NATIVE WOMEN'S ASSOCIATION OF CANADA

L'ASSOCIATION DES FEMMES AUTOCHTONES DU CANADA

SUBMISSION TO THE HUMAN RIGHTS COUNCIL
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1. The Native Women's Association of Canada (NWAC) is a national non-profit Indigenous organization representing the political voice of Indigenous women throughout Canada. It was incorporated in 1974 as a result of the activities of local and regional grassroots Native women's associations over many years. NWAC was formed to promote the wellbeing of Indigenous[1] women within Indigenous and Canadian societies, and we focus our efforts on helping women overcome sex-based discrimination.

2. Today, NWAC engages in national advocacy measures aimed at legislative and policy reforms that promote equality for Indigenous women and girls. Through advocacy, policy, and legislative analysis, NWAC works to preserve Indigenous culture, advance the wellbeing of Indigenous women and girls, as well as their families and communities.

3. This submission to the United Nations Human Rights Council (HRC) reviews the implementation of recommendations made during the last Universal Periodic Review (UPR) while highlighting additional human rights concerns impacting Indigenous women and girls.

4. During the second UPR (2013), Canada accepted several recommendations related to improving the lives of Indigenous Peoples and eradicating systemic racism.[2] Since this review, Canada has undergone a change in federal government which has resulted in the roll-out of a nation-to-nation framework for engaging with Indigenous peoples, and the launch of an Inquiry into Missing and Murdered Indigenous Women and Girls. However, both these changes have brought forward new forms of discrimination requiring urgent attention.

5. Additional issues flagged by the Committee on the Elimination of Racial Discrimination (CERD) during Canada's review in July 2017 include Canada's failures to:
    - Provide reliable, disaggregated statistical data relating to Indigenous peoples;
    - Develop a National Action Plan Against Racism and anti-racism legal framework;
    - Develop and adopt an action plan for implementing UNDRIP;
    - Develop and adopt an action plan for implementing the Truth and Reconciliation Commission's 94 Calls to Action;
    - Respect and affirm Indigenous land rights and Indigenous Peoples' right to free, prior and informed consent on all matters related to the land;
    - Abate the high rates of violence against Indigenous women and girls, and

- The failure of the Inquiry into Missing and Murdered Indigenous Women and Girls to meaningfully and consistently communicate with families and survivors and to report on their progress.[3]

NWAC's Exclusion from Nation-to-Nation Dialogue

6. For over 40 years, NWAC has demonstrated its capacity to be a key player in regional, national, and high-level discussions with the Government of Canada. In 1992, the Federal Court of Appeal found that "NWAC is a *bona fide*, established and recognized national voice of and for Aboriginal women".[4]

7. Prime Minister Justin Trudeau has repeatedly committed to building a renewed nation-to-nation relationship between the Government of Canada and Indigenous peoples, "based on recognition, respect for rights, co-operation, and partnership".[5] However, the Government of Canada has unilaterally decided to exclude NWAC from the nation-to-nation framework, choosing to include only the Assembly of First Nations (AFN), Inuit Tapiriit Kanatami (ITK), and Métis National Council (MNC).

8. This approach fails to recognize or respect that NWAC's constituency–Indigenous women–are rights holders and are is not adequately represented by other National Indigenous Organizations and denies equality to the body which Indigenous women have chosen to represent them on issues that matter most. The Government of Canada must respect that Indigenous women have established the Native Women's Association of Canada as their representative body for national and international issues. Further, Prime Minister Trudeau has committed to the full implementation of UNDRIP, Article 18 of which states that *"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions."* [6] During the second UPR, NWAC recommended the full implementation of UNDRIP.[7]

9. Excluding women from these processes continues to marginalize the perspectives and lives of Indigenous women. In 1996, the Royal Commission on Aboriginal Peoples (RCAP)[8], outlined steps to ending violence against Indigenous women, one of which is to "assure the full and fair representation of women in decision making".[9]

10. In addition to being a flagrant contradiction of the spirit and content of UNDRIP, excluding NWAC from nation-to-nation dialogue also contradicts a number of recommendations accepted by Canada during the second UPR, including:

63. Enhance, through consultation mechanisms, the participation of indigenous peoples in the determination of public policies that affect them (Peru)[10]

65. Continue to strengthen its relationship with indigenous peoples (Gabon)[11]

68. Implement the recommendation of CERD to realise the economic, social and cultural rights of aboriginal people (Turkey)[12]

70. Continue to ensure the human rights of the Aboriginal people, including by realizing their economic, social and cultural rights (Indonesia)[13]

RECOMMENDATION

That the Government of Canada:

11. Include the Native Women's Association of Canada in the nation-to-nation framework.

12. Provide the necessary resources and support for the organization to fully participate in decision making frameworks that affect the lives of Indigenous women and girls.

