore be implemented (Crenshaw 1989). The words of the district court in *De Graffenreid v. General Motors* 1976 epitomised such incomprehension: 'the plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new "super-remedy" . . . Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both'.[I]

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This single-axis frame for anti-discrimination policies and gender discourses has been abandoned only very recently, a product of a progressively rising awareness that – paraphrasing Crenshaw again – neither representatives of cultural, ethnic and/or religious groups, nor feminists, can ignore the intersectional experiences of those whom the movements claim as their respective constituents.[II]

This rising awareness impinged on the evolution of the Canadian legal system in matters of gender equality. In effect Canada faces two challenges, the first is the measures for overcoming the well-stablished patriarchal assumption of male superiority as everywhere else, while the second is the need to ensure the collective rights of Aboriginal peoples[III] and of minorities increasingly inhabiting the country due to migration[IV] with gender mainstreamed human rights without infringing the tenets of the constitutional democracy. The presence of these groups – Aboriginal peoples and ethnic and religious minorities – has been governed according to policies that have progressively shifted from attempts of assimilation, as for instance demonstrated by the content of 1947 Canadian Citizenship Act, to the recognition of pluralism. Such a recognition was notably realised with the 1982 Canadian Charter of Rights and Freedom, aiming at the preservation and the enhancement of the multicultural heritage of Canadians (sec. 27).[V] The Charter was also relevant for definitively stating the principle of equality (sec. 15) together with a specific provision entrenching gender equality (sec. 28). Despite these protections at the constitutional level, and the participation of Canada in the main international Charters promoting gender equality, when its implementation crosses with cultural, religious and traditional issues Canadian institutions still face difficulties in approaching them in respect of intersectionality, in order not to disperse the protection of gender rights in the bigger issues concerning collective rights.

Therefore, this essay, relying on Gender Rebellion Feminism, defined by Paludi as feminism focusing on the 'interrelationship among inequalities of sex, race, ethnicity, social class and sexual orientation' (Paludi 2010: xv), discusses some cases of double discrimination predicated on the intersectionality with race or religion. Notably, after an analysis of the case-law on equality – demonstrating the difficulties in overcoming a patriarchal approach when adjudicating on gender equality – the cases of Aboriginal and religious women are discussed. In this analysis, the approval of the 1982 Charter has been

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considered as a turning point for the legal framework as well as for the Supreme Court's understanding of gender equality.

2. The principle of gender equality in Canada

Due to its origins as a British colony, from the establishment of the Confederation with the British North American Act – BNA (1867) to the 1931 recognition of self-governance inside the British Commonwealth, Canada has followed British legislation, according to which the status of women was also governed. Indeed, as far as the recognition of political and civil rights went, and in line with British legislation, women could theoretically (there is a lack of evidence of their actual participation) be included among 'persons' allowed to vote. However, according to the provisions of the 1791 Constitutional Act, this was subject to their demonstrating that they owned a property of a certain value; a status achievable only by widows and single women, but not by married women, as the law provided an automatic transfer of the ownership to the husband at the moment of the wedding. Similarly, since 1809 Quebecois women owning properties were entitled to vote. The language of the 1840 Act of Union was neutral as well, and since its entry into force women probably started to be more politically active – and therefore object to men's request for a clarification of the legislation in their exclusive favour – as demonstrated by a complaint raised by a defeated Reform candidate who protested that seven women voted for his Tory opponent in Canada West (formerly Upper Canada) in 1844. Indeed, at the provincial level electoral laws were progressively amended in order to clearly exclude women from those eligible to vote.

This decision was completely contrary to the tradition of the majority of Aboriginal communities, which based participation in decision-making according to rules indifferent to gender, and more akin to the 'relevance' of each individual inside the community. Nevertheless, the approach of excluding women from the public sphere was completely consistent with the tradition of that time in the colonial power. Therefore, the BNA, although ruling that voters' eligibility was a provincial matter, denied women the right to vote by establishing it only for British (or naturalized) males over 21 years old.

World War I partially changed societal behaviour, and women's participation in the military effort was rewarded with a recognition of the right to vote in some Provinces, the

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first of which was Manitoba on 28 January 1916. Then, following the decision taken in London, on 20 September 1917, at the national level female relatives of any person in the military who was serving or had served with Canada or Great Britain during World War I, and also women serving in the military, were allowed to vote. On 25 May 1918, the Westminster Parliament gave women the right to vote in a Dominion election, provided they were British subjects having attained legal capacity (21 years) and otherwise met the same qualifications entitling a man to vote. Therefore, in 1920 the Dominion Elections Act was amended to recognise all Canadians, male or female, over 21 as eligible voters in federal elections. Slowly, all Provinces adapted their legislation to the new federal law, the last being Quebec on 25 April 1940 (Cleverdon 1974). As described in detail below, this evolution was not accepted without resistance, and in 1929 a specific decision of the Privy Council was needed to recognise women's voting eligibility.

In spite of this recognition of gender equality in the enjoyment of the right to vote, women belonging to minorities continued to be considered as minors for a long time: Asian women were entitled to vote only on 16 June 1948, Inuit on 12 June 1951, and First Nations on 31 March 1960.[VI] It should be noted that Aboriginal women suffered discrimination even when compared with their Asian peers. In fact, Asian women obtained the right to vote in 1948 together with Asian men, whilst Aboriginal women were excluded from the recognition as eligible voters granted to enfranchised men – including any person of Aboriginal descent – with the 1885 Dominion Franchise Act (in force until 1898), and had to wait for the abolition of race discrimination in order to gain the right.

