



NGO Report on Canada's Nineteenth and Twentieth Periodic Report to CERD

Report Submitted by the Indigenous Bar
Association in Canada

January 23, 2012

Prepared by: Brenda L. Gunn, Director, Indigenous Bar Association and Assistant Professor, University of Manitoba Faculty of Law

The author would like to acknowledge Tanya Kappo, JD student at Robson Hall Faculty of Law for her assistance in preparing this report.

I. Introduction

The Indigenous Bar Association submits the following information in response to Canada's nineteenth and twentieth periodic report to CERD for period from June 2005-May 2009.

The Indigenous Bar Association in Canada (IBA) is a non-profit professional organization for Indigenous (Indian, Inuit and Métis persons) trained, in training and employed in the legal field. The membership of the IBA is comprised of lawyers (practicing and non-practicing), judges, law professors, legal consultants and law students.

The IBA plays an active role in promoting the development of Indigenous law and supporting Indigenous legal practitioners. The objectives of the IBA include:

- To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions;
- To promote the advancement of legal and social justice for Indigenous peoples in Canada;
- To promote the reform of policies and laws affecting Indigenous peoples in Canada;
- To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada;
- In pursuance of the foregoing objects, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous law; and to discuss Indigenous legal issues; and

Given our legal expertise and mandate to promote the advancement of legal justice for Indigenous peoples, the IBA's submissions will focus a number of legal issues relevant to eliminating discrimination against Indigenous peoples, especially Canada's obligations in regards to articles 5 and 6, as well as CERD General Recommendation XXIII. Our submissions focus on four main legal issues:

- Murdered and missing Aboriginal girls and women
- The protection of Indigenous peoples' lands, territories and resources
- The duty of consultation and accommodation
- The impact of the criminal justice system on Indigenous peoples, especially over incarceration.

II. Political Background/Context

The Conservative Party of Canada was elected as a minority government in 2006, then re-elected as a minority government in 2008. In 2011, the Conservatives were elected as a majority government.

As one of its first actions, the Conservative government cancelled the commitments in the Kelowna Accord, which was negotiated between Indigenous peoples and the previous Liberal government. The Kelowna Accord would have provided \$5 billion over 10 years to close the gap between Indigenous peoples and the rest of Canada in the areas of education, health, housing and economic development.¹ The Conservative government did not provide any other financial commitment to address social and economic disparities of Indigenous peoples when the Kelowna Accord was terminated.

Rather than the proactive economic and social investment that Kelowna represented, Canada is currently promoting a 'Tough on Crime' approach, which most recently has evolved into *The Safe Streets and Communities Act*.² This omnibus bill reintroduces reforms that were introduced in previous parliamentary sessions but never become law. This legislation sets out new mandatory minimum sentencing for certain offences. With this legislation Canada will invest substantial resources into building more incarceration centers to house the increased number of criminals.³

¹ <http://www.cbc.ca/news/background/aboriginals/undoing-kelowna.html>

² Introduced into the House of Commons on September 20, 2011. The Safe Streets and Communities Act re-introduces the following reforms:

- The Protecting Children from Sexual Predators Act (former Bill C-54), which proposes increased penalties for sexual offences against children, as well as creates two new offences aimed at conduct that could facilitate or enable the commission of a sexual offence against a child;
- The Penalties for Organized Drug Crime Act (former Bill S-10), which would target organized crime by imposing tougher sentences for the production and possession of illicit drugs for the purposes of trafficking;
- Sébastien's Law (Protecting the Public from Violent Young Offenders) (former Bill C-4), which would ensure that violent and repeat young offenders are held accountable for their actions and the protection of society is a paramount consideration in the treatment of young offenders by the justice system;
- The Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act (former Bill C-16), which would eliminate the use of conditional sentences, or house arrest, for serious and violent crimes;
- The Increasing Offender Accountability Act (former Bill C-39), which would enshrine a victim's right to participate in parole hearings and address inmate accountability, responsibility, and management under the Corrections and Conditional Release Act;
- The Eliminating Pardons for Serious Crimes Act (former Bill C-23B), which would extend the ineligibility periods for applications for a record suspension (currently called a "pardon") to five years for summary conviction offences and to ten years for indictable offences;
- The Keeping Canadians Safe (International Transfer of Offenders) Act (former Bill C-5), which would add additional criteria that the Minister of Public Safety could consider when deciding whether or not to allow the transfer of a Canadian offender back to Canada to serve their sentence;
- The Justice for Victims of Terrorism Act and related amendments to the State Immunity Act (former Bill S-7), which would allow victims of terrorism to sue perpetrators and supporters of terrorism, including listed foreign states, for loss or damage that occurred as a result of an act of terrorism committed anywhere in the world; and
- The Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act (former Bill C-56), which would authorize immigration officers to refuse work permits to vulnerable foreign nationals when it is determined that they are at risk of humiliating or degrading treatment, including sexual exploitation or human trafficking.

³ <http://www.thestar.com/opinion/editorialopinion/article/1086785--10-reasons-to-oppose-bill-c-10>

Canada continues to undermine Indigenous peoples' self-government by imposing external reporting measures.⁴ Canada continues to impose external management on First Nation communities, rather than working with Indigenous peoples to resolve financial and social issues.⁵ This approach fosters an adversarial relationship between Indigenous peoples and Canada.

While the Government of Canada has undertaken some initiatives, these actions have not had any concrete beneficial effects in addressing poverty of Indigenous people; advancing Indigenous peoples' land rights; protecting their culture and identity; or decreasing the incidences of violence against Indigenous people. Furthermore, Canada has not properly consulted with Indigenous peoples on these efforts.

While the substance of Canada's periodic report and our response is focused on the 2005-2009 period, up to date information is provided where it is indicative of negative trends perpetuating discrimination against Indigenous peoples in Canada.

III. Questions and Recommendations to Canada

Based on Canada's periodic report, we respectfully request the Committee present the following questions to Canada for further clarification and information:

1. When Canada uses the term "Aboriginal" in its reporting, how does Canada ensure that all three constitutionally recognized Indigenous peoples receive benefit of the programs and measures identified. Can Canada provide disaggregated data on the impacts of measures on Indian (First Nation), Inuit and Métis peoples, including by gender?
2. Has Canada established the National Police Support Centre for Missing Persons linked to National Aboriginal Policing Services? How will this resource be maintained overtime?
3. What steps has Canada taken to implement CERD recommendation that Canada "ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts?"⁶
4. How will the Canada's approach to targeting crime ensure that flexibility still exists to address the over representation of Indigenous peoples in prison and justice system.

The Indigenous Bar Association respectfully submits the following recommendations:

⁴ <http://www.cbc.ca/news/canada/story/2011/11/23/pol-first-nations-salaries-bill.html>

⁵ <http://www.thestar.com/opinion/editorialopinion/article/1108609--after-attawapiskat-what>

⁶ CERD/C/CAN/CO/18 at para 22.

1. Canada provide disaggregated data to indicate how initiatives indicated are targeting and benefitting all Indigenous peoples in Canada, including Indian (First Nation), Inuit, Métis including benefits to both men and women.
2. Canada, in consultation with Indigenous people especially Indigenous women, establish a national inquiry on missing and murdered Aboriginal women and girls. The inquiry should have full powers to subpoena witnesses to testify. The goals of the inquiry should include gaining information necessary to prosecute those responsible for the murdered and missing Aboriginal girls and women and to provide recommendations for a national strategy addressing the social and economic circumstances that contribute to Aboriginal girls' and women's vulnerability.
3. Canada ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.⁷
4. Canada unequivocally recognize Indigenous peoples' right of self-determination and the inherent right of self-government and provide legal protection to this right, including remedies for interferences with this right.
5. Canada, with the full and effective participation of Indigenous peoples, ensure Canadian law on the duty of consultation and accommodation upholds the standard of free, prior and informed consent. Further, that Canada engage in such a process openly and in good faith.
6. Canada reduce the use of incarceration for Indigenous offenders and encourage correctional program service delivery in communities. Canada provide adequate resources for the development and administration of community justice initiatives, in particular programs that are designed by and for Indigenous peoples.
7. Canada, in consultation with Indigenous peoples, create and promote mandatory educational programs for judges, prosecutors and defence lawyers on the relevant *Criminal Code* provisions and *Gladue* to ensure that alternatives to incarceration are considered in all cases involving an Aboriginal offender.

IV. Substantive Issues

A. Murdered and Missing Aboriginal Girls and Women

Canada identifies several initiatives that relate to the issue of murdered and missing Aboriginal girls and women in their periodic report. The majority of the measures indicated by Canada

⁷ *Ibid* at para 22.

attempt to strengthen services for Aboriginal women and to increase cultural sensitivity of law enforcement officers in accordance with CERD's previous recommendations.⁸

The Indigenous Bar Association supports the positions put forth by the Native Women's Association of Canada on this issue in their report. We will also raise a few additional concerns. While the Indigenous Bar Association (IBA) supports preventative initiatives on the issue of murdered and missing Aboriginal girls and women, the IBA has serious concerns about the lack of legal action taken to address the issue.

Over the past decade, the numbers of missing and murdered Aboriginal women continue to increase. Canada does not have a national strategy for investigation into this issue. Rather, resources are only directed toward capacity building for law enforcement agencies to better equip them for future cases. The preventative approach that Canada has taken, completely fails to tangibly address the underlying social and economic root causes that make Aboriginal girls and women the most vulnerable sector of Canadian society.⁹ Furthermore, negative racist stereotypes of Indigenous women permeate Canada,¹⁰ impacting how cases murdered and missing women are handled by the justice system.

One recent manifestation of negative stereotypes against women is the Manitoba Court of Queen's Bench sentence of a man to a two year conditional sentence on a rape charge.¹¹ In this decision, Justice Dewar commented that "sex was in the air" that night, commenting on the complainant's attire and consumption of alcohol. Justice Dewar continued to write that the accused was a "clumsy Don Juan" and that "this is a case of misunderstood signals and inconsiderate behaviour."¹² While no information can be released on the complainant to protect her identity, the incident occurred in Northern Manitoba, where there is a high Indigenous population. These stereotypes will thus have a greater impact on Indigenous women who are acknowledged to experience rates of violence 3.5 times higher than non-Indigenous women. With these attitudes pervading the justice system, it hampers the justice system's (from police through to the judges) response to the issue of murder and missing Aboriginal girls and women.

Canada also fails to recognize that Aboriginal women are the most over represented population within the criminal justice system.¹³ This contributes to the "over policed and under protected" problem that Indigenous women continue to face. Thus, Canada's preventative approach is not sufficient to address the systemic racism within the justice system that inhibits real justice for those women already lost.

⁸ *Ibid* at para 20.

⁹ *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper*, Commissioners A.C. Hamilton and C.M. Sinclair, 1991. [AJI report]

¹⁰ AJI report, *supra* note 9. Dr. Emma Laroque testified that "The portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world... she has no human face, she is lustful, immoral, unfeeling and dirty. Such a grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence". Emma LaRoque, Department of Native Studies, University of Manitoba, in a presentation to the Manitoba Justice Inquiry.

¹¹ *R. v. Rhodes* (February 18, 2011) (Man. Q.B.). The Crown requested 3 years imprisonment. See news article in Annex II.

