Department of Justice Canada | Ministère de la Justice Canada

Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses

Scott Clark, Ph.D.

2019

Canada

Cite as:

Clark, Scott. 2019. "Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses." Research and Statistics Division, Department of Justice Canada.

Table of Contents

EXECUTIVE SUMMARY

This literature review addresses the overrepresentation of Indigenous people in the Canadian criminal justice system.[1] It examines the extent of overrepresentation, its underlying causes, and some initiatives taken to address the issue. The report also identifies gaps in the efforts to address overrepresentation and suggests potential ways to mitigate the problem. Understanding overrepresentation along these lines should provide policy makers and program managers with useful information to assist in their work.

The vast overrepresentation of Indigenous people in the criminal justice system has received attention from high levels. This report provides assessments of the problem by the Aboriginal Justice Inquiry of Manitoba (1991), The Royal Commission on Aboriginal Peoples (1996), by Justice Frank Iacobucci in his report on the *Independent Review of First Nations Representation on Ontario Juries* (2013), and by the Supreme Court of Canada in *R. v. Gladue* (1999), wherein the Court stated in reference to overrepresentation "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system" (688).

The incarceration numbers for Indigenous people are worsening year by year. Indigenous inmates in federal institutions rose from 20 percent of the total inmate population in 2008-2009 to 28 percent in 2017-2018, even though Indigenous people represented only 4.1 percent of the overall Canadian population (Department of Justice Canada 2018a). Similarly, the percentage of federally incarcerated Indigenous women rose from 32 percent of the female inmate population to 40 percent (*ibid*.). While the proportion of Indigenous incarceration has risen substantially, the overall inmate federal population (number) has risen only slightly.

In 2016-2017, Indigenous youth (12 to 17 years) accounted for 8 percent of all youth in the provinces and territories (Department of Justice Canada 2018a).[2] However, in 2016-2017 they accounted for 46 percent of young people admitted to the corrections system (*ibid*.). The overrepresentation of Indigenous youth was even more disproportionate among girls. In 2016-2017, Indigenous female youth accounted for 60 percent of all female youth admitted to provincial and territorial corrections systems (Statistics Canada, 2018a).

[1] This paper considers the term "Indigenous" to be an update of the term "Aboriginal". As per the *Constitution Act* of 1982, "Aboriginal" peoples includes First Nations, Inuit, and Métis peoples of Canada. For consistency, "Indigenous" is used throughout this report, with the exception of (1) where "Aboriginal" or "Indian" are used to convey a legal meaning, (2) where Statistics Canada uses "Aboriginal identity" in data collection, and (3) when quoting directly from authors.

[2] Ten provinces/territories provided data on youth admissions to the corrections system. Quebec, Nova Scotia, and New Brunswick did not report 2016-2017 numbers.

Reasons for the vast overrepresentation of Indigenous offenders and victims in the criminal justice system are discussed in this report. The Royal Commission on Aboriginal Peoples (RCAP) identified three viable explanations, each of which has a degree of currency in government thinking and academic literature: colonialism, socio-economic marginalization, and culture clash. Systemic discrimination against Indigenous people is also a serious problem.
The RCAP Commissioners identified the ongoing impacts of colonialism on Indigenous peoples and made direct links between the effects of colonialism and criminal behaviour. They also connected colonialism directly to systemic discrimination and, to socio-economic marginalization and culture clash. The literature and Commissions of Inquiry, such as the Truth and Reconciliation Commission of Canada (2015), confirm the removal of people from their traditional lands, restrictive legislation such as the *Indian Act*, and, most especially, residential schools have taken a severe toll on Indigenous individuals, families and communities over many years.

Systemic discrimination occurs throughout the criminal justice system, including in policing, courts and corrections. It was identified as serious by the Supreme Court in both *R. v. Gladue* (1999) and *R. v. Wells* (2000).

Policing is problematic as Indigenous people are both over-policed and under-policed. In other words, they are often targeted by police but they are also often neglected when assistance is needed (Rudin, 2007). Research also suggests community policing – which is the most appropriate model for Indigenous communities – has not always been a priority approach for police services responsible for Indigenous communities, including the Royal Canadian Mounted Police (RCMP) (Clark, 2007).

With respect to courts, Indigenous people continue to be sentenced to custody in comparatively greater proportions than non-Indigenous offenders. They are also denied bail more frequently and therefore held in remand (applied to adults) or pre-trial detention (applied to youth) more frequently and for longer periods than non-Indigenous offenders. An important related factor is that Indigenous accused have a greater tendency to breach their conditions, whether bail conditions or probation conditions. This has significant implications for elevating Indigenous incarceration numbers.

The corrections system is also characterized by discriminatory policies and practices. The Office of the Correctional Investigator (OCI) has repeatedly expressed concerns about the high rates of incarceration of Indigenous people in the federal system and the problematic implementation of sections 81 and 84 of the *Corrections and Conditional Release Act*, which are intended to address overrepresentation by involving communities in the corrections process (OCI, 2018).

RCAP stressed the significance of culture clash. In broad terms, Indigenous cultures – which are many and diverse in Canada – tend to view wrong-doing and justice differently than non-Indigenous cultures. They are more likely to focus on rehabilitation, community reintegration, and healing than on adversarial confrontation, finding of guilt, and punishment that currently characterize the mainstream justice system. As well, Indigenous cultures often have normative behaviours that can be misinterpreted by justice officials and jury members not familiar with the particular culture. The literature is clear that approaches to community-based justice must be appropriate to the culture concerned.

The report addresses three sets of policies and initiatives designed and implemented with a view to addressing overrepresentation: sentencing legislation and Supreme Court of Canada decisions, Gladue Courts, and community-based initiatives and government relations.

Bill C-41, a bill to amend the *Criminal Code* with regard to sentencing, was passed in 1995 and the new law came into force in 1996. One significant purpose of the legislation was to reduce the overrepresentation of Indigenous offenders in custody. Section 718.2(e) specifically addressed the issue as follows: "A court that imposes a sentence shall also take into consideration the following principles: (e) 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*" (emphasis added). Subsequent to the enactment of section 718.2(e), a case in British Columbia tested the applicability of the law. On appeal, the Supreme Court of Canada rendered its ruling in *R. v. Gladue*, and provided more concrete direction for sentencing judges. The Court's judgement was valuable in several ways, including the fact that it recognized (i) the very serious reality of Indigenous overrepresentation, (ii) the existence of systemic discrimination throughout the justice system, and (iii) the need for culturally relevant restorative justice programs as alternatives to jail. However, section 718.2(e) and the Gladue judgement still did not provide adequate clarity for the judiciary. The Supreme Court attempted to rectify that concern in *R. v. Ipeelee*, wherein the Court reaffirmed the requirement for judges to adhere to s. 718.2(e) when sentencing Indigenous offenders.

Gladue Courts are generally characterized by certain goals relevant to the intent of s. 718.2(e) and the Supreme Court of Canada decisions in *Gladue* and *Ipeelee*. In order to achieve these goals, a Gladue Court requires the provision of detailed information regarding the offender to the presiding judge. Another essential component of the Gladue process is the availability and accessibility of culturally appropriate rehabilitative programs, often referred to as restorative or community-based justice programs. This presents a challenge for many Canadian courts as

relevant programs, especially those designed for Indigenous people, are still lacking in much of the country.

Gladue has not had the positive results many had expected. Incarceration statistics and relevant case law appear to confirm this. While there has been increased judicial awareness of Gladue principles since 2010, there remain disagreements regarding some aspects of *Gladue*; for example, its application to bail hearings. In this regard, Toronto's Gladue Court (Aboriginal Persons Court) at Old City Hall and the Aboriginal Youth Court in Toronto were established in 2001 and 2011, respectively, and are seen as success stories (Clark, 2016a; Clark, 2016b).

The Department of Justice Indigenous Justice Program (IJP) supports Indigenous community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances. Evaluation results have been encouraging.

Despite these positive advancements, the overrepresentation of Indigenous persons in the criminal justice system, especially in correctional facilities, continues to rise. Experts and expert bodies such as RCAP, the Truth and Reconciliation Commission (TRC), and the Supreme Court argue that overcoming historic and persistent challenges should be the first goals of governments, as well as of Indigenous organizations and communities. Progress has been made in overcoming those challenges. Further progress will ultimately set the conditions whereby justice policy will truly be able to make positive and long lasting changes for Indigenous people. Overrepresentation might then become a thing of the past.

Introduction

This report addresses the overrepresentation of Indigenous people in the Canadian criminal justice system.[3] It examines the extent of overrepresentation, its underlying causes, and some initiatives taken to address the issue. The report also identifies gaps in the efforts to address overrepresentation and suggests potential ways to mitigate the problem. Understanding overrepresentation along these lines should be of interest to people looking to learn more about the relationship between Indigenous people and the criminal justice system, and should provide policy makers and program experts with useful information to assist in their work.

This is a literature review and, as such, it is based on published and unpublished materials already in the public realm, as well as on a recent case law review. Most of the sources for the report are dated from the mid-1990s to present.

The report is structured in the following way. First, it presents some high level views indicating the seriousness of the problem of overrepresentation of Indigenous people in the criminal justice system. Second, the report addresses the nature and extent of overrepresentation. It then turns to the factors leading to overrepresentation, focussing on colonialism, socio-economic marginalization, systemic discrimination, and culture clash. Next the report examines specific initiatives implemented to address the problem: (i) amendments to the *Criminal Code* regarding the sentencing of Indigenous offenders, together with the subsequent Supreme Court of Canada rulings in *R. v. Gladue* and *R. v. Ipeelee*; (ii) the establishment of Gladue Courts; (iii) issues of bail and remand; (iv) case law review; and (v) community initiatives and relevant government programs aimed at mitigating the problem of overrepresentation. The report also discusses gaps: what are we missing in our attempts to solve the overrepresentation problem? The report ends with a brief conclusion.

[3] The term “Indigenous” refers to First Nation, Inuit, and Métis peoples. See footnote 1.

Overrepresentation as a Critical Issue

The overrepresentation of Indigenous people in the criminal justice system has received attention from high levels. Since 1989, eleven Royal Commissions or Commissions of Inquiry have addressed the issue of Indigenous justice either directly or as one among many questions regarding Indigenous people in Canada.[4] Despite the research and policy recommendations resulting from these inquiries, academia, and other sources, the problem of Indigenous overrepresentation continues and, in some ways, continues to worsen.

The final report of the Aboriginal Justice Inquiry of Manitoba unequivocally summed up the relationship between Indigenous people and the justice system in the following statement:

> The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated…. It is not merely that the justice system has failed Aboriginal people; justice has also been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded (Aboriginal Justice Inquiry of Manitoba, 1991: 1).

The Royal Commission on Aboriginal Peoples (RCAP) concurred in the Manitoba Inquiry's findings and recommendations and extended the failure of the justice system to all Indigenous people in Canada, not just those living in Manitoba:

> [t]he current Canadian justice system, especially the criminal justice system, has failed the Aboriginal people of Canada – Indian, Inuit and Métis, on-reserve and off-reserve, urban and rural, in all territorial and governmental jurisdictions" (RCAP, 1996: 27).

[4] The Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989); the Aboriginal Justice Inquiry of Manitoba (1991); The Cawsey Commission (Alberta, 1991); The Commission on Systemic Racism in the Ontario Criminal Justice System (1995); The Royal Commission on Aboriginal Peoples (1996); the Stonechild Inquiry (Saskatchewan, 2004); the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform (2004); the Ipperwash Inquiry (Ontario, 2007), the Review of First Nations Representation on Ontario Juries (the Iacobucci Report, 2013), the Truth and Reconciliation Commission of Canada (2015), and the National Inquiry Into Missing and Murdered Indigenous Women and Girls (2019).

In his report on the *Independent Review of First Nations Representation on Ontario Juries* (2013), the Honourable Frank Iacobucci wrote:

> [i]t is also regrettably the fact that the justice system generally as applied to First Nations peoples, particularly in the North, is quite frankly in a crisis. If we continue the status quo we will aggravate what is already a serious situation, and any hope of true reconciliation between First Nations and Ontarians generally will vanish. Put more directly, the time for talk is over, what is desperately needed is action (2013: 1).

The Supreme Court of Canada in *R. v. Gladue* noted that overrepresentation data are both startling and an effective indication that relations between Indigenous people and the justice system are seriously flawed. The Court stated "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system" (*R. v. Gladue*, [1999] 1 S.C.R. 688).

The Truth and Reconciliation Commission of Canada (TRC) listed eighteen Calls to Action aimed specifically at addressing gaps in the justice system with respect to Indigenous people, as well as another three Calls to Action aimed at equity for Indigenous people in the legal system (TRC, 2015a).

Finally, and most importantly, the seriousness of the problem has been clearly expressed by the many Indigenous individuals, organizations and leaders who shared their views and experiences with the inquiries noted above and who intervened in Supreme Court cases such as *Gladue.*

A further point worth noting at the outset is that Indigenous people in Canada, whether status, non-status, Métis, or Inuit, increasingly live in urban settings (see Appendix). According to Statistics Canada (2017a), in 2016 51.8 percent of the total Indigenous population lived in a metropolitan area of at least 30,000 people. From 2006 to 2016, the number of Indigenous people living in a centre of this size increased by 59.7 percent (Statistics Canada 2017a). Statistics Canada explains the increasing urban population results from multiple factors, including demographic growth in both urban and non-urban settings, mobility, and changing patterns of self-reported identity (*ibid.*). Thus, while many Indigenous people continue to live in rural and remote northern communities, the stereotype of Indigenous people living predominantly in isolation no longer holds true, a fact that has significant implications for policy development in most social arenas, including criminal justice.

