

RECONCILIATION AND EQUALITY RIGHTS: Visioning Forward for the Next Generation

It is suggested that participants read the following, and consider actions one can take to raise awareness of the unresolved legacies linked to the over incarceration and criminalization of Aboriginal women and girls in their own communities, while promoting organizational/institutional change to address these challenges.

The term Aboriginal refers to First Nation, Inuit and Metis Peoples. The term Indigenous is also used to represent Aboriginal Peoples and is most often referred to within the international context.

There is an expectation that Canada will live up to all human rights established by the international community. Correctional Services Canada rightly recognized this by saying it should “adhere to both binding and other international human rights standards”.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly, Canada’s subsequent endorsement of it; the Statement of Apology to former students of Indian Residential Schools, on behalf of the Government of Canada, and the Truth and Reconciliation Commission of Canada, present opportunities to forge renewed relationships through a commitment to address injustice

and discrimination, while upholding internationally recognized Indigenous Peoples rights.

The fundamental ground of reconciliation must be a deepened understanding of relevant human rights obligations and strengthened measures to fulfill these. Everyone who works with Aboriginal people in conflict with the law should be able to demonstrate the principles behind the Aboriginal rights provisions within the *Canadian Charter of Rights and Freedoms* and *Constitution Act* as well as other relevant, jurisprudence and treaties that govern the relationship between Aboriginal Peoples and Canada.

At the same time, hearing survivor’s stories, including those of intergenerational survivors, and criminalized Aboriginal women and girls; is vital to building relationships, while detecting and remedying further harms of colonization.



CRIME PREVENTION: NON-DISCRIMINATION AND FULFILLMENT OF EQUALITY RIGHTS

Many of the problems which culminate in the criminalization of Aboriginal girls and women could be prevented at the outset if better attention was paid to protecting Aboriginal children and young women from violence, exploitation, homelessness, hunger and other forms of discrimination. Child welfare apprehensions add another layer of trauma and loss and fracture fundamental family relationships, and render Aboriginal girls and boys more vulnerable to criminalization.

Canada has a legal obligation to ensure freedom from discrimination based on race, ethnicity, sex, disability and other grounds. This is called for in the *Canadian Charter of Rights and Freedom*, the *Canadian Human Rights Act*, as well as in this countries international commitments, through being a signatory to the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on Elimination of Discrimination Against Women, the Universal Declaration of Human Rights, and the International Convention on the Elimination of all Forms of Racial Discrimination.

VIOLENCE PREVENTION: fulfilling obligations to protect against violence against women

The United Nations Committee on the Elimination of Discrimination Against Women

(Recommendation 19) declares violence against women a form of discrimination. While Canada is a signatory to the CEDAW and its optional protocol, and other treaties, conventions, and international resolutions such as **The Beijing Platform for Action** the fact that 91% of Aboriginal women, and 86% of Aboriginal girls who are criminalized report having been victims of prior physical or sexual assault, has not translated to adequate protection, either in prevention, or subsequent attention to women who end up in conflict with the law.

In 2010, Canada also became a signatory to the **United Nations Declaration on the Rights of Indigenous Peoples**; *Article 21* specifically refers to improvement of economic and social conditions for women; *Article 22(2)* refers to full protection for women and children against all forms of violence and discrimination.

The vast majority of Aboriginal women/Peoples who have committed crimes have also experienced victimization. For Aboriginal women, while this victimization often starts early in childhood, it can extend throughout their lifetime. The criminal

justice system judges and blames Aboriginal women and girls when they are victimized while those who violate them are often given lenient sentences, if pursued at all. Statements by judges such as ‘drugs and violence go hand in hand’, or ‘she willingly chose a dangerous occupation’, are completely unacceptable, particularly from a system which purports to increase public safety and administer justice.

ADHERENCE TO DOMESTIC AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Corrections Services Canada recognizes it should be bound to follow human rights instruments which Canada has adhered itself to:

“It is our view that any correctional authority should adhere to both binding and other international human rights instruments that have been approved by the state concerned before the international community”.