In a parallel process, in the Provinces' reserved matters, a domino effect progressively introduced other tools for (white) women's emancipation, without necessarily impacting on race discrimination.[VII] Legislation allowing for six weeks maternity leave was first passed in British Columbia in 1921; in 1922 Alberta passed the Married Women's Property Act, giving married women the same legal capacity as men and thus allowing them to maintain their ownership rights even after the marriage; and in 1951 Ontario approved the Fair Employment Practices Act and the Female Employee's Fair Remuneration Act, introducing the principle women's movements claimed for 'Equal Pay for Equal Work'. Concurrently, Federal interventions introduced in 1925 the recognition of the right to divorce on equal grounds than men[VIII] and extended in 1953 to all the citizens of the Federation the principles already entrenched in the Ontario's labour law in 1951.[IX]

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Despite the recognition of rights and the enactment of laws (almost) equalising women to men in the field of private law, at the time of the royal assent for the entry into force of the Canadian Bill of Rights (1960), sex still was not fully conceived of as an element of possible discrimination. Indeed, although sec. 1 of the Bill of Rights recognized that rights should be protected 'without discrimination by reason of race, national origin, colour, religion or sex', the then Minister of Justice Davie Fulton clearly stated in front of the ad hoc committee established for studying the Bill, that a distinction existed between the equality before the law on the basis of sex and the difference in status between men and women. Notably, he anticipated that sec. 1 'would not be interpreted by the courts so as to say we are making men and women equal, because men and women are not equal: they are different' (Canada Special Committee on Human Rights and Fundamental Freedom Minutes 1960). This approach entailed obvious consequences at the provincial level. For instance, when Ontario's 1962 Human Rights' Code entered into force, discrimination on the grounds of race, creed, colour, nationality, ancestry or place of origin were prohibited, but not on the grounds of sex.

Acknowledging the persistence of gender discrimination, in 1967 Prime Minister Lester Pearson established a Royal Commission on the Status of Women, a precursor to the Minister Responsible for the Status of Women established in 1981.

In tackling the elimination of all discrimination in the country, the 1977 Canadian Human Rights Act definitively included gender among those discriminations prohibited by law, paving the way for the content of sec. 28 of the 1982 Canadian Charter of Rights and Freedom. This section actually represents a specification of the prohibition of any discrimination already stated at sec. 15, for whose introduction in the Charter women strongly lobbied, and finally succeeded (MacLaren 1991).

3. The Supreme Court's adjudication on women's rights

Established in 1875, the Supreme Court was bound by the decisions of the Privy Council until 1933, for criminal appeals and 1949, for civil appeals. As for women, the existence of this further level of adjudication has proved quite beneficial, in opposition to the original patriarchal approach of the Canadian Supreme Court. Indeed, although in 1876 British common law rulings stated that 'women are persons in matters of pains and

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penalties, but are not persons in matters of rights and privileges', it was the Privy Council which finally intervened in recognizing women as persons in the legal sense. This came about in 1929, on the occasion of the Privy Council decision in *Edwards v. AG for Canada*, better known as the 'Persons' case, and originated from a Prime Minister's request to the Supreme Court in the interpretation of sec. 24 of the BNA, in order to clarify whether the world 'person' mentioned in the section included female individuals. In spite of the Canadian Court's decision in 1928 – conceiving women as less qualified than men and therefore ineligible to sit in the Senate – the Privy Council recognized their equality and eligibility rights thus derived (Sharpe and McMahon 2007).[X]

Since the Supreme Court started its role of court of last resort, and despite the legislative recognition of equality, its adjudication has, for a long time, prejudiced women due to the test used for assessing the existence of a gender-based discrimination. Indeed, the Court relied on the idea that consistency of treatment would be enough to ensure equality, assuming that whenever women and men are treated the same procedurally, they would enjoy the same opportunities; furthermore, the Court assessed discrimination only when a clear preferential treatment for a category, used as a term of comparison, could be proven (Baines 2005b). The fallibility of such a test paradoxically emerged in the *Bliss* case,[XI] when the Court refused to recognise the discrimination existing against pregnant women in the 1971 Unemployment Insurance Act. The Court relied on the fact that 'any inequality between the sexes in this area is not created by legislation but by nature', and took non-pregnant women as a group of comparison for assessing the discrimination, instead of men. In the words of Justice Ritchie, writing for the Court, 'if sec. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women'; evidently the distinguished judges, and the whole Court, forgot that pregnancy is a condition that affects only women.

After the entry into force of the 1982 Canadian Charter, the Court seemed to adopt a more protective approach for women's rights, probably relying on jurisprudence more akin to the general protection of human rights that it was developing during that period.[XII] For instance, in 1987, a case originated from the lobbying activity of women to the Canadian Human Rights Commission for a recognition of the discriminative policies of the Canadian National Railway Company (CNR)[XIII] in hiring women. Here the Supreme Court, citing sec.

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41, 2a of the Canadian Human Rights Act, ruled that the CNR had to fulfil an employment equity program to break the cycle of systemic discrimination that included exclusionary hiring and promotion policies, as well as the harassment of female employees. This decision is noteworthy because the Court also stated that laws may be discriminatory, notwithstanding the formal equal treatment they entail, if they produced unintended adverse effects on protected groups or individuals. This reflected an approach to discrimination already advanced in *O'Malley*,[XIV] when the Court recognized that discrimination may also derive from unintended effects of neutral practices, and recognized the effectiveness of affirmative actions in overcoming systemic discriminations. Focusing again on sexual harassment, in 1989 the Court explicitly declared it as a form of discrimination exacerbating the gender inequalities already entrenched in the work-field.[XV] With reference to the actions aimed at restoring the gender imbalance, the Court also justified the protection of female hockey as a necessary measure to open athletic activities to women.[XVI]

