



ASSEMBLY OF FIRST NATIONS

**SUBMISSION TO THE HOUSE OF COMMONS
STANDING COMMITTEE ON PUBLIC SAFETY AND
NATIONAL SECURITY**

Study on Systemic Racism in Police Services in Canada

August 7, 2020



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About the Assembly of First Nations

The Assembly of First Nations (AFN) is the national body representing First Nations governments and approximately one million people living on reserve and in urban and rural areas. The National Chief is elected every three years and receives direction from the Chiefs-in-Assembly. The AFN is dedicated to advancing the priorities of First Nations through review, study, response and advocacy on a broad range of issues and policy matters.

Context and Introduction

The AFN has various mandates to challenge systemic racism and to press for action. These include action to secure a national action plan for implementation of the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and a jointly developed legislative framework during this Parliament for the implementation of the UN Declaration on the Rights of Indigenous Peoples (the Declaration).

The Declaration is not merely aspirational, as Prime Minister Justin Trudeau acknowledged before the United Nations General Assembly in a 2018 speech. The AFN has identified that the Declaration, and the larger body of binding international human rights law in which it is situated, **requires** a human-rights-based approach to address the racism and discrimination that has caused profound harm to Indigenous peoples in Canada. These legal obligations include addressing systemic discrimination in policing services. The AFN reiterates the urgency for this Parliament to pass a legislative framework supporting the full implementation of the Declaration, in keeping with the commitment in the 2019 Speech from the Throne.

We also note that the World Health Organization defines violence as “the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.” This definition notably includes violence perpetrated by states against collectives.¹

In this regard, Canada is regularly reviewed by international human rights bodies and is found wanting in matters relating to policing and Indigenous peoples’ human rights. For example, the United Nations Committee on the Elimination of Racial Discrimination (CERD) is a human rights treaty body responsible for regularly monitoring State performance and compliance with the United Nations Convention on the Elimination of

¹ Krug, Etienne, Linda Dahlberg, James Mercy, Anthony Zwi, and Rafael Lozano, eds. 2002. *The World Report on Violence and Health*. Geneva: World Health Organization.



Racial Discrimination (CERD). The last two reviews of Canada² (2012 and 2017) focused significantly on racism impacting Indigenous peoples. We recommend that this Standing Committee review the CERD concluding observations as well as the recommendations of other UN bodies, such as the UN Committee on the Elimination of Discrimination Against Women), and reports, such as the 2017 report of the UN Expert Mechanism on the Rights of Indigenous Peoples on Restorative Justice.³

From UN human rights guidance specifically targeting Canada and the testimony of Indigenous witnesses before this Standing Committee, the Committee should be able to conclude that a much more vigorous, and less tentative, approach to a national anti-racism strategy is required in the context of policing.

Without a bold, action-oriented approach, Canada cannot improve its performance in meeting its human rights obligations to Indigenous peoples. A distinct strategy to address racism experienced by First Nations in policing is needed. Such a strategy must be grounded in:

- The minimum standards of the UN Declaration on the Rights of Indigenous Peoples, and
- The Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls.

There are several key elements for such a strategy:

1. Passage of a federal bill supported by First Nations to support the full implementation of the UN Declaration on the Rights of Indigenous Peoples.
2. Work with First Nations in a truly collaborative manner on a legislative framework to support First Nations-led policing, including the financial resources required to support First Nations policing services as essential government services.
3. A national action plan to implement the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls.
4. Work with First Nations on amendments or on new legislation respecting the RCMP (the RCMP Act and legislation respecting oversight bodies).
5. Continuous respectful engagement with First Nations in all parts of Canada.

² UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations* (Canada), 4 April 2012, CERD/C/CAN/CO/19-20, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FCAN%2FCO%2F19-20&Lang=en [accessed 24 July 2020]; UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations* (Canada), 25 August 2017, CERD/C/CAN/CO/21-23, available at <https://undocs.org/CERD/C/CAN/CO/21-23> [accessed 24 July 2020]

³ United Nations Human Rights Council. 2014. A/HRC/EMRIP/2014/3/Rev.1. Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth and persons with disabilities. Study by the Expert Mechanism on the Rights of Indigenous Peoples. Seventh session, 7–11 July 2014.



6. The inclusion of First Nations leadership as full participants in intergovernmental meetings (federal/provincial/territorial) on policing, justice and corrections at the ministerial level.

Without an informed, action-oriented focus, we will lose ground in the battle to uproot systemic discrimination in policing services in Canada. It is evident to all that First Nations have been locked in a battle for our lives and safety for hundreds of years; this is a result of many forms of overt and systemic discrimination generated by institutions of the State including policing services.

With respect to the safety and security of First Nations, Canada has not delivered on the most fundamental human rights. It is obliged to provide these rights as a matter of Treaty, international law, constitutional law, federal and provincial/territorial statutory law and First Nations law.

We ask you to consider for a moment, the reality and the history of police violence and other state violence imposed on Indigenous peoples (such as the Indian Residential School system). Canada stands at a very critical juncture. Decades of inaction and hesitancy now starkly reveal the lack of government action to protect Indigenous peoples' lives, our safety, and our well-being.

We also bring your attention to the fact that systemic discrimination in policing as it impacts First Nations people has dual aspects: over-policing and under-policing.