Overrepresentation: The Nature and Extent of the Problem

Failures of the criminal justice system for Indigenous people are manifested in many ways, perhaps most notably in the extreme overrepresentation of Indigenous individuals as incarcerated offenders. This can be demonstrated in two ways: by examining the Indigenous inmate population as a proportion of the total inmate population; and by looking at the comparative rates of Indigenous incarceration and changes in those rates.

The 2017-2018 Annual Report of the Office of the Correctional Investigator (OCI) pointed to increasing numbers of incarcerated Indigenous people. Indigenous inmates in federal institutions rose from 20 percent of the total inmate population in 2008-2009 to 28 percent in 2017-2018, while representing only 4.1 percent of the overall Canadian population. Similarly, the percentage of federally incarcerated Indigenous women rose from 32 percent of the female inmate population to 40 percent. While proportions of Indigenous incarceration have risen substantially, the overall inmate population (Indigenous and non-Indigenous) has risen only slightly. The Correctional Investigator stated:

> In the ten-year period between March 2009 and March 2018, the Indigenous inmate population increased by 42.8% compared to a less than 1% overall growth [in the total adult custodial population] during the same period. As of March 31, 2018, Indigenous inmates represented 28% of the total federal in-custody population while comprising just 4.3% of the Canadian population.[5] The situation continues to worsen for Indigenous women. Over the last ten years, the number of Indigenous federally sentenced women increased by 60%, growing from 168 in March 2009 to 270 in March 2018. At the end of the reporting period, 40% of incarcerated women in Canada were of Indigenous ancestry. These numbers are distressing. (OCI, 2018: 61)

The Department of Justice Canada (2018c) has examined trends in adult federal custody populations based on data points for the last three census years (2006, 2011, and 2016).[6] The

[5] Slight discrepancies appear in different official publications with respect to the Indigenous percentage of the overall Canadian population; for example, while the OCI estimated the percentage of Indigenous people to be 4.3 percent of the total Canadian population, Statistics Canada concluded the proportion to be 4.1 percent. Absolutely accurate Indigenous population counts are difficult to achieve and may vary according to timing and the enumeration techniques employed. Regardless, the variances are small enough such that they do not affect the message in the overall incarceration numbers as expressed here. See footnote 11.

[6] The Department of Justice explains the concept of rates. Contrary to offender counts, rates are based on calendar year data points. A rate is defined as a measure of the number of adults in custody per 100,000 adults in the

Department's report draws a number of conclusions, including the following that relate directly to adult Indigenous individuals admitted to federal correctional institutions:

- Although the incarceration rates for both Indigenous and non-Indigenous men have decreased over the past decade, the rate of Indigenous male offenders remains eight times higher than that of non-Indigenous men. The number of Indigenous male offenders continues to increase while the number of non-Indigenous male offenders has decreased slightly.
- The incarceration rates and total numbers for both Indigenous and non-Indigenous women have increased over the past decade; the incarceration rate of Indigenous women continues to be much higher (12.5 times) than that of non-Indigenous women. (Department of Justice Canada, 2018c)

Statistics Canada has provided data that expand on the overrepresentation issue by addressing provincial and territorial corrections, as well as federal corrections. In 2016-2017, Indigenous adults accounted for 28 percent of admissions to provincial and territorial correctional services and 27 percent of admissions to federal correctional services (Statistics Canada, 2018a).[7] Yet they represented only 4.1 percent of the total Canadian population (*ibid.*). According to Statistics Canada:

> An admission is counted each time an individual begins any type of custody or community supervision program. Aboriginal adults represented 4.1% of the Canadian adult population in 2016/2017, while accounting for 28% of admissions to provincial/territorial correctional services and 27% of admissions for federal correctional services. In comparison, in 2006/2007, Aboriginal adults accounted for 21% of admissions to provincial and territorial correctional services (excluding Prince Edward Island and the Northwest Territories) and 19% to federal correctional services. (Statistics Canada, 2018a)

Overall adult admissions to federal institutions (Indigenous and non-Indigenous adults combined) grew less than one percent in 2018. However, Statistics Canada data indicate admissions of Indigenous adults to federal correctional services increased significantly between

---

general population. It is important to note that a rate will decrease if the number of adults in custody decreases, but it can also decrease if the number of adults in the Canadian population increases while the number of adults in custody remains the same.

[7] Provincial and territorial correctional systems supervise adults serving custodial sentences of less than two years, as well as those being held in pre-trial custody (remand) or serving community sentences such as probation. Provincial and territorial systems also supervise youth (12 to 17 years). Custodial sentences of two years or more are served in the federal corrections system.

2006-2007 and 2016-2017 to 27 percent. The proportion of Indigenous adult admissions to provincial and territorial institutions was slightly higher at 28 percent in 2016-2017 (*ibid*.).

The numbers for Indigenous youth involved in provincial and territorial correctional services are even more serious:

> Aboriginal youth accounted for 46% of admissions to correctional services in the 10 reporting jurisdictions in 2016/2017, while representing 8% of the general youth population in those same jurisdictions. Aboriginal youth are overrepresented in both custody and community supervision, accounting for 50% of custody admissions and 42% of community supervision admissions. Aboriginal females accounted for a greater proportion of custody admissions among youth relative to their male counterparts. Aboriginal female youth accounted for 60% of female admissions, while Aboriginal male youth made up 47% of male youth admissions. (Statistics Canada, 2018a)

A telling way to see the trend to higher Indigenous incarceration numbers is to compare percentages of adult Indigenous admissions to provincial and territorial correctional services by type of supervision between 2012-2013 and 2016-17. These numbers represent the percentage of Indigenous inmates as a proportion of the total inmate population. It is also important to remember that the Indigenous population as a percentage of the overall Canadian population was only 4.1 percent in 2016-2017 (Statistics Canada, 2018a).

Between 2013-2014 and 2016-2017, total Indigenous admissions to custody rose from 25 percent of total admissions to 30 percent. Sentenced admissions rose from 26 percent to 30 percent. Remands rose from 23 percent to 29 percent. And other custodial statuses rose from 32 percent to 33 percent. (Statistics Canada 2016a; Statistics Canada, 2017a) [8]

A number of significant points arise from these numbers. First, Indigenous admissions to custody are substantially higher than non-Indigenous admissions in all categories. Second, admission percentages for Indigenous offenders increased in all categories between 2012-2013 and 2016-2017. This means, of course, that the admission percentages for non-Indigenous offenders decreased in all categories. Third, when one considers the relative overall Indigenous population size, the differences are striking. For example, while representing 4.1 percent of the overall Canadian population, Indigenous adults accounted for almost 30 percent of total custodial admissions in 2016-2017 (Statistics Canada 2016a; Statistics Canada, 2017a).

[8] Other custodial statuses include persons being held in provincial/territorial correctional institutions for lock-ups, parole violations or suspensions, immigration holds, and those who are temporarily detained without warrants of any type.

It is worth noting that custodial admissions of adult Indigenous offenders vary by province and territory, as do the proportions of Indigenous inmates compared to the relative proportions of Indigenous people in the general population. Ontario, the western provinces, and the territories have significantly higher proportions of Indigenous incarceration relative to the Indigenous percentage of the population than do Quebec and the Atlantic provinces. For example, in 2011-2012, Saskatchewan had a relatively high proportion of Indigenous people in its total adult population at 12 percent, but 78 percent of the total adult incarcerated population were Indigenous. In Nova Scotia, on the other hand, Indigenous adults were 3 percent of the provincial adult population and 11 percent of the incarcerated adult population (Statistics Canada, 2014). Thus, the relative incarceration numbers are lower compared to overall population rates in Nova Scotia than in Saskatchewan. These relative differences apply generally when comparing jurisdictions across the country. [9]

In 2016-2017, Indigenous youth (12 to 17 years) accounted for 8 percent of all youth in the provinces and territories (Department of Justice Canada 2018a).[10] However, in 2016-2017 they accounted for a much higher proportion of young people admitted to the corrections system: 46 percent (*ibid.*). The overrepresentation of Indigenous youth was even more disproportionate among girls in 2016-2017. Indigenous female youth accounted for 60 percent of all female youth admitted to provincial and territorial corrections systems, compared to 47 percent for Indigenous male youth (Statistics Canada, 2018a).

Finally, we should look at the victimization of Indigenous people in Canada. Statistics Canada has provided data relating to this problem for the year 2014 (Statistics Canada, 2016c: 3):

> In 2014, a higher proportion of Aboriginal people than non-Aboriginal people in Canada reported being victimized in the previous 12 months. Overall, 28% of Aboriginal people living in the provinces and territories compared with 18% of non-Aboriginal people

[9] Explanations for regional differences are complex and not entirely understood. LaPrairie (2002) suggests that, in cities at least, a significant factor is the relative degree of advantage or disadvantage experienced by Aboriginal people living in a particular city. She describes disadvantage as "the concentration of poor, single parent, and poorly educated aboriginal people in the inner core of their large cities." In other words, according to LaPrairie it is the relative degree of marginalization that primarily affects crime and incarceration rates, thus leading to differences between cities in the Maritime provinces and the Prairie provinces. Sprott and Doob (2002) and Doob and Sprott (2007) would not disagree with LaPrairie but also argue that regional differences can be explained by differences in systemic cultures in the justice system itself, particularly in the judiciary, thus leading to higher rates of sentenced incarceration in the Prairie provinces. This is an important question that deserves further investigation as it calls into question the principles of fair, equitable and consistent application of the law.

[10] Ten provinces/territories provided data on youth admissions to the corrections system. Quebec, Nova Scotia, and New Brunswick did not report 2016-2017 numbers.

> reported being the victim of one of the eight types of offences measured by the General Social Survey (GSS) on Victimization.[11]
>
> In 2014, the overall rate of violent victimization among Aboriginal people was more than double that of non-Aboriginal people (163 incidents per 1,000 people versus 74 incidents per 1,000 people). Regardless of the type of violent offence, rates of victimization were almost always higher for Aboriginal people than for non-Aboriginal people.

While victimization rates are relatively high for Indigenous people, it is important to recognize that this does not mean Indigenous people are inherently more likely to commit crimes, including violent crimes, than non-Indigenous people. Nor are Indigenous people inherently more likely to be victimized than non-Indigenous people. As the Statistics Canada analysis below indicates, being Indigenous in itself is not the most significant risk factor in becoming a victim. Rather, other social and economic factors – both historical and current – have greater statistical weight in potential victimization.

> When controlling for various risk factors, Aboriginal identity by itself did not remain associated with increasing one's overall risk of violent victimization. Rather, the higher rates of victimization observed among Aboriginal people appeared to be related to the increased presence of other risk factors among this group—such as experiencing childhood maltreatment, perceiving social disorder in one's neighbourhood, having been homeless, using drugs, or having fair or poor mental health. (Statistics Canada, 2016c)

While this is true in statistical terms, it must be recognized that being Indigenous is often a strong factor in victimization. We know this from the many disturbing examples of violence, including murder, experienced by Indigenous women and young people. The cases addressed by the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019), and the inquiry into the deaths of seven Indigenous high school students in Thunder Bay from 2000 to 2011 (Talaga, 2017) demonstrate this point. The problem is further complicated by the fact that colonialism, socio-economic marginalization, and systemic discrimination always play a role in these terrible cases.

Numerous Commissions of Inquiry and courts, including RCAP (1996), the TRC (2015), and the Supreme Court of Canada (various rulings), have confirmed that a broad range of factors have

[11] The eight offences include sexual assault, robbery, physical assault, break and enter, motor vehicle/parts theft, theft of household property, vandalism, and theft of personal property.

contributed to the overrepresentation of Indigenous people as offenders and victims. These factors are discussed in the following section.

Causes of Overrepresentation

Why are Indigenous people so vastly overrepresented as offenders and victims? RCAP identified three viable explanations, each of which has currency in government thinking and academic literature: colonialism; socio-economic marginalization; and culture clash. Systemic discrimination against Indigenous people in the criminal justice system is also a serious problem. These factors have acted together over many years. They are addressed below.

4.1 Colonialism

RCAP's most fundamental explanation for Indigenous overrepresentation in the criminal justice system is colonialism. According to RCAP and others (Levy and Young, 2011; Commission on First Nations and Métis Peoples and Justice Reform, 2007; Crosby and Monaghan, 2012; Friedland, 2009; Manzano-Munguia, 2011), the colonial experience for Indigenous peoples from the time of early French and British contact has been characterized by attempts by the colonial powers to control Indigenous lands and natural resources. Many mechanisms of colonial control have been imposed, including violent relocation to reserves and other designated settlements and restrictive legislation, most commonly through the *Indian Act*.

The *Indian Act* was (and many would say, continues to be) a discriminatory piece of legislation. Early years saw many repressive measures enacted through a series of amendments, including: restrictions on the use of mechanized farm implements by Indigenous farmers; the banning of ceremonial activities such as the potlatch in British Columbia and the sundance on the prairies; involuntary enfranchisement (loss of Indian status) if a man attained a certain level of education; prevention of Indigenous groups or communities from hiring a lawyer to represent their interests before the federal government; and the threat of fines for lawyers who represented Indigenous groups or communities (see Coates, 2008). Other complications continue, including unsuccessful attempts to revise certain parts of the legislation that affect many First Nations individuals and families; for example, restrictions on the granting of Indian status, which especially impacts Indigenous women and their children (Palmater, 2011).

