

## *Aboriginal Peoples and the Criminal Justice System*

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\* Opinions expressed are those of the author and do not necessarily reflect those of the Ipperwash Inquiry or the Commissioner.

## EXECUTIVE SUMMARY

This paper, written for the Ipperwash Inquiry, deals with the relationship between Aboriginal people and the criminal justice system, with particular emphasis on the situation of Aboriginal people in Ontario. The paper argues that an understanding of the dynamics of this relationship helps explain the way in which attitudes and responses to events such as the occupation of Ipperwash Park can be understood. Further, unless changes are made in this relationship, similar responses from both Aboriginal and non-Aboriginal people can be expected.

Aboriginal overrepresentation in the criminal justice system is one of the clearest markers of what the Supreme Court of Canada has referred to as “a crisis in the Canadian justice system.” Aboriginal overrepresentation is often thought of as a problem in western Canada but, in fact, Ontario ranks third in terms of overrepresentation across the country. Aboriginal youth are overrepresented in Ontario correctional facilities at a much higher rate than Aboriginal adults. While recent sentencing amendments and Supreme Court decisions have led to a lowering of the overall jail population, the drop in Aboriginal admissions is much smaller than that of non-Aboriginal admissions. This is true in both the adult and youth justice spheres. This suggests that overrepresentation will continue to be a problem for the years to come.

In order to address this problem, it is first necessary to understand what the major causes of the problem are. The three explanations that have been advanced as significant causal factors are: 1) culture clash, 2) socio-economic, and 3) colonialism. While all three explanations have their strengths, the paper agrees with the Royal Commission on Aboriginal Peoples and other commissions and reports that it is the experience of colonialism that best explains the persistence of Aboriginal overrepresentation.

While overrepresentation may be the most obvious example of the problems Aboriginal people have with the criminal justice system, in many ways over- and under-policing, although more difficult to demonstrate statistically, are equally serious. Over-policing refers to the practice of police targeting people of particular ethnic or racial backgrounds or people who live in particular neighbourhoods. While Aboriginal people are clearly over-policed today, over-policing has a particular history with regards to Aboriginal people. Governments in Canada have historically used the police to pre-emptively attempt to resolve Aboriginal rights disputes by arresting those attempting to exercise those rights prior to any determination as to the validity of the claims. In addition, police have been used to further the objectives of the government in terms of assimilation of Aboriginal people through apprehension of children in order to have them attend residential school, and later in support of child welfare agencies. Police also were used to support many of the most egregious provisions of the *Indian Act*.

The impact of over-policing has led to a great distrust of the police by Aboriginal people. Over-policing also leads to the police forming attitudes that view Aboriginal people as violent, dangerous, and prone to criminal behaviour. These sorts of attitudes are not counteracted by Aboriginal awareness programs or similar initiatives.

At the same time, Aboriginal people are also under-policed. Aboriginal people are not only overrepresented in the criminal justice system as accused persons, but as victims as well. Nevertheless, Aboriginal people are often seen as less worthy victims by the police, and thus

requests for assistance are often ignored or downplayed. This attitude is mirrored by governments who also routinely downplay the significance of Aboriginal rights claims and ignore long-standing grievances. Just as over-policing has a significant impact on Aboriginal peoples attitudes toward the police, under-policing also plays a great role in fostering a deep distrust of police. Under-policing and over-policing are really two sides of the same coin.

Governments and the courts have undertaken a number of initiatives to address the problems discussed in this paper. In 1996, the sentencing provisions of the *Criminal Code* were significantly amended. Among the amendments was s. 718.2(e), which instructs judges to look for all alternatives to imprisonment that are reasonable in the circumstances for all offenders “with particular attention to the circumstances of aboriginal offenders.” The meaning of this section was elaborated upon by the Supreme Court of Canada in the 1999 decision of *R. v. Gladue*. Subsequent to *Gladue*, the federal government, in the 2001 Throne Speech, pledged to eliminate Aboriginal overrepresentation within a generation.

There are a number of specific programs funded by both the federal and provincial governments that are meant to address overrepresentation and related issues. Aboriginal Courtworkers have been in place in Ontario since the 1970s. In the 1990s, both levels of government began funding Aboriginal justice programs that were specifically aimed to take Aboriginal offenders out of the criminal justice system and have them dealt with in more culturally appropriate and meaningful ways. In Ontario, Legal Aid Ontario has also funded some of these programs. In Toronto, the Gladue (Aboriginal Persons) Court was established in 2001 to allow judges to truly respond to the *Gladue* decision. The court has a number of specific resources available to it in its work. One of the most important is the presence of a Gladue Caseworker who writes Gladue Reports, providing the sentencing judge with valuable information on the life circumstances of the offender and also possible recommendations for sentences that can address the problems that have brought the individual before the court.

