Supplementary Submission of Amnesty International
Violence Against Indigenous Women and Girls in Canada and the issue of "acquiescence" under articles 1 and 16 of the Convention against Torture

Introduction

This supplementary submission is in response to Canada's position on the meaning of "acquiescence" in article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention against Torture" or "the Convention")[1] as expressed in Canada's 2016 report to the UN Committee Against Torture ("the Committee")[2] and during a meeting between representatives of the Canadian government and civil society on 17 October 2018.[3] In particular the submission addresses the government's objection to the Committee's position articulated in its General Comment No. 2[4] in the context of the application of article 2 in addressing violence against women and other gender-based violence by non-state actors.

Amnesty International Canada (Amnesty International) is in full agreement with the Committee's view that "acquiescence" should be interpreted using the due diligence framework such that *failure* of the State to take measures to prevent, stop, punish perpetrators and provide remedies to victims of violence against women and other gender-based violence by non-state actors amounts to "consent or acquiescence" for the purposes of articles 1 and 16 of the Convention.

Analysis

1. *Committee Against Torture's position and guidance in its General Comment*

In its General Comment No. 2, the Committee explains the meaning of article 2 of the Convention in the context of "effective measures" States parties are to take to give effect to that article.[5] In doing so, the Committee endorses the due diligence framework to establish responsibility under the Convention, and in particular responsibility incurred through consent or acquiescence, when acts of torture or other cruel, inhuman or degrading treatment or punishment (other ill-treatment) are committed by non-state actors.

The Committee states that "States parties should adopt effective measures to prevent public authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture."[6]

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[1] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by UN General Assembly, 10 December 1984, 1465 UNTS 85, ["Convention against Torture"].
[2] Committee against Torture, *Consideration of reports submitted by States parties under article 19: Canada*, UN Doc CAT/C/CAN/7 (13 September 2016), online: http://undocs.org/CAT/C/CAN/7 ["Canada's Submission"].
[3] Amnesty International participated in this meeting where the position was articulated.
[4] Committee against Torture, *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008), online: http://undocs.org/CAT/C/GC/2 ["General Comment No. 2"].
[5] *Ibid*, paras 16-19.
[6] *Ibid*, para 17.

The Committee explains that it is not necessary for officials to have knowledge of acts of torture being committed for state responsibility to arise from its failure to prevent the act from taking place. It is sufficient if an official has "reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they *fail to exercise due diligence* to prevent, investigate, prosecute and punish such non-state officials or private actors consistently with the Convention [emphasis added]" for the State to bear responsibility and for its officials to be considered authors of the offending acts, or "complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[7]

As a member of the Committee, both at the time the General Comment was adopted, and currently, explained:

> The Comment's explicit use of the concept of due diligence to explain this kind of acquiescence has thus opened the Committee's eyes to examine issues of private violence and public responses, looking sometimes "through women's eyes".[8]

The Committee explicitly considers this interpretation of the Convention as applicable to State responsibility for violence against women and other gender-based violence by non-state actors.[9]

2. *Canada's position*

In its submission, Canada states that it disagrees with the Committee's approach to what constitutes acquiescence.[10] Canada advances a significantly narrower interpretation which would require what appears to be a stricter *mens rea* element for attaching responsibility to the State. Canada posits: "[…] acts of violence will only constitute 'torture' when there is some *intentional* involvement, including acquiescence, by a public official or other person acting in an official capacity [emphasis added]."[11] In addition, for torture by a non-state actor to be brought under the Convention, Canada has also argued that a public official ought to have "subjective and specific knowledge" of the impermissible acts before failing to take "reasonable preventive measures."[12] Even this is not sufficient for acquiescence according to Canada, which submits that acquiescence "*might* [emphasis added]" occur in such circumstances.[13] Further, lack of knowledge of something that ought to have been known is omitted from the test put forward by Canada.

Canada's position is not generally inconsistent with the understanding of acquiescence in international law to the extent that it rejects a strict liability standard such that every instance of an impermissible act would trigger State responsibility.[14] By introducing the "intentional

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[7] *Ibid*, para 18.
[8] Felice Gaer, "Violence against women by private actors: Is there State responsibility under the Convention against Torture?" (12 March 2015), *OMCT* (blog), online: http://blog.omct.org/violence-women-private-actors-state-responsibility-convention-torture/.
[9] *Ibid*.
[10] Canada's Submission, *supra* note 2, para 56.
[11] *Ibid.*
[12] *Ibid*.
[13] *Ibid.*
[14] Rhonda Copelon, "Gender Violence as Torture: The Contribution of CAT General Comment No 2" (2008) 11 NY City L Rev 229 at 254 ["Gender Violence as Torture, 2008"].

involvement" standard, however, Canada advances an interpretation that allows the State to avoid responsibility by simply claiming its officials were unaware.

