Re-Centering the Resilience and Resistance of Migrant Women of Colour:

Exploring the Potential of Intersectionality and Indigenous Approaches to Immigration Appeals[1]

Written by: Will Tao, 2019-2020 Founders Award Winner

"Are you telling me she does not know how to operate a rice cooker or wash dishes?"

The question took me by surprise.

I was attempting to negotiate a settlement with the Minister's Counsel, a middle-aged white male, someone known to put up a fight even on the most compelling facts. My mentee, a racialized law student and migrant himself, leaned in curiously from the edge of his seat. It was his first hearing as an observer. The Member, also a middle-aged white male, had ordered a ten-minute break.

"You are telling me she can't take care of her own child?"

The Appellant, a 75-year old widowed elderly grandmother, a racialized woman with fading memories but strength and conviction equivalent to her years, had just finished her lengthy testimony. During the cross-examination, she was asked by the Minister's Counsel whether she

[1] The author acknowledges that this paper was written on the traditional and ancestral territories of the Coast Salish – sḵwx̱wú7mesh (Squamish), səl̓ílwitulh (Tsleil-Waututh), and xʷməθkʷəy̓əm (Musqueam) nations in present day Vancouver, B.C. This roundtable session is being presented on the unceded territories of the Kanien'kehá:ka Nation in Tiohtià:ke/Montréal, QC.

The author would also like to thank his mentees, Karen Jantzen (2L at Allard/UBC), Astitwa Thapa (2L at Allard/UBC), his Edelmann and Co. Law Offices assistant, Edris Arib, and Firm Partner, Erica Olmstead for their help, inspiration, and edits on this paper. The author is grateful to the CBA National Immigration Section, Founder's Award Committee for their selection and to Erica Olmstead, Erin Roth, and Richard Kurland for their nomination support letters.

This paper is dedicated to the author's spouse Olivia Yin, her resilience, and the resilience of other Indigenous women, Black women, and women of colour.

had taken any English classes. During her 15 years as a permanent resident, retiree and stay-at-home grandmother, she never learned English.

We were awaiting the testimony of the Appellant's Canadian citizen daughter, the true object of the Minister's inquiries and concerns. The Appellant's daughter was herself a past victim of abuse, suffered from depression and anxiety, and was a single mother to the Appellant's granddaughter.

She self-described as 'simple-minded' but was also an incredible entrepreneur, a Canadian university graduate, with an impeccable memory of the details of her oft-torturous and difficult life. She admitted to not being the best mother, often putting her own career and work ahead of her daughter's interests and struggling to provide adequate care for her daughter. Her daughter (the Appellant's granddaughter), only four years old, was already demonstrating early signs of being a child prodigy. The child had been raised primarily by her grandmother and thrived when her elderly wisdom and cultural teachings were part of her life.

I tried to address the Minister's concerns: 'She's a single mother, she's been through hard times," I responded, referring to the Appellant's daughter. "If you remove the Appellant, you expose her granddaughter to financial hardship, you take a primary caregiver away from a Canadian child." "Grandma needs to be here."

I tried to think of some way to appeal to the Minister's Counsel, to unlock his human empathy. As much as I tried to step into the white athletic shoes of the Appellant's daughter, they were not mine. I could not relate directly to her worsening financial situation, her role as a mother, her navigation through immigration challenges, and most of all, the physical and emotional abuse. Even though I also lost a father to illness and spoke her mother-tongue, I was not her.

I was an employed lawyer to her present unemployment. She paid me. I had grown up in this city compared to her few months here. I had luxuries of saying 'no' where she could only say 'yes.'

"I don't buy it. There are plenty of single moms and divorced women who are citizens and permanent residents in Canada" the Minister's Counsel continued. "What makes this woman so special?"

I had a different thought. What were four men doing in this discussion of what the 'best interests' and 'hardships' of the women were, in this matter? Who was I, as an agent of patriarchal oppression, to be having this conversation on the future of these women's lives? Who was I to be a gatekeeper or saviour through this deeply re-traumatizing process?

Earlier, I had made submissions that my client was 'vulnerable' by way of her age and level of cognition. I felt uncomfortable labelling her as vulnerable - she was simply an elderly woman going through a deeply unsettling and invasive appeals process. She struggled with dates. In fact, by the end of her direct testimony, she probably could not remember her own birth date due to how disjointed and aggressive the questioning was, as she kept repeating " I cannot remember the specific details anymore.. I can't remember." To me it sounded like a plea for help, a desire for escape.

It was determined that the hearing would need a resumption. I stepped out of the hearing room, inviting my mentee to join me. Before the hearing, I had given him a rundown of the modified-Ribic test and given him a preview of where I expected the evidence to fit into the respective boxes.

"I cannot imagine if it were my mother," my mentee responded. "She would probably not remember any of these details and also get them wrong. Why is this woman (the Appellant) being put through this? Do they expect her to be perfect? Why do they want to kick her out of this country?" "Where is the room for her resilience?"

For many of us who barely know our own mothers and sisters, how do we begin to participate or render decisions that impact them so directly, without understanding how these barriers and marginalization intersect?

How do we keep from forcing Eurocentric, patriarchal and assimilative perspectives on migrant women of colour? Or do we simply resign ourselves to accepting the historical context, as Professor Constance Backhouse sums:

> *Immigration laws shaped the very contours of Canadian society in ways that aggrandized the centrality of white power.*[2]

Extending beyond this, how do I personally justify that I may be, as an immigration lawyer, spending a career as a translator or go-between for ongoing white supremacy[3] *and the harms it may (re)produce? In this paper, I want to begin the process of deconstructing the process*[4] *and offer up new possible frameworks to address these concerns.*

Re-Examining and Deconstructing Three Frameworks of Immigration Appeals

Over the past nearly five years of representing clients in Immigration Appeal Division ("IAD") hearings, more specifically clients who were migrant women of colour, I have come to identify gaps, which my above story illustrates.[5]

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[2] Constance Backhouse, Colour-Coded: A Legal History of Racism in Canada, 1900-1950, Toronto, ON, University of Toronto Press, 1999, at page 15.

[3] I adopt the definition of white supremacy from Erika Wilson, The Legal Foundations of White Supremacy, 11 DePaul J. for Soc. Just. (2018) Available at: https://via.library.depaul.edu/jsj/vol11/iss2/6 at page 3.

