

Cecilia Kell v Canada

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Committee on the Elimination of Discrimination against Women

Lolita Buckner Inniss, Jessie Hohmann and Enzamaría Tramontana

Authors' Note

Introduction

In 2008, Cecilia Kell, an indigenous woman from the Behchokò community¹ in Canada's Northwest Territories (NWT), submitted a complaint to the Committee on the Elimination of Discrimination against Women ('CEDAW Committee'). Over a decade earlier, Kell had been living in a common-law relationship with her partner, William Senych. Together, they had lived in housing specially set aside for indigenous people, allocated by the Northwest Territories Housing Corporation. Senych himself was not indigenous. Senych was abusive, and Kell was forced from their home on multiple occasions. On one occasion, she returned to find the locks changed, and to discover that Senych, who was a member of the Community's

¹ The Community's website includes information on the community's governance, history, culture, geography and other matters. See: www.tlicho.ca/communities/behchoko-k.

housing board, had exploited his position on the board to have her name removed from the title to the property.²

Over the next 11 years, Kell struggled to regain her home. In multiple engagements with the Canadian legal system, many of them mediated through state-provided legal aid lawyers, Kell found the law deaf to her claims. As a marginalised person seeking to be audible to the law, her struggles reveal the almost Kafkaesque nature of legal engagements for marginalised actors. Her legal aid lawyers advised her not to contest her forced removal from the home. They pursued compensation while she sought restitution of the home itself. They acted contrary to her instructions. The lack of independent funds to pursue her case hampered her. Her claims were dismissed without written reasons. Throughout, however, she remained committed to one aim: regaining her home.

Although the CEDAW Committee found in Kell's favour, our re-written decision is motivated by a number of issues that we perceive to be problematic with the CEDAW views in this case from a feminist perspective.

Notably, the CEDAW Committee's decision hints at, but fails to fully expose, the multiple ways in which the law marginalised and silenced Cecilia Kell. The decision reveals a failure to grasp the intersectional nature of the discrimination that Kell experienced, and its impact on her ability to pursue her legal claims. More particularly, we were unsatisfied with the construction and application of some of the CEDAW provisions, notably on the right to housing, the right to independently conclude a contract, and on women's property ownership. We were also surprised that the Committee did not pay more attention to Kell's indigeneity and the fact that the loss of her housing had resulted from abuse suffered in the home.

The Kell case is representative of the problems that face marginalised women when they seek to assert their rights both in domestic legal contexts, and indeed under CEDAW. As such, we have re-written this decision to make evident the ways in which the law can silence or render the claims of women invisible. But also to demonstrate how the law – and specifically CEDAW – can, using alternative (and importantly, feminist) methodologies, hear and see them. Our work here is informed by insights from film theory, particularly the concept of the 'space

² The facts are set out in *Kell v Canada*, Communication No 19/2008, 28 February 2012, CEDAW/C/51/D/19/2008, paras 2.1–2.13.

off', representations of women in the law, critiques of the public/private distinction and its operation in the law, and the concept of intersectionality.

Facts, Background and Legal Context

The facts of Cecilia Kell's case are complex, lengthy and deeply entangled in the procedural history of her struggle for recognition before, and a hearing in, the Canadian judicial system. The complexities are such that it is difficult to provide a brief summary of either the facts or procedural history of the complaint she ultimately communicated to the CEDAW Committee in 2008. At a fundamental level, however, Kell's complaint was a straightforward one, and reflects the all too common experience of women who attempt to assert their independent legal status, their rights to housing, and to other forms of property. Women's struggles in such matters are particularly acute in instances where they are subjected to violence by their male partners.

Cecilia Kell is a member of the indigenous Behchokò community in Canada's Northwest Territories. After a period away from the community, during which she attended college, she sought to return, and to be provided with housing for herself and her children. Having experienced some difficulties being approved as a single applicant for housing prioritised for indigenous people in the community, she was advised by the Community's Housing Board to apply as a family with her common law spouse, William Senych. As a non-indigenous person, Senych himself was not entitled to housing under the scheme, although he was a director of the Housing Board. Kell and Senych were successful in their application for housing, and their names were entered jointly on the assignment of lease.

Senych repeatedly subjected Kell to violence and abuse, and on several occasions, she was forced to leave her home for her safety. During one such absence, Senych changed the locks on the house, excluding Kell. At this point, it emerged that Senych, without authorisation, and through abuse of his position on the Housing Board, had had Kell's name removed from the housing deed, leaving himself with sole legal rights to the property.

Over a period of 11 years, Kell engaged in a continuous struggle with the Canadian legal system to regain her right to her home. It is clear from the views adopted by the CEDAW Committee that her claims before the Canadian courts had pursued this sole aim. It is equally clear that the Canadian legal system was, in myriad ways, unable to hear this claim. Her legal

aid lawyers advised her not to pursue her claims, or acted contrary to her instructions, treating her in many respects as though she were a child, rather than an independent person before the law. Kell's intersecting marginality (as woman, indigenous person, indigenous woman, mother, victim of violent abuse, marginalised financial actor) seemed to render her both invisible and inaudible to the law.

It is important to point out that the facts, the procedural aspects of the matter *and* their entanglement, are central to the outcome of the case. This aspect of the decision posed problems for the CEDAW Committee. The difficulties the CEDAW Committee clearly had in dealing with this entangled factual and procedural situation raised feminist issues for analysis, which we deal with below.

Issues at Stake

Kell asserted that she had been the victim of multiple violations of the rights recognised under CEDAW. First, she asserted a violation of Articles 1 and 2(d) because the State party had failed to ensure that its agents refrain, respectively, from discrimination against her on the basis of her sex, marital status and cultural heritage, as a women applicant for housing, and from engaging in any act or practice of discrimination against women, when they removed her name from the lease without her consent. Second, she asserted that the fact that the State Party did not take any action to remedy the situation when it was brought to its attention violated article 2(e) of the Convention. Third, she claimed that the State Party had violated article 14(2)(h), by failing to ensure that its agents took all appropriate measures to eliminate discrimination against women in rural areas, particularly with respect to housing. Fourth, she submitted that the State party had contravened Article 15(1) and (2), as it failed to ensure that its agents recognised her equal rights to conclude a legal contract, in particular a leasehold, independently of her partner, and to administer property independently and equally in all stages and procedures in court. Fifth, she argued that the State Party had contravened Article 15(3) and (4), as it had failed to ensure that its agents respect the Agreement for Purchase and Sale; had failed to rectify the fraudulent act of her partner; and had failed to ensure that the new assignment of lease, on which the author's name was not included, was declared null and void. Finally, she submitted that the State Party had contravened Article 16(1)(h), as it had failed to ensure that its agents afforded the same rights to her in comparison to her partner's rights in respect of ownership, acquisition, management, administration and enjoyment of property.

The CEDAW Committee found in favour of Kell, although it did not accept that Canada had violated all of the CEDAW rights Kell alleged. Its view was that Canada had violated Articles 2(d) and (e), and 16(1)(h), read in conjunction with Article 1 of the Convention.

The Committee's recommendations included both individual remedies, as well as structural reparations. As to the former, it recommended Canada provide Cecilia Kell with housing commensurate in quality, location and size to the house that she had been deprived of; it further called upon the State to provide appropriate monetary compensation for material and moral damages commensurate with the gravity of the violation of her rights. As to the latter, it recommended the State recruit and train more Aboriginal women to provide legal aid to women from their communities, including on domestic violence and property rights; and that it review its legal aid system to ensure that Aboriginal women who are victims of domestic violence have effective access to justice.

There was one dissent, from Committee Member Patricia Schulz, arguing that the communication should be considered inadmissible on the ground of failure to exhaust domestic remedies and that, if considered on the merits, the communication should be rejected on the ground that the author had failed to advance evidence to support her allegations.

Reception of the Original Judgment in Scholarship and Practice

The *Kell* decision has not achieved fame, or even notoriety. There was some domestic media coverage in the immediate aftermath of the decision, particularly from local media sources in the Northwest Territories. Much of the media attention focused on the fact that this was Canada's first censure in a contentious case by the CEDAW Committee.³ Some of the attention also focussed on the legal aid reforms the Committee had called for in its recommendations.⁴

³ See eg, L Herman 'UN Determines NWT woman was discriminated against' *Northern News Service Online* (7 May 2012) www.nnsl.com/frames/newspapers/2012-05/may7_12hr.html.

⁴ See L Track, 'Women's Rights Still Imperfect' *Vancouver Sun* (17 October 2012) www.vancouversun.com/life/Women+rights+still+imperfect/7406312/story.html.

The case has, further, served as a (small) plank in the broader framework of civil society and union activism within Canada,⁵ and in domestic efforts for legal aid reform.⁶

It is also important to note the reception of the decision by Kell herself. While we found the CEDAW views problematic in a number of ways, Kell herself has expressed satisfaction with the decision, and a representative of Kell was quoted in the local media stating: ‘They covered it all ... We were ecstatic over the victory.’⁷

Scholars, too, have engaged with the *Kell* case only to a limited extent. Some scholars have pointed to the *Kell* decision as an example of the CEDAW Committee’s successful movement towards recognising and challenging intersectional discrimination⁸ (although we ourselves found it lacking in this respect). Others have noted that the *Kell* case is important because it counters the general trend wherein the CEDAW Committee has not, in general, upheld claims based on economic, civil or political matters, while cases concerning violence against women have met with a warmer reception.⁹ Of course it is important to note the ties between domestic violence and the political, economic and civil matters in the *Kell* case. Jessie Hohmann has considered *Kell* in the context of the right to housing, and as an expression of

⁵ See eg, Public Service Alliance of Canada/Alliance de la Fonction Publique du Canada: ‘International Women’s Day 2013: Women are ALL affected by the Conservative Government’ (Public Service Alliance of Canada, February 2013) 6.

