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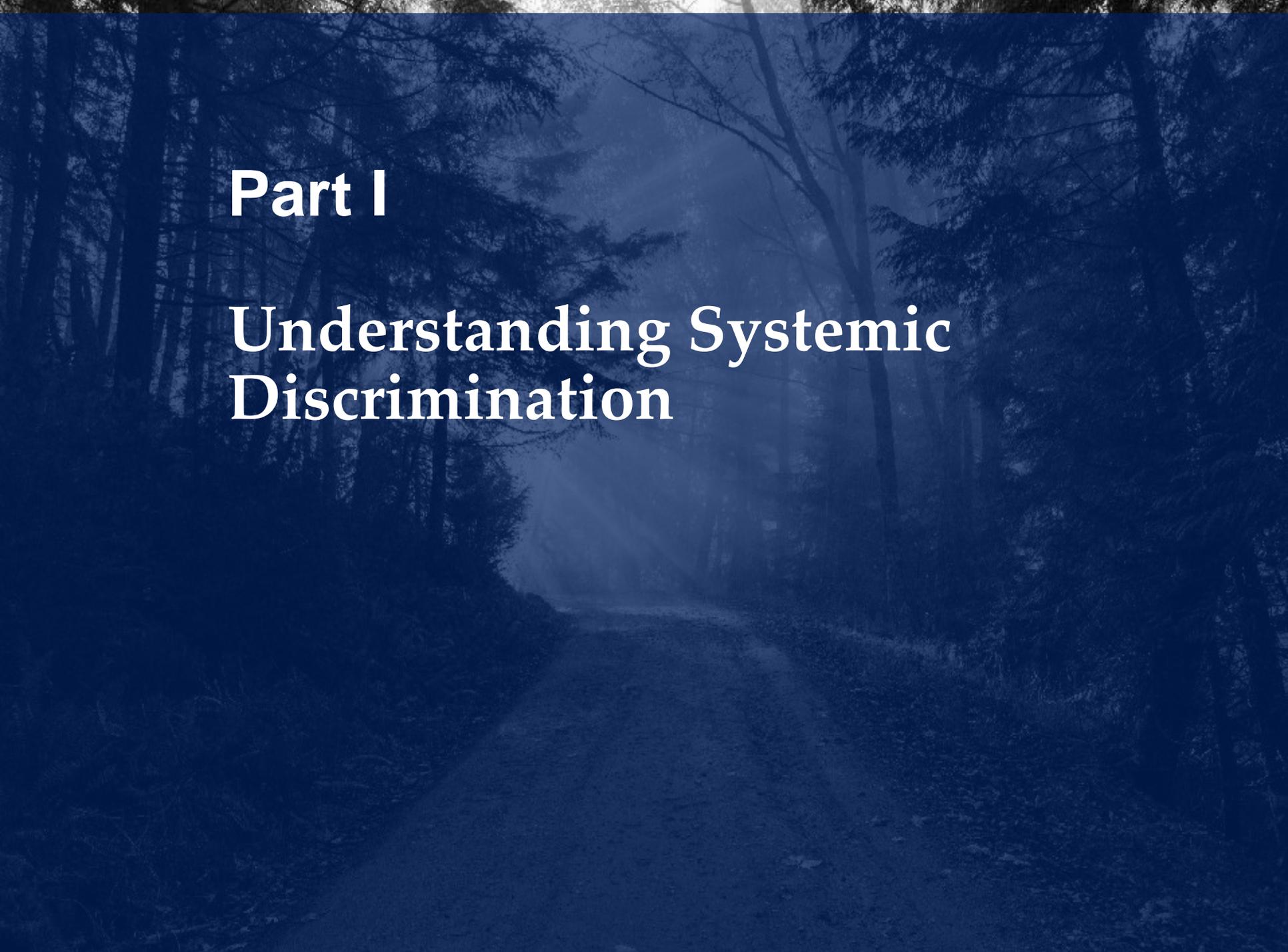
INDIGENOUS PEOPLES AND THE RIGHT TO EQUITABLE PUBLIC SERVICES: REMEDYING SYSTEMIC DISCRIMINATION