Despite these initiatives, Aboriginal overrepresentation and concerns about over- and under-policing have not diminished in any significant way in the past 10 to 15 years. Among the reasons for this are the real systemic barriers to change in the criminal justice system.

The *Gladue* decision is not a sentencing discount case. The decision requires judges to approach the sentencing of an Aboriginal offender in a different manner. Crucial to this approach is the provision of information that the judge can use to craft the type of restorative sentence contemplated by the decision. Unfortunately, outside of the Gladue Court and the recent expansion of the Gladue Caseworker program by Aboriginal Legal Services of Toronto, judges are generally not getting the information they require to make Gladue meaningful to Aboriginal offenders before the court.

A further systemic issue that has blunted the impact of *Gladue* is the tendency of many Aboriginal accused persons to plead guilty to their offences if they are denied bail. In Ontario, there has been a significant rise in the remand population—those held in custody while awaiting trial—while there has been a reduction in custodial sentences imposed after a finding of guilt. This development means that many offenders are essentially receiving “time-served” sentences.

A number of factors work together to make Aboriginal people more likely to be denied bail or to be unable to meet bail conditions.

While Aboriginal justice programs may have the potential to make a positive impact on overrepresentation, the fact that many programs are relatively new and take on a limited range of offenders means that their potential has yet to be reached. In order for these programs to make a difference, Crown Attorneys must be willing to have matters that would otherwise result in jail sentences referred to these programs.

While some of the changes necessary to address the root causes of why Aboriginal people appear before the courts and are sentenced to jail in disproportionate numbers lie outside of the justice system, it is possible to make changes within the system that can have a real and significant impact. It is vital that such changes be undertaken in order that Aboriginal people experience the criminal justice system as one that can actually serve their needs. If the system is not changed, it will remain unable to resolve disputes such as the one that arose in Ipperwash.

This report recommends that:

- In order to make the promise of s. 718.2(e) and the *Gladue* decision real, the Province of Ontario create a Gladue Caseworker program throughout the province.
- The province develop a concrete plan to expand the range of Aboriginal justice programs and commit to ongoing funding for such programs.
- While the issue of policing is the subject of other papers written for the Ipperwash Inquiry, there is no question that change in the policing area must be of a substantive nature. The addition of an Aboriginal awareness program or a push to recruit Aboriginal people to join the police force will have no impact if the dynamics within the police force itself do not change.
- The delivery of victims services to Aboriginal people should be undertaken directly by Aboriginal organizations. In this context the concept of what constitutes victims services should be expanded to meet the real needs of Aboriginal people.
- It is recommended that the province undertake substantive consultations with Aboriginal organizations that might be affected by the development of government policies regarding Aboriginal and restorative justice initiatives.
- Crown policies of general application be examined for their impact on Aboriginal people charged with criminal offences.
- The province fund Aboriginal-specific Bail Programs where numbers warrant.
- The Ministry of the Attorney General accept the decision of Mr. Justice Archibald in *R v. Bain* and instruct local Crowns that the *Gladue* principles apply at bail hearings.

## INTRODUCTION

This paper, written for the Ipperwash Inquiry, deals with Aboriginal people and the criminal justice system, with particular emphasis on the situation of Aboriginal people in Ontario. In this paper, issues relating to overrepresentation of Aboriginal people in prison, the overrepresentation of Aboriginal people as victims of crime, and over- and under-policing of Aboriginal people will be examined. In addition, the paper will look at governmental and judicial initiatives that have been created to address problems in the difficult relationship between Aboriginal people and the justice system. In particular, the paper will focus on the 1996 amendments to the sentencing provisions of the *Criminal Code* and the decision of the Supreme Court of Canada in 1999 in *R. v. Gladue*<sup>1</sup> that gave the section renewed vigour and power. The paper will illustrate how initiatives developed to address overrepresentation can be the spur for more comprehensive and wide-ranging responses to some of the causes of social dislocation in Aboriginal communities. Finally, the paper will make some recommendations for how positive change might come about.

At the outset it is important to make clear how the issues that are the subject of this paper relate to the Ipperwash Inquiry. The connection is not immediately apparent. What relevance does the fact that Ontario has the third-highest rate of overrepresentation of Aboriginal people in prison in Canada have to do with a dispute over a provincial park? How does knowing that Aboriginal people continue to be both over- and under-policed help us to understand the response by government and police to the occupation of the park by residents of the traditional lands of Stoney Point and their supporters? And how could addressing the problems raised in this paper help prevent disputes such as the ones that occurred at Ipperwash from occurring again?