⁶ L Leslie, *The Right to Legal Aid: How British Columbia’s Legal Aid System Fails to Meet International Human Rights Obligations* (Lawyers’ Rights Watch Canada, 2014) 55; Canadian Feminist Alliance for International Action, *Submission to the UNHRC on the Occasion of the Second Universal Periodic Review of Canada* (October 2012) paras 59–60, available at www.womensdirectorate.gov.yk.ca/pdf/fafiaupr_submission_2012.pdf.

⁷ A Hache, representative spokesperson for Kell, quoted in Northern News Service online, above n 3. See the interview with Kell herself, ‘Group Says Canada Failing Aboriginal Women who Face Violence’ *CBC News North* (22 November 2012), available at www.cbc.ca/news/canada/north/group-says-canada-failing-aboriginal-women-who-face-violence-1.1270515.

⁸ See A Nguyen, ‘Through the Eyes of Women? The Jurisprudence of the CEDAW Committee’ (2014) 30 *Outskirts Online Journal*, available at www.outskirts.arts.uwa.edu.au/volumes/volume-30/athena-nguyen; L Hodson, ‘Women’s Rights and the Periphery: CEDAW’s Optional Protocol’ (2014) 25 *European Journal of International Law* 561, 578.

⁹ See S Cusak and L Pusey, ‘CEDAW and the Rights to Non-Discrimination and Equality’ (2013) 14 *Melbourne Journal of International Law* 54, 77.

the complex and profound attachments women may have to home, even when their experience of and in the home has been deeply marked by violence and violation.¹⁰ A few other scholars have considered *Kell* as a contribution to the debate on women and the right to housing,¹¹ but in general, the decision has not been analysed in any sustained way. In sum, there has been little attention by scholars and academics to the *Kell* case either domestically or internationally. The decision has not been treated to the in-depth analysis that it deserves. In our re-writing of this judgment, we hope to remedy this void.

Purposes of the Re-written Judgment

Despite the lack of attention to, and analysis of, the *Kell* decision, and despite Cecilia Kell's own apparent satisfaction, the decision raises issues of particular significance from a feminist perspective. Our concerns included the following.

First, we were unsatisfied with the approach of the Committee to some of the CEDAW provisions. Notably, this was the first time that the Committee had considered Article 14(2)(h) on the (limited) right to housing for rural women, and we felt that the Committee had not interpreted the provision correctly in general, or applied it correctly to Kell's case.

Second, we were concerned with the approach of the Committee to Kell as an independent legal subject, rights holder and economic actor. We felt that her independent right to property had not been given full expression. In many ways, the decision reveals that the Canadian legal system had not treated Kell as a subject of rights and as having full capacity as a legal actor, but rather as though she were a child, in a position of legal dependency, particularly in her interactions with her legal aid lawyers. The CEDAW Committee decision did not acknowledge and address this wrong.

¹⁰ J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford, Hart Publishing, 2013) 39–41.

¹¹ See eg, F Banda, 'Gender Discrimination and the Right to Family Life' in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (Abingdon, Routledge, 2014) 313. Banda observes of the *Kell* decision that state provided housing for domestic violence victims is not by itself a remedy for women dispossessed from housing and may in some cases exacerbate the problems of such women. Banda notes that Cecilia Kell's residency in a women's shelter enabled her partner to exclude her from their shared home.

Third, and in contrast to some of the scholarship above, we found the Committee's failure to address what is clearly intersectional discrimination in this case problematic. Why, for instance, did the Committee make so little of Kell's status as an indigenous woman, even using the European name Rae-Edzo rather than the indigenous Behchokò to identify her community and its geographic location?¹² In 2005, the name of the community was officially changed to Behchokò, but well before this change, the community had always been known as and referred to as Behchokò in the aboriginal language of the local people, Tłı̄cho. Indigeneity was clearly central to the factual basis of her claim; only Kell, as an indigenous woman, not Senych, had access to housing under the scheme through which he eventually managed to claim sole right to the home.

The marginality of indigenous women the world over is also a deplorable fact the Committee has clearly been made aware of over the years, yet this marginality is not acknowledged in the Committee's views. This is all the more puzzling when we reflect on the fact that the CEDAW Committee was at the time of the judgment working on a significant report on the profoundly shocking harms that indigenous women currently experience in Canadian society and in their interactions with the justice system.¹³

Finally, and perhaps most significantly, were two background issues that seemed to us to pervade the judgment. The first was the issue that the Canadian legal system had appeared largely deaf to Cecilia Kell's claims and silent in response to them, even when it acknowledged hearing any aspects of Kell's claims. The system – and, notably, its procedures – had seemed unable to comprehend what Kell was asking for and to give any redress. The result, while not completely Kafkaesque, at least calls to mind the scene in Dickens' *Bleak House* where legal claims are reduced to a cacophony of which 'the law' takes no notice whatsoever.¹⁴

¹² *Kell*, above n 2, para 2.1.

¹³ CEDAW, *Report of the Inquiry Concerning Canada* CEDAW/C/OP.8/CAN/1 (30 March 2015).

¹⁴ In Dickens' *Bleak House*, readers are introduced to a dark, dank English Court of Chancery in which cases are interminable and complex, relief is rarely forthcoming, and where parties compete for the attention of the Lord Chancellor who is frequently deaf to their entreaties. One character, a financially ruined suitor without legal representation, has appeared for years seeking vainly to have his matter heard by the Lord Chancellor. The man keeps an eye on the judge at all times, ready to call out 'My lord!' if an opportunity for address presents itself.

Legal silences about women's lives are not unusual. This is largely because many general accounts of law record events from a male-centric perspective.¹⁵ The presence of a male-centric perspective remains even though the general nature of legal endeavour has been typically framed as objective, broadly inclusive, autonomous and unbiased. Such accounts of the legal enterprise are typically premised upon fixed understandings with singular goals.¹⁶ However, the absence of women, as well as the racially and sexually marginalised, from the purview of law points up the problem with this sovereign notion of law. Law's freedom from many external influences, or at least its failure to acknowledge them, means that there are few opportunities for outsiders to advocate for change even while law internally transforms itself. Law has thus sometimes operated as an unrestrained meta-doctrine that constantly re-invents itself, 'manufacturing the conditions of its own existence'.¹⁷ The CEDAW Committee strained to overcome this deafness, and to speak where there had been silence, but the Committee was in turn constrained by its own limits. One limit in particular is the rule on the exhaustion of domestic remedies, which, we would argue, results in the peculiar and intractable way in which the procedural history and the merits claims in this case are entwined.

Relatedly, but deserving of separate analysis, was the fact that so much that underlies the views of the CEDAW Committee is unstated and remains opaque, but can be felt pulling at the reader's consciousness like a deep undertow. This in particular, once again, is flagged up in the way that the Committee deals with the issue of lack of merits hearing at the domestic level. It is not clear in the original CEDAW views that Cecilia Kell ever succeeded in having the merits of her claim (the details of her matter and the ways in which those details support her claims) heard in full by the Canadian courts, despite her multiple engagements with the Canadian legal system over a period of 11 years. It was obvious that the Committee was not

However, this is unlikely ever to occur since, the Chancellor is 'legally ignorant' of the man's existence. C Dickens, *Bleak House* (Ware, Wordsworths Classics, reprinted 1993).

¹⁵ See B Welke, 'Willard Hurst and the Archipelago of American Legal Historiography' (2000) 18 *Law and History Review* 197.

¹⁶ Consider, for example, the words of Owen Fiss: 'Law is an autonomous sphere of human activity that serves no master other than justice. We value law for that very reason and celebrate it by proclaiming that all must bow to the rule of law.' O Fiss, 'The Autonomy of Law', (2001) 26 *Yale Journal of International Law* 517, 517.

¹⁷ R Van Krieken, 'Law's Autonomy in Action: Anthropology and History in Court' (2006) 15 *Social and Legal Studies* 574, 574.

willing to say that Kell had not exhausted domestic remedies – her claim was accepted as admissible even though it was equally obvious that she had never received a full merits hearing before the Canadian courts.

The *Kell* case (domestically and before the CEDAW Committee) exemplifies the limits of the law with respect to women’s claims, demonstrating both that the law is not equally open to all women, or to all types of claims, and that even CEDAW, which is explicitly designed to redress the violation of women’s rights, struggles to make visible within the legal frame the harms women experience.

Theoretical Underpinnings of the Re-written Judgment

The concept of the ‘space off’ helpfully framed our thinking about the unstated undercurrents of the decision. The ‘space off’, a term borrowed from film theory, describes the imperceptible margins and background, very real and very present, but by their very nature not within the frame, and thus not at the visible forefront of ‘represented space.’¹⁸

Kell’s claim goes well beyond addressing her own personal grievance with the State’s actions and omissions. It is about broader notions of space, identity and home. It also foregrounds issues of women’s legal subjectivity, personhood and rights which are central to CEDAW. Kell’s claim exposes to public view and hearing a group of persons who are largely unseen and unheard: Aboriginal women who, as a result of domestic violence and economic marginality, combined with the State’s control of marital relations and private property (not to mention its sovereign control of the territory that is now settler-colonial Canada), face homelessness and dispossession.

¹⁸ For a fuller discussion of the concepts of space off and represented space in the context of women’s rights, especially in the context of seeking home, see L Buckner Inniss, ‘From Space-Off to Represented Space: A Review of Reimagining Equality’ (2013) 28 *Berkeley Journal of Gender Law and Justice* 138, 147–49. See also T De Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington IN, Indiana University Press, 1987) 26.