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Systemic Discrimination: Challenges and Complexities Research
Project, supported by the Social Sciences & Humanities Research
Council of Canada

Presentation Outline:

- I. Understanding Systemic Discrimination
- II. Systemic Discrimination against Indigenous Peoples in Public Services: Select Examples
- III. Remedial Pathways: Expanding Legal Liability & Developing Systemic Remedies



Part I

Understanding Systemic Discrimination

Discrimination

- **Direct Discrimination** = overt bias, stereotyping, stigmatization & prejudice, negative treatment of individuals or groups
- **Indirect Discrimination/ Adverse effects discrimination** = inequitable effects of apparently “neutral” institutional policies, practices and norms
- **Systemic Discrimination** = Dynamic and cumulative direct and indirect discrimination that is **widespread in society and institutionalized in practices, policies and culture** (institutional, inter-sectoral, lifecycle, inter-generational)

Sources of Protection

Canadian Charter of Rights and Freedoms

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

Quebec Charter of Human Rights & Freedoms

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Canadian Human Rights Act s. 5 Prohibition on discriminatory denial of good, service, facility or accommodation

International Human Rights Documents (e.g. International Covenant on Civil & Political Rights, art. 2; UN Declaration on the Rights of Indigenous Peoples, art. 2)

The Systemic Lens

“Systems thinking is a discipline for seeing wholes. It is a framework for seeing interrelationships rather than things, for seeing patterns of change rather than static 'snapshots.'

... systems thinking is a sensibility -- for the subtle interconnectedness that gives living systems their unique character.”

Peter M. Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization*, 2nd edition (Doubleday, 2006) (p. 68, Ch. 5, A Shift of Mind)

Systemic Discrimination: Changing the Paradigm



Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the **single perpetrator and the single victim**, the systemic approach acknowledges that by and large **the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society...**

Canada & Rosalie S. Abella, Report of the Royal Commission on Equality in Employment (Canada: 1984) at 9.

Systemic Discrimination: Key Intertrelated Features

- **Interactional Inequalities: Pervasive and widespread inequitable human relations** – rooted in **conscious and unconscious bias** (direct discrimination) (organizational cultures & subcultures); reinforced by inadequate supervisory or institutional processes for preventing and/redressing recurrent abuses, particularly in contexts of unequal power & privilege
- **Inequitable policies & rules: Extensive discriminatory effects of institutional policies, rules and laws** (adverse effects, indirect discrimination) (including effects of **extra-institutional realities**)
- **Cumulative effects of discrimination over time**

Systemic Discrimination: Exclusion fosters further discrimination



... systemic discrimination ... is discrimination that results from the simple operation of established procedures ... none of which is necessarily designed to promote discrimination. The discrimination is then **reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, ...** To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

CN v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 (Action travail des femmes) at 1139

Systemic Discrimination: Cumulative and Dynamic



... Discrimination may also result from a combination of complex factors and institutionalized practices that interact in such a way as to produce a global exclusionary effect on members of protected groups.... The discrimination is “systemic” in that it arises from the cumulative and dynamic interdependence of different variables.

Commission des droits de la personne du Québec c. Commission scolaire régionale Chauveau (1993) CanLII 7 (QHRT) 83-84

Systemic Discrimination: Long-term & Rooted in History & Society



Systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time.

Public Service Alliance of Canada v. Canada (Department of National Defence), [1996] 3 FCR 789 (Federal CA) at para 16.

Systemic Discrimination & Structural Injustices



Attawapiskat, 2011

Structural Injustice: Inter-sectoral & Intergenerational



Structural injustice ... exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them.

