



**Native Women's  
Association of Canada**

**Special Submission to the  
Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)  
on Access to Justice for Aboriginal Women in Canada**

**March 10, 2014**

**Native Women's Association of Canada**

## Executive Summary

The Native Women's Association of Canada (NWAC) welcomes the opportunity to put forward our Special Submission to the Office of the United Nations High Commissioner for Human Rights (OHCHR), for the access to justice study currently being carried out by the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). This study is on access to justice in the promotion and protection of the rights of indigenous peoples, with a focus on restorative justice and indigenous juridical systems, including an examination of access to justice related to indigenous women, children and youth and persons with disabilities, to be presented to the Human Rights Council at its 27th session.

NWAC is a national Aboriginal (First Nations, Inuit, Métis) organization representing the political voice of Aboriginal women throughout Canada. NWAC works to advance the well-being of Aboriginal women and girls, as well as their families and communities, through advocacy, policy, and legislative analysis in order to improve policies, programs, and legislation. NWAC is actively committed to raising the profile nationally and internationally on many issues such as the following: violence against women, the lack of justice response, high rates of women in prison, multiple forms of discrimination, poverty, and ongoing sexual exploitation and trafficking of women and girls, along with the many other violations to our basic human rights.

NWAC's collective goal is to help empower women by being involved in developing and changing legislation, which affects them, and by involving them in the development and delivery of programs promoting equal opportunity for Aboriginal women. NWAC engages in national advocacy measures aimed at legislative and policy reforms that promote equality for Aboriginal women and girls. This work includes identifying gaps in Aboriginal women's human rights and by mobilizing action to address these gaps.

This report focuses specifically on the thematic issue of Access to Justice in the protection and promotion of the rights of Indigenous Peoples as it relates to Canada's Indigenous Peoples. It discusses current issues such as the current complaint before the Canadian Human Rights Tribunal - the First Nations Child and Family Caring Society (FNCFCS) and the Assembly of First Nations (AFN) versus the Federal Government of Canada, the Bill C-10, the Safe Streets and Communities Act, a new law dealing with crime measures, and the overrepresentation of Aboriginal women and girls in the federal prison system.

With this Special Submission, NWAC hopes to illuminate the conditions faced by Aboriginal women and girls for access to justice in Canada, and inspire efforts to address the difficulties, inequalities, inequities, and human rights violations that they face. The following summary highlights some of the challenges and issues that affect the ability of Aboriginal women and girls to fully participate and thrive in Canada.

- **Indigenous women in Canada continue to face multiple forms of discrimination and increased risk of violence.**

Aboriginal women experience extreme marginalization and suffer from inequalities related to their social, economic, cultural, political, and civil rights. These inequalities breed violence, such as post-colonial structural inequalities, family violence, racialized and sexualized violence, and gender-based violence.

The number of missing and murdered Aboriginal women and girls in Canada is alarming. Presently, NWAC has documented the disappearances and murders of over 600 Aboriginal women and girls in Canada over about twenty years. In Canada, Aboriginal women experience rates of violence 3.5 times higher than non-Aboriginal women, and young Aboriginal women are five times more likely to die of violence<sup>1</sup>. Additionally, research has shown that there is a disproportionate number of Aboriginal women and girls who are being sexually exploited and trafficked domestically and internationally. In a 2013 study at St Michael's Hospital, researchers found that socio-economic position is a major factor influencing risks of abuse for Aboriginal women. Aboriginal women in the study were more likely to have low incomes (37.6 per cent) and have less than a high school education (24 per cent) compared to non-Aboriginal women (13.8 per cent and 6.7 per cent, respectively).

With Aboriginal communities already facing extreme poverty and health disparities, the Government of Canada imposed a 30 % funding cut, for the 2013-2014 fiscal, on regional and national Aboriginal Representative Organizations, impacting on social and health programs, and the capacity of these important organizations to advocate for Aboriginal Peoples human rights and their access to justice. These funding cuts decisions were made unilaterally by the Government without consultation by First Nations leadership and the Aboriginal Representative Organizations who were severely crippled and some eliminated. These actions greatly undermines the ability of these organizations and the commitments of this Nation to improve living conditions for Aboriginal Peoples and close the gap between Aboriginal Peoples and the rest of Canadians.

There was a series of resolutions from the UN Human Rights Council (which is conducting its Universal Period Review of Canada's rights record, on a wide range of issues from poverty, immigration, prostitution and the criminal justice system) calling on Canada to undertake sweeping national reviews of violence against Aboriginal women. Although there is strong support for this action domestically among provincial and territorial leaders and the Canadian public and strong international support, including a multitude of reports and investigations that urge Canada to act, on Sept 19, 2013 the Canadian government rejected the UN's call for a comprehensive national review of violence against Aboriginal women.

Systemic violence against Aboriginal women (VAAW) and girls, their communities, and their nations is grounded in colonialism, creating cultural, social, economic, and political dislocation among Aboriginal Peoples in Canada. Assimilation tactics set in place by the Canadian government, such as the Indian Act, negatively impacted First Nations women and girls more than any other group; however, the negative effects of colonial attitudes equally impact Inuit and Métis women. As mentioned by Dr. Janet Smiley, "Violence against Aboriginal women is more complex than elevating socioeconomic status alone... Future studies and research on the subject

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<sup>1</sup> Brzozowski, J., Taylor-Butts, A., Johnson, S. *Victimization and offending among the Aboriginal population in Canada* (Canada: Stats Canada, 2006), 7.

need to focus on the effect of colonial policies, such as residential schools, on Aboriginal populations.”

The overrepresentation of Aboriginal women in Canada as victims of violence must be understood in the context of a colonial strategy that sought to dehumanize Aboriginal women. The value of Aboriginal women is diminished by the persistence of patriarchal values that, consciously or not, continue to influence and regulate social norms and gender relations.

Colonial mentality has also led to:

- Creation of the Indian Act (1867) aimed to assimilate First Nations people in order to free up lands and resources and allow the Crown to avoid fiduciary responsibilities.
- Removal of Aboriginal children to residential schools where they faced malnutrition, physical, sexual, and emotional abuse, and even death (1870s – 1996)<sup>2</sup>
- Era of the ‘60s scoop’ whereby Aboriginal children (more even than attended residential school) were taken from their homes and put in state-run foster care leading to new rounds of abuse<sup>3</sup>

Canadian police and public officials have done little to prevent the pattern of racist violence among Aboriginal women in Canada partially because they (police and public officials) are the primary perpetrators of the racial discrimination against Aboriginal women. During the province of British Columbia’s (BC) Commission of Inquiry, funding was denied to NWAC and as a result Aboriginal women and girls were denied fair and direct access to the administrative and legal mechanisms of justice, which could have assisted them throughout the Inquiry’s process. NWAC questions the kind of fairness and justice families received without NWAC’s involvement in the BC Commission of Inquiry process. In effect, by refusing the representative bodies for vulnerable Aboriginal women, the BC Government did not work towards protecting this vulnerable group, nor did it provide equal treatment before the law.

Marginalization and discrimination put Aboriginal women, girls and communities at risk of violence and the same factors deny victims protection of the justice system.

#### **Action required by Canada:**

There are unacceptably high numbers of missing and murdered Aboriginal women in every province in Canada. Therefore, NWAC has and is calling upon the Government of Canada to conduct a national Inquiry into these missing and murdered Aboriginal women in Canada and an Action Plan to address the situation and issues that are uncovered.

- **First Nations children are tragically over-represented in Canada’s child welfare systems.**

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<sup>2</sup> For more information about residential schools, please try the following documentation sites:

<http://www.wherearethechildren.ca/>; <http://www.trc.ca/websites/trcinstitution/index.php?p=26>

<sup>3</sup> For more on the 60s scoop, please try the following: <http://www.originscanada.org/the-stolen-generation/>;  
<http://firstnationsdrum.com/2009/03/the-sixties-scoop-how-canada%E2%80%99s-%E2%80%9Cbest-intentions%E2%80%9D-proved-catastrophic/>

The Department of Aboriginal Affairs and Northern Development Canada (AANDC - formerly, Indian and Northern Affairs Canada), funds Aboriginal Child and Family service agencies at an average of 22% less than their provincial counterparts and it is 12.3 times more likely for an Aboriginal child to be in care than a non-Aboriginal child in fiscal 2009/10. Comprising 3.8 % of the Canadian population, Aboriginal children make up a staggering 30 percent of children in foster care.

In order to begin repairing this large imbalance, the first issue to address is the exclusion since its inception in 1977 of First Nations from the Canadian Human Rights Act (CHRA). Under Section 67 of this act, those with status under the Indian Act were excluded from the CHRA. First Nations were excluded from the Canadian Human Rights act in order to limit Aboriginal avenues of redress for numerous Canadian government violations of their human rights. Under Bill C-21, introduced in 2008, the Conservative government agreed to repeal Section 67, but gave First Nations leaders three years to learn about the CHRA and prepare for inclusion. This took place in June of 2011

The Assembly of First Nations (AFN)/First Nations Family and Child Caring Society of Canada (FNCFCS) case against the government is reasonable in that it indisputably characterizes child welfare service inequities as a failure on the part of the federal government “to consider the best interest of the child in conjunction with their collective cultural rights”<sup>4</sup> which according to the United Nations Committee on the Rights of the Child, is a human right of indigenous children.

The Government of Canada is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach. It is expected that all agencies will be using the prevention-focused approach by 2013.

“The disproportionately high number of Aboriginal children in state care is part of broader social challenges on reserves, such as poverty, poor housing conditions, substance abuse and exposure to family violence. The Government of Canada is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach. It is expected that all agencies will be using the prevention-focused approach by 2013.”<sup>5</sup>

As stated in Canada’s 2009 report to the International Convention on the Elimination of All Forms of Racial Discrimination, i, the federal government has amended the Canadian Human Rights Act to remove an exemption that had prevented the Canadian Human Rights Commission (CHRC) examining complaints of discrimination in respect to government operations under the Indian Act. According to the government, the reform of the CHRA was intended to allow First Nations “to file a grievance in respect of an action either by their first nation government, or ... by the Government of Canada, relative to decisions that affect them. This could include access to

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<sup>4</sup> Convention on the Rights of the Child; Article 21. 1989.

<sup>5</sup> Canada, “Government Response to the Standing Senate Committee on Human Rights Report: ‘Children: The Silenced Citizens Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children’” in Canada, “Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007”, received by Committee on the Rights of the Child on 20 November 2009, Appendix 5, at para. 98. [emphasis added]

programs, access to services, the quality of services that they've accessed, in addition to other issues.”<sup>ii</sup>

NWAC is concerned, however, that Canada’s actions in response to one of the most significant discrimination cases to come before the Commission, and subsequently the Canadian Human Rights Tribunal (CHRT), threaten to severely curtail Indigenous Peoples’ access to these mechanisms. We further believe that the government’s actions reflect a broader pattern, illustrated below, in which the resources of the state have been used to arbitrarily oppose and hinder recognition of Indigenous rights to such an extent as to effectively deny Indigenous Peoples access to protection and remedy.