The Court overruled its previous decisions on the grounds of this new approach to gender discrimination, and radically reconsidered the rationale leading to them. Consequently, in *Brooks*,[XVII] the Court overruled the rationale on which *Bliss* was based by stating that complainants are not bound to demonstrate discrimination through a comparison with a more favoured group. In *Turpin,*[XVIII] the Court discussed the similarly situated test which led to the judgement in *Bliss*, and recognized that such tests failed to address some women's claims and to ensure their constitutionally granted equality, because they posited situations in which men have no comparable needs. In 1999 the Court finally conceived of substantive equality as a direct derivation of sec. 15, which, in the opinion of the Court, has the aim 'to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equality recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration'.[XIX]

Furthermore, after the Charter entered into force, the Court protected women's autonomy of the person. Indeed, in the *Morgentaler* case,[XX] the Court stated that the prohibition of abortion could have endangered women's security, and only allowed provincial health laws to cover its regulation, clarifying the impossibility of their prohibiting

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it. It is worth mentioning here the opinion of the only woman sitting in the bench, Justice Bertha Wilson, which also focused on the limits the prohibition of abortion represented for women's right to liberty, defined in terms of personal autonomy over important decisions intimately affecting an individual's private life. However, some scholars argued that the Court annulled the law only because the parameters for allowing women to interrupt their pregnancy were too narrow, therefore criticizing the fact that the Court does not 'guarantee women the constitutional right to control our own bodies; from this perspective, societal transformation is not yet a reality' (Baines 2005b: 56). The issue of abortion was also discussed in *R. v. Sullivan*,[XXI] when the Supreme Court had to deal with the case of two midwives convicted of criminal negligence for having caused the death of a foetus, and finally decided on acquittal as a foetus is not a person for the purposes of the Canadian Criminal Code.

Although, according to the Court, stereotyping is among the elements against which sec. 15 stands, gender stereotypes have affected its adjudications, at least in some cases[XXII] concerning 'collaborative divorce'[XXIII], where the Court demonstrated 'an expectation that women should stick their agreements, no matter how unfair the consequences may be' (Boyd 2004). This patriarchal perspective was epitomised in the decision that the Court took in *Murdoch*[XXIV] in 1975, when it denied a share of a farm property on a couple's separation – despite the fact that the wife used to take care of it on her own for five months of the year – arguing that the wife was simply performing activities typical of any ranch wife, and which were not sufficient to create a beneficial interest in the property. Patriarchal echoes still continued to be evident twenty years later in the *Thibaudeau* decision.[XXV] Here the Court refused to declare a violation of the principle of gender equality in the provision of the Income Tax Act, forcing a mother to pay income tax on her child support payment, despite the fact that her ex-spouse could have deducted payments from his taxable income.[XXVI]

In a final comment on Supreme Court's jurisprudence on gender equality, it should be also noted that in several cases a claim for gender equality was raised by men. Here, the position of the Court seemed to support men's claims, notwithstanding the possible consequences on women. A neutral approach, for instance, was used in the case of a man challenging the legislation protecting birth mothers from forcefully acknowledging biological fathers on birth certificate and including their surnames in the child's surname.

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The Court decided that this protection, although aimed at ensuring women's self-determination, discriminated against men in so far as it denied their aspirations to affirm biological ties and familial bonds across generations.[XXVII] Quite controversially, a gender-blind approach was used in adjudicating the claims on gender equality of men accused of sexual assaults[XXVIII] (Baines 2012: 95).

4. Women belonging to minorities: the cases of Aboriginal and Muslim women

At the time of colonization, the rights and status of Aboriginal peoples was at first regulated through the 1763 Royal Proclamation, which guaranteed certain rights and protections for those peoples generically individuated as 'Indians' and established conditions for the government to acquire their lands. Evidently, this regulatory approach made the understanding of who could be considered as an Indian fundamental. The question was first regulated by the 1850 'Act for the Better Protection of the Lands and Property of the Indians in Lower Canada', which defined as criteria for being an Indian the fact of having 'Indian blood', and therefore of belonging to the 'Body or Tribe of Indians'. Accordingly, non-Indians who 'intermarried with such Indians', people whose parents (one or both) would also have been considered Indians, and 'all persons adopted in infancy by any such Indians' were considered to be Indian. The recognition of the existence of these peoples did not mean a recognition of their fundamental right to exist and to have extended rights. Several laws aimed at enforcing their assimilation have, instead, been approved since the 1867 BNA, such as the Gradual Enfranchisement Act of 1869, which 'reinforced' the measures for enacting the voluntary enfranchisement already provided by the Gradual Civilization Act of 1857. These two acts were then consolidated in the 1876 Indian Act, establishing the Department of Indian Affairs, whose first action was the replacement of the Aboriginal structures of governance with tribes' councils (or group's councils), thus starting the erosion of Aboriginal traditions, and fostering assimilation.[XXIX] Although Inuit were never subjected to the Indian Act, since 1939 the federal government issued programs for (often forcefully) transforming them from their nomadic original tradition into a sedentary people, and for progressively assimilating them.[XXX]

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With the entry into force of the 1982 Canadian Charter of Rights and Freedom, as said, sec. 15 introduced the principle of non-discrimination; sec. 25 also constitutionalised Aboriginal rights by clarifying that the content of the Charter cannot abrogate any of the acquired rights of Aboriginal peoples (Harder and Patten 2015). This group comprises Inuit, Metis and First Nations, according to the definition of autochthone population introduced in sec. 35 of the 1982 Constitutional Act, whose content also impinges on the placement of the treaties between the Canadian authorities and Aboriginal communities in the hierarchy of sources of law. Indeed, according to sec. 35 such treaties now had the rank of constitutional norms, instead of that of ordinary laws as previously (Pentney 1988). It should finally be highlighted how the relevance of these provisions, with regard to the governance of Aboriginal peoples, shifted from a reasoning based on otherness/exclusion to one based on the implementation of equality (Ceccherini 2016).

