Aboriginal Prisoners’ Legal Rights

This booklet explains your rights, and the programs available to you, as an Aboriginal prisoner in federal custody.
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Introduction

Aboriginal people are over-represented in Canadian prisons. Aboriginal people make up less than 4% of the population in Canada, but 20% of the people serving federal sentences in Canada are Aboriginal. Thirty-three percent of women in federal prisons are Aboriginal.¹

The reasons Aboriginal people are imprisoned at higher rates than other people in Canada may include:

- systemic discrimination and prejudices about First Nations;
- poverty;
- substance abuse; and
- family problems over generations caused by residential schools and colonial adoption policies.²

Aboriginal prisoners tend to be classified at higher security levels than other prisoners and are segregated more often than other prisoners. Aboriginal prisoners are less likely to be granted parole and are more likely to be suspended and detained. This means that Aboriginal prisoners spend more time in prison, and less time on conditional release in the community where community based programs may be available.³

- 45% of Aboriginal prisoners report being the victim of physical abuse.
- 28% of Aboriginal prisoners were raised in foster care.
- 15% of Aboriginal prisoners went to residential schools.⁴

CSC’s duty to consider Aboriginal heritage

The Correctional Service of Canada (CSC) has a duty to consider how you are affected because of your Aboriginal heritage when making decisions about you during your sentence.
The law recognizes First Nations’ history of colonization, including dislocation, residential schools, forced adoption (the “sixties scoop”), and loss of cultural and spiritual identity. The law recognizes that Aboriginal people and communities may be affected by the following factors because of this history of colonization:

- low income;
- unemployment;
- lack of opportunities and options;
- lack of formal education;
- substance abuse;
- loneliness;
- community fragmentation; and
- poor social and economic conditions.\(^5\)

These systemic factors are called the “Gladue” factors, after a Supreme Court of Canada decision.\(^6\) CSC has a duty to consider how these factors relate to you whenever it makes a decision that affects your liberty, including:

- security classification and pen placement;
- transfer decisions;
- disciplinary sanctions; and
- administrative segregation.\(^7\)

CSC also has a duty to provide Aboriginal programs. These programs, and how to apply to serve part of your sentence in an Aboriginal community or Healing Lodge, are discussed later in this booklet.
Liberty issues

Security classification and pen placement

When you arrive at prison, you will go through the “intake assessment process”. Your security classification, pen placement and correctional plan are decided from this process.

CSC must try to place you in an institution that restricts your freedom as little as possible, considering public safety and prison security.8

CSC must consider your Aboriginal heritage in deciding your security classification, including:

- your or your family’s experience with the residential school system;
- any history of unemployment or lack of education;
- any history of substance abuse;
- any history of discrimination against you;
- any history of involvement in restorative justice or community based sanctions;
- your history of being involved in Aboriginal traditional teachings, ceremonies or activities; and
- your history of living on or off reserve.9

CSC must try to place you in an institution that lets you access Aboriginal cultural programs, your home community and your family.10

CSC must give you written reasons for your security classification and pen placement, and a chance to respond to the decision before you are moved to the institution.11

You can call Prisoners’ Legal Services for advice or help in responding to your security classification and pen placement recommendation.
Involuntary transfer

CSC staff might recommend that the warden raise your security classification level and transfer you to a higher security institution.

CSC must not classify you at a higher level of security than is necessary. The warden should consider the alternatives to transferring you to higher security, such as:

- resolving the problem at your institution; or
- transferring you to an institution of the same security level.

CSC must consider your Aboriginal background before it decides to increase your security classification or transfer you to higher security. CSC should consider these factors:

- your or your family’s experience with the residential school system or adoption;
- your family or community’s history of suicide, substance abuse or victimization;
- your level of connection with your family or community;
- your level of education;
- your experience in the child welfare system;
- your experience with poverty;
- your struggle with your cultural or spiritual identity; and
- your exposure to, or involvement in, gangs.

CSC should also consider your access to Aboriginal cultural programs, your home community and your family when making a transfer decision.

You must be given written reasons for a recommendation to increase your security classification and involuntary transfer you to another institution.
You have the right to respond to these recommendations before any decision is made. You can ask the warden for an extension of 10 working days to submit your response (this is called your rebuttal). You can call Prisoners’ Legal Services for advice or assistance in writing your rebuttal.

After you submit your response, CSC must give you a final decision and the reasons for the decision.

Unless CSC transfers you because of an emergency, it must give you the reasons for the decision to transfer you at least 2 days before you are moved.

**Disciplinary sanctions**

You can call Prisoners’ Legal Services for advice or assistance if you are charged with a disciplinary offence. You can also ask for a copy of our booklet “The Prison Disciplinary Process: Your Legal Rights”, for more information.