> *Importantly, in using the term white supremacy, I do not mean the kind of white supremacy used in popular discourse to mean individual animus or hate towards individuals or groups who are not white. While that kind of white supremacy is certainly invidious and worth paying attention to, that is not the kind of white supremacy on which this paper is focused. Instead, I use the term white supremacy as defined by legal scholar Professor Frances Lee Ansley to mean: A political, economic and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exists across a broad array of institutions and social settings. Notably, this definition of white supremacy focuses primarily on the institutional arrangements that underlie white supremacy and only secondarily on individual race-based animus. More importantly, it emphasizes the ways in which white supremacy undergirds the way we organize our society, and the ways in which we distribute resources and power.*

[4]Marc Higgins, Brooke Madden & Lisa Korteweg, Witnessing (halted) deconstruction: white teachers' 'perfect stranger' position within urban Indigenous education, Race Ethnicity and Education, 2015, 18:2, 251-276, DOI: 10.1080/13613324.2012.759932 at page 269:

> *'Deconstruction is more than working within/against a structure. It is also the overturning and displacement of a structure so that something(s) different can be thought/done' (St. Pierre 2011, 613).*[4]

[5] Authors note: My motivation for this paper comes from work done earlier in 2019 where I had the privilege of being part of the CBA's consultations on the *Immigration Appeal Division Rules*.[5] I was parachuted in last minute, but the collaborative approach of having stakeholders together left a lasting impression on me. The IAD Appeal process is a collaborative and dynamic process, and a perfect forum for new ideas. The success of Alternative

In this paper, I examine three existing frameworks: (1) the discretionary jurisdiction of the IAD under s.67(1) of the *Immigration and Refugee Protection Act;*[6] (2) the designation of a 'vulnerable person' under *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB;*[7] and (3) the role of witnesses and storytelling.

I propose the need to reassess these areas and to critically examine where the IAD appeals process can better reflect the modern challenges appellants are facing. These three existing frameworks give little space for resilience,[8] resistance,[9] ignore systemic barriers (including the centering of racism), and reinforce binary concepts at the expense of intersectional realities. I also propose applying Indigenous perspectives and consulting with Indigenous communities as a possible avenue of process renewal.

Dispute Resolution ("ADR"), a relatively new process, is a perfect example. I hope this paper can spark the beginning of a new conversation.

[6] *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) ["*IRPA*"]

[7] *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB, Amended 15 December 2012*, Available at: https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx

[8] Resilience has multiple definitions in multiple contexts, but broadly, we can begin with the definition provided by the American Psychological Association ("APA"): "Psychologists define resilience as the process of adapting well in the face of adversity, trauma, tragedy, threats or significant sources of stress — such as family and relationship problems, serious health problems, or workplace and financial stressors. As much as resilience involves "bouncing back" from these difficult experiences, it can also involve profound personal growth." See: https://www.apa.org/topics/resilience (Accessed 27 April 2020). Statistics Canada adopted a different definition in their recent 25 February 2020 Report titled "Canada's Black population: Education, labour and resilience" https://www150.statcan.gc.ca/n1/pub/89-657-x/89-657-x2020002-eng.htm (Accessed;: 27 April 2020). The StatsCan report defines Resilience as the *"ability to form a successful adaptation in the face of obstacles and adversity"* (Seiler, Shamonda and Thompson 2011).

[9] The APA defines resistance as - generally, any action in opposition to, defying, or withstanding something or someone. See: https://dictionary.apa.org/resistance (Accessed: 27 April 2020). Resistance, in the context of the feminist scholarship (especially Black Feminist Scholarship) has a much deeper and complex meaning, not always agreed upon. Borrowing from the theoretical formulations of Heidi Safia Mirza, I will define resistance as a challenge to the systematic institutionalized discriminatory practice deeply embedded in white (Euro-centric) patriarchial colonial society, through collective agency and personal transportation through knowledge and educational opportunities. (See: Mirza, Heidi S.. 2018. "Decolonizing Higher Education: Black Feminism and the Intersectionality of Race and Gender." Journal of Feminist Scholarship 7 (Fall): 1-12. https://digitalcommons.uri.edu/jfs/vol7/iss7/3 at page 9)

Limitations

I am acutely aware of my role as an oppressor. I have benefited from my gender, class, and East Asian privileges countless times in my work, in sharp contrast to many women of colour colleagues who have shared far different stories of race and gender-based discrimination. The story I presented and the stories that I am alluding to ultimately need to be told by the women at the center of the appeal experience and it is not my place with my positionality to try and tell them, but rather to reflect only on what they have taught me.

I am also writing amidst the continual colonization of Indigenous lands and as a non-Indigenous settler and I have much to learn about Canada's history of genocide on stolen land. In looking at inspiration and ideas from Indigenous contexts, I am cautious that I have not yet asked for consent to apply the teachings they have graciously shared through scholarship into the context of Canadian immigration. Eventual implementation of Indigenous knowledge and practices (if pursued) would require the building of trust and direct, compensated engagement with Indigenous communities.

Three Existing Frameworks to Unpack

Discretionary Jurisdiction

In the appeal of removal orders (such as for misrepresentation, criminality, and residency obligation non-compliance), IAD members have the ability to allow an application on humanitarian and compassionate (H&C) grounds, exercising their discretionary jurisdiction. The IAD may allow the appeal and quash the removal order, stay the execution of the removal order, or dismiss the appeal. In most cases, there is a one-person IAD member responsible for making this decision.[10]

[10] To allow an appeal on discretionary jurisdiction, the Member must apply s.67(1)(c) of the IRPA

> Appeal allowed
> 67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

The overall framework for determining whether sufficient H&C considerations per s.67(1)(c) *IRPA* warrant special relief continues to be from a 1970 case called *Chirwa.*[12]

This test was recently referred back to in the Supreme Court of Canada (SCC)'s the seminal decision in *Kanthasamy*[13] at paragraph 13:

> *"those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act."*[14]

Members apply the *Ribic*[15] factors (modified in a case heard at the SCC called *Chieu*[16] in 2002), in order to apply discretionary jurisdiction. These factors have been further modified in *Ambat*[17] in the residency obligation context and were re-iterated in *Wang*[18] in the misrepresentation context.[19]

> ….
> (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[12] *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 [*Chirwa*].
[13] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61.
[14] Per the full paragraph 13 of *Kanthasamy:* [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "**those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act"**: p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350. **(emphasis added)**
[15] *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.D.D. No. 636 ["*Ribic"*]
[16] *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84. [*"Chieu*"]
[17] *Ambat v. Canada (Citizenship and Immigration)*, 2011 FC 292 (CanLII),
[18] *Wang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059.
[19] The factors are as follows:

> **Criminality:** (a) the seriousness of the offence or offences leading to the removal order; (b) the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission; (c) the length of time spent, and the degree to which the appellant is established in, Canada; (d) the family in Canada and the dislocation to the family that removal would cause; (e) the family and community support available to the appellant; and (f) the degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

All of these frameworks have some commonality. First, they involve some assessment of the Appellant's contravening action, the Appellant's efforts to remedy those actions, the Appellant's level of establishment in Canada, hardship from the separation of family members and country conditions, and the best interests of the child. Members are given broad discretion to balance the factors as they wish, not needing to mathematically demonstrate when H&C discretionary relief is justified.[20]

The problem with the above factors, as elucidated by the example presented at the beginning of the piece, is that it can often pit factors against one another. A set of identical facts can lead decision-makers to view them under different headings of the modified-*Ribic* tests.

Furthermore, the *Ribic* test is entirely silent to systemic factors. Hardship is only examined with respect to the country of possible removal. Still, the resilience of women, persisting and resisting against patriarchal relationships, racism, and other factors that may go beyond the hardship of removal, go unassessed.