It has been long understood that space and identity are frequently reciprocally produced.¹⁹ The spaces that people occupy – such as home – help to shape identities, and those spaces in turn are formed and reformed by the people who occupy them.²⁰ In Kell’s case, the search for home is at the foundation of her claim, and home in this case, and in others like it, is more than a physical structure. Home is also a powerful embodiment of figurative sanctuary, nurture, autonomy and freedom. ‘Home’ is a heavily charged word that calls forth a number of images.²¹ Home as a word also has wider meaning as the geographic space or place where one belongs: country, city, village and community.²² Perhaps most ironic for Kell’s claim, home is often construed as a ‘woman’s place’, her natural environment.²³ An added trenchant irony is that Kell is an Aboriginal woman deprived of a home provided to her as part of a State sponsored scheme to address historic State dispossession in the process of colonisation. The spatial dynamics of Kell’s struggle to regain her home re-enact those seen in the relation between dominant imperial power and the subordinate colonial subject.²⁴ The particular dynamics at work when race, gender and space come together, as in Kell’s case, help to create and maintain sharp legal and spatial divisions between indigenous and white populations.²⁵ The construct of spatiality is all the more important given the ways in which home expresses an

¹⁹ Buckner Inniss, *ibid*, 147. See also Hohmann, above n 10, chs 7 (identity) and 8 (space); S Razack, ‘When Place Become Race’ in S Razack (ed), *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto, Between the Lines Press, 2002).

²⁰ Buckner-Inniss, above n 18. Hohmann, above n 10, 164, 169–70 and 193–94.

²¹ See L Buckner Inniss, ‘It’s the Hard Luck Life: Women’s Moral Luck and Eucatastrophe in Child Custody Allocation’ (2011) 32 *Rutgers Women’s Rights Law Reporter* 56, 74. See also R Marangoly George, *The Politics of Home: Postcolonial Relocations and Twentieth-Century Fiction* (Berkeley CA, University of California Press, 1999) 1–2; L Fox O’Mahoney, *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart Publishing, 2006).

²² Buckner Inniss, above n 18, 147. Hohmann, above n 10, 195–96.

²³ Buckner Inniss, above n 21, 74 citing E Janeway, *Man’s World, Woman’s Place: A Study in Social Mythology* (New York NY, Delacorte Press, 1971) 15.

²⁴ EW Said, *Culture and Imperialism* (London, Vintage, 1993) 93.

²⁵ Razack, above n 19, 1, 6.

intensely personal relationship to an actual physical place.²⁶ The notion of home also articulates a shared understanding of inclusion and community.²⁷ The latter is especially significant for many Aboriginal persons like Kell for whom community is the source of personal satisfaction, economic well-being and political self-definition.²⁸

Kell's situation is one that often remains away from the 'represented space' of legal scrutiny and within the raced and gendered 'space-off' that dwells 'at home' in the Aboriginal community. Borrowing from film theory, one scholar describes the 'represented space' of gender as ideological male-centred points of view made visible within a frame.²⁹ Represented space is contrasted with 'space-off', spaces not visible within the frame and which are only inferable from represented spaces and sometimes even erased or contained in the represented space by cinematic rules of narrative. Feminist concerns, practices or themes are often confined or erased in the margins of the space-off.³⁰ Thus, in constructing our decision we took particular efforts to address the ways that the actions or inactions of key figures in Kell's case failed to account for how she would be affected as a woman and a particular type of woman. In our work we sought to bring feminism into the mainframe.

Our purpose in re-writing the Kell decision was explicitly motivated by a desire to represent these invisible spaces, and to make them seen. Part of our project to render these spaces visible was to fill informational voids regarding Kell's culture and her community, so as to make clear how her particular characteristics shaped her own experiences and the way that others interact with her, particularly in having her claims heard.

²⁶ C Holohan, 'Between a Rock and No Place: Ursula Meier's Home' in B Richardson (ed), *Spatiality and Symbolic Expression: On the Links between Place and Culture* (New York, Palgrave Macmillan, 2015) 177, 178.

²⁷ *ibid.*

²⁸ J Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000) 189.

²⁹ Buckner Inniss, above n 18, 147–49.

³⁰ *ibid.*

VIEWS OF THE COMMITTEE

Submitted by: Cecilia Kell (not represented by counsel)

Alleged victim: The Author

State party: Canada

Communication No. 19/2008

The Committee on the Elimination of Discrimination against Women consisting of:

L Buckner Inniss, J Hohmann and E Tramontana

Date of communication: 24 June 2008 (initial submission)

Date of adoption of decision: 28 February 2012

Views under article 7, paragraph 3, of the Optional Protocol

1. The author of the communication, dated 24 June 2008, is Cecilia Kell, an Aboriginal woman living in the Northwest Territories (NWT) of Canada. She claims violations by Canada of her rights under Articles 1, 2(d) and (e), 14(2)(h), 15(1)–(4), and 16(1)(h), of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The author is acting on her own behalf and is not represented by counsel. The Convention and its Optional Protocol entered into force for Canada on 10 December 1981, and 18 January 2003, respectively.

The Approach of the CEDAW Committee

2.1. CEDAW specifically aims to eliminate *all forms* of discrimination against women. The Committee is elected to oversee State Parties' progress in this regard, and, for those State Parties who have ratified the Optional Protocol, to ensure the rights of individuals are protected when they are violated. It is therefore incumbent upon the Committee to understand discrimination as it relates to women's actual experiences, particularly taking account of and capturing those aspects of women's lives which law has, in the past, often remained blind to.

2.2. It is a strange paradox that women's bodies have long borne the work of depicting justice, yet as a whole, women have not experienced justice on the basis of equality with men. Well before the Roman *Justicia*, whose ideally feminised figure stands to deliver justice in courtrooms throughout the world, justice was portrayed as a woman.¹ Through history, many have noticed the irony behind *Justicia*'s womanly persona and the frequent denial of legal personality and capacity to women in fact.² Yet the female form of *Justicia* is linked to the denial of women's participation in legal and political orders: Justice remained an abstraction, rather than a real woman, and could thus bear impassively her allegorical symbols of neutrality, authority, and impartiality in the process of adjudication.³

2.3. The irony of justice's typically feminine form is deepened by a second feature of justice's common portrayal: that of justice as blind. Blind justice has come to stand for neutrality and the rule of law. Yet these attributes represent only one reading of justice's blindfold, and justice's blindness remains a contested metaphor for the operations of the law.⁴ Blindness can represent a turning away from the truth on the part of the judge;⁵ blindness can represent the failure of the law to see the harms experienced by another person as wrongs in the law.⁶ It is these readings of *Justicia*'s blindness which speak to women's experience of the law.

2.4. CEDAW is premised on the need for a body of law, and a body – we the Committee – which will make women's experience of the world and the law central. The Convention turns explicitly towards women's experience of the law and of human rights violations, and seeks to see those harms that law has so often remained blind to. If, as we believe, the CEDAW

¹ J Resnick and D Curtis, *Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms* (New Haven CT, Yale University Press, 2011) 18–21.

² O De Gouges, *Declaration on the Rights of Women* (Reston VA, Pythia Press, 1989); M Wollstonecraft, *A Vindication of the Rights of Women: With Strictures on Political and Moral Subjects* (Boston MA, Peter Edes, 1792).

³ Resnick and Curtis, above n 1, 95.

⁴ See Resnick and Curtis, *ibid*, chs 3, 4 and 6.

⁵ *ibid* 62.

⁶ *ibid* 132.

Committee must see the violations of women's human rights, we must accept a greater role for the Committee in creating a feminist, not just feminine, justice. We, the Committee, must personify feminist justice.

Factual Background and Procedural History

3.1. The author Cecilia Kell is an Aboriginal woman who belongs to the Behchokò indigenous community in Canada's Northwest Territories. Behchokò, known until 2005 as Rae-Edzo, has a population of approximately 43,000 people, more than half of whom are Aboriginal. The Tłı̄cho Government is the governing authority within Tłı̄cho lands, including the Behchokò community, and exercises a large measure of self-government. The most recent Canadian census data shows that though today many residents are employed in Tłı̄cho companies, in local government or private businesses, more than a third of the total population engages in traditional activities of hunting, trapping, and the production of traditional arts and crafts; half of all households rely on foods produced or harvested from the land for at least 50% of their subsistence needs; and almost 40% of people speak an Aboriginal language.

3.2. The facts of the case, set out in detail below, demonstrate that Canadian law and the legal system failed to protect Kell's legal and human rights. Her partner, William Senych, abused Kell both physically and psychologically, silencing her, preventing her from accessing her legal rights. The Canadian legal system was unable to offer adequate assistance to her either to remedy her physical and psychological abuse, or to protect her legal rights to property, home and contract.

3.3. Kell left Behchokò to attend college. She later returned to seek housing for herself and her two children. Kell thereafter began a common law relationship with William Senych, in 1989. This relationship came to be characterised by Senych's violence and abusive behaviour towards the author.

3.4. When housing became available in the Behchokò community under a program for members of the local indigenous community, the author informed Senych that she wanted to apply for housing in order to bring her children, at the time living with relatives outside the community, home. Senych, on his own initiative and without telling Kell, applied for housing from the Behchokò community in his own name. In November 1990 the Housing Authority board declined Senych's application because, as a non-indigenous person, he was not a member of the Behchokò community and because he applied as a single man.

3.5. Senych told Kell that she had been turned down for housing. Because of Senych's violence and abuse towards her, Kell did not feel able to ask Senych any questions as to why she had been refused housing when she herself had not made an application. However, the Tenant Relations officer at Behchokò informed Kell that her partner Senych could not apply for himself because he was not a member of the Behchokò community. Authorities in the community advised Kell to apply for housing and to list Senych as her spouse. She complied with this advice. In October 1991 the Northwest Territories Housing Corporation (NWT HC), an agency of the NWT Government, issued an Agreement for Purchase and Sale to William Senych and Cecilia Kell as co-owners of the house into which the couple moved.

3.6. During the three-year period following Kell's move into the co-owned house, Kell obtained employment and became financially independent. Her increased autonomy heightened Senych's abuse. Senych controlled Kell's finances and movements. He threatened Kell, barred her from contact with her family, and physically assaulted her on numerous occasions. Senych attempted to prevent Kell from working and took actions that resulted in her losing jobs. As a result of Senych's actions, on occasions Kell sought and was admitted to a shelter for abused women in Yellowknife.

3.7. In 1992, at Senych's request and without Kell's knowledge or authorisation, the Rae-Edzo Housing Authority wrote to the NWT HC stating that Senych wanted Kell's name removed from the document that certified co-ownership of the home. Senych was a board member of the Rae-Edzo Housing Authority at the time, and in 1993, the NWT HC complied with his request.