In a paper for the Ipperwash Inquiry, Jonathan Rudin defined over-policing as “the practice by the police of focusing their attention inordinately in one particular geographic area (or neighbourhood) or on members of one particular racial or ethnic group.”⁴ Over-policing is evident in discriminatory targeting of First Nations peoples by police and the inappropriate and excessive use of force against First Nations people. Over-policing is also tied to the exercise of police discretion.⁵ We see over-policing in urban, rural and remote settings.

Over-policing is evident when First Nations people assert and exercise inherent rights and jurisdiction over our lands and resources and are then subjected to surveillance and police actions. Public figures in Canada often invoke “the rule of law” to condemn First Nations land defenders or to encourage police actions to dismantle camps or blockades. In doing so, they are defining rule of law in a way that is prejudicial and inaccurate. In any society committed to respect for international human rights and reconciliation with Indigenous peoples, our own laws and protocols must be given equal respect. The rule of law cannot be one-sided.

⁴ Rudin, J. 2000. Aboriginal Peoples and the Criminal Justice System.

⁵ Ibid.



Governments have failed to coordinate with each other and Indigenous peoples to collect and analyze relevant identity-based data on policing. Consequently, in this submission, we have had to rely on research undertaken by news organizations.

As of June 2020, a CTV news analysis reported that there have been at least 22 police shootings of Indigenous people.⁶ This study concluded that since 2017, an Indigenous person is more than 10 times more likely to have been shot and killed by a police officer than a white person in Canada. This report also concluded that more than 70 per cent of those dying in encounters with police suffered from mental health or substance abuse problems.

Research by CBC News in 2017 examined 461 cases of people dying in encounters with police. Indigenous people were overly represented in these deaths relative to their population numbers.⁷

A 2019 report from the Council of Canadian Academies found that:

- Indigenous Canadians are 11 times more likely than non-Indigenous Canadians to be accused of homicide.
- Indigenous Canadians are 56 percent more likely to be victims of crime than other Canadians.⁸

These appalling statistics stand in stark contrast to the outstanding record of some First Nations police services, who have never had shooting related fatalities over the decades that they have been in operation. In over 36 years of policing nine Cree communities, the Cree Nation police force has zero shooting related deaths.⁹ In its 26 years of existence, the Nishnawbe Aski Police Service in Northern Ontario has never shot nor killed anyone, and no officer has died in the line of duty despite a despairing lack of resources.¹⁰

Rudin describes “under-policing” as situations where the police choose not to act even where there is evidence that crimes have been committed. In other words, Indigenous peoples are under-served as victims of crime. The work and determination of the families, activists and First Nations women has put this issue regarding missing and murdered Indigenous women and girls, where everyone could see it. The AFN maintains that

⁶ CTV News (Ryan Flanagan). June 19, 2020. “What we know about the last 100 people shot and killed by police in Canada”. Available at: <https://www.ctvnews.ca/canada/what-we-know-about-the-last-100-people-shot-and-killed-by-police-in-canada-1.4989794>

⁷ CBC News. 2015. “Deadly Force”. Available at: <https://newsinteractives.cbc.ca/fatalpoliceencounters/>

⁸ Canadian Council of Academies, The Expert Panel on Policing in Indigenous Communities.. 2019. *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. Ottawa, Council of Canadian Academies.

⁹ Source. Bill Namagoose, Executive Director, Cree Nation Government.

¹⁰ The Canadian press. “Canada's largest indigenous police force has never shot anyone dead”, the *Globe and Mail*. July 12 2020.



“under-policing” is also evident in the appalling lack of support for First Nations policing services.

Several First Nations have launched complaints under the Canadian Human Rights Act against the federal government regarding the persistent, inadequate funding available for their police forces. The Mushkegowuk Council, representing seven First Nations covering a large area in Northern Ontario, argues it receives lower-quality police services and facilities than non-Indigenous communities. It launched a complaint of discrimination based on race (CHRT File No. T1683/3811, T1684/3911), after two men who were being held for intoxication burned to death at a police detachment on Kashechewan First Nation more than a decade ago.

The Pekuakamiulnuatsh First Nation (CHRT File No. T2251/0618) has two actions: one in the Quebec Superior Court and another in the Canadian Human Rights Tribunal (CHRT). The matter before the Quebec Superior Court is a claim to recover approximately \$1.6 million dollars from Canada and the province for deficits accumulated since April 1, 2014 for policing services provided on its territory. Despite being filed in April 2011, the claim is still in the early stages of litigation. The First Nation had obtained three Orders for Canada to provide adequate disclosure to proceed to a hearing on the merits.

The matter before the CHRT is in relation to discriminatory treatment and ending discriminatory funding practices under the FNPP. In this matter, the First Nation is seeking document disclosure from Canada to proceed to a hearing on the merits. It is exceedingly difficult to seek justice for racial discrimination in the Canadian justice system.¹¹

Systemic discrimination in the policing and justice systems has been studied by a collection of federal and provincial inquiries and commissions over decades. These studies have documented the pattern of discriminatory policing and criminalization of First Nations people as well as the discriminatory under-servicing of First Nations people who are victims of crime.

First Nations can no longer afford to argue about the existence of overt and systemic discrimination. To deny or to express hesitation about the existence of systemic discrimination is willful blindness given the many conclusions, recommendations and Calls to Action from dozens of inquiries that the Crown itself commissioned, and paid for, over the past decades.