In his recent report on the death of Neil Stonechild in Saskatoon, Mr. Justice David Wright spoke of the two solitudes that exist in Saskatoon and in Saskatchewan as a whole between Aboriginal and non-Aboriginal people: “As I reviewed the evidence in this Inquiry, I was reminded, again and again, of the chasm that separates Aboriginal and non-Aboriginal people in this city and province. Our two communities do not know each other and do not seem to want to.”<sup>2</sup>

The existence of such divergent views has an impact on every aspect of the relationship of Aboriginal people with the criminal justice system. This problem is not unique to Saskatchewan, it is found throughout the country.

The first conclusion of *Bridging the Cultural Divide*—the Royal Commission on Aboriginal Peoples’ study on the criminal law—was unequivocal:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people, on-reserve and off-, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with

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<sup>1</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>2</sup> *Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild*, The Honourable David H. Wright, Commissioner (Regina, 2004), p. 208.

respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>3</sup>

This conclusion of the Royal Commission was accepted by the Supreme Court of Canada in *Gladue*. In the context of a discussion of Aboriginal overrepresentation in prison the court stated the case quite dramatically: “These findings 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 justice system.”<sup>4</sup>

The findings of the Royal Commission and Supreme Court of Canada are repeated in the many judicial inquiries and commissions held across Canada dealing with Aboriginal justice issues. In Ontario, The Report of the Osnaburgh/Windigo Tribal Council Justice Review called by the Attorney General reported in 1990:

The arrival of Europeans produced a profound effect on [Aboriginal] societies and their way of life.... First Nations people have become dispossessed—the Fourth World.... What Euro-Canadians accept as common-place for themselves and their children are absent from these communities....

While this report addresses the justice system it is but a flash point where the two cultures come in poignant conflict.... The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness. It is evident that the frustration of the First Nations communities is internalized; the victims, faced with what they experience as a repressive and racist society, victimize themselves.

The clash of the two cultures has been exacerbated by the attempts of the Euro-Canadian system to address the problems faced by the First Nations people. It lacks legitimacy in their eyes. It is seen as a very repressive system and as an adjunct to ensuring the continuing dominance of Euro-Canadian society.... Any attempt to reform the justice system must address this central fact; the continuing subjugation of First Nations people.<sup>5</sup>

Recent reports by Amnesty International<sup>6</sup> and the Ontario Human Rights Commission<sup>7</sup> both sadly confirm that over-policing and under-policing of Aboriginal people continue to this day. The realities of the interactions of Aboriginal people with the justice system have a profound influence on the way that Aboriginal and non-Aboriginal people view each other.

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<sup>3</sup> Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995), p. 309

<sup>4</sup> *Gladue*, para. 64.

<sup>5</sup> *Report of the Osnaburgh/Windigo Tribal Justice Review Committee*, prepared for the Attorney General (Ontario) and the Minister Responsible for Native Affairs and the Solicitor General (Ontario), (1990), pp. 4–6.

<sup>6</sup> Amnesty International Canada, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, AI Index: AMR 20/003/2004 (Ottawa: Amnesty International Canada, 2004).

<sup>7</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2004).

The 1988 report of the Canadian Bar Association, “Locking Up Natives in Canada,” put the matter quite starkly, in a statement that was adopted by the Supreme Court of Canada in *R. v. Williams*:<sup>8</sup> “There is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.”<sup>9</sup>

In *Williams*, the Supreme Court upheld the validity of asking questions of potential jurors to determine if their ability to judge a case would be influenced by the fact that the accused was Aboriginal. In its judgment, the Supreme Court was not saying that non-Aboriginal Canadians were racist, but that stereotypes insidiously play on our perceptions and allow us to see others as less than equal, and to tolerate treatment of them that we would not tolerate for ourselves, our family, or our friends.<sup>10</sup>

If jurors are susceptible to stereotypes, there is no reason to believe that others involved in the justice system are any more immune to this phenomenon. The standard response of police to charges that they target Aboriginal people is that they treat everyone the same and that they just go where they are needed. Aboriginal people are overrepresented in prison, the argument goes, not because they are singled out by the police, but, because for a variety of reasons, Aboriginal people commit more crimes than non-Aboriginal people.

The commonly held view is that there is more criminality among Native people than among non-Natives, but is that true?... The apparent differences are more explainable by police conduct than by anything else.... Police use race as an indicator for patrols, arrests, detentions etc.... For instance police in cities tend to patrol bars where Native people congregate, rather than private clubs frequented by businessmen. Remote Native communities by comparison with largely white communities tend to have more policing.

Does this indicate that police are invariably racist? Not necessarily, since there is some empirical basis for the police view that proportionately, more Native people are involved in criminality. It is just that the police view then becomes a self-fulfilling prophecy ... they tend to police areas frequented by groups they believe are involved in criminality.<sup>11</sup>

Just as Aboriginal individuals are both over- and under-policed, the same has been true in relation to Aboriginal disputes with government—both historically and in the present day. Canadian governments at both the federal and provincial level have consistently relied on the police to deal with such matters. As a result, the police have often been used as the blunt instrument of government policy. This use of police has meant that, in the case of public order

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<sup>8</sup> *R. v. Williams*, [1988] 1 S.C.R. 1128.