3.8. In early 1995, Kell took employment. In retaliation, Senych had the locks changed on the home and denied the author access. This expulsion left Kell homeless for several days. In February 1995, Senych allowed Kell to enter the house to retrieve a few of her belongings. At that time, Senych presented her with a letter from his lawyer requesting that she vacate the shared house. The letter further indicated that if the author did not, Senych would use all legal remedies available to him to compel her departure. Kell submits that Senych sought to remove her because she had left their shared house to escape the abusive relationship and because she sought refuge in an abused women's shelter.

3.9. In May 1995, Kell resolved to file the first court action against her partner before the Supreme Court of the NWT. Kell sought compensation for claims arising from assault, battery, sexual assault, intimidation, trespass to chattels, loss of use of her home and consequential payment of rent and related expenses. Kell also filed a declaration asserting that Senych had obtained the house through fraud, aided by the NWT Government. Kell applied for state-provided legal aid and was assigned a lawyer. The legal aid lawyer advised her to comply with the removal letter and not to return to her home, in order to avoid being charged.

3.10. Shortly after the first lawsuit was filed, Senych became ill with cancer. Due to his illness, Kell's lawyer recommended that the court action be delayed. Senych died in November 1995. In March 1996, Kell's lawyer initiated a second court action against Senych's estate (the Estate), the NWT HC and William Poirier, who was at the time residing in the house. Kell's subsequently appointed counsel amended her claim on 9 July 1998 to include a claim for damages for assault and intimidation.

3.11. In May 1999, the Estate and the NWT HC made a formal offer to settle in the amount of Can \$15,000. Kell's lawyer focused his efforts on negotiating a settlement of Can \$20,000. Kell maintained an express desire to regain her own home, rather than accept a monetary settlement.

3.12. No further steps were taken in respect of the author's outstanding legal actions. Thereafter, Kell's file was reassigned twice to different lawyers because one relocated to Alberta, and the other ceased employment with the Legal Services Board.

3.13. In November 1999, Kell was assigned a fourth lawyer, who insisted that she accept a

monetary settlement, in contravention of her express wish to regain her own home. Because Kell's lawyer was unwilling to act according to Kell's wishes, she chose not to accept his advice. Thus rebuffed, Kell's fourth lawyer ceased acting on her behalf in June 2002. Kell was then denied another legal aid lawyer. She appealed her denial of legal aid to the Legal Services Board, which allowed her appeal and assigned her a fifth lawyer.

3.14. On 3 June 2003, the Estate filed a notice of motion to set aside Kell's statement of claims for want of prosecution. Such an order may be granted where it is clearly established that the litigant has inexcusably delayed advancing the litigation and that defendants are likely to be seriously prejudiced by the delay. The grounds of the motion were that Kell, as the party who initiated a legal action, had not diligently acted to pursue her claim. On 10 June 2003, the NWT HC also brought a motion to dismiss Kell's action.

3.15. Kell offered no opposition when the application for dismissal of the first action was heard in October 2003 in the NWT Supreme Court. Thus, Kell's first action was dismissed without appeal to the Court of Appeal for the NWT. However, Kell argued against the dismissal of the second action, on the ground that the Court should have reviewed all the actions in the two cases in its assessment of whether there had been a material delay in prosecution. Kell was actively responsive to the first action that was linked to the second case, hence she considered it unjust that the Court deemed that she had taken no action or had unreasonably delayed the prosecution. The NWT Supreme Court dismissed Kell's second action on 3 November 2003. Costs were imposed, which were later assessed at Can \$5,800. Kell appealed against this decision in the NWT Court of Appeal. The appeal was dismissed without written explanation. Kell did not appeal any of these matters to the Canadian Supreme Court.

3.16. On 16 November 2004, the author initiated a new (third) action solely addressing the issue of her interest in and right to the property. In January 2005, a lawyer for the Estate brought a motion seeking summary judgment, alleging no genuine issue for trial. The Estate also in its motion asked for security costs in the alternative. The Estate had sold the property in question to third-party purchasers and a transfer of lease had been given to them in early November 2004. Kell's position was that the Estate still held her legal title and equitable interest, which she had acquired prior to the purchasers in question.

3.17. On 21 July 2005, the NWT Supreme Court, while hearing the application for summary dismissal in the third court action, held that since the third action sought essentially the same relief as the previous two actions, the author had to pay the amount of the taxed bill of costs in court with respect to the previous court actions as well as post security for the respondent's costs in this third action before continuing with the case. Kell could not pay the costs and security within the time period established, and the NWT Supreme Court accordingly dismissed the case on 26 April 2006.

The complaint

4.1. Kell asserts that she was the victim of violations of the following Articles of CEDAW.

4.1.1. Article 1

Kell asserts a violation of Article 1 because the State Party allowed its agents - the NWT HC and the Behchokò (then, Rae-Edzo) Housing Authority - to discriminate against her on the basis of her sex, marital status and cultural heritage, in that it failed to ensure that its agents provide equal treatment to women applicants for housing.

4.1.2. Article 2(d) and (e)

Kell claims a violation of Article 2(d), on the basis that the State failed to ensure that its agents refrain from engaging in any act or practice of discrimination against women, when they removed her name from the lease without her consent. She further contends that the fact that the State Party did not take any action to remedy the situation when it was brought to its attention is a violation of Article 2(e) of the Convention.

4.1.3. Article 14(2)(h)

Kell claims the State Party has contravened Article 14(2)(h) by failing to ensure that its agents take all appropriate measures to eliminate discrimination against women in rural areas. She alleges that the State party failed to ensure that its agents apply its policies and procedures with regard to the allocation of housing and the provision of adequate living conditions fairly and equally for men and women.

4.1.4. Article 15

Kell submits the State Party has contravened Article 15(1) and (2), as it failed to ensure that its agents recognise her equal rights to conclude a legal contract, in particular a leasehold, independently of her partner, and to administer property independently and equally in all stages and procedures in court and before the Housing Corporation. The author also submits that the State Party has contravened Article 15(3) and (4), as it failed to ensure that its agents respect the Agreement for Purchase and Sale, failed to rectify the fraudulent act of her partner and failed to ensure that the new Assignment of Lease, on which the author's name was not included, was declared null and void.

4.1.5. Article 16

Kell submits that the State Party has contravened Article 16(1)(h), as it failed to ensure that its agents afford her the same rights as her partner in respect of ownership, acquisition, management, administration and enjoyment of property.

Admissibility

5.1. The State Party has raised a number of admissibility issues. First, that the communication does not reveal any discriminatory law, policy or government action, and as such the communication is insufficiently substantiated; that the CEDAW Optional Protocol was not in force for Canada at the date that Kell's name was removed from the Assignment of Lease, and as such the communication is inadmissible *ratione temporis*; and that the author did not exhaust domestic remedies. These grounds have been contested by the author.

5.2. The Committee finds that Kell has sufficiently substantiated a *prima facie* complaint of violations under CEDAW. She has raised issues under Articles 1, 2, 14, 15 and 16. It is proper for the Committee to proceed to hear the arguments on the merits, particularly as this communication alleges violations of CEDAW that the Committee has not previously considered. In addition, the author is unrepresented, and the Committee must take due account of the need to ensure those individuals who come before the law are not silenced by the technical procedures it imposes.

5.3. In addition, we do not agree that the alleged violation hangs on a 'relevant fact': that of the removal of Kell's name from the Assignment of Lease on her home. Rather Kell's claim is characterised by a confluence of numerous violations and harms, resulting in a pervasive situation of discrimination. This discrimination was not based only on the individual facts of Kell's case, but is revealed in the discriminatory effect of the Canadian legal process with respect to Kell's ability to have her claim heard at all. It is characterised by an overall failure of the Canadian legal system to adequately hear, and thus respond, to Kell's circumstances.

5.4. On exhaustion of domestic remedies, from her first contact with the legal aid system, when her assigned legal aid counsel advised her to comply with her removal notice, to the point at which her counsel pushed her to accept monetary compensation rather than the restitution of her own home, to the moment when a settlement was negotiated without, Kell submits, her consent, her claims have been diminished rather than regarded with any seriousness. In sum, the Canadian justice system has been both deaf and blind to Kell's claims, and it is the Committee's view that the application of further domestic remedies would be unlikely to bring effective relief to her.

5.5. Cecilia Kell's case forces us to make a decision as to how CEDAW will respond to women's experiences of injustice. The Canadian court system could neither see nor hear the violation of Kell's rights. For Kell, the Canadian justice system was both deaf and blind. We, the CEDAW Committee, hear and see Kell's experience of violation. We find her complaint admissible.

MERITS CONSIDERATION

Violation of states' general obligations in articles 2(d) and 2(e) and 15, 1–4.

6.1. CEDAW defines discrimination against women in Article 1 as:

...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Under Article 2, sections (d) and (e), States undertake:

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

Article 15, paragraphs 1–4 of CEDAW provides:

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

6.2. By accepting these provisions of CEDAW, States commit themselves to undertake a series of measures to end discrimination against women in all forms, and, correspondingly, by

all methods, including where such discrimination is not as a result of one attribute but of many, and where those plural attributes are intersectional in nature.

6.3. Race and sex have often been discussed in the context of ‘intersectional analysis’ — engaging in a multifaceted analysis that addresses the ways in which various socially or culturally-constructed identity categories interact.⁷ Such intersectional attributes may, however, go well beyond race and gender. In the instant case, an intersectional analysis enriches our decision, as it allows us to be sensitive to the multiple forms of harm that Kell experienced as a woman and as an Aboriginal person.

6.4. We conclude that the discrimination experienced by the author is intersectional in nature. Kell was a victim of numerous forms of discrimination. Racism, sexism and poverty contributed to a State sanctioned or State enacted pattern of behaviour that was abusive and bullying. Domestic violence, unemployment, dislocation and homelessness resulting from the seizure of Kell’s home also played a role in her dispossession. We further conclude that the State Party’s actions and its failure to refrain from and provide effective remedies to address discrimination constituted a violation of Canada’s general obligations in Articles 2(d) and 2(e) of CEDAW. The State’s actions and failures also violated Articles 15 (1–4). Our reasoning on these aspects, and their intersecting implications, follows.