In February 2007, the First Nations Child and Family Caring Society (FNCFCFCS) and the Assembly of First Nations (AFN) filed a complaint alleging that the federal government discriminates against First Nations children by providing significantly less funding per child for child welfare services on reserves than its provincial and territorial counterparts provide within their respective jurisdictions.<sup>iii</sup> The federal government has strongly opposed the CHRT examining the merits of this case. The government twice applied unsuccessfully for the Federal Court to stop the process. The government also presented arguments before the CHRT for the case to be dismissed without examination of the evidence and was eventually successful in these efforts.

Canada made two main arguments against the case going forward. Both relied on a narrow, technical interpretation of the CHRA that is at odds with Canada’s international human rights obligations. First, Canada argued that the CHRA’s prohibition of discrimination in the delivery of services does not apply to the federal government’s role in providing funds for services delivered by First Nations and First Nations organizations, even though the funding levels are crucial in determining the availability and quality of services. Second, while the government has elsewhere talked of providing First Nations “services comparable to those provided by the provinces and territories,”<sup>iv</sup> the government argued before the CHRT that no such comparison can be made for determining discrimination under the CHRA since it would require comparisons between different jurisdictions within the federal state.

The case was dismissed by the CHRT in March 2011 on the basis of the latter argument. The complainants have appealed the decision. Should the decision stand, it would dramatically limit First Nations access to the protection of the CHRA in respect to a wide range of government services that, because of the Constitutional division of powers, are a matter of federal responsibility.

Of equal concern is that fact that five years after the initial complaint was filed, the underlying situation of discrimination against First Nations children remains unaddressed. Furthermore, it appears that one of the complainants, the FNCFCFCS, may have been subjected to retaliatory action from the federal government as a result of bringing this case forward.<sup>v</sup> After the discrimination complaint was filed, all federal core funding to FNCFCFCS was cut. Applications under the federal access to information and privacy acts revealed that the FNCFCFCS’s executive director has been subject to intensive government scrutiny in both her professional and personal life.<sup>vi</sup>

There is no body in Canada with a specific mandate to ensure redress for the wide range of human rights violations experienced by Indigenous Peoples. The only human rights processes in Canada that are specifically focused on the rights of Indigenous Peoples are those that have been set up to address land and treaty disputes. These processes have been repeatedly criticized by international human rights bodies and mechanisms. This Committee has previously criticized the “strongly adversarial positions”<sup>vii</sup> taken by federal and provincial governments in land and treaty negotiations. UN treaty bodies and human rights mechanisms<sup>viii</sup> have also repeatedly criticized state efforts to make completion of new treaties contingent on arbitrary restrictions on Indigenous Peoples’ enjoyment of their inherent rights.<sup>ix</sup>

In 2009, in a ruling on the admissibility of a complaint brought by six Coast Salish First Nations from British Columbia, the Inter American Commission on Human Rights (IACHR) agreed with the petitioners, and numerous other First Nations that had filed supportive amicus briefs, that the negotiation process and the option of seeking resolution through litigation were too lengthy, onerous and costly to meet international standards of fair, timely and effective redress. The petition, filed by the Hul’qumi’num Treaty Group (HTG), concerns Canada’s failure to restore or provide other redress for land expropriated without consent or adequate compensation, and the failure to ensure interim protection while the dispute is under negotiation. HTG has been in negotiation with the federal and provincial governments since 1994 under the comprehensive claims process in British Columbia. HTG reports that negotiations have already cost the First Nations \$20 million for research and other expenses, which will be deducted from any settlement.

The time and expense that the HTG has incurred in negotiations with the federal and provincial governments – without either a resolution of their case or implementation of effective interim protections – is consistent with the experience of many Indigenous Peoples throughout Canada. In 2006, the Auditor General of Canada estimated that the majority of BC treaty negotiations had stalled or were making little progress, with some First Nations having already incurred costs that would consume a substantial portion of any future settlement they would likely achieve.<sup>x</sup>

Furthermore, even when treaty negotiations are successfully concluded, Indigenous Peoples have little guarantee that governments will uphold the terms of these treaties. In a review of implementation of the Inuvialuit Final Agreement, the Auditor General noted that many of the most significant provisions remained unimplemented after more than two decades, stating that the federal government “has yet to demonstrate the leadership and the commitment necessary to meet federal obligations and achieve the objectives of the Agreement.”<sup>xi</sup> Canadian Senate hearings into the implementation of modern treaties concluded that “current federal policy and organizational structures are ill-suited to manage the implementation of modern treaties,” that federal implementation practices “appear largely to address the interests of government and minimize costs,” and that this approach is “out of step with the very nature” of the treaty process.<sup>xii</sup>

Indigenous Peoples in Canada have also been obstructed in their efforts to obtain remedy through international human rights mechanisms. While treaty bodies and other international mechanisms have helped advance international human rights standards through their consideration of cases brought forward by Indigenous Peoples from Canada, the government of Canada has repeatedly

failed to act on the resulting recommendations. In 2008, this Committee wrote to the Government of Canada under the Early-Warning Measures and Urgent Procedures to express concern over oil and gas development on the territory of the Lubicon Cree in Alberta.<sup>xiii</sup> Eighteen years earlier, the UN Human Rights Committee ruled that the failure to protect recognize and protect Lubicon lands had resulted in historic and ongoing violation of their rights. The federal government has still not provided any legal protection for Lubicon land rights.

This Committee<sup>xiv</sup> and other international human rights bodies<sup>xv</sup> have repeatedly commented on the wide range of human rights violations experienced by Indigenous Peoples in Canada. The scale and seriousness of these violations underscores the urgency of effective and timely access to remedy.

### **Recommendations**

Canada should withdraw its opposition to the Canadian Human Rights Tribunal examining the First Nations child welfare case on the basis of its merits.

Canada should not pursue legal strategies that would have the effect of limiting Indigenous Peoples' access to the Canadian Human Rights Act to pursue complaints of discrimination in the delivery of government services.

Canada should avoid the use legal technicalities to obstruct or delay the workings of human rights tribunals so that complainants are not further disadvantaged in the process.

Canada should work with Indigenous Peoples to develop land claims policies based on the recognition and fulfillment of Indigenous Peoples' rights, including rights to the full and fair implementation of land claims agreements (modern treaties) according to their objectives and as well as their more detailed text

The government should report regularly to Parliament and the Canadian public on measures taken to fulfill the recommendations of human rights treaty bodies and special mechanisms.

### **Federal-Provincial Funding Jurisdictional Disputes**

Jordan River Anderson was 5 years old when he died in the hospital due to a federal-provincial funding jurisdictional dispute. Jordan's Principle is a child first principle implemented to end the jurisdictional disputes within and between Governments (Provincial/Federal) regarding funding to First Nations children.

Since the establishment of Jordan's Principle, Cindy Blackstock, Child Advocate, notes that Jordan's Principle has been interpreted restrictively by applying only to children with complex medical needs with multiple service providers. Only months after Jordan's Principle passed through the House of Commons, Canada and Manitoba argued over who should pay for feeding tubes for two chronically ill children living with their family on reserve. A 2005 report identified 393 disputes between the Federal and Provincial/territorial governments impacting First Nations children.



The inability of Canada to remedy the administrative nightmare of its policies and programs related to the national Native education and child welfare programs in Canada is a serious problem.

**Action required by Canada:**

In keeping with Jordan's Principle, Canada must follow the recommendations made by its own Auditor General with respect to the national Aboriginal child welfare system in Canada and take immediate steps to remedy jurisdictional barriers and funding problems of the Aboriginal child welfare system.

- **Aboriginal Peoples in Canada experience poorer educational outcomes than other Canadians**

Disparity in education between Aboriginal and Non-Aboriginal Canadians persists. According to the 2011 National Household Survey, nearly half of Aboriginal Peoples between 25 and 64 years of age had some post-secondary education in comparison to two-thirds of non-Aboriginal Canadians. The biggest difference is in university graduates. While about 1 in 5 Aboriginals and non-Aboriginals in that age group had a college diploma, fewer than 1 in 10 Aboriginals had a university degree compared to more than 1 in 4 non-Aboriginal Canadians.

The Aboriginal female population is growing substantially faster than the overall population. In the period from 2001 to 2006, the number of Aboriginal women and girls rose by 20.3% compared to a 5.6% growth rate in the non-Aboriginal population of women and girls. Based on these changing demographics it is clear that Aboriginal needs for education and educational supports will continue to rise in the coming years. This is of particular concern for those facing socioeconomic barriers as funding for education has not kept up with the cost of living or community demand.

The current funding levels of First Nations education, repeatedly highlighted by First Nations themselves, are insufficient and well below the funding levels given to provincial school systems by the Canadian Federal government. Former National Chief Phil Fontaine stated how "resources to First Nations communities have been capped at 2% growth since 1996 a cap that does not keep pace with inflation or our young, booming population."<sup>6</sup> This funding cap towards First Nations education is intolerable, and clearly depicts inequities between the provincial education system and First Nations education.

The underfunding of elementary education is a serious concern for NWAC. Many First Nations on-reserve schools are in miserable condition and disrepair. The Canadian government recognizes the need to improve First Nations education because it is affecting Canadian economic productivity, and politics. The solution, proposed by the Canadian Federal government (in the 2008 Federal Budget) was to integrate First Nations education into the provincial education system. This solution does not consider the culture, language, and identity of First Nation people, and could be viewed as another attempt by the government to assimilate First

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<sup>6</sup> Fontaine, Phil (2009), AFN has a plan that benefits all. Editorial, The Toronto Star, January 15, 2009, <http://www.thestar.com/comment/article/571159>.

Nations.

Shannen Koostachin was a Mushkegowuk Innanu from an isolated community, Attawapiskat First Nation in Ontario, Canada, who advocated for “safe and comfy schools” and culturally-based and equitable education on reserves (Shannen’s Dream campaign). Tragically, she passed away in a car accident in 2010 at the mere age of 15. Before this tragedy occurred, Shannen wrote to the United Nations Committee on the rights of the child in 2008 and was nominated for the international Children’s Peace Prize in the Netherlands in 2008. She and her family made the difficult decision to send her hundreds of miles away from her family to get a proper education off-reserve. Shannen is noted as saying that children “are losing hope by grade 5 and dropping out.” While Shannen is no longer with us, her dream lives on and has been taken up by many. The need for equal education for Aboriginal children remains critical.

**Action required by Canada:**

Canada must follow the recommendations made by its own Auditor General and take immediate steps to remedy the education shortfalls in infrastructure, funding, access and services in First Nations’ schools in Canada to commensurate with provincial schools.

- **Aboriginal Women continue to experience gender-based discrimination through Canadian legislation**

The Department of Aboriginal Affairs and Northern Development Canada (AANDC - formerly Indian and Northern Affairs Canada), is the only government-mandated federal department in Canada which registers its citizens as a separate and distinct group in Canada under the Indian Act. Its mandate is to register “Indians” under the Indian Affairs’ Departmental Register in order to track and fund social programs based on Indian identity. Each Indian citizen belongs to a reserve and is allotted a number. Due to past inequities in the application of the registration, AANDC was forced to change some of its registration policies in 1985, allowing both men and women to be registered on the same basis. However, this issue was never fully addressed and resulted in a subsequent legal case being brought forward by Sharon McIvor (BCCA 2009). Even though the Government recently passed and put into effect Bill C-3 Equity in the Indian Registration Act, residual discrimination still exists today.