<sup>9</sup> M. Jackson, “Locking Up Natives In Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release” (1989) 23 *U.B.C. Law Review* 220, cited by the Supreme Court of Canada in *R. v. Williams*, para. 58.

<sup>10</sup> “There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system...” *R. v. Williams*, para. 58.

<sup>11</sup> Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (Canada)*, Vol. 1 (Edmonton: The Task Force, 1991), p. 49, quoting from Tim Quigley, “Introducing Cross-Cultural Awareness,” paper presented at the Western Judicial Workshop, 1990.

disputes involving Aboriginal communities, the police often play a unique role, one that they do not play in protests brought by other groups.

As this paper will show, the problem of Aboriginal overrepresentation in Ontario, as bad as it is at present, is likely to get worse over time unless significant action is taken. An increase in Aboriginal overrepresentation will fuel a corresponding increase in police presence in Aboriginal communities, which will continue to feed this vicious cycle. The impact of such a development will be to reinforce the view that Aboriginal people are a violent and dangerous people.

Closely tied to this view is the belief that Aboriginal people are less than equal. Historically, this belief has been an explicit part of government policy toward Aboriginal people extending well into the twentieth century. While that belief is now rarely articulated, it clearly influences the relations between Aboriginal and non-Aboriginal people, and particularly in the context of this paper, the relations between Aboriginal people and the various actors in the criminal justice system. Unless that belief is challenged and rooted out, violent clashes between Aboriginal people and the police are inevitable. Cross-cultural awareness programs are powerless to confront stereotypes rooted deeply in public perception. The best way to challenge the stereotypes of Aboriginal people is to change the reality that allows the stereotypes to flourish. In order to do this, we must first acquaint ourselves with the reality of the situation and then look at ways in which change can occur. This is the purpose of this paper.



## I. OVERREPRESENTATION OF ABORIGINAL PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

The failings of the criminal justice system toward Aboriginal people are most clearly seen in the overrepresentation of Aboriginal people in federal and provincial prisons. In its report on criminal justice, *Bridging the Cultural Divide*, the Royal Commission on Aboriginal Peoples called Aboriginal overrepresentation “injustice personified.”<sup>12</sup> As noted earlier, the Supreme Court of Canada called the overrepresentation of Aboriginal people a “crisis in the criminal justice system.”<sup>13</sup> At the same time, there has been some controversy regarding the significance of Aboriginal overrepresentation in Canada, the extent to which it is or is not a national issue, and the causes of overrepresentation itself. This section will look at the issue of overrepresentation with a particular focus on the situation in Ontario. Subsequent sections will explore, among other things, the causes of overrepresentation and the impact of legislative and judicially mandated changes in sentencing as it relates to overrepresentation.

Before discussing the issue of overrepresentation itself, it is important to set the stage by looking more generally at trends in Aboriginal incarceration in Canada. These trends will help us interpret and understand the overrepresentation data. The data relied upon here comes from the Canadian Centre for Justice Statistics, a branch of Statistics Canada. The data relates only to admissions to custody and excludes any individuals sent to jail while on remand—awaiting trial or a bail hearing. Specifically the figures examined deal with admission to provincial prisons from the period from 1978 to 2001. The analysis relied upon was conducted by Professors Julian Roberts and Ronald Melchers.<sup>14</sup>

Baldly stated, over the period of the study, the number of Aboriginal people in custody increased from 14,576 to 15,349 while the number of non-Aboriginal people in custody decreased significantly from 76,526 to 65,576.<sup>15</sup> Within the period studied however, Roberts and Melchers identify three distinct sub-periods.

The first period, from 1978 to 1983, showed an increase in the jail population for both Aboriginal and non-Aboriginal offenders. During that five year span, Aboriginal admissions to custody rose 35 percent while non-Aboriginal admissions rose 45 percent.<sup>16</sup> The second period, from 1983 to 1991, showed a marked divergence with Aboriginal admissions to custody rising by 9 percent while non-Aboriginal admissions dropped by 15 percent.<sup>17</sup> The final period studied, from 1991 to 2001, saw admissions to custody for Aboriginal and non-Aboriginal people drop, but the drop for non-Aboriginal admissions was much greater than for Aboriginal admissions.<sup>18</sup> What makes these latter figures more puzzling is that until 1997 Aboriginal admissions to custody declined more quickly than non-Aboriginal admissions but then Aboriginal admissions

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<sup>12</sup> Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa: Canada Communications Group, 1995), p. 28.