¹² *Ibid*.

¹³ Annex III, Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services," (2009) 29:3 *Juristat*.

Currently, there is only one inquiry on this issue, which is specific to the province of British Columbia, the “British Columbia Missing Women Commission of Inquiry.” This inquiry has a very limited scope – it is specific to only one known suspect, Robert Pickton and focuses on police failure to act on information provided about the suspect. This inquiry has serious procedural flaws including the lack of funding for the participation of Indigenous peoples, including Indigenous women’s organizations.¹⁴

Recommendation:

Canada, in consultation with Indigenous people especially Indigenous women, establish a national inquiry on missing and murdered Aboriginal women and girls. The inquiry should have full powers to subpoena witnesses to testify. The goals of the inquiry should include gaining information necessary to prosecute those responsible for the murdered and missing Aboriginal girls and women and to provide recommendations for a national strategy addressing the social and economic circumstances that contribute to Aboriginal girls’ and women’s vulnerability.

B. Protection of Indigenous Peoples’ Lands, Territories and Resources

Aboriginal and treaty rights, which includes Aboriginal title, were constitutionally entrenched in section 35(1) when Canada patriated the Constitution in 1982. However, this protection is weak in part because of the interpretation given by Canadian courts and by Canada’s approach to resolving these claims.

CERD General Recommendation XXIII encourages States to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”¹⁵

Canadian courts have narrowly defined Indigenous peoples’ rights to use their lands (the inherent limit¹⁶), which is justified by deeming Aboriginal title a lesser form of land holding. This definition of Aboriginal title is racially discriminatory because it provides lesser legal protection to Indigenous peoples’ land rights.

In its periodic report, Canada sets out the test the Supreme Court of Canada created for the legal recognition of Aboriginal title in Canada.¹⁷ The burden of proof has made Aboriginal title all

¹⁴ See Annex IV. The Committee on the Elimination of Discrimination Against Women has initiated an inquiry procedure under article 8 of the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁵ CERD General Recommendation XXIII at para 5.

¹⁶ Canada’s report explains “the protected uses must not be irreconcilable with the nature of the Aboriginal group’s attachment to the land, which forms the basis of the group’s Aboriginal title” at para 110.

¹⁷ Canada’s report at paras 110-111.

but impossible for most Indigenous groups to reach.¹⁸ Most recently, the Supreme Court of Canada held that in order to prove Aboriginal title, the claimants must prove exclusive pre-sovereignty occupation; exclusive possession means an intention and capacity to retain exclusive control of the land.¹⁹ This test makes it extremely difficult for any Indigenous group whose use of the land was seasonal, was nomadic in their occupation, or where multiple groups used a particular area.

In its periodic report, Canada fails to state that there has not been any decision where an Indigenous group has received a declaration of Aboriginal title.²⁰ There is gross disparity between the law and the actual protection of Indigenous peoples' land rights. Thus, the inclusion of Aboriginal title within section 35(1) of the Constitution has not led to the effective protection of Indigenous peoples' land rights. In fact, the Inter-American Commission of Human Rights has found that there is no effective legal remedy in Canada to obtain a declaration and protection of aboriginal title in Canada.²¹

Finally, Indigenous peoples with statutory land rights or "reserve lands" under the *Indian Act* are also subject to weak legal protection. As Canada stated, the protection is a matter of policy; there is no legal protection preventing Canada from expropriating reserve lands.²² The minimal protection that is available to reserve lands may be subject to even greater threat with the privatization approach the current government has been exploring.²³

On matters of self-government, Canada reports that "the Government of Canada views negotiation as the best means for engaging Aboriginal groups, and provincial and territorial governments in considering pragmatic, practical options that respond to different needs across the country. Canada continues to negotiate self-government agreements with Aboriginal communities, which leads to the enhanced enjoyment of economic, social and cultural rights."²⁴ However, these processes are slow and costly.²⁵ Furthermore, Canada has no binding law that mandates Canada to engage in fair negotiations that recognize Indigenous peoples' inherent right

¹⁸ See for example, *Manitoba Métis Federation*, currently on appeal to the Supreme Court of Canada. The lower courts have held that the Métis people, a constitutionally recognized Indigenous people in Canada cannot meet the Aboriginal title test because their traditional form of land holding was not communal.

¹⁹ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para 70. The Court held that the Mi'kmaq did not prove exclusive occupancy because their nomadic use of the land did not demonstrate sufficient control over the lands.

²⁰ For example, *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, where the British Columbia Supreme Court declined to make a declaration of Tsilhqot'in Aboriginal Title, but was of the opinion that Tsilhqot'in Aboriginal Title does exist inside and outside the Claim Area.

²¹ *Hul'qumi'num Treaty Group v. Canada*, Organization of American States (OAS), Inter-American Commission on Human Rights, Report No 105/09 (2009), Case No. 12.374 at para 42.

²² CERD/C/CAN/19-20 at para 109.

²³ A Special Project on Reserve Land and First Nations Development is being conducted by Paul Fauteux: <http://www.winnipegfreepress.com/canada/top-first-nations-success-to-be-studied-102047333.html>. Some concerns have been raised that the project is designed to further the proposals of Manny Jules and Tom Flanagan that privatization of reserve lands would solve First Nation's economic issues.

²⁴ *Supra* note 22 at para 101.

²⁵ Senate Committee on Aboriginal Peoples, *Negotiation or Confrontation: It's Canada's Choice*, 2006, warned that First Nations frustration with the grindingly slow and costly specific claims process was reaching the boiling point.

to self-government.²⁶ Currently, the Supreme Court of Canada has greatly limited self-government by requiring Indigenous peoples prove self-government through the same judicial tests as any other right under s. 35(1).²⁷ This decision has resulted in no judicial or legal protection to Indigenous peoples' right to self-government.

While there have been several attempts to legislate for the recognition of the right to self-government, these attempts have failed. In 2007, *An Act for the Recognition of Self-Governing First Nations* (Bill S-216), which would have promoted the recognition and implementation of First Nations' right to self-government, died on the Order Paper. This Act set out a framework for recognizing and implementing the rights and powers of First Nation governments and institutions through optional, enabling legislation. Under the Bill, First Nations wishing to be recognized had to develop a proposal, including a constitution, which was to be provided in draft form to the Office of the Auditor General (OAG). The OAG would make non-binding recommendations for changes based on an assessment of whether the constitution provided for good governance and complied with the legislative requirements in the Bill. Following successful ratification by the First Nation, there would be recognition of a First Nation as self-governing and they would have access to a long list of law-making powers. This Act would have greatly sped the process and cost for self-government negotiations.

While Canada claims to promote negotiation to resolve self-government claims, Canada continues to undermine First Nations governance by exerting additional federal oversight over First Nations, including introducing requirements for chiefs and counillors to publish their salaries and expenses²⁸ and the imposition of third party management.²⁹

Recommendations:

Ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.³⁰

²⁶ Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, 1990.

²⁷ *R. v. Pamajewon*, [1996] 2 SCR 821 at para 25-27. The Court held "the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) "a defining feature of the culture in question" prior to contact with Europeans." Then went on to decide that "Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."

²⁸ See Annex VI: UN Special Rapporteur on the Rights of Indigenous Peoples' expresses concern about Attawapiskat First Nation. See also *First Nations Financial Transparency Act*, originally introduced in October 2011 and then reintroduced November 23, 2011, which will create additional reporting burdens for First Nations, but does nothing to address chronic underfunding of First Nations.

²⁹ *Ibid.*

³⁰ *Supra* note 6 at para 22.

The federal government unequivocally recognize the right of self-determination and the inherent right of self-government of Indigenous peoples and provide legal protection to this right, including remedies for interferences with this right.

C. Duty To Consult

In CERD General Recommendation XXIII, States are called upon to ensure that Indigenous peoples' informed consent is attained before making decisions that directly affect Indigenous peoples' rights and interests. Canada submits that "many First Nations have successfully challenged governmental decisions in Canadian courts on the basis of asserted but unproven Aboriginal rights and successfully enjoined developmental activity until proper consultation and, where required, reasonable accommodation of asserted Aboriginal rights occurs."³¹ While the Government's duty of consultation and accommodation prior to a proven right was upheld in *Haida Nation*, Canada takes a very restrictive approach as to when consultation is required and what is required to fulfill Canada's obligation to consult with Indigenous peoples.

In many circumstances, Indigenous peoples are forced to take expensive litigation to assert these rights.³² Most often, Canada adamantly denies that consultation is required when these claims are brought to the courts.³³ Most recently, Canada's position was that the common law duty of consultation does not apply to modern treaty agreements.³⁴ The Supreme Court of Canada disagreed and concluded Canada cannot contract out of its obligations to consult with Aboriginal peoples.³⁵ Further, Canada continues to appeal decisions when lower courts find that Canada owes a duty of consultation.³⁶

³¹ Supra note 22 at para 115.

³² See Annex V. The chart indicates the number of cases of consultation heard before the Canadian courts during the time period from Canada's periodic report. For example, *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 (ON SC) where the community was forced to seek an interlocutory injunction to prevent mining exploration on their traditional territory until full and proper consultations could occur.

³³ The federal minister denied a duty of consultation in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, see paras 36 and 37 where the Court rejected the government's position.

³⁴ Appellant's factum submitted to Supreme Court of Canada on May 25, 2009.

³⁵ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.

³⁶ For example, see *Canada v. Brokenhead First Nation*, 2011 FCA 148 where Canada appealed the 2009 Federal Court decision requiring Canada to consult local Indigenous peoples before transferring lands surplus federal lands (the Kapyong Barricks). In this situation, several Indigenous peoples had never received the full amount of land they were entitled under a historic treaty signed in 1871. When federal lands became available in an urban area, Canada transferred the lands without considering whether the lands would be appropriate to fulfill outstanding treaty obligations. The Federal Court was highly critical of Canada's position that no duty of consultation was required or alternatively, that if consultation was required, it had been fulfilled. Justice Campbell held:

Canada has vigorously defended its position that, based on the extinguishment and release arguments, no duty to consult existed when it conducted its decision-making with respect to the Kapyong Barracks. However, Canada also makes an alternative argument which I cannot take seriously. Canada argues that, if a duty to consult did exist, it did consult. It is not credible to take the position in law that a very serious action is not required and to conduct yourself accordingly, and then argue that, if it is required, it was accomplished.

Brokenhead First Nations v. Canada, 2009 FC 982 at para 27.

The minimal protection provided under the Canadian jurisprudence on the duty of consultation does not conform to the international standard of free, prior, and informed consent. Canada continues to assert that free, prior, informed consent cannot be used as a veto.³⁷ Canada fails to fully appreciate that the free, prior and informed consent standard requires a process of open dialogue to reach a mutually agreeable resolution. Consultation and accommodation requires Canada to enter into a discussion with the affected Indigenous peoples with the intention of seriously addressing Indigenous peoples concerns. The imposition of timelines hampers the ability to have full and free dialogue.