(Correctional Service Canada, 1997)¹

Later amendments to the criminal code, such as the Gladue ruling attempt to address a difference in worldviews bringing the Canadian

justice system slightly more in line with Aboriginal traditional justice practices which examine a person who committed an offence in relation to larger factors. Section 718.2 (e) of the Canadian criminal code of Canada states that:

“all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

(Gladue decision)

1. Correctional Service Canada. Chapter 2: The Human Rights Legislative Framework. 1997. Accessed March 2011

Despite this important recognition of human rights obligations, and directive for judges in sentencing, Aboriginal people continue to be over-incarcerated, over-segregated, subject to more restrictive security conditions and seemingly arbitrary and illegal strip searches and are inadequately protected from police, corrections staff, and other inmates.

Aboriginal women and girls are too often blocked from accessing appropriate health care services, including mental health services, and rehabilitation programs; and face restricted opportunities for contact with their children, extended families and communities. Young girls housed in co-ed detention facilities are also exposed to considerable harassment and abuse.



RECONCILIATION AND THE RIGHT TO SELF-DETERMINATION

Section 35 (1) of the *Constitution Act* recognizes and affirms existing Aboriginal and treaty rights; and has been interpreted as the inherent right to self-government and those practices which have been integral to the distinct natures of Aboriginal cultures prior to colonization. Internationally, it is also recognized that:

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

–United Nations Declaration on the Rights of Indigenous Peoples. (Article 34)

While there have been some very important developments in this regard in Canada through the support, for example, of the Aboriginal Justice Strategy, not nearly enough Aboriginal women, girls/Peoples are being diverted into traditional Aboriginal justice programs, and where these do exist, specific attention to the distinctive needs of women and girls are usually overlooked.

Another important aspect of reconciling and renewing relationships based on an understanding of the principles of self-determination, has to do with participation in decision making:

PARTICIPATION IN DECISION MAKING

The United Nations Declaration on the Rights of Indigenous Peoples reminds states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain their own indigenous decision making institutions” (art. 18 UNDRIP) and that further: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures.” (art. 19 UNDRIP)

Canada is also a signatory to **The United Nations Security Council Resolution 1325**, which reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of equal participation, full involvement, and the need to increase women’s role in decision-making.

Aboriginal girls comprise close to half of all girls in custody

in Canada. Despite Canada’s international commitments in relation to the decision-making rights of Aboriginal Peoples and recognition of the need to increase women’s role in conflict resolution and in decision-making, legislative and administrative measures related to justice have gone ahead without any form of participation or consent from Aboriginal women’s organizations and their representatives.

ADDRESSING CULTURAL AND GENDER-BASED DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

Over the years there have been numerous attempts to study the short comings of the criminal justice system in relation to sentenced women in Canada. In each case the situation of Aboriginal women was found to be alarming and in dire need of remedy. Recommendations from the commission chaired by Louise Arbour “Creating Choices”, from the National Association of Elizabeth Fry Societies, from the National Association of Women and the Law, from the Native Women’s Association of Canada among others, remain for the most part unimplemented. Ten years ago Patricia Monture-Angus concluded that the Crown was in violation of its fiduciary duty to Aboriginal women/Peoples for failing to remedy obvious and known circumstances of discrimination”.²

2. P. Monture-Angus. The Lived Experiences of Aboriginal women who are Federally Sentenced. 2002.

ENSURING EFFECTIVE INFORMATION GATHERING

Ensuring effective information gathering on a national scale to monitor either progress in combating, or a worsening of any conditions of discrimination is a fundamental responsibility of the state. To be useful, data should be broken down and cross referenced according to gender/ race and ethnicity , as well as by other variables such as disability; socio-economic status, etc. Lack of such data in many areas, including the youth and adult criminal justice systems, combined with the lack of independent external oversight bodies to enforce compliance with the Rule of Law, invites human rights violations to continue.