<sup>13</sup> *R. v. Gladue*, para. 64.

<sup>14</sup> J. Roberts and R. Melchers, “Incarceration of Aboriginal Offenders—1978–2001” (April 2003) *Canadian Journal of Criminology and Criminal Justice* 211.

<sup>15</sup> *Ibid.*, 221.

<sup>16</sup> *Ibid.*, 224.

<sup>17</sup> *Ibid.*, 224.

<sup>18</sup> *Ibid.*, 225.

actually rose for a brief period and then stabilized while non-Aboriginal admissions continued to decline.<sup>19</sup>

What is mystifying is why the number of Aboriginal admissions to custody did not decline at an accelerated rate (compared to non-Aboriginal offenders) from 1996 onwards, as a result of the sentencing reforms introduced that year and the subsequent judgements from the Supreme Court within the next few years. In fact, although it encompasses only a few years (1997-1998 to 2000-2001), the post C-41 period reveals an increase in the volume of Aboriginal admissions to custody of 3%, while non-Aboriginal admissions declined by fully 27%. This is quite the reverse of what would be expected in light of sentencing reforms specifically addressing the plight of Aboriginal offenders. After all, both statutory reforms and appellate jurisprudence during this period encouraged judges to consider the use of alternatives to incarceration for all offenders but to pay particular attention to the circumstances of Aboriginal offenders.

This suggests that these developments, including a proliferation of publications highlighting the issue, codification of a special direction to judges (and its subsequent endorsement by the Supreme Court), and the creation of a new alternative to imprisonment (the conditional sentence of imprisonment) have all failed to benefit Aboriginal offenders to quite the same extent as non-Aboriginal offenders....<sup>20</sup>

Roberts and Melchers suggest a number of reasons for the fact that Aboriginal admissions to custody have not declined over the period in question. One of the reasons is demographic—the Aboriginal population in Canada has increased more quickly than that of the non-Aboriginal population. Looking specifically at the extent of overrepresentation of Aboriginal people in prison allows for some control over that variable.

Discussions regarding the overrepresentation of Aboriginal people in the criminal justice system focus on numbers and the interpretation of data. Before launching into an examination of that data it is important to set out what reliance should and should not be placed on the numbers that are presented. While some caution is due in extrapolating conclusions based on specific pieces of information, the significance of the overrepresentation data is what it shows as a general trend. Getting lost in the minutiae can lead to the overlooking of these important issues.

In order to draw any conclusions regarding overrepresentation of any group in the criminal justice system, two pieces of data are required: first, the percentage of the particular group of the overall population, and second, the proportion of the group among those in the criminal justice system. Overrepresentation occurs when we see more members of a particular group enmeshed in the criminal justice system than one would expect based on their percentage of the population. The assumption behind this type of analysis is that, all things being equal, groups should be represented in the criminal justice system in roughly the same proportion they are represented in the general population.

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<sup>19</sup> During this post-1997 period there were a number of initiatives, both at the legislative and court level, specifically addressed at alleviating Aboriginal overrepresentation. These initiatives are alluded to in the following quote from Roberts and Melcher and will be examined in more depth later in this paper.

<sup>20</sup> Roberts and Melchers, "Incarceration," p. 226.

For this reason, care must be taken in looking at figures that say, for example, that Aboriginal people make up 25 percent of the prison population in a province. The problem with interpreting such a bald figure is that there is no context for understanding the implications of that figure. For example, if Aboriginal people make up 5 percent of the population of the province, then the figure would suggest that Aboriginal people are overrepresented at a rate of five times. On the other hand, if Aboriginal people make up 25 percent of the population of the province, then one would conclude that, despite the high percentage of Aboriginal people in prison, there is, in fact, no overrepresentation.

Before delving into the statistics, it is important to point out several significant caveats with respect to the data being analyzed. Tracking the movement of a particular group of people through the criminal justice system is not as easy as keeping track of widgets or of inventory in a grocery store.<sup>21</sup> Problems occur both in trying to determine the Aboriginal population of a province and Aboriginal representation in the criminal justice system.

Statistics Canada (StatsCan) has been tracking Aboriginal populations over a number of censuses. In so doing, it has recognized the difficulties in compiling truly accurate numbers. For example, StatsCan figures for the 2001 census with respect to Aboriginal Identity Population Counts for Canada, the provinces, and territories identify significant problems with the data from Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories, and Nunavut. As a result, StatsCan also flags problems with the cumulative data for the country as a whole. StatsCan's Data Quality Note with respect to these provinces and territories states: "Excludes census data for one or more incomplete enumerated Indian reserves or Indian settlements."<sup>22</sup>

The problem, in a nutshell, is that census enumerators are not able to provide any sort of accurate count of Aboriginal people on many reserves in Canada. The main reason for this problem is that members of reserves are generally reluctant to be enumerated. The causes of this reluctance are beyond the scope of this paper. The significance of the problem, however, is that the census figures underestimate the Aboriginal population, although it is difficult to know by what specific factor or amount.