6.5. The author is a member of the Behchokò community. Although the people of Behchokò have their own, independent, Aboriginal way of life, there are a number of non-Aboriginal persons in the area who are also permanent residents. Some, like Kell’s partner Senych, intermarry with Aboriginal people.⁸ Despite such intermixing, there is sometimes cultural conflict between Aboriginal and non-Aboriginal people, with non-Aboriginal people wielding greater power. For example, Aboriginal people in Canada have been shown to suffer widespread discrimination in their interactions with the Canadian legal system.

6.6. One of the clearest markers of what the Canadian Supreme Court has described as a crisis, is Aboriginal overrepresentation in the criminal justice system.⁹ Aboriginal people in Canada also suffer poorer health than non-Aboriginal people, and this is often due to the adverse psychological, spiritual, cultural, economic, historical, sociological, and environmental factors they face in interacting with mainstream Canadian society.¹⁰ Aboriginal women in

⁷ For a brief discussion of the nature and history of intersectionality and related concepts, see L Buckner Inness, ‘A Review of Mayeri’s Reasoning from Race’ (2001) 1 *Texas Law Review Dicta* 2; see also L Buckner Inness, “‘Other Spaces’ in Legal Pedagogy’ (2012) 8 *Harvard Journal of Racial and Ethnic Justice* 67.

⁸ MO Dickerson, *Whose North?: Political Change, Political Development, and Self-government in the Northwest Territories* (Vancouver, University of British Columbia Press, 1992) 26–27.

⁹ J Rudin, *Aboriginal Peoples and the Criminal Justice System*, Paper prepared for the Ipperwash Inquiry (2006). Available at www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf.

¹⁰ J Burgess Waldram, A Herring, T Kue Young, *Aboriginal Health in Canada: Historical, Cultural, and Epidemiological Perspectives* 2nd edn (Toronto, University of Toronto Press, 2006) 3.

Canada also face gender discrimination combined with racial discrimination.¹¹ This ‘double-burden’ exacerbates all the other ills faced by Aboriginal people and places Aboriginal women in a particularly precarious position.

6.7. The author’s status as an Aboriginal parent made her especially vulnerable to the denial of her housing rights. Kell noted that a principal reason for obtaining housing was to be able to bring her children back to the community. Although this was a personal goal for Kell, it also reflects the interdependency between Aboriginal families and their broader communities. Aboriginal community resiliency has been shown to be deeply connected with the conditions of individual Aboriginal families and children and the extent to which they are able to attain economic and social stability within the community.¹² Community membership is a source of economic and social support for many Aboriginal people, and this support may be greatly diminished by residency in areas outside of traditional Aboriginal communities.¹³

6.8. Paradoxically, Kell was in an especially difficult position with regard to making a claim for discrimination in the administration of Aboriginal housing: under Canadian legal provisions, persons who object to actions taken by their own tribal government or some aspect of that government are limited in the extent to which they may redress those claims under State-wide anti-discrimination norms.¹⁴

6.9. Kell was also a victim of gender bias in the form of a bias against the independent rights of a married or formerly married woman and as a victim of domestic violence. As a woman in a common-law marriage, she was treated as if she had no independent legal identity or rights.

6.10. Kell was told by authority figures in the community that she must apply with her partner Senych in order to obtain housing in her Aboriginal community. She was thereby denied her independent right to contract. In like fashion, when Kell’s name was removed from the Assignment of Lease the document that certified co-ownership of the home, she also suffered gender discrimination related to her independent rights as a woman.

¹¹ M Gorelick, ‘Discrimination of Aboriginals on Native Lands: A Comprehensive Crisis’ (September 2007) 44(3) *UN Chronicle* 50–52. Available online at <https://unchronicle.un.org/article/discrimination-aboriginals-native-lands-canadag>.

¹² *ibid.*

¹³ R Todd, ‘Aboriginal People in the City’ in DM Collins, R Todd and M Thornton (eds), *Aboriginal People and Other Canadians: Shaping New Relationships* (Ottawa, University of Ottawa Press, 2001) 98–99.

¹⁴ S 67 of the Canadian Human Rights Act exempts persons living and working in communities operating under the Indian Act from filing complaints of discrimination arising from actions taken under the Indian Act. See R Dupuis, R Chodos and S Joanis, *Justice for Canada's Aboriginal Peoples* (Toronto, James Lorimer and Company, 2001) 61–65.

6.11. Much of this de jure discrimination against Aboriginal women was eliminated in recent decades.¹⁵ Nonetheless, many governing entities, both Aboriginal and non-Aboriginal, impose patriarchal norms and frameworks that continue to subject some Aboriginal women to unfair and unjust treatment, often without legal foundation.¹⁶ Kell, like so many other women, was subject to such biased treatment.

6.12. Kell's partner attempted to prevent her from working. His violence and threats of violence, along with other actions he took, resulted in her losing her job and in her being admitted a few times to a shelter for battered women in Yellowknife. This violence, and the State's failure to offer meaningful protection from it, also infringed Kell's right to contract with an employer.

6.13. Moreover, the failure to reach a settlement regarding Kell's housing claim was also a direct result of biased actions or lack of action on the part of her legal aid lawyers. Most of the lawyers would not hear her instructions, but instead gave Kell instructions and threatened to quit if she disputed their position; some lawyers acted on her behalf without her knowledge or consent.

6.14. In addition, Kell was a victim of gender bias in that the State Party's actions tended to force or coerce the marriage and/or cohabitation of the author with her partner. In February 1992, at the partner's request and without Kell's knowledge or consent, the Housing Authority wrote to the NWTHC stating that the partner wanted Kell's name removed from the Assignment of Lease. The partner was a member of the Housing Authority Board. In June 1993 the Northwest Territories Housing Corporation complied with the partner's request.

6.15. In May 1995 the author filed the first court action against her partner before the Supreme Court of the Northwest Territories. She sought compensation for assault, battery, sexual assault, intimidation, trespass to chattels, loss of use of her home and consequential payment of rent and attendant expenses. The author also filed a declaration that her partner had obtained the house through fraudulent methods, and that the partner was aided and abetted in taking the house by the government of the Northwest Territories.

6.16. The author applied for legal aid and was assigned a lawyer. Her lawyer advised the author to comply with the removal letter and not to return to her home. The lawyer indicated that the author would be charged if she returned home.

6.17. Shortly after the first court action was filed, the author's partner became ill with cancer. The author's lawyer suggested that the court action be delayed. The partner died in November 1995. In March 1996 the author's lawyer initiated a second court action against the estate of the partner, and the NWTHC. The court action was also filed against William Pourier, a man

¹⁵ PJ Blair, *Rights of Aboriginal Women On- and Off-Reserve* (Vancouver, The Scow Institute, 2005).

¹⁶ National Aboriginal Women's Summit, *Strong Women, Strong Communities: Summary Report* (January 2008). Available at www.womensdirectorate.gov.yk.ca/pdf/naws1_2008_summary_report.pdf.

who was alleged to have been residing at the house with the author's partner at the time of the author's death, and who continued to reside there.

6.18. In sum, as a result of a continuous pattern and practice of discrimination, the legally unsupported desires of Kell's non-Aboriginal male partner were at all times prioritised over Kell's legally founded rights as an Aboriginal woman.

Art 14(2)(h) Right to Housing

The Purpose of Article 14

7.1. Article 14 is premised on the need for states to take particular account of the problems faced by rural women, and, moreover, to take measures to eliminate discrimination they face in rural areas, to ensure their equality with men, and to guarantee their equal benefit from rural development. As such, states are required to 'ensure to such [rural] women the right':

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 14 should not be narrowly construed. Its purpose is to overcome specific forms of discrimination experienced by rural women, who are subject to discrimination in multiple spheres of life.¹⁷ The Committee has observed that across the world, women in rural areas experience greater problems in accessing education, health care, and access to resources and opportunities.¹⁸ Women in rural areas are at particular risk of gender-based violence, especially where attitudes to the subordinate role of women are entrenched.¹⁹ They also face particular discrimination in relation to rights to ownership, and transfer of land and property.²⁰ As such, Article 14(2)(h) responds to the specific problems with access to land and property *in and to the home*, which are experienced by rural women. We accept that 14(2)(h) is 'inextricably linked' to land and property rights, access to financing, and the rights to equality of treatment

¹⁷ CEDAW, *General Statement of the Committee on the Elimination of Discrimination Against Women on Rural Women* (Adopted 19 October 2011 during the 50th Session) 2. Available at www.ohchr.org/documents/HRBodies/CEDAW/Statements/StatementRuralWomen.pdf.

¹⁸ *ibid.*

¹⁹ *ibid.*, 1.

²⁰ *ibid.*, 2.

in Article 15 and 16,²¹ (addressed further below) as well as rights to equality and non-discrimination which form part of customary international law.²²

The Committee's Approach to Article 14(2)(h) and the right to housing

7.2. This communication is the first in which the Committee considers Article 14(2)(h). As such, it is necessary for the Committee to give careful consideration to interpreting the provision.

7.3. Article 14(2)(h) must, 'be articulated and implemented in ways that recognize the specific constraints and vulnerabilities of women.'²³ Women are the primary users of housing, and thus, are the most affected by it.²⁴ This is partly because of childbearing and childrearing responsibilities, and in many instances because of cultural mores that place women in and of the home.²⁵ Moreover, women have been systemically and historically denied rights to the home and property.²⁶ Thus housing remains of central importance in the lives of many women, yet women have often experienced great difficulty in accessing housing and asserting legal rights to it.