Canada is obliged by the Constitution and international human rights law to take action in order to address the many forms of discrimination experienced by First Nations women,

¹¹ Tanovich, David M.. "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40. (2008). <http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/21>



men, boys, and girls by police and by the justice system. Action must be taken in consultation and cooperation with us, as nations and peoples, in a way that respects our inherent title and jurisdiction.

We cannot address the disturbing reality of overt and systemic discrimination in Canada through piecemeal reforms or by tinkering with existing legislative frameworks. That approach has never worked. If Canada is serious about protecting and respecting the human rights of Indigenous peoples, it is time for action that is both foundational and transformative.

In this submission, the AFN sets out several specific actions necessary for addressing systemic racism in Canada's policing services.

First, there is a need for transforming models of policing in First Nation communities (on and off reserve) to align with First Nations laws, values and jurisdictions. Much work needs to be done to tackle unchecked inherent biases towards First Nations peoples in the ranks of Canada's policing services and to encourage an environment where First Nations can develop their own policing models that best suit the needs of their communities. This work will require legislative change and reallocation of resources.

Canada must acknowledge the fact that systemic discrimination is a reflection of white supremacist values. Systemic discrimination is so often denied or misunderstood by those who are not racialized precisely because the dominance of power structures that favour white people and disadvantage Indigenous peoples has been normalized for so long.

Confronting and ending the systemic racism that exists in Canada's policing services is a significant, timely, and urgent matter. The AFN has long been an advocate for transforming the Canadian policing and justice systems. Neither have served First Nations peoples well.

Canada also needs to provide greater protections against hate speech and hate crimes through increased sanctions under the criminal law. A more effective national response is required to address white supremacist ideology when it is acted out and acted on.

Implementation Inertia

Since 1989, more than 20 commissions of inquiry have examined systemic racism towards First Nations people in Canada's policing and justice systems.¹² In 1989, the Royal Commission on the Donald Marshall Jr., Prosecution, prosecutors found the criminal justice system failed Mr. Marshall "at virtually every turn from his arrest and

¹² Council of Canadian Academies, *Toward Peace, Harmony, Well-Being*. (Ottawa, ON: The Expert Panel on Policing in Indigenous Communities, Council of Canadian Academies, 2019).



wrongful conviction for murder in 1971” up until his acquittal in 1983.¹³ The Commission stated that the miscarriage of justice occurred because of his Indigenous identity. The recommendations of the Commission, including the establishment of a Native Justice Institute, were never implemented. In the early 1990’s, the Aboriginal Justice Inquiry of Manitoba began its examination of the response of the policing and justice systems to the murder of Helen Betty Osborne, the police shooting death of John Joseph Harper and many other matters involving discrimination in the justice system in Manitoba. This was followed by The Aboriginal Justice Implementation Commission.

In 1991, a public inquiry into policing in relation to the Blood tribe investigated a series of suspicious murders of Blood Tribe members, including the 1988 murder of Bernard Tallman, Jr. The inquiry made 36 recommendations aimed at improving the timeliness of missing person investigations. The fact that this remains a recommendation 28 years later in the 2019 National Inquiry into Missing and Murdered Indigenous Women and Girls final report indicates that the 1991 recommendations were not taken seriously by police.

Following the shooting death of Anthony O’Brien “Dudley” George in 1995, the Ipperwash Inquiry Report found that the deployment of a Tactical Response Unit, which resulted in George’s death, was unfounded and merely a “show of force” towards First Nations peoples based on wrong information about protestors and/or blockaders.¹⁴ In other words, the accusations that First Nation people in Ipperwash Provincial Park were carrying automatic weapons were false. The Report provided multiple recommendations to avoid future violent confrontations, but given that the RCMP, military, and other law enforcement agencies are deployed almost every time First Nations people carry out demonstrations, it is clear that the recommendations arising from various inquiries are many times never considered, much less implemented.

Some recommendations have been implemented in ways that do not reflect the original intent of the inquiry. For example, the First Nations Policing Program (FNPP) was established in 1992 to provide alternative forms of policing in First Nations territories. However, chronic underfunding and inadequate resourcing has left many First Nations without fiscal resources to determine the models of policing they deem appropriate, as originally envisioned by the program. The recommendations in various inquiries that call for more First Nations control over their own policing matters have never come to fruition.

The National Inquiry into Missing and Murdered Indigenous Women and Girls is Canada’s latest inquiry into systemic racism. The final report found that the police’s failure to properly protect First Nations women, girls, and two-spirit people was tantamount to genocide. The Calls to Justice explicitly call on all police services “to acknowledge the

¹³ Province of Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution*. (Nova Scotia, The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989) (Chair: T. Alexander Hickman CJ) at 1.

¹⁴ Ontario, *The Report of the Ipperwash Inquiry: Volume 4 – Executive Summary* (Ontario, The Report of the Ipperwash Inquiry, 2007) at 76.



historic and current relationship between Indigenous women, girls, and 2SLGBTQQIA people and the police has been largely defined by colonialism, racism, bias, discrimination, and fundamental cultural and societal differences.”¹⁵ In upholding the rule of law, police services are obliged to address the systemic racism within their institutions, policies and operational practices.