Gender Discrimination in the *Indian Act*: Bill S-3

13. During the second UPR, Germany recommended that the Government of Canada "abolish all discriminatory implications of the *Indian Act*[14] and grant women and men the same rights with regard to their aboriginal status".[15] Although Canada accepted this recommendation,[16] it has failed to introduce legislation that ends all forms of sex-based discrimination, and other forms of discrimination, embedded in the *Indian Act*.

14. Bill S-3 [*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procurer général)*] was drafted as Phase I of a two-Phase response to the Superior Court of Québec's decision in *Descheneaux v. Canada*.[17] The Decision found that several sections of the *Indian Act* related to status transmission were in violation of Section 15 of the *Canadian Charter of Rights and Freedoms*, which prohibits discrimination on the basis of sex or gender. Although Bill S-3 addresses some sex-based discrimination in the *Indian Act*, more remains.[18]

15. Bill S-3 has been criticized for constituting more of the piecemeal approach to addressing discrimination that the Government of Canada has been engaged in since the inception of the *Indian Act*.[19] However, the Government of Canada has

stated that more wide-reaching amendments (such as a “6(1)(a) all the way” amendment, which would allow women born before 1985 to have full status) would require further consultation with Indigenous communities and further demographic study to determine the full impacts. By refusing to remove all sex-based discrimination in the *Act*, the Government of Canada is effectively condoning this discrimination and continuing to prevent women from accessing essential services.

16. Further to this discrimination, Canada has also put forth a no liability clause in Bill S-3 which states that individuals who experience discrimination as a result of the legislation cannot file for damages with the Crown.[20]

RECOMMENDATIONS

That the Government of Canada:

17. Remove all sex-based discrimination from the *Indian Act* as recommended by the Committee on the Elimination of Discrimination Against Women,[21] the Inter-American Commission on Human Rights,[22] by CERD,[23] and by the Human Rights Council during both previous UPRs.[24]

18. Prioritize fulsome engagement with Indigenous women and communities on all matters related to membership and status in Phase II.

19. Remove the no-liability clause (section 11) from Bill S-3.

Child Welfare & Jordan’s Principle

20. In January 2016, the Canadian Human Rights Tribunal (CHRT) released its decision that "Canada’s flawed and inequitable provision of First Nations child and family services is discriminatory pursuant to the Canadian Human Rights Act on the grounds of race and national ethnic origin".[25] The Tribunal additionally ordered Canada to "cease applying its narrow definition of Jordan's Principle[26] and to take measures to immediately implement the full meaning and scope of Jordan's Principle".[27]

21. Since the release of this decision, the Government of Canada has been issued three non-compliance orders by the CHRT and, as of June 2, 2017, had spent upwards of $700,000 in legal fees fighting the CHRT decision.[28] Despite this, Canada chose on June 23, 2017 to file for a judicial review of the decision[29] rather than to comply with the orders.[30]

22. In August 2017, CERD released its concluding observations[31] on Canada's periodic review, expressing alarm that Canada had ignored the CHRT decisions (as well as a past CERD recommendation[32]) by continuing to underfund child and family services for Indigenous children and communities, and that the Government of Canada had adopted an "overly narrow definition of Jordan's Principle".[33] Specifically, CERD recommended that Canada:

> *a. Fully comply with and implement the January 2016 ruling (2016 CHRT 2) and subsequent non-compliance orders (2016 CHRT 10, 2016 CHRT 16, and 2017 CHRT 14) of the Canadian Human Rights Tribunal, and end the underfunding of First Nations, Inuit and Métis child and family services.*
>
> *b. Ensure that all children, on and off reserve, have access to all services available to other children in Canada, without discrimination.*
>
> *c. Implement the full scope and meaning of Jordan's Principle so that access to these services is never delayed or denied because of disputes between the federal, provincial and territorial governments over their respective responsibilities.*
>
> *d. Address the root causes of displacement such as poverty and poor housing that disproportionately drive children into foster care.[34]*