In *Hajrizi Dzemajl et al v Yugoslavia*, the case that Canada relies on[15] in its submission, the complainants, in fact, in the Committee's words, "*rely on a review of international jurisprudence on the principle of 'due diligence'* and remind the current state of international law with regard to 'positive' obligations that are incumbent on States [emphasis added]."[16] In its findings, the Committee endorsed the complainants' claims and positions in full, thereby clearly adopting the approach later expressed in General Comment No. 2 which equates official "acquiescence" to torture or other ill-treatment by non-state actors with state failure to meet its due diligence obligations to prevent, stop, punish or ensure remedy for such acts. The Committee, in that case, found that when police failed to act to stop the burning of homes by private actors in which individuals remained hidden, the State acquiesced within the meaning of article 16 of the Convention.[17]

This case, in fact, supports the position advanced by Amnesty International that the failure of the Canadian state to prevent acts of torture or other ill-treatment against Indigenous women and girls constitutes acquiescence. Canada does not advance any other legal authority to support its narrow interpretation of "acquiescence."

As the section below shows, Canada's position runs afoul of not just the Committee's interpretation of the Convention itself, but also that of international law experts, UN bodies, and other sources of international law that guide interpretation on the state of the law on gender-based violence and violence against women as torture.

3. Support for the position advanced by the Committee and Amnesty International

Amnesty International submits that Canada's attempt to narrow the scope of articles 1 and 16 to exclude violence against women and other gender-based violence by non-state actors reflects a significant misunderstanding of the state of international human rights law on this matter. A narrow interpretation is out of step not just with the Committee's endorsement of the due diligence framework itself, [18] but with international law at large.

(A) <u>The due diligence framework</u>

Due diligence — the State responsibility to take every reasonable precaution to prevent, stop, punish and ensure remedies for human rights violations — has a specific characterization in the

[15] Canada's Submission, *supra* note 2, para 56.
[16] Committee against Torture, *Hajrizi Dzemajl et al. v Yugoslavia*, UN Doc CAT/C/29/D/161/2000 (2 December 2002), para 3.7, online: http://undocs.org/CAT/C/29/D/161/2000.
[17] *Ibid*, para 9.2.
[18] General Comment No 2, *supra* note 4, para 18. See also Committee against Torture, *Concluding observations on Greece*, UN Doc CAT/C/CR/33/2 (2004), para 4 and 5, online: http://undocs.org/CAT/C/CR/33/2; Committee against Torture, *Concluding observations on Ecuador*, UN Doc CAT/C/ECU/CO/3 (2006), para 17, online: http://undocs.org/CAT/C/ECU/CO/3; *Concluding observations on Bahrain*, UN Doc CAT/C/CR/34/BHR (2005), para 6 and 7, online: http://undocs.org/CAT/C/CR/34/BHR; and *Concluding Observations on Canada*, UN Doc CAT/C/CAN/CO/6 (2012), para 20, online: http://undocs.org/CAT/C/CAN/CO/6.

context of violence against women by non-state actors that is now so well-established and widely accepted that it is considered a rule of customary international law.[19]

The due diligence framework is well established across international human rights treaty mechanisms. Laid out in article 4(c) of the *Declaration on the Elimination of Violence Against Women* (1993), the standard for due diligence in the context of violence against women requires States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[20] The UN Committee on the Elimination of Discrimination against Women (CEDAW) has clarified that "States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-state actors which result in gender-based violence against women.."[21]

(B) The due diligence framework in the context of Indigenous women and girls

The requirement of due diligence is even greater where, as in the case of Indigenous peoples in Canada, government actions have already harmed groups or individuals or put them in situations of heightened risk of further human rights violations. A research report for a British Columbia provincial inquiry into the disappearance and murder of marginalized women in Vancouver called attention to this heightened standard: "The State must be cognizant that certain groups of females, such as girls, poor women and Aboriginal women, may be even more vulnerable to these acts of violence and that [the State is], therefore, under a heightened duty of due diligence vis-à-vis these groups."[22]

Amnesty International submits that in decisions potentially affecting the rights of Indigenous peoples, the Canadian authorities need to take account of the lasting harm created by such wrongs

[19] Special Rapporteur on Violence Against Women, its Causes and Consequences (Yakin Ertürk), *Report of the Special Rapporteur: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, UN Doc E/CN.4/2006/61 (20 January 2006) paras 19-29, online: http://undocs.org/E/CN.4/2006/61 ["Special Rapporteur Report (Ertürk), 2006"]..