Importantly, there is no introspective assessment of the *Ribic* factors in the context of those systematic barriers arising from Canada, as a source of ongoing oppression. Canadian assimilative standards and exceptionalism are presumed the ideal. Those that fail to fit in, or resist societal norms, may have their establishment viewed negatively, and thus their availability to leave Canada presented in a positive light. I provided the earlier example of English classes

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> **Misrepresentation**: (a) the seriousness of the misrepresentation and circumstances surrounding it; (b) the degree of remorse demonstrated by the appellant; (c) the length of time spent in Canada and the appellant's degree of establishment; (d) the appellant's family in Canada and the impact to the family that removal would cause; (e) the family and community support available to the appellant; (f) the degree of hardship that would be caused to the appellant by his return to his country of nationality; and (g) the best interests of any child directly affected by the decision.
>
> **Residency**: (a) the extent of the non-compliance with the residency obligation; (b) the reasons for the departure and stay abroad; (c) the degree of establishment in Canada, initially and at the time of hearing; (d) family ties to Canada; (e) whether attempts to return to Canada were made at the first opportunity; (f) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada; (g) hardship to the appellant if removed from or refused admission to Canada; and, (h) whether there are other unique or special circumstances that merit special relief.

[20] As a recent example, see *Singh v. Canada (Citizenship and Immigration)*, 2020 FC 328 (CanLII) – in the context of a criminality appeal where the Member refused to grant a stay. See especially paras 34-34, and 45;

(language) but we also see this in rehabilitation and proof of medical evidence, where non-Western practices or rehabilitative efforts are scrutinized and frowned upon.[21]

There are also significant gaps. The rising issue of mental health is not given direct recognition beyond the medical context in its important relationship to other *Ribic* factors. Neither are factors such as resilience or resistance, which do not fit neatly under the category of establishment or hardship, but may serve as either stand-alone factors or important context for a lack of establishment or why hardship may exist beyond the immediate and peripheral.

IAD discretionary jurisdiction cases currently turn on the individual Member's assessment - no doubt influenced by past experiences, conscious and unconscious biases, and the perceived credibility of the Appellant in their testimony in trying to testify to fit their case into these boxes. Often it is his decision, and his alone, whether to grant discretionary relief to racialized and migrant women he may know little about.

Vulnerable Persons

One of the recent efforts made by the IRB to accommodate individuals is the application for designation as a vulnerable person. This is done through *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB,*[22] issued by the Chairperson pursuant to paragraph 159(1)(h) of the *IPRA.*

These guidelines state:

> *Vulnerable persons*
>
> *2.1 For the purposes of this guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired.* ***Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been***

[21] I just recently settled a matter where an Officer criticized an Applicant (non-appeal context) for pursuing religious/spiritual-based treatment and not demonstrating proof of having attended registered therapy-based treatment based on his alcoholism.
[22] *supra,* note 7.

> ***victims of persecution based on sexual orientation and gender identity.***[23] ***(emphasis added)***

The label of vulnerability can be a problematic one. First, as set out by Amy S. Katz et al.,[24] the term *"vulnerability"* can be vague, create space for scientific racism by omitting individuals who do not face barriers to service, and ignore the individuals and groups responsible for the vulnerability in the first place.

Structural barriers, lack of access, and the reality that vulnerability may be produced by the colonial immigration system itself are all ignored by our current definitions of vulnerability. Through these guidelines, it is also apparent that the starting point of the source of vulnerabilities are generally factors outside Canada or individual vulnerabilities (mental health, etc.) that have been uncovered and pathologized in Canada.

As such, the binary of needing to meet a high threshold to be considered vulnerable ignores the fact that individuals can be both vulnerable and resilient in different contexts. For example, an elderly woman, such as in the story told above, may be vulnerable in memory and age, but may demonstrate strength in her leadership of the family home or her role as a primary caregiver to her granddaughter.

Witnessing/Storytelling

The current process of witnessing in hearings generally involves the Appellant testifying first, followed by witnesses. The process begins with a direct examination by the Appellant's counsel (if the Appellant has counsel), followed by cross-examination from Minister's counsel, often interlaced or followed by questions from the Member.

[23] *Ibid.*
[24] Amy S. Katz, Billie-Jo Hardy, Michelle Firestone, Aisha Lofters & Melody E. Morton-Ninomiya (2019) *Vagueness, power and public health: use of 'vulnerable' in public health literature,* Critical Public Health, DOI: 10.1080/09581596.2019.1656800,

The process very rarely gives the Appellant the opportunity to tell their own story in the manner they wish to present it, unless questions are properly curated in advance by counsel to provide that space.

On the other hand, the over-curation of the process by counsel leads to concerns that the Appellant has 'memorized' or 'prepared' answers and is not providing authentic, genuine, and *credible* testimony.[25]

Failure to adequately prepare a client, or self-represented clients who are unaware of the process they are engaging in, open themselves up to gaps, memory deficiencies, and natural inconsistencies which can be perceived as non-credible. A non-credible Appellant generally does not bode well for the exercise of a Member's positive H&C discretion.

With respect to witness examination, witnesses who have yet to testify are generally excluded from the room. They are unable to hear or participate in the testimony of earlier witnesses. Often, questions directed at them will be sought to find inconsistency in the Appellant's testimony, confirming a lack of credibility.

Significant paper-based evidence ("disclosure"[26]) is a crucial factor to successful cases. Appellants and their supporters who are literate, have better access to interpreters and translators, and who come from countries with strong written documentation traditions, are generally able to provide stronger paper-based evidence. Those with significant financial resources or access to professionals are able to obtain reports from psychologists or educational experts. These reports help address issues such as health issues and best interest of the child, which often are assigned significant evidentiary weight by Members.

In conducting exit interviews with Appellants following their testimony, I have found some common themes. Many have commented that the appeal process was difficult for the fact that their very personal family issues, particularly around domestic abuse, family illness, and

[25] This is often true in the sponsorship appeal context, which this paper will not address. See e.g.: *Chin v Canada (Citizenship and Immigration)*, 2019 CanLII 82145 (CA IRB),
[26] *IAD Rules* at Rule 30.

fractured relationships, had to be opened up in a very public forum – often with strangers (observers) in the room.[27] Many Appellants and their witnesses also found that the presence of family and friends in the hearing audience was a double-edged sword - helping them with respect to demonstrating establishment but giving rise to parallel concerns about the family's private situations (often times that were shielded from even their own children), now being shared within broader religious and ethno-cultural community circles. Overall, most former clients I spoke to found the appeal process deeply re-traumatizing.

Another common reflection from Appellants is the feeling of being rushed through the IAD appeal process, particularly in shorter two-hour hearings. Appellants felt as though Members were preoccupied with moving forward or skipping over certain parts of their stories, leaving them inadequate opportunities to tell and present their stories in a cogent and comfortable manner.

Intersectionality as a Possible Lens

Intersectionality is an analytical framework that attempts to identify how interlocking systems of power impact those who are most marginalized in society.[28] Social stratifications such as class, race, sexual orientation, age, religion, disability, and gender do not exist as separate silos but are interwoven.[29]

Professor Kimberlé Williams Crenshaw's foundational definition of intersectionality describes the impact of multiple identities and forms of oppression on experiences of inequality, with a focus on African American (Black) women's location at the intersection of gender, race, and class statuses, often overlooked by mainstream research that focused on the experience of White

[27] It is common for media, trainees, and other counsel to attend as observers. Note that the *Immigration Appeal Division Rules* (SOR/2002-230). Rule 49 provides that an individual must make an application for a private hearing. The legal test is onerous.