Furthermore, the Indian Act interferes with First Nations individuals’ right to non-discrimination because the current provisions erode the right to status and membership under the Indian Act of all First Nations individuals. While an individual can marry whom he or she chooses, as noted by Canada’s report, such a decision is not made without negatively affecting his or her equal right to pass on status and membership rights to their descendants. This further negatively affects a person’s right to culture and to pass on their culture, which is intimately tied to the land, to their descendants. Canada’s assertion that the registration system has as its purpose to “maintain continuity with the original Aboriginal Peoples of Canada” does not reflect the well-documented reality that this registration system will in fact lead to the elimination of individuals entitled to register under the Indian Act. This is because of the overly rigid, still residually discriminatory registration system created by the 1985 Amendments.

This situation requires legislative and policy changes, based on full and effective consultation

and collaboration with Indigenous Peoples and representative organizations. Indigenous women's organizations must play a key role, given the specific discriminatory impact this legislation has had on Indigenous women and their descendants.

In addition, in order for a Native woman's child to be registered as an Indian and to receive the entitlements that follow from this status, Native women who hold Indian status in Canada are presently being informed that they must register the name of the paternal father of their child on the child's birth certificate in order for their child to receive Indian registration and the entitlements which flow from that registration.

#### **Actions Required by Canada:**

In consultation and cooperation with Indigenous Peoples and representative organizations, including Indigenous women's organizations, Canada must implement policy and legislative changes that will remove the residual gender discrimination against First Nations women and their descendants and redress the current discriminatory erosion of rights to membership and status under the Indian Act of all First Nations individuals.

- **Aboriginal women remain vastly over-represented in the federal prison system.**
- **33.6% of all federally sentenced women are Aboriginal.**

NWAC has concerns about the lack of access to justice and high rates of incarceration of Aboriginal women and the impacts on those individuals and their families. As well, the overall concern about the general direction of these initiatives. The Canadian Bar Association (CBA) is committed to public safety, and there is broad consensus among reputable Canadian criminal justice experts as to what is most effective in achieving a safer society. At its 2011 Canadian Legal Conference, the CBA publicly urged that Canada adopt:

- A more health based response to the mentally ill, in place of incarceration; policies and laws that recognize the historical, social and economic realities of aboriginal people;
- A judicial "safety valve" to ensure justice in sentencing; and
- A policy of transparency in regard to the cost of any future criminal justice initiatives.

In their view and in NWAC's view as well, the initiatives in Bill C-10 are in direct contrast. They adopt a punitive approach to criminal behavior rather than one concentrated on how to prevent that behavior in the first place, or rehabilitate those who do offend. As most offenders will one day return to their communities, we know that prevention and rehabilitation are most likely to contribute to public safety. The proposed initiatives also move Canada along a road that has clearly failed in other countries. Rather than replicate that failure, at enormous public expense, we might instead learn from those countries' experiences.

The proportion of full parole applications resulting in National Parole Board reviews is lower for Aboriginal offenders. The percentage of full parole waived due to incomplete programs continues to increase at a higher rate for Aboriginal offenders than for non-Aboriginal offenders

(33.4% from 2002/03 to 41% 2006/07 for Aboriginal offenders and 26.6% to 31.4% for the same period for non-Aboriginal offenders). The percentage of denied recommendations to grant full parole continued to increase for Aboriginal offenders while decreasing for non-Aboriginal offenders (24.3% compared to 5.2%). The gap in outcomes has significantly increased. (13.1% in 2005/06 to 19.1% in 2006/07). Aboriginal offenders are over-represented among those referred for detention rather than parole and their parole is more likely to be revoked for breach of conditions.

The greater likelihood of statutory release for Aboriginal offenders equals more time spent incarcerated and less time in the community under supervision for programming/intervention than for non-Aboriginal offenders. While CSC does not direct the National Parole Board, the Service does have control over many of the factors that contribute to delayed parole for Aboriginal offenders.

Systemic discrimination, culturally laden notions of accountability, over-classification, over-segregation, and a lack of availability of Aboriginal specific programs while incarcerated may all play a role in the granting of parole to Aboriginal offenders.

The situation of Aboriginal women in terms of security classification, access to programs, and timely conditional release is even more problematic. The Office of the Correctional Investigator OCI has noted a significant increase in the number of women offenders returning to the community on statutory release rather than on day or full parole as well as a corresponding increase in the number of waivers and postponements of National Parole Board hearings by women offenders. Both of these trends are most evident among Aboriginal women.

According to the Annual Report of the Office of the Correctional Investigator 2012-2013, “Aboriginal offenders are kept behind bars for longer periods of time and at higher security levels than their non-Aboriginal counterparts” (p.30). Additionally, they are overrepresented in “segregation placements, maximum security populations, institutional charges and in-use of force incidents” (p.30). The Aboriginal prison population has risen by over 40% since 2005-06. The Report of the Office of the Correctional Investigator was the result of a systemic investigation of how CSC responded to how Canada direction to share care and custody of Aboriginal offenders. The report “*Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act*” highlighted the urgent issues facing Canada’s Aboriginal people in the federal correctional system.

**Recommendations from the Annual Report of the Office of the Correctional Investigator 2012-2013, were that the Correctional Service of Canada (CSC), (p. 32):**

- publish a public accountability report card summarizing key correctional outcomes, programs and services for Aboriginal people, to be tabled annually in Parliament by the Minister of Public Safety;
- publish an update to its response to Spirits Matters in collaboration and consultation with its National Aboriginal Advisory Committee; and,

- audit the use of *Gladue* principles in correctional decision making affecting significant life and liberty interests of Aboriginal offenders, to include penitentiary placements, security classification, segregation, use of force, health care and conditional release.

The Supreme Court of Canada has confirmed Aboriginal offenders' rights to have *Gladue* principles considered in their sentencing. They are identified as:

- Effects of the residential school system.
- Experience in the child welfare or adoption system.
- Effects of the dislocation and dispossession of Aboriginal people.
- Family or community history of suicide, substance abuse and / or victimization.
- Loss of, or struggle with, cultural/ spiritual identity.
- Level or lack of formal education.
- Poverty and poor living conditions.
- Exposure to / membership in, Aboriginal street gangs.

However, despite the recognized importance of considering *Gladue* principles in Aboriginal sentencing, there is little evidence that *Gladue* is routinely used.

## **Violence towards Aboriginal Women in Canada: Colonization and the Impacts of Violence against Aboriginal Women and Girls**

Systemic violence against Aboriginal women (VAAW) and girls, their communities, and their nations is grounded in colonialism. This violence, which stems from colonial mentalities, is still a major issue impacting Aboriginal communities, and has become a primary concern for many Aboriginal organizations. Even though many initiatives, programs, and support have been implemented there is still the concern for the high levels of violence towards Aboriginal women in their communities in Canada<sup>7</sup>—an issue that must be remedied.

The social, “economic, and cultural rights of Indigenous Peoples are sterilized through the operation of colonial doctrines”<sup>8</sup> and their paternalistic foundation of dominance. This foundation must be recognized as a contributor to the acts of violence towards Aboriginal women if we as equitable societies are to become more effective at ending violence against Aboriginal women.

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<sup>7</sup> Royal Commission on Aboriginal Peoples, 1996.

<sup>8</sup> Independent Indigenous Submission to the United Nations Committee on Economic, Social and Cultural Rights in response to Canada's Periodic Reports. May 2006. <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/independentindigenous.pdf>

Aboriginal Peoples have suffered repeated trauma at the hands of the Canadian Government and the Church. They stole Aboriginal lands, destroyed their cultures, and confined their children to residential schools where many were systemically abused. Due to the implementation of various laws—most pertaining to the regulations in Canada’s Indian Act (1867)—Aboriginal Peoples are restricted from their inherent freedom to practice their culture and language, helping to develop a cycle of intergenerational violence and trauma. This cycle is present in all Aboriginal communities, increasing Aboriginal women’s exposure to both systemic and interpersonal violence. It is evident that this “commonness” of violence in Aboriginal communities has altered the perceptions of Aboriginal women and “lack of resources within the communities all too often limit their options when it comes to ensuring their safety and that of their children.”<sup>9</sup>

Long-term subjugation in Aboriginal communities exacerbated these conditions, doubling the suffering for women. Colonization has manifested into our own Peoples’ way of thinking and behaving. Aboriginal women face discrimination on multiple fronts: as women within their home communities due to the patriarchal legacy of colonization, as women in mainstream society, and as Aboriginal persons in mainstream society.<sup>10</sup> Additionally, a disproportionate number of the most vulnerable street prostituted women are Aboriginal, who struggle with addiction, homelessness, and chronic, often life-threatening, health problems.<sup>11</sup> Engagement in prostitution is a reflection of the overall economic and social marginalization faced by Aboriginal women and girls, and it further increases levels of vulnerability to coercion, abuse, and violence. The discrimination and indifference by authorities towards Aboriginal women results in impunity for many of the crimes committed against them, and permits the violence to continue.

Young Aboriginal women are 5 times more likely than other women of the same age to die as the result of violence.<sup>12</sup> Canadian police and public officials have done little to prevent the pattern of racist violence among Aboriginal women in Canada partially because they (police and public officials) are the perpetrators of the racial discrimination against Aboriginal women. According to Amnesty International the pattern of violence towards Aboriginal women is as follows:

- The denial of dignity and worth of Indigenous women through racist and sexist stereotypes encourage some men to feel they can get away with acts of hatred against them.
- For many years government policy has left many Indigenous families and communities broken apart and impoverished therefore resulting in the vulnerability of many Indigenous women and girls to exploitation and attack.
- There has been a failure on the part of many police forces to organize necessary actions (training, protocols, and accountability mechanisms) ensuring that officers serve Indigenous communities with understanding and respect. Without these measure, officers

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<sup>9</sup> Lamontagne, M. “Violence Against Aboriginal Women”. Canadian Women’s Foundation, 2011.

<sup>10</sup> The B.C. CEDAW Group, Inaction and Non-compliance: British Columbia’s Approach to Women’s Inequality, (Sept. 2008) at 10, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CEDAWCanadaBC2008.pdf>.

<sup>11</sup> Id. at 29

<sup>12</sup> Brzozowski, J., Taylor-Butts, A., Johnson, S. Victimization and offending among the Aboriginal population in Canada (Canada: Stats Canada, 2006), 7.

increase the vulnerability of violence towards Indigenous women and girls.<sup>13</sup>

The federal government of Canada over the past five years has granted \$10 million to address the issue of violence facing many Aboriginal women and girls. The money devoted to the above mentioned does not specially focus on patterns of violence among Aboriginal women and girls. Instead the majority of the money is put towards improving police initiatives that track missing persons. Even at that, implementation is still problematized:

This initiative is undermined by the fact that police are still not required, or provided training and support, to ensure that police reports consistently and accurately record whether or not victims of crime and missing persons are Aboriginal. As a result, the true extent and nature of violence against Indigenous women will continue to be obscured.<sup>14</sup>

### *NWAC's Role in Minimizing Racial Discrimination among Aboriginal Women and Girls in Canada*

In 2005 NWAC launched the Sisters In Spirit Initiative (SIS). The initiative began as a five-year research, education, and policy initiative funded by Status Women Canada and designed to address the alarming incidence of violence against Aboriginal women, including disturbing numbers of missing and murdered Aboriginal women and girls. This knowledge assists NWAC and other stakeholders to explore the connection between the root causes of violence and identify measures to increase the safety of Aboriginal women and girls. While NWAC has made great strides in bringing to light issues of violence that have led to the disappearance and death of Aboriginal women and girls, Aboriginal women continue to be the most at risk group in Canada for issues related to violence and complex issues linked to intergenerational impacts of colonization and residential schools.