A further problem with the data not recognized by Statistics Canada but highlighted by some Aboriginal organizations is that significant numbers of Aboriginal homeless people are also missed by the census. In Toronto, for example, the Mayor's Committee on Homelessness estimated that, in 1996, there were 4,000 Aboriginal people who were homeless—15 percent of the total homeless population. In addition, another 8,000 Aboriginal people were at risk of becoming homeless.<sup>23</sup> The problems with enumerating the homeless (and near homeless) in general would therefore have a significant impact on determining Aboriginal populations in metropolitan areas with large homeless populations.

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<sup>21</sup> J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 *Saskatchewan Law Review* 6.

<sup>22</sup> Statistics Canada, *Aboriginal Identity, Population, 2001 Counts, for Canada, Provinces and Territories*, online: <[www12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?](http://www12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?)> (accessed January 2005).

<sup>23</sup> Report of the Mayor's Homelessness Action Task Force, *Taking Responsibility for Homelessness—An Action Plan for Toronto* (Toronto, 1999), p. 66.

On the other side of the data issue are questions regarding Aboriginal representation in the criminal justice system. There is no data that shows, in any definitive sense, Aboriginal participation in the criminal justice system as a whole. Rather, the data that is collected on a federal, provincial, and territorial level relates only to the number of Aboriginal people who are incarcerated. While arrest records may note the ethnicity or racial background of the arrestee, this data is compiled haphazardly by arresting officers who do not necessarily make any specific inquiries of the person being arrested. In addition, there is no reason to think that individuals would necessarily be particularly forthcoming about providing such information. In any event, arrest data is not regularly compiled or analyzed on this basis.

Aboriginal identity is regularly compiled and reported on for admissions to detention centres, correctional institutions, and prisons. At the same time, the limitations to this data must be noted. In general, the problem in this area relates to underreporting of Aboriginal people in jail. Often, correctional officers will determine whether a person is or is not Aboriginal based on their particular assessment of the individual. The person may not be asked if they are Aboriginal and if they do state that they are Aboriginal they might not be believed. For a period of time, for example, the Ontario Ministry of Correctional Services would only report a person as Aboriginal if that person could produce a status card. Obviously such an approach would miss all Métis, non-status, and Inuit individuals. In addition to this problem, many inmates are not necessarily in a hurry to identify themselves as Aboriginal. Being identified as an Aboriginal person in jail may mean harsher treatment.<sup>24</sup>

These data problems do not mean that we should not put faith in the information that is collected. As we will see, the numbers, regardless of any particular flaws, tend to be so stark and so clear that it is impossible to pretend that Aboriginal overrepresentation does not exist in Canada. Problems with data do mean that we should be careful in drawing conclusions about trends where numbers change very little or where we are dealing with small absolute numbers. For the most part, however, the data, despite its problems, speaks volumes.

## THE CANADIAN PICTURE

Aboriginal overrepresentation has not been a part of Canada's criminal justice system for its entire history. It appears that overrepresentation first emerged as an issue following the Second World War<sup>25</sup> and did not become a matter of significant public policy until the late 1980s. While the fact of Aboriginal over-incarceration had been known for some time, it was the publication of "Locking Up Natives In Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release" in 1988 that really brought the issue to the fore. The report, written by Professor Michael Jackson of the University of British Columbia, provided a comprehensive Canada-wide look at Aboriginal overrepresentation.

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<sup>24</sup> As the Supreme Court said at paragraph 68 in *Gladue*: "regrettably discrimination towards them [Aboriginal people] is so often rampant in penal institutions."

<sup>25</sup> Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, *The Justice System and Aboriginal People*, A.C. Hamilton and C.M. Sinclair, Commissioners (Winnipeg, 1991), p. 101.

The report noted that at the penitentiary level (where those serving sentences of two years or more are held) Aboriginal people made up 10 percent of the jail population although Aboriginal people represented only about 2 percent of the Canadian population as a whole. When looked at on a regional level the figures were, in some cases, much higher. For example, in the Prairie region of Corrections Canada, Aboriginal people made up 5 percent of the population but 32 percent of inmates in federal jails.<sup>26</sup>

The report then went on to look at some of the figures in provincial jails and found even greater levels of overrepresentation. In B.C. and Alberta, where Aboriginal people made up 3–5 percent of the general population they made up 16 percent and 17 percent respectively of admissions to provincial jails. In Manitoba, Aboriginal people were 6 percent of the overall population and 46 percent of provincial jail admissions, and in Saskatchewan, Aboriginal people were 7 percent of the population but 60 percent of provincial jail inmates.<sup>27</sup> What was even more significant, the report noted, was that Aboriginal rates of overrepresentation appeared to be rising, and thus the numbers, as stark as they were at the time, were likely going to increase over time.