Iris Marion Young, *Responsibility for Justice* (Oxford, 2011), p 52

Identifying Systemic Discrimination: A Contextual Approach

- Micro Level: Experiential Knowledge & Narratives
- Meso Level: Institutional Policies, practices, procedures
- Macro Level: Broader structural sources of exclusion & discrimination

See Colleen Sheppard, Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada (McGill-Queen's: 2010), chapter



Susan Bell, Betsy Longchap, Corine Smith, "First Nations hockey team subjected to racist taunts, slurs at Quebec City tournament" CBC News, May 31 2018 (Photo by Tommy H J Neeposh)

Identifying Systemic Discrimination: Sources of Knowledge

- Consultation, participation, experiential knowledge, ensuring mechanisms for continuing consultation
- Legal, sociological, historical, interdisciplinary research
- Data Collection: group-based, statistical, longitudinal, intersectional

Race-based & Disaggregated Data Collection



... [C]ollecting and analyzing data that identifies people on the basis of race, disability, gender identity, sexual orientation and other [protected grounds]...is in accordance with Canada's human rights legislative framework...

[D]ata collection can play a useful and often essential role in creating strong human rights and human resources strategies for organizations in the public, private and non-profit sectors.

Ontario Human Rights Commission, *Count Me In! Collecting human rights-based data* (2009)

Indigenous Data Sovereignty: Five Key Principles

1. Indigenous peoples **have the power to determine who should be counted** among them;
2. Data sovereignty for Indigenous peoples **must reflect the interests and priorities** of Indigenous peoples;
3. Communities must not only **dictate the content of data collected about them**, but also have the power to **determine who has access** to these data;
4. There will be **different approaches to data sovereignty across Nations**. Nations themselves need to define their data parameters, how it gets protected and how they wish to tell their story historically, today, and into the future;
5. There needs to be investment in Community-driven, Nation-based institutions to manage the transition back to self-government. This includes establishing resources for further capacity building in Indigenous' **compilation of data** and development of use of information

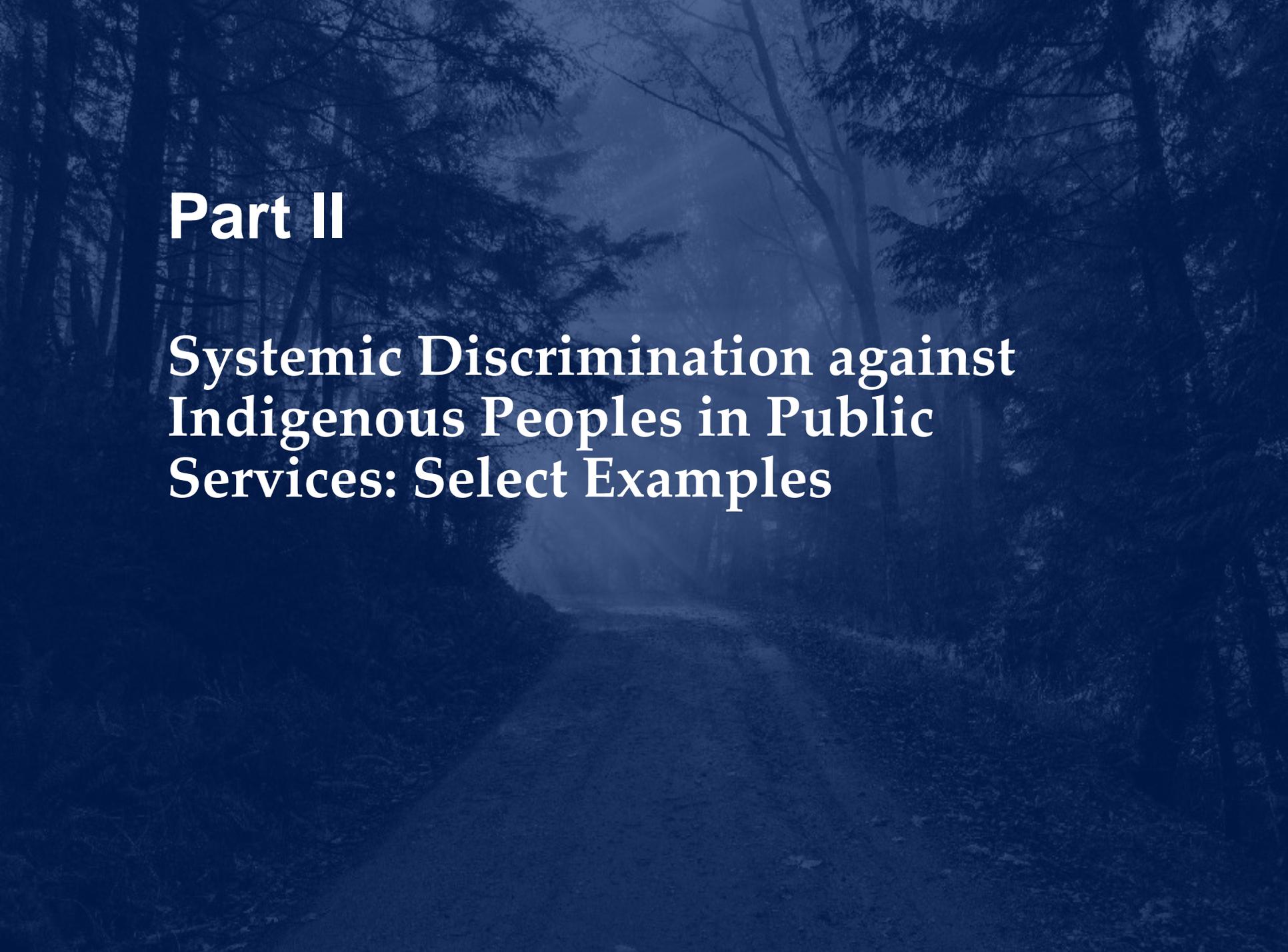
Open North, in collaboration with the British Columbia First Nations Data Governance Initiative, “Decolonizing Data: Indigenous Data Sovereignty Primer” April 2017