[28] Krishnakumar , *The Importance of Intersectionality*, 1 April 2019, Available at: http://affinitymagazine.us/2019/04/01/the-importance-of-intersectionality/

[29] Tina Parbhakar, Wei William Tao, and Linda Guang Yang - "At the Intersection: A Conversation with Three Lawyers About Legal Practice, Purpose, and Their Pursuit of Passion", *The Advocate*, May 2019 at page 343.

women and Black men. Therefore, disadvantaged statuses and linked forms of oppression can be easily missed when one fails to take an intersectional lens.[30]

Unfortunately, intersectionality itself has become a buzzword.[31] Its own methodological application has been hampered by interpretations that any one person can be 'intersectional' because they hold multiple identities. This has the effect of re-centering the 'norm' as whiteness and allows individuals to compare their own marginalization in a manner that misses Crenshaw's original focus on race, gender, class, and politics at the intersections of her race-centred lens.

Another challenge with intersectionality is when it is viewed solely as a catch-all framework for diversity. In this concept of intersectionality, as long as a policy takes into account the different groups that may be affected and weigh those effects, intersectionality has been applied. When intersectionality becomes a blanket term for addressing the problems of all differently-situated communities, it loses methodological effectiveness to examine actual marginalization within those communities.

Strong evidence of both misapplications and misinterpretation of intersectionality can be found in the Government's own processes. An example is Immigration, Refugees and Citizenship Canada's ("IRCC") own framework, Gender-Based Assessment + ("GBA+").

Status of Women Canada defines the GBA+ framework as follows:

> *"GBA+ is an analytical process used to assess how diverse groups of women, men and non-binary people may experience policies, programs, and initiatives. The "plus" in GBA+ acknowledges that GBA goes beyond biological (sex) and socio-cultural (gender) differences. We all have multiple identity factors that intersect to make us who we are; GBA+ also considered many other identity factors, like race, ethnicity, religion, age, and mental or physical disability.*[32]

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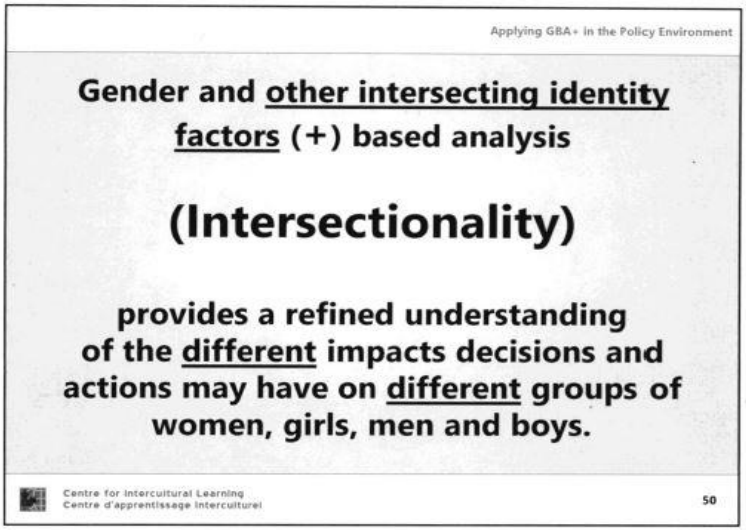
[30] See section: "Intersectionality and the Stress Process" and quote in: Perry BL, Harp KL, Oser CB. Racial and Gender Discrimination in the Stress Process: Implications for African American Women's Health and Well-Being. Sociol Perspect. 2013;56(1):25–48, at page 2, Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3783344/pdf/nihms492047.pdf :

> Focusing on African American women's location at the intersection of disadvantaged gender, racial, and class statuses, advocates of this perspective argue that the oppressions associated with each of these disadvantaged statuses combine to produce linked forms of injustice that are not captured in mainstream research (Collins 2000)

[31] *Ibid* at page 1.

[32] Status of Women Canada, Government of Canada, "What is GBA+, Available at: https://cfc-swc.gc.ca/gba-acs/index-en.html?wbdisable=true (Date modified: 2018-12-04)

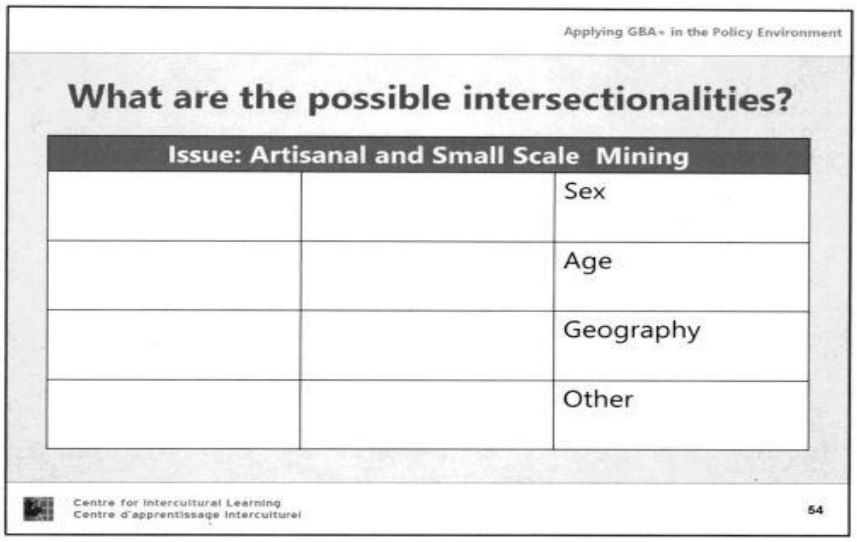
As such, rather than exploring how members within one group experience marginalization and discrimination differently, the starting point is that each of these constituent groups experience different decisions differently. Below is an example of training materials obtained from Government training materials which sets out their current interpretation of intersectionality:



[33]

The Government's current approach also leads to a continued boxed method of analysis that excludes a proper examination of the intersection, very much defeating the analysis itself, as demonstrated by the training exercise below:

[33] Results from 2019 *Access to Information Request filed with Global Affairs Canada* for training materials on intersectionality. Presentation deck from "Applying GBA+ in Policy Development."



[34]

Another extension of this critique is that the existing GBA+ framework, by definition, treats binary gender difference as the centering norm and turns the remainder of intersectional identities into a list of checkbox (add-on) items that can be selectively and situationally examined.

The neatness of being able to go through such a list is convenient, comparable to the *Ribic* test, but fails to examine the systemic nature of how, particularly for racialized migrant women, it may be their racial or sexual orientation-based challenges (for example as a Queer Black woman seeking employment in a predominantly White city) at the heart of their marginalized identity.

Applying a GBA+ (gendered) analysis may see them first and foremost this individual as a woman, allowing for comparisons to other cis-gendered White women who may carry unexamined privileges to obtain said employment, to conclude that these challenges can be ameliorated or have already been addressed by existing policy.