23. During its last UPR, Canada refused to establish a federal Children's Ombudsman, arguing that the functions of such a position were "already being performed through existing domestic implementation mechanisms".[35] Canada's current refusal to comply with the CHRT ruling also contradicts its acceptance of several recommendations from the same review,[36] including

> *64. Ensure parity of funding and services between Aboriginal and non-Aboriginal communities (United States of America),[37]*
>
> *129.Take steps to ensure that all Canadian children have equal access to government services, such as health, education and welfare, and address the disparities in access to these services for indigenous children in particular, as recommended by the Committee on the CRC (Norway)[38]*

RECOMMENDATION

That the Government of Canada:

24. Withdraw its application for a judicial review of the CHRT decision and take immediate steps to comply with all CHRT rulings affirming the rights of Indigenous children.

Indigenous Women and Solitary Confinement / Segregation[39]

25. During the second UPR, Canada accepted the following recommendation:

> *26. Closely monitor the situation of other disadvantaged groups such as women migrant workers and women prisoners (Turkey)[40]*

26. Although Indigenous women account for less than 5% of the total female population in Canada, they make up over one third (39%) of female admissions to federal custody.[41] Further, they make up 42% of the maximum security women's population in Canada, and 50% of segregation placements.[42] This over-representation exemplifies Canada's racist legacy of colonization, and is rooted in the over-policing of Indigenous communities, the inefficacy of Gladue[43] reports, and systemic racism within the criminal justice system.

27. The destructiveness of the practice of solitary confinement has been well-documented and condemned at the international level.[44] Further, the Government of Canada and its sub-agencies have acknowledged the particular harmfulness of solitary confinement on the psychological wellbeing of women in general and Indigenous women in particular.[45] This can be attributed to their overrepresentation as victims of sexual, physical, emotional, and psychological abuse, as well as the violent legacy of colonialism, including the Indian Residential School System, colonizing child welfare practices, and lack of access to training, education, and employment.[46]

28. For these reasons, Sections 81 and 84 of the Corrections and Conditional Release Act (CCRA) allow Indigenous peoples to serve their sentences in non-institutional Healing Lodges. However, 90% of Indigenous prisoners are prevented from accessing these services due to their security classification.[47] The Office of the Correctional Investigator (OCI) has asserted that Correctional Services Canada's (CSC) policy of only admitting minimum security prisoners to Healing Lodges "was neither Parliament's intent nor CSC's original vision" and "is seen as a way for the Service to minimize risk and exposure".[48]

29. The overrepresentation of Indigenous women in solitary confinement has wide-reaching implications. In addition to the side effects on psychological health,

individuals in solitary confinement tend to be less able to reintegrate after release, are granted few to no opportunities to complete programming while incarcerated, and are less likely to be granted discretionary release.[49] Overall, this creates a culture of recidivism and revictimizes Indigenous women. This is particularly troubling as Indigenous women are disproportionately impacted by patriarchal and colonial legislation such as the *Indian Act*, and as a result are more likely to have to leave their communities, are more impacted by poverty, and are more likely to have to engage in precarious or criminal activities.

RECOMMENDATIONS

That the Government of Canada:

30. Abolish the practice of solitary confinement and segregation for Indigenous women.

31. Revise CSC policies and practices regarding Sections 81 and 84 of the CCRA so that they do not restrict the legislative provisions and fulfill their legislative intent[50] and therefore enable more women to access community-based and culturally appropriate options.

32. Train police officers, judges, and lawyers on the impacts of colonialism and systemic discrimination and how those systems lead to the over-criminalization and incarceration of Indigenous women.[51]

33. Collaborate with Indigenous communities, Elders, National Indigenous Organizations, and social justice/human rights organizations to develop community-based, culturally appropriate programming that is responsive to the needs of Indigenous women.[52]

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[1] In the Canadian context, *Indigenous* refers to the Aboriginal peoples of Canada as defined in Section 35(2) of the Canadian Constitution (First Nations, Inuit, and Métis), as well as non-status First Nations people. First Nations refers to Status and Non-Status Indians as defined in the *Indian Act, 1985* http://laws.justice.gc.ca/eng/acts/I-5/

[2] Canada, "Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review" (2013), UNHRC, 24th Session (A/HRC/24/11/Add. 1), para. 11-14 at p. 3

[3] United Nations Committee on the Elimination of Racial Discrimination, "Concluding observations on the twenty-first to twenty-third periodic reports of Canada (advanced unedited version)" (2017) (CERD/C/CAN/CO/21-23)

[4] *Native Women's Assn. of Canada v Canada (F.C.A.)*, [1992] F.C.J. No. 715 at para. 3.