While the federal government accepted the National Inquiry’s report, the government has postponed the release of a national action plan in response to the report due to the COVID-19 pandemic. Given the scope and urgency of the matter, and a reported increase in domestic violence as a result of the pandemic, any delays to the Calls to Justice are unacceptable. The AFN is recommending that the federal government and all police services accelerate action to implement the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women, Girls, and Two-Spirit People. Additionally, the Standing Committee should re-examine the recommendations of all published Inquiries and Commissions since 1989 regarding systemic racism in Canada’s policing system to finally move forward on implementation. In addition to these reports, are countless reports from human rights commissions and others on issues such as on racial profiling.

Reallocation of Resources and De-militarization of Police

A linkage between the militarization of police and systemic racism is well-documented. While many studies focus on the militarization of police in the United States, a 2016 Canadian study¹⁶ indicated that the deployment of SWAT teams, which was once a fallback, last resort option, has become a routine practice in many Canadian police forces. In fact, since 1980, the use of SWAT teams has risen 2100%. The RCMP are perceived by some as a paramilitary force far removed from the values of the communities in which they serve.¹⁷

This has adverse effects on First Nations peoples who are already overrepresented in the policing and justice systems. As the authors of the above study note, the militarization of police “does not merely affect interactions between the state and criminal offenders, it changes what policing is by changing what police officers do. This means that police officers who are trained like soldiers can only respond to situations like soldiers.”¹⁸

We have recently witnessed this response in New Brunswick, Alberta, and Saskatchewan where Chantel Moore, Rodney Levi, Chief Alan Adam, and Evan Penner, were either shot and killed or assaulted by police officers in an excessive use of force for the

¹⁵ Canada, *Reclaiming Power and Place: The Final Report on the National Inquiry into Missing and Murdered Indigenous Women and Girls, Call to Action* (Ottawa, ON: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019).

¹⁶ Kevin Walby & Brendan Roziere, “Rise of the SWAT Team: Routine police work in Canada is now militarized”, online: *The Conversation* < <https://theconversation.com/rise-of-the-swat-team-routine-police-work-in-canada-is-now-militarized-90073>>

¹⁷ First Nations Regional Justice Forum, Chilliwack. July 2019.

¹⁸ Ibid.



circumstances. It is not surprising that public calls to “defund the police” are gathering increased attention and support. The AFN suggests this means shifting more fiscal resources from police services to other social supports. We maintain that many of the police killings of First Nations people could have been prevented if the proper social support services were available and adequately funded.

The AFN offers several recommendations:

- Fiscal resources should be redirected from current mainstream policing models to much needed social support systems such as mental health services, homelessness prevention, and other social work services that do not rely on police presence.
- That an immediate review of RCMP operational practices involving “wellness checks” be undertaken with First Nations.
- Establish a zero-tolerance policy for excessive use of force by police.

Legislative Changes Are Needed Requiring Respect of First Nations Laws, Governance, and Human Rights

RCMP Act and RCMP oversight legislation

The *RCMP Act* requires a full review, and likely a major overhaul in order to:

- Make space for First Nations’ self-determined policing services;
- Create a clear legislative mandate for the RCMP to work productively with provinces and First Nations; and
- Affirm and support First Nations inherent jurisdiction, through stand-alone legislation or by agreement.

Other legislative changes are needed to empower civilian oversight bodies to hold police properly accountable for actions involving police brutality.

Increased police accountability

A recent CBC article outlined how the investigations of the Civilian Review and Complaints Commission (CRCC) have been stalled by the RCMP, in some cases for more than a year.¹⁹ When reports are delayed by the RCMP, accountability suffers. We recommend a review of the *RCMP Act* to empower civilian oversight committees to be fully independent of the RCMP in their investigations regarding police misconduct.

¹⁹ Catherine Tunney, “RCMP watchdog’s misconduct reports caught in limbo, stalling their release”, online: CBC News <https://www.cbc.ca/news/politics/rcmp-complaint-watchdog-1.5594861>



Criminal Code & Human Rights amendments to tackle inherent biases

The RCMP was established in 1873 to control First Nations. At the time, Canada enacted such legislation as the *Gradual Enfranchisement Act* and the *Lands Dominion Act* to remove First Nations peoples from their land and transfer those lands to settler newcomers. Canada's founding leaders soon realized that they needed a paramilitary police organization to enforce the legislation. In 1884, Sir John A. MacDonald stated that the objective of the RCMP was to "keep peace between Whitemen + Indians."²⁰ However, peace was never made as the legislation the RCMP enforced was based on attitudes of white racial supremacy that deemed First Nation people inferior. This attitude persists in Canadian society today and, unfortunately, many RCMP officers carry it whether implicitly or not.

Many of the inquiries mentioned in this brief investigated police misconduct negatively impacting First Nation people. Other inquiries outline much of the same. In 1988, the Manitoba Aboriginal Justice Inquiry found that the racism, sexism, and indifference by Canada's police and justice systems were the main factors in the failure to bring the murderers of Helen Betty Osbourne to justice. In 2003, the inquiry into the death of Neil Stonechild revealed that Saskatchewan police were carrying out "starlight tours" where officers would leave First Nations men on the outskirts of town in freezing temperatures. In 2010, the Aboriginal Peoples Television Network (APTN) reported that Winnipeg police were involved in at least 76 cases of starlight tours.

Independent of official commissions and inquiries, numerous complaints against the RCMP have been made by First Nations peoples. During the 2016 case involving the killing of Colten Boushie by Gerald Stanley, the Boushie family raised numerous complaints about the actions of the RCMP including:

- Officers drawing their weapons on Colten's mother, who had been mourning her son. They proceeded to ask "if she had been drinking."
- The mishandling of evidence during the investigation (e.g. the car that Colten had been shot in was left uncovered, allowing footprints and DNA evidence to be washed away by the rain).