In a 2010 NWAC “Sisters In Spirit” Report, it is noted that there are over 600 missing or murdered Aboriginal women in Canada. From 2005 to 2010 NWAC was successful in turning the research of Sisters In Spirit into practical analysis and reflection on how to better respond to the issue of missing and murdered Aboriginal women.

NWAC has recorded information concerning 582 cases of murdered and disappeared Aboriginal women and girls in Canada. Of the 582 cases, 115 (20%) involve missing Aboriginal women and girls, 393 (67%) involve Aboriginal women or girls who died as the result of homicide or negligence, and 21 cases (4%) fall under the category of suspicious death (incidents that police have declared natural or accidental but that family or community members regard as suspicious). There are 53 cases (9%) where the nature of the case remains unknown, meaning it is unclear whether the woman was murdered, is missing, or died in suspicious circumstances. Compared to the rest of Canada’s provinces and territories, British Columbia holds the record for missing and murdered Aboriginal women with the majority being found along Highway 16, known as the “Highway of Tears”. NWAC continues to collect information since its 2010 report, and the count of missing and murdered Aboriginal women and girls is now over 600.

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<sup>13</sup> Amnesty International, “Stolen Sisters Overview” [http://www.amnesty.ca/campaigns/sisters\\_overview.php](http://www.amnesty.ca/campaigns/sisters_overview.php)

<sup>14</sup> Amnesty International, “Stolen Sisters Overview” [http://www.amnesty.ca/campaigns/sisters\\_overview.php](http://www.amnesty.ca/campaigns/sisters_overview.php)

The research, combined with life stories of women and girls who are either missing or who have been found murdered, has led to an intimate knowledge of the experience of families, the patchwork of policies, programs, and services available to women, families, communities, and the jurisdictional divisions that prevent effective responses by the police and justice systems to the needs of Aboriginal women and families.

On September 27, 2010, the government of British Columbia established the Missing Women Commission Inquiry, with the former Attorney General of British Columbia, Wally Oppal Q.C., as the Commissioner.<sup>15</sup> This is an Inquiry into the facts, police investigations, and official decisions involved in the disappearances and murders of over 33 women from Vancouver's Downtown Eastside between the years 1997 and 2002. The volume of missing and murdered women depict the lack of concern official have towards violence against Aboriginal women, not only in British Columbia but also across Canada. NWAC has worked to collect evidence on the issue of violence against Aboriginal women and disseminate in order to shed light on these terrible circumstances in hopes of bringing about change.

The Inquiry is the first and only official Inquiry appointed in Canada that is mandated to examine some of the disappearances and murders of Aboriginal women and girls, as well as police responses to these incidents. NWAC applied for standing at the Inquiry and was the only Aboriginal organization granted full standing. Standing permits participation as a party with the right to cross-examine witnesses, present evidence, and make submissions. Commissioner Oppal granted standing to a number of groups because of their expertise and direct interests. He also determined that some of these groups would not be able to participate unless public funding was provided for legal counsel, and he therefore recommended that funding be provided as appropriate. Commissioner Oppal stated specifically that the participation of NWAC was crucial. He wrote:

NWAC has spent nearly ten years gathering evidence and information related to missing and murdered Aboriginal women across Canada. They have a direct interest in the outcome of this hearing and a large role to play in ensuring that the voice of Aboriginal women is represented in the Inquiry process.<sup>16</sup>

On July 22, 2011, the Attorney General refused to provide funding for legal counsel, with the exception of one lawyer. This lawyer was sought to represent some of the victims' families, who were murdered by serial killer William Robert Pickton. The Attorney General, in effect, overturned the independent Commissioner's ruling on standing, since, without federal funding for legal counsel, NWAC and other groups could not exercise the standing they were granted. NWAC was forced to discontinue its involvement in the Inquiry because of the denial of funding.

The Vancouver Police Department, the Criminal Justice Branch of the Attorney General's Ministry, and the Royal Canadian Mounted Police—whose conduct is all under scrutiny—are

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<sup>15</sup> See terms of reference and complete information on the Missing Women Commission of Inquiry at: <http://www.missingwomeninquiry.ca/>

<sup>16</sup> Letter from the Commissioner Wally Oppal to the Honorable Barry Penner, Attorney General of British Columbia, June 30, 2011.



each represented by publically funded legal counsel. Commissioner Oppal, on August 10, 2011, announced that the commission had hired two “independent” lawyers on contract to help “ensure that the perspectives of Vancouver’s Downtown East Side community and Aboriginal women are presented at the inquiry”<sup>17</sup>

The denial of funding placed NWAC on an unequal footing with the Vancouver Police Department, the Royal Mounted Police, and the Criminal Justice Branch of the Attorney General’s Ministry. Whereas these state officials and institutions are represented by publically funded counsel, NWAC, and other organizations with direct knowledge of the disappeared and murdered women and of their lives and conditions, have been denied the equal capacity to participate, cross-examine witnesses, and to bring forward their information and expertise. The effect of this is to privilege the information, perspectives, and expertise of the state officials over that of disadvantaged women, whose experience and vulnerability is conditioned by their sex, Aboriginality, and poverty. It is a continuation of the privilege and inequality that led to these women being in positions of vulnerability in the first place.

Due to the BC Commission of Inquiry’s denial of funding to NWAC, Aboriginal women and girls were denied fair and direct access to the administrative and legal mechanisms of justice. As one of the organizations who have committed the most time, effort, and skills into building knowledge of this ongoing tragedy and making others aware of missing and murdered Aboriginal women, and who have worked at the level of families as well as provincially and federally, NWAC questions the kind of fairness and justice families received without NWAC’s involvement in the BC Commission of Inquiry process. In a letter to the BC Commission, The former NWAC president Jeannette Corbiere-Lavelle stated:

The goal of the Inquiry is not simply to identify wrongdoing or mistakes but to also determine how to prevent this from being an ongoing situation. To determine the best practices, NWAC has expressed that it is only through independent and thorough examination of the root causes of violence and what has happened, and through listening to the knowledge and experience of NWAC and others, can governments in Canada develop the appropriate and effective measures to stop the violence.<sup>18</sup>

Many of the groups and individuals who are advocates for the safety of Aboriginal women have worked for more than a decade to bring this issue to the attention of the Government of Canada, as well as provincial and territorial governments. We have tried to impress upon our governments the seriousness of the human rights violations involved, and the need for strategic, co-ordinated action to address the police and government failures that permit and condone persistent sexualized and racialized violence. Many of us have provided support and services to Aboriginal women and girls who have experienced violence, and to members of the families of women and girls who have disappeared or been murdered. We have all worked in different ways and in different communities within Canada.

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<sup>17</sup> (Missing Women’s Commission of Inquiry, “Missing Women Commission Appoints Two Independent Counsel; Two Others to participate Pro Bono”, August 10, 2011, online at: <http://www.missingwomeninquiry.ca/2011/08/august-10-2011-missing-women-commission-appointes-two-independent-lawyers-two-others-to-participate-pro-bono/>

<sup>18</sup> Letter to the BC Commission of Inquiry dated July 22, 2011 from Jeannette Corbiere-Lavell, President NWAC).

We have lobbied, written, spoken out, walked across the country, held hundreds of vigils for the disappeared and murdered women, intervened with police, appeared before Parliamentary Committees, and met with government officials, repeatedly. Despite our years of effort, our goal has not been achieved. Canada does not yet have in place a co-ordinated National Plan, with detailed and concrete measures to address the root causes and remedy the consequences of the violence against Aboriginal women and girls. Some small steps have been taken, but when these steps are assessed against the long-standing and continuing pattern of violence and the harms that it causes to women, girls, families, and communities, the response of the Government of Canada and the provincial and territorial governments remains weak, un-coordinated, and inadequate.

In addition, the voices of Aboriginal women and their organizations are still ignored and disrespected, and they are excluded from participation in deliberations about their lives and their deaths. Most recently, the Parliamentary Committee on the Status of Women released its final report on violence against Aboriginal women. The report ignores the testimony given by hundreds of Aboriginal women and Aboriginal women's organizations and it offers no real solutions.

Further, because the Government of British Columbia denied funding for legal counsel to the groups who were granted standing by Inquiry Commissioner, Wally Oppal, the Missing Women Commission of Inquiry in British Columbia, is proceeding without the participation of the Native Women's Association of Canada, and other crucial organizations who work directly with, and defend the rights of, women who are targets of violence.

*Neither analysis of the problems, nor solutions to them, can be formulated effectively if Aboriginal women, their organizations, and those with knowledge and expertise are silenced and excluded from participation.*

As time goes by, and there are still no effective measures in place, there is an increasing sense of urgency and frustration. Aboriginal women and girls continue to disappear and be found murdered.

## **First Nations Child Welfare System in Canada**

As part of early colonialist policies, the Government of Canada implemented the residential school era (1870s – 1996). This horrific practice removed Aboriginal children from their homes and subjected them to a third-rate education, physical, sexual, and emotional abuse, malnutrition, and cultural degradation. Now, First Nations children are tragically over-represented in Canada's child welfare system. In fact, it has been considered a continuation of the residential schools, except that far more children have been taken into the child welfare system than were taken to residential school.

Coined by author Patrick Johnston, the sixties scoop refers to the mass removal of Aboriginal children from their families into the child welfare system, in most cases without the consent of their families or bands. "Children growing up in conditions of suppressed identity and abuse tend eventually to experience psychological and emotional problems. For many apprehended children,

the roots of these problems did not emerge until later in life when they learned about their birth family or heritage.”<sup>19</sup> The child welfare system in Canada currently in place reflects, “white dominant mainstream ideas and ideals and it has historically been used on Aboriginal Peoples in ways that conflicts and are inconsistent with Aboriginal people’s values and family traditions.”<sup>20</sup>

First Nations children are tragically over-represented in Canada’s child welfare systems. INAC funds Aboriginal Child and Family service agencies at an average of 22% less than their provincial counterparts and it is 12.3 times more likely for an Aboriginal child to be in care than a non-Aboriginal child in fiscal 2009/10. Comprising 3.8 % of the Canadian population, Aboriginal children make up a staggering 30 % of children in foster care.<sup>21</sup>

“Sadly, the involvement of the child welfare system is no less prolific in the current era...the “Sixties Scoop” has merely evolved into the “Millennium Scoop.”<sup>22</sup>

The Auditor General of Canada has underlined that, in 2008, the number of First Nations children in State care “was close to eight times the proportion of children residing off reserves”:

4.46 First Nations children are among the most vulnerable members of society. In 2008, we noted that over five % of all children residing on reserves were in care; this was close to eight times the proportion of children residing off reserves. INAC has taken some actions to implement the two recommendations on which we followed up for this audit. Nevertheless, there has yet to be a notable change in the number of First Nations children in care.<sup>23</sup>

Canada was aware of the resulting discrimination when it referred to the “disproportionately high number of Aboriginal children in state care” and claimed it was incrementally shifting to a prevention-focused approach:

The disproportionately high number of Aboriginal children in state care is part of broader social challenges on reserves, such as poverty, poor housing conditions, substance abuse, and exposure to family violence. The Government of Canada is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach. It is expected that all agencies will be using the prevention-focused approach by 2013.<sup>24</sup> (Underlining added)

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<sup>19</sup> Indigenous Foundations. “The Sixties Scoop”, University of British Columbia, 2009.