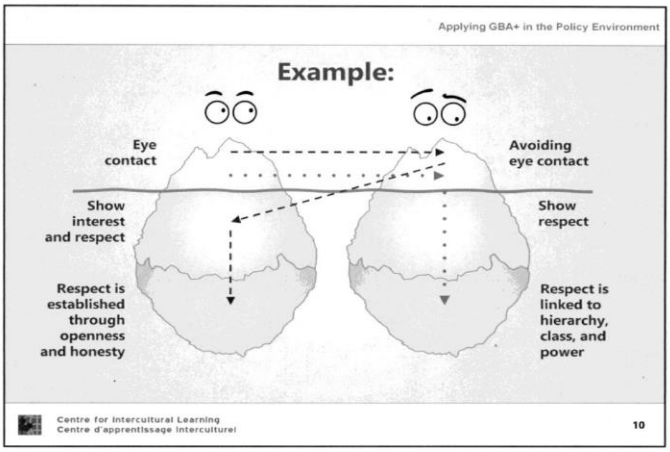
With issues such as race and culture as just one of many 'pluses,' there is fear that the starting point of GBA+ can reinforce Eurocentric approaches.

> *"Eurocentrism, the ideology that 'Western European cultures are superior and a standard against which other cultures should be judged' (Lewis and Aikenhead 2000, 53), is upheld by claims of universality and thus objectivity and is intimately linked to*

[34] *Ibid.*

> *aspirations of domination (Battiste 2005). The 'colonizer's model of the world' (Blaut 1993, 10): their epistemology, knowledge systems, history, and language, is constructed as the universal norm and projected onto other cultures that possess different worldviews and localized knowledge. Differences of the dominated are then constructed as inferior, and often negative, only appearing relevant if they have a (often manufactured) positive relationship to Western culture (e.g., The First Thanksgiving) (Battiste 1998, 2005; Blaut 1993).*
> ...
> *Through false notions of universality and meritocracy, whiteness becomes the norm, the standard, the good, and in the process overrides one's own distinct culture as a recognizable, articulated quality."*[35]

Importantly, government training materials are generally silent on Eurocentrism and race. Currently, diversity (often framed as *cultural competency*[36]) training is largely limited to examination of these superficial elements such as eye contact - in a manner that does not apply an intersectional lens and fails to dig beyond binary perceptions.



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Indeed in IRCC's recently released *Annual Report to Parliament on Immigration for 2019*, the Department states that they do not collect information on race (nor religion) as part of their administrative purposes.[38] This ignorance of race continues a tradition of colourblindness that is

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[35] *Supra* note 4 at pages 259-260.
[36] Due to length limitations, I cut a section of this paper specifically related to why cultural competency itself cannot be the solution. I would recommend reading Pooja Parmar's seminal work on this area, *Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence*, Available at: https://cbr.cba.org/index.php/cbr/article/view/4558/4465. I share her views on why increasing lawyer/decision-maker cultural competency cannot be a simple solution or process.
[37] *Supra* note 30.
[38] "Gender and Diversity Concerns in Immigration" IRCC, *Annual Report to Parliament on Immigration 2019, at page 28*, Accessed on 27 April 2020. https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2019.pdf

itself a longstanding racist policy in Canada and thoroughly inconsistent with Crenshaw's intersectional analytical framework centering race.[39]

When race data is collected and Blackness is centered, the results reveal significant statistical discrepancies in the access of Black Canadians to education and employment compared to other Canadians. The research also specifically reveals a higher level of resilience as a key distinguishing factor for Black Canadians compared to other Canadians. However because race-data is not collected in the Canadian immigration context, this particular intersectionality has gone largely unexplored and therefore is not factored into policy and decision-making.[40]

The implications of failing to examine race are exacerbated in the adversarial context of immigration tribunals proceedings such as the IAD. Academic studies have been done on the history of courtrooms as white space, and racial performance and testimony as presumptively non-credible,[41] suggesting a deeper, intersectional analysis of the tribunal space and the rules that govern it is urgently required.

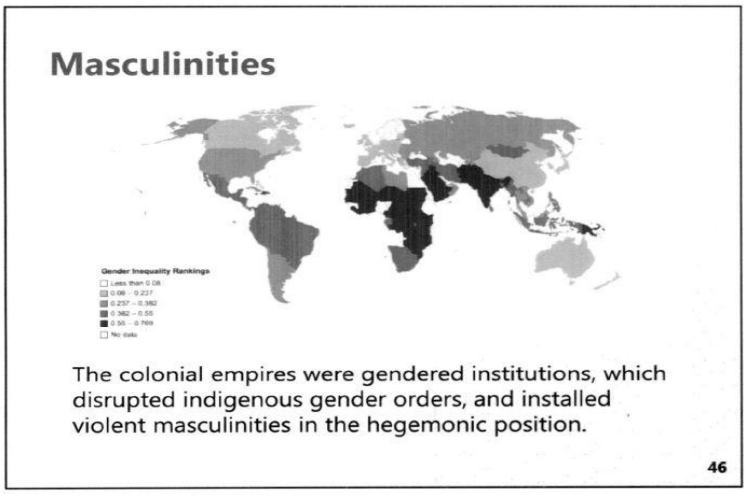
On a more positive note, one should acknowledge the progressive direction in which the national conversation on these type of issues appears to be moving. Recent materials from Government training provided to Global Affairs Canada staff, reveals content that goes beyond a simple discussion of women's rights and delves into the harms of violent masculinity and the colonial nature of gender.

[39] Writer Ibram X. Kendi explores the foundation of racism as a mode for power holding, and writes poignantly in his book, How to Be in An Anti-Racist (New York : One World, [2019] ©2019) at page 10:

> "The common idea of claiming "colorblindness" is akin to the notion of being "not racist" - as with the "not racist" the colorblind individual, by ostensibly failing to see race, fails to see racism and falls into racial passivity. The language of colorblindness - like the language of "not racist" is a mask to hide our racism"

[40] https://www150.statcan.gc.ca/n1/daily-quotidien/200225/dq200225b-eng.htm

[41] See especially: Carlin, Amanda. (2016). The Courtroom as White Space: Racial Performance as Noncredibility. UCLA law review. University of California, Los Angeles. School of Law. 63. 450-484.



[42]

The benefits of looking beyond simply the vulnerabilities of women to the actual perpetrators of patriarchy and violent masculinity can help decision-makers avoid gaslighting[43] migrant women or just at harmfully, idealizing the 'perfect migrant' woman. In taking this more nuanced approach, an actual exploration of the systemic barriers that serve to marginalize women within specific migrant communities can be factored into decisions such as those where domestic violence and sexual abuse form part of the factual matrix.

Currently, based on the GBA+ model, the Government's approach can be summarized as a 'checkbox' approach to intersectionality – which by definition, fails to provide normative guidance as to how policies and decisions can substantively address intersectional concerns.

[42] *Supra* note 30.