Similar complaints regarding the negligent actions by the RCMP to properly investigate the murders of First Nations men and women have also been made in such investigations regarding Jon Styres, Cindy Gladue and Barbara Kentner, among others.

The RCMP have also been implicated in many sexual and gendered assault allegations. The final report on the National Inquiry into Missing and Murdered Indigenous Women and Girls detailed RCMP negligence in dealing with the systemic epidemic of violence against Indigenous women, girls, and two-spirit people. In May of 2019, CBC reported on

²⁰ M Gouldehawk, "A Condensed History of Canada's Colonial Cops: How the RCMP secured the imperialist power of the north", (10 Mar 2010), online: *The Inquiry* <https://thenewinquiry.com/a-condensed-history-of-canadas-colonial-cops/>



security footage that caught a Kelowna RCMP officer harassing an Indigenous woman who had reported a sexual assault. The questioning officer asked if “she was turned on” by the attack and pressed her further by asking if she was aroused “even subconsciously.”

Another glaring example occurred in 1991 when Leo LeChance, a Cree man, was shot and killed by members of two well-known white supremacy groups. It was later revealed at trial that one of the murderers, a self-proclaimed white supremacist, was an informant for the RCMP. He was put into a witness protection program after serving 3 years for manslaughter. Recently, the head of the Canadian Security Intelligence Service (CSIS) stated his agency is increasingly preoccupied with the threat of violent right-wing extremism and white supremacists.²¹ The collected reports on the actions of RCMP officers reflect longstanding biases against First Nations people.

One avenue to address systemic racism and white supremacy is to amend the Criminal Code to outlaw white supremacist groups and “lone wolfs,” reforms in the law relating to hate crimes, and listing white supremacists as terrorist groups. The Department of Justice Canada has made similar recommendations, especially towards developing a unified definition of hate crime and the inclusion of the definition in the Criminal Code. According to Justice Canada, the definition should not require an exclusive motivation threshold (that hate or bias was *in part* or *in whole* responsible for the commission of the offense) and must include a “real or perceived” group status in regard to what constitutes a hate crime.²² Amending the Criminal Code with an updated definition would better reflect the nature of hate crimes. We recommend consideration of Criminal Code amendments to provide support in the battle against white supremacist criminality in Canada as well as amendments to the Canadian Human Rights Act to also provide civil law remedies for hate speech and action.

Accountability for upholding First Nations rights and jurisdiction

First Nations peoples’ inherent rights are constitutionally protected and are affirmed by international human rights law. The UN Declaration on the Rights of Indigenous Peoples affirms our individual rights to equality, to the safety and security of the person as well as our collective inherent right to self-determination. Canada must comply with the minimum standards of the Declaration to eradicate all forms of discrimination against Indigenous peoples.

Section 35(1) of the Constitution Act, 1982 “recognizes and affirms” Aboriginal and treaty rights. Section 25 ensures that no Aboriginal or treaty right can be “abrogated” or “derogated” by another right under the Canadian Charter of Rights and Freedoms.

²¹ Catherine Tunney, “CSIS dealing with right-wing extremism ‘more and more’ says spy chief”, online *CBC News* < <https://www.cbc.ca/news/politics/csis-right-wing-white-supremacy-1.5092304>>

²² Department of Justice Canada, “Disproportionate Harm: Hate Crime in Canada” (2015) Online: *Department of Justice* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/wd95_11-dt95_11/p5.html



The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) affirms human rights standards such as Indigenous peoples' right to self-determination, self-governance, and to their lands and territories, as well as the ability to exercise consent respecting decisions that would affect their territories and ways of life. The standards of the UN Declaration affirm the application of existing human rights standards to Indigenous peoples. In British Columbia, the UN Declaration has been passed into provincial law. Implementation is still in its early stages and violations of First Nations' inherent rights, including by law enforcement, is still endemic. This is evident in the 2020 Wet'suwet'en conflict. Those who opposed the construction of a natural gas pipeline asserted title and rights enshrined under s.35 and the rights upheld by the UN Declaration, such as the right of Indigenous peoples not to be forcibly removed from their territories. Yet the Canadian media and political leaders positioned our people as being outside the law, thus producing a common scenario of rationalizing the deployment of the RCMP against land defenders. The UK news outlet *The Guardian* reported that the RCMP argued for "lethal overwatch" in a strategy session about the Wet'suwet'en conflict, and that RCMP commanders instructed officers to "use as much violence towards the gate as you want."²³ Despite the recommendations outlined in the Ipperwash Inquiry, the RCMP have not taken steps to mitigate their violent tactics against First Nation people defending their rights.

No assertion and exercise of rights enshrined under international law or the Constitution should ever result in violent conflict. The rights to self-determination, self-governance, and access to ancestral homelands with the right to exercise consent under the principles of free, prior, and informed consent are all part of customary international law, and under the "doctrine of adoption," such rights are a part of the Canadian legal system without legislative enactment. The Supreme Court of Canada has affirmed this doctrine in *R. vs Hape*.²⁴ Therefore, the RCMP should not have been deployed against First Nations people defending their lands under the principles and rights enshrined under s.35 (1) or the UN Declaration.