The Supreme Court of Canada jurisprudence holds that Canada's obligations to fulfill the duty will vary with the circumstances. In circumstances where the asserted claim is weak or there is a limited impact, consultation may only require Canada to "give notice, disclose information, and discuss any issues raised in response to the notice,"³⁸ which falls short of the international standard of free, prior and informed consent. Additionally, even when Canada agrees to consult Indigenous peoples, there is a lack of funding available for Indigenous peoples to gain the necessary technical information to fully participate and be informed as to the impacts on their rights.³⁹

One of the biggest challenges Indigenous peoples face is the disjunction in the evaluation of the degree of that the government's action interfere with the Indigenous peoples' rights as well as the severity of the impact on their rights. Recent court decisions indicate a trend away from accepting Indigenous peoples' position on impact on their rights and accepting the government's position on degree of impact. In Canada, there is no safe guard available to ensure that Indigenous peoples' perspective is properly considered by the Court.⁴⁰

Recommendation:

Canada, with the full and effective participation of Indigenous peoples, work to ensure Canadian law on the duty of consultation and accommodation upholds the standard of free, prior and informed consent. Further, that Canada engage in such a process openly and in good faith.

D. Increased Incarceration Rates of Aboriginal people

It has long been recognized that the over representation of Indigenous peoples within the Canadian criminal justice system is due to systemic racial discrimination.⁴¹ The Criminal Code

³⁷ See for example Canada's endorsement of the UN *Declaration on the Rights of Indigenous Peoples* and also Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011, 10.

³⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para 43.

³⁹ Canada's consultation guidelines (both interim and final) do not require financial assistance to be provided to ensure Indigenous peoples' full participation in consultation processes.

⁴⁰ See for example, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 and *Little Salmon/Carmacks*, supra note 35 where the court in both cases dismissed the Indigenous peoples' articulation of the degree of infringement.

⁴¹ In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada held "the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the

of Canada was amended in 1996 to provide that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of aboriginal offenders.⁴² However, these changes in Canada law have not resulted in a decrease in the overrepresentation of Indigenous peoples within the criminal justice system.

After Canada's last periodic review, CERD recommended that Canada "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."⁴³ However, Canada has failed take meaningful action to address these recommendations.

In its present periodic report, Canada submits that there are provisions that there are three Criminal Code provisions directly or indirectly support alternatives to imprisonment for Aboriginal offenders.⁴⁴ While we acknowledge that these laws exist, these provisions have not been effectively implemented. Over incarceration of Indigenous peoples continues at disproportionately high rates considering Indigenous peoples only comprise 3.8% of the Canadian population.⁴⁵ Within the federal penitentiary system, Indigenous peoples represent 17 to 19% of all adult admissions over the past decade.⁴⁶ The over incarceration rate is even more acute within provincial prisons across Canada. In 2007/2008, Indigenous persons comprised 21% of all admissions to provincial jail in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories.⁴⁷ These variances of incarceration rates also indicate that s. 718.2(e) of the Criminal Code and *Gladue* have different meanings in different provinces.⁴⁸

While s. 718.2(e) is still good law in Canada and has the potential to effectively reduce the discrimination Indigenous peoples face within the justice system, there have not been the procedural changes necessary to present the information necessary to the Courts to encourages

Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system" at para 61. See also Alvin Hamilton & Murray Sinclair, Commissioners, Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Aboriginal Justice Inquiry, 1991), and Paul Chartrand & Wendy Whitecloud, Commissioners, Final Report of the Aboriginal Justice Implementation Commission (Winnipeg: Government of Manitoba, 2001).

⁴² *Criminal Code*, R.S.C., 1985, c. C-46, Part XXIII, section 718.2(e).

⁴³ *Supra* note 6 at para 19.

⁴⁴ *Supra* note 22 at para 99.

⁴⁵ *Ibid* at para 30.

⁴⁶ *Supra* note 13 at 20.

⁴⁷ *Ibid*.

⁴⁸ Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 *Crim LQ* 470 at 472.

judges to consider alternatives to sentencing.⁴⁹ In particular, there is no mandatory training for judges, Crown prosecutors or defense counsel to ensure that all participants fully understand the obligations to consider non-incarceration options. Further, there is not sufficient financial supports to ensure appropriate information can be gathered and submitted to courts on the offenders background circumstances which lend support to non-custody options.⁵⁰

Additionally, each provincial Crown prosecutors office has discretion on how to implement federal criminal law, including discretion on what offences will be diverted, according to s. 717(1). This has resulted in numerous situations where Crown prosecutors use their residual discretion to send a matter to diversion in situations where charges would normally be dropped. A related concern is that there is a serious lack of funding available to community justice programs to ensure non-custodial options are available for Aboriginal offenders.

Canada's proposed legislation which will set out mandatory minimum sentences is indicative that the trend of over representation of Indigenous peoples in the justice system is likely to worsen and not improve. Canada has not taken a proactive approach as recommended by CERD in its previous response to Canada's periodic report.

Recommendation:

Canada reduce the use of incarceration and encourage correctional program service delivery in communities. Canada provide adequate resources for the development and administration of community justice initiatives.

In consultation with Indigenous peoples, create and promote mandatory educational programs for judges, prosecutors and defence lawyers on the relevant criminal code provisions and *Gladue* to ensure alternatives to incarceration are considered in cases involving an Indigenous offender.

V. Conclusion

In response to Canada's periodic report to CERD, the Indigenous Bar Association submits that Canada has failed to uphold its obligations under article 5 to ensure equality before the law, in particular the ongoing discrimination against Indigenous women, the limited definition of Aboriginal title under Canadian law, and the over incarceration of Indigenous peoples.

In relation to article 6, provision of effective protection and remedies, the Indigenous Bar Association submits that Canada has failed to uphold its obligations through its failure to investigate and prosecute murdered and missing Aboriginal girls and women, the unavailability of effective measures to protect Indigenous peoples' land rights, the failure to ensure Indigenous peoples' perspectives are used when determining consultation requirements and the failure to implement laws meant to reduce the over incarceration of Indigenous peoples.

⁴⁹ *Ibid*, citing Judge Mary Ellen Turpel-Lafond, "Sentencing with a Restorative Paradigm: Procedural Implications of R. v. Gladue" (2000), 43 C.L.Q. 34.

⁵⁰ These have often been described as "Gladue Reports". For a discussion on the difference between Gladue Reports and Pre-Sentence reports see Kelly Hannah-Moffat and Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race," (2010) 12 *Punishment and Society* 262.

Annex I: Excerpts from Manitoba Justice Inquiry: Aboriginal Women (1990)

Introduction

Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society. They are the victims of racism, of sexism and of unconscionable levels of domestic violence. The justice system has done little to protect them from any of these assaults. At the same time, Aboriginal women have an even higher rate of over-representation in the prison system than Aboriginal men. In community after community, Aboriginal women brought these disturbing facts to our attention. We believe the plight of Aboriginal women and their children must be a priority for any changes in the justice system. In addition, we believe that changes must be based on the proposals that Aboriginal women presented to us throughout our Inquiry. ...

Cultural Changes—The Impact upon Aboriginal Women

For Aboriginal women, European economic and cultural expansion was especially destructive. Their value as equal partners in tribal society was undermined completely. The Aboriginal inmates in Kingston Prison for Women described the result this way: “The critical difference is racism. We are born to it and spend our lives facing it. Racism lies at the root of our life experiences. The effect is violence, violence against us, and in turn our own violence.”⁵ ...

The Changing Image of Aboriginal Women

The demeaning image of Aboriginal women is rampant in North American culture. School textbooks have portrayed Aboriginal woman as ill-treated at the hands of Aboriginal men, almost a "beast of burden." These images are more than symbolic—they have helped to facilitate the physical and sexual abuse of Aboriginal women in contemporary society. Emma LaRocque, a Metis woman and professor of Native Studies at the University of Manitoba, wrote to the Inquiry about such demeaning images.

The portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The ‘squaw’ is the female counterpart to the Indian male ‘savage’ and as such she has no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence.... I believe that there is a direct relationship between these horrible racist/sexist stereotypes and violence against Native women and girls. I believe, for example, that Helen Betty Osborne was murdered in 1972 by four young men from The Pas because these youths grew up with twisted notions of “Indian girls” as “squaws” ... Osborne’s attempts to fight off these men’s sexual advances challenged their racist expectations that an “Indian squaw” should show subservience ... [causing] the whites ... to go into a rage and proceed to brutalize the victim.⁷

Racist and sexist stereotypes not only hurt Aboriginal women and their sense of self-esteem, but actually encourage abuse—both by Aboriginal men and by others. The Ma Mawi Chi Itata Centre’s Family Violence Program attempts to help both victims and offenders to see beyond the stereotypes. In a book used by the program, Paula Gunn Allen explains about "recovering the feminine in American Indian traditions":

For the past 40 or 50 years, American popular media have depicted American Indian men as bloodthirsty savages devoted to treating women cruelly. While traditional Indian men seldom did any such thing—and in fact among most tribes abuse of women was simply unthinkable, as was abuse of children or the aged—the lie about “usual” male Indian behaviour seems to have taken root and now bears its brutal and bitter fruit.

The colonizers’ revisions of our lives, values, and histories have devastated us at the most critical level of all—that of our own minds, our own sense of who we are. ...

Our Inquiry was told by the Canadian Coalition for Equality and by the Manitoba Women’s Directorate that the media today continue to employ stereotypical images of women. Both presentations compared lurid newspaper coverage of the Helen Betty Osborne murder in The Pas to the more straightforward and sympathetic coverage of the killing of a young non-Aboriginal woman in Winnipeg. ...

In order to address the underlying problems that give rise to this perception, the public generally, and those within the justice system specifically, need to be educated about those issues by Aboriginal women. Elsewhere in this report we have recommended that cross-cultural training be provided to a variety of individuals involved in the justice system. We would like to make it clear that Aboriginal women must play a central role in the development and delivery of those programs. ...

According to the Manitoba Women's Directorate, the average annual income for Manitoba's Aboriginal women is less than 75% of that for other women. The labour force participation rate for Aboriginal women is 40%, while 72% of Aboriginal women do not have a high school diploma.

The status of Aboriginal women in the city of Winnipeg is particularly disturbing. Forty-three per cent of Aboriginal families are headed by single women, compared to 10% of non-Aboriginal families. In her presentation on behalf of the Women's Directorate, Janet Fontaine said:

Poverty is an unmistakable factor in the lives of Manitoba Native women and children. Poverty has been shown to be positively correlated with conflict with the law, low levels of education, decreased opportunity for employment, and a low level of health.

While the "official" unemployment rate has been estimated at 16.5% for Aboriginal women, official statistics typically do not count those who are not actively looking for work.⁹ Many Aboriginal women do not actively seek work because there is no employment available to them, or because it is impossible for them to work, due to their family circumstances or for other reasons. The actual employment rate for female status Indians age 15 or more has been estimated as low as 24%.¹⁰ These numbers appear to be due, in part, to an absence of educational and employment opportunities for Aboriginal women.

This history of social, economic and cultural oppression should be seen as the backdrop for our discussion of Aboriginal women as both victims and offenders in the Manitoba justice system.

The Abuse of Women and Children

The presentations of Aboriginal women were blunt and direct. Violence and abuse in Aboriginal communities has reached epidemic proportions. This violence takes a number of forms. Sometimes it involves physical assaults between adult males. More often—and more disturbingly—it involves the victimization of the least powerful members of the community: women and children.