<sup>20</sup> Crichlow, Wesley. “Western Colonization as Disease: Native Adoption and Cultural Genocide”. Critical Social Work 2002. <http://www.uwindsor.ca/criticalsocialwork/western-colonization-as-disease-native-adoption-cultural-genocide>

<sup>21</sup> <http://www.jhr.ca/rightsmedia/2009/05/today%E2%80%99s-canadian-aboriginal-children-the-origin-of-tomorrow%E2%80%99s-government-apology/>

<sup>22</sup> Sinclair, Raven. 2007. “Identity lost and found: Lessons from the sixties scoop.” First Peoples Child and Family Review. 3.1 (2007): 65-82. Available online at: [http://www.fnfcfs.com/pubs/vol3num1/Sinclair\\_pp65.pdf](http://www.fnfcfs.com/pubs/vol3num1/Sinclair_pp65.pdf)

<sup>23</sup> Office of the Auditor General of Canada, Status Report of the Auditor General of Canada to the House of Commons – 2011, Ch. 4 (Programs for First Nations on Reserves), at 23.

<sup>24</sup> Canada, —Government Response to the Standing Senate Committee on Human Rights Report: “Children: The Silenced Citizens Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children” in Canada, “Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the

Patricia Monture-Angus states that the child welfare system is determined to remove and seclude First Nations children from their cultural identity and their cultural heritage, and that “the child welfare law is racist in that it applies standards that are not culturally relevant to Aboriginal Peoples and which serve to reinforce the status quo”<sup>25</sup> This analysis is applied to the racist bias from which judicial interpretations of the best interests of the children are met.<sup>26</sup> The disregard of the “indigenous factor” within the Canadian child welfare system is merely a reflection of the position of First Nations within Canadian society. The colonial pressure to assimilate is immeasurable, placing many psychological burdens on First Nations Children, families, and communities.

### *Child Welfare and the Recent Human Rights Complaint*

According to federal government figures the number of status Indian children entering child welfare care rose 71.5% nationally between 1995-2001.<sup>27</sup> These statistics show clear violations of the human rights of First Nations children. When a discrimination complaint was filed against the Canadian government under the CHRA, the government denied that the CHR Tribunal had jurisdiction to hear cases relating to Canadian government discrimination in providing funding for child welfare services on First Nations reserves. However, this position contradicts the government’s earlier statements on the scope of cases that could be heard following the repeal of s. 67.

The Canadian government has been both consistent and persistent in the continuation of colonial policy and legislation. Since its inception in 1977, First Nations have been excluded from the Canadian Human Rights Act (CHRA). The exclusion of First Nations from the Canadian Human Rights act limited Aboriginal avenues of redress for numerous Canadian government violations of their human rights. This is part of a pattern in the colonial domination of Canada’s First Nations by the Canadian government. Under Section 67 of the CHRA, those with status under the Indian Act were excluded from the CHRA’s protections. Under Bill C-21, introduced in 2008, the Conservative government finally agreed to repeal Section 67, but gave First Nations leaders three years to learn about the CHRA and prepare for inclusion. This took place in June of 2011.

Though the passing of Bill C-21 in 2008 and its application in 2011 are positive steps, one can be skeptical of the government’s actual willingness to be accountable to First Nations, especially in relation to their reaction to the FNCFCS (First Nations Caring Society of Canada) and AFN’s (Assembly of First Nations) human rights complaint which is outlined below.

AFN/FNCFCS’s case against the government is reasonable in that it indisputably characterizes

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period January 1998 – December 2007”, received by Committee on the Rights of the Child on 20 November 2009, Appendix 5, at para. 98. [emphasis added]

<sup>25</sup> Monture, Patricia A. (1989). A Vicious Circle: Child Welfare and the First Nations. *Canadian Journal of Women & the Law* 3. 1-17.

<sup>26</sup> Crichlow, Wesley. “Western Colonization as Disease: Native Adoption and Cultural Genocide”. *Critical Social Work* 2002. <http://www.uwindsor.ca/criticalsocialwork/western-colonization-as-disease-native-adoption-cultural-genocide>

<sup>27</sup> First Nations Family and Child Caring Society of Canada. “Why is this Case Important?” <http://www.fncaresociety.com/fnwitness/importance>

child welfare service inequities as a failure on the part of the federal government “to consider the best interest of the child in conjunction with their collective cultural rights”<sup>28</sup> which according to the United Nations Committee on the Rights of the Child is a human right of Indigenous children.

Among many issues the FNCFCS underlines the fact that according to the 2005 Wen:de study, “...0.67% of non-Aboriginal children were in child welfare care in three sample provinces in Canada as compared to 10.23% of status Indian children, and that overall there are more First Nations children in child welfare care in Canada than at the height of residential schools.”<sup>29</sup> The Attorney General’s move to avoid being evaluated on Aboriginal child welfare through claims of exemption of the application of CHRA is designed to give the federal government sweeping immunity from Human Rights prosecution. This attempt to replace First Nations exclusion from the CHRA with federal immunity from Bill C-21 is similar to replacing an explicit act of discrimination with a more subtle variety. The federal government tends to obfuscate the issues raised in the First Nations human rights complaint by distracting from the underlying and central point of inequity. For example Minister of Indian and Northern Affairs Duncan’s 2010 comments before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, in which he draws attention to the fact that INAC’s child welfare funding has increased “from 193 million 14 years ago to 550 million last year.”<sup>30</sup> This ignores how much is comparatively spent on non-First Nations children, and also ignores questions of cultural discrimination in how that money is spent. INAC also frequently underlines its partnership with AFN on the Canada-First Nations Joint Action Plan, as if this somehow detracts from the legitimacy of the human rights complaint.

Minister of Indian Affairs, Jim Prentice, made representations in 2007 to the Parliamentary Standing Committee on Aboriginal Affairs on the significance of the repeal of s. 67. The Minister confirmed that the CHRA could be a basis for reviewing INAC programs and services to ensure compliance with human rights obligations:

The repeal of section 67 will provide first nation citizens, in particular first nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, the quality of services that they've accessed, in addition to other issues, such as membership, I assume, as well.<sup>31</sup>

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<sup>28</sup> United Nations Committee on the Rights of the Child. General Comment on the Rights of Indigenous Children. Geneva, Switzerland. January 12-30, 2009.

<sup>29</sup> KPMG LLP. Indian and Northern Affairs Canada: Review of Wen:De The Journey Continues. Ottawa, Ontario, July 30, 2010.

<sup>30</sup> Duncan, the Honourable John, PC, MP. Notes for an address to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, regarding First Nations Child and Family Services. Ottawa, Ontario. November 24, 2010.

<sup>31</sup> Canada, Standing Committee on Aboriginal Affairs and Northern Development, Minutes of Proceedings and Evidence, (March 22, 2007). <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2786776&Language=E&Mode=1&Parl=39&Session=1> [emphasis added]

More recently, AANDC affirmed that the amendment to repeal s. 67 “ensures that First Nations people living on reserves have full access to, and protection under” the CHRA. In reference to the repeal of section 67 of the Act, AANDC has concluded as follows in its Backgrounder, issued contemporaneously with its official statement endorsing the Declaration: “... a legislative amendment passed in 2008 ensures that First Nations people living on reserves have full access to, and protection under, the Canadian Human Rights Act.”<sup>32</sup>

### *Jordan’s Principle and the National Level of Child Welfare Cases in Canada*

On the basis of race and ethnic origin the Government of Canada discriminates towards First Nations in its failure to provide adequate funding. This violates section 15 of the Canadian Charter of Rights and Freedoms as well as infringes on the rights of First Nations children and youth to the equal benefit of the laws of Canada.

A casualty of this inequality, Jordan River Anderson was 5 years old when he died in a hospital, having never been able to go home. Born with serious health challenges, Jordan spent the first two years of his life receiving needed care in a hospital instead of at home in his family’s remote Aboriginal community. After two years, doctors declared that he could finally go home, but due to a federal-provincial funding dispute as to which should cover his medical needs, Jordan spent two more years in the hospital unnecessarily, dying after his fifth birthday before he could go home for the first time.<sup>33</sup> Jordan’s Principle is a child first principle implemented to end the jurisdictional disputes within and between Governments (Provincial/Federal) regarding funding to First Nations children.

Since the establishment of Jordan’s Principle, Cindy Blackstock, Child Advocate, notes that Jordan’s Principle has been interpreted restrictively by applying only to children with complex medical needs with multiple service providers. Only months after Jordan’s Principle passed through the House of Commons, Canada and Manitoba argued over who should pay for feeding tubes for two chronically ill children living with their family on reserve. A 2005 report identified 393 disputes between the Federal and Provincial/territorial governments impacting First Nations children.<sup>34</sup>

NWAC is concerned at the rising number of Aboriginal children in care in Canada. The widespread reach and legacy of colonialism’s inequality leads to poverty and the inability to access services on and off the reserve, with First Nations children being taken from their families and communities.

Children are our future. The living conditions of many Aboriginal families are alarming. Concrete commitments are required to ensure that Aboriginal families and

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<sup>32</sup> Indian and Northern Affairs Canada, “Backgrounder: Canada’s Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples” 12 November 2010, <http://www.aadnc-aandc.gc.ca/eng/1292353979814>. [underline added].

<sup>33</sup> <http://www.fncfcs.com/jordans-principle/>

<sup>34</sup> <http://www.straight.com/article-254075/cindy-blackstock-and-andrea-auger-reconciliation-cant-be-empty-promise-first-nations-children>

children do not live in poverty and that they have access to decent and safe housing, running water, food and other basic necessities that most Canadians take for granted.<sup>35</sup>

If the needs of Aboriginal children are to be taken seriously, Jordan’s Principle should be formally implemented as a requirement in all federal, provincial, and territorial policies pertaining to Aboriginal child welfare. In keeping with Jordan’s Principle, Canada must follow the recommendations made by its own Auditor General with respect to the national Aboriginal child welfare system in Canada and take immediate steps to remedy jurisdictional barriers and funding problems of the Aboriginal child welfare system in Canada. The best preventative approach is to allow Aboriginal children to stay in their families and in their communities in order to end the cycle of dislocation. Instead of implementing so called “emergency measures”—what the government perceives to be “the best interest for the child” by “measuring” First Nations households with the “material yardstick”—the Government of Canada should be installing ways (through funding) to prevent dislocation of First Nation families with their children.