The consequences for women of regulations on Aboriginal peoples, as well as the effectiveness of their implementation with regard to gender equality, are discussed below, in order to underline the possible risks deriving from the intersectionality between gender and race in the case of Canadian Aboriginal women.

Almost coevally to the Charter, in 1988 Canada also approved the Multiculturalism Act, which definitively affirmed multiculturalism as a foundational principle of the State, in accordance with an approach followed under the Premiership of Pierre Trudeau of the 1970s. In the same period, the Supreme Court intervened in its interpretation of multiculturalism, with reference to religious pluralism as a hindrance to the establishment of favourable treatments only for some religions.[XXXI] These interventions impinged on the evolution of the Canadian system, as they involved a new approach toward minorities, aimed at respecting their collective rights as a form of protection for the cultural heritage they represent for the country.

Despite this framework establishing equality among religions and among believers, the intersectionality between gender equality and religious freedom raised critical challenges for Canada, and the way they were faced still gives rise to potential critique. Although questions of religious freedom are not limited to this group of women, only the case of Muslim women is considered here, as the consequences of intersectionality are exacerbated by an international environment intensifying attention toward Islamic symbols and religious practices.

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4.1. Aboriginal women

Ethnically discriminated against for a long time along with their male mates, Aboriginal women started to suffer gender discrimination with the approval of the 1951 amendment of the Indian Act. Here, provisions confirmed the exclusion of women from voting in tribes' councils, and ruled on the definition of the status of Indian by entirely attaching it to the marital condition. Moreover, a non-status woman who married a status-man would gain status herself, but a status woman who married a non-status man lost her status, even when she was widowed or abandoned by her husband. As a partial compensation for the loss of their membership, women received a per capita share of the tribe's capital funds (Weaver 1974). Evidently, the aim of preserving tribes' assets and reserves from the possible threat represented by non-Indian men marrying with Indian women given as a justification of the loss of status was nullified by the provision of such a compensation draining groups' assets, to the point that the Royal Commission on Aboriginal Peoples[XXXII] considered the 1951 amendment as a 'legal fiction', apparently introduced for ruling the phenomenon of group exclusion and instead legalizing women's discrimination.

In 1969 Trudeau's government released a White Paper, devoting special attention to the conditions of Aboriginal peoples, including women, and declared the intention of abolishing the Indian status and the Department of Indian Affairs and of entirely assimilating Aboriginals into Canadian society. Obviously, Aboriginals harshly contrasted the idea of assimilation, and issued a Red Paper, the content of which led to the withdrawal of the proposals in the White paper.

The 1977 Canadian Human Rights Act did not affect the conditions of Aboriginal peoples due to the notwithstanding clause of sec. 67, and only in 1985, with Bill C-31, were remedies introduced with regard to the issue. This Act allowed women who lost their status through marriage to be reinstated as Status Indians and as group members; as for their children Bill C-31 confirmed their status too, but at the same time granted groups two years to enact their own membership codes. A group's Code, therefore, could have excluded children – but not their mothers – from the group only when enacted prior to June 1987; otherwise, children were directly entitled to a full group membership. In an attempt to incentivize the recognition of the status of children, the Act linked the assessment of funding allocations to tribes, through the Indigenous and Northern Affairs

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Canada (INAC), to the demographic consistency of tribes (i.e. counting the number of status members of each group). Nonetheless, discrimination was maintained in the fact that the child of a woman whose status was reinstated under Bill C-31 would not be able to pass the status over to her/his children if the other parent was a non-status, according to the so-called 'double mother' rule. With the aim of remedying these persisting discriminations, and to align the Human Rights Act with the 1982 Charter, the 2008 amendment to the Act removed sec. 67 and clarified that regard given to Aboriginal legal traditions and customary laws should not be interpreted as giving the possibility of infringing the principle of gender equality.

The discrimination women suffered due to the regulation of their status until the 2008 reform still, however, affect their children. Indeed, in an on-going attempt to introduce further reform to the Indian Act, the government has individuated the issues: the cousins' issue, concerning the differential treatment of first cousins whose grandmother lost her status having married with a non-status man before 17 April 1985; the siblings' issue, concerning the differential treatment of children born out of wedlock of status fathers between 4 September 1951 and 17 April 1985; the issue of omitted minors, concerning the differential treatment of those minor children having lost their status when their mother (re)married a non-status men after their birth. The federal government is still dealing with all these issues.[XXXIII]

The discriminative policies enacted by the federal government during the pre-Charter period were supported by discriminative decisions in the Supreme Court, the most notorious of which was issued in the 1974 *A.G. Canada v. Lavell* case.[XXXIV] Here, the Court held that the provision tying a woman's status to that of her husband cannot be considered as a gender discrimination, despite evidence deriving from the fact that status-men kept their status if they married out. In fact, the Court refused to recognize a discrimination, confirming the decision of the first instance tribunal, because the group of comparison was individuated in non-status women, rather than on status-men. The issue of status was subsequently appealed at the United Nations Human Rights Commission, which in 1981 declared that Canada had violated article 27 of the International Covenant on Civil and Political Rights with reference to the case of Sandra Lovelace,[XXXV] a Maliseet woman who had lost her status through marriage and was thus prevented by the government from returning to her community. Since then, a more protective approach has developed,

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involving lower Courts too, which prompted the on-going reforms of the Indian Act. This was the case of the British Columbia Court of Appeals in the 2009 *McIvor*[XXXVI] case, which highlighted existing discrimination against the descendants of Aboriginal women married to non-status men, and of the Québec Superior Court judge in the 2015 *Descheneaux*[XXXVII] case, who denounced the subtler forms of sexual discrimination persisting under the Indian Act.