The Manitoba Women's Directorate submitted to our Inquiry a document entitled "Native Perspective on Rape." According to one of the women interviewed for the study:

- Rape is a common and widespread experience.
- Rape extends back many generations.
- People treat rape as a personal, private pain and do not talk about it unless there is an unavoidable crisis.
- The individual who is raped comes to view violence as the norm.¹¹ ...

Professor LaRocque wrote: "People violate persons and laws, not because of "cultural differences" but because of the human potential for evil which is perhaps influenced by socio-economic conditions. I believe sexual violence is best explained by sexism and misogyny which is nurtured and inherent in patriarchy. Rape in any culture and by any standards is warfare against women."¹²

The victimization of Aboriginal women has not only been manifested in their abuse, but also in the manner in which Aboriginal female victims are treated. Women victims often suffer unsympathetic treatment from those who should be there to help them. We heard one example of such treatment from the Aboriginal mother of a 16-year-old rape victim. She told of how the police came to her home after her daughter had reported being raped and had undergone hospital examination and police questioning. The police told the mother that her daughter was lying and should be charged with public mischief. According to the mother, the officer added, "Didn't you want it when you were 16?" ...

Annex II: “Sexual assault anomaly” By: Editorial Winnipeg Free Press, November 3, 2011, A10

Attitudes toward sexual assault and rape have come a long way in Canada, where, until 1983, raping a spouse was not a criminal offence. Within a decade, courts had ruled that guilt or innocence to an accusation of sexual assault turned on the element of consent to sex, and it was the accused's responsibility to establish consent was given.

The remarks a Manitoba judge expressed in convicting a Thompson man -- the "clumsy Don Juan" -- of sexually assaulting a young woman indicate that not only is there far to go yet, but the law on consent is not clearly understood even within the courts. Both the Crown and the defence are appealing the case. Both believe the judge made serious errors; the former is seeking a new trial and the latter, insisting Kenneth Rhodes reasonably believed consent was given, wants an acquittal.

The Women's Legal Education and Action Fund is arguing the conviction should be upheld and that the court must recognize there are systemic discriminatory issues and attitudes still at play in sexual assault cases that lead jurists to blame victims. It is well-recognized that women and girls are fearful of reporting sexual assault because of the stigmatization, generally, and because they fear not being believed and being blamed, fears that often are justified. The advice by a Toronto officer recently that one way female students could avoid being attacked was to not dress like a slut reinforces victims' fears.

The Appeal Court's review of Justice Robert Dewar's remarks and decision, both in convicting and sentencing Rhodes, is critical to the law, the public's understanding of the issue of consent and the treatment of sexual assault in Manitoba.

LEAF noted Statistics Canada's compilation of crime data shows that Manitoba has Canada's lowest conviction rate in sexual assaults, tied with Nova Scotia at 31 per cent in 2010. Alberta sits at 32 per cent, but all other provinces have discernibly higher rates, including Saskatchewan, at 48 per cent. No province comes close to Manitoba's rate of sexual assault charges being stayed.

There is no good analysis of why Manitoba sticks out like a sore thumb on this measurement. LEAF believes the old attitudes toward rape and sexual assault and the role of the victim, particularly with aboriginal women, are alive and well in this province. Judge Dewar's comments feed that fire.

Equally troubling is the fact Winnipeg Police Service statistics show while more victims are reporting to police, fewer and fewer sexual assault complaints are being "cleared," either resulting in charges or otherwise being resolved. In the late 1990s, 60 per cent of complaints were resolved. The rate has fallen fairly steadily. In 2008-09, it stood at 30 per cent.

Society slowly is accepting that no means no and that consent is required. Why it is that in Manitoba it is much less likely for a sexual assault charge to end in conviction? That fact encourages people to draw conclusions, many that will be unfair to all involved. Much work has been done to support victims, but there remains huge reluctance to report rape and the best efforts of prosecutors are thwarted if a complainant does not testify. Manitoba's low conviction rate sticks out like a red flag. It deserves the attention not just of Appeal Court judges but of police, prosecutors and the justice department's analysts.

Judge's sex assault comments wrong: professor: No jail for 'clumsy Don Juan' The Canadian Press, Feb 24, 2011

A University of Manitoba law professor has concerns about a judge's comments at a sexual assault sentencing.

Karen Busby said the remarks by Justice Robert Dewar are a legal throwback to the time when how a woman dressed or acted could be treated as implied consent to sex.

Dewar said "sex was in the air" when he spared a man jail time by handing him a two-year conditional sentence instead and allowing him to remain free in the community.

'There are lots of women who will dress to go out and to party and they're going to have alcohol, but when they do that they're not saying, 'oh, and please rape me.'—*Karen Busby, University of Manitoba law professor*

The Crown had sought a prison sentence of at least three years.

The sentence was delivered last week in Thompson, Man.

The comment was inappropriate, even if Dewar did convict the man of sexual assault, said Busby.

During the sentencing, Dewar also commented on the way the woman was dressed and her actions the night she was forced to have sex in the woods along a dark highway outside Thompson in 2006.

The man and a friend met the 26-year-old woman and her girlfriend earlier that night outside a bar under what the judge called "inviting circumstances."

He pointed out the victim and her friend were dressed in tube tops, no bras, and high heels and noted they were wearing plenty of makeup.

Dewar called the man a "clumsy Don Juan" who may have misunderstood what the victim wanted.

'This is a case of misunderstood signals and inconsiderate behaviour.'—*Justice Robert Dewar*

"This is a case of misunderstood signals and inconsiderate behaviour," he said.

Busby said laws regarding consent may have changed but some attitudes have not.

"That [decision] goes back to suggesting that women are in a state of constant sexual readiness and that sexually active women will consent to sex with all comers," she said.

"It should have changed 20 years ago. It should have changed 40 years ago. But we can see that it hasn't changed for some," she added, saying the decision makes her sick to her stomach.

"Every Friday and Saturday nights, there are lots of women who will dress to go out and to party and they're going to have alcohol, but when they do that they're not saying, 'Oh, and please rape me.'"

Busby also noted an incident just last week in Toronto where a police officer had to apologize after he suggested women could be inviting sexual assault by the way they dressed.

"We had a police officer last week in Toronto saying to a group of university students that if a woman dresses like a slut she should expect to be raped," she said.

Annex III: Samuel Perreault, “The incarceration of Aboriginal people in adult correctional services” (2009) 29:3 Juristat

The over representation of Aboriginal people in correctional services is an issue that has been known for many years. In 1989, the issue of over representation of Aboriginal people in the criminal justice system was raised by the *Royal Commission into the Donald Marshall, Jr. Prosecution*. In 2002, the Auditor General of Canada identified a lack of information on this issue ([Auditor General of Canada, 2002](#)).

Aboriginal peoples occupy a distinct social, cultural and political status within Canada as bearers of constitutionally protected Aboriginal and Treaty rights. As such, governments need reliable data to ensure an equitable justice system and to put in place effective policies to address the representation of Aboriginal people in the criminal justice system ([Kong and Beattie, 2005](#)).

To date, statistical information on the factors contributing to the representation of Aboriginal adults in custody has been limited. Since 1978, the Canadian Centre for Justice Statistics (CCJS), through the [Adult Correctional Services Survey \(ACS\)](#), has collected data on the number of adults admitted to and released from correctional services in Canada. This survey permits analysis of trends in admissions and releases, including the number of Aboriginal adults admitted to custody each year, but allows little analysis on the factors contributing to incarceration.

A detailed micro data survey was developed by the CCJS and its partners in correctional services in order to have richer data to better respond to policy issues affecting correctional services. The [Integrated Correctional Service Survey \(ICSS\)](#) collects detailed information on the characteristics of each adult entering correctional services, including age, their highest level of education attained, their employment status prior to entering correctional services and their rehabilitation needs. For the reporting year 2007/2008, the following jurisdictions were reporting to the ICSS: Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, and the Correctional Service of Canada (which is responsible for offenders sentenced to prison for two years or more).

With the ICSS data, it is therefore possible to conduct certain analysis to better understand the factors that may influence incarceration.

This *Juristat* article first presents a brief overview of all admissions to correctional services in Canada in 2007/2008. Next, data introducing the representation of Aboriginal people in adult correctional services over time and across jurisdictions is provided. Finally, using data from the ICSS and the 2006 Census, an analysis of certain factors that could be contributing to this representation of Aboriginal adults in custody is presented. The factors examined include age, level of education attained, employment status, and the rehabilitation needs of people admitted to custody as assessed by correctional services staff.

Text Box 1: Aboriginal identity

The definition of Aboriginal Identity used in the Integrated Correctional Services Survey (ICSS) was modeled after the definition within the Census.

The concept of Aboriginal Identity within the Census refers to those persons who reported identifying with at least one Aboriginal group (i.e., North American Indian, Métis, or Inuit). Also included are individuals who did not report an Aboriginal identity, but did report themselves as a Registered or Treaty Indian, and/or Band or First Nation membership.

The ICSS collects Aboriginal identity information at admission to correctional services through self identification. At admission, each person is asked to self-identify with at least one Aboriginal classification

(including, Non-Aboriginal, Non-Status Indian, North American Indian, Aboriginal—Status unknown, Métis, or Inuit). The data are then reported to the Canadian Centre for Justice Statistics.

Overall, the percentage of unknown admissions to provincial or territorial custody ([remand](#), other [temporary detention](#), or [sentenced custody](#)) in 2007/2008 by Aboriginal Identity is low at 1.4%, with Newfoundland and Labrador reporting the highest percentage of unknowns at 6.3%.

Also, it is worth noting that Aboriginal groups are not equally distributed among the provinces and territories. Ontario and the western provinces combined accounted for an estimated 577,300 First Nations people, or four-fifths (83%) of this group's total population. About 158,395 First Nations people (23%) lived in Ontario; 129,580 (19%) lived in British Columbia; 100,645 (14%), in Manitoba; 97,275 (14%), in Alberta; and 91,400 (13%), in Saskatchewan.

In 2006, 87% of all Métis lived in the West and in Ontario. An estimated 7% of the Métis lived in Quebec, 5% in Atlantic Canada and the remainder lived in one of the three Territories. As for Inuit population, 49% of the lived in Nunavut, 19% in Nunavik in northern Quebec, 6% in the Inuvialuit region of the Northwest Territories, and 4% in Nunatsiavut in northern Labrador.

Although some differences may exist among the different Aboriginal groups, Aboriginal peoples will be analysed as a whole for the purpose of this *Juristat* article.

Adult correctional services in Canada

Federal, provincial and territorial governments share the responsibility of the administration of correctional services in Canada. These services include custody as well as community services. Which adult offenders are placed in the federal system and which are placed in the provincial and territorial system depends on decisions taken by the judiciary.

Adult offenders sentenced to custody terms of two years or more fall under the federal penitentiary system. Federal correctional services are provided by the Correctional Service of Canada (CSC), an agency of Public Safety Canada. The CSC is responsible for the administration of sentences and the supervision of offenders. Decisions to grant, deny, cancel, terminate or revoke [parole](#), however, are made by the National Parole Board (NPB), which is also an agency of Public Safety Canada. The NPB is responsible for offenders serving a federal custodial sentence and for offenders serving a provincial/territorial sentence in jurisdictions that do not have their own parole boards, meaning all jurisdictions except Quebec and Ontario. However, at times, “exchange of service agreements” are made with provinces and territories without parole boards in order to have staff from these provinces or territories supervise parolees in their jurisdiction.