## **Recommendations**

While the 2011 Auditor-General’s Report could not establish a full costing of the amount spent on Child Welfare in Canada in its last report to Parliament, the Report acknowledges its awareness of the problem.

NWAC reiterates the following Recommendations made by the Auditor-General in its 2011 Report:

4.74: Indian and Northern Affairs Canada should determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program. It should periodically review the program’s budget to ensure that it continues to meet program requirements and to minimize the program’s financial impact on other departmental programs.<sup>36</sup>

NWAC supports the following recommendations of Ms. Arlene Johnson, Director of the Mi’kmaw Family and Child Services of Nova Scotia: “INAC must take immediate steps to fully redress the inequities and structural problems with the Directive 20-1, enhanced funding approach and the 1965 Indian Welfare Agreement, which the Auditor General has found to be inequitable”<sup>37</sup>

When First Nations child welfare experts completed the first two reports to remedy inequalities

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<sup>35</sup> NWAC President Jeannette Corbiere-Lavell.

<sup>36</sup> 2008 May Report of the Auditor General of Canada, retrieved from: [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200805\\_04\\_e\\_30700.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_04_e_30700.html)

<sup>37</sup> Johnson, A. Testimony before Standing Committee on Aboriginal Affairs and Northern Development, February 15<sup>th</sup>, 2011. Retrieved from: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4966298&Language=E&Mode=1&Parl=40&Ses=3>

in First Nations child welfare funding (McDonald & Ladd, 2000; Loxley et al., 2005), the federal government was running a surplus budget in the billions of dollars. The second report known as the *Wen:de: the Journey Continues Report* (Loxley et al., 2005), suggested that an additional 109 million dollars in additional child welfare funding on reserves was needed (excluding Ontario and the territories) along with some policy changes. The 2008 federal budget announcement on First Nations child welfare funding (Department of Finance, 2008) provided only 23% per year of what was needed. In the 2009 budget the government announced an additional 20 million over two years (Department of Finance, 2009). When added, the amount provided in both budgets represents one third of what was recommended per year in the *Wen:de* reports (excluding Ontario and the territories) to achieve equity.<sup>38</sup> Detailed economic analysis determined that an additional 109 million dollars per year in federal child welfare funding is needed to ensure a very basic level of equivalency to provincial funding levels, which are 22% higher. (Loxley, DeRiviere, Prakash, Blackstock, Wien & Thomas Prokop, 2005). The key area of underfunding was Least Disruptive Measures services to First Nations families to keep their children safely at home, resulting in larger numbers of First Nations children resident on reserve entering child welfare care than necessary (Blackstock, Prakash, Loxley & Wien, 2005). A recent survey of 12 First Nations child and family service agencies indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 hours to resolve each incident. The most frequent types of disputes were between two or more federal government departments (36%), between two or more provincial departments (27%) and between federal and provincial governments (14%). Examples of the most problematic disputes were with regard to children with complex medical and educational needs, reimbursement of maintenance, and lack of recognition of First Nations jurisdiction.<sup>39</sup>

In the discrimination complaint concerning federal funding of child welfare services, the Canadian government is attempting to evade responsibility by opposing any comparison with provincial services off-reserve. Yet the Canadian government insists on using a provincial comparator when it suits its own actions. In regard to First Nations reserves, it is reported that the Aboriginal and Northern Affairs Canada (ANAC) is drastically cutting social assistance payment, so as to align them with those of the provinces:

. . . Aboriginal Affairs and Northern Development . . . Will be aligning all First Nations social welfare policies with that of the provinces. An email from the department states, “The policy of ensuring that First Nations receive income assistance rates that are comparable to those which provinces provide to those off reserve has been in effect since 1964 and thus represents the policy of successive federal governments.”<sup>40</sup>

This contradiction has been noted in a *Windspeaker* editorial:

Ottawa is fighting on several fronts to not be held to provincial rates in such areas as child welfare and education funding that it seemed a curious thing to have

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<sup>38</sup> [http://www.fncfcs.com/sites/default/files/docs/SenateCommitteeOnHumanRights\\_2009.pdf](http://www.fncfcs.com/sites/default/files/docs/SenateCommitteeOnHumanRights_2009.pdf)

<sup>39</sup> [http://www.fncfcs.com/sites/default/files/docs/FNCFCS\\_eco\\_soc\\_cul\\_UNSubmission.pdf](http://www.fncfcs.com/sites/default/files/docs/FNCFCS_eco_soc_cul_UNSubmission.pdf)

<sup>40</sup> Jennifer Ashawasegi, “Social assistance adjustments coming”, *Windspeaker*, Vol. 29, Issue 9, 2011. <http://www.ammsa.com/publications/windspeaker/social-assistance-adjustments-coming>



bureaucrats hell-bent on upholding a policy of parity in the territory of welfare payments. Could it be that it's just now convenient to hitch a pony to a provincial wagon when that province is slashing costs and reducing outgoings? <sup>41</sup>

In keeping with Jordan's Principle, Canada must follow the recommendations made by its own Auditor General with respect to the national Aboriginal child welfare system in Canada and take immediate steps to remedy jurisdictional barriers and funding problems of the Aboriginal child welfare system in Canada.

## **First Nations Education**

*There is a longing among the youth of my nation  
to secure for themselves and their people  
the skills that will provide them with a sense of  
purpose and worth.*

*They will be our new warriors; their training will  
be much longer and more demanding than it was  
in the olden days...*

*But they will emerge with their hand held  
forward not to receive welfare, but to grasp a  
place in society that is rightly ours.*

### **- Chief Dan George**

The current funding levels of First Nations education, repeatedly highlighted by First Nations themselves, are insufficient and well below the funding levels given to provincial school systems by the Canadian Federal government.<sup>42</sup> National Chief Phil Fontaine recently stated how “resources to First Nations communities have been capped at 2% growth since 1996—a cap that does not keep pace with inflation or our young, booming population.”<sup>43</sup> This funding cap towards First Nations education is intolerable, and clearly depicts inequities between the provincial education system and First Nations education.

Equality between First Nations education and provincial education is not present in Canada. In 2006, about “60% of First Nations youth (aged 20 to 24) living on reserve had not obtained a high school diploma or certificate a rate that has not improved over the last decade and is 4 times higher than that of non-Aboriginal youth in Canada.”<sup>44</sup>

The underfunding of elementary education is a serious concern for NWAC. Many First Nations

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<sup>41</sup> Editorial, (Canada: Windspeaker, 2011), vol. 29(12)

<sup>42</sup> AFN (2005) Resolution No. 53, Special Chiefs Assembly Oct 31-Nov 2, 2005. Regina, Saskatchewan.

<sup>43</sup> Fontaine, Phil (2009), AFN has a plan that benefits all. Editorial, The Toronto Star, January 15, 2009, <http://www.thestar.com/comment/article/571159>.

<sup>44</sup> Statistics Canada (2006) Educational Portrait of Canada, 2006 Census. Catalogue no. 97-560-X.

on-reserve schools are in miserable condition and disrepair. The Canadian government recognizes the need to improve First Nations education because it is affecting Canadian economic productivity, and politics. The solution, proposed by the Canadian Federal government (in the 2008 Federal Budget) was to integrate First Nations education into the provincial education system. (This solution does not consider the culture, language and identity of First Nation people, and could be viewed as another attempt by the government to assimilate First Nations.)

As stated in the 2008 Federal Budget Plan: “The government will spend \$70 million over two years to improve First Nations education by encouraging integration with provincial systems.”

Current estimates show that First Nations children on reserves in Canada receive 2,000 to 3,000 dollars less funding for education than non-Aboriginal children and many of these schools and some of the conditions are deplorable. Some schools are infested with snakes, rats, black mould or sitting on contaminated waste dumps. There are many First Nations communities that do not have schools, in which children in these communities have to be sent hundreds of miles away to get an education. This shortfall means less funding for teachers, special education, teaching resources such as books, science and music equipment and other essentials that other children in Canada receive. There is no funding provided by the department of Aboriginal Affairs and Northern Development (AANDC) for the basics such as libraries, computer software and teacher training, the preservation of endangered First Nations languages, culturally appropriate curriculum or retaining school principals.<sup>45</sup>

First Nations elementary and secondary education, unlike the public schools system, reflects governance primarily at one level—the schools (level one). In most cases, many of the benefits that flow from structures that provide educational services at other levels such as school boards (level two) and ministries of education (level three) are either absent or inadequate.<sup>46</sup>

In her appearance before the Committee, then Auditor General of Canada, Sheila Fraser, stated: “I think everyone recognizes that when [educational] programs were transferred to First Nations, many of the institutions and structural supports were not there to achieve it.”<sup>47</sup>

Serious problems regarding educational funding from AANDC have been reported by Federal Auditor General, Sheila Fraser since 2001. She also made a statement to the Senate committee in November 2009 that she has seen little improvement over the decade. In 2010 the Parliamentary Budget Officer supported complaints of underfunding in a special report on capital spending in First Nations schools. The statistics of First Nations schools in Canada are as follows:

- Only 49% of schools were listed in “good condition”
- 77 schools were housed in “temporary structures” and 10 schools were closed due to their condition.

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<sup>45</sup> Native Women’s Association of Canada. Shadow Report to Committee on the Elimination of Racial Discrimination, 2012.

<sup>46</sup> Harvey McCue, First Nations 2 and 3 Level Services: A Discussion Paper for the Joint Working Group INAC-AFN, April 2006.

<sup>47</sup> Sheila Fraser, former Auditor General of Canada, *Proceedings*, 12 May 2010.

- More than 20% of the schools were described as “not inspected”<sup>48</sup>

Overall, the PBO found that all 803 First Nations schools will need replacement by 2030 but INAC does not appear to be on track to make that happen, as it appears to be significantly under-estimating what it needs to provide to maintain and build proper schools. “Thus according to the PBO projections, for FY2009-10, INAC’s plans for capital expenditure are under-funded to the tune of between \$169 million in the best case, and \$189 million in the worst-case scenario annually, as depicted in the chart above. Thus, the annual INAC Planned Capital Expenditures according to its CFMP LTCP underestimates the likely expenditures compared to the PBO Best-Case and Worst-Case Projections (by more than 58%).”

Education, culture, and language are not a high priority of the Government of Canada, despite calls to make it so. Language is “not only a means of communication, but a link which connects people with their past and grounds their social, emotional, and spiritual vitality” (Norris 1998: 8). In fact teaching Aboriginal languages to Aboriginal students is considered imperative in defining and understanding Aboriginal self-identity (Corbiere, 2000; Norris, 2006). The First Nations Confederacy of Cultural Education centre (2000) was founded on the argument that languages and educational epistemologies point toward the uniqueness of Aboriginal cultures that are intrinsically associated to traditional knowledge.

Historically, Aboriginal youth faced considerable barriers in using their languages particularly through the prohibition of Aboriginal languages in residential schools. While today’s Aboriginal youth may not face the same obstacles as their predecessors, the impacts of those past policies remain, and combine with significant new barriers and challenges in the revitalization and maintenance of traditional languages.