The Royal Commission on Aboriginal Peoples commissioned a study on Aboriginal populations in Canada in 1995. This study, combined with data from the Canadian Centre for Justice Statistics, allowed for a more comprehensive look at Aboriginal overrepresentation on a province-by-province basis. The table below provides a figure for the level of overrepresentation in each province or territory in 1995.

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<sup>26</sup> Jackson, “Locking Up Natives,” p. 215.

<sup>27</sup> *Ibid.*

**Table 1: Aboriginal Overrepresentation in Provincial Correctional Facilities—1995<sup>28</sup>**

Col. 1 Province/Territory	Col. 2 Aboriginal People as Percentage of General Population	Col. 3 Aboriginal People as Percentage of Provincial Corrections Population	Col. 4 Level of Overrepresentation (col. 3/col. 2)
Atlantic (Nfld., N.B., N.S., P.E.I.)	1.3	6	4.6
Quebec	1	1	1
Ontario	1.4	8	5.7
Manitoba	10.6	55	5.2
Saskatchewan	10.5	72	6.9
Alberta	4.9	36	7.3
British Columbia	3.6	17	4.7
Yukon	18.2	67	3.7
N.W.T.	62	n/a	-

A number of striking findings arise from an analysis of the figures. The first is that Aboriginal overrepresentation appears to be a Canada-wide phenomenon. The second is that the level of overrepresentation in Ontario is basically the same as that in Manitoba—a province that is widely seen as having a significant level of Aboriginal overrepresentation.

The 2001 census allows for the 1995 data to be updated. The table below combines information from the census and the Centre for Justice Statistics for 2001 to create a more current look at the issue of overrepresentation.

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<sup>28</sup> Rudin and Roach, “Broken Promises,” p. 8.

**Table 2: Aboriginal Overrepresentation in Provincial Correctional Facilities—2001**

Col. 1 Province/Territory	Col. 2 Aboriginal People as Percentage of General Population	Col. 3 Aboriginal People as Percentage of Provincial Corrections Population	Col. 4 Level of Overrepresentation (col. 3/col. 2)
Newfoundland and Labrador	3.7	10	2.7
Prince Edward Island	1.0	3	3
Nova Scotia	1.9	7	3.7
New Brunswick	2.4	7	2.9
Quebec	1.1	2	1.8
Ontario	1.7	9	5.3
Manitoba	13.6	69	5.1
Saskatchewan	13.5	77	5.7
Alberta	5.3	38	7.2
British Columbia	4.4	21	4.7
Yukon	22.9	76	3.3
N.W.T.	50.5	90	1.8
Nunavut	85.2	98	1.2

As noted earlier in this section, given the vagaries of the data, small movements in either direction should not be given much weight. What the data does show, quite clearly, is that overrepresentation continues to be a Canada-wide issue and that the rate of Aboriginal overrepresentation across the country does not seem to be declining in any appreciable sense. In fact, the Centre for Justice Statistics shows that from 1997 to 2001 the Aboriginal population in all jails in Canada increased from 15 percent of the population to 20 percent.<sup>29</sup>

<sup>29</sup> Statistics Canada, Adult Correctional Services, *Admissions to Provincial, Territorial and Federal Programs, 1997–2001*, online: <[www.statcan.ca/english/Pgdb/legal30b.htm](http://www.statcan.ca/english/Pgdb/legal30b.htm)> (accessed January 2005).> By 2002 the total had increased again to 21 percent, online: <[www.statcan.ca/english/Pgdb/legal30a.htm](http://www.statcan.ca/english/Pgdb/legal30a.htm)> (accessed January 2005).

All the findings above relate exclusively to Aboriginal adults. It is not surprising to find that the same trends hold true for Aboriginal youth as well. While Canada ranks in the top three Western countries for incarceration of adults, in the late 1990s and early 2000s Canada was number one in the incarceration of young people. It was this reality that helped spur the federal government to reform the youth justice system in Canada with the *Youth Criminal Justice Act* (YCJA). One of the avowed purposes of the Act was to reduce the rate at which young people were jailed in Canada. The Act contains a number of sections that specifically address the issue of incarceration of Aboriginal youth. Nevertheless, a one-day snapshot of Aboriginal youth in custody in 2003 found that,

[w]hile there have been substantial reductions in the number of Aboriginal youth in custody since 2000, Aboriginal youth continue to experience an appreciably higher incarceration compared to non-Aboriginal youth. The incarceration rate of Aboriginal youth was 64.5 per 10,000 population while the incarceration rate for non-Aboriginal youth was 8.2 per 10,000. Aboriginal youth were almost eight times more likely to be in custody compared to their non-Aboriginal counterparts.<sup>30</sup>