[20] UN General Assembly, *Declaration on the Elimination of Violence Against Women*, 20 December 1993, UN Doc A/Res/48/104, article 4(c), online: http://www.un.org/documents/ga/res/48/a48r104.htm.

[21] Committee on the Elimination of Discrimination Against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017), para 24(b), online: https://undocs.org/CEDAW/C/GC/35.

[22] Dr. Melina Buckley, *Violence Against Women: Evolving Canadian and International Legal Standards on Police Duties to Protect and Investigate – A Research Report Prepared for the Missing Women Commission of Inquiry*, Missing Women Commission of Inquiry, June 2012, page 71, online: http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/RESE-5-June-2012-MB-Violence-Against-Women-Evolving-Legal-Standards-on-Police-Duties-to-Protect-Investigate.pdf. For commentary on State responsibility to consider intersectionality, see Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010), paras 18 and 26, online: https://undocs.org/CEDAW/C/GC/28.

as the Residential School program,[23] the Sixties Scoop,[24] and other efforts to forcefully assimilate Indigenous societies. The State must pay particular attention to the fact that Indigenous women and girls in Canada face much higher rates of violence than other women and girls.

(C) International jurisprudence and expert opinion

International law experts have also argued that domestic violence can constitute torture or other cruel, inhuman or degrading treatment or punishment,[25] both generally and with particular regard to Canada's inaction on violence against Indigenous women and girls.[26] International jurisprudence has evolved to support the view that privately inflicted gender-based violence can trigger State responsibility, including for torture or other ill-treatment.[27]

For instance, in *Opuz v Turkey*,[28] the European Court of Human Rights considered the State of Turkey's responsibility in a case where the husband of the applicant used violence since the beginning of the relationship, made death threats, and eventually killed the applicant's mother. Turkish authorities did not intervene despite complaints, having deemed this a "family matter."[29] The Court found this to be a violation of the State's positive obligation to act with due diligence

[23] For decades, Canada and Christian churches facilitated the systematic assimilation of Indigenous children through forcible indoctrination in non-Indigenous residential schools with a view to preventing these children from learning and practicing their own cultures while undergoing severe abuse. This system contributed to a cultural genocide of Indigenous peoples in Canada with lasting inter-generational trauma. See Indigenous Foundations, "The residential School System," *University of British Columbia*, online: https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/.

[24] This term refers to the forcible removal of Indigenous children from their families and communities, sometimes newborn children from the arms of their mothers, particularly in the 1960s. See Indigenous Foundations, "The Sixties Scoop and Aboriginal Child Welfare," *University of British Columbia*, online: https://indigenousfoundations.arts.ubc.ca/sixties_scoop/.

[25] See Rhonda Capelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1993-1994) 25 Colum Hum Rts L Rev 291; Claire Wright, "Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence" (2013) 24 Hastings Women's LJ 457. See also Felice Gaer, "Violence against women by private actors: Is there State responsibility under the Convention against Torture?" (12 March 2015), *OMCT* (blog), online: http://blog.omct.org/violence-women-private-actors-state-responsibility-convention-torture/, where she notes that "acts by non-state or private actors are matters of concern if the State fails to exercise due diligence."

[26] Brenda L Gunn, "Engaging a Human Rights Based Approach to the Murdered and Missing Indigenous Women and Girls Inquiry" (2017) 2:2 Lakehead LJ 89, at 106, where Professor Gunn addresses Canada's responsibility for domestic violence under the Torture Convention noting that Canada has had "knowledge," in the meaning of the Convention, of violence against indigenous women for decades, and has failed to act decisively.

[27] Gender Violence as Torture, 2008, *supra* note 14, page 241. See also the following selected cases: *Maria da Penha v Brazil*, Case 12.051, Report No 54/01, OEA/SerL/V/II.111 Doc 20 rev at 704 (2000), online: http://hrlibrary.umn.edu/cases/54-01.html, where the Inter-American Commission on human rights found Brazil to have failed to take steps to prevent and investigate a domestic violence complaint under the American Convention of Human Rights, American Declaration on the Rights and Duties of Man and the Declaration of Belém do Pará; CEDAW, Communication No 2/2003, *AT v Hungary*, 26 January 2005, 32nd Sess, online: http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf, where the CEDAW Committee ruled that Hungarian authorities failed to protect the complainant who suffered domestic violence.

[28] *Opuz v Turkey*, (Application no 33401/02), European Court of Human Rights, Judgment 9th June 2009, online: http://www.refworld.org/cases,ECHR,4a2f84392.html.