You can ask CSC staff to “informally resolve” a problem instead of charging you with an offence. You can ask that an Elder or Aboriginal Liaison Officer be involved in informal resolution.

If you are found guilty of an offence after a hearing, or if you plead guilty to an offence, the chairperson should consider your Aboriginal background before deciding on the penalty or sanction to the offence.

Sanctions can include one or more of the following:

- a warning or reprimand;
- a loss of privileges (this cannot include visits - unless you are segregated - or spiritual activities that are not recreational);
- an order to make restitution (to pay for damage you caused);
- a fine;
- extra duties; or
- segregation for up to 30 days, or 45 days for 2 or more offences (only for serious offences). You can be denied visits while in segregation.\textsuperscript{19}

**Administrative segregation**

You can be placed in administrative segregation if the warden has a good reason to believe that:

- your presence in the population would threaten the security of the institution or the safety of any person, including yourself; or
- your presence in the population would interfere with an investigation of a prison or criminal offence.\textsuperscript{20}

You can be placed in administrative segregation only if there are **no reasonable alternatives** to your segregation.\textsuperscript{21}

Alternatives to administrative segregation might include:

- a resolution or healing circle (with an Elder);
- mediation (with the Inmate Committee or other prisoners);
- a change of cell, range or unit; or
- an agreement to stay locked up in your cell.\textsuperscript{22}

The warden must review your administrative segregation status and give you written reasons within 1 working day.\textsuperscript{23} The Segregation Review Board must review your administrative segregation status within 5 days, and at least once every 30 days after you arrived in segregation.\textsuperscript{24}

CSC must give you a clear plan for how to get you out of segregation.\textsuperscript{25}

CSC must tell you in writing what alternatives were considered before you were put in segregation, and say why these alternatives could not be used in your case.\textsuperscript{26}
CSC must consider your Aboriginal ancestry when deciding whether to continue your segregation.

You can call Prisoners’ Legal Services for advice or assistance with your segregation reviews.

**Rights in segregation**

While you are in administrative segregation, you must be given the same rights, privileges and conditions as other prisoners, unless they cannot be given because they can only be enjoyed in a group, due to security concerns or limitations of the segregation area.\(^{27}\)

In disciplinary or administrative segregation, you must be allowed access to spiritual support, including Aboriginal Elders. You must also be allowed access to personal cell effects, such as your medicine bundle and smudging kit, within 5 working days of moving to segregation.\(^{28}\)
Aboriginal programming

CSC has a duty to provide Aboriginal programs.\textsuperscript{29} CSC recognizes that when Aboriginal prisoners join in spiritual and cultural activities and programs, and have family and community support, they are more successful when they return to the community.\textsuperscript{30}

Your correctional plan

If you are interested in taking part in Aboriginal programs, you should tell your Institutional Parole Officer (IPO) during intake. You can work with your IPO to make sure Aboriginal programs are part of your Correctional Plan.

During intake, your IPO should explain the role of Elders, Aboriginal Liaison Officers, Aboriginal Community Liaison Officers and Aboriginal Community Development Officers, who can be a part of your Case Management Team and help you include Aboriginal traditions in your Correctional Plan.

Your IPO should also tell you how to apply to serve part of your sentence in an Aboriginal community or Healing Lodge, or be released into an Aboriginal community on parole.\textsuperscript{38}

For more information about release to an Aboriginal community on parole, see Prisoners’ Legal Services booklet “Conditional Release for Aboriginal Prisoners”. Agreements to serve part of your sentence in an Aboriginal community are discussed later in this booklet.
**Role of Elders**

Elders or Spiritual Advisors can give you individual counselling, teachings and ceremonial services.\(^{31}\)

If you want to take part in traditional healing with an Elder, your Correctional Plan should include a Healing Plan and Elder Review report.\(^{32}\)

Your **Healing Plan** should include the ceremonies, teachings and activities you will do to heal the four aspects of yourself: physical, emotional, spiritual and mental.\(^{33}\)

Your **Elder Review** is the Elder’s perspective of you, based on traditional knowledge and teachings, and is used to measure your progress.\(^{34}\)

Your Healing Plan and Elder Review will be part of your Correctional Plan and all key case management documents to guide CSC staff in supporting you during your sentence and after release.\(^{35}\)

**Role of Aboriginal Liaison Officers**

Aboriginal Liaison Officers provide leadership, cultural awareness, counselling and general services.

The Aboriginal Liaison Officer is a link between you and your Case Management Team, and should help communicate your cultural and spiritual needs with case management and correctional program staff. The Aboriginal Liaison Officer is also a link between you, your Aboriginal community and Aboriginal Community Development Officers.\(^{36}\)
Role of Aboriginal Community Development Officers

The Aboriginal Community Development Officer can help you find support in an Aboriginal community for your release. The Aboriginal Community Development Officer can also help Aboriginal communities make release plans for Aboriginal prisoners.37

Role of Aboriginal Community Liaison Officers

Aboriginal Community Liaison Officers can give you support in the community and help you connect with Aboriginal community resources, ceremonies and events.