We recommend to the Standing Committee that Canadian governments and law enforcement agencies be required to meet performance based measures regarding their responsibility to uphold Canada's legal obligations to respect the rights of First Nations. There must be greater accountability including the full implementation of the UN Declaration at all levels of government.

²³ Jaskiran Dhillon & Will Parrish, "Exclusive: Canada police prepared to shoot Indigenous activists, documents show" (20 Dec 2019), Online: *The Guardian*

<https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents>

²⁴ [2007] 2 SRC 292, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 39 (SCC). Joffe explicates this point in more detail. See Joffe *supra* note 12 at 133.



Additional Recommendations

The AFN offers several additional recommendations.

Body Cameras

The AFN supports the use of body cameras, but not as a single-handed solution to stopping police violence. Various studies²⁵ have shown that the use of body cameras does not necessarily decrease excessive use of force but body camera footage can provide a record of police-citizen encounters. Consideration should also be given to prohibiting the officer from turning off their cameras and facilitating access by citizens to body camera video records.

Additionally, community parameters around data and footage need to be considered. Currently, the police release footage where they assert force was justified, but are unwilling to release footage when substantial injuries have resulted from excessive force or gross misconduct. Footage should also be made available to legal counsel to allow the accused to build their defense in criminal proceedings, including civil actions or complaints against the police. Discussions regarding First Nations' public ownership of police footage should also be considered. Additionally, honouring the requests by First Nations individuals or communities for removal after time has passed must also be considered and co-developed within legislative frameworks regarding such matters. It should be reemphasized that these would be stopgap measures. Body cameras do not prevent excessive use of force, so other solutions are required.

Increased Training

Police require increased training to de-escalate tense situations without the use of force. Additionally, cross-cultural training has been a recommendation put forward by various commissions and inquiries such as the 1990 *Report of the Osnaburgh-Windigo Tribal Council Justice Review Committee* in Ontario, the 1991 *Policing in Relation to the Blood Tribe: Report of a Public Inquiry* and the 2000 *Report to the Attorney General: T'suu T'ina First Nation Inquiry* both in Alberta. Acknowledging and addressing inherent biases should be an integral part to police training.

More First Nations representation

First Nations representation in the delivery of policing services to First Nations communities has drastically fallen in recent years. According to the Canadian Council of Academics, between 1996 and 2014, the proportion of Indigenous officers in First Nations

²⁵ Ariel, B. et al., "Wearing body cameras increases assaults against officers and does not reduce police use of force: Results from a global multi-site experiment." (2016) *European Journal of Criminology*; Doleac, J., "Do body-worn cameras improve police behaviour?", (2017, October 25) *Brookings Institute*;



police services declined from 86% to 59%, from 94% to 25% in the RCMP, and from 76% to 10% in the OPP.²⁶ This decline is especially alarming given that the non-First Nations officers are subscribing less to the principles of community policing and appear more invested in policing models of strict law enforcement and investigation.²⁷

At the same time, there are unaddressed workplace racism issues in these services. For example, a recent proposed class action suit led by Margorie Hudson, one of the first Indigenous women to join the RCMP,²⁸ alleges that First Nations and other racialized officers received unequal pay and fewer opportunities and training while on the job compared to non-racialized officers. It also states that oftentimes these officers were sent into dangerous situations with no backup.

We recommend that the RCMP and other police services improve efforts to increase First Nations representation in their ranks, including deployment of First Nations officers to serve First Nations communities. A survey conducted in 2014 revealed that “non-Indigenous respondents... place a greater value on [non-Indigenous] policing models and are more dismissive of community engagement and collaboration than the Indigenous officers.”²⁹ More First Nations people need to be hired to serve their own communities.

Name Changes

Lastly, we recommend that the RCMP change their name from “Canada’s national police force” to “Canada’s national police service.” While largely symbolic, it is important to facilitate a mental shift away from the normalization of police militarization. The name change can help in increasing First Nations’ perceptions of police on and off reserve.

Policing, Self-Determination & First Nations Justice Systems

A significant contribution to redressing systemic discrimination in policing for First Nations is the advancement of self-determined policing in First Nations communities, whether on or off reserve (for those interested).

First Nations hold pre-existing inherent jurisdiction. It is time for Canada to support and affirm our jurisdiction to operate peacekeeping and policing services and our right to implement our laws, priorities, and definitions of justice. It is time for Canada and the

²⁶ Council of Canadian Academies *supra* note 1 at 99.

²⁷ *Ibid* at 101.

²⁸ Brenda Owens, “Proposed class-action lawsuit led by former constable alleges racism in RCMP” (13 July 2020), online: *CBC News* < <https://www.ctvnews.ca/canada/proposed-class-action-lawsuit-led-by-former-constable-alleges-racism-in-rcmp-1.5022934> >

²⁹ Jones, N. A., Ruddell, R., & Summerfield, T., “Envisioning community policing: Perceptions of officers policing Indigenous communities”, (2019) *Canadian Journal of Criminology and Criminal Justice*, 61(1), 1-43.



provinces to support First Nations in the exercise of our right to self-determination in ways that acknowledge and respect First Nations justice and policing authority.

In 2016, Public Safety Canada conducted a nation-wide consultation on policing and found that First Nations have little latitude to determine models of policing and funding arrangements under the FNPP.³⁰ The FNPP is classified as a discretionary program and permits significant underfunding in comparison to municipal and provincial police forces.