Sentences to custody of less than two years and community-based sanctions, such as probation and conditional sentences, are the responsibility of the provinces and territories. In addition, provinces and territories are responsible for adults who are ordered to be held in custody before or during their trial (i.e., remand, or pre-trial detention) and other forms of temporary detention (e.g., immigration holds). As mentioned above, Quebec and Ontario operate their own provincial parole boards. These boards are authorized to grant releases to offenders serving a sentence of less than two years in a prison in their jurisdiction. Although the federal and provincial and territorial governments are responsible for different populations, they both work toward the same goals: the protection of society, the rehabilitation of offenders and the safe and successful integration of offenders into communities.

Growth in the number of adults admitted to remand continues

In 2007/2008, there were about 369,200 admissions to correctional services, unchanged from 2006/2007. Most admissions (42%) were to [remand](#), followed by provincial/territorial [sentenced custody](#) (23%), and [probation](#) (22%) ([Table 1](#)).

Since the 1980s, all provincial/territorial correctional services have seen a shift in the types of admissions to their institutions whereby the number of adults admitted to remand (custody while awaiting trial or sentencing) has increased and the number of adults admitted to serve a custodial sentence has decreased ([Babooram, 2008](#); [Sinha and Landry, 2008](#)). This long term trend continued in 2007/2008 where, among the 11 reporting jurisdictions, the number of adults remanded into provincial and territorial institutions to await trial or sentencing grew by 2% while those entering provincial/territorial institutions to serve a sentence remained relatively stable (-0.5%) ([Table 1](#)).¹

In 2007/2008, the number of adults admitted to remand increased in all jurisdictions except Alberta (-1.1%) ([Table 2](#)). The number admitted to sentenced custody decreased in 6 of the 11 reporting jurisdictions. In contrast, in Nova Scotia, British Columbia, Yukon and the Northwest Territories admissions to both sentenced custody and remand increased. Ontario's admissions to both types of custody remained relatively stable ([Table 2](#)). Prior to 1996/1997 individuals were admitted to remand in about the same proportions as sentenced custody. By 1997/1998 the majority of admissions to custody were to remand. Thus, by 2005/2006, on an average day, there were more people held in remand than sentenced custody ([Sinha and Landry, 2008](#)).

After three years of increases, federal institutions, which house offenders sentenced to two years or more, saw the number of admissions decrease 1.8% in 2007/2008 ([Table 1](#)). The number of adults admitted to federal custody to serve a sentence decreased in all regions, except Quebec (+8.6%).

Number of adults admitted to probation and conditional sentences is relatively stable

Overall, the number of admissions to provincial/territorial [community supervision](#) remained unchanged from 2006/2007 to 2007/2008 (declining 0.4%). Admissions to [probation](#)—the community corrections program that has traditionally accounted for the greatest number of admissions—remained stable in 2007/2008 (-0.1%) ([Table 1](#)).

The implementation of the [conditional sentence](#) in 1996 provided the courts with a sanctioning option that permitted a sentence of imprisonment to be served in the community, thus reducing the reliance on incarceration. Conditional sentencing has been viewed as an important factor in the decline in the number of offenders admitted to sentenced custody and the corresponding increase in the admissions of offenders to [community supervision](#) ([Hendrick, Martin and Greenberg, 2003](#)). Admissions to conditional sentences grew steadily from its implementation to 2004/2005. Following a decline in 2005/2006 and 2006/2007, admissions to conditional sentences increased 0.8% in 2007/2008. ([Table 1](#)).

While overall admissions to community corrections remained unchanged, releases to provincial [parole](#) decreased 23% from 2006/2007 to 2007/2008, largely due to the closure of British Columbia's provincial parole board as of April 1, 2007. As of that date, and like other provinces and territories that do not have their own parole board, the National Parole Board assumed responsibility for parole decisions relating to offenders serving sentences in British Columbia's provincial correctional facilities and the Correctional Service of Canada assumed the responsibility of supervising provincial parolees in that province. This change partly explains the 23% decline in provincial parole (although releases to provincial parole in Quebec also declined 21% in 2007/2008), as well as the 4.0% increase in [community releases](#) supervised by the Correctional Service of Canada ([Table 1](#)).

Characteristics of people admitted to correctional services

Typically, a larger proportion of women are admitted to provincial and territorial facilities than federal facilities. In 2007/2008, while women accounted for 12% of all admissions to provincial and territorial sentenced custody,

they accounted for 6% of federal admissions. As well, a larger proportion of women also tend to be admitted to community sentences than custody, as women accounted for 18% of admissions to probation and conditional sentences in 2007/2008.

There was some variation in the median age of those admitted to provincial and territorial sentenced custody in 2007/2008, ranging from 28 years in Manitoba to 38 years in Quebec, while the median age of those admitted to federal custody was 33 years. In contrast, there was little difference within provinces and territories in age of those admitted to probation in 2007/2008, ranging from 28 years in Saskatchewan to 33 years in British Columbia and the Yukon.

Representation of Aboriginal adults in custody and community programs remains higher than their representation in the overall population

According to the 2006 Census, 3.1% of adults 18 years or older in Canada self-identified themselves as Aboriginal and this proportion has increased over the previous two Censuses. In comparison, the representation of Aboriginal adults in custody and community correctional programs has traditionally been higher. For instance, in 2007/2008, Aboriginal adults accounted for 17% of adults admitted to remand, 18% admitted to provincial and territorial custody, 16% admitted to probation and 19% admitted to a conditional sentence ([Table 3](#)).

Among the various programs, the representation of Aboriginal adults is growing only in admissions to provincial and territorial sentenced custody. From 1998/1999 to 2007/2008, Aboriginal adults as a proportion of adults admitted to provincial and territorial sentenced custody grew steadily from 13% to 18% ([Table 3](#)). While the number of admissions to sentenced custody has decreased over time for both Aboriginal and non-Aboriginal adults, declines have been larger for non-Aboriginal adults.

While the number of female offenders is small relative to the total population under supervision by correctional services, Aboriginal females are more represented among the female correctional population than are Aboriginal males within the male correctional population ([Table 3](#)).

In all provinces and territories, the representation of Aboriginal adults in correctional services exceeds their representation in the general population, with gaps being wider in some jurisdictions than others ([Table 4](#)). For instance, in Quebec the representation of Aboriginal adults in provincial and territorial sentenced custody is two times their representation in the province's general population. In Saskatchewan, the representation is seven times greater.

In addition to being more represented among admissions, Aboriginal adults tend to be admitted more often for violent offences, compared to their non-Aboriginal counterparts. Among the six provinces that reported to the Integrated Correctional Services Survey in 2007/2008, 28% of Aboriginal adults who were admitted to provincial custody had committed violent offences, compared to 25% of non-Aboriginal adults ([Table 5](#)). Admissions for serious violent offences (murder, attempted murder and major assault) were more prevalent among Aboriginal adults, as were admissions for common assault.

Factors that may contribute to the Aboriginal population representation in custody

Certain studies ([LaPrairie, 2002](#); [Cattarinich, 1996](#)) have put forth that the representation of Aboriginal people in correctional services would be less pronounced if factors such as age, level of education and employment status were taken into account. With the more detailed data being collected through the ICSS, it is now possible to consider a greater number of factors when analyzing the question of representation of Aboriginal adults in custody. Specifically, using data from the ICSS and the 2006 Census, the effects of age, education and employment on the representation of Aboriginal adults in custody will be examined in the following sections. The analysis will focus on the jurisdictions that have provided sufficient data to the ICSS to permit such

analysis. These jurisdictions are Saskatchewan, Alberta, Nova Scotia, New Brunswick, Ontario, Newfoundland and Labrador and Correctional Service of Canada.

To analyse the effects of age, education level and employment status, a rate of incarceration for Census Day was calculated. This rate is the number of adults in custody on May 16, 2006 (the day the Census is taken) for every 1,000 persons in the general population² that day (see Text box 2).

Text box 2: Census Day incarceration rate

In this report, the term “incarceration rate” refers to the rate of incarceration on Census Day, meaning May 16, 2006. The Census Day incarceration rate represents the number of adults incarcerated on Census Day for every 1,000 population. Incarcerated adults include those serving a sentence, those in detention while awaiting trial or sentencing (also known as remand), or in other temporary detention (e.g., immigration hold). The rate is calculated using the number of adults incarcerated on May 16, 2006 based on data from the Integrated Correctional Services Survey (ICSS).

The Census Day incarceration rate is not an official indicator of the use of incarceration in Canada. The official adult incarceration rate is determined by using the average daily number of adults in custody in a given year for every 10,000 adults in the general population. This average daily number of adults in custody for a given year is collected through the Corrections Key Indicator Reports. This collection tool does not collect [average counts](#) based on Aboriginal Identity, which is why this present report has taken the approach of a Census Day incarceration rate using data from the ICSS (which collects information on Aboriginal identity).

Readers should also be aware that, on Census Day, Aboriginal identity and other socio-demographic characteristics are not collected on persons in institutions (including prisons). However, given the small numbers of adults incarcerated on Census Day compared to the general population, this limitation has little effect on the overall rates that are presented in this report.

As such, the Census Day incarceration rate that is presented in this report is a way of estimating the incarceration rate of Aboriginal and non-Aboriginal adults for the purpose of this report only.

Ratio of Aboriginal and non-Aboriginal incarceration rates

The ratio between Aboriginal and non-Aboriginal incarceration rates represents how many times higher the Aboriginal incarceration rate is over the non-Aboriginal incarceration rate. It is calculated by dividing the Aboriginal incarceration rate by the non-Aboriginal incarceration rate. For example, if the Aboriginal incarceration rate is 6 per 1,000 population and the non-Aboriginal rate is 2 per 1 000 population, then the ratio is 3, indicating that the Aboriginal rate is 3 times higher than the non-Aboriginal rate.

Census Day incarceration rates highest among adults aged 20 to 34 years

According to the 2006 Census, the Aboriginal population in Canada is a young population. Compared to the non-Aboriginal population, persons aged 15 to 24 years account for a greater proportion of the Aboriginal population (18% versus 13%). The gap narrows among 25-to-34-year-olds as they account for 14% of the Aboriginal population and 13% of the non-Aboriginal population. People in these age groups are at greatest risk of conflict with the law ([Silver, 2007](#); [Wallace, 2004](#); [Boe, 2002](#)).

[Boe \(2002\)](#) has actually compared the demographic situation of the Aboriginal population to the Baby Boom that occurred within the non-Aboriginal population. In essence, Canada experienced a significant increase in its birth rate after World War II. As Boe notes, as this group of “Baby Boomers” reached early adulthood in the years between 1960 and 1970, increases were seen in the crime rate. According to Boe, the same situation is now occurring among the Aboriginal population. As was the case for the non-Aboriginal population in the 60's and

70's, high proportions of the Aboriginal population are now entering the age range where people are more at risk of conflict with the law.