[29] *Ibid*, para 195.

to protect the right to life of the applicant's mother since the authorities "knew or ought to have known"[30] of the immediate risk to her life at the hands of a third party (the husband).[31]

In *Z and Others v the United Kingdom*, the Court found that the children in that case were not effectively protected from abuse, ruling that the State is obligated to take "reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[32] In clarifying this threshold, the Court stated in another case that the test does not require a high "but for" threshold to engage State responsibility, but rather the failure "to take reasonably available measures which could have […] a real prospect of altering the outcome or mitigating the harm."[33]

The Inter-American Court of Human Rights has found that States bear a responsibility to prevent violations of human rights committed by non-state actors, including in the context of domestic violence.[34] The UN Human Rights Committee has stated that domestic violence could trigger the right under article 7 of the International Covenant on Civil and Political Rights to be free from torture and other ill-treatment.[35] The Human Rights Committee has also stated that:[36]

> States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons.

And further, that:[37]

> It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

The 1995 Inter-American Commission report on Haiti found that the State's failure to prevent rape and sexual abuse at the hands of private actors, including paramilitary, amounted to a violation of several human rights instruments, including the Convention against Torture.[38]

In 1996, more than twenty years ago, the UN Special Rapporteur on violence against women stated that "the argument that domestic violence should be understood and treated as a form of torture

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[30] *Ibid*, para 130.
[31] *Ibid*, para 149.
[32] *Z and Others v the United Kingdom* (application no. 29392/95), para 73.
[33] *E and Others v the United Kingdom* (application no. 33218/96), para 99.
[34] *Velázquez Rodriguez v Honduras*, Inter-Am Ct H R, (Ser C) No 4 (1988), dated (29 July 1988), para 172, online: http://www.refworld.org/cases,IACRTHR,40279a9e4.html.
[35] Human Rights Committee, *General Comment No 28: Equality of rights between men and women (Article 3)*, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000), para 11, online: http://www.refworld.org/docid/45139c9b4.html.
[36] Human Rights Committee, *General Comment No 20: Article 7*, (10 March 1992), para 13, online: http://www.refworld.org/docid/453883fb0.html.
[37] *Ibid*, para 2.
[38] Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Haiti*, Doc 10 rev OEA/Ser.L/v/II.88 (9 February 1995), para 129, 130 and 134, online: http://www.cidh.org/countryrep/EnHa95/EngHaiti.htm.

and, when less severe, ill-treatment, is one that deserves consideration."[39] In her report, the Special Rapporteur conducted an analysis of domestic violence as torture:[40]

> It is argued that, like torture, domestic violence commonly involves some form of physical and/or psychological suffering, including death in some cases. Secondly, domestic violence, like torture, is purposeful behaviour which is perpetrated intentionally. Men who beat women partners commonly exercise control over their impulses in other settings and their targets are often limited to their partners of children. Thirdly, domestic violence is generally committed for specific purposes including punishment, intimidation and the diminution of the woman's personality. Lastly, like torture, domestic violence occurs with at least the tacit involvement of the State if the State does not exercise due diligence and equal protection in preventing domestic abuse. This argument contends that, as such, domestic violence may be understood to constitute a form of torture.

Recognizing the nexus between torture and domestic violence since then, the UN Special Rapporteurs on violence against women have at different times concluded that gender-based violence can and does amount to torture in particular circumstances.[41] In 2011, the Special Rapporteur noted: "The problematic nature of human rights discourse regarding violence, which has until recently regarded violence mostly as public violence perpetrated by or condoned by the State, and which often carries with it the elements of spectacle, has led to the marginalization and invisibility of violence perpetrated against women in the private sphere."[42]

Conclusion

The term "acquiescence" within the definition of torture under the Convention against Torture was first proposed by the USA during the drafting of the Convention in 1978, responding to two early drafts of that Convention. According to a summary by the UN Secretary General:

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[39] Special Rapporteur on Violence Against Women, its Causes and Consequences (Ms Radhika Coomaraswamy), *Report of the Special Rapporteur: Submitted in accordance with Commission on Human Rights Resolution 1995/85*, 52nd Sess, UN Doc E/CN.4/1996/53 (5 February 1996), para 50, online: http://undocs.org/E/CN.4/1996/53.

[40] *Ibid*, paras 42-49.