Research completed on the education of First Nations and other minority group students has shown that “schools, which respect and support a child’s culture, demonstrate significantly better outcomes in educating those students.”<sup>49</sup>

In the words of a First Nation’s child, Shannen Koostachin who was a Mushkegowuk Innanu from an isolated community, Attawapiskat First Nation in Ontario, Canada:

I have three brothers and three sisters. I am fourteen years old. ***I’ve graduated and finished*** elementary school called JR Nakogee Elementary School and going to go to school somewhere down south just to have a proper education. I want to have a better education because I want to follow my dreams and grow up and study to be a lawyer. For the last eight years, ***I have never been in a real school since I started my education. For what inspired me was when I realized in grade eight that I’ve been going to school in these portables for eight*** long struggling years. We put on our coats outside and battle through the seasons just to go to computers, gym, and library. (***Shannen’s Dream***: ([www.shannensdream.ca](http://www.shannensdream.ca)).

<sup>48</sup> Goyette, Linda. “A Report Card no Parent would accept”. Canadian National Geographic. December, 2010.

<sup>49</sup> Hamme, Linda 1996 American Indian Cultures and the Classroom. Journal of American Indian Education 35(2): 21- 36. [http://www2.brandonu.ca/library/cjns/17.2/cjnsv17no2\\_pg293-314.pdf](http://www2.brandonu.ca/library/cjns/17.2/cjnsv17no2_pg293-314.pdf)

A campaign spearheaded by a student, Shannen's Dream pursues "safe and comfy schools" and culturally-based and equitable education on reserves. This is a pursuit shared by many Aboriginal communities across Canada. Shannen, an Aboriginal youth, wrote to the United Nations Committee on the rights of the child in 2008 and was nominated for the international Children's Peace Prize in the Netherlands in 2008. She and her family made the difficult decision to send her hundreds of miles away from her family to get a proper education off-reserve. Shannen is noted as saying that children "are losing hope by grade 5 and dropping out." Shannen died tragically in a car accident in the spring of 2010 at the age of 15, while attending school far away from her home.

### **Recommendations and Actions required by Canada**

The ongoing problems lie in jurisdictional solutions in Canada. Although Canada is aware that there are ongoing structural, sanitary, and funding shortfalls in the First Nations Educational system in Canada, Canada continuously fails to remedy a problem that it knows exists.

NWAC reiterates the statements and the recommendations of the Auditor-General Report of 2011 at 5.27:

5:33 Canadian and Northern Affairs Canada, in consultation with First Nations, should immediately develop and implement a comprehensive strategy and action plan, with targets, to close the education gap. It should also report progress to Parliament and to First Nations on a timely basis including: Indian and Northern Affairs Canada should undertake to obtain reliable and consistent information on the actual costs of delivering education services on reserves and compare the costs with those of providing comparable education services in the provinces (5.51), Indian and Northern Affairs Canada, in consultation with First Nations, should accelerate its efforts to develop and apply appropriate performance and results indicators along with targets. (5.46), and, in consultation with First Nations and other parties, the Department needs to urgently define its roles and responsibilities and address the long-standing issues affecting First Nations elementary and secondary education. It also needs to improve its operational performance and reporting of results.<sup>50</sup>

Canada must follow the recommendations made by its own Auditor General and take immediate steps to remedy the education shortfalls in infrastructure, funding, access, and **services in First Nations schools in Canada** to commensurate with provincial schools.

### **The Indian Act and Equality Under the Law, Child Paternity Registration, Sexual Discrimination Based On Race, Colour, Descent, National or Ethnic Origin**

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<sup>50</sup> Report of the Auditor General of Canada, Chapter 5 "Indian and Northern Affairs Canada-Education Program and Post-Secondary Student Support" (Canada: Office of the Auditor General of Canada, 2004). It can be viewed here: [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200411\\_05\\_e\\_14909.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200411_05_e_14909.html)

*"The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."*

- John A Macdonald, 1887

The Department of Aboriginal Affairs and Northern Development Canada (formerly, Indian and Northern Affairs Canada), is the only government-mandated federal department in Canada, which registers its citizens as a separate and distinct group in Canada, under the Indian Act. Its mandate is to register "Indians" under the Indian Affairs' Departmental Register in order to track and fund social programs based on Indian identity.

Each "Indian" citizen belongs to a reserve and is allotted a number. Due to past inequities in the application of the registration, the Department of Indian Affairs was forced to change its registration policies in 1985, allowing both men and women to be registered on the same basis. However, this issue was never fully addressed and resulted in a subsequent legal case being brought forward by Sharon McIvor (BCCA 2009). Even though the Government recently passed and put into effect Bill C-3 Equity in Indian Registration Act, residual discrimination still exists today.

### *Equality before the Law*

The 1985 amendments to the Indian Act regarding the right to pass on status to one's children (commonly referred to as "the Bill C-31 Amendments") only partially addressed the discriminatory provisions of the Indian Act. Previous to 1985, only Aboriginal men could pass on status to the children, regardless of the status of their marriage partner. Aboriginal women who married non-status men were stripped of their status and any children originating from that marriage would be denied status. Bill C-31 allowed for women who had lost their status to regain it, and for those women now marrying non-status men, neither they nor their children would now be stripped of their status. However, Bill C-31 created registration rules that led to non-entitlement of grandchildren to registration after two successive generations of parenting with a non-Indian.

In an effort to remedy this colonialist thinking, this new system creates new violations related to discrimination and equality and continues the theme of assimilation. Under this system, there are two categories of status. 6(1) is full status, whereas 6(2) is the child of one full-status parent and one no-status parent. A 6(2), if they marry another 6(2) or a non-status person as well, they cannot pass status on to their children. The descendants of those individuals classified under subsection 6(2) are more likely to reach the second-generation cut-off point. First Nations women reinstated under Bill C-31 (after having been stripped of status in an overtly discriminatory manner) are more likely than their male relatives to be classified under subsection 6(2), and their children from those non-status unions by default become 6(2). This is why Bill C-31 contains residual discrimination, as noted in the Sharon McIvor case.

Eliminating status through marriage also severs a child's connection to their community. This further negatively affects a person's right to culture and to pass on their culture, which is intimately tied to the land, to their descendants. Canada's assertion that the registration system

has as its purpose to “maintain continuity with the original Aboriginal Peoples of Canada”<sup>51</sup> does not reflect the well-documented reality that this registration system will in fact lead to the elimination of individuals entitled to register under the *Indian Act*. This is because of the overly rigid, still residually discriminatory registration system created by the 1985 Amendments.

This situation requires legislative and policy changes based on full and effective consultation and collaboration with Indigenous Peoples and representative organizations. Given the specific discriminatory impact this legislation has had on Indigenous women and their descendants, Indigenous women’s organizations must play a key role,

**Actions required by Canada:**

In consultation and cooperation with Indigenous Peoples and representative organizations, including Indigenous women’s organizations, Canada must implement policy and legislative changes that will remove the residual gender discrimination against First Nations women and their descendants and redress the current discriminatory erosion of rights to membership and status under the *Indian Act* of all First Nations individuals.

*Personal and Human Rights Infringements Regarding Paternal Registration issues under the Indian Act*

In order for an Indigenous woman’s child to be registered as an Indian and to receive the entitlements that follow from this status, Native women who hold Indian status in Canada are presently being informed that they must register the name of the paternal father of their child on the child’s birth certificate,

NWAC maintains that other ethnic groups in Canada are not being compelled to identify the name of the father of their child(ren) on provincial vital statistics registration records in order to receive provincially-funded medical care and other benefits which derive from their registration. A non-Aboriginal mother can refuse to identify the father of her child and still receive educational, medical, and social services.

By denying Indian registration to a Indigenous woman’s child who chooses not to reveal the name of the paternal father of the child, the Indigenous’ woman is also affected by the denial of what should be her child’s inherent right to an Indian registration identity. This ultimately severely affects a Indigenous woman’s right to live freely with her child, including her own right and the child’s right to move freely, to choose and be proud of her own and her child’s national, ethnic, and racial identity, as well as her choice of spouse and her right to own and inherit property in the Native community.

**Action required by Canada:**

NWAC demands that Canada through the Indian registration of a child’s paternity stop denying equal rights to Native women and their children. This can be done by ceasing the requirement of having Native women register the paternal identity of their child(ren) in order to receive Indian registration and the benefits which flow from that registration under Indian Registration

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<sup>51</sup> Canada’s Human Rights Program, Part III: Measures Adopted by the Government of Canada, Article 5, 63. It can be viewed here: [http://www.pch.gc.ca/pgm/pdp-hrp/docs/cerd/rppts\\_17\\_18/3-eng.cfm](http://www.pch.gc.ca/pgm/pdp-hrp/docs/cerd/rppts_17_18/3-eng.cfm)

Regulations.

### *The Indian Act and Matrimonial Rights—Personal and Property Rights*

Another matter which is still yet unresolved relating to Indigenous women's sexual, ethnic, personal, and property rights are the membership, registration, and land ownership (sections 8-20) of the *Indian Act*. Sections 8-20 of the *Indian Act* disallows a person who is not a duly registered member of a First Nation under the *Indian Act* to receive benefits from registration, own lands, or to give or will those lands to their unregistered children. Nor can a Indigenous woman acquire any ownership of the matrimonial home when it is registered in the name of the husband on a certificate of possession (CP) under section 20 of the *Indian Act*. As a result, some Indigenous women have been left abandoned following the marriage dissolution.

This matter has been of great concern to the Native Women's Association of Canada for many years now because many of the affected individuals are Indigenous women who lost their right to live in the matrimonial or family home when their marriage or common-law relationship dissolved, and it forces women to stay in abusive and deteriorating marriages to prevent the loss of their rights.

In an attempt to rectify this problem the Canadian Government, through the Department of Aboriginal Affairs (Indian Affairs), has promoted the enactment of Matrimonial Real Property (MRP) Legislation in 1996. The MRP legislation when enacted requires First Nations to address any resulting gender inequities as a result of marriage dissolution by opting out of the land provisions of the Indian Act. In exchange, the new legislation must allow First Nations women to seek an appropriate remedy when their marriage dissolves, either under provincial enactment, through remedial legislation, through mediation and negotiation, or by any other instrument deemed appropriate to address this inequity.

However, since 1996 only 24 First Nations of 651 in Canada have enacted this MRP legislation to date because the MRP legislation is onerous for First Nations communities. First Nations are required to invest in specific training with limited staff, find the legal fees to draft the legislation and essentially extinguish the nature of their existing land rights under the Indian Act. For impoverished communities with little funds and capacities, many First Nations are reluctant to enact the MRP legislation, as the demonstrated lack of total enactments since 1996 suggests.

First Nations women and their children who have lost their right to live on their First Nations reserve after the dissolution of a marriage affects their decisions to choose whom they marry, their right to own the property – even though they have lived with their spouses – and the right of her child(ren) to own and inherit property. Too often the certificate of possessions (CP) lands are registered in her former husband's name.

#### **Action required by Canada:**

NWAC calls on Canada to abandon the MRP legislation and work with the Native Women's Association of Canada to develop realistic remedies to resolve and ensure that Indigenous women's human rights and freedoms are secure both on- and off-reserve in Canada if her marriage or relationship dissolved. She must have the same rights as everyone else and



receive the same remedies with respect to the division of property on reserve.