Adults within the youngest age groups had the highest rates of incarceration on Census Day in 2006. For example, on Census Day, the incarceration rates for Aboriginal adults in Saskatchewan aged 20 to 24 years and those aged 25 to 34 years were, respectively, 26.6 and 21.9 per 1,000 population. This rate declines to 17.4 per 1,000 population among the 35-to-44-year-olds, and then to 8.2 per 1,000 population among those aged 45 to 54 years. Among the non-Aboriginal population, incarceration rates also decline with age.

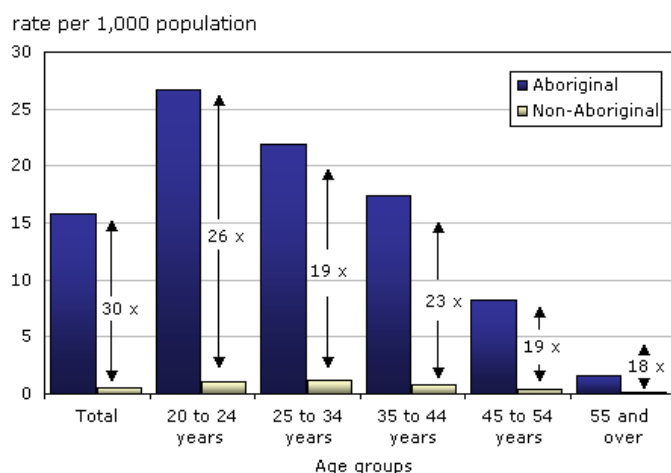
To understand if the relative youthfulness of the Aboriginal population is contributing to the representation of Aboriginal adults in custody, we need to see if the ratio between the incarceration rate for Aboriginal populations and non-Aboriginal populations decreases when we control for age. If this ratio remains the same for each of the specific age groups and for the total, then it can be concluded that age does not have an influence on the representation of Aboriginal adults in custody.

Age partially explains the representation of Aboriginal adults in custody

The fact that the Aboriginal population is young partially explains its representation in custody. This is evident when we compare the ratio between the incarceration rates for the Aboriginal and non-Aboriginal populations for each of the age groups, and find that each of these ratios is generally slightly lower than the ratio between the total population (where age is not considered) ([Table 6](#)).

For example, when we do not consider age, the incarceration rate for the Aboriginal population in Saskatchewan on Census Day is about 30 times higher than the rate for the non-Aboriginal population ([Table 6](#)). For those 20 to 24, this ratio is lower at 26.1. For those aged 25 to 34 years, this ratio is even lower at 18.6 ([Chart 1](#) and [Table 6](#)). In Alberta, the incarceration rate moves from being 11.4 times higher among the total Aboriginal population, to being 8.3 times greater among those aged 20 to 24 and 9.8 times greater among those aged 25 to 34 ([Table 6](#)). Similar patterns are observed in the other jurisdictions for which data exist.

Chart 1: Incarceration rate on Census Day, by age groups, Saskatchewan, May 16, 2006



Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Correctional Services Survey and 2006 Census of Population.

The fact that the ratio between the incarceration rate on Census Day for Aboriginal and non-Aboriginal adults is lower for each of the specific age groups than it is for the total demonstrates that age is a factor that contributes somewhat to the representation of Aboriginal adults in custody. However, even when considering age, Aboriginal adults continue to be more represented in custody compared to their non-Aboriginal counterparts. Other factors, therefore, also likely contribute to this representation.

Education and employment characteristics are factors related to incarceration rates among young adults

Education and employment characteristics are other factors that can influence the risk of criminal behaviour ([Brzozowski, Taylor-Butts and Johnson, 2006](#); [Lochner, 2004](#); [LaPrairie, 2002](#); [Boe, 2000](#)). [Cattarinich \(1996\)](#) found that the socio-economic conditions of Aboriginal people provided a better explanation for the representation of Aboriginal people in custody than did age. As higher proportions of the Aboriginal population are without a high school diploma or employment, these could be factors contributing to the representation of Aboriginal adults in custody.

According to the 2006 Census, 38% of Aboriginal people aged 20 years and over had not completed high school, compared to 19% of non-Aboriginal people. As well, that year, the unemployment rate among Aboriginal people was 14%, compared to 6% among non-Aboriginal people.

Census Day incarceration rates based on characteristics of education and employment indicate that these factors influenced incarceration in the jurisdictions for which data exist—Nova Scotia, New Brunswick, Saskatchewan and Alberta. Rates based on education and employment were calculated only for adults aged 20 to 34 years to eliminate the effect that age or characteristics of different generations might have on education and employment levels. Moreover, it is generally accepted that analyses of education level be conducted on those aged 20 years and older (to allow for drop-outs to finish high school). Finally, among the jurisdictions for which data exists, this age group is most highly represented in custody and is the age group among adults that is at highest risk of criminal behaviour.

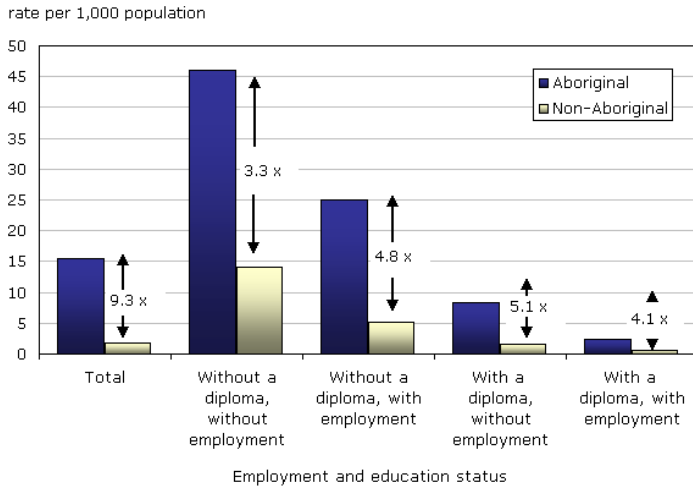
In all the jurisdictions under analysis, the Census Day incarceration rate for Aboriginal adults aged 20 to 34 who were unemployed and without at least a high school diploma was higher than the rate for Aboriginal adults who were employed and had at least a high school diploma. For instance, the incarceration rate among Aboriginal young adults in Alberta without a high school diploma and employment was 46.1 per 1,000 compared to 2.4 per 1,000 population for those with a high school diploma and a job ([Table 7](#)). The same pattern is seen in the other jurisdictions and also among non-Aboriginals. The fact that persons without a diploma and without employment account for a greater proportion of the Aboriginal population could be contributing to the higher overall incarceration rates among Aboriginal adults.

High proportions of Aboriginal adults without a high school diploma and employment contribute to the overall incarceration rates among Aboriginal young adults

As mentioned above, young adults without a high school diploma or employment are more at risk of committing crimes that lead to being incarcerated. Overall, these characteristics exist among a higher proportion of the Aboriginal population than of the non-Aboriginal population. As such, with the high incarceration rates among this population, these characteristics play a role in the overall incarceration rate among Aboriginal adults aged 20 to 34 years.

For example, in Alberta, the overall incarceration rate among Aboriginal adults aged 20 to 34 years was 9.3 times higher than the overall rate among non-Aboriginal young adults (15.5 versus 1.7 per 1,000 population) ([Table 7](#) and [Chart 2](#)). However, when comparing Aboriginal adults and non-Aboriginal adults with the same education and employment characteristics, the incarceration rates among Aboriginal adults were 3.3 to 5.1 times higher. In short, these socio-economic characteristics reduced the difference in incarceration rates of adults aged 20 to 34 by half in Alberta. A similar pattern occurs in Saskatchewan ([Table 7](#)). Still, even when comparing persons with the same characteristics, incarceration rates for Aboriginal young adults remain higher than those of their non-Aboriginal counterparts.

Chart 2: Incarceration rate on Census Day, by employment and education status, population aged 20 to 34, Alberta, May 16, 2006



Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Correctional Services Survey and 2006 Census of Population.

Education appears to have more influence than employment on incarceration rates in Saskatchewan and Alberta

Of the jurisdictions for which data are available, having a high school diploma has a greater impact on incarceration rates for Aboriginal young adults than does employment in Saskatchewan and Alberta. For instance, in Saskatchewan, the incarceration rate among Aboriginal young adults with a high school education but without a job was approximately four times lower than the rate among those with a job but without a high school diploma (9.9 versus 41.4 per 1,000) (Table 7). In Alberta, the rate among those with a high school diploma but without a job was almost three times lower than the rate among those with a job but without a high school diploma.

Employment characteristics have a greater impact on the incarceration rate of non-Aboriginal adults in Saskatchewan

While education and employment characteristics have an influence on the representation of Aboriginal adults aged 20 to 34 in custody, employment characteristics seem to have a greater effect with the non-Aboriginal population, particularly in Saskatchewan. Among persons with no high school diploma, the Census Day incarceration rate for non-Aboriginal adults aged 20 to 34 years decreases from 9.9 per 1,000 among those not employed to 2.7 per 1,000 among those employed. Among Aboriginal adults, the rate also declines, but the change is less notable as it decreases from 48.8 per 1,000 among those without employment to 41.4 per 1,000 among the employed.

In fact, an examination of the ratios between the incarceration rates for Aboriginal adults and non-Aboriginal adults reveals that Aboriginal adults without a diploma or employment have an incarceration rate that is 4.9 times higher than that of their non-Aboriginal counterparts. The incarceration rate among Aboriginal adults aged 20 to 34 also without a diploma but with employment is about 15 times that of their non-Aboriginal counterparts.

In brief, for both Aboriginal and non-Aboriginal adults aged 20 to 34, the Census Day incarceration rate declines as the education and employment situation improves, but it decreases more rapidly among non-Aboriginal adults. This is again another indication that other factors also have an influence on the representation of Aboriginal adults in custody.

Even when accounting for education and employment, Aboriginal young adults remain more represented in custody than their non-Aboriginal counterparts

Education and employment characteristics help to explain some of the representation of Aboriginal adults in custody. However, the incarceration rates for Aboriginal adults aged 20 to 34 still remain higher than for their non-Aboriginal counterparts even when high school graduation and employment are considered.

For instance, for every 1,000 Aboriginal adults in Alberta aged 20 to 34 with a high school diploma and employed as of Census Day, there were 2.4 with the equivalent characteristics in prison. Among their non-Aboriginal counterparts, the rate was 0.6. In addition, the incarceration rates for Aboriginal populations differ across the provinces (for which data exist). Other factors beyond education and employment, therefore, may also contribute to the representation of Aboriginal adults in custody. However, other indicators of socio-economic status, such as income, are not collected by the ICSS.

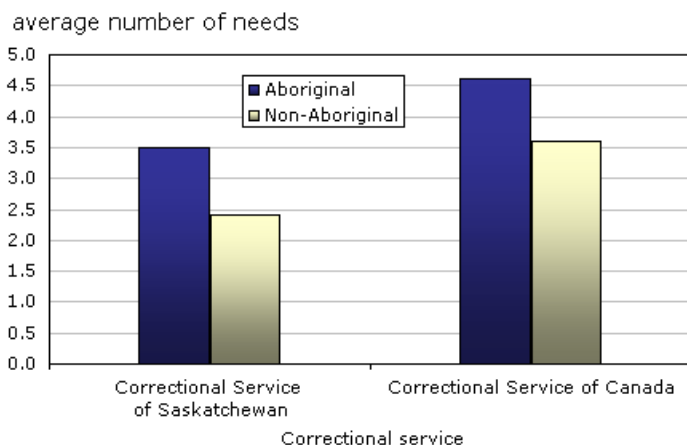
Aboriginal adults admitted to provincial custody in Saskatchewan or into a federal penitentiary have more rehabilitation needs than non-Aboriginal adults

Correctional services evaluate the [needs](#) of people entering into custody. These needs correspond to risk factors for re-offending, and to areas in need of improvement in order to increase the chances of successful re-integration into the community upon release. Data on these needs could therefore provide further information on the factors that could also contribute to the representation of Aboriginal adults in custody.