7.4. Accordingly, the Committee understands that the realisation of the right to housing is an issue of special significance for women. We recognised this in our 2011 General Statement on Rural Women,²⁷ where we called on States to ensure rural women's equal access to basic social services such as housing, and to use and ownership of land and property.²⁸ In this Statement, we noted that indigenous women living in rural areas often face added layers of vulnerability, and can suffer from 'a severe lack of basic resources for subsistence, income

²¹ UN Commission on Human Rights (UNHRC), *Women and Adequate Housing* (26 March 2003) E/CN.4/2003/55 para 12.

²² *ibid*, para 13; Committee on Economic, Social and Cultural Rights, *General Comment No. 16* (2005), CESCR E/C.12/2005/4.

²³ UNHRC, above n 21, para 21.

²⁴ See for example, UNHRC, above n 21, paras 20, 25; L Farha, 'Women and Housing' in D Askin and DM Koenig (eds), *Women and International Human Rights Law: Vol 1* (Ardsley NY, Transnational Publishers, 1999) 486.

²⁵ UNHRC, 'Economic, Social and Cultural Rights: Women and Adequate Housing' E/CN.4/2005/43 paras 53–58.

²⁶ UNHRC, above n 21, paras 42, 45–48. See UNHRC, above n 25, paras 53–58.

²⁷ CEDAW Committee Statement on Rural Women, above n 17.

²⁸ *ibid*, 4.

security, access to health care, information on and enjoyment of their entitlements and rights.²⁹ Indigenous women's right to adequate housing is also threatened by historical patterns of forcible land dispossession and decimation of the cultures of their Peoples, continuing violent conflict, large-scale development projects, and the contemporary failure to recognise land and self-determination rights.³⁰ The role of these underlying conditions is evident in Cecilia Kell's case.

7.5. CEDAW protects women's right to housing only in Article 14(2)(h), thus the right to housing in the Convention is necessarily linked to the human rights of rural women. Nevertheless, we adopt the approach of the Committee on Economic, Social and Cultural Rights (CESCR) to the right to housing as an element of the right to a broader adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³¹ Housing is not an isolated material asset, but an inherent element of that larger right. This is reflected not only in the ICESCR, but also in Article 25 of the Universal Declaration of Human Rights (UDHR), where an adequate standard of living is based on the enjoyment of adequate housing, but also 'food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. It should go without saying that CEDAW interprets this provision as applying to women, despite the gendered language.

7.6. The CESCR has interpreted the right to housing under ICESCR as requiring the presence of at the very least, the minimum core of each of seven elements. These are: (i) legal security of tenure; (ii) availability of services, materials, facilities and infrastructure; (iii) affordability; (iv) habitability; (v) accessibility; (vi) location; and (vii) cultural adequacy.³²

²⁹ *ibid.*

³⁰ See UNHCR, above n 25, para 65.

³¹ ICESCR Article 11(1):

The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The CESCR's interpretations of the right to housing are contained primarily in UNCESCR, The Right to Adequate Housing (Article 11(1)): CESCR General Comment No. 4 (1991) E/1992/23 and UNCESCR, The Right to Adequate Housing: Forced Evictions (Article 11(1)) CESCR General Comment No. 7 (1997) E/1998/22 Annex IV.

³² UNCESCR General Comment 4, *ibid.*

7.7. These legal standards, and the expression of the right to housing as encompassing seven elements, are an authoritative approach to the right to housing in international human rights law, and should guide the CEDAW Committee, as much as and insofar as they are applicable to rural women. The CEDAW Committee is well placed to apply these standards, and to foreground the centrality of housing to women and their concurrent difficulties in realising their right to it, though its interpretation of Article 14(2)(h).

7.8. It should also be noted that although the ICESCR imposes a standard of progressive realisation in Article 2(1), CEDAW 14(2)(h) is not couched in those terms, and, moreover, the obligation on States to eliminate gender discrimination is one of immediate effect.³³

The Right to Housing in Situations of Domestic Violence

7.9. Gender-based violence is ‘a central thread in the fabric of human rights violations faced by women.’³⁴ More specifically, violence in the home – domestic violence – is a key cause of women’s homelessness, the violation of the right to security of the person, and security of tenure.³⁵ The relationship between the experience of domestic violence and inadequate housing is reciprocal, as a lack of adequate housing makes women vulnerable to violence, and violence experienced in the home leads to a violation of housing rights.

7.10. Women subject to domestic violence are living in housing that is unsafe for their habitation. They are subject to both psychological and physical harm. Their security of tenure is compromised, and they are often rendered homeless when forced to flee violence. Women who live in situations where they are subjected to domestic violence are, de facto, living in inadequate housing. Thus, domestic violence is a breach of the right to adequate housing.

7.11. Domestic violence amounts to forced eviction when an individual is forced to flee her home.³⁶ A meaningful right to security of tenure and to be free from forced eviction should take *as the norm* the required removal of the perpetrator of domestic violence from the home, rather than the forced eviction of the victim of violence. This Committee has previously held in *A T v Hungary* that women victims of domestic violence should be provided with a safe home, through immediate and effective measures preventing the perpetrator from entering the woman’s home, and/or through provision of an alternate, safe home.³⁷

³³ Common Article 3 ICESCR/ICCPR. See further CESCR General Comment No 16 (n 22).

³⁴ UNHRC, above n 25, Summary.

³⁵ UNHRC, above n 21, para 27.

³⁶ G Pagilione, ‘Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing’ (2006) 28 *Human Rights Quarterly* 120, 139.

³⁷ *A T v Hungary*, Communication No 2/2003, 26 January 2005, CEDAW/C/32/D/2/2003.

14(2)(h) in the instant case

7.12. Cecilia Kell is an Aboriginal woman living in a remote region of Canada. As noted above, the Behchokò community is a rural indigenous community, located in Canada's far north. Many members rely on traditional subsistence activities such as hunting, trapping and fishing. As such, the Community as a whole can be considered rural for the purposes of falling within the protection of Article 14. Given that Aboriginal communities in Canada remain in a state of under-development in comparison with the euro-Canadian population, Article 14 is of particular relevance here.

7.13. The fact that the author of the complaint has spent time in urban centres does not prevent her from accessing relief under Article 14, provided that the violation, or its on-going effects, are tied to particular harms she experienced as a women in a rural location.

7.14. Housing is central to Cecilia Kell's claim. As is true for many women, Kell's relationship with her home and housing was not always positive. Nonetheless, throughout the domestic legal process she specifically asserted a claim for the restitution of her home. Her desire to make her home in the Behchokò community was motivated by her desire to bring her children home. The author further asserted that a home in the Behchokò community would fulfil her Aboriginal treaty rights, and is thus tied to cultural identity and belonging.

7.15. The Committee is of the opinion that the following elements of Cecilia Kell's Article 14(2)(h) right were violated.

Legal Security of Tenure and Forced Eviction

7.16. Security of tenure is the cornerstone of the right to housing. It protects against forced or arbitrary evictions or removals and provides crucial security and stability. When housing can be seized at will, or when one is subject to arbitrary or forced eviction, one does not enjoy the right to housing but resides at another's pleasure.

7.17. The CESCR defines forced evictions as occurring where there is 'permanent or temporary removal against their will of individuals ... from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'³⁸ This duty extends to a state obligation to protect individuals from the actions of private persons.³⁹ The legal prohibition of forced evictions in international law would thus apply to the forced removal of Kell from her home in this case.

7.18. Canada owed an obligation of due diligence to protect Cecilia Kell from the forced eviction she experienced. The failure to provide a safe space is one of the ways in which violence against Aboriginal women in contemporary Canadian society has become

³⁸ CESCR General Comment 7, above n 31, para 3.

³⁹ CESCR General Comment 4, above n 31, para 9.

normalised,⁴⁰ accordingly the Committee regards Canada's due diligence obligations as heightened when indigenous women's safety in their homes is at stake.

7.19. First, Canada owed a duty to Kell to protect her from the experience of domestic violence, itself a violation of the right to adequate housing. Here, Kell was forced to flee her home and take refuge in a woman's shelter, despite her legal interest in the home and her right to benefit from housing under the specific housing scheme. The Committee reiterates that States should provide, as the de-facto position, that the perpetrator is removed from housing, rather than the victim of domestic violence is forced to flee the home. Second, Kell's right to housing was breached in respect of the right to security of tenure when the state failed to protect her or remedy the illegal removal of her name from the property lease. This aspect of rights violation is also considered further below.

Habitability

7.20. The requirement of habitability, as defined by the CESCR, ensures that housing is physically safe for its occupants.⁴¹ Domestic violence can violate the habitability aspect of the right to housing, rendering the home unsafe for the dwellers.⁴² As noted above, the State Party had an obligation of due diligence to ensure that Kell's housing rights were not violated by private parties. The failure to protect her from domestic violence was a violation of her right to housing. In addition, the failure of the State to provide alternative housing of adequate size and quality to house Kell and her family breaches this aspect of the right to housing.

Accessibility

7.21. Housing must be made accessible for disadvantaged groups. 14(2)(h) of CEDAW explicitly recognizes that rural women experience greater burdens of discrimination. Rural women should thus be accorded some degree of priority in access to housing. Aboriginal women are often among the most marginalized and disadvantaged of all groups. Thus, they fall directly within the priority groups contemplated by the CESCR in its goal of ensuring access to housing.

7.22. Likewise, the CESCR includes children in its list of disadvantaged groups for whom priority access should be ensured. Kell sought housing in the Behchokò community specifically to bring her children home to live with her. As such, her right to housing is intertwined with

⁴⁰ S Razack, 'Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George' (2000) 15(2) *Canadian Journal of Law and Society* 91.

⁴¹ CESCR General Comment 4, above n 31, para 8(c) and (d).

⁴² L Farha, 'Is there a Woman in the House?: Re/conceiving the Right to Housing' (2002) 14 *Canadian Journal of Women and the Law* 118, 129.

the rights of another vulnerable group – her children. In addition, it is to be noted that international standards such as the Universal Declaration of Human Rights Article 24(2), protect motherhood and childhood, as areas of special vulnerability and thus concern. These standards should inform the interpretation of CEDAW's Article 14(2)(h) and the right to housing under it.