DUTY TO PROTECT

Along the entire spectrum of the criminal justice system, from policing to probation and everything in between, there is a duty to protect people from abusive treatment, whether these are at the hands of other officials or inmates. This includes acts that cause mental suffering as well as physical suffering. Anyone who has suffered such abuse has the right to justice and must be protected from retaliation for making a complaint. There is a great deal of impunity afforded to those who take advantage of the power imbalance and abuse the criminalized in their charge.

Some Canadians as well as some of those who work in public

safety and the criminal justice system, fail to understand not only that the state has an obligation to uphold fundamental rights of those in conflict with the law, but also that the failure to treat those who are criminalized with dignity and ensure their best route to rehabilitation, actually creates less safety in the long run for us all.

Some of the human rights of federally sentenced Aboriginal women which have been violated and in need of remedy according to the National Association of Women and the Law include³:

- The International Covenant on Civil and Political Rights (art. 7 & 10)
- The Convention on the Elimination of all of Discrimination Against Women (Articles 2 & 3)
- The Declaration Against Torture (Articles 3 & 6)
- The Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment (Articles 11 & 16)
- The Body of Principles for the Treatment of Prisoners (Princ. 1, 3, 28) (domestic)
- Basic Principles for the Treatment of Prisoners (s.2, s. 5)
- UN Standard Minimum Rules for the Treatment of Prisoners (SMR's (s. 6 (1), s. 8(a), s. 51. (3), s. 59 , s. 66 (1), s. 67)

- The Declaration on Elimination against Racism Article 4
- The Convention on the Elimination of Racial Discrimination. Preamble.

To this list we need to add:

The United Nations Declaration on the Rights of Indigenous Peoples; Articles 18 & 19, referring to Aboriginal decision making and the States obligation to obtain the Free Prior and Informed Consent of Aboriginal Peoples in legislative and administrative matters that affect their rights, Article 21 specifically refers to improvement of economic and social conditions for women; Article 22(2) refers to full protection for women and children against all forms of violence and discrimination. Article 34 refers to the right to develop and maintain Aboriginal Traditional justice systems. Canada is failing to address the medical, psychosocial and economic consequences of collective trauma and colonization which include widespread physical and sexual violence, poverty, and discrimination. Jails have become, in effect, replacements for programs which should be ensuring equality and redress. More diversion to Aboriginal Justice Initiatives is needed.

The Convention on the Rights of the Child (CRC) and the CRC Committee's general comment of Indigenous children: A component of children's rights under international law, the Convention and the CRC Committee's General Comment on Indigenous Children

is the right of the child to grow up in their family. This involves the States' obligation to protect that relationship. The number of Aboriginal children being raised in foster care while their mothers are imprisoned is troubling.

The closures of mother-child prison programs in a number of provinces are a violation of the rights of both the child and a failure of the state to live up to its obligation to the family.

Universal Declaration on Human Rights (art 27) "Everyone has the right freely to participate in the cultural life of the community". Under international law, the right to culture and religion are rights to be enjoyed in a community. While corrections have increased the number of Elders in prisons and Aboriginal liaison workers, the high rate of classification of Aboriginal female prisoners in maximum security and in segregation, denies women the opportunity to participate in many of the cultural support and rehabilitation programs. The fact that at one point in 2011 there was only a handful of Aboriginal women at CSC's Okimaw Ohci Healing lodge attests to ongoing violations of this right.

The International Covenant on Economic, Social and Cultural Rights (Art 15 - 1a) upholds the right of everyone to take part in cultural life.

3. National Association of Women and the Law. Federally Sentenced Women: Canada's Breach of Fiduciary Duty and Failure to Adhere to International Obligations.