[5] Office of the Prime Minister, "Statement by the Prime Minister of Canada on meeting with National Aboriginal Organizations" (16 December 2015) online http://pm.gc.ca/

[6] United Nations Declaration on the Rights of Indigenous Peoples, online <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>

[7] NWAC et al, "Joint Submission to the United Nations Human Rights Council in regard to the

Universal Periodic Review Concerning Canada (Second Cycle)“ (October 2012), online at http://lib.ohchr.org/HRBodies/UPR/Documents/Session16/CA/JS6_UPR_CAN_S16_2013_JointSubmission6_E.pdf

[8] The Royal Commission on Aboriginal Peoples (RCAP) was a Canadian Royal Commission established in 1991 to address many issues faced by Aboriginal Peoples. Its final report was released in 1996.

[9] Ibid. “Ending the Cycle of Family Violence”

[10] United Nations Human Rights Council, “Report of the Working Group on the Universal Periodic Review: Canada” (2013) UNHRC 24th Session (A/HRC/24/11), para. 128.63 at pg. 18

[11] Ibid., para. 128.65 at pg. 18

[12] Ibid., para. 128.68 at pg. 18

[13] Ibid., para. 128.70 at pg. 18

[14] The *Indian Act* defines how the Government of Canada interacts with Status Indians, and defines who is eligible to register for Status. Individuals who the Government of Canada deem to be Status Indians have the right to access certain federal programs services that are otherwise inaccessible, including tax exemption, health care benefits, and some education subsidies.

[15] Supra note 9, para. 128.59 at pg. 18

[16] Supra note 2, para. 16 at pg. 3.

[17] Descheneaux v. Canada, 2015 QCCS 3555

[18] This includes issues related to adoption (particularly for same-sex couples), as well as the 1951 cut-off for entitlement to registration.

[19] Passed in 1985, Bill C-31 (An Act to Amend the *Indian Act*) reinstated status to some women who had been lost status to 1985. In doing so, the Government created new “tiers” of status that again disproportionately impact how and when women can transmit status. In 2010, Bill C-3 (Gender Equity in Indian Registration Act) was drafted to remedy this and to comply with the British Columbia Court of Appeal’s 2009 *McIvor* decision. Similar to Bill C-31 in 1985, Bill C-3 created further tiers of status that impact Indigenous women and their descendants.

[20] See Bill S-3 [An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procurer général)], page 9, section 11. Available online at http://www.parl.ca/Content/Bills/421/Government/S-3/S-3_3/S-3_3.PDF

[21] CEDAW, “Report of the inquiry concerning Canada of the CEDAW under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women” (2015) (CEDAW/C/OP.8/CAN/1), para. 219(c) at pg. 58, online at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf

[22] Inter-Am-Ct HR, “Missing and Murdered Indigenous Women in British Columbia, Canada” (2014) (OEA/Ser.L/V/II.Doc.30/14),at paras 68-69, 93, 129, online http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf

[23] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, CERD/C/CAN/19-20, 9 March 2012, at para. 18, online http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf

[24]United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review - Canada* (2009) (A/HRC/11/17); United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review - Canada* (2013) (A/HRC/24/11)

[25] First Nations Caring Society, "Information Sheet - Canadian Human Rights Tribunal Decisions on First Nations Child Welfare and Jordan's Principle" (2016), pg. 2, online at https://fncaringsociety.com/sites/default/files/Info%20sheet%20Oct%2031.pdf

[26] Named in memory of Jordan River Anderson (Norway House Cree Nation), Jordan's Principle is a child-first principle meant to ensure that "First Nations children can access public services on the same terms as other children without experiencing any service denials, delays or disruptions related to their First Nations status." Within this model, the government of first contact pays for the service and resolve any jurisdictional issues related to reimbursement later, ensuring that First Nations children do not suffer or die due to bureaucracy. (See First Nations Caring Society, "Information Sheet - Jordan's Principle: Summary of Orders from the Canadian Human Rights Tribunal" [2017], pg. 1. Online https://fncaringsociety.com/)

[27] Ibid.