Aboriginal programs

Aboriginal programs include:

- the Aboriginal High Intensity Correctional Program;
- the Aboriginal Moderate Intensity Correctional Program; and
- the Aboriginal Sex Offender Treatment Program.

You can ask an Elder or Aboriginal Liaison Officer for more information on the Aboriginal programs available at your institution.

Aboriginal Pathways

Aboriginal Pathways are units in institutions that provide a healing and traditional environment for prisoners who are dedicated to following an Aboriginal healing path.39 Pathways is aimed at helping you in your
healing journey to prepare for minimum security, work release, temporary absences, day parole or full parole.\textsuperscript{40}

Aboriginal Pathways should be available at all security levels.\textsuperscript{41}

**Maximum security institutions** should allow space for Aboriginal ceremonies and activities to help prepare you for transfer to a medium security Pathways unit.\textsuperscript{42} This is called Pre-Pathways. In the Pacific Region, Kent Institution has Pre-Pathways.

Some **medium security institutions** have Pathways units. In the Pacific Region, Pathways units are offered at Mission and Mountain Institutions.

**Minimum security institutions** can also provide a Pathways unit. In the Pacific Region, a Pathways range is offered at William Head Institution. Kwikwexwelhp is a minimum security Healing Village.

The **Fraser Valley Institution for Women** has Pathways available to prisoners in all security levels.

**Joining Pathways**

To join Pathways, you must have worked with an Elder for some time and show your commitment to a healing journey.\textsuperscript{43} You can apply through your Case Management Team, the Elder or the Aboriginal Liaison Officer.

To be eligible for a typical Pathways initiative, you must:

- commit to following an Aboriginal traditional and spiritual way of life;
- show respect for yourself and others;
- not use drugs or alcohol;
- show commitment to fulfilling your Healing Plan and Correctional Plan;
show good institutional behaviour for at least 3 months before entering Pathways;
be willing to join in all the Pathways activities; and
have the support of Pathways and CSC staff.\textsuperscript{44}

If there is not enough space in Pathways, your name will be added to a wait list.\textsuperscript{45}

If you are admitted to Pathways, you must agree to work with the Elders and staff to follow a healing path. You also must follow the rules of the Pathways program.
Transfer to an Aboriginal community or Healing Lodge

You might be able to serve part of your sentence in an Aboriginal community or Healing Lodge. This is called a section 81 agreement. If you are interested in transferring to an Aboriginal community or Healing Lodge, you should tell your IPO during intake so that this goal will be part of your Correctional Plan and Healing Plan.

Aboriginal communities

Transfers to Aboriginal communities are very rare. To date, no one in the Pacific Region has been transferred to serve part of their sentence in an Aboriginal community or Aboriginal Community Residential Facility (halfway house).

You can be transferred to an Aboriginal community or halfway house only if:

- there is an agreement between CSC and the community or halfway house;
- you agree to the transfer and the rules of the community or halfway house; and
- the community or halfway house can meet your programming needs and keep the public, you and any victims safe.

In the Pacific Region, the following Aboriginal communities and halfway houses might consider taking part in section 81 custody agreements:
Aboriginal communities
- Cowichan Tribe Community, Duncan, BC
- Nak’azdli First Nation, Fort St. James, BC
- Prince George Urban Aboriginal Justice Society, Prince George, BC
- Sto-lo Nation, Chilliwack, BC
- Secwepemc Community, Kamloops, BC
- Sliammon First Nation, Powell River, BC
- Tsleil-Waututh Nation, North Vancouver, BC
- Wet’suwet’en Nation, Smithers, BC

Aboriginal halfway houses
- Circle of Eagles Lodge Society, Vancouver, BC
- Cwengengitel Aboriginal Society, Surrey, BC
- Tsow Tun Le Lum Society, Nanaimo, BC
- Raven’s Moon Transitional Housing, Abbotsford, BC

Transfer to a Healing Lodge
Healing Lodges are minimum-security facilities that focus on traditional Aboriginal teachings. Some are run by CSC and others are run by Aboriginal communities. The staff at both kinds of healing lodges must be respectful of Aboriginal culture.48

CSC must consider a Healing Lodge as your first option for placement if you are classified as minimum security at intake. If you are not transferred to a Healing Lodge, your IPO must tell you why and what you need to do to be able to go to a Healing Lodge in the future.49
To be eligible for a transfer to Healing Lodge, you must:

- be classified minimum security (or in rare cases, medium) and a low risk to public safety;
- need a low degree of supervision and control;
- be willing to continue with your healing journey;
- be committed to the Healing Lodge’s philosophy and your Healing Plan;
- be willing to follow the rules of the Healing Lodge; and
- have the agreement of a Healing Lodge that is able to provide for your programming and reintegration needs.\(^{50}\)

Transfer to a Healing Lodge should be the next step for you if you have successfully participated in a medium institution Pathways initiative.\(^{51}\)

Tell your IPO if you are interested in transferring to a Healing Lodge. You will be interviewed by Healing Lodge staff. You then submit an application to transfer to the Healing Lodge.\(^{52}\) It is up to the Healing Lodge director whether or not to accept your request.\(^{53}\)

CSC treats your application like any voluntary transfer request. CSC has 60 days from when you submit your request to make a decision.\(^{54}\)

You can be involuntary transferred out of a Healing Lodge if you are considered a risk to public safety, and no longer manageable at the Healing Lodge.\(^{55}\)

**Healing Lodge temporary absence requests**

You can also ask to go on a temporary absence to a Healing Lodge. If you are interested, give your request to your IPO. Your IPO will submit your request to the Healing Lodge director.\(^{56}\)
Healing Lodge locations

There are no Healing Lodges in the Pacific Region. Kwikwèxwelhp Healing Village is a CSC-run minimum security institution, and acceptance there is based on similar rules.

CSC-run Healing Lodges in other parts of Canada

- Pê Sâkâstêw Centre (Minimum) in Hobbema, Alberta
- Okimaw Ohci Healing Lodge (Medium/Minimum) in Maple Creek, Saskatchewan
- Willow Creek Healing Lodge (Minimum) in Willow Creek Saskatchewan

Aboriginal community-run Healing Lodges

- Stan Daniels Healing Lodge in Edmonton, Alberta
- Wahpeton Healing Lodge in Prince Albert, Saskatchewan
- Ochichakkosipi Healing Lodge in Crane River, Manitoba
- Waseskun Healing Lodge in Saint-Alphonse-Rodriguez, Quebec
- Somba Ke’ Healing Lodge in Yellow Knife, Northwest Territories
Getting legal help

You can contact Prisoners’ Legal Services for advice or assistance with issues that affect your liberty (such as segregation, disciplinary charges or parole) or about health care or human rights issues.

For assistance from Prisoners’ Legal Services, you must have a referral from the Legal Services Society. Contact their call centre at 1-888-839-8889. Once you have a referral, you can call Prisoners’ Legal Services directly at 1-866-577-5245.

Prisoners’ Legal Services phones are open Monday to Friday from 9:00 a.m. to 11:00 a.m. and from 1:00 p.m. to 3:00 p.m.
Endnotes

3 “Backgrounder: Aboriginal Inmates”.
4 “Backgrounder: Aboriginal Inmates”.
6 R. v. Gladue is the name of a Supreme Court of Canada decision that says judges must consider systemic factors and all available reasonable alternatives to incarceration when sentencing Aboriginal people.
10 CCRA, s. 28.
11 CCRA, s. 30 and Corrections and Conditional Release Regulations, SOR/92-620 (“CCRR”), s. 11.
12 CCRA, s. 4(c).
14 CCRA, s. 28.
15 CCRA, s. 30(2); CCRR, s.11.
16 CCRR, s.11.
17 CCRR, s.12.
19 CCRA, s. 44(1).
20 CCRA, s. 31(3).
21 CCRA, s. 31(3).
23 CCRR, s. 19, 20
24 CCRR, s. 21.
27 CCRA, s. 37.
28 CD 580, at ¶ 64 and 65; CD 709, at ¶ 19.
29 CCRA, s. 80.
31 CD 702, at ¶ 31.
33 CD 702, Annex C.
34 CD 702, Annex C.
36 CD 702, at ¶ 35.
37 CD 702, at ¶ 51.
39 CD 702, at ¶ 39.
40 Mountain Institution Pathways Unit Brochure (Spring 2011).
42 CD 702, at ¶ 40.
44 Mountain Institution Pathways Unit Brochure (Spring 2011).
45 William Head Institution Pathways Unit Brochure (Spring 2011).
46 CCRA, s. 81.
50 Guidelines 710-2-1, at ¶ 10.
52 Guidelines 710-2-1, at ¶ 16 and 17.
53 Guidelines 710-2-1 at ¶ 19.
54 CD 710-2, Transfer of Offenders – Delegation of Authority and Timeframes for Decision.
55 Guidelines 710-2-1, at ¶ 52.
56 Guidelines 710-2-1, at ¶ 33 and 34.
This publication contains general information only. Each situation is unique. Law and policy can also change. If you have a legal problem, contact Prisoners’ Legal Services or a lawyer.

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