IT TAKES A VILLAGE AND A NATION: public participation in reconciliation and transformative justice processes

“Reconciliation is a parallel process of personal and political transformation from systems of domination to relationships of mutuality”

(Sutherland, 1998: ii)⁴

It takes a great deal of compassion and a paradigm shift to be able to apply a reconciliation lens to an issue such as Aboriginal criminalization and over incarceration, which is surrounded by myths, and at the outset, threatens to rock the very foundation of one’s core values and beliefs.

Most Canadians know little or nothing at all about the lives of incarcerated Aboriginal women and girls. Those in conflict with the law are blamed for having brought on penalties themselves while wide scale impunity exonerates those who violate their rights. NWAC believes that enhancing access to alternative Aboriginal justice initiatives for Aboriginal women and girls in conflict with the law would be signal a positive move towards reconciliation and justice for past abuses.

4. Sutherland, Jessie. 2005. WorldView Skills: Transforming Conflict from the Inside Out. Published by WorldView Strategies.

HEALING THE LEGACIES OF INTERGENERATIONAL COLONIZATION TRAUMA, AND CREATING SAFE, CARING COMMUNITIES

Ensuring all Canadians better understand the legacies and impacts Indian residential schools and colonial policies is important. For those in the field of justice, or public safety, in particular, hearing the stories and the truths of criminalized Aboriginal women and girls is essential. Likewise if we are to counter systemic discrimination and exclusion, it is vital to create independent publicly visible oversight bodies with power to monitor and influence government institutions to ensure accountability. NWAC believes that reconciliation dialogues dealing with the over incarceration of Aboriginal girls and women is critical, and should also help to inform the results of Canada’s Truth and Reconciliation Commission. Getting the right people to the table and ensuring effective dialogue actually can lead to concrete improvements in the lives of Aboriginal women and girls, and stem the cycles of victimization and criminalization is essential. Below are some basic principles applicable to promoting public participation in a change process. These stem from the International Association of Public Participation. Readers are encouraged to add to these in relation to the challenge at hand.

CORE VALUES FOR THE PRACTICE OF PUBLIC PARTICIPATION⁵

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. *For Aboriginal Peoples this is a right recognized by International human rights instruments.*
2. Public participation includes the promise that the public’s contribution will influence the decision. *In other words those who have the power to make decisions should also be at the table.*
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers. *This is where deep listening, world viewing, conflict resolution and also an understanding of Rights and fiduciary obligations must pay a key role.*
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision. *Aboriginal women and girls must be involved in the process,*
5. IAP2 Core Values for Public Participation” for use in the development and implementation of public participation processes. (Number 1-7) Italics from NWAC.

while measures are put in place to avoid their re-traumatization, given then very challenging / loaded content.

5. Public participation seeks input from participants in designing how they participate. *Every attempt should be made to agree on a common agenda and process for the dialogues.*
6. Public participation provides participants with the information they need to participate in a meaningful way. Benchmarks should be set for determining strategic approaches, and participants should be given time in advance to reflect on key discussion content and questions on the agenda.
7. Public participation communicates to participants how their input affected the decision.

ADDITIONAL CONSIDERATIONS:

Reconciliation dialogue processes must respect Aboriginal protocols for selecting Elders and honouring traditional practices from distinct regions. Strong, credible facilitation is essential to this process. Facilitators must actively promote reconciliation while keeping an open mind as to what reconciliation is.

6. The table is compiled from various sources including: Ada Pecos Melton. Indigenous justice systems and tribal society. Judicature. Volume 79, No. 3, November-December 1995; Abbotsford Restorative Justice and Advocacy Association.

7. Ross, Rupert. Institutional Colonization and the Delivery of Healing Programs in First Nations. 2008.

RECONCILIATION AND WORLD VIEWING

In addition to a deepened understanding of the foundational role of human rights in effective reconciliation practice, understanding how Aboriginal and non-Aboriginal world views in relation to justice differ is critical⁶. Doing so increases appreciation of the strengths of Aboriginal culture and traditions, and their invaluable role in restoring justice and wellness.