Besides the issue of having their status recognized on an equal footage to men, Aboriginal women had to face the challenge for having their interest groups conceived of as being equal to those not explicitly lobbing for women. This was the case in *Native Women's Association*,[XXXVIII] when the Native Women's Association of Canada (NWAC) was excluded from the directly State-funded participation in the discussions on the Beaudoin-Dobbie Committee Report.[XXXIX] The NWAC therefore claimed that the State funded only male-dominated groups, violating both freedom of expression and the right to equality, and applied to the Federal Court of Appeal, which refused to issue an order of prohibition but recognized that the federal government had restricted freedom of expression of Native women, infringing sec. 28 of the Charter. Nevertheless, in its decision, the Supreme Court stated that the exclusion of NWAC from directly funded associations did not infringe sec. 28, as it does not impose on the government a positive obligation of consulting or funding anyone; moreover, the Court did not see any infringement of gender equality judging that the NWAC failed to demonstrate that the convened groups were unable to represent women's points of view.

Aboriginal women also failed to obtain recognition of their gender equality in decisions concerning the acquisition of properties, a topic on which the discriminative approach of the Court with broad reference to Canadian women has been already discussed. Notably, in *Derrickson,*[XL] the Court rejected the appeal of a wife claiming one-half of the interest in the properties her husband owned according to the land reserve provided by sec. 20 of the Indian Act, affirming that the Family Relations Act on which the woman based her claim could not apply to lands on reserve. However, recognizing the inequalities deriving from this exclusion, the Court introduced the possibility of awarding compensation in order to adjust the division of family assets between the spouses. Relying on this reasoning, in *Paul v. Paul*,[XLI] the Court also dismissed the appeal of a wife claiming possession of the family residence her husband owned according to sec. 20 of the Indian Act.

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Finally, it should be noted that some hindrances to the implementation of gender equality for Aboriginal women may derive from the establishment of means for alternative dispute resolutions, which in the case of Aboriginal peoples takes the form of 'circles' – generally composed of the victim and the accused, their relatives, a judge, the elders of the community and the remaining members of the community – aimed at providing restorative justice (Wall 2001). This system has been criticized for the consequences it may entail on the protection of women from domestic violence, as the composition of the circles may reduce their self-confidence and their ability to bear witness to the violence (Goel 2000), as clearly appeared during the circle hearings that the Court of Quebec discussed in *R. v. Naappaluk*.[XLII] The Supreme Court addressed this point in the 1999 *R. v. S.G.N.* case, stating that, although the creation of circles in matters of criminal law is consistent with Canadian law, they cannot represent a means for reducing the protection that the Canadian legal system grants to Aboriginal women.[XLIII] On these grounds, in *R. v. Morris,*[XLIV] concerning the case of a man who beat and raped his partner, the Court of Appeal of British Columbia clarified that circles can be established only once the community clearly condemns crimes against women as well as any form of their subjugation. As a consequence, the Court overruled the decision of the first instance tribunal, based on the determinations of the circle, because of the 'toxic atmosphere' during the meeting of the circle.

4.2. Muslim women

As said, religious communities in Canada benefit from a legal framework based on multiculturalism, which accords them great margins of discretion in ruling some aspects of their lives according to religious precepts. In the recognition of a role for these precepts, however, lies the risk of endangering the implementation of gender equality and therefore specific attention must be paid to adjudications balancing the protection of religious freedoms with the protection of gender rights.

Although the risks deriving from intersectionality between gender and religion concern women belonging to all religious communities, [XLV] it was decided here to pay specific attention to the cases of Muslim Canadian women, as the risks for their gender equality are twofold. On the one side, they may be endangered by a strict interpretation of the religious precepts of Islam, which could confine them to an unescapable position of subjugation.

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On the other side, a lack of protection may derive from stereotypes against Islamic culture consolidated since the affirmation of Orientalism (Said 1979) – which had consistent impacted on gender stereotypes (Yeğenoğlu 1998) – and through the wrongful interpretation of the theory of the clash of civilizations (Huntington 1993 and 1997) that has conceived of all Muslims as potential terrorists.

The possibility of an overly strict interpretation of religious precepts with reference to women in the field of family law was at the centre of the complaints against the establishment of a Muslim Court of arbitration, according to the 1991 Arbitration Act of Ontario. Indeed, when in November 2003 the Islamic Institute of Civil Justice was established for applying Islamic Law to the fields of family laws and inheritance, several Civil Society Organizations (CSOs) rose up against the risks for women. Despite the results of the Boyd Report,[XLVI] the Provincial Government of Ontario intervened in 2006 by amending the Arbitration Act, and prohibited the establishment of religious courts. The Provincial Government seemed to understand the possible risks deriving from this kind of Court, where judges may decide to adjudicate following the general principles of law, gender equality included, or alternatively according to a strict interpretation of religious precepts, which in the case of an Islamic Court would have meant a literal interpretation of the Quran apparently justifying women's subjugation, beating and never-ending control by male relatives. Given that no appeal can be made against the arbitration, with only minor exception, this control could have resulted in pressure on women in accepting to submit their claim to religious courts, thus losing the possibility to access other – and possibly more consistent – means for overcoming their status of discrimination.