Further examples of colonialism in the present are seen in government's reluctance to honour the conditions set out in treaties between Indigenous peoples and the federal government, as emphasized by RCAP (1996). Many specific claims – claims to land and other promised benefits

– remain unresolved by the federal government. This is a concern to many First Nations and regional First Nation governments and organizations. It is explicitly identified as an ongoing problem with the federal government and is a contributor to the ongoing marginalization of Indigenous peoples.

According to RCAP, "[t]he relationship of colonialism provides an overarching conceptual and historical link in understanding much of what has happened to Aboriginal peoples" (1996: 47). Colonialism is a historical relationship characterized by "particular and distinctive historical and political processes that have made Aboriginal people poor beyond poverty" (*ibid.*: 46). A relatively early explanation of the links between colonialism and overrepresentation was contained in a 1988 report prepared by Michael Jackson for the Canadian Bar Association. In that report, Jackson spoke of a colonial relationship whereby cultural alienation, territorial dispossession, and socio-economic marginalization became increasingly pronounced among Indigenous peoples. According to Jackson, "[t]his process of dispossession and marginalization has carried with it enormous costs of which crime and alcoholism are but two items on a long list" (1988: 218). In other words, the impacts of colonialism have contributed in significant ways to the overrepresentation of Indigenous people in the criminal justice system.

Some authors (e.g., Proulx, 2003) refer to colonialism and post-colonialism as part of the same process. This may be most glaringly true with regard to residential schools, which were in place for over one hundred years. In the words of the TRC,

> The government-funded, church-run schools were located across Canada and established with the purpose to eliminate parental involvement in the spiritual, cultural and intellectual development of Aboriginal children. The last residential schools closed in the mid-1990s…. During this chapter in Canadian history, more than 150,000 First Nations, Métis, and Inuit children were forced to attend these schools some of which were hundreds of miles from their home. *The cumulative impact of residential schools is a legacy of unresolved trauma passed from generation to generation and has had a profound effect on the relationship between Aboriginal peoples and other Canadians* (TRC, 2015b; emphasis added.).

It is almost impossible to estimate the extent of the negative intergenerational impacts of the residential school experience. The results have been complex and tragic, including disproportionately high rates of physical and mental health problems, alcohol and drug abuse, cognitive impairment, interpersonal violence, and suicide. These factors all contribute to the overrepresentation of Indigenous people in the criminal justice system.

Indigenous people often say they lost their parenting skills through the residential school experience (as was likely intended by authorities) and that this loss has been passed down to their children and grandchildren (Clark, 2007; TRC, 2015a). The federal Correctional Investigator noted serious underlying problems experienced by Indigenous inmates, problems which could be directly or indirectly related to the residential school experience and family breakdown. He referred to Correctional Service of Canada research that found, among other negative factors, that half of the Indigenous offenders involved in the Aboriginal Offender Substance Abuse Program "had been in the care of the child welfare system – 71% had spent time in foster care and 39% in a group home" (OCI, 2014: 43).

Both RCAP and the TRC have argued that colonialism in its various forms, whether residential schools, removal of people from their traditional lands, the dictates of the *Indian Act*, or the failure of government to honour the treaties, has had and continues to have profound negative impacts on Indigenous people. These impacts are manifested in many ways, including crime and victimization. In the words of RCAP Commissioners,

> .. [w]e are of the opinion that locating the root causes of Aboriginal crime in the history of colonialism, and understanding its continuing effects, points unambiguously to the critical need for a new relationship that rejects each and every assumption underlying colonial relations between Aboriginal peoples and non-Aboriginal society (RCAP, 1996: 52).

In this quote and throughout their report, the RCAP Commissioners make direct links between the effects of colonialism and criminal behaviour by Indigenous people. They also connect colonialism directly to systemic discrimination and, as described below, to socio-economic marginalization and culture clash.

4.2 Socio-economic Marginalization

It is clear that colonialism in its various forms has had long-term negative impacts on Indigenous people. Also bearing directly on offending, victimization and inequitable treatment of Indigenous people in the justice system is socio-economic marginalization which, according to RCAP, can be seen as a direct result of colonialism, past and present (RCAP, 1996). Even a basic investigation leaves no doubt that Indigenous individuals and entire communities are marginalized in Canada. The average income in 2015 for Canada's total non-Indigenous population was $46,449, while the average income for the total Indigenous population was $36,748 (Statistics Canada, 2016b). As well, Indigenous employment was significantly lower than that for the non-Indigenous population for the same period: 81.6 percent for the non-

Indigenous population compared to 65.8 percent for the total Indigenous population (*ibid*.). Employment in remote and isolated Indigenous communities is significantly lower than overall Indigenous employment numbers, which include urban Indigenous people who are more likely to have jobs (*ibid*.). [12]

Compounding the problem of relatively low income and high employment is a host of other unacceptable social and living conditions facing Indigenous people, especially those living in remote and isolated areas. Many authors, agencies, and inquiries have documented seriously substandard levels of housing, education, and health care for Indigenous communities. In 2016, the proportion of Indigenous dwellings requiring major repairs was 19 percent, compared to 6 percent for the non-Indigenous population. While 29 percent of the non-Indigenous population between 25 and 64 years of age had attained a university degree by 2016, 11 percent of Indigenous people had achieved this level of education (Statistics Canada, 2016b).[13]

Health is another serious issue. The high and increasing rate of tuberculosis (TB) currently seen in Indigenous communities is a significant indicator of the effects of socio-economic marginalization, combining poverty, poor housing, and poor health care. According to Health Canada, "[s]tudies have shown that First Nation people are more at risk than other Canadians of getting TB infection. Some of the root causes are related to poor socio-economic conditions where they live" (Health Canada, 2010). A further indicator of social and economic marginality is the high rate of suicide among Indigenous people, especially youth. A 2017 parliamentary report found that suicide rates among Indigenous persons, especially youth (both female and male) were as much as 40 times higher than among the non-Indigenous population. Moreover, while the suicide rate for the Canadian population has declined, the rates among Indigenous people have increased over the past three decades (Standing Committee on Indigenous and Northern Affairs, 2017).

[12] Statistical data should be viewed with caution. It is difficult to ensure the accuracy of census counts of Aboriginal people, and even more difficult in terms of crime related data. This problem results mainly from difficulties in acquiring census data from Indigenous individuals and families for various reasons, including community isolation and lack of internet capacity. Statistics Canada (2005) has acknowledged the challenges and Rudin has described the problem in detail (2007: 10-11). Additional problems include failure to report by provinces and territories, as noted above. That said, Statistics Canada provides the best available data and the most useful for purposes of this report.

[13] It is worth noting that the employment and educational attainment figures for the Indigenous population may be inflated because of the difficulty in surveying Indigenous people. It is possible that Statistics Canada achieved a disproportionately high response rate from Indigenous individuals who had a job or a university degree compared to those who did not.

Social and economic marginalization, which includes the problems noted above, contributes to the overrepresentation of Indigenous people in the criminal justice system. According to the RCAP,

> Cast as a structural problem of social and economic marginality, the argument is that Aboriginal people are disproportionately impoverished and belong to a social underclass, and that their over-representation in the criminal justice system is a particular example of the established correlation between social and economic deprivation and criminality.... There is no doubt in our minds that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people (1996: 42).

Regrettably, we have seen little improvement in the negative effects of socio-economic marginalization since the RCAP report.

4.3 Systemic Discrimination

Indigenous overrepresentation exists throughout the justice system. The Supreme Court of Canada noted the following in *R. v. Gladue*:

> Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".[14]

Systemic discrimination can be seen in all phases of the criminal justice system: policing, courts, and corrections. The Aboriginal Justice Inquiry of Manitoba provides a definition of systemic discrimination: "The term 'systemic' discrimination is used where the application of a standard or criterion, or the use of a 'standard practice,' creates an adverse impact upon an identifiable group that is not consciously intended" (1991: 100). It should be noted, however, that this a problem that affects not only Indigenous people, but also other racialized and minority groups as demonstrated, for example, by the Commission on Systemic Racism in the Ontario Criminal

[14] *R. v. Gladue* [1999] 1 S.C.R. 688, para. 61.

Justice System (1995). That said, Indigenous people as a whole are the most adversely affected by systemic discrimination (Rudin, 2007).

Systemic discrimination in the criminal justice system is manifested in various ways and, ultimately, it contributes to the overrepresentation of Indigenous people at all stages of the system. These realities are addressed below.

4.3.1 Policing

Various commissions and inquiries, as noted above, have addressed the issue of policing Indigenous individuals and communities. All have identified the need for effective community policing in the Indigenous context. Hylton has written that the RCMP describes community policing as "a partnership between the community and the police in the delivery of police services" (2005: 1-2). Other institutional voices have also called for a community-based model. The Law Reform Commission, for example, recommended in 1991 that "[c]ommunity-based policing should be facilitated to the fullest extent in Aboriginal communities that wish to continue to have external police services" (1991: 46).

While community policing appears to be an effective model for Indigenous communities, communities differ among themselves with regard to a preferred approach to policing. For example, some communities want to continue being policed by the RCMP, while others would prefer (and some already have) their own police services. This suggests the need for policing relevant to "situationally-specific definitions of social regulation and control" (Depew, 1992: 462). In other words, and as recommended by all inquiries addressing the issue, policing should be community specific.

Why is policing a major concern in the Indigenous context? There are three related reasons: over-policing; under-policing; and the general absence of a community policing model in Indigenous communities.

Rudin addressed the issues of over- and under-policing in a paper prepared for the Ipperwash Inquiry (Rudin, 2007). He said the following:

> Aboriginal people are both over- and under-policed. The impact of over-policing is that Aboriginal people come before the court in large numbers because Aboriginal communities or communities where Aboriginal people live are policed more aggressively than other communities…. At the same time, Aboriginal people are also under-policed. The legitimate claims of Aboriginal people that their rights,

> either individually or collectively, are being violated are not responded to with the same vigour as when those claims are advanced by non-Aboriginal people….. Over-policing and under-policing are different sides of the same coin. Each feeds upon the other to perpetuate systemic discrimination and negative stereotypes regarding Aboriginal people (2007, 64).

Systemic discrimination and negative stereotypes result in more Indigenous people being arrested, charged, and entering the criminal justice system. One approach to the over/under policing issue is to establish more community policing in Indigenous communities.

Hylton, quoted above, says the community policing model "is based on four principles: knowing and working with communities; identifying common problems and concerns; resolving problems through partnerships; and effective and directed enforcement" (2005: 2). Linden, Clairmont, and Murphy take a similar view with regard to policing in Indigenous communities. They say it must involve the following elements: community involvement in decisions about policing, leading to joint priority setting; decentralized management, recognizing the unique needs and approaches for individual communities; and proactive, preventative approaches to problem solving, rather than a focus only on enforcement (2001: 32).

The three elements identified by Linden, Clairmont, and Murphy are seen as essential for effective community policing in the Indigenous context. However, after applying those criteria to their research on Indigenous policing in Manitoba, Linden et al regrettably arrive at a negative assessment:

> … while the police have been trying to put community policing into practice for nearly two decades, very few police forces have changed their operations to incorporate these three elements in a meaningful way. Even police agencies that have publicly committed themselves to community policing typically give the community only token involvement in determining policies and programs…. It is apparent that there is a need for "community conversations" to determine community priorities and to help determine what can realistically be expected from a police service (2001: 32).

Similarly, Clark found a general lack of commitment to community policing on the part of the RCMP – in spite of clear community requests for this model – in the three northern territories (2007). Deukmedjian (2008) found that while community policing had been the most reasonable RCMP model for Indigenous communities, RCMP Headquarters made a major policy decision after the September 2001 attacks in the United States to remove community policing

as a high priority and to focus on intelligence based policing. Rudin's comments about systemic discrimination in policing, and the findings by Linden et al, Clark, and Deukmedjian suggest that community policing is an appropriate model for Indigenous communities. Those studies also indicate that community policing is not adequately in place. Because of competing priorities and changes in policy, Indigenous communities lost out on having improved community policing implemented. This inaction signals that policing Indigenous communities remains characterized by over policing/under policing, which in turn contributes to overrepresentation. The promise community policing models hold cannot be realized without commitment.

4.3.2 Courts

As indicated earlier in this report, Indigenous offenders are sentenced to custody more often than non-Indigenous offenders. This is true for men and women, adults and youth in provincial and territorial correctional services. In 2016-2017, 30 percent of the total sentenced custody population were Indigenous. For Indigenous youth, the comparative numbers for secure custody and open custody were even higher at 55 percent and 60 percent, respectively (Department of Justice Canada 2018a).

Indigenous accused are also denied bail significantly more often and therefore held in remand (adults) or pre-trial detention (youth) more frequently and for longer than non-Indigenous accused. Remand numbers have increased significantly for adult Indigenous accused in the last several years (Clark, 2016b). Remand among adult Indigenous accused in 2016-2017 stood at 29 percent of the total adult remanded population. Indigenous youth in pre-trial detention represented 48 percent of the total youth pre-trial detention population (Department of Justice Canada, 2018a). In certain jurisdictions, such as Nunavut, the disparity is even greater. According to Statistics Canada (2017b), 100 percent of the adult individuals in remand in Nunavut were Indigenous in 2004/2005 and 2014/2015.[15] As well, it is noted that the median number of days adult Indigenous accused are held in remand in Nunavut increased from 3 days in 2004-2005 to 23 days in 2014-2015 (Statistics Canada, 2017b). The remand and pre-trial detention numbers remain substantially higher for Indigenous accused compared to non-Indigenous accused. Why is this so?