MAINSTREAM JUSTICE	ABORIGINAL JUSTICE
Punitive. Removes the offender from the victim.	Corrective, offenders are responsible for restitution to the victim and for changing their behavior. Importance of personal responsibility and accountability not only to the victim but also to the community.
Isolates the crime from the individuals context (Gladue Case Reports -aim to build in greater contextual awareness in sentencing)	Looks at problem in its entirety, examines contributing factors, while still holding offenders to account
Emphasis on facts and pervasive arguments. Victims are easily re-victimized in this process.	Emphasis on feelings, impacts, and the belief that crime affects the whole of a community. Attributes such as empathy, care, and healing for both victim and offender are shown. Conflicts have ensued when offenders appear unsafe and unapologetic. Empowering crime victims and ensuring community safety takes precedence in the process is key.
Individualizes crime Prescribed penalties by the state Limits participants in the process and solutions	Encourages communities to assume responsibility for what is happening to their young people and to come together with the common purpose of identifying a solution that meets everyone's needs
Professionals who are not linked to the community	Elders are central to the process and provide guidance, as well as spiritual grounding, along with others who have undergone their own healing and can offer support to those currently in the process
Offender does not have to provide any repair to those harmed	Holistic towards resolution of issues, repair the harm done by the offender's behaviour, customary sanctions are used to restore the relationship, while ensuring community safety
Legalistic. Excludes many people impacted by the crime by extension. Victim is fairly marginalized in the process.	Ceremony and prayer are a part of the process. Inclusive process, definition of who is impacted by crime is enlarged, includes all people affected by affected in the process and finding of solutions, Focuses on victim and also communal rights and responsibilities, both victim and offender feel a sense of justice has been accomplished in the resolution of a situation.
Promotes deterrence by temporary removal. removes active responsibility from offender	Promotes healing and responsible decision-making,
Judgmental	Non-judgmental –offender needs to be reintegrated into community
Despite the fact that Elders are increasingly part of Aboriginal programming in prisons, Treatment Programs mainly focus on curing individuals and “their pathologies”.	Healing circles and Traditional healing processes integral. These aim to bring balance into many relationships. Referrals made to healing programs which address not only the symptoms of colonization trauma (addictions, violence, sexual abuse, anger and despair) but also their root ⁷ .

QUESTIONS FOR DISCUSSION

1. Not all reconciliation processes turn to human rights law as a fundamental ground for moving forward in the building of new relationships. *Why is this particularly important in the case of seeking reconciliation and justice for Aboriginal women and girls?*
2. In addition to recognizing that significant differences in world views exist between Aboriginal and non-Aboriginal notions of justice, *what are some of the shared needs, hopes and values in relation to community safety, crime and rehabilitation?*
3. *What can judges, police, lawmakers, community workers, justice advocates, community leaders, and those working with criminalized /or at risk Aboriginal women and girls do to take proactive steps to decrease their over incarceration while stepping up measures to improve the health, safety and wellness of Aboriginal women and girls in local urban, rural and remote communities? What are some of the roles that public opinion leaders, educators and the media can play?*
4. *What are some of the existing milestones and practices within the criminal justice system which aim to create better relationships, increased accountability while meeting the distinct needs of Aboriginal women and girls?*
5. *How can we ensure strong safeguards are in place to prevent human rights abuses as a result of the operations of the various components of the criminal justice system?*
6. *What are some of the most urgent recommendations which have yet to be implemented? What steps need to be taken to unblock obstacles to their implementation? Who needs to be involved and how can progress or lack of implementation best be monitored?*
7. *What would a culturally relevant gender-based pilot project aimed at diverting criminalized Aboriginal women and girls away from custody look like? What kinds of creative Aboriginal –non-Aboriginal alliances can be formed to support such programs? How might gender-based diversion programs contribute in an important way to an inclusive vision of healing, justice, increased public safety and reconciliation over the long term in Canada?*