[41] Special Rapporteur on Violence Against Women, its Causes and Consequences (Dubravka Šimonović), *Report of the Special Rapporteur: Adequacy of the international legal framework on violence against women*, 72nd Sess, UN Doc A/72/134 (19 July 2017), paras 17, 43 and 86, online: http://undocs.org/A/72/134. See also: Special Rapporteur on Violence Against Women, its Causes and Consequences (Rashida Manjoo), *Report of the Special Rapporteur: State Responsibility for eliminating violence against women*, 23rd Sess, UN Doc A/HRC/23/49 (14 May 2013), para 27, online: http://undocs.org/A/HRC/23/49; Special Rapporteur on Violence Against Women, its Causes and Consequences (Rashida Manjoo), *Report of the Special Rapporteur: Violence against women – Twenty years of developments to combat violence against women*, 26th Sess, UN Doc A/HRC/26/38 (28 May 2014), para 21, online: http://undocs.org/A/HRC/26/38, where the Rapporteur notes the relevance of the Convention against Torture to combating violence against women, and para 24 of the report where the Rapporteur notes her observations on CAT General Comment No 2 (*supra*, note 4); Special Rapporteur on Violence Against Women, its Causes and Consequences (Ms. Radhika Coomaraswamy), *Report of the Special Rapporteur: Violence against women in the family*, 55th Sess, UN Doc E/CN.4/1999/68 (10 March 1999), para 22, online: http://undocs.org/E/CN.4/1999/68, where the Rapporteur notes "scholars have argued that domestic violence is a form of torture and should be dealt with accordingly."

[42] Special Rapporteur on Violence Against Women, its Causes and Consequences (Rashida Manjoo), *Report of the Special Rapporteur: Multiple and intersecting forms of discrimination and violence against women*, 17th Sess, UN Doc A/HRC/17/26 (2 May 2011), para 55, online: http://undocs.org/A/HRC/17/26.

> […] the United States proposes the concept of "acquiescence" of a public official rather than "instigation by" so that public officials have a clear duty to act to prevent torture.[43]

The idea behind the inclusion of "acquiescence" was therefore to underline and clarify a positive, active duty of States to prevent torture (and other ill-treatment) – very much like the duty by States to prevent other acts violating human rights by non-state actors through exercising due diligence. There is no indication that for a finding "acquiescence" in torture or other ill-treatment by officials, their "intentional involvement" needs to be established, as Canada claims – rather, officials need to be intentionally involved in preventing such acts.

Canada's position is that violence against women and gender-based violence by non-state actors, including the staggering and disproportionate rates of violence against Indigenous women and girls that is currently subject of a National Inquiry in Canada, is not within the ambit of the Convention against Torture, other than "in the most exceptional circumstances."[44]

This position is inconsistent with the Committee's own interpretation of the Convention, as well as with international jurisprudence and academic opinion. Amnesty International is deeply concerned that the adoption or acceptance of Canada's position would be a regressive step in the development of international human rights law and damaging to the decades of international legal advocacy to recognize that violence against women and gender-based violence, including by non-state actors, are grave violations of numerous international human rights, including in many circumstances the right to be free from torture and other ill-treatment.

Canada's claim that there has not been acquiescence by the State in the longstanding and entrenched pattern of violence against Indigenous women and girls is clearly contradicted by the numerous concerns expressed and recommendations made by various UN and Regional human rights bodies and experts over the years pointing to systemic government failure to prevent, stop, punish or ensure redress for such violence. It is also belied by the commendable and long overdue step that the Canadian government itself has taken in establishing a National Inquiry into Missing and Murdered Indigenous Women and Girls,[45] the goal of which, in Canada's words, is to "address and prevent violence against Indigenous women and girls."[46]

In Amnesty International's view, violence against Indigenous women and girls is the result of State inaction to remedy the lasting impacts of colonialism, institutionalized racism and glaring socioeconomic inequities including widespread poverty. It is one of the strongest possible examples of a failure of due diligence at all levels of government. It is Amnesty International's submission that in this context and for the purposes of the Convention, when such violence is directly perpetrated by non-state actors it is inflicted with the consent or acquiescence of officials.

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[43] Commission of Human Rights, 35th session, item 10 of provisional agenda, Summary prepared by the Secretary-General in accordance with Commission resolution 18 (XXXIV), UN Doc. E/CN.4/1314, 19 December 1978, para. 29.

[44] Canada's Submission, *supra* note 2, para 56.

[45] For more information on the National Inquiry, see the website: National Inquiry into Missing and Murdered Indigenous Women and Girls, online: http://www.mmiwg-ffada.ca/.

[46] Crown-Indigenous Relations and Northern Affairs, "Background on the inquiry" (22 April 2016), *Government of Canada*, online: https://www.rcaanc-cirnac.gc.ca/eng/1449240606362/1534528865114.