The program's classification, funding structure and cookie-cutter approach has led to chronic underfunding of essentials for First Nations to operate a sufficient police service, such as underfunding for infrastructure, salaries, equipment and training. A lack of appropriate, community-based policing contributes to the higher crime rates and violence experienced in First Nations communities, particularly violence against women, girls, and 2LGBTQQIA people. The FNPP needs a formal statutory basis and needs to be classified as an essential service to address high rates of violence in communities. This call was clearly made in the MMIWG Report, reproduced below:

5.4 We call upon all governments to immediately and dramatically transform Indigenous policing from its current state as a mere delegation to an exercise in self-governance and self-determination over policing. To do this, the federal government's First Nations Policing Program must be replaced with a new legislative and funding framework, consistent with international and domestic policing best practices and standards, that must be developed by the federal, provincial, and territorial governments in partnership with Indigenous Peoples. This legislative and funding framework must, at a minimum, meet the following considerations:

- i. Indigenous police services must be funded to a level that is equitable with all other non-Indigenous police services in this country. Substantive equality requires that more resources or funding be provided to close the gap in existing resources, and that required staffing, training, and equipment are in place to ensure that Indigenous police services are culturally appropriate and effective police services.
- ii. There must be civilian oversight bodies with jurisdiction to audit Indigenous police services and to investigate claims of police misconduct, including incidents of rape and other sexual assaults, within those services. These oversight bodies must report publicly at least annually.

³⁰ Development, Planning, Research, and Analysis, *Renewed Approach to Policing in Indigenous Communities*. (Ottawa, ON: Development, Planning, Research, and Analysis, 2016).



Other recommendations that have been made to fulfil self-determined policing include:

- The formal affirmation of First Nations' inherent power to enact laws concerning the service in question or to enter into agreements with provinces for delegated authority if they so choose;
- Clarification regarding circumstances where provincial or territorial laws would still apply to a First Nations person;
- Obligations of the federal government with respect to the funding of the service;
- The establishment of a First Nations governing body;
- Mechanisms for handling disputes and complaints; and
- Provisions related to data collection and reporting and training to ensure that all staff have the necessary skills and knowledge, including knowledge of the First Nation's culture and laws.

We reiterate that a legislative framework must be co-developed by the federal government and First Nations leadership with common objectives of supporting First Nations-led policing, with the proper financial resources to support self-determining First Nations policing service as essential government services, at a level that is equitable with non-Indigenous policing, including the provision of funds to close the gap. We welcome the approach of the BC First Nations Justice Strategy, co-developed with First Nations, which calls for a new approach to Community Tripartite Agreements that strengthens how CTAs are used to address First Nations priorities, reflects First Nations jurisdiction and governance, and builds understandings of First Nations laws and law-making.

This is especially important given that First Nations have forms of justice subject to their laws, principles, values and customs. Revitalizing traditional and restorative forms of justice will help address systemic racism in policing and justice systems. From time to time, Canada has explored non-adversarial, non-retributive approaches to justice better aligned with First Nations' principles embodied in Restorative Justice (RJ) systems. Court-ordered healing circles are one example, but more action is required to fully address systemic racism. The binding effects of outcomes and decisions made within RJ initiatives should be taken seriously. Various First Nations leaders have raised complaints about policing failing to enforce and uphold First Nations bylaws when stationed in First Nations communities. The Indian Act enables the enactment of First Nations bylaws with the force of the Canadian state.³¹ However, federal and provincial justice systems have done little to support the enforcement of First Nations law including bylaws under the Indian Act.

As restorative justice systems become fully operational, the RCMP and other law enforcement agencies must respect and uphold our laws. The AFN also recommends that federal and provincial governments fully-support First Nations and restorative justice initiatives and have all Canadian citizens respect the jurisdiction that arises from them.

³¹ *Indian Act*, RSC 1985, c I-5 at s. 81(1).



The strategies of First Nations governments for a transformation of policing and justice in order to end systemic discrimination must be prioritized and supported and cannot be implemented piecemeal. A national strategic framework, action plan, and commitments are required, led by First Nations with full support and partnership of Canada and the provinces, to make all of these necessary changes towards First Nations self-determined policing and justice in a coherent and comprehensive way. We draw the Committee's attention to the BC First Nations Justice Strategy, led by the First Nations Justice Council of BC and the work of other First Nations from the Yukon, Alberta and many others.



Recommendations

1. Accelerating federal action on the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls in partnership with First Nations;
2. Working with First Nations to prioritize action on all recommendations by Commissions and Inquiries regarding systemic racism against First Nations in policing and justice systems with the aim of implementing the unfulfilled recommendations;
3. Working with First Nations on a legislative framework to support First Nations-led policing with the proper financial resources to support self-determining efforts of First Nations policing services;
4. Federal and provincial support for First Nations restorative justice initiatives and respect for the jurisdiction that arises from such initiatives;
5. Immediately establishing an independent review of RCMP operational practices involving “wellness checks” and a timelines for corrective action to end police violence and to ensure the safety and security of those in need of mental health support;
6. Redirecting fiscal resources from militarized policing to much needed, and more effective social supports such as: mental health, homeless and social work supports that do not require police presence;
7. Implementing zero-tolerance policies on the excessive use of force;
8. Reforming RCMP training from a paramilitary force trained in isolation and training all RCMP officers in their community of service;
9. A review of the *Royal Canadian Mounted Police Act* and the legislation and policies respecting RCMP oversight bodies to further support and affirm First Nations jurisdiction over policing and to clearly state a federal obligation to partner with and support First Nations inherent jurisdiction;
10. Consider amendments to the Criminal Code to outlaw white supremacist groups, strengthening criminal offences in regard to hate crimes, listing white supremacists as terrorist groups, and enhancing the role of the Canadian Human Rights Commission to deal with civil law aspects of hate speech and action motivated by hate against Indigenous peoples;
11. Canadian governments and law enforcement agencies must demonstrate greater accountability for the protection and respect of the fundamental human rights of First Nations, including the full implementation of the UN Declaration at all levels of government without undermining the universality of such rights;
12. With the understanding that body cameras do not remedy the violent actions of police, discuss and determine, with First Nations governments, protocols for their use including access and ownership to footage involving First Nation citizens or taken in First Nations communities;