Rudin points out that, consistent with the Criminal Code, courts deny bail and impose remand for one or more of three reasons: (i) the person is not likely to attend court for his/her next hearing or trial; (ii) the person is considered a threat to the community or an individual; or (iii) the nature of the alleged crime is so offensive that it would shock the public if the alleged

[15] Nunavut's adult Indigenous population was approximately 80 percent of the territory's total adult population in 2011-2012 (Statistics Canada, 2014).

offender were released on bail (Rudin, 2007: 51). If bail is granted, it is done with certain conditions attached. A standard condition is that the accused have a surety; i.e., a person who is able and willing to make a payment to the court in the event the accused breaks their conditions or fails to appear. This is often difficult for individuals accused of a crime; however, it can be especially difficult for Indigenous accused. Indigenous people living in the city are often without family or other supports and so will not have a surety to back them. These same individuals are often abjectly poor, homeless, unemployed, and have little education. (This is consistent with the socio-economic marginalization of many Indigenous people, as suggested above.) But whether in the city or in a remote community, poverty and the inability to post bail or to have a surety who can post bail is common and typically leads to remand.

Another significant factor leading to Indigenous overrepresentation is that Indigenous accused are relatively more likely to breach their conditions, whether bail conditions or probation conditions. Typically, this works against individuals who have been before the courts previously; bail is usually denied in such cases. The issue of bail is important for several reasons, including the fact, as various experts have shown (e.g., Knazan, 2009), that "those held in custody on remand are more likely to plead guilty and be found guilty than those who are released pending trial" (Rudin, 2007: 53 citing Kellough and Wortley, 2002; Bressan and Coady, 2017).

The important issues of bail, remand, pre-trial detention, and some positive movement are discussed further in section 5.3, below.

4.3.3 Corrections

The extent of the overrepresentation of Indigenous people in corrections, particularly in custody, was noted earlier in this report. They face inequities on a regular basis, primarily as the result of systemic discrimination. The main source of information on federal corrections, particularly on custodial institutions, is the Office of the Correctional Investigator (OCI). OCI Annual Reports and special reports commissioned by the OCI (e.g., Mann, 2009; OCI, 2012), clearly indicate that Indigenous inmates are subject to systemic discrimination while in prison.

In his 2013-2014 Annual Report, the Correctional Investigator made the following comments which are worth repeating here:

> …the factors and circumstances that bring Aboriginal people into disproportionate contact with the federal correctional system defy easy solutions. The gap in outcomes between Aboriginal and non-Aboriginal offenders is widening as the most significant indicators of correctional performance continue to trend downward. Aboriginal people

> under federal sentence tend to be younger, less educated, and more likely to present a history of substance abuse, addictions and mental health concerns. They are more likely to be serving a sentence for violence, stay longer in prison before first release and more likely to be kept at higher security institutions.
>
> They are more likely to be gang-affiliated, overinvolved in use of force interventions and spend disproportionate time in segregation. Aboriginal offenders are more likely denied parole, revoked and returned to prison more often. The situation is compounded by the fact that the proportion of Aboriginal people under federal sentence is growing rapidly. (OCI, 2014: 43-44)

With regard to the federal *Corrections and Conditional Release Act* (S.C. 1992, c. 20), the OCI says:

> The Corrections and Conditional Release Act (CCRA) makes specific reference to the unique needs and circumstances of Aboriginal Canadians in federal corrections. The Act provides for special provisions (Sections 81 and 84), which are intended to ameliorate overrepresentation of Aboriginal people in federal penitentiaries and address long-standing differential outcomes for Aboriginal offenders (2012: 3).

Section 81 of the Act provides for the opportunity for the Correctional Service of Canada (CSC) to enter into agreements with Indigenous communities for the care and custody of offenders who would otherwise be in a federal facility. Section 81 also covers healing lodges for Indigenous offenders. Section 84 permits agreements between CSC and Indigenous communities for the release of individuals to communities with conditions at the time of parole.

While Sections 81 and 84 are intended to address overrepresentation, the OCI concluded that they were not being implemented effectively. According to the OCI, "[t]he investigation found a number of barriers in CSC's implementation of Sections 81 and 84. These barriers inadvertently perpetuate conditions that further disadvantage and/or discriminate against Indigenous offenders in federal corrections, leading to differential outcomes" (OCI, 2012: 5). More recently, the Correctional Investigator maintained that the implementation of Sections 81 and 84 still requires better application. He made the following recommendation in his 2017-2018 Annual Report (2018: 65):

> I recommend that CSC re-allocate very significant resources to negotiate new funding arrangements and agreements with appropriate partners and service providers to transfer care, custody and supervision of Indigenous people from prison to the community. This would include creation of new section 81 capacity in urban areas and section 84 placements in private residences. These new arrangements should return to the original vision of the Healing Lodges and include consultation with Elders.

In light of the above and in consideration of the OCI's assessment that Section 81 is not being effectively used to build Indigenous healing lodges, the OCI fairly concludes that (a) Indigenous offenders are experiencing systemic discrimination while in prison and at the time of their parole eligibility, and (b) that the relevant provisions of the CCRA are not being implemented as intended and it is, therefore, failing to ameliorate the overrepresentation issue.

Consistent with the findings of the OCI, the Commission on First Nations and Métis Peoples and Justice Reform earlier recommended the following:

- access to cultural & spiritual programming (2004: 6-23)
- more resources to assist transition from prison to community (2004: 6-24)
- more programming to meet the needs of women in prison (2004: 6-26)
- programs to help children whose parent is incarcerated (2004: 6-27)
- programs to help youth reintegrate into community (2004: 6-28).

The OCI, the Commission on First Nations and Métis Peoples and Justice Reform, and the Manitoba Justice Inquiry are clear that the failure of the corrections system to acknowledge the realities and meet the needs of Indigenous offenders results in ever increasing overrepresentation. Approaches to the problem must be fair, equitable and innovative in order to see positive results.

4.4 Culture Clash

RCAP (1996) and Rudin (2007), among others, identify culture clash as a fourth factor contributing to overrepresentation. According to Rudin,

> [The culture clash] theory starts from the undeniably correct thesis that Aboriginal concepts of justice and Western concepts of justice are very different. The theory then goes on to conclude that when Aboriginal people are required to fit into a system that does not recognize their values, overrepresentation occurs (2007: 22).

Many Indigenous people in many communities hold a different "worldview" from non-Indigenous people. This is a complicated point, in part because it varies by community and by culture (there is great diversity among Indigenous cultures throughout Canada). However, at the risk of generalizing excessively, it is fair to say that Indigenous worldviews are more likely to focus on rehabilitation, community reintegration, and healing than is currently the case in the Euro-Canadian justice system. The standard Canadian system has tended to focus on adversarial processes and retribution or punishment, although this has seen some positive change in recent years with the advent of specialized courts and other initiatives.

We can look at the question of differences in worldview in two ways. The first refers to different ways to manage wrong-doing. The second way is to understand that many Indigenous people, as part of a particular Indigenous culture, do even small things differently. For example, Rupert Ross, as a beginning Crown prosecutor in Kenora, Ontario, assumed that an Indigenous witness was inadvertently admitting guilt, or at least blameworthiness, by not making eye contact with the Crown during questioning at trial. But in fact, as Ross eventually learned, the act of avoiding eye contact is a sign of respect among certain Indigenous cultures and in no way expresses guilt (Ross, 1992: 4). While this might seem an innocuous example of cultural difference, one can see how it could lead to incorrect assumptions and inappropriate decisions by lawyers, judges, juries and others.

Similarly, Rudin (2007: 22) makes the point that in many Indigenous cultures, the terms "guilty" and "innocent" have nothing analogous in their languages. Rather, an Indigenous person might conflate "guilt" with "responsibility." In other words, a person might see themselves as being responsible for a criminal act, even though it was someone else who actually committed the offence. But the court might interpret the witness's affirmative response as a guilty plea. Clark found a similar problem when conducting research with Mi'kmaq for the Royal Commission on the Donald Marshall, Jr., Prosecution. Mi'kmaq, especially those from more remote communities, translated the judge's question, "How do you plead: guilty or not guilty?" as "Are you being blamed?" Heard in this way, the natural response is to answer in the affirmative, which can then be interpreted by the Court to mean "guilty" (Clark, 1989: 47-48).

Culturally relevant approaches to justice are viewed as positive alternatives to the mainstream justice system. In general terms, they align more closely with Indigenous approaches in that they focus on mediation, cooperation, support and healing, rather than on adversarial confrontation, blame and punishment. Restorative (or transformative) approaches are meant to resolve the problems between an offender, on one hand, and the victim, his or her family, and the community, on the other. The offender is typically called to task by his or her community but is also supported through rehabilitation and reintegration into the community.

It is the victim and the community who have been offended, not the state as currently implicit in the *Criminal Code*. Thus, the community has a primary role to play – working together with the offender and often the victim – in making matters right in a positive, transformative way. Ideally, the state, through the criminal justice system, would play a secondary but supportive role in the transformative process. In this light, alternatives to the mainstream system – circle sentencing, family group conferencing, Elder counselling, community and youth justice committees as examples – are, in many communities, more effective in restoring harmony than traditional mainstream approaches.

Rudin acknowledges that not all Indigenous people share the same values or understandings of justice as rooted in their cultural heritage. This may be especially true in urban settings where individuals are not as likely as those living in reserve communities or in Inuit settlements to be connected to their culture and traditional ways of settling disputes.[16] However, it is clear that culturally relevant approaches to justice, generally described under the community justice or restorative justice umbrella, appear to be effective in terms of problem solving and longer lasting remedies (see, for example, Clark, 2013; Maurutto and Hannah-Moffat).[17]

There are many culturally appropriate approaches to criminal justice matters in Indigenous communities across Canada. They are not addressed in detail in this report; however, some examples are provided in section 5.5, below.

Addressing Overrepresentation

The report will now turn to some of the policies and initiatives designed and implemented with a view to addressing problems arising from systemic discrimination, colonialism, socio-economic marginalization, and culture clash. Five aspects will be addressed: first, changes to the *Criminal Code* regarding sentencing introduced by the Government of Canada and subsequently elaborated upon by the Supreme Court of Canada; second, the establishment of Gladue Courts; third, issues of bail and remand; fourth, a review of *Gladue* case law; and fifth, community initiatives and government relations with regard to addressing Indigenous justice issues. A common aim of the approaches discussed in the following sections has been to reduce the overrepresentation of Indigenous people in the criminal justice system, particularly in custodial facilities.

[16] The Community Council Project in Toronto is an example that suggests community-based solutions can work effectively even in large urban centres.
[17] While there is considerable anecdotal evidence to support the effectiveness of culturally relevant, restorative approaches, comprehensive research has been lacking.

5.1 Sentencing Policy: Section 718.2(e) and *Gladue*

In June 1995, Parliament passed Bill C-41, a bill amending the *Criminal Code* with respect to sentencing. The new law came into force in 1996 and contained *Criminal Code* Section 718.2(e), which was intended to ameliorate the high rates of incarceration of Indigenous people. Section 718.2 reads: "A court that imposes a sentence shall also take into consideration the following principles: (e) 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*" (emphasis added). In proposing this legislation, the government recognized that the rate of sentencing involving custody for Indigenous people was unacceptable and action was needed. As Rudin points out, before the amendments came into force "sentencing was the exclusive purview of judges who balanced the principles of deterrence, denunciation, incapacitation, and rehabilitation in their own personal fashion, subject only to appellate review" (2007: 40-41). The amendments reflected in s. 718 introduced a degree of restriction on judges' decision making by imposing legislated sentencing guidelines. The primary aim of the amendments was to reduce the frequency of custodial sentences imposed by Canadian courts. The implications of s. 718.2(e) are addressed below but the reasons why it was needed fall under the rubric of systemic discrimination facing Indigenous people, as discussed in section 4.3, above.

Rudin points out that "[a]s with much legislation, the actual meaning of s. 718.2(e) remained somewhat vague until the Supreme Court of Canada released its decision interpreting the section in 1999 in the case of *R. v. Gladue*" (2007: 42). The Gladue appeal arose from a sentencing decision handed down by a trial court judge in British Columbia in the case of Jamie Gladue, an Indigenous woman convicted of murder. The sentence, which involved incarceration and probation, was appealed on the grounds the trial judge had not adequately considered the circumstances and heritage of the offender as an Indigenous person according to s. 718.2(e). The judge's decision was based, in part, on the notion that because Ms. Gladue lived in an urban setting and not in a reserve community, she was estranged from her Indigenous heritage and way of life. The judge therefore concluded that Ms. Gladue was not subject to s. 718.2(e) whereby all reasonable and available sanctions other than imprisonment should be considered for all offenders, especially Indigenous offenders. The British Columbia Court of Appeal upheld the ruling of the trial court judge and the case then went to the Supreme Court of Canada.

In its response to the appeal, the Supreme Court of Canada left no doubt as to its position regarding Indigenous overrepresentation and s. 718.2 (e):

> These findings [regarding Aboriginal overrepresentation] cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree.[18]

> It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.[19]

The Supreme Court of Canada's judgment added weight to the government's concerns about Indigenous overrepresentation, and affirmed the underlying principle and general guidance in s. 718.2(e). The Court also recognized the roles played by poverty, marginalization, and systemic discrimination in the overrepresentation of Indigenous people. Significantly, the Supreme Court of Canada's judgment supported the idea – contrary to the view of the British Columbia trial court judge – that Indigenous people in urban areas, as well as in reserve communities and more remote and isolated areas, should be considered under s. 718.2(e).