## **Criminal Justice - Bill C-10 - Discrimination, Insecurity and Disregard for Human Rights**

There are disproportionately high rate of incarceration of Indigenous Peoples compared with the general population. Rather than giving preference to alternatives to imprisonment with respect to Aboriginal persons, considering the negative impacts of imprisonment, Canada has taken regressive legislative measures, through Bill C-10, *the Safe Streets and Communities Act*<sup>xvi</sup>, focusing on a punitive approach to criminal offenders.

This Omnibus Bill combines nine legislative measures into one bill aimed at “getting tough on crime” which include imposing mandatory minimum sentences for criminal offences and limiting the availability of conditional sentence orders. These are imposed without any judicial or prosecutorial discretion.<sup>xvii</sup> International norms require proportional sentencing. It has been noted with concern that special attention must be paid to any system of minimum punishments and obligatory detention due to the likelihood of disproportionately negative impacts on marginalized groups.<sup>xviii</sup>

Numerous legislative amendments are made in relation to young offenders in relation to pre-trial detention, sentencing principles, police record-keeping, application of adult sentences and other measures. In relation to youth, there are some positive measures, such as the prohibition on placing a youth in an adult facility.

The Canadian Bar Association has criticized “bundling several critical and entirely distinct criminal justice initiatives into one omnibus Bill” as “inappropriate, and not in the spirit of Canada’s democratic process.” There is also widespread expert criticism to the legislation based on the determination that it will be costly and will not achieve its stated purpose – to make streets and communities safer – but will actually have a detrimental effect.<sup>xix</sup> In fact, United States studies reveal that where similar approaches have been taken, the results have been costly, ineffective penal systems that have been since cancelled due to these failures. Furthermore, the statistical reality in Canada is that crime has been declining over the past 20 years and between 2009 and 2010, the overall volume of criminal incidents fell by 5 per cent, similar to the relative severity of crimes.<sup>xx</sup>

These measures were introduced without consultation with Indigenous Peoples. However, Indigenous Peoples in Canada will be disproportionately negatively impacted by Bill C-10 given their over-representation in the criminal justice system caused by discrimination and socio-economic marginalization in society.

The Committee on the Elimination of Racial Discrimination (CERD)’s Concluding Observations from its review of Canada’s 17th and 18th Reports in 2007 (UN Doc. No. CERD/C/CAN/CO/18 25 May 2007) commented upon the disproportionately high rate of incarceration of Indigenous peoples compared with the general population. In this regard, the Committee recommended that:



“In the light of its general recommendation no. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party give preference, wherever possible, to alternatives to imprisonment with respect to aboriginal persons, considering the negative impact of separation from their community that imprisonment may entail. Furthermore, the Committee recommends that the State party increase its efforts to address socio-economic marginalization and discriminatory approaches to law enforcement, and consider introducing a specific programme to facilitate reintegration of aboriginal offenders into society.” (para. 19)

Rather than giving preference to alternatives to imprisonment with respect to Aboriginal persons, considering the negative impacts of imprisonment, as recommended by the Committee, Canada has taken regressive legislative measures, through Bill C-10, focusing on a punitive approach to criminal offenders.

In Canada’s report to the Committee, Canada states the following in relation to Aboriginal offenders:

“99. Three Criminal Code provisions directly or indirectly support alternatives to imprisonment for Aboriginal offenders:

- The sentencing principle in subsection 718.2(e) reminds sentencing judges that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” Jurisprudence has resulted in non-carceral or lower carceral sentences for Aboriginal offenders in appropriate cases and has led to the creation of three experimental courts to deal specifically with Aboriginal accused persons.
- Section 742.1 allows sentencing judges to impose conditional sentences where specific criteria are met, whereby convicted offenders serve their sentences in the community rather than in a carceral institution, but subject to stringent conditions. Given that the majority of Aboriginal crimes involve non-violent property offences, resulting in less severe sentences, substantial numbers of Aboriginal offenders have received conditional sentences rather than custodial sentences.
- Subsection 717(1) authorizes “alternative measures” whereby offenders may be diverted from the formal courts system in appropriate cases to be dealt with through rehabilitative programs. The Government of Canada’s Aboriginal Justice Strategy (AJS), delivered in partnership with provincial and territorial governments, as well as Aboriginal communities, seeks to divert Aboriginal offenders, wherever possible, from the mainstream justice system. Operating at the community level, AJS uses traditional dispute resolution methods to address Aboriginal over representation in Canada’s federal institutions and provides opportunities for victims and communities to participate in the sentencing of

offenders, healing circles, mediation, and arbitration mechanisms for civil disputes. Diversion through AJS programs can take place pre- or post-charge or at the time of sentencing. A 2006 recidivism study indicates that offenders who participate in AJS programs are approximately half as likely to re-offend as those offenders who do not participate in these programs.”

The above measures, the *Gladue* provision, conditional sentencing and restorative justice initiatives as an alternative to sentencing, necessarily rely on judicial discretion. These initiatives, among others, will be severely constrained, if not rendered inoperable under Bill C-10. Canada’s decision to enact regressive measures violates its obligations to promote non-discrimination and protect against racial discrimination in accordance with the UN Declaration of the Rights of Indigenous Peoples.

Many reports, such as the Royal Commission on Aboriginal Peoples, the Aboriginal Justice Inquiry of Manitoba, and the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, have called for preventative measures aimed at ameliorating historic, social and economic discrimination leading to Indigenous Peoples’ over-representation in the criminal justice system. Bill C-10 does the opposite and will have a disproportionately negative impact on Aboriginal offenders.

These reports are also supported by CERD General Recommendation XXXI, which states, in part:

“5. States parties should pursue national strategies the objectives of which include the following...

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;

27. Prior to the trial, States parties may, where appropriate, give preference to non-judicial or parajudicial procedures for dealing with the offence, taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples.

36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.<sup>xxi</sup>

In addition, they are supported by the UN Declaration on the Rights of Indigenous Peoples. Article 34 states that

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in

the cases where they exist, juridical systems or customs, in accordance with international human rights.”

Article 2 states that

“Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. ”

In addition, they are supported by the UN Declaration on the Rights of Indigenous Peoples.

*Article 34* states that

“Indigenous Peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights.”

*Article 2* states that

“Indigenous Peoples and individuals are free and equal to all other Peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”

**Recommendation:**

It is recommended that Canada withdraw Bill C-10, *the Safe Streets and Communities Act*. In addition, it is recommended that Canada work with Indigenous Peoples to develop alternatives, including First Nations controlled justice systems and a national strategy to address socio-economic disadvantages, including poverty, high rates of substance and alcohol abuse and inadequate housing. This strategy should be aimed at prevention, education and rehabilitation.

## Endnotes

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- <sup>i</sup> *Canada: Nineteenth and twentieth periodic reports of States parties due in 2009*, International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. CERD/C/CAN/19-20 (8 June 2011), Paras. 125-6.
- <sup>ii</sup> Honourable Jim Prentice, Minister of Indian Affairs and Northern Development. House of Commons Standing Committee on Aboriginal Affairs and Northern Development. Evidence. 22 March 2007.
- <sup>iii</sup> The substance of this case is detailed in a separate submission to CERD by FNCFCS, KAIROS Canadian Ecumenical Justice Initiatives and other organizations.
- <sup>iv</sup> Canada, “Government Response to the Standing Senate Committee on Human Rights Report: ‘Children: The Silenced Citizens Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children’” in Canada, “Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007.” P. 195.
- <sup>v</sup> The Canadian Human Rights Act states, “It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.” CHRA, s. 114.1.
- <sup>vi</sup> An article appearing the *Toronto Star* describes government actions in this way: “...federal officials attended 75 to 100 meetings at which she spoke, then reported back to their bosses. They went on her Facebook page during work hours, then assigned a bureaucrat to sign on as himself after hours to check it again looking for testimony from the tribunal. On at least two occasions, they pulled her Status Indian file and its personal information, including data on her family.” Tim Harper. “Government spies on advocate for native children,” *Toronto Star*, 15 November 2011.
- <sup>vii</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007). Para. 22.
- <sup>viii</sup> UN Commission on Human Rights. *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum: Mission to Canada*, UN Doc. E/CN.4/2005/88/Add.3 (2 December 2004); Paras. 91-3; UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*. UN Doc. CCPR/C/CAN/CO/5. (20 April 2006). Para. 8; UN Commission on Human Rights. *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum: Mission to Canada*, UN Doc. E/CN.4/2005/88/Add.3 (2 December 2004). Para. 16.
- <sup>ix</sup> The federal government has defined its approach as “interest-based” negotiations in which “undefined Aboriginal rights” are exchanged “for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.” Department of Indian Affairs and Northern Development, *Federal Policy for the Settlement of Native Claims*, Ottawa, 1993, p. i.
- <sup>x</sup> *Report of the Auditor General of Canada to the House of Commons*. Chapter 7: Federal Participation in the British Columbia Treaty Process—Indian and Northern Affairs Canada. November 2006. Para. 7.72.
- <sup>xi</sup> *Report of the Auditor General of Canada to the House of Commons*. Chapter 3—Inuvialuit Final Agreement. November 2007. Paras. 3.91, 3.92.
- <sup>xii</sup> Standing Committee on Aboriginal Peoples. *Honouring the Spirit of Modern Treaties: Closing the Loopholes*. Special Study on the implementation of comprehensive land claims agreements in Canada. Interim Report. Senate of Canada. May 2008. Pp. 35-6. [http://publications.gc.ca/collections/collection\\_2011/sen/yc28-0/YC28-0-392-5-eng.pdf](http://publications.gc.ca/collections/collection_2011/sen/yc28-0/YC28-0-392-5-eng.pdf)
- <sup>xiii</sup> Committee on the Elimination of Racial Discrimination, Letter from Chairperson Fatimata-Binta Victoire Dah to H.E. Mr. Marius Grinius, Ambassador, Permanent Mission of Canada to the United Nations at Geneva, Early-Warning Measures and Urgent Procedures (15 August 2008).
- <sup>xiv</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007).
- <sup>xv</sup> UN Commission on Human Rights. *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum:*

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*Mission to Canada*, UN Doc. E/CN.4/2005/88/Add.3 (2 December 2004); UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*. UN Doc. CCPR/C/CAN/CO/5. (20 April 2006); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (22 May 2006); UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the UN Committee on the Elimination of Discrimination Against Women*, CEDAW/C/CAN/CO/7 (7 November 2008); UN Human Rights Council. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: Addendum: Mission to Canada (9 to 22 October 2007)*, A/HRC/10/7/Add.3 (17 February 2009).

<sup>xvi</sup> The long title of this Omnibus Act is An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts.

<sup>xvii</sup> CBA Submission on Bill C-10 at 4.

<sup>xviii</sup> CERD Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (from UN Doc. No. A/60/18, pp. 98-108). At paragraph 35, it states, “35. Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences and to capital punishment in countries which have not abolished it, bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.

<sup>xix</sup> CBA Submission on Bill C-10 at 2.

<sup>xx</sup> The Globe and Mail, “Crime falls to 1973 levels as Tories push for sentencing reform” 21 July 2011; Statistics Canada.

<sup>xxi</sup> CERD Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (from UN Doc. No. A/60/18, pp. 98-108), para’s 5(e), 27 and 36.