Conversely, gender stereotypes deriving from a consolidated fear of otherness may affect Muslim women when it comes to the most discussed symbol of their religious belonging: the veil. As the veil is clothing that only Muslim women are committed to wear – under certain interpretations of Islamic precepts – a clear case of discrimination in the enjoyment of the freedom of expression of religious behaviours, deriving from the intersectionality between religion and gender, can occur.

This issue was notably raised for the first time in 1994, when several Quebecois schools decided to expel Muslim girls because of their refusal to remove the *hijab* when attending classes. Finally, in trying to regulate the issue, in 2010 the Provincial Government introduced Bill 94 to the Assembly in order to prohibit the full-face veil in public

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institutions. Notwithstanding both the reaction of those who hailed it as a modernist victory – such as the Quebec Council on the Status of Women or the Canadian Muslim Congress – and of those who conceived of it as having a specific discriminatory intent – such as the Canadian Council on American-Islamic Relations or the Canadian Council of Muslim Women – it is worth underlining that the Bill could have been attacked for unconstitutionality on the grounds of an infringement of the freedom of religion, and also for putting Muslim women under serious threat of gender discrimination (Fournier and See 2014: 275-292). It was probably for this reason that the Bill died on the order paper. However, Bill 62, mentioned above, was approved in October 2017 and has brought the ban back to life. Following the same strategy already put forward in France in 2010 and in Belgium in 2011, full-face coverings have been prohibited in the name of state neutrality, without explicitly mention Islamic full-face veils. Such an omission is quite controversial, as it may turn into a prohibition of wearing big sunglasses, whilst at the same time permitting other religious signs to be shown, such as crucifixes, kippahs or the turban.

While we are still waiting to see the role the judiciary will eventually play in the implementation of Bill 62, it is worth to remembering that, at this stage, the issue of the veil was only discussed for the first time before the Supreme Court in 2012,[XLVII] when, in a rape trial in Ontario 'N.S.' claimed her right to take the witness stand wearing the veil. 'N.S'. was a woman accusing her aunt and her cousin of rape, who refused to remove her veil at the request of the defendants, who claimed that this garment would have concealed her facial expression, thus jeopardizing their right to full answer and defence. After a colloquium with her, the prosecutor forced 'N.S.' to remove the veil, taking the fact that she already removed it for her driving license photo as proof of her moderate adherence to the religious precept. As a consequence, 'N.S.' appealed to the Superior Court of Justice and then to the Court of Appeal of Ontario, which both refused to take a decision and affirmed the need of a case-by-case decision to be taken by the prosecutor, although inviting the latter to deeply evaluate women's religious behaviour. Consequently, 'N.S.' appealed to the Supreme Court for a final decision. However, the Court confirmed that this kind of decision cannot be taken according to a general rule and has to be assessed on a case-by-case evaluation pertaining to the prosecutor.

The issue of the veil became relevant again in 2015, when a woman claimed her right to wear the *niqab* when taking her citizenship oath.[XLVIII] Notably, she challenged the content

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of sec. 6.5 of the manual for taking the oath, which since 2011 provided a duty for the citizenship candidates wearing face coverings to remove them during the ceremony in order to avoid the termination of their application for citizenship, on the grounds that the removal of the veil was not justified by reasons of security or of identity certification. Despite the government's argument that removal was not mandatory, as the manual only offered guidelines, the Federal Court invalidated section 6.5 on the assumption of its mandatory nature, and affirming that it interfered 'with a citizenship judge's duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath'.[XLIX]

4.3. Concluding remarks

Cultural traditions imbued with patriarchal traits represent the main hindrance to a full implementation of the principle of gender equality, even when this is a clearly stated aim in fundamental Charters, as has occurred in the case of Canada. Furthermore, this principle is notably endangered when it has to be balanced with the need to accommodate ethnic and religious minorities, whose understanding of it may vary greatly from ideas affirmed in liberal democracies. In Canada, this meant a rising tension between two prominent principles of the legal system: equality and multiculturalism. In fact, the way conflicting equalities should be reconciled has represented a highly debated point among scholars (Deveaux 2000: 523-525). Some have argued that liberal democracies should accord protection to cultural rights providing that compliance with them does not infringe the respect of individual autonomy and of equality (Okin 1997 – Kymlika 1997: 29-30); others have maintained that discrimination deriving from cultural traditions should be respected (Carens 1990) and ultimately only modified through dialogue and confrontation among groups and communities (Parekh 1996). Both these points of view, however, may be accused of approaching the topic from a very selfish and 'western' perspective, according to which there is a specific perception of equality to be protected, despite the fact that they propose two different paths to provide such protection. At the same time, it could be hard to abandon the perception of equality which might recognise a community's option of carrying out discrimination in name of its specific culture, or even justify crimes with the so-called cultural defence,[L] given the fact that equality is a quintessential principle for ensuring the peaceful coexistence among people. In this regard, the cited cases of

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Aboriginal circles, and religious arbitration courts, demonstrate the risks potentially deriving from the inclusion of traditional means of adjudication in the legal framework, as they could be detrimental for groups representing a minority inside the minority, such as women or children.