The Supreme Court of Canada recognized the importance of sentencing alternatives for both Indigenous and non-Indigenous offenders. In the Indigenous context, alternatives are often categorized under the umbrella "restorative justice." The Court referred to "restoring a sense of balance to the offender, victim, and community, and in preventing future crime." This is very much a restorative approach to dealing with crime. However, Roach and Rudin (2000) predicted one year after the *Gladue* judgment that while it was positive in many respects, it was not likely to reduce the disproportionate rate of incarceration of Indigenous offenders, a prediction that appears to have been accurate. According to Roach and Rudin,

> [a]lthough the court recognized the congruence between restorative justice and aboriginal justice, it also realized that such programmes are relatively rare and stressed the need to consider all possible alternatives to imprisonment for aboriginal offenders even if those alternatives do not have a cultural component (2000: 356).

[18] *R. v. Gladue*, para. 64.
[19] *R. v. Gladue*, para. 65.

The availability of viable, culturally relevant community-based programming has improved since the Supreme Court's ruling in *Gladue* (see section 5.5, below). However, the proportion of Indigenous adults in provincial and territorial institutions has continued to increase substantially relative to non-Indigenous adults. Similarly, Aboriginal youth continue to be involved in the corrections system at disproportionate and increasing rates. Why is this so?

While the Supreme Court in *Gladue* was progressive in some respects, it was less helpful in others (Roach, 2009). Rudin notes that the court stated that s. 718.2(e) did not automatically mean an Indigenous person would receive a lesser sentence, and said further that when convicted for a serious violent offence, an Indigenous person would likely receive the same sentence as a non-Indigenous offender.[20] As Rudin points out, "[i]n the subsequent case of *R. v. Wells* – a conditional sentencing case – the court continued to send some mixed messages as to the impact of s. 718.2(e) in cases of violence" (Rudin, 2007: 43). According to Anand, "[i]f one of the functions of the Supreme Court is to clarify the law and provide effective guidance to lower courts, then *Gladue* is a failure" (Anand, 2000: 414). Rudin continues with the following regarding vagueness in the *Gladue* judgment:

> What the court did not do in *Gladue* was to indicate to a sentencing judge how she was to obtain the information she needed to sentence according to the new provisions found in the *Criminal Code*. It was not clear how a legal system that had contributed to the over-incarceration of Aboriginal people was suddenly to reconstitute itself to redress the same problem that it had a hand in creating (Rudin, 2007: 43).

The Supreme Court in *Gladue* directed sentencing judges to look at alternative sentencing options, and to consider broad systemic and background factors that affect Indigenous people generally and the offender in particular. Following the lack of clarity expressed by the Supreme Court in *Gladue*, the ruling in a more recent case was intended to rectify the situation (*R. v. Ipeelee*, 2012 SCC 13). In *Ipeelee*, the Court reaffirmed the importance of *Gladue* and confirmed that it applies in all contexts, including when sentencing a long-term Indigenous offender for breach of a Long-Term Supervision Order. The Supreme Court noted two errors being made regularly by the lower courts when sentencing Indigenous offenders. The errors concerned a lack of understanding of Gladue principles as set out by the Supreme Court in *Gladue*, and the inconsistent application of those principles. In the *Ipeelee* ruling, the Supreme Court acknowledged with regret that despite *Gladue*, "section 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice

[20] *R. v. Gladue*, para. 79.

system." In fact, according to the Court, "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened".[21] As Rudin points out, "In *Ipeelee* the Court decried the failure of the system to answer the call of *Gladue* and renewed its call for changes in the way Indigenous offenders were sentenced by the courts" (Rudin, 2018: 2).

It is not unusual for Supreme Court rulings to be written in a relatively general manner, at which point governments and the lower courts are left to assign practical meaning and manage the realities on their own. In the case of the *Gladue* ruling, this is precisely what happened in Toronto on the initiative of the Ontario Court of Justice, as described later in this report. Other jurisdictions have not been so effective in adapting to *Gladue*.

Other, perhaps more serious, concerns have been raised with respect to the *Gladue* judgment. For example, there is a danger, identified by Roach and Rudin, that s. 718.2(e) and *Gladue* might result in net-widening for Indigenous offenders. Their concern is that judges might choose to apply conditional sentences as an alternative to imprisonment in instances when a less serious sanction might have been ordered prior to the arrival of s. 718.2(e) and *Gladue*.[22] As Roach and Rudin explain,

> Conditional sentences, however, can result in net widening if they are ordered in cases where less intrusive sanctions would ordinarily have been ordered.... There are real grounds for concern that conditional sentences are resulting in net widening as judges apply them to offenders who would not normally have been subjected to actual imprisonment (2000: 369).

The use of a conditional sentence is more serious than commonly understood. It is not a probationary sentence, but a jail sentence of less than two years to be served in the community under certain conditions set by a judge. The breaching of the conditions associated with such a sentence could automatically lead to the actual incarceration of the offender for the remainder of their term. If Roach and Rudin are right and judges are applying conditional sentences when they would normally have handed down a less serious sentence such as a probation order, a fine, or a suspended sentence, then net widening is resulting in more serious sentences than

[21] *R. v. Ipeelee*, paras. 62-63

[22] Conditional sentences are sentences of imprisonment (jail) that are served in the community and strictly monitored. The imposition of a conditional sentence by a judge is restricted in several ways, including the fact that the period of imprisonment is less than two years, that the offender has not been convicted of a serious personal injury offence, and that the judge is satisfied the offender would not threaten community safety if a conditional sentence were imposed. Breaching one or more conditions would normally require the offender to return to court and would often result in the offender serving the remainder of the sentence in jail.

perhaps are justified. The upshot, according to Roach and Rudin, is that "[a]t the most basic level, it is clear that prison populations have not decreased to the same extent as conditional sentences have been ordered. With over 28,000 conditional sentences being ordered in their first two years of existence, prison populations have not been reduced to nearly the same extent" (Roach and Rudin, 2000:369). In part, at least, this may be due to the relatively high rate of breaching the terms of conditional sentences by Indigenous offenders and the subsequent incarceration of those individuals.

A related concern is that judges may impose a conditional sentence of greater duration than if they had handed down a sentence of actual incarceration at the outset. This is especially concerning in light of the fact that Indigenous offenders, especially in the western provinces, are disproportionately likely to breach their conditions. The result may be that when an Indigenous offender is sent to prison for the remainder of their sentence after a breach, they may be incarcerated longer than if they had been sent to prison in the first place (Rudin, 2018).

Again, such problems can be explained by systemic discrimination in the criminal justice system. More up-to-date research is required to thoroughly address these issues.

The problem of breaching conditions, whether linked to fine payment, probation orders or conditional sentences, is serious for Indigenous offenders, and is largely tied to socio-economic marginalization. Dickson-Gilmore and La Prairie (2005) argue that Indigenous people are at higher risk of offending, re-offending, and breaching conditions due to their relative marginality in Canadian society. This marginality is characterized by the problems noted earlier in the report: poverty, unemployment, low educational attainment, poor housing, and poor mental and physical health. Dickson-Gilmore and La Prairie are careful to note that the severity of these conditions and the degree of Indigenous marginality vary among different groups and in different parts of the country. However, they discuss the emergence of a growing "Aboriginal underclass", comprising mainly First Nation individuals living in reserve communities (2005: 35-36). Relatively speaking, this group is the most disadvantaged among all Indigenous groups in the country and therefore at greatest risk. Overall, however, Dickson-Gilmore and La Prairie confirm that social and economic marginality resulting from a history of living the colonial experience contributes to higher risk of offending, re-offending, and breaching conditions among Indigenous people. In the case of conditional sentences, this means a disproportionate likelihood of being sent to jail.

Have the policies represented by the *Criminal Code* amendment in the form of s. 718.2(e) and the subsequent Supreme Court judgment in *Gladue* had their intended effects? Certainly, the scale of the problem of Indigenous over-incarceration was recognized and the relevant

motivation was present. Government and judicial support for the concept of alternatives to incarceration – community-based justice – was strongly indicated. However, not much appears to have changed. The incarceration rate for Indigenous offenders has continued to rise since the *Gladue* decision in 1999. Indigenous offenders continue to be incarcerated at levels significantly higher than non-Indigenous offenders. Judges often have little recourse to sentencing alternatives at the community level, although the Indigenous Justice Program in the Department of Justice is making headway on this problem. Net widening through the use of conditional sentences and the likelihood of breaching conditions are still serious potential problems. It would appear that, while s. 718.2(e) and *Gladue* were steps in the right direction, they are a work in progress (Knazan, 2009; Pfefferle, 2008; Roach, 2009; Rudin, 2009). As the Supreme Court stated in *Ipeelee*,

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. (*R. v. Ipeelee*, SCC 13 2012)

Perhaps the difficulty lies in the intersection of two realities: the enormous scope of the problem and the limitations of the justice system in coming to grips with the fundamental issues underlying Indigenous overrepresentation. RCAP, among many others, has shown us that overrepresentation stems from the colonial experience, from socio-economic marginalization, and from culture clash. The resulting conditions facing Indigenous people as a whole create a higher risk of being involved in the system as an offender or a victim. It is these fundamental problems that must be addressed in a comprehensive and proactive way by courts, other justice institutions, and governmental and non-governmental institutions operating in other sectors such as health, education, housing, and employment.

5.2 The Establishment of Gladue Courts

Gladue Courts are plea and resolution courts with diversion being a possible resolution. Sentencing is part of the process as prescribed by the Supreme Court of Canada in *Gladue*. A further important factor is that the accused individual must plead guilty prior to their case being heard in Gladue Court. If a not-guilty plea is entered, the individual's hearing would be held in regular trial court.

The number of Gladue Courts is steadily increasing across Canada. The first was at Old City Hall in Toronto in 2001 and others have followed. There are higher numbers of Gladue Courts in

Ontario and British Columbia. However, caution should be taken when identifying a court as a Gladue Court. The assumption is sometimes made that because a court predominantly processes cases involving Indigenous persons, it is thus a Gladue Court. In fact, a true Gladue Court is characterized by certain specific factors relevant to the intent of s. 718.2(e) and the Supreme Court decision in *Gladue*. These factors, or goals, can be summarized as follows:

- Directly address section 718.2(e) of the *Criminal Code* in order to reduce Indigenous incarceration;
- Apply the Gladue principles identified by the Supreme Court, notably by understanding and accounting for the offender's background and the history of marginalization, systemic discrimination, and socio-economic deprivation experienced by Indigenous peoples in Canada;
- Encourage effective restorative justice/community-based justice alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans that will engage Aboriginal persons in their own rehabilitation; and
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

In order to achieve these goals, a Gladue Court requires the provision of detailed information regarding the offender to the presiding judge. This takes the form of Gladue Reports, which are prepared by trained experts who do relevant background investigations on individuals. Gladue Reports are usually prepared when the Crown is seeking a custodial sentence of at least ninety days for an out-of-custody individual or three additional months for an individual who is in-custody. Consistent with the *Gladue* ruling, Gladue writers may take weeks to document, through interviews with individuals who know the offender and other means, the life factors that have led the offender to their present state and to have committed a crime. Courts that do not have the capacity to access Gladue Reports generally do not meet the standards of *Gladue* because the presiding judge is not provided with the essential information to make a sentencing decision appropriate to the individual Indigenous offender, as indicated in *Gladue*.

Not every court applying Gladue principles has the benefit of a resident Gladue writer. While some courts in Ontario such as Toronto, Ottawa and Thunder Bay, for example, are supported directly by a Gladue writer, others require the assistance of Aboriginal Legal Services (ALS), the Toronto-based Indigenous legal support organization. ALS Gladue writers provide report writing services to at least twenty Ontario courts upon request.

Another essential component of the Gladue process is the availability and accessibility of culturally appropriate rehabilitative programs, often referred to as community-based justice programs. The Supreme Court in *Gladue* recognized the importance of such programs and also recommended that, if specifically Indigenous programs are not available, the court should attempt to refer the offender to any program as long as it is restorative in nature. This presents a challenge for many Canadian courts as restorative programs, especially those designed for Indigenous people, are still lacking in much of the country. While larger centres such as Toronto are relatively well equipped with these kinds of programs (for example, the Community Council at Aboriginal Legal Services in downtown Toronto), many communities are not. It therefore becomes important for local Indigenous communities to be supported in their efforts to provide restorative programming of their own design and management so that courts have appropriate alternatives to which offenders can be diverted. The Department of Justice has achieved success in this regard, as noted later in this report.

Similarly, Gladue Courts benefit significantly from the presence of an Indigenous Courtworker who often plays a key role in facilitating the Gladue process in several ways. Among other duties, the Courtworker explains the court process to the accused and determine if Gladue Court is appropriate, ensure the accused is connected with the court's Duty Counsel (a legal aid lawyer who works at the courthouse and is often the first legal contact for accused individuals), work with the Crown prosecutor to identify the best diversion program for the individual, work with program providers to set up the diversion program, and advise the presiding judge as required.