[28] Tanya Talaga, “Ottawa spent $707,000 in legal fees fighting decision that protects Indigenous children“ (2 June 2017) *The Toronto Star,* online https://www.thestar.com/news/canada/2017/06/02/ ottawa-spent-707000-in-legal-fees-fighting-a-rights-decision-that-protects-indigenous-children.html
[29] *Caring Society v Canada*, (23 June 2017), Federal, FCTD T-918-17 (notice of application), online: https://fncaringsociety.com/sites/default/files/Notice%20of%20Application%20for%20Judicial%20Review%20-%20June%2023%202017.pdf
[30] For a more detailed overview of Canada’s history of non-compliance with CHRT rulings on this matter, see FAFIA, “Discrimination against Indigenous and Racialized Women in Canada: Report to CERD on the Occasion of the Committee’s twenty-first to twenty-third Periodic Review of Canada” (2017), pp. 3-8, online http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_28045_E.pdf
[31] Supra note 3
[32] CERD/C/CAN/CO/19-20, para. 19
[33] Ibid., para. 27 at pg. 8
[34] Ibid., para. 28 at pg. 8
[35] Supra note 2, para. 24 at pg. 4
[36] Ibid., paras. 64 and 129
[37] Supra note 9, para. 128.64 at pg. 18
[38] Ibid., para 128.129 at pg. 22
[39] NWAC’s full backgrounder on this issue can be accessed online at https://www.nwac.ca/wp-content/uploads/2017/07/NWAC-Indigenous-Women-in-Solitary-Confinement-Aug-22.pdf
[40] Supra note 9, para. 128.26 at pg. 15
[41] Statistics Canada, “Study: Women in Canada: Women in the Criminal Justice System” (Ottawa: Statistics Canada, 2017) at pg. 2. Online at http://www.statcan.gc.ca/daily-quotidien/170606/dq170606a-eng.pdf.
[42] Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: Office of the Correctional Investigator, 2016) at pg. 62
[43] The result of a 1999 Supreme Court Decision, the Gladue principle mandates that sociological and historical factors stemming from colonialism and racism (such as the residential school system, experience with the child welfare or adoption system, lack of education, poverty, and unstable housing) must be considered “whenever the liberty interests of an Aboriginal person are at stake” (Office of the Correctional Investigator, 2016). However, the Office of the Correctional Investigator has also reported that “there remains insufficient and uneven application of Gladue social history considerations in correctional decision-making” and that investigators often find “little explanation of how Gladue factors were actually considered, incorporated or applied to [these] decision”.
[44] See United Nations Human Rights Committee, (10 March 1992) “CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 44th Session of the Human Rights Committee; See Juan Méndez, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General* (United Nations General Assembly, sixty-sixth session, 2011); International Psychological Trauma Symposium (9 December 2007), *The Istanbul statement on the use and effects of solitary confinement;* United Nations, “The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)” (2015); United Nations General Assembly, “United Nations Rules for the Protection of Juveniles Deprived of their Liberty” A/RES/45/113 (1990); United Nations General Assembly, "United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)" A/RES/65/229 (2011)
[45] See Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E); 2015 and 2016 Annual Reports of the Office of the Correctional Investigator; Office of the Prime Minister, “Minister of Justice and Attorney General Mandate Letter” (2015) online at http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter
[46] Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E).
[47] Office of the Correctional Investigator, “Spirit Matters: Aboriginal People and the Corrections and

Conditional Release Act" (Ottawa: Minister of Public Works and Government Services Canada, 2012) (CAT. NO.: PS104-6/2013E-PDF) at pg. 3
[48] Ibid. at pgs. 3 and 4
[49] CSC (2013), iii.
[50] Office of the Correctional Investigator, "Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act" (Ottawa: Minister of Public Works and Government Services Canada, 2012) (CAT. NO.: PS104-6/2013E-PDF) at pg. 3
[51] NWAC, Aboriginal Women and the Legal Justice System in Canada: An Issue Paper. (2007), at pg. 9 Online https://www.nwac.ca/wp-content/uploads/2015/05/2007-NWAC-Aboriginal-Women-and-the- Legal-Justice-System-in-Canada-Issue-Paper.pdf
[52] Ibid.