When dealing with the accommodation of cultural traditions with the principle of equality, it should not be ignored, however, the adverse (and unexpected?) impact that the Euro-North American approach produced. Again, the case of Canadian Aboriginals is noteworthy. Before colonization, these communities grounded gender differences on behavioural differences instead of biological ones (Native Women's Association of Canada 2010: 61), and were therefore deeply affected by the process of progressively equalizing Aboriginal to European women, whose discrimination instead derived from a patriarchal position grounded on the pretence of biological differences. Disregarding this sociological element, Canadian authorities favoured the substitution of women with men in farming activities, maintaining that this would be more consistent with traditional European gender roles, and that the devotion of women to agriculture in Aboriginal communities was due to their subjugation to 'lazy' men only devoted to hunting. In fact, Europeans completely misunderstood that farming was considered a skilled activity by Aboriginals, and that it granted women a position of equality with men inside the community. Therefore, substituting men to women in farming actually lessened women's relevance and fostered inequalities (Native Women's Association of Canada 2010). This misunderstanding about Aboriginal gender roles resurfaced when the Supreme Court, deciding on the governmental duty to consult with Aboriginal peoples and accommodate their interests, ignored the recognized role of women in decision-making councils of Aboriginal communities, and failed to ensure their duty to consult with Aboriginal women.[LI]

Despite failures like the one mentioned above, the Supreme Court's activism has proved fundamental in the evolution of the interpretation of the principle of gender equality in the Canadian legal framework, from an initial lack of a consistent test for gender discriminations – i.e. in *Bliss* – to the awareness of the relevance of intersectionality (Jamieson 1978) – i.e. in *Lavel*. Notably, the Court has not only recognized that 'equality, when constructed as sameness, perpetuates race and gender oppression' (Monture and Okanee 1992: 237), but has also understood the risks of discrimination deriving from intersectionality between gender and religion.

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In this regard, gender stereotypes play a crucial role in fuelling the paradoxical idea that women are simultaneously agents of religious fundamentalism and victims of a male-dominated religious society. The cases concerning the veil are illuminating, depicting women as stubborn opponents to the removal of the veil when required by public authorities despite the fact that it is just a patriarchal imposition.

In order to overcome this paradox, the Canadian Court again had to face the *vexata questio* of the respect of formal equality in front of the respect of substantive equality, the former being satisfied from the imposition of an equal appearance between men and women and among women – everyone has to accede to the public service without showing symbols of religious belonging – whilst the latter being satisfied by the recognition of women's right to follow their religious (or any other) trappings, with of course the attendant possibility of introducing limitations when necessary in a democratic society. This clearly appeared in the (non)decision in 'N.S.', when the Supreme Court merely requested prosecutors to more carefully consider their motivations in the final decision, thus refusing to introduce a general precedent for balancing freedom of religion and rights to a defence, as it could have done following examples quoted by the Court itself. Although it is not clear whether this is an approach the Court will continue to follow, and as it entails the related risk of imposing the choice between the protection of gender rights and the guarantee of their religious rights on women (Scotti 2014), the positive effects of promoting a case-by-case evaluation should be highlighted. According to some scholars, in order to solve the issues connected to intersectionality the principle of anti-discrimination should be substituted with the principle of anti-subordination (Volpp 1996), better able to tackle the fact that what is deemed to be cultural is not undeniably accepted by all members of a community, and that every individual may have a personal interpretation of cultural precepts. On these grounds, the case-by-case analysis approach is considered beneficial, as it may allow for the effective assurance of substantive equality, avoid discrimination, and solve the possible issues raising from intersectionality. In a concrete application to the cases on the veil, therefore, the principle of anti-substitution will allow the taking into consideration of women's multifaceted identity, instead of asking them to choose between their gender belonging and their religious 'membership'.

The application of this principle, however, still deserves analysis and scholarly discussions, for the questions it still raises. For instance: taken to its extremes, could the

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case-by-case approach frustrate the certainty of the law, in its meaning of general principles valid for all? If accommodation were made through case-by-case adjudications, might this endanger weaker women unable to access Courts, as the cases of circles or of arbitrary courts in Canada already demonstrated?

As evident, the issue of gender intersectionality with race and/or religion should be handled with care, for it carries a risk of hierarchizing women, instead of ensuring a fair application of the principle of equality. Indeed, intersectionality must be conceived of as a tool for discussing discrimination with the aim of protecting women and their multifaceted identities, and not as a tool for justifying discrimination on the ground of those cultural elements that contribute to create the identity.

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[I] *De Graffenreid v.General Motors*, 413 F Suoo, 142 (E D Mo 1976) at 143.

[II] Actually the doctine has evolved even further. La Barbera, for instance, assumed that the Crenshaw approach to intersectionality should be broadened in order to be intended as an attribute of gender, assuming the latter 'inherently made up by different conditions all of which simultaneously shape gender in a non-predefined way' (La Barbera 2009).

[III] It is worth remembering that lands currently belonging to Canada, whose name derives from the Huron-Iroquois world *Kanata* (settlement), were originally sparsely inhabited by Aboriginal tribes then colonized by French and British since mid-XVIII century and unified in a Confederation with the 1867 British North American Act (BNA). Because of the colonisers' ambition of creating a white and Christian country, Canada for long time had a legal framework discriminating Aboriginal peoples. It should be clarified that the noun 'Aboriginal' is used here with reference to First Nations peoples – for long time individuated as Indians – Metis and Inuit; when different treatments were provided for them it is explicitly stated.

[IV] It has to be noted that migration flows to Canada were composed of European people until WWII, whilst later on they were mainly composed of Asian, Caribbean and Latin American people.

[V] In this evolution, a significant role was played by the Royal Commission on Bilingualism and Biculturalism, which in 1969 recommended integration, instead of assimilation, as the main policy to be fulfilled by the federal government.

[VI] It is worthy to note that, differently from Inuit and First Nations, Metis never experienced restrictions in their right to vote.

[VII] The process however needed several years, as emerges from the consideration that the first recognitions of spouses' equality occurred in the 1920s, but Quebec recognized it only in 1964.

[VIII] See 1925 Marriage and Divorce Act.

[IX] See 1953 Fair Employment Practices Act.

[X] See Privy Council, *Edwards v. AG for Canada*, 18 October 1929.