13. Enhanced de-escalation and implicit bias training, including cross-cultural training;
14. The recruitment and promotion of First Nations within the RCMP;
15. Change of name from “Canada’s national police force” to “police service”;
16. Creating a national First Nations justice strategic framework, action plan, and commitments, led by First Nations with full support and partnership of Canada and the provinces, and examining potential models such as the BC First Nations Justice Strategy process and other initiatives brought forward by First Nations;
17. Work with First Nations on issues respecting data collection from federal/provincial/territorial efforts and protocols respecting the collection of identity-based policing statistics, including race-based data and the emerging issues respecting the collection and use of “big data” (such as facial recognition) – all of which may have risks of their own in regard to systemic discrimination; and,
18. All of this work requires the presence of First Nations leadership at all relevant intergovernmental and ministerial tables for public safety, justice and human rights.



Bibliography

- Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jane Sykes, Simon Megicks, and Ryan Henderson, "Wearing body cameras increases assaults against officers and does not reduce police use of force: Results from a global multi-site experiment." (2016) *European Journal of Criminology*
- Canada, *Reclaiming Power and Place: The Final Report on the National Inquiry into Missing and Murdered Indigenous Women and Girls, Call to Action* (Ottawa, ON: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019).
- Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 SCR 3 at 23-4
- Council of Canadian Academies, *Toward Peace, Harmony, Well-Being*. (Ottawa, ON: The Expert Panel on Policing in Indigenous Communities, Council of Canadian Academies, 2019).
- Department of Justice Canada, "Disproportionate Harm: Hate Crime in Canada" (2015) Online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/wd95_11-dt95_11/p5.html>
- Development, Planning, Research, and Analysis, *Renewed Approach to Policing in Indigenous Communities*. (Ottawa, ON: Development, Planning, Research, and Analysis, 2016).
- Dhillon, Jaskiran & Will Parrish, "Exclusive: Canada police prepared to shoot Indigenous activists, documents show" (20 Dec 2019), Online: *The Guardian* <<https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents>>
- Doleac, Jennifer, "Do body-worn cameras improve police behaviour?" (25 October 2017) Online: *Upfront*, Brookings Institution <<https://www.brookings.edu/blog/upfront/>>
- Gouldehawk, M. "A Condensed History of Canada's Colonial Cops: How the RCMP secured the imperialist power of the north", (10 Mar 2010), online: *The Inquiry* <<https://thenewinquiry.com/a-condensed-history-of-canadas-colonial-cops/>>
- Indian Act*, RSC 1985, c I-5
- Jones, Nicholas A., Rick Ruddell, and Tansi Summerfield, "Envisioning community policing: Perceptions of officers policing Indigenous communities", (2019) *Canadian Journal of Criminology and Criminal Justice*, 61(1), 1-43.



Ontario, *The Report of the Ipperwash Inquiry: Volume 4 – Executive Summary* (Ontario, The Report of the Ipperwash Inquiry, 2007)

Owens, Brenda. “Proposed class-action lawsuit led by former constable alleges racism in RCMP” (13 July 2020), online: *CBC News* <<https://www.ctvnews.ca/canada/proposed-class-action-lawsuit-led-by-former-constable-alleges-racism-in-rcmp-1.5022934>>

Price, John. “UNDRIP Act Gives Horgan an Option in Wet’suwet’en Standoff. He Should Use It”, online: *The Tyee* <<https://thetyee.ca/Opinion/2020/01/21/Horgan-Should-Use-Bill-41-To-Work-With-First-Nations/>>

Province of Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution*. (Nova Scotia, The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989) (Chair: T. Alexander Hickman CJ)

R. vs Hape, [2007] 2 SRC 292, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 39 (SCC).

Saulnier, A., “The effect of body-worn cameras on public perceptions of police: A Canadian study” (2019, April 22) *Blue Line*.

Tunney, Catherine. “RCMP watchdog’s misconduct reports caught in limbo, stalling their release”, online: *CBC News* <<https://www.cbc.ca/news/politics/rcmp-complaint-watchdog-1.5594861>>

-- “SCIS dealing with right-wing extremism ‘more and more’ says spy chief”, online *CBC News* <<https://www.cbc.ca/news/politics/csis-right-wing-white-supremacy-1.5092304>>

Walby, Kevin & Brendan Roziere, “Rise of the SWAT Team: Routine police work in Canada is now militarized”, online: *The Conversation* <<https://theconversation.com/rise-of-the-swat-team-routine-police-work-in-canada-is-now-militarized-90073>>