A further essential component of an effective Gladue Court is the involvement of committed justice professionals, including judges, Crowns, and defence counsel, who are trained in Indigenous justice issues. However, this appears not to be present in all courts addressing Indigenous cases. An evaluation of the Aboriginal Youth Court in Toronto, for example, found that some courts in the Toronto area were attended by lawyers who had very little idea of *Gladue* and Gladue principles as set out by the Supreme Court, even though they were prosecuting and representing Indigenous persons (Clark, 2016a). Further, it became apparent that many defence counsel were not aware of the availability and the importance of culturally appropriate diversion programs. This appears to be changing in the Toronto area thanks to the efforts at increasing awareness by the judges at the Aboriginal Youth Court, the Old City Hall Gladue Court, and Aboriginal Legal Services. It remains a concern in other parts of Ontario and in other provinces and territories.

In recent years, courts designed to address sentencing, access to restorative justice programs, and the overrepresentation problem have been initiated in several locations across Canada.

However, the various courts do not necessarily share the same structure or process.[23] For example, the sentencing circle concept is seen as relevant to Indigenous ways of addressing problems and finding solutions in a communal, supportive manner. It has taken hold in many venues involving Indigenous offenders and victims, including at the Toronto Old City Hall Gladue Court where sentencing circles are increasingly being held in a room other than a regular courtroom and take on a more informal character. Similarly, and more regularly, other courts are using the circle model. The Tsuu T'ina First Nation Court in Alberta is a good example. According to Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System, a report prepared by the Department of Justice Canada (2017a),

> The court blends two systems: the Provincial Court of Alberta and the peacemaker process – a circle process that involves the victim and offender, their respective families, and volunteers and resource personnel. It presides over Tsuu T'ina members, non-Tsuu T'ina Indigenous persons, and non-Indigenous persons, and has jurisdiction over criminal justice, youth justice, and First Nation by-law offences.

The same report goes on to say,

> The Court uses peacemaking traditions that reflect the values of the Tsuu T'ina Peoples, including smudging with sage or sweet grass. Local Peacemakers and Elders are directly involved in the court process and review the cases diverted from the justice system as well as cases that require dispute resolution.

In British Columbia there are four First Nations (Gladue) Courts with more on the way. They accept referrals of Indigenous individuals who have pled guilty and take on most bail and sentencing hearings. These courts are similar in format and process to the Aboriginal Youth Court in Toronto. Proceedings are held in relatively informal settings where the judge works with a range of resource persons to devise an individualized healing plan for the offender. The offender is requested to return to court after a certain period of engagement with the plan so they can be monitored by the judge hearing the case. In the Aboriginal Youth Court, this responsibility is taken on more directly by the Crown prosecutor, with the judge's approval.

The Cree-speaking Gladue Court based in Prince Albert, Saskatchewan is run by Cree justice professionals, including Cree judges and Crown prosecutors. It is unique in that it is a circuit court serving several First Nations in northern Saskatchewan. Similarly, the Gladue Court in

[23] A useful paper in this regard has been published by the Department of Justice, Canada, 2017a. It is entitled "Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System." Available at https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf

Meadow Lake, Saskatchewan takes a restorative approach and conducts hearings in Dene, Cree or English (Department of Justice Canada, 2017a).

In addition to courts specifically established to apply Gladue principles, certain other specialized courts also operate effectively. For example, Domestic Violence Treatment Option Courts in Yukon and the Northwest Territories process mainly Indigenous offenders in a manner consistent with Gladue principles. Relevant court-ordered programs are tied to the process and are aimed primarily at healing and reintegration (Clark, 2013). The courts monitor each individual's rehabilitative progress and a judge makes a final sentencing determination. Similarly, Yukon and the Northwest Territories have established Wellness Courts, designed to provide rehabilitative support for offenders with issues of mental health, addiction or cognitive impairment (see Hornick, Kluz and Bertrand, 2011). It would appear that *Gladue* – together with acknowledgement of the serious overrepresentation of Indigenous people – has stimulated movement to address issues of fairness and equity through problem-solving in the criminal justice system.

It should be noted, however, that one size does not fit all. It is important to remember that community-based approaches that involve the court, such as circle sentencing, are not appropriate in all cases. As noted earlier, Indigenous peoples in Canada represent many different cultures, each having its own views on justice. For example, while court mandated sentencing circles can work well in Ontario or Saskatchewan, they do not fit with Inuit culture. Inuit prefer smaller group approaches to restorative justice (see Crnkovich, 1995). The importance of ensuring the relevance of programs to individual communities is discussed further below.

5.3 Issues of Bail and Remand

Bail remand, and pre-trial detention have been particularly serious issues requiring attention, as noted in section 4.3.2, above. Justice Knazan of the Ontario Court of Justice (2003) points to the recognition by those working in the criminal courts that once an individual has been denied bail and imprisoned for a pre-trial period, the likelihood is higher that they will also receive a custodial sanction at sentencing. Judges may not be aware they can be influenced by the fact of pre-trial detention (assumes a greater risk of some form) and subsequently assume the offender deserves further prison time at sentencing. Higher rates of pre-trial detention for Indigenous accused, particularly in view of a lack of appropriate community-based pre-trial alternatives, may then translate into an increased likelihood of custodial sentences.

Bail relates directly to issues discussed earlier regarding systemic discrimination, s. 718.2(e) and the *Gladue* decision. In its examination of Manitoba courts, the Aboriginal Justice Inquiry of Manitoba identified the denial of bail and pre-trial detention as concurrent problems commonly facing Indigenous accused (1991: 221-4; 360-1).[24] The Commissioners noted that, according to analyses of provincial court data, Indigenous men and especially women were significantly more likely to spend time in pre-trial detention than non-Indigenous accused. A major reason for the difference was the higher likelihood that an Indigenous accused would be denied bail. This view was also held by the Supreme Court in *R. v. Gladue*.[25] However, to the extent that unequal denial of bail and pre-trial detention are realities, at least in some jurisdictions, the causes of the problems lie in underlying practices. When a judge or justice of the peace makes a decision regarding bail and pre-trial detention, the following basic questions form part of their consideration: "Is this a dangerous person?" and "Is this a person who can be trusted?" (Aboriginal Justice Inquiry of Manitoba, 1991: 100). The first question covers potential danger to the public, an individual, and/or to the accused individual themselves. The second question refers primarily to whether the accused would be likely or unlikely to adhere to bail conditions and to return to court on their hearing date.

The Manitoba Commissioners point out that while these questions are important, they are "inherently subjective" (Aboriginal Justice Inquiry of Manitoba, 1991: 100). They are subjective in the sense that the information required by the decision-maker contains a bias that often works against the accused Indigenous person. For example, information regarding education, employment, income, and permanent residency, which is typically sought from the accused, generally favours non-Indigenous individuals who are significantly more likely than Indigenous accused to have completed a certain level of education, have a job, earn a steady income, and have a permanent residence where the alleged offence was committed. Thus, bail may be less likely to be granted to an Indigenous accused than to his/her non-Indigenous counterpart. Consequently, according to the Manitoba Commissioners, pre-trial detention is more frequent for Indigenous accused.

The *Criminal Code* does not specifically address the question of bail for Indigenous offenders. In fact, as the case law material used in this report demonstrates, many judges remain unconvinced of the applicability of *Gladue* to bail applications. For example, the following

[24] Pre-trial detention is also known as custodial remand. A judge or a justice of the peace can deny a bail application and order pre-trial detention on the basis of any one of the three following criteria established in the *Bail Reform Act* of 1972, codified in s.515 of the *Criminal Code*, and modified more recently: (i) to ensure the attendance of the accused in court; (ii) to ensure the protection or safety of the public and to protect against criminal offences before the trial; and (iii) to maintain confidence in the administration of justice.
[25] *R. v. Gladue*, para. 65.

formed part of a judge's ruling in a bail application in the Provincial Court of Saskatchewan (*R. v. Heathen*, 2018 SKPC 29):

> In four separate decisions over the course of 17 years, the Supreme Court of Canada has had the opportunity to declare that Gladue should be applied to bail hearings. Each time, the Court has chosen not to direct lower courts to take such a step. Even in Antic, when the Supreme Court laid out an explicit set of rules for bail courts to follow, the Court did not see fit to mention Gladue. It would seem that the Supreme Court of Canada is not interested in expanding Gladue to a bail context.[26]

Nonetheless, as Justice Knazan says, "[a]ll the same, the Toronto Gladue Court addresses the particular circumstances of Aboriginal offenders at the bail hearing as an important part of considering 'all available sanctions other than imprisonment that are reasonable in the circumstances' as s.718(2)(e) requires" (2003: 11). This is a significant policy decision by the Toronto Gladue Court. It is premised on the realization noted by Knazan that "[a]s any lawyer knows ... the bail hearing becomes the most important proceeding because a detention order will effectively pre-determine the sentence as one of imprisonment.... Pre-trial detention is an obstacle to applying s.718(2)(e) and *R. v. Gladue* because imprisonment occurs before the judge can fulfill her role of considering the unique circumstances of Aboriginal offenders" (2003: 11-12; 2009).

One of the Manitoba Justice Inquiry's "inherently subjective" factors in decision making regarding bail is the ability of the accused person to cover the cost of bail or provide a surety. This, as noted in section 4.1.2, above, is a form of systemic discrimination for Indigenous accused. Indigenous people are less likely to be employed or to have an income and are often alienated from family and community, making bail is a real problem. Pre-trial detention is almost inevitably the result in many courts. In the Toronto Gladue Court as in some other Gladue Courts, however, every effort is made to accommodate individuals who cannot cover bail or provide a surety by assessing the individual's risk and by developing a pre-trial release plan. Bail is not guaranteed, but it is a real possibility for those who qualify by the standards set by the court. The court now has an Aboriginal Bail Program supervisor who is associated with the Toronto Bail Program and who interviews and screens accused without sureties for eligibility for release. The Toronto Bail Program agreed to adapt its guidelines so that Indigenous persons without a surety, including those with histories of failing to appear in court, can be considered for supervision.

[26] It appears that a Gladue Report was neither requested nor provided in this case.

Pre-trial detention or remand is a serious problem across the country for both Indigenous and non-Indigenous accused. Up to 60 percent of admissions to provincial or territorial jails are remands while approximately 40 percent are sentenced individuals. This places significant stress on the correctional system, as well as on the individuals in remand. As Rudin says, "[t]he importance of release on remand cannot be stressed [enough]" (Rudin, 2007: 53).

In June, 2011, Justice Marion Cohen of the Ontario Court of Justice, Youth Court Division began hearings in the Aboriginal Youth Court in Toronto, the first of its kind in Canada. In so doing, Justice Cohen was applying Section 38(2)(d) of the *Youth Criminal Justice Act (YCJA)*, which states:

> A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:… (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.

Section 38(2)(d) of the *YCJA* corresponds directly to s. 718.2(e) of the *Criminal Code* and is expressly designed to lower the high incarceration rate among Indigenous youth. Justice Cohen ran her court with a view to avoiding sentenced incarceration and pre-trial detention for youth. The Aboriginal Youth Court hears cases in a more relaxed atmosphere than regular youth court and diverts youth to culturally relevant programs in Toronto, particularly to the Community Council Project at Aboriginal Legal Services.[27] The court monitors the youth's progress in diversion programming and the result is typically the withdrawal of charges. An evaluation of the Aboriginal Youth Court concluded the court was achieving positive results with respect to several measures, including re-offending (Clark, 2016a). The Toronto Aboriginal Youth Court is a model worthy of consideration in other jurisdictions.

5.4 *Gladue* Case Law Review

Gladue has not had the positive results many had expected. As Maurutto and Hannah-Moffat state,

[27] The "relaxed atmosphere" involves all participants in the case, including the judge, Crown, defence counsel, the youth and anyone involved in supporting the youth (parents, care giver, social worker, group home supervisor, probation officer, etc.) sitting around a large table in the centre of the courtroom. The court is welcoming and takes the time necessary to ensure the youth and everyone else around the table are heard and that the youth is diverted to culturally relevant programming.

> Notwithstanding the promise of significant reforms, section 718.2(e) and subsequent case law have not significantly altered rates of incarceration for Aboriginal offenders. In fact, the imprisonment of Aboriginal people has increased since *R. v. Gladue*…. The Supreme Court of Canada itself recognized in *R. v. Ipeelee* [2012] the "worsening" overrepresentation of aboriginal people following the *Gladue* decision. Moreover, it reaffirmed the "inadequacy" and "failure" of Canadian courts "to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process." (Maurutto and Hannah-Moffat, 2016: 458)

Incarceration statistics and relevant case law appear to confirm the statements made by Maurutto and Hannah-Moffat. An analysis undertaken for this report involved a limited review of case law in which the court referenced *Gladue* in sentencing. While the focus of the review was on *Gladue* citations, in some cases other rulings, such as *Ipeelee*, were also brought to bear on sentencing.[28]

The case law review indicated certain trends. It demonstrated that judges in 2018 were more aware of Gladue principles and the significance of their application than they were in 2010 and, especially, in 2000. There appears to be a substantial degree of consensus on the question of the requirement to cite *Gladue*, at least. Similarly, *Ipeelee* now tends to be acknowledged as judges appear to accept that mandatory minimum sentences should not apply when Gladue principles are cited, and that Gladue principles should be applied in every case involving an Indigenous offender, including in cases addressing serious charges. On the other hand, while the frequency of judges referencing Gladue increased from 2000 and 2010 to 2018, there were still many cases where *Gladue* received only a cursory mention. Gladue Reports are not being requested in many cases and pre-sentence reports (PSRs) are used to fill the gap in knowledge of the individual offender. This continues to be problematic for two reasons. First, PSRs are used to assess risk. This can have negative impacts on the accused and can further result in net widening in terms of more incarceration and over classification of the offender in terms of jail security. (This point was made consistently over the years by the Office of the Correctional Investigator.)