## **ABORIGINAL OVERREPRESENTATION IN ONTARIO**

Most discussions of Aboriginal overrepresentation in Canada have focused on figures at the federal level or in the western provinces. The reason for this is that if overrepresentation is seen as simply the percentage of Aboriginal people as a proportion of those in prison, then the issue does not seem as acute in Ontario as it does elsewhere. The fact that 9 percent of provincial inmates in Ontario are Aboriginal appears to pale in respect to the much higher figures in the western provinces where, in Manitoba and Saskatchewan, Aboriginal people make up over half of the jail population. As was noted earlier, however, Aboriginal overrepresentation is really only understood when the proportion of Aboriginal people in jail is contrasted with the Aboriginal population of the province or territory as a whole. Viewed in that light, Ontario's rate of Aboriginal overrepresentation, 5.3, is greater than that of Manitoba (5.1) and only slightly less than Saskatchewan (5.7). If Aboriginal overrepresentation is a problem in the western provinces, then it is a problem in Ontario as well.

Aboriginal overrepresentation is also particularly significant for Ontario as the province has the highest number of Aboriginal people in the country. According to StatsCan's admittedly not totally accurate figures, there are 188,315 Aboriginal people in the province. British Columbia is next with 170,025 Aboriginal people, followed by Alberta, Saskatchewan, and Manitoba.<sup>31</sup> In terms of urban Aboriginal populations, many people believe that Toronto has more Aboriginal people than any other city in Canada.<sup>32</sup>

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<sup>30</sup> J. Latimer and L. Foss, *A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II* (Ottawa: Department of Justice Canada, 2004), p. ii.

<sup>31</sup> Statistics Canada, *Aboriginal Identity, Population, 2001 Counts, for Canada, Provinces and Territories*.

<sup>32</sup> It is difficult to get definitive figures on the Aboriginal population of specific cities. The 1996 census found that there were only 16,000 Aboriginal people in Toronto, well below the 46,000 in Winnipeg, 33,000 in Edmonton, and 31,000 in Vancouver (Statistics Canada, Canadian Centre for Justice Statistics Profile Series—*Aboriginal Peoples in Canada*, Catalogue No. 85F0033MIE [Ottawa: Statistics Canada, 2001], p. 4). The Mayor's Committee on Homelessness in Toronto rejected the Statistics Canada figures and put the Aboriginal population at 60,000



Data in Ontario with regard to the incarceration of 16- and 17-year-olds—or Phase II youth as they were called until recently—provides some particularly interesting information. This data suggests that the YCJA is not having much of an effect on the over-incarceration of Aboriginal youth, and that the issue of overrepresentation appears to be more acute for youth than it is for adults.

The following table looks at Phase II youth admissions to a range of correctional supervision for 2003/04—the first year of the YCJA.<sup>33</sup> The four aspects of correctional supervision captured by the table are: secure detention—remand or custody while awaiting trial; secure custody—post-sentence incarceration in a youth jail; open residence—post-sentence placement in an open custody facility, i.e., group home; and community disposition—supervision by probation.<sup>34</sup> The data shows that Aboriginal youth are overrepresented in all aspects of correctional supervision, but are most overrepresented in secure custody facilities.<sup>35</sup>

**Table 3: Phase II Youth Admissions to Correctional Supervision—2003/04**

	Total Number	Total Aboriginal	Percentage Aboriginal
Secure Detention	5638	609	10.1
Secure Custody	812	228	28.1
Open Residence	709	114	16.1
Community Disposition	7934	570	7.2
Total of all Supervision	15093	1521	10.1

(Mayor's Task Force, *Taking Responsibility*, p. 64, fn. 46). Aboriginal organizations in the city currently estimate the Aboriginal population to be between 80,000 to 100,000.

<sup>33</sup> The raw data for these tables comes from the Statistical Services branch of the Ministry of Community Safety and Correctional Services.

<sup>34</sup> This data includes total counts for all categories. Thus a person who was detained before trial and then was sentenced to a further term of incarceration would show up in the first two categories.

<sup>35</sup> It should be noted that when the secure custody figures are examined by gender we find that 24.4 percent of the male youth in secure custody are Aboriginal and a staggering 59.3 percent of women in secure custody are Aboriginal.

Because the data regarding Phase II youth looks at the full range of sentencing dispositions, we can also use this information to get a sense of how Aboriginal youth are sentenced generally as compared to non-Aboriginal youth. This type of data provides a richer and fuller look at the way Aboriginal people are sentenced. Unfortunately this data is not available for adults as it focuses only on admissions to custodial facilities.

**Table 4: Dispositions Received by