7.23. In Kell's case, there was a specific housing scheme that was designed to give priority in family housing to indigenous people. Kell was initially able to access housing through this scheme, though ultimately only as a shared claimant with her non-indigenous male partner. The state failed to take steps to protect and ensure Kell's legal right to her home as an indigenous woman and mother, and her ability to access that home in practice. The accessibility element of her right to housing was, therefore, breached in this case.

Article 16(1)(h)

8.1. Under article 16(1)(h), States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

8.2. The Committee is of the view that inequality within the family is one of the most serious forms of inequality experienced by women, affecting their most intimate relationships. Especially regarding matters related to property, the Committee reiterates, in accordance with its General Recommendation No. 21 on Equality in Marriage and Family Relations, that the right to own, manage, and dispose of property is crucial to a woman's right to enjoy financial independence.⁴³ This access to property is also vital to a woman's ability to earn a livelihood and provide adequate housing and nutrition for herself and for her children. Unequal access to property frequently has a deep impact on women's position within their families, leading in many cases to their being in subordinate positions with respect to their husbands or male partners. Such unequal access to property may also considerably affect women's life choices, especially but not exclusively their decision to freely enter into or leave marriage. Accordingly, the Committee considers that any discrimination in the assignment of property that rests on unacceptable gender biases should be strongly condemned and that States should take all necessary measures to protect women from property rights discrimination by institutions and by private individuals.

8.3. As to the merit of the case, the Committee takes note of the State party's submission that the author has not pointed out any property laws or customs that discriminate against women in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property; or any discriminatory laws that interfered with her ownership,

⁴³ CEDAW General Recommendation 21: Equality in marriage and family relations, UN Doc A/49/38, 04/02/94.

acquisition, management, administration or enjoyment of the Behchokò property in particular. However, the Committee has consistently stated that CEDAW's aim is the elimination of all forms of discrimination against women both *de jure* and *de facto*; and that while the recognition of formal legal equality is crucial to prevent women from being discriminated against because of their gender, States parties' commitment to equality must also encompass the adoption of all necessary measures to combat gender-based discriminatory conduct and attitudes that women experience *in practice*, resulting from the activities or omissions on the part of States parties, their agents, or committed by any persons or organisations in all fields of life.

8.4. Considering the facts at hand, the Committee is of the view that Kell's property rights have been prejudiced due to the removal of her name from the Assignment of Lease certifying co-ownership without her consent, and that she has been discriminated against as a woman since she has been treated by the authorities as *not having equal rights* to her partner Senych. Accordingly, the Committee concludes that the State party has violated Article 16(1)(h) as it failed to eliminate discrimination against women in all matters relating to marriage and, in particular, to ensure that its agents afforded Kell the same rights in comparison to those of her partner Senych in respect of ownership, acquisition, management, administration and enjoyment of the property.

Article 16(1)(g)

9.1. The Committee notes that from 1991 Kell was the victim of serious spousal abuse and that such violence worsened when she obtained a job and became financially independent. Her partner Senych controlled her finances, tried repeatedly to prevent her from working and took actions that resulted in her losing more than one job. In early 1995, it was as a consequence of Kell's decision to take employment without Senych's consent that the latter changed the locks on the family home and denied the author access, thereby leaving her with no place to live for several days and denying her access to her property and home.

9.2. Even if Kell has not expressly alleged a violation of Article 16(1)(g) of the Convention, the Committee is of the view that the principle of *pro homine*, which informs the interpretation and application of the CEDAW, provides it with the opportunity to rule on a matter not raised by the author, whenever functional to the achievement of a comprehensive protection of human rights and fundamental freedoms.

9.3. Accordingly, the Committee recalls that under Article 16(1)(g) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage, and in particular ensure men and women the same personal rights as husband and wife, including the right to choose a profession and an occupation. Further, General Recommendation No. 21 on Equality in marriage and family relations states that '[a] stable family is one which is based on principles of equity, justice and individual fulfilment for each member', and refers to the duty of states to ensure the right of each partner to choose a

profession or employment that is best suited to his or her abilities, qualifications and aspirations.⁴⁴

9.4. In this regard, and considering the facts at hand, the Committee takes the occasion to stress that discrimination within the family affects women's economic well-being no less than labour market practices and laws. The Committee also notes that gender-based domestic violence manifests itself in myriad different ways, including oppressive practices aimed at preventing women from working outside the home. At the same time, it is relevant to consider that employment is central not only to women's right to enjoy financial independence, and to provide for her and her children's basic needs on her own, but also, and relatedly, to freely take life decisions, including the choice (as in the case under review) of leaving an abusive and violent husband.

9.5. The Committee recalls that Article 2(e) requires States Parties to take all appropriate measures to eliminate discrimination against women 'by any person, organization or enterprise', thus creating redress for violations of the Convention perpetrated by private actors, including those committed within the family.

9.6. At the same time, General Recommendation 19 on Violence against Women provides that States Parties should take appropriate and effective measures to overcome all forms of gender-based violence, that is 'violence that is directed against a woman because she is a woman or that affects women disproportionately'; and it specifies that States may be responsible not only for acts of violence perpetrated by public authorities, but also for private acts, if they fail to act with due diligence (i.e. with appropriate effort and effectiveness), to prevent or to investigate and punish their commission.⁴⁵

9.7. In the light of these considerations, the Committee observes that, as a consequence of the State's failure to act with due diligence to prevent and stop spousal abuse against her, the author has been deprived of the opportunity to freely choose an occupation and lead an independent economic life on equal terms with her partner.

Intersectional Harms to the Author

10.1. The harm to the Author from all sources, and under all Articles cited herein, is not as a result of one or an accumulation of the claims alleged by her, but also as a result of the intersection of the harms to the author.

⁴⁴ *ibid.*

⁴⁵ CEDAW General Recommendation n 19 on Violence against Women, UN Doc A/47/38 (1993). See C Chinkin, 'Violence against Women' in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford, Oxford University Press, 2012) 443 ff. See also C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (The Hague, Martinus Nijhoff, 2008).

10.2. There has been in Canadian and other national legal literature some discussion in courts about intersectional oppression and about the extent to which, or whether, an intersectional approach can yield results in eradicating certain forms of discrimination.⁴⁶ The influence of intersectionality has extended beyond domestic social and legal spheres to international human rights discourses. For example, thematic reports to the United Nations (UN) have discussed the importance of intersectional forms of discrimination and how such discrimination exacerbates harm to women.⁴⁷ These recent discussions of intersectionality in international law build upon earlier work in this regard.⁴⁸ Because intersectionality has frequently relied on a relatively narrow definition of ‘women’ that fails to address identity markers such as race or class, explicit attention to these and other factors in the international arena represents significant progress for the world's women.

10.3. Throughout this Committee’s opinions regarding State violations of Articles 1; 2(d) and (e), 14(2)(h), 15, (1)–(4), and 16(1)(h), it is readily apparent that the intersection of Kell’s status as an Aboriginal woman experiencing domestic abuse, poverty, and property dispossession has caused harm. These harms have served to deprive the author of her individual rights and agency. The harms also, however, contribute to broad structural inequalities faced by all women across states and cultures.

10.4. Accordingly, the Committee is of the view that the rights of the author under article 16(1)(g), of the Convention have been violated.

Recommendations:

11.1. Acting under article 7, paragraph 3, of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State Party has

⁴⁶ See K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 *University of Chicago Legal Forum* 139, 140 and 149. See further, K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford Law Review* 1241, 1242–44; G Valentine, ‘Theorizing and Researching Intersectionality: A Challenge for Feminist Geography’ (2007) 59(1) *The Professional Geographer* 10; RJF Day, *Multiculturalism and the History of Canadian Diversity* (Toronto, University of Toronto Press, 2002); D Khayatt, ‘Boundaries of Identity at the Intersection of Race, Class and Gender’ (1994) 14(2) *Canadian Woman Studies: Racism And Gender* 6; J Siltanen and A Doucet, *Gender Relations in Canada: Intersectionalities and Social Change* (New York NY, Oxford University Press, 2008).

⁴⁷ AN Davis, ‘Intersectionality and International Law: Recognizing Complex Identities on the Global Stage’ (2015) 28 *Harvard Human Rights Journal* 205; JE Bond, ‘International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations’ (2003) 52 *Emory Law Journal*, 71.

⁴⁸ R Coomaraswamy, *Special Rapporteur on Violence against Women: Report to the Commission on Human Rights* (6 January 2003), UN Doc. E/CN.4/2003/75.

failed to fulfil its obligations and has thereby violated the rights of the author under Articles 2, (d) and (e), 15 and 16, 1 (h), and 14(2)(h) read in conjunction with Article 1 of the Convention, and makes the following recommendations to the State party:

(a) Concerning the author of the communication

- Provide housing commensurate in quality, location and size to the one that she was deprived of;
- Provide appropriate monetary compensation for material and moral damages commensurate with the gravity of the violations of her rights;
- Ensure that the author is consulted and able to participate in the process of remedying her rights violations.

(b) General

- Ensure that appropriate protective and support services for victims of violence – including transportation to safe accommodation, healthcare, legal, psychological and employment counselling, social and financial support – are accessible to rural women and provided to isolated communities.
- Provide through law and policy the presumption that the perpetrator of domestic violence is removed from the shared home, rather than that the victim is forced to flee.
- Recruit and train more Aboriginal women to provide assistance to women from their communities who are victims of violence and other forms of gender-based discrimination.
- Review its legal aid system to ensure that women facing multiple discrimination, especially rural women, and women victims of violence, have effective access to justice and, in particular, establish adequate gender-sensitive training of judicial and law enforcement officials.
- Design and implement public policies and institutional programs to overcome existing stereotypes of the role of women in rural communities and promote the elimination of discriminatory socio-cultural patterns that prevent women from fully enjoying their human rights and attaining equality.
- Encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence, especially violence against rural women.