First Nations Data Collection: OCAP®

- Ownership of the information
- Control over the research
- Access to the information
- Possession (physical) to protect ownership

... [OCAP® is] a set of standards that establish how First Nations data should be collected, protected, used, or shared. OCAP® is fundamentally tied to self determination and the preservation of First Nation cultures. They are in effect standards on how to conduct research with First Nations.

Chiefs of Ontario, Presented by Carmen R Jones, “OCAP” The Key to Unlocking the Value of First Nations Data” (April 2017): https://www.bornontario.ca/assets/documents/2017%20Conference/Speaker%20Presentations/CarmenJones_RoseanneSutherland.pdf



Part II

Systemic Discrimination against Indigenous Peoples in Public Services: Select Examples

Systemic Discrimination and Police Violence

“In Saskatchewan, Human Rights Watch documented 64 alleged cases of violent abuse against Indigenous women at the hands of the police. The abuse documented included excessive use of force, invasive body and strip searches by male officers, and sexual harassment during these searches.” (p. 8)

“The province of Saskatchewan has also come under scrutiny and criticism for abusive practices by law enforcement in Indigenous communities—both on and off reserve. These include the now infamous “starlight tours,” where police drove Indigenous people to the outskirts of the city to walk home in the dead of winter, risking death by hypothermia. These starlight tours are reported to have been happening as early as 1976.” (p. 3-4)

Human Rights Watch Report: “Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan” 2017
2017 <https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-indigenous-women-saskatchewan-and-failures>

Indigenous women and girls in Canada experience alarmingly high levels of violence. Although they represent just 4.3 percent of Canada's female population, 16 percent of female homicide victims are indigenous. For too long, the government's response to the violence has been glaringly inadequate – so much so that the United Nations called it a “grave violation” of the rights of indigenous women and girls.

National Inquiry into Murdered and Missing Indigenous Women and Girls September (2016) <http://www.mmiwg-ffada.ca/en/about-us/>

“The negativity which many people feel about how they will be treated leads them to avoid using public institutions, like the police, to get assistance when it is appropriate. Aboriginal (and other) communities consistently report that while they frequently feel the brunt of greater law-enforcement attention from the police, they also receive less peace-keeping and other types of assistance.”

Paying the price: The human cost of racial profiling: The impact of racial profiling on the Aboriginal community (OHRC, October 21, 2003) - <http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling>

“I will never forget that day,” said “Lena G.,” whose 15-year-old daughter’s arm was broken by a police officer after the mother called the police for help during an argument between her daughter and her daughter’s abusive boyfriend. “It’s the worst thing I ever did. I wish I didn’t call.”