Among the different types of needs that are assessed by correctional services, the ICSS collects data on needs in these areas: employment, marital/family relationships, social interaction, substance abuse, community functioning, personal/emotional status, and attitude. Presently, these data are only reported by Saskatchewan and the Correctional Service of Canada to the ICSS.³

In 2007/2008, Aboriginal adults entering custody in Saskatchewan or entering a federal penitentiary were assessed as having, on average, a higher number of needs than were non-Aboriginal adults (Chart 3).

Chart 3: Average number of needs by Aboriginal identity, 2007/2008



Note: Represents individuals who were assessed as having either medium or high needs. For those who were admitted more than one time during the fiscal year 2007/2008, information is based on the most recent admission.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Correctional Services Survey, 2007-2008.

Moreover in almost all areas of assessment, a greater proportion of Aboriginal adults were assessed as having medium to high need as compared to non-Aboriginal adults. For example, in Saskatchewan, 81% of Aboriginal adults were

found to have a need in the area of substance abuse, compared to 58% of non-Aboriginal adults ([Table 8](#)). Among those admitted to federal custody in Canada, the same was true for 82% of Aboriginal adults and 67% of non-Aboriginal adults. Some studies have noted that resolving substance abuse problems may be an important element in reducing the risk of criminal behaviour ([Heckbert and Turkington, 2002](#)).

Research also indicates that strong family support could be another important element in reducing the risk of criminal behaviour ([Heckbert and Turkington, 2002](#)). Data indicate that, as a proportion, Aboriginal adults are more often assessed as having a need in the area of marital/family relationships. In Saskatchewan, 48% of Aboriginal adults were seen as having a need in this area, compared to 33% of non-Aboriginal adults ([Table 8](#)).

Among those admitted to custody by the Correctional Service of Canada, these proportions were 51% for Aboriginal adults and 32% for non-Aboriginal adults.

Likewise, higher proportions of Aboriginal adults were assessed as having needs in the areas of social interaction, attitude, employment and community functioning ([Table 8](#)).

The needs assessments suggest that a higher proportion of Aboriginal adults could be at risk of re-offending and possibly returning to correctional services—a factor that could contribute to the representation in custody ([Johnson, 2005](#)).

Summary

The representation of Aboriginal adults in custody has historically been, and continues to be, higher than their representation in the overall population. The gap in socio-economic conditions between Aboriginal and non-Aboriginal people has frequently been presented as context to this representation. Analysis of Census and correctional services data from selected provinces suggests that age, while one of the strongest factors in criminal behaviour, may not be the strongest explanation for the representation of Aboriginal people in custody.

Rates of incarceration based on education and employment characteristics, on the other hand, suggest that a lack of a high school diploma and employment contribute to the representation of Aboriginal adults aged 20 to 34 in custody. Analysis also suggests that while education and employment may reduce an Aboriginal person's risk of incarceration, the risk still remains higher than for their non-Aboriginal counterparts. As such, factors other than education and employment are likely involved in the representation of Aboriginal offenders in custody. Other factors could include income, housing and criminal justice processes. Finally, information on the rehabilitative needs of Aboriginal offenders provides an indicator of risk factors for re-offending and returning to correctional services—factors that may also contribute to the representation of Aboriginal offenders in custody.

References

- Auditor General of Canada. 2002. [Report of the Auditor General of Canada to the House of Commons, Chapter 4: The Criminal Justice System: Significant Challenges](#).
http://www.oag-bvg.gc.ca/internet/English/parl_oag_200204_04_e_12377.html (Accessed July 6, 2009).
- Babooram, Avani. 2008. “[The changing profile of adults in custody 2006/2007](#).” *Juristat*. Vol. 28, no. 10. Statistics Canada Catalogue no. 85-002. Ottawa.
- Boe, Roger E. 2002. “[Future demographic trends may help Canada's Aboriginal youth](#).” *Forum on Corrections Research*. Vol. 14, no. 3. Correctional Service of Canada. Ottawa.
<http://www.csc-scc.gc.ca/text/pblct/forum/e143/e143e-eng.shtml> (Accessed July 6, 2009).
- Boe, Roger E. 2000. “[Aboriginal inmates: Demographic trends and projections](#).” *Forum on Corrections Research*. Vol. 12, no. 1. Correctional Service of Canada. Ottawa.
<http://www.csc-scc.gc.ca/text/pblct/forum/e121/e121c-eng.shtml> (Accessed July 6, 2009).
- Brzozowski, Jodi-Anne, Taylor-Butts, Andrea and Johnson, Sara. 2006. “[Victimization and offending among the Aboriginal population in Canada](#).” *Juristat*. Vol. 26, no. 3. Statistics Canada Catalogue no. 85-002. Ottawa.
- Cattarinich, Xavier. 1996. “[Alternative perspectives on the over-representation of Native peoples in Canadian correctional institutions: The case study of Alberta](#).” *The Canadian Journal of Native Studies*. Vol. 16, no. 1.
<http://www.brandonu.ca/Library/cjns/16.1/Cattarinich.pdf> (Accessed July 6, 2009).
- Heckbert, Doug and Turkington, Douglas. 2002. “Turning points: Factors related to the successful reintegration of Aboriginal offenders.” *Forum on Corrections Research*. Vol. 14, no. 3. Correctional Service of Canada. Ottawa.

Hendrick, Diane, Michael Martin and Peter Greenberg. 2003. [*Conditional Sentencing in Canada: A Statistical Profile 1997–2001*](#). Statistics Canada Catalogue no. 85-560. Ottawa.

Johnson, Sara. 2005. “[Returning to correctional services after release: A profile of Aboriginal and non-Aboriginal adults involved in Saskatchewan corrections from 1999/00 to 2003/04](#).” *Juristat*. Vol. 25, no. 2. Statistics Canada Catalogue no. 85-002. Ottawa.

Kong, Rebecca and Beattie, Karen. 2005. [*Collecting Data on Aboriginal People in the Criminal Justice System: Methods and Challenges*](#). Statistics Canada Catalogue no. 85-564. Ottawa.

Laprairie, Carol. 2002. “Aboriginal over-representation in the criminal justice system: A tale of nine cities.” *Canadian Journal of Criminology*, April, 1 2002.

Lochner, Lance. 2004. “Education, work and crime: A human capital approach.” *International Economic Review*. Vol. 45, no. 3. p. 811-843.

Silver, Warren. 2007. “[Crime statistics in Canada, 2006](#).” *Juristat*. Vol. 27, no. 5. Statistics Canada Catalogue no. 85-002. Ottawa.

Sinha, Maire and Landry, Laura. 2008. “[Adult correctional services in Canada, 2005/2006](#).” *Juristat*. Vol. 28, no. 6. Statistics Canada Catalogue no. 85-002. Ottawa.

Wallace, Marnie. 2004. “[Crime statistics in Canada, 2003](#).” *Juristat*. Vol. 24, no. 6. Statistics Canada Catalogue no. 85-002. Ottawa.

Detailed data tables

[Table 1 Composition of the admissions to adult correctional services, 2006/2007 to 2007/2008](#)

[Table 2 Number of admissions to custody by province and territory, 2006/2007 and 2007/2008](#)

[Table 3 Aboriginal people as a proportion of admissions to adult custody, probation and conditional sentence, selected jurisdictions, 1998/1999 to 2007/2008](#)

[Table 4 Aboriginal people as a proportion of admissions to remand, provincial and territorial sentenced custody, probation and conditional sentence, by jurisdiction, 2007/2008](#)

[Table 5 Number of Aboriginal and non-Aboriginal people admitted to adult custody, by most serious offence, Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, Saskatchewan and Alberta, 2007/2008](#)

[Table 6 Number and rate of incarcerated Aboriginal and non-Aboriginal adults aged 20 or older, by age group, selected jurisdictions, May 16, 2006](#)

[Table 7 Number and rate of incarcerated Aboriginal and non-Aboriginal adults aged 20 to 34, by employment and education status, selected jurisdictions, May 16, 2006](#)

[Table 8 Proportion of Aboriginal and non-Aboriginal adults admitted to custody and assessed as having needs, by the type of need, Saskatchewan and Correctional Service of Canada, 2007/2008](#)

Notes

1. Excludes Prince Edward Island and Nunavut due to missing data.
2. Excludes people living in institutions.
3. Each correctional service has its own methods and criteria for assessing needs. Therefore, comparisons between jurisdictions should be made with caution.

**Annex IV: Press Release by the Committee on the Elimination of Discrimination
against Women concerning the inquiry regarding disappearances
and murders of aboriginal women and girls in Canada**

Press releases are currently circulating indicating that the Committee has taken a decision to undertake an inquiry with respect to disappearances and murders of aboriginal women and girls in Canada. The Committee would like to clarify the situation. At its fiftieth session held in October 2011, based upon information received, it decided to **initiate** an inquiry procedure under article 8 of the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women.

In accordance with article 8(1) of the Optional Protocol and the Rule 83 of the Rules Procedure of the Committee, if the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention on the Elimination of all Forms of Discrimination against Women, the Committee is required to invite the State party concerned to cooperate in the examination of information received, which may include information from Government representatives, governmental organizations, non-governmental organizations, individuals and the United Nations system, and to submit observations with regard to such information.

The inquiry procedure may also include a visit to the territory of Canada, if warranted and agreed to by the Canadian Government, in accordance with article 8(2) of the Optional Protocol. The Committee has not yet decided whether it will conduct a visit at this initial stage of the process, and is currently not in a position to provide additional information in this regard.

The Committee would also like to note that inquiries are confidential and the cooperation of the Government of Canada will be sought at all stages of the process.

For more information on the Committee, inquiry procedures under article 8 of the Optional Protocol and Rules of Procedure of the Committee, please refer to the CEDAW webpage (under Human Rights bodies) available on the website of OHCHR (<http://www2.ohchr.org/english/>).

The Committee on the Elimination of Discrimination against Women

16 December 2011

Native Women's Association Press Release – Ottawa, ON (December 13, 2011) – UN Will Conduct Inquiry into Missing and Murdered Aboriginal Women in Canada

(Ottawa) The United Nations Committee on the Elimination of Discrimination against Women has decided to conduct an inquiry into the murders and disappearances of Aboriginal women and girls across Canada. The Committee, composed of 23 independent experts from around the world, is the UN's main authority on women's human rights. The Committee's decision was announced today by Jeannette Corbiere Lavell, President of the Native Women's Association of Canada (NWAC), and Sharon McIvor of the Canadian Feminist Alliance for International Action (FAFIA).