[43] See esp. Paige L. Sweet "The Sociology of Gaslighting" American Sociological Review 2019, Vol. 84(5) 851–875 © American Sociological Association 2019 DOI: 10.1177/0003122419874843 journals.sagepub.com/home/asr at p. 865-867. Sweet writes, as one example of institutional gaslighting:

> "The legal system becomes a critical site of gaslighting when abusers gain control of the narrative and "flip" stories and events, drawing on stereotypes about women as irrational, and especially about black women as aggressive. In this way, institutional authorities sometimes become unknowing colluders in gaslighting tactics, setting women up for further violence and loss of credibility."

Indigenous Approaches

While intersectionality has been presented as a relatively new concept in Western discourses, Indigenous academics such as Dr. Natalie Clark argue that indigenous communities have long practiced intersectionality through their holistic ('holism') world view, a multiplicity of frames that shape their lives and indigenous ontology that is inherently intersectional.[44]

Clark provides the example of Indigenous communities living in a 'space, time, and place continuum; and that colonial violence was actually brought through the process of gendering (*think back to the G in the GBA+)* the sacredness of Two-Spirit Indigenous peoples and the roles of women.[45] Clark explores Red Intersectionality as a possible framework, and in the application how the trauma industry (including trauma-informed practice) continues the process of labelling and pathologizing Indigenous girls that manage their behaviour through criminalization, medication, and talk therapy program in a manner that "reinforce(s) a sense of powerlessness and undermine women's ability to resist."[46] Finally, she highlights the importance of 'reflexivity" – an ongoing grounding of Red Intersectionality through personal experiences and considering the intersections of power and privilege at each step.[47]

Another seminal work, Jo-Ann Archibald's book *Indigenous Storywork: Educating the Heart, Mind, Body and Spirit*[48] can serve as a starting point for examining the possible overlap between Indigenous storywork and re-examining migrant stories (through oral testimony, written

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[44] Natalie Clark, Red Intersectionality and Violence-informed Witnessing Praxis with Indigenous Girls. Journal of Girlhood Studies, (Summer 2016), at page 49.
[45] *Ibid* at page 50.
[46] *Ibid* at page 51. See also definition per Clark, at page 51:

> "Red intersectionality recognizes the importance of local and traditional tribal/nation teachings, and the inter-generational connection between the past and the present, while also recognizing the emergent diversity of Indigenous girlhood and the geographic movement off and on reserve, and the construction of Indigenous girls through the Indian Act. A Red intersectional perspective of Indigenous girls and violence does not center the colonizer, nor replicate the erasure of Two-Spirit and trans peoples in our communities, but, instead, as I have already mentioned, attends to the many intersecting factors including gender, sexuality, and a commitment to activism and Indigenous sovereignty. It helps us to understand and address violence against Indigenous girls since it foregrounds context, which in Canada's case has to include gendered forms of colonialism, and the dispossession of Indigenous lands.

[47] *Ibid* at page 59
[48] Jo-ann Archibald (Q'um Q'um Xiiem), *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit,* Vancouver, BC: UBC Press, c2008

documentation, and witnessing). In doing so she explores holism, as creating a context for orality.

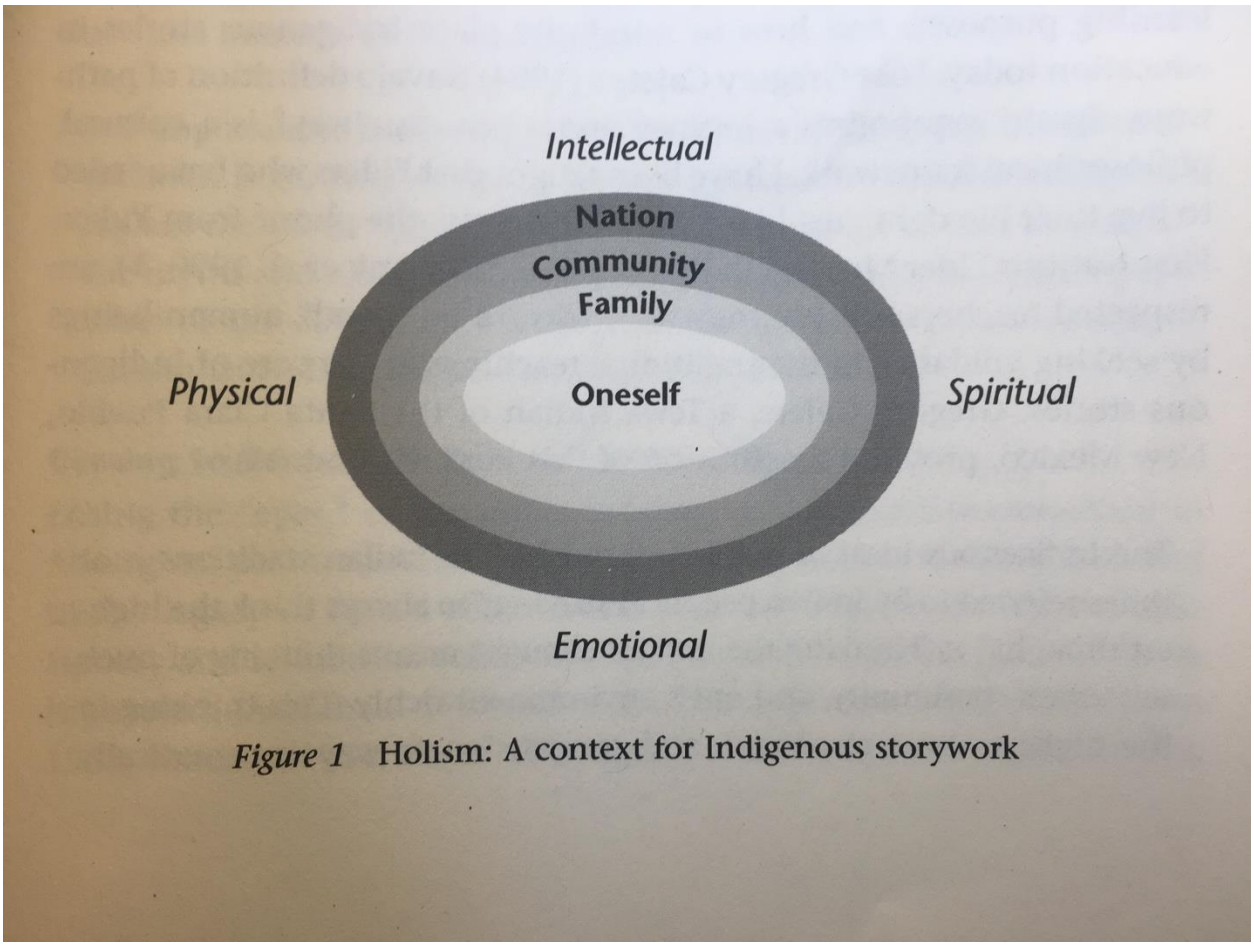


Figure 1 Holism: A context for Indigenous storywork

[49]

Indigenous communities, like many migrant communities in Canada, come from oral history traditions – meaning that the writing down or recording of their stories/histories represents a fundamental shift from usual practice.[50] Archibald talks in her book, specifically about the need to give space and time to Indigenous communities to tell their story.[51] This relates directly to the issue of hearing length, hearing format, and interpretation that rear itself to immigration appeals.