[28] The case law review material was provided by the Research and Statistics Division, Department of Justice Canada. In all, 118 cases in various Canadian courts (provincial/territorial courts, provincial Supreme Courts, provincial Courts of Appeal) were identified for review: 90 in 2018; 19 in 2010; and nine in 2000. The cases ranged in severity and included drug trafficking, driving while under the influence, firearms trafficking, robbery, armed robbery, assault, aggravated assault, sexual interference, sexual assault, manslaughter, second degree murder, and first degree murder. Most of the cases involved sentencing but several involved bail hearings and a few involved other applications (e.g., a Danger Offender/Long-Term Supervision Application; an Application for Declaration that Section 99 of the *Criminal Code* is of no force and effect regarding a charge of firearms trafficking). Approximately 2,129 cases citing *Gladue* were listed in CanLII from 1999 to 2018.

Second, the absence of a Gladue Report, written by a trained Gladue writer, denies a judge the opportunity to fully understand the individual offender's background and the life factors that led them to commit a crime. In turn, this decreases a judge's ability to hand down a non-incarceration sentence appropriate to the individual offender, thereby failing to follow the Supreme Court of Canada's ruling in *Gladue*.

Finally, review of the cases from 2018 suggests that there remains some disagreement among judges as to whether Gladue principles should apply to bail and remand. Judges who assume the negative position are often concerned primarily with public security and the perceived need to keep the offender in pre-trial detention. Those who favour granting bail, if reasonable, tend to agree that *Gladue* should apply to all Indigenous offenders because incarceration, whether as part of a sentence or pre-trial, is still incarceration and contradicts *Gladue*. Unsurprisingly, judges in the latter category, especially in 2018, were more likely to request a Gladue Report in order to fully understand the offender's background and to grant bail with appropriate conditions.

While there have been positive changes in judicial approaches between 2000 and 2018, it appears that Gladue principles are still not being applied universally in sentencing or in bail decisions.

5.5 Community Initiatives and Government Relations

In 1991, the Government of Canada implemented the Aboriginal Justice Initiative (AJI). The five-year program was administered by the Department of Justice Canada, although it was established as a cost-sharing program with provincial and territorial governments. It aimed to support community-based justice projects such as diversion programs, community involvement in sentencing, and mediation and arbitration processes for civil disputes. In 1996 the government renewed and expanded the initiative and changed its name to the Aboriginal Justice Strategy (AJS). In 2002, the AJS was renewed for a further five years, and in 2007 it was renewed with enhanced funding until 2012. It was again renewed in 2012, 2013, and 2014. Most recently, it was renewed in the 2017 federal budget and was re-named the Indigenous Justice Program (IJP) with a permanent mandate. Like the AJS, the IJP is primarily intended to fund community-based initiatives and is the primary and most comprehensive federal program in support of Indigenous people and criminal justice.

The IJP supports Indigenous community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances. The program has three main

objectives: (i) to assist Indigenous people in assuming greater responsibility for the administration of justice in their communities; (ii) to reflect and include Indigenous values within the justice system; and, (iii) to contribute to a decrease in the rate of victimization, crime and incarceration among Indigenous people in communities with community-based justice programs funded by the IJP. (Department of Justice Canada, 2018b)

Programs vary somewhat in terms of specific purpose and structure; however, they all take a community-based justice approach. In the North, for example, community justice committees and youth justice committees are funded to carry out a variety of functions including family group conferences, elder counselling, and spousal mediation. Sentencing circles and healing circles are supported in other regions.

Is this approach effective? The final report of the summative evaluation of the AJS dedicates the following paragraph to conclusions on this question: "To what extent have community-based programs had an impact on crime rates in the communities where they are implemented?" The conclusion reads as follows:

> Individuals who participate in the AJS programs are more likely to get rehabilitated than those who are sent into the mainstream justice system. The recidivism study conducted in support of this evaluation indicates that offenders who participate in AJS-funded programs are approximately half as likely to re-offend as are offenders who do not participate in these programs (Department of Justice Canada, 2007: 47).[29]

This finding is encouraging. It is essentially replicated in the final report on the Evaluation of the AJS 2016:

> For individuals accessing AJS-funded programs, recidivism rates are lower than for those not participating, and the evaluation found anecdotal evidence that the programs can help bring about transformational change in the lives of participants and in some cases improve community safety (Department of Justice Canada, 2017b: iii).

Yet why are rates of Indigenous overrepresentation continuing to rise in spite of the work of the AJS/IJP, provinces and territories, legislators (s. 718.2(e)), and the Supreme Court (*Gladue* and *Ipeelee)*? Is there something lacking in our approach to community-based justice? The

[29] The authors of the evaluation admit the recidivism study had methodological limitations; however, for present purposes we can accept the study's general findings.

following analysis considers the working relationship between Indigenous communities and governments and between Indigenous communities and the criminal justice system.

Dickson-Gilmore and La Prairie (2005) raise questions about how funding agencies have, in the past, at least, employed "top-down" approaches to defining community and community needs that often do not serve the interests of the community itself. Proulx attributes this hegemonic approach to defining community as the result of "historically and geographically specific colonial discourses and practices", including legislation such as the *Indian Act* (2003: 152). The alternative is a "bottom-up" definition "which recognizes that communities are self-defined by people as a reflection of their local interactions and participation" (B.C. Resources Community Project, 1998: 3 quoted in Dickson-Gilmore and La Prairie, 2005: 8). In other words, people are capable of defining themselves as a community according to the criteria that matter most to them. Further, the community – not a researcher or government– is best able to identify its needs, aspirations, and appropriate approaches to addressing problems. The community must, at the very least, directly engage with government in defining issues and creating innovative solutions (Ross, 1996; Warry, 1998; Proulx, 2003; Dickson-Gilmore and La Prairie, 2005; Clark and Landau, 2012; Iacobucci, 2013).

This is a critical point for many reasons. For example, consider the importance of culture and culture clash in the development of new approaches to Indigenous justice. The concept of culture clash suggests that Indigenous worldviews and approaches to justice are often significantly different from the principles and methods of the mainstream system. It is also the case that the problem of Indigenous overrepresentation is seen to exist, in large part, because the dominant justice system, including police, courts and corrections, has often been socially and culturally out of step with the needs of Indigenous people and the dynamics of Indigenous communities. The *Aboriginal Justice Strategy Formative Evaluation* noted the following:

> Although there is support for the notion of restorative justice, which is critical to an Aboriginal approach to justice, there is still a need for more emphasis on Aboriginal values within the Canadian justice system. One community indicated that the most successful programs are the ones where cultural practices are emphasized (Department of Justice Canada, 2005: 27-28).

In response to this argument, governments and related organizations such as the RCMP often claim to have initiated "culturally relevant" or "culturally appropriate" community-based alternatives as an effective way to address problems. However, for such claims to be valid, it is essential for funding bodies and their affiliates, such as the RCMP, to take very seriously the proposals developed by communities and community-based groups (Clark, 2007). In every case,

discussion must take place and culturally relevant justice alternatives supported if reasonable. Regrettably, this has not always happened and, until recently, there were concerns expressed in the literature and by Indigenous communities and organizations that top-down approaches prevented the initiation of culturally relevant and effective community-based alternatives. The Department of Justice Canada has worked to address these concerns; hence the relative success of the AJS/IJP with respect to Indigenous communities.

Since the AJI began in 1991, the federal government has developed a strong capability to enter into effective dialogue with provincial and territorial governments and with the Indigenous communities and community groups proposing community-based justice programs. It is understood that the essential question is this: What approach would best meet the needs of a community in ways that make most sense for the community itself? Governments and Indigenous communities alike are well served by accepting this as the key question and by working together to address it.

While governments are doing a reasonably good job supporting community-based initiatives, two problems with regard to policy and practice continue to negatively affect the development of community-based alternatives and the reduction of overrepresentation. First – and this is a serious critique of the mainstream justice system – the system often fails to support the attainment of community goals by not doing its part to make the intersections between Indigenous communities and the mainstream system work effectively. Second, there continue to be gaps in successfully addressing fundamental social and economic factors underlying Indigenous overrepresentation in the criminal justice system.

With regard to the first point, we see instances of the mainstream justice system not following through on its responsibilities – responsibilities which are essential in making the intersection of mainstream approaches and community alternatives viable. Two anecdotes from my own experience are symptomatic and may help to demonstrate the problem. As the first example, I have witnessed occasions where a long-standing and effective Community Justice Committee has been shut out of the business of rehabilitating young offenders simply because a newly arrived RCMP Detachment Commander did not agree with the concept of restorative justice and therefore would not divert pre-charge cases to the local committee (although restorative justice was claimed to be a fundamental aspect of RCMP policy). Similarly, I have witnessed a judge referring a man convicted of spousal assault to a Community Justice Committee for "traditional counselling" as part of his probation order when, in fact, the Committee was not at all prepared to deal with such offenders. When asked, the judge acknowledged never having spoken with the local committee about what they could and would take on. These examples suggest the mainstream justice system must fulfil its part of the bargain if innovative

community-based approaches are to work. The mainstream system is, after all, still the dominant system. Until Indigenous communities achieve greater responsibility in managing their own justice matters, alternative approaches will work only if the mainstream system allows them to proceed and works closely and cooperatively with communities.

Even more serious is the social and economic marginality of Indigenous people in Canada. Earlier this report addressed the unacceptably high rates of poverty and unemployment, and the substandard levels of housing, education, and health care currently experienced in Indigenous communities. Again, in the words of RCAP, "[t]here is no doubt in our minds that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people" (1996:42). Similarly, the Supreme Court of Canada recognized the extent of the problem in *Gladue*:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people.[30]

Like the decision to sustain the Aboriginal Justice Strategy and now the Indigenous Justice Program, policy decisions required to address issues of marginalization are largely the responsibility of the Government of Canada and, to a lesser extent, provincial and territorial governments. While the federal government continues to address those issues through various departments (e.g., Crown-Indigenous Relations and Northern Affairs Canada; Health Canada), it never seems to be enough. Social and economic marginalization, together with the disastrous intergenerational effects of residential schools, remains a critical problem and rates of overrepresentation continue to rise. While the current government is committed to implementing the Calls to Action by the TRC, much remains to be done; for example, the provision of clean drinking water to First Nation communities, the provision of adequate housing to northern communities, and the provision of sound health, education and employment programs in most Indigenous communities. Lack of success in these areas and others continues to be a major impediment to solving the problem of overrepresentation. Hopefully, the 2019 federal budget, which included substantial funding for Indigenous programs, will have positive effects.

[30] *R. v. Gladue*, para. 65.

A comprehensive strategy is required to address continuing problems of colonialism, social and economic marginalization, and systemic discrimination. The absence of such a strategy might be the most serious policy failing with respect to the overrepresentation of Indigenous people in the criminal justice system. Adequate resources must accompany positive policies and consultations with Indigenous communities and organizations must be open and in-depth. The problems will not be resolved quickly, in part because they have developed over many years, and in part because they are so serious. But the Government of Canada, together with provincial and territorial governments and Indigenous communities and organizations, has a responsibility to make reversing the marginalization of and discrimination against Indigenous people a priority.

Conclusion

Indigenous criminal justice policy in Canada continues to face major challenges. Rates of overrepresentation of Indigenous people in the system are still extremely high and getting worse, and systemic discrimination is an ongoing reality. Yet we have seen improvements. The legislated amendments to the *Criminal Code*, in recognizing how unequal life chances contribute to offending and victimization among Indigenous people, as well as recognizing the value of sentencing alternatives, were significant advances in federal policy. Similarly, the expanded recognition of the same realities by the Supreme Court of Canada in *Gladue* and *Ipeelee* was a major step forward. The fact that the sentencing amendments and *Gladue* stimulated the creation of successful Gladue Courts in Toronto and elsewhere is testament to their importance in the effort to reduce overrepresentation and over-incarceration of Indigenous people.

The overall achievement of the Department of Justice Canada approach to Indigenous justice issues is also significant as many projects funded by the Indigenous Justice Program have been successful. Department officials have recognized that a genuinely active engagement of Indigenous communities in policy and program design and in program implementation is essential if local justice alternatives are to be effective.

A remaining concern is with the role of the mainstream justice system. Recognizing that the system will continue to be dominant – for the time being, at least – it is important to ensure the intersections between the mainstream structures (police, courts and corrections) and community approaches remain viable. The mainstream structures have important roles to play and they should work to fulfill those roles. A significant aspect of that work must involve close cooperation with Indigenous communities.

Underlying any policy development with respect to Indigenous peoples in Canada are the fundamental issues of historical and ongoing colonialism, systemic discrimination, social and economic marginalization, and culture clash. Thanks to the conclusions drawn by many experts and expert bodies such as RCAP, the TRC, and the Supreme Court of Canada, we know that poverty and unequal life chances contribute to the overrepresentation of Indigenous people in the criminal justice system. Overcoming those historic and persistent challenges should be the first goal of governments, as well as Indigenous organizations and communities. Significant progress toward achievement of that goal will finally set the conditions whereby justice policy will truly be able to make positive and long lasting changes for Indigenous people. Overrepresentation might then become a thing of the past.

References

Aboriginal Justice Inquiry of Manitoba. 1991. *Report, Volume 1: The Justice System and Aboriginal People.* Winnipeg: Queens Printer.

