RESPONSE TO CANADA'S 19th and 20th PERIODIC REPORTS (COVERING THE PERIOD OF JUNE 2005 TO MAY 2009) TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

JANUARY 2012

Joint Submission by Treaty 4 First Nations, the Union of British Columbia Indian Chiefs, Indigenous World Association, Assembly of First Nations of Québec and Labrador, International Indigenous Women's Forum (North America), International Organization of Indigenous Resource Development and the International Indian Treaty Council

Introduction

This joint submission comments on Canada's Nineteenth and Twentieth Reports (Canada's Report) to the Committee on the Elimination of Racial Discrimination (the Committee) on its compliance with the UN *International Convention on the Elimination of Racial Discrimination* (CERD). It focuses specifically on Canada's enactment of Bill C-10, *the Safe Streets and Communities Act*.[1]

This Omnibus Bill combines nine legislative measures into one bill aimed at "getting tough on crime" which include imposing mandatory minimum sentences for criminal offences and limiting the availability of conditional sentence orders. These are imposed without any judicial or prosecutorial discretion.[2] International norms require proportional sentencing. Indeed, in General Comment XXXI, this Committee has noted with concern that special attention must be paid to any system of minimum punishments and obligatory detention due to the likelihood of disproportionately negative impacts on marginalized groups.[3]

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

The Canadian Bar Association has criticized "bundling several critical and entirely distinct criminal justice initiatives into one omnibus Bill" as "inappropriate, and not in the spirit of Canada's democratic process." There is also widespread expert criticism to the legislation based on the determination that it will be costly and will not achieve its stated purpose – to make streets and communities safer – but will actually have a detrimental effect.[4] In fact, United States studies reveal that where similar approaches have been taken, the results have been costly, ineffective penal systems that have been since cancelled due to these failures. Furthermore, the statistical reality in Canada is that

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

[2] The Canadian Bar Association, "Submission on Bill C-10: *Safe Streets and Communities Act*" (Ottawa: Canadian Bar Association, 2011) at 4.

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

[4] The Canadian Bar Association, "Submission on Bill C-10: *Safe Streets and Communities Act*" (Ottawa: Canadian Bar Association, 2011) at 2.

crime has been declining over the past 20 years and between 2009 and 2010, the overall volume of criminal incidents fell by 5 per cent, similar to the relative severity of crimes.[5]

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

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

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

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

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

> "99. Three *Criminal Code* provisions directly or indirectly support alternatives to imprisonment for Aboriginal offenders:
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> - The sentencing principle in subsection 718.2(e) reminds sentencing judges that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." Jurisprudence has resulted in non-carceral or lower carceral sentences for Aboriginal offenders in appropriate cases and has led to the creation of three experimental courts to deal specifically with Aboriginal accused persons.

[5] The Globe and Mail, "Crime falls to 1973 levels as Tories push for sentencing reform" 21 July 2011; Statistics Canada.

- Section 742.1 allows sentencing judges to impose conditional sentences where specific criteria are met, whereby convicted offenders serve their sentences in the community rather than in a carceral institution, but subject to stringent conditions. Given that the majority of Aboriginal crimes involve non-violent property offences, resulting in less severe sentences, substantial numbers of Aboriginal offenders have received conditional sentences rather than custodial sentences.

- Subsection 717(1) authorizes "alternative measures" whereby offenders may be diverted from the formal courts system in appropriate cases to be dealt with through rehabilitative programs. The Government of Canada's Aboriginal Justice Strategy (AJS), delivered in partnership with provincial and territorial governments, as well as Aboriginal communities, seeks to divert Aboriginal offenders, wherever possible, from the mainstream justice system. Operating at the community level, AJS uses traditional dispute resolution methods to address Aboriginal over representation in Canada's federal institutions and provides opportunities for victims and communities to participate in the sentencing of offenders, healing circles, mediation, and arbitration mechanisms for civil disputes. Diversion through AJS programs can take place pre- or post-charge or at the time of sentencing. A 2006 recidivism study indicates that offenders who participate in AJS programs are approximately half as likely to re-offend as those offenders who do not participate in these programs."

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

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

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

> "5. States parties should pursue national strategies the objectives of which include the following…
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> (e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;
> …
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> 27. Prior to the trial, States parties may, where appropriate, give preference to non-judicial or parajudicial procedures for dealing with the offence, taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples.
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> …
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> 36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.[6]

Recommendation:

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

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