<https://www.hrw.org/news/2013/02/13/canada-abusive-policing-neglect-along-highway-tears>

Human Rights Watch Report: “Highway of Tears”
(2013) <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women>

Systemic Discrimination in Health Care

- “Structural racism is evident throughout the Canadian health care system. Structural racism exists in the policies and practices in the Canadian public health system and other sectors, which has profound negative effects on access to health care and health disparities. Racial discrimination in the health care system as well as broader Canadian society has direct physiological effects on health.”
- Professor Brenda Gunn, University of Manitoba “Ignored to Death: Systemic Racism in the Canadian Healthcare System” Submission to Expert Mechanism on the Rights of Indigenous Peoples, Study on the Right to health and indigenous peoples with a focus on children(2016)
<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Health/UniversityManitoba.pdf>

Systemic Discrimination: Health Care Services & Jordan's Principle

Jordan's Principle

In the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

Private Member's Motion (M-296)
Federal House of Commons

... Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service.

It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 para 351

Applying Jordan's Principle

I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him.

Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has ever known. He would be placed in the same situation as was little Jordan.

Justice Mandamin, Pictou Landing Band Council v Canada (Attorney General), 2013 FC 342 , para 110 (CanLII)

Jurisdiction & Systemic Inequality: Risks of a Narrow Approach

“ To win may simply mean to more fully situate yourselves as a subordinate to a paternal guardian state.

Mary Ellen Turpel, “Home/Land” (1991)¹⁰
Canadian Journal of Family Law at 19-20, 30.

Systemic Discrimination: Child Protection Services

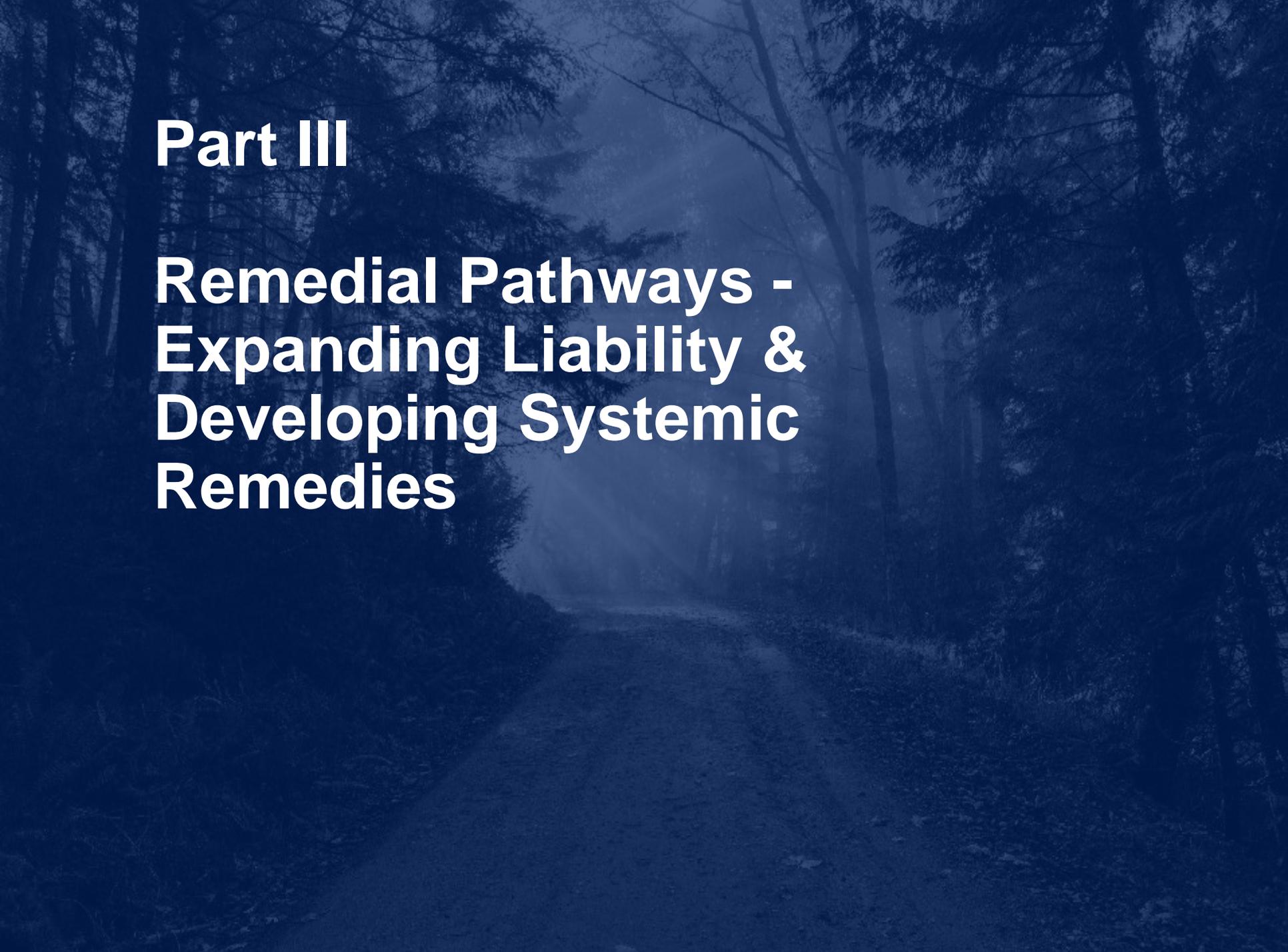
... For First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic needs. Poverty, poor housing and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services.