Anand, Sanjeev. 2000. "The sentencing of aboriginal offenders, continued confusion and persisting problems: A comment on the decision in *R. v. Gladue*" in *Canadian Journal of Criminology* 42(3): 412-420.

B.C. Resources Community Project. 1998. Geography Department, University of Northern British Columbia. Prince George, B.C.

Bressan, Angela, and Kyle Coady. 2017. *Guilty pleas among Indigenous people in Canada*. Ottawa: Research & Statistics Division, Department of Justice. https://justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf

Clark, Scott. 1989. *The Mi'kmaq and Criminal Justice in Nova Scotia*. Report prepared for The Royal Commission on the Donald Marshall, Jr., Prosecution. Halifax: Province of Nova Scotia.

Clark, Scott. 2007. *Final Report: Northern Policing Review (Pan-Territorial).* http://www.justice.gov.nt.ca/pdf/CommunityJustice/Policing_Report_2007.pdf

Clark, Scott. 2013. *A Review of the Northwest Territories Domestic Violence Treatment Option Court and PARTNER Program*. Report prepared for the Department of Justice of the Northwest Territories.

Clark, Scott. 2016a. *Evaluation of the Aboriginal Youth Court, Toronto.* Available on the Aboriginal Legal Services website http://www.aboriginallegal.ca/assets/ayc-evaluation-final.pdf

Clark, Scott. 2016b. *Evaluation of the Gladue Court, Old City Hall, Toronto*. Available on the Aboriginal Legal Services website http://www.aboriginallegal.ca/assets/gladue-court-evaluation---final.pdf

Clark, Scott and Tammy Landau. 2012. "Aboriginal Justice Policy in Canada" in Karim Ismaili, Jane B. Sprott and Kim Varma (eds.), *Canadian Criminal Justice Policy: Contemporary Perspectives*, Toronto: Oxford University Press.

Coates, Ken. 2008. *The Indian Act and the Future of Aboriginal Governance in Canada*. Research paper prepared for the National Centre for First Nations Governance. Issued as part of the Canadian Electronic Library, documents collection.

Commission on First Nations and Métis Peoples and Justice Reform. 2004. *Final Report*. Saskatchewan: Queen's Printer.

Commission on Systemic Racism in the Ontario Criminal Justice System. 1995. *Final Report*. Ontario: Queen's Printer.

Crosby, Andrew and Jeffrey Monaghan. 2012. "Settler governmentality in Canada and the Algonquins of Barriere Lake" in *Security Dialogue*, 43(5): 421-438.

Crnkovich, Mary. 1995. *The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities*. Paper presented at the Canadian Institute for the Administration of Justice Conference, Banff, Alberta, October, 1995.

Department of Justice Canada. 2005. *Aboriginal Justice Strategy Formative Evaluation: Summary, Recommendations and Management Response*. Ottawa.

Department of Justice Canada. 2007. *Aboriginal Justice Strategy Summative Evaluation: Final Report*. Ottawa.

Department of Justice Canada. 2017a. *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*. https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf

Department of Justice Canada. 2017b. *Evaluation of the Aboriginal Justice Strategy December 2016*. Ottawa. https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/ajs-sja/ajs-sja.pdf

Department of Justice Canada. 2018a. "Indigenous overrepresentation in provincial/territorial corrections." *Just Facts.* Research and Statistics Division. https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/docs/nov01.pdf

Department of Justice Canada, 2018b. *Indigenous Justice Program.* https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html

Department of Justice Canada, 2018c. "Trends in Adult Federal Custody Populations." *Just Facts.* Research and Statistics Division. https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/docs/march01.pdf

Depew, Robert. 1992. Policing native communities: some principles and issues in organizational theory. Canadian Journal of Criminology 34: 3-4: 461-478.

Dickson-Gilmore, Jane and Carol La Prairie. 2005. *Will the Circle Be Unbroken? Aboriginal communities, restorative justice, and the challenges of conflict and change*. Toronto: University of Toronto.

Doob, Anthony N. and Jane B. Sprott. 2007. "The Sentencing of Aboriginal and Non-Aboriginal Youth: Understanding Local Variation", *Canadian Journal of Criminology and Criminal Justice* 49, 1: 109-123.

Deukmedjian, John Edward. 2008. "The Rise and Fall of RCMP Community Justice Forums: Restorative Justice and Public Safety Interoperability in Canada" *Canadian Journal of Criminology and Criminal Justice* 50(2): 117-151.

Friedland, Hadley. 2009. "Different Stories: Aboriginal people, Order, and the Failure of the Criminal Justice System" *Saskatchewan Law Review*, 72: 105-142.

Health Canada. 2010a. "First Nations, Inuit and Aboriginal Health: Tuberculosis (TB)" http://www.hc-sc.gc.ca/fniah-spnia/diseases-maladies/tuberculos/index-eng.php

Hornick, Joseph P., Karolina Kluz and Lorne D. Bertrand. 2011. *An Evaluation of Yukon's Community Wellness Court*. Report prepared for the Yukon Department of Justice.

Hylton, John H., 2005. *Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples*. Paper produced for the Ipperwash Inquiry (Ontario).

Iacobucci, The Honourable Frank. 2013. *Final Report: First Nations Representation on Ontario Juries*. Ontario: Queen's Printer.

Jackson, Michael. 1988. *Locking Up Natives in Canada*. Report of the Canadian Bar Association Committee on Imprisonment and Release. Ottawa: Canadian Bar Association.

Kellough, Gail and Scot Wortley. 2002. "Remand for Pleas: Bail Decisions and Plea Bargaining as Commensurate Decisions" in *British Journal of Criminology* 42(1): 186-210.

Knazan, Judge Brent. 2003. "Sentencing Aboriginal Offenders in a Large City – the Toronto Gladue (Aboriginal Persons) Court". Paper presented at the National Judicial Institute Aboriginal Law Seminar, Calgary.

Knazan, Judge Brent. 2009. "Time for Justice: One Approach to *R. v. Gladue*" *Criminal Law Quarterly* 54(4): 431-446.

Law Reform Commission of Canada, 1991. Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Ottawa: Law Reform Commission of Canada.

Levy, Jacob and Iris Marion Young (editors). 2011. *Colonialism and Its Legacies*. Lexington Books. https://the-eye.eu/public/concen.org/01052018_updates/Sins%20of%20Colonialism%20-%20Collection%2028/Levy%20%28Ed.%29%20-%20Colonialism%20and%20Its%20Legacies%20%282011%29.pdf

Linden, Rick, Don Clairmont, and Chris Murphy. 2001. *Aboriginal Policing in Manitoba: A Report to the Aboriginal Justice Implementation Commission*. Winnipeg. http://www.ajic.mb.ca/policing.pdf

Manzano-Munguia, Maria C. 2011. "Indian Policy and Legislation: Aboriginal Identity Survival in Canada" *Studies in Ethnicity and Nationalism*, 11(3): 404-426.

Mann, Michelle M. 2009*. Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*. Prepared for the Office of the Correctional Investigator. Ottawa. http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20091113-eng.aspx

Maurutto, Paula and Kelly Hannah-Moffat. 2016. "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" in *Canadian Journal of Law and Society*, Vol 31: 3. https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/aboriginal-knowledges-in-specialized-courts-emerging-practices-in-gladue-courts/7238B5C4A480110392F8E9FE58BBCBCD

National Inquiry into Missing and Murdered Indigenous Women and Girls. 2019. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.* https://www.mmiwg-ffada.ca/final-report/

Office of the Correctional Investigator (OCI). 2012. *Final Report: Spirit Matters: Aboriginal people and the Corrections and Conditional Release Act*. Ottawa. http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx

Office of the Correctional Investigator (OCI). 2014. *Annual Report of the Office of the Correctional Investigator 2013-2014* http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf

Office of the Correctional Investigator (OCI). 2018. *Annual Report of the Office of the Correctional Investigator 2017-2018*. http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx

Palmater, Pamela D. 2011. *Beyond Blood: Rethinking Indigenous Identity*. Saskatoon: Purich Publishing.

Pfefferle, Brian R. 2008. "*Gladue* Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration" *Manitoba Law Journal* 13: 113-143.

Proulx, Craig. 2003. *Reclaiming Aboriginal Justice, Identity, and Community*. Saskatoon: Purich Publishing.

Roach, Kent. 2009. "One Step Forward, Two Steps Back: *Gladue* at Ten and the Courts of Appeal" *Criminal Law Quarterly* 54(4): 470-505.

Roach, Kent and Jonathan Rudin. 2000. "*Gladue*: The judicial and political reception of a promising decision" in *Canadian Journal of Criminology* 42(3): 355-388.

Ross, Rupert. 1992. *Dancing with a Ghost*. Toronto: Penguin.

Ross, Rupert. 1996. *Return to the Teachings*. Toronto: Penguin.

Royal Commission on Aboriginal Peoples (RCAP). 1996. *Bridging the Cultural Divide: a report on Aboriginal people and criminal justice in Canada.* Ottawa: Minister of Supply and Services Canada.

Rudin, Jonathan. 2007. *Aboriginal Peoples and the Criminal Justice System*. Report prepared for the Ipperwash Inquiry (Ontario). http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf

Rudin, Jonathan. 2009. "Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs" *Criminal Law Quarterly* 54(4): 447-469.

Rudin, Jonathan. 2018. "The (in)justice system and Indigenous people" in *Widening the Lens on Criminal Justice Reform* (article series), Policy Options website: http://policyoptions.irpp.org/magazines/april-2018/the-injustice-system-and-indigenous-people/

Sprott, Jane B. and Anthony N. Doob. 2002. "Two Solitudes or Just One? – Provincial Differences in Youth Court Judges and the Operation of Youth Courts" in *Canadian Journal of Criminology* 44(2): 165-180.

Standing Committee on Indigenous and Northern Affairs. 2017. *Breaking Point: The Suicide Crisis in Indigenous Communities.* http://www.ourcommons.ca/Content/Committee/421/INAN/Reports/RP8977643/inanrp09/inanrp09-e.pdf

Statistics Canada. 2005. "Collecting Data on Aboriginal People in the Criminal Justice System: Methods and Challenges" http://www.statcan.gc.ca/pub/85-564-x/85-564-x2005001-eng.pdf

Statistics Canada. 2006. "Victimization and offending among the Aboriginal population in Canada" *Juristat* Article, Vol. 26, no. 3 http://www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf

Statistics Canada. 2008. "Youth custody and community services in Canada, 2005/2006" *Juristat* Article, Vol. 28, no. 8 http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008008-eng.pdf

Statistics Canada. 2009a. "2006 Census: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census" http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/p3-eng.cfm

Statistics Canada. 2009b. "The incarceration of Aboriginal people in adult correctional services" *Juristat*, 29(3). http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.pdf

Statistics Canada. 2009c. "2006 Aboriginal Population Profile for Toronto" http://www.statcan.gc.ca/pub/89-638-x/2009001/article/10825-eng.pdf

Statistics Canada. 2010. "Aboriginal Statistics at a Glance" http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?lang=eng&catno=89-645-X

Statistics Canada. 2011. "Violent victimization of Aboriginal people in the Canadian provinces, 2009" *Juristat* Article http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11415-eng.pdf

Statistics Canada. 2012. 'Youth Correctional Statistics in Canada, 2010/2011'. *Juristat* Catalogue 85-002 http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11716-eng.pdf

Statistics Canada. 2014. 'Admissions to Adult Correctional Services in Canada, 2011/2012' *Juristat* Catalogue 85-002-x http://www.statcan.gc.ca/pub/85-002-x/2014001/article/11918-eng.htm#a5

Statistics Canada. 2016a. "Adult custody admissions to correctional services by aboriginal identity." Table 35-10-0016-01. https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601

Statistics Canada. 2016b. *Data Tables: 2016 Census*. https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?TABID=2&Lang=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=1334853&GK=0&GRP=1&PID=110682&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2017&THEME=123&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0

Statistics Canada. 2016c. *Juristat: Victimization of Aboriginal people in Canada, 2014*. Canadian Centre for Justice Statistics. https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14631-eng.pdf?st=LhuuzsWc

Statistics Canada. 2017a. "Aboriginal peoples in Canada: Key results from the 2016 census." *The Daily* released 2017-10-25. https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm

Statistics Canada. 2017b. "Trends in the use of remand in Canada: 2004/2005 to 2014/2015". https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14691-eng.htm

Statistics Canada. 2018a. "Adult and youth correctional statistics in Canada, 2016/2017". https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm

Talaga, Tanya. 2017. *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City*. Toronto: Anansi Press.

Truth and Reconciliation Commission of Canada. 2015a. *Calls to Action.* http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf

Truth and Reconciliation Commission of Canada. 2015b. *Homepage*. http://www.trc.ca/reconciliation.html)

Warry, Wayne. 1998. *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government*. Toronto: University of Toronto Press.

Legislation Cited

Bail Reform Act, S.C. 1970-71-72, c. 37.
The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Criminal Code (R.S., 1985, c. C-46).
Indian Act, (R.S., 1985, c. I-5).
Corrections and Condition Release Act, (S.C. 1992, c. 20)

Cases Cited

Guerin v. R., [1984] 2 S.C.R. 335.
R. v. Gladue, [1999] 1 S.C.R. 688.
R. v. Heathen, 2018 SKPC 29.
R. v. Ipeelee, 2012 SCC 13. [2012] 1 S.C.R. 433
R. v. Sparrow, [1990] 1 S.C.R. 1075.
R. v. Wells, [2000] 1 S.C.R. 207.
R. v. Williams, [1998] 1 S.C.R. 1128.