The inquiry procedure is used to investigate what the Committee believes to be very serious violations of the *Convention on the Elimination of All Forms of Discrimination against Women*. In January and in September 2011, faced with the continuing failures of Canadian governments to take effective action in connection with the murders and disappearances, FAFIA and NWAC requested the Committee to launch an inquiry. Canada has signed on to the treaty, known as the Optional Protocol to the Convention, which authorizes the Committee to investigate allegations of "grave or systematic" violations of the Convention by means of an inquiry. Now that the Committee has formally initiated the inquiry, Canada will be expected to cooperate with the Committee's investigation.

"FAFIA and NWAC requested this Inquiry because violence against Aboriginal women and girls is a national tragedy that demands immediate and concerted action," said Jeannette Corbiere Lavell. "Aboriginal women in Canada 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. NWAC has documented the disappearances and murders of over 600 Aboriginal women and girls in Canada over about twenty years, and we believe that there may be many more. The response of law enforcement and other government officials has been slow, often dismissive of reports made by family members of missing women, uncoordinated and generally inadequate."

"These murders and disappearances have their roots in systemic discrimination and in the denial of basic economic and social rights" said Sharon McIvor of FAFIA. "We believe that the CEDAW Committee can play a vital role not only in securing justice for the women and girls who have died or disappeared, but also in preventing future violations, by identifying the action that Canadian governments must take to address the root causes. Canada has not lived up to its obligations under international human rights law to prevent, investigate and remedy violence against Aboriginal women and girls."

"The Committee carried out an inquiry into similar violations in Mexico five years ago and we expect the process will follow the same lines here in Canada," said McIvor. "Mexico invited the Committee's representatives to make an on-site visit and during the visit the representatives interviewed victim's families, government officials at all levels, and NGOs. The Committee's report on the inquiry spelled out the steps that Mexico should take regarding the individual cases and the systemic discrimination underlying the violations. Mexican women's groups say that the Committee's intervention helped to spur Government action and we hope to see the same result here in Canada, said McIvor."

ANNEX V: Duty of Consultation and Accommodation Cases

No Consultation Required	Consultation Required and fulfilled	Consultation Required but not fulfilled
<i>Canada v. Brokenhead First Nation</i> , 2011 FCA 148	<i>Louis v. British Columbia (Energy, Mines and Petroleum Resources)</i> , 2011 BCSC 1070	<i>Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.</i> , 2011 ONSC 7708
<i>White Bear First Nations Chief and Council v. Canada (Indian Affairs and Northern Development)</i> , 2011 FC 361	<i>Upper Nicola Indian Band v. British Columbia (Environment)</i> , 2011 BCSC 388	<i>Halalt First Nation v. British Columbia (Environment)</i> , 2011 BCSC 945
<i>City of Brantford v. Montour et al</i> , 2010 ONSC 6253	<i>Kehewin Cree Nation v. Canada</i> , 2011 FC 364	<i>West Moberly First Nations v. British Columbia (Chief Inspector of Mines)</i> , 2011 BCCA 247
<i>Athabasca Regional Government v. Canada (Attorney General)</i> , 2010 FC 948	<i>Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)</i> , 2011 NLTD 44	<i>Da'naxda'xw/Awaetlala First Nation v. British Columbia (Environment)</i> , 2011 BCSC 620
<i>Provost v. Canada (Indian Affairs and Northern Development)</i> , 2009 FC 1214	<i>Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)</i> , 2011 ABCA 29	<i>Adams Lake Indian Band v. British Columbia</i> , 2011 BCSC 266
<i>Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.</i> , 2009 FCA 308	<i>Tsuu T'ina Nation v. Alberta (Environment)</i> , 2010 ABCA 137	<i>Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)</i> , 2011 BCCA 78
<i>Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)</i> , 2009 ABQB 576	<i>Nlaka'pamux Nation Tribal Council v. Griffin</i> , 2009 BCSC 1275	<i>Yellowknives Dene First Nation v. Canada (Attorney General)</i> , 2010 FC 1139
<i>Ta'an Kwach'an Council v. Government of Yukon et al</i> , 2008 YKSC 60	<i>Brokenhead Ojibway First Nation v. Canada (Attorney General)</i> , 2009 FC 484	<i>Brokenhead First Nations v. Canada</i> , 2009 FC 982
<i>Native Council of Nova Scotia v Attorney General of Canada</i> , 2008 FCA 113	<i>John Voortman & Associates Limited v. Haudenosaunee Confederacy Chiefs Council</i> , 2009 CanLII 14797 (ON SC)	<i>Klahoose First Nation v. Sunshine Coast Forest District (District Manager)</i> , 2008 BCSC 1642
<i>Hester v. Canada (National Revenue)</i> , 2007 CanLII 52015 (ON SC)	<i>R. v. Douglas</i> , 2008 BCSC 1098	<i>Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)</i> , 2008 BCSC 1505
<i>Cook v. The Minister of Aboriginal Relations and Reconciliation</i> , 2007 BCSC 1722	<i>R. v. Tommy</i> , 2008 BCSC 1095	<i>Wii'litswx v. British Columbia (Minister of Forests)</i> , 2008 BCSC 1139
	<i>Tzeachten First Nation v. Canada (Attorney General)</i> , 2008 FC 928	<i>Newfoundland and Labrador v. Labrador Métis Nation</i> , 2007 NLCA 75
	<i>Ahousaht First Nation v. Canada (Fisheries and Oceans)</i> , 2008 FCA 212	<i>Musqueam First Nation v. Canada</i> , 2007 FC 1027

Annex VI: Special Rapporteur on Indigenous Peoples issues statement on the Attawapiskat First Nation in Canada, December 21, 2011



The United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, issued the following statement in light of the serious situation of the Attawapiskat First Nation, a remote community in northern Ontario, Canada, as well as the alleged generally poor living conditions in aboriginal reserves in the country 20 December 2011

“I have been in communication with the Government of Canada to express my deep concern about the dire social and economic condition of the Attawapiskat First Nation, which exemplifies the conditions of many aboriginal communities in the country.

Many of this First Nation’s approximately 1,800 members live in unheated shacks or trailers, with no running water. The problem is particularly serious as winter approaches in the remote northern area where the Attawapiskat community lives, which faces winter temperatures as low as -28 degrees Celsius.

The federal Government has recently agreed to provide emergency housing in Attawapiskat to address the crisis situation, placing the community under third party management to oversee spending, as a condition to receiving such housing assistance. However, band members, including the band chief, have denounced the third party management regime, asserting that they are better equipped to respond to the needs of their community than a third party manager.

The social and economic situation of the Attawapiskat seems to represent the condition of many First Nation communities living on reserves throughout Canada, which is allegedly akin to third world conditions. Yet, this situation is not representative of non-Aboriginal communities in Canada, a country with overall human rights indicators scoring among the top of all countries of the world. Aboriginal communities face vastly higher poverty rates, and poorer health, education and employment rates as compared to non-Aboriginal people.

According to the information received, First Nations communities are systematically underfunded as compared to non-Aboriginal towns and cities. This unequal funding is allegedly rooted in various funding formulas and policies used by Indian and Northern Affairs Canada to allocate funds to First Nations to support various social and economic programs.

Reportedly, systematic underfunding of First Nations exacerbates their already diminished capacity to attend to the social and economic interests of their members. Further, it does not appear that the Government is responding adequately to requests for assistance.

Moreover, the Government has allegedly been resisting efforts by the Canadian Human Rights Commission to inquire into allegations of discrimination on the basis of national or ethnic origin related to disparities in funding provided to First Nations as compared to non-aboriginal communities, inquiries that have been requested by First Nations themselves.

In a communication sent to the Canadian authorities on 19 December 2011, I asked the Government to express its views about the accuracy of this information, and requested further details regarding official programs currently in place to address the disparate social and economic conditions of First Nations communities, as compared to non-Aboriginal communities, as well as the disparate social and economic conditions between and among First Nation communities.

As the United Nations Special Rapporteur on the rights of indigenous peoples I will be monitoring closely the situation of the Attawapiskat First Nation and other aboriginal communities in Canada, keeping an open dialogue with the Government and all stakeholders to promote good practices, including new laws, government programs, and constructive agreements between indigenous peoples and states, and to implement international standards concerning the rights of indigenous peoples.”

Taking a Second Look at those Attawapiskat Numbers, by Lorraine Land, partner with
OLTHUIS, KLEER, TOWNSHEND, L.L.P., in Toronto. December 13, 2011

Should Toronto be put under third party management? That community has been running a deficit for years, and the combined total of all government spending (federal, provincial and municipal) is **\$24,000 a year for each Torontonian**.

Attawapiskat, on the other hand, which is only funded by one level of government — federal – received \$17.6 million in this fiscal year, for all of the programs and infrastructure for its 1,550 residents. **That works out to about \$11,355 per capita in Attawapiskat.**

People often forget, when talking about costs of delivering programs and services to First Nations, that almost all those costs are paid from one pot: Aboriginal Affairs. By contrast, non-Aboriginal Canadians receive services from at least three levels of government.

Here are the total expenditures per capita per level of government for Toronto residents:

- The 2010 federal budget expenditures were \$280 billion or about \$9,300 for each Canadian
- The 2010 Ontario budget is \$123 billion in expenditures or about \$9,500 for each Ontario resident
- The 2010 Toronto budget is \$13 billion, or \$5,200 for each Toronto resident
- That's a grand total of \$24,000 per Torontonian.

Some additional points to consider:

Indian Affairs (now Aboriginal Affairs and Northern Development Canada, or AANDC) has capped expenditure increases for First Nations at two percent a year since 1996. Yet:

- The Aboriginal population has been growing at a rate closer to four percent a year, so per capita support is falling behind.
- In that same period, the number of staff hired at AANDC has almost doubled, from 3,300 in 1995 to 5,150 in 2010. (Source: Indian Affairs)
- Those salaries plus consultants fees for people like third-party managers come from the program dollars that should go to First Nations.
- Consultants (including lawyers and accountants) receive 1,500 contracts per year from AANDC, worth about \$125 million. (This does not include fees that First Nations pay directly using sources other than AANDC funding). (Source: Toronto Star)
- One of these sets of fees, taken away from other AANDC budgeting and provided instead to consultants, is the payment for third-party managers.
- Another recent and publicly disclosed example of third-party-manager fees is those being paid for Barriere Lake. When the community took political action on some of its issues, Canada imposed third-party management. The accounting firm is paid \$600,000 per year, according to Indian Affairs Records. (Source: Toronto Star).
- Almost every time a First Nation goes into third-party management, it comes out with as much debt as it had going in — or more. This is a good indicator that the problem is not fiscal mismanagement, it's the insufficiency of resources to deliver the programs needed. (Source: what we hear and see from our own clients)
- Each First Nation has to file, on average, 160 reports per year to AANDC. The Auditor General says the problem is not under-reporting, its over-reporting (because of the resources and administration needed to service AANDC's bureaucratic requirements). (Source: Federal Auditor General)
- Costs of living in northern Aboriginal communities are considerably higher than costs in the rest of Canada. A bag of apples in Pikangikum is \$7.65 (versus the Canadian average of \$2.95) and a loaf of bread in Sandy Lake costs \$4.17 (versus the Canadian average of \$2.43). (Source: Canadian Association of Foodbanks). In Attawapiskat, 6 apples and 4 small bottles of juice currently costs \$23.50 (Source: CBC).