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 para 120

Child Protection Services on Reserve

The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of [the government's First Nations Child & Family Services]... Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 para 404



Part III

Remedial Pathways - Expanding Liability & Developing Systemic Remedies

Remedial Pathways:

- Systemic Remedies for Systemic Discrimination: Increasing Institutional Responsibility & Proactive Prevention
- Rethinking Public Services: Inter-sectoral and Structural Inequalities
- Indigenous Self-Governance & Equality

Systemic Remedies: Institutional Responsibility and Proactive Prevention

- **Identify problems of Direct & Adverse Effects Discrimination** : Consultation, data collection, review of policies, practices, institutional culture, extra-institutional issues;
- **Change Exclusionary Policies, Rules & Structures**; establish accountability & oversight processes for interactional discrimination;
- **Restructure decision-making processes** to ensure ongoing monitoring, consultation & participation (to prevent the reproduction of inequality)

Inclusive Equality: Substance & Process

Securing greater equality will require more than a redistribution of income. It will require a restructuring of human relations and governance structures.

*Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 147*

Rethinking Public Services & Restructuring Service Delivery

- **Multifunctional Public Services Spaces:** Combining several services such as public security, policing, emergency health services, fire stations, children's aid, employment services, women's shelters, etc. in **one space** (See: *Illustrative Case Studies of First Nations Policing Programs*,) **Public Safety Canada, p. 33**
- **Recognizing Inter-sectoral Connections:** e.g. Child Protection & Housing
- **Community-controlled & funded services:** Reducing external bureaucratic control over public services
- **Employment equity initiatives** to increase representation of Indigenous peoples in public service delivery & professions

Indigenous Self-Governance: UN Declaration on the Rights of Indigenous Peoples

- Article 21 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
- 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Indigenous Self-Governance: UN Declaration on the Rights of Indigenous Peoples

- **Article 23** Indigenous peoples have the right to **determine and develop priorities and strategies for exercising their right to development.** In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Indigenous Self-Governance: UN Declaration on the Rights of Indigenous Peoples

- Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Conclusions

- **An Expansive Definition of Discrimination** to encompass Systemic Discrimination: Focus on Systems, Institutional & Structural Change
- Numerous Examples of Systemic Discrimination facing Indigenous Communities : Important to address underlying systemic dimensions (not just an individual problem)
- **Creative & Proactive Remedies to Redress Past Harms & Prevent Discrimination in the future**
- **Beyond Law: Societal & Intergenerational Responsibilities**



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