[49] *Supra* note 41 at pages 11, 19-20.
[50] *Ibid* at pages 11-25.
[51] *Ibid* at page 12.

Comparable to issues of credibility in the migration context, Archibald highlights the "Trickster" as a complex character that represents the layers within Indigenous story work. Stories of the Trickster may involve deception or seemingly logic-defying gaps,[52] two things that within the immigration context would assure *prima facie* concern. Archibald explains that stories are often presented as non-linear or through parables that may or may not lead immediately to the expected conclusion.[53]

Archibald also delves into cultural difference as it pertains to the presentation of these stories. She discusses the cultural expectation to talk less and practice quietness as respect.[54] Stories are also often told from the core (inside) outwards, as opposed to from the outside first - a process that involves patience from the listener and a greater established trust between parties.[55]

Creating conditions of comfortability, such as talking circles,[56] one thinks about the circular seating the Refugee Protection Division has adopted and the square table format of Alternative Dispute Resolution. Creating circles instead of separate witness stands, may be more effective than the current IAD set up which mirrors a courtroom's adversarial set-up.

Archibald's book ultimately concludes by highlighting the harm in non-Native and Indigenous teachers using and telling Indigenous stories. She highlights the need for a cultural-sensitivity learning process for non-Indigenous teachers, which includes gaining knowledge about storytelling protocol and the nature of these stories but recognizing that they do not have cultural authority to tell these stories.[57]

One thinks of the many ways in which IAD Members must tell both sides of this story rendering their decisions - purporting to understand not only the Canadian cultural dynamics better than the

[52] *Ibid* at pages 5-11.
[53] *Supra* note 41 at page 31. See especially cited text re: question of cultural initiation, involvement and commitment to problem solving as opposed to merely background and anthropological data gathering.
[54] *Ibid* at page 12.
[55] *Ibid* at pages 38, 55.
[56] *Ibid* at pages 39, 62-66.
[57] *Ibid* at page 151.

‘migrant’ Appellant but also be often the sole interpreter of the genuineness, credibility, and reasonability of the actions migrants take at various points in their lives.

In the following section, I will look to see how our above look into Intersectionality and Indigenous Approaches may apply in practice.

Applying Intersectional and Indigenous Approaches

Discretionary Jurisdiction

One of the ways intersectionality can be immediately applied is by taking the last part of the test for discretionary jurisdiction from the *Ambat* residency test - *“whether there are other unique or special circumstances that merit special relief”* - and utilize this as an opportunity to explore intersectional issues and go beyond the other factors.

For example, a woman from Zimbabwe who has had difficulty meeting the residency obligation because of her inability to find employment in Canada and her decision to pursue a Masters in the United States, could have her employment challenges framed in the context of racial hiring bias in Canada. This individual would not need to solely limit her documentary evidence to demonstrating she could not find employment back in Zimbabwe and could provide evidence of Canadian barriers while not hurting her own case of establishment. Similarly, a woman from China who committed misrepresentation during a period of undiagnosed depression, can have challenges finding culturally-specific services while facing stigma against seeking mental healthcare – which cannot be simplistically characterized as a negative rehabilitative/remorse factor.

A Red Intersectionality approach cautions us against pathologizing a migrant as ‘non-credible’ or immediately questioning why tradition Eurocentric paper-based reports or documentary evidence were not obtained or provided, giving space for resistance and resilience in ways women see fit – on a case-by-case basis. Ultimately, an Appellant’s tendency to make certain decisions can be

viewed at the intersections of her identity as a racialized migrant, struggling in a colonial system, affected by cultural practices and norms.

Another second area of immediate applicability is in intersectionality, playing a significant role is in the best interest of the child (BIOTC) analysis. Specifically, the Red Intersectionality approach provides an alternative framework.

The current test as set out in Immigration, Refugees and Citizenship Canada (IRCC)'s guidelines on BIOTC,[59] examine factors such as:

- *the age of the child*
- *the level of dependency between the child and the H&C Applicant*
- *the degree of the child's establishment in Canada*
- *the child's links to the country in relation to which the H&C assessment is being considered*
- *the conditions of that country and the potential impact on the child*
- *medical issues or special needs the child may have*
- *the impact to the child's education*
- *matters related to the child's gender.*

A Red Intersectionality Approach asks instead:

> *What are the intersecting axes of social location, power, and resistance in the life of this girl? How are these health needs framed or pathologized in the current health system?*
>
> *How are her experience and her coping framed by the current mental health, criminal justice, and child welfare system policies and programs? How is she resisting this?*
>
> *What are the daily lived experiences of violence that she is resisting? What*

[59] IRCC, Humanitarian and compassionate assessment: Best interests of the child, (Date modified: 2016-03-02) Available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-best-interests-child.html

strengths and resistance can you identify in her story?

If we situate the girl and the present policy within the context of colonialism, poverty, racism, and discrimination among others, how is this policy, in reference to her, shaped by mainstream institutions and ideas of health that exclude cultural, gendered, and spatial experiences of young women's health and wellness and the intersection of these in girls' lives?

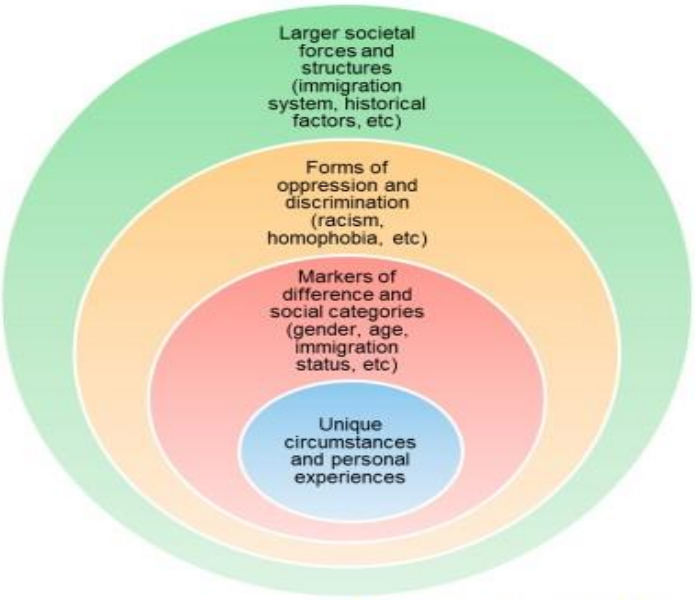
Does this policy support through referral and advocacy the use of local resources, capacity and strengths?[60]

The Red Intersectionality approach to best interest of the child delves beyond the surface to examine points of marginalization and privilege in a child's life. Given the challenges decision-makers have in applying *Kanthasamy* in a manner that does not minimize the best interests of the child, a Red Intersectionality approach allows for space to provide an objective analysis of systemic factors, which Members may be inclined towards.

Ultimately, an intersectional framework can explore and uncover the various layers in which an individual's own personal circumstances and experiences are positioned, putting the migrant woman of colour back as the centre of her own narrative.