11.2. With regard to general recommendations, the Committee takes the occasion to underline that when women's rights are violated it is crucial to award reparations from a gender perspective, and that adopting such perspective should influence the definition of both the beneficiaries and the content of reparatory measures. In particular, this requires us to

supplement individual with general, structural forms of reparation directed to the society as a whole (rather than to the rights holder alone). These structural forms of reparation have the transformative potential to address – and progressively contribute to eradicate – widespread patterns of gender-based discrimination and violence forming the backdrop of individual violations.

11.3. In accordance with article 7(4), of the Optional Protocol, the State Party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State Party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all relevant sectors of society.

Reflections

In the course of writing our judgment, we encountered several recurring issues that deserve attention here and that shine a light on the challenges of feminist judgment writing, but also some of its pleasures.

[Aren't CEDAW Decisions Already Feminist?](#)

First, as noted above, the three of us set out to write a decision that would be a significant, even radical, departure, from the existing CEDAW views. We wanted to make visible and audible the way law operates over women, and the silencing of women that often occurs, as here, through the domestic judicial process and even in international fora designed to rectify domestic failures. Why was this necessary? We might assume that the CEDAW Committee is by its very nature a feminist body, and that its decisions would therefore be feminist decisions, in which women's experience of human rights and their violation would be revealed in full force. The *Kell* decision is evidence that the application of CEDAW by the CEDAW Committee does not, by and of itself, make women's experience of the law fully visible. This is perhaps not surprising, as feminists have long known that simply applying law to facts does not result in 'the answer' being divinely revealed by the process, notwithstanding ancient notions of a female *Justicia* as the goddess of justice. As such, we found ourselves in the position of imposing a feminist judgment on the Committee of the Women's Convention.

One of our goals was thus to centre women's legal stories as specific topics and to deploy a feminist legal method more generally. By telling women's stories we refer to the exploration of their roles in legal events. We use feminist legal methods to describe a perspectivist approach to law that involves re-reading law from a feminist viewpoint or co-reading traditional male-centred legal stories along with legal stories that foreground women's perspectives. Related to this is what has been described as feminist legal realism, a feminist-focused legal movement whose goal is to deconstruct legal norms and engage in emancipatory

or revisionist efforts to re-shape legal norms to include women.¹ We began with the issue of intersectionality.

Intersectionality

In our use of feminist methodologies, we sought to make intersectionality truly central to the decision. Gender and racial intersectionality is a paradigm that has long informed a number of legal discussions, although its use in international law is more recent.² However, problems often arise in deploying it to its greatest utility. These problems are often the result of the numerous complexities involved in crafting multifaceted theories. Such theories posit explanations for the way in which socially constructed categories of difference combine to create a social hierarchy. Because of these complexities, many efforts at addressing intersectionality begin and end by doing little more than noting the marginalisation of victims of intersecting (or perhaps interlocking) sources of oppression to victims and empowerment to oppressors. We were acutely aware of these issues, and sought to overcome them.

To our surprise and consternation – but also to our profound illumination – we discovered that the issue of intersectionality remained elusive and continually seemed to be marginalised in our CEDAW views. The very *form* of a legal decision constrained our ability to write about harms intersectionally. The fact that legal opinions – including CEDAW views – are organised on an issue-by-issue analysis, that proceeds sequentially through the violation of each individual article of the relevant law, meant that the ability to write about the totalising effect of the operation of the law over an indigenous single woman subject to violence in the home, and unable to assert her legal rights before the courts, kept slipping from our grasp. We found, as Hunter, McGlynn and Rackley identified, that judgments, even when broadly

¹ See M Quinn, 'Feminist Legal Realism' (2013) 35 *Harvard Journal of Law and Gender* 1, 2–5.

² A Nicole Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Human Rights Journal* 205; L Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1997) 40 *Howard Law Journal* 619. Another example is H Lewis, 'Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women' (1998) 50 *Maine Law Review* 309; LL Green, 'Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law' (2002) 33 *Columbia Human Rights Law Review* 733, 735.

interpreted and loosely constrained as is the case with CEDAW views, are both constrained and constraining, ‘and writing a judgment imposes certain expectations and constraints on the writer that inevitably affect – even infect – her theoretical purposes.’³ At the same time, our own disciplinary training continually, almost subconsciously, and certainly against our stated intentions and wills, seemed to subvert our ability to think and write beyond the standard form. Even with our explicit attention turned towards intersectionality – both the intersectional power of Senych and the intersectional disempowerment of Cecilia Kell – we found it very difficult to include a meaningful picture of the intersectional nature of the human rights violations in this case.

Nevertheless, by specifically engaging intersectionality in Kell’s case, we attempt to take up the baton of intersectionality and move it forward in a way that is both individually useful in assessing the facts of Kell’s case and also more broadly serviceable in cases involving women (and men) whose multiple identities require address.

Use of the CESCR’s Approach to the Right to Housing

The CESCR’s General Comments on the right to housing are some of the most advanced, explicit and authoritative available at the international level. As such, we felt it was appropriate for the CEDAW Committee to adopt them here as the international standard. However, we did this with some reserve, as it is not clear that the CESCR has, to date, itself adopted a particularly feminist understanding of the right to housing. As such, we also drew on the significant work of the UN Special Rapporteurs on the right to adequate housing, who have taken an explicitly feminist and gender sensitive approach to the right.⁴ We also drew on a richer conception of the relationship between domestic violence and the right to housing than the CESCR has

³ R Hunter, C McGlynn and E Rackley, ‘Feminist Judgments: An Introduction’ in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010) 5.

⁴ See further J Hohmann, ‘Principle, Politics & Practice: The Role of UN Special Rapporteurs in the Development of the Right to Housing in International Law’ in A Nolan, R Freedman and T Murphy (eds), *The UN Special Procedures* (Leiden, Brill, 2017).

embraced to date, partly drawing on the work of UN Special Rapporteurs, but also academic sources.⁵

The Feminist ‘Reveal’, and what Sort of Feminist is Revealed?

We also wondered whether we should reveal ourselves as feminists, and the potential implications of doing so as judges (or at least Committee members), a question that has already been raised in various feminist judgment projects.⁶ Taking as an assumed starting point that the CEDAW Committee should be a feminist body, we declared early on in our decision that the Committee would take on the mantle not just of feminine, but of feminist justice. We were alert to the political implications of this move, and it was a move that we as the Committee as a whole felt some discomfort with. We questioned whether this move was ‘realistic’ in light of the CEDAW Committee’s actual composition, appointments process, and its views and other work. In the end, we decided that an ideal CEDAW Committee would make this commitment, and we would demonstrate how it could be done.

A further question arises: what sort of feminists might we be? Feminism is far more fluid than is sometimes acknowledged. However, it is important to point out that we can evaluate our work here, and the original CEDAW views, using schools of feminist thought which provide a useful analytical frame. For example, in our views we attempt to go well beyond the liberal legal subject, the ‘atomised, self-interested, competitive being’,⁷ of liberal feminism which might be considered as the least confrontational or radical expression of feminism and which we might expect as the bare minimum level of feminism we would see from the CEDAW Committee.

⁵ Particularly in J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford, Hart Publishing, 2013), and see G Pagilione, ‘Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing’ (2006) 28 *Human Rights Quarterly* 120; L Farha, ‘Is there a Woman in the House?: Re/conceiving the Right to Housing’ (2002) 14 *Canadian Journal of Women and the Law* 118.

⁶ See Hunter, McGlynn and Rackly, above n 3, particularly chs 2 and 3; H Douglas, F Bartlett, T Luker and R Hunter, ‘Reflections on Rewriting the Law’ in H Douglas, F Bartlett, T Luker and R Hunter (eds), *Australian Feminist Judgments: Rights and Rewriting Law* (Oxford, Hart Publishing, 2014).

⁷ Hunter, McGlynn and Rackley, above n 3, 21.

However, in certain aspects of the *Kell* views, we found that the CEDAW Committee would have done well to treat Kell as an ‘atomised individual.’ Particularly in recognising her independent right to property and her autonomy as a full subject of rights and status in law, we as the CEDAW Committee stood firmly behind her formal rights to equality in law, a stance not strongly enough adopted in the original decision. In other areas, we felt that only a feminist stance that explicitly acknowledged the structural, historical, and relational aspects of women’s marginalisation and the denial of rights and status in law could give effect to the claims Cecilia Kell made with such deep commitment and compelling steadfastness. We have noted above our efforts to write a judgment that took real account of, and responded to, intersectional discrimination, and our struggles to succeed in this respect.

In the end, we did not subscribe to any one ‘feminism’ in our decision. Our decision rather draws on a range of feminist insights, from critical and radical feminist and queer theory insights into represented space, to liberal feminist insistence on formal equality, to structural concerns about the historical and relational aspects of power and patriarchy. Our judgment demonstrates that ‘feminisms’ do not necessarily compete, and may rather complement our understanding of women’s experience of the law. In addition, our work could be thought of in the view of what some scholars have labelled ‘meta-feminism’: that is, where feminism is self-reflective and explicitly struggles to define itself all while applying the label outside of itself.⁸

We conclude by observing that the very notion of engaging in this writing as a collaborative enterprise has been both feminist and self-reflexive in nature. We have, in short, produced feminist work while querying and shaping the nature of how we, as feminists, work together. It is difficult for academics working in any context to produce work that is non-traditional, broadly generative and explicitly ameliorative. It is all the more difficult to do so as a collaborative enterprise. Each of us has felt at various times in this project that it would certainly be easier to render a single-authored chapter. While we are all three legal scholars, we are also, in true intersectional fashion, women who represent a range of differences including nationality, ethnicity, race, professional and personal experiences, approaches to research and writing styles. We have had to bridge these differences in order to do our work, and we have developed methods of collaboration. In the process we have forged a new narrative

⁸ MJ Matthews Green, *Women and Narrative Identity: Rewriting the Quebec National Text* (Montreal, McGill-Queen’s Press, 2001) 104.

identity that unites the merits of our individual voices into what we hope is one sonorous, highly enriched stereo-voice. Thus while feminism is notoriously difficult to define, we three authors have, implicitly if not explicitly, embraced shared notions of what it means to do feminist work.