[XI] *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183.

[XII] See: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.); *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 (S.C.C.).

[XIII] See *Action Travail des Femmes v. Canadian National Railway Company et al.* [1987] 1 S.C.R. 1114.

[XIV] See *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd*, [1985], 2 SCR 536.

[XV] See *Janzen v. Platy Enterprises Ltd*, [1989] 1 SCR 1252.

[XVI] See *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 and *Blainey v. Ontario Hockey Association* (1988), 9 C.H.R.R. D/716.

[XVII] *Brooks v. Canada Safeway Ltd*, [1989] 1 S.C.R. 1219.

[XVIII] *R. v. Turpin*, [1989] 1 SCR 1296.

[XIX] *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 51. Substantive equality was introduced in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, but the test to be used for its safeguard is still contested by Supreme

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Court's judges (see *Quebec A.G. v. A.*, [2013] 1 SCR 61). On the evolution of the test and on its impact in cases concerning gender issue, see Baines 2012.

[XX] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

[XXI] *R. v. Sullivan*, [1991] 1 S.C.R. 489.

[XXII] See *Miglin v. Miglin*, [2003] 1 S.C.R. 303, and *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550.

[XXIII] It is based on the idea that spouses willing to terminate their marriage should find a settlement out of court. An approach that feminist scholars have criticized for the consequences this may entail on women (Bryan 1999).

[XXIV] *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

[XXV] *Thibaudeau v. Canada*, [1995] 2 SCR 627.

[XXVI] It is worthy to note, however, that the failure of the claim raised a huge debate in the country persuading the government in introducing a new and fairer legislation on the point.

[XXVII] See *Trociuk v. British Columbia*, 2003 S.C.C. 34.

[XXVIII] See *R. v. Hess and Nguyen*, [1990] 2. S.C.R. 906; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *A.(L.L.) v. Beharriell*, [1995] 4 S.C.R. 536; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

[XXIX] It can be relevant to remember that, for instance, the Indian Act and the amendments progressively introduced to it, imposed on Aboriginal children a requirement to attend schools in the non-Aboriginal cities, and forbad traditional ceremonies including dances, in a clear attempt of obliterating Aboriginal traditions among younger generations.

[XXX] The assimilationist attempt was led in a very crude way, which completely ignored Aboriginal traditions. For instance, a campaign for individuating each member of the communities by imposing a single name – against the tradition according to which Inuit may have been known by several names throughout their lives and depending on context – was led by providing them with leather discs, originally to be worn on one's person.

[XXXI] See *R. c. Big M Drug Mart Ltd*, [1985] 1RCS 295.

[XXXII] Composed of four Aboriginal and three non-Aboriginal Commissioners, it was established in 1991 with the aim of investigating and reporting back to the Government of Canada on a proposal for reforming the relationship between Aboriginal and non-Aboriginal peoples. After public hearings and research studies, the Commission released a five-volume report in 1996.

[XXXIII] Bill S-3, introduced in the Senate of Canada on 25 October 2016, is still under consideration.

[XXXIV] *A.G. Canada v. Lavell* [1974] S.C.R. 1349. *A.G. Canada v. Canard* [1975] 52 DLR 548 was also relevant in that period for demonstrating the inconsistency of several provisions of the Indian Act with the Bill of Rights.

[XXXV] *Sandra Lovelace v. Canada*, Communication n. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

[XXXVI] See *McIvor v. Canada*, 2009 BCCA 153.

[XXXVII] See *Descheneaux v. Canada*, 2015 QCCS 3555.

[XXXVIII] *NWAC v. Canada*, [1994] 3 S.C.R. 627.

[XXXIX] This was the name of the report issued in 1991 by the Special Joint Committee of the Senate and of the House of Commons appointed to consult with Canadians and report upon the process for amending the Constitution of Canada, which took into account also the rights of Aboriginal Peoples.

[XL] See *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

[XLI] *Paul v. Paul*, [1986] 1 S.C.R. 306.

[XLII] *R. v. Naappaluk*, [1994] 2 CNLR 143.

[XLIII] See *R. v. S.G.N.*, [1999] 133 BCAC 277.

[XLIV] *R. v. Morris*, [2004] 3 CNLR 295.

[XLV] It could sound quite rhetorical to quote here the *Markovitz* case, when a Jewish man refused to consent to a divorce citing religious reasons (*Bruker v. Marcovitz*, [2007] 3 S.C.R. 607).

[XLVI] When CSOs and feminist groups – included the Canadian Council of Muslim Women – asked the Government to consider the possible discriminations against women a Sharia Court would have justified, the Government appointed Marion Boyd, provincial MP and feminist activist, as rapporteur on the topic. Her report, issued in 2005, suggested that the Government not amend the Arbitration Act.

[XLVII] See *R. v. N.S.*, [2012] 3 SCR 726.

[XLVIII] See *Ishaq v. Canada (Citizenship and Immigration)*, [2015] 4 FCR 297.

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[XLIX] The Conservative government in force at the time of the decision appealed to the Supreme Court, but the Liberal government, having meanwhile settled, dropped the appeal.
[L] The possibility of cultural defense has been explicitly rejected as an option for defending the perpetrators of violence against women in the Istanbul Convention, elaborated by the Council of Europe and considered as the golden standard at the international level (see UN statement at http://www.unwomen.org/en/news/stories/2013/3/the-istanbul-convention-strengthening-the-response-to-ending-violence-against-women) as for the prevention of gender violence. It is worthy to underline that Canada participated to its elaboration as a non-CoE country, but has not yet signed it.
[LI] See *Haida Nation v. British Columbia* (Minister of Forest), 2004 SCC 73.

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