[60] Supra note 37, at pages 52-53

Diagram: Layers of intersectionality[14]



Adapted from Simpson (2009). [61]

Vulnerable Persons

A potentially more effective approach is to giving Counsel or a self-represented Appellant the ability in the beginning of a hearing to point out and acknowledge an Appellant or key witnesses' vulnerability, thus allowing for in-hearing accommodation. This could include switching the order of testifying witnesses, extending the hearing, or excluding members of the audience (making portions of the hearing private) as the case may need to be.

Another possible approach is to not see vulnerability merely as a required accommodation, but as a factor that could influence the application of discretionary jurisdiction. For example, the age, mental, and physical health of an elderly applicant may explain why they are not taking ESL classes at this time. An introverted, devoutly religious woman without a connection to faith and community in a particular city she lives in, may justify her lack of volunteerism or her local establishment without an immediate conclusion that she would be better off returning "home".

[61] AMSSA, *Intersectionality and Settlement,* Migration Matters – September 2017, Issue 41, at page 2 Available at: https://www.amssa.org/wp-content/uploads/2017/10/InfoSheet41_Intersectionality_Sept2017.pdf

In an ideal situation, intersectionality exists as a foundation rather than addition (as it is currently presented).

In the interim, I would suggest guidelines along the lines of the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* and *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*. However, as with any jurisprudential or Chairperson's guidelines, care should be put into the scope, knowing that when instructions appear targeted to specific groups or individuals, others (in the case of Appellants at the IAD) may be inadvertently excluded. One should not immediately hold that Appellants at the IAD are 'less vulnerable' simply by holding permanent resident status rather than temporary resident/refugee status, given the nature of immigration status as but one important marker of social difference.

Witnessing and Storytelling

Several tips from Indigenous storytelling could be beneficial for the IAD process. First, rather than an inquisitorial approach to stories represented by direct examination, there could be a greater focus on providing space for storytelling. Appellants can be provided a simple question - either by their Counsel or the Minister - *'tell me who you are and why you are here today?'*[62] - and an adequate opportunity to present their side of their story in a manner that best suits their case. This could involve allowing Appellants to prepare a presentation with visuals, appear together to share their stories, and present their case in a less-intimidating manner (prior to direct examination).

It would not be administratively more difficult to begin a hearing with an open discussion/conversation before going straight into cross-examination and witness evidence. Witnesses themselves, rather than be excluded, can be true witnesses to the testimony. A common practice in many Indigenous-held events is to have witnesses speak to what they have

[62] *Supra* note 41, at page 88 – Archibald highlights how the process of introducing oneself and one family as a custom to help place the individual's community and family history.

observed during the event as opposed to being brought into either impugn or confirm the Appellant's credibility based on testimony they were excluded from witnessing.

One idea for access to justice would be to ensure, along the same lines as the requirement for a Designated Representative for minors and individuals who do not have the capacity to represent themselves, at the very least a community elder or linguistically trained individual who is familiar with the appeals process to be provided as an informational resource to assist self-represented Appellants. This individual could help navigate language and cultural barriers and provide helpful information rather than legal advice to ensure that the Appellants are at the very least aware of the process.

A final possibility is to bring in community elders as advisors to the members themselves.[63] As discussed, these crucial decisions are largely placed at the feet of IAD Members, who we know carry biases and privileges that have led them to be where they are. Neutrality, as this paper has tried to demonstrate, is itself a myth when societally and legally, we are so firmly engaged in colonial and Eurocentric practices. A community elder, similar to the way an Early Resolution Officer ("ERO") assists at Alternative Dispute Resolution, can be present/serve as a non-excluded witness and advise the Member on their written decision, if required.

There may also be beneficial input that can be gained if Indigenous elders are specifically brought in to advise and reflect on the experiences of the Appellants. As Archibald highlights in her book, "[t]heir [Elder's] life stories depict resilience and resistance to colonization."[64] The presence of Indigenous Elders with lived experience of fighting against colonialism can therefore help an IAD Member reflect on the many ways assimilation can be a source of harm and the nuanced ways in which resilience and resistance can be seen as positive, rather than negative, discretionary factors in the H&C analysis.

[63] My recommendation is inspired by Archibald's discussion of the role of elder mentorship throughout, see especially *supra* note 41 at pages 61-62.
[64] *Supra* note 41 at page 43.

Conclusion

In this paper, I began by presenting a story, where a racialized Appellant with a racialized Canadian citizen daughter and granddaughter faced barriers to presenting their cases because of the existing frameworks. I then suggested that through deconstructing the process, three of these frameworks offer the potential for change: (1) discretionary jurisdiction, (2) vulnerable persons; and (3) witnessing and storytelling.

I argued that a better understanding of intersectionality theory as a lens could benefit our approach to change. Defining intersectionality, I demonstrated how the existing use of intersectionality as a buzzword, focused on either an individual "we're all intersectional" approach or a catch-all "intersectionality as diversity" approach fails to properly examine the intersecting marginalization that women of colour face, as a result of race's intersection with other factors of marginalization such as migration status, gender, and class. I explored as well Indigenous approaches, specifically Natalie Clark's holistic, Red Intersectionality approach, which goes beyond pathologizing Indigenous women and girls and Jo-Ann Archibald's work on Indigenous storytelling, as providing sources of inspiration for intersectional change. Ultimately, I explored how issues such a migrant woman's resilience and resistance have not been given adequate space for consideration.

Deconstructing immigration appeals will not be a straight-forward process and will face institutional pushback. Crenshaw writes:

> *Intersectionality is not easy. It's not as though the existing frameworks that we have - from our culture, our politics, or our law - automatically lead people to be conversant and literate in intersectionality.*[65]

Yet it is time for us to move away from neatly defined boxes and usual Eurocentric colonial process; to open our hearts, eyes, and minds to other ways of thinking. There is significant harm

[65] Bim Adewunmi, *Kimberlé Crenshaw on intersectionality: "I wanted to come up with an everyday metaphor that anyone could use*, New Statesman America, 2 April 2014, Available at: https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could

in ignoring migrant women of colour, especially when we know our colonial processes re-create harm, re-traumatize, and re-stigmatize them. As Clark sets out in her paper:

> *As Eve Tuck (2009) has noted, we need to suspend the ongoing creation of Western stories of damage and harm. Otherwise, the statistics become toxic narratives of identity that are not situated within lives of resistance and strength, nor placed in historical and changing place and time.*
>
> *It is vitally important in our listening and our witnessing that we do not continue to create narratives of risk and harm separated from the stories of strength, resiliency and survivance.*[66]

We may find, as a corollary benefit to this work, that with proper consultation and engagement, we are able to bridge the gap between Indigenous communities (who were historically colonized) and newcomers (who may carry histories of post-colonization, but now find themselves colonizing or assimilating through settlement on Indigenous lands).

Ultimately, I believe a greater look at how the appeal process may not currently serve migrant women of colour and particularly those without access to resources to engage lawyers, will benefit the broader issue of access to justice. A more reflexive Immigration Appeal process is a well-suited starting point for this larger system improvement.

[66] *Supra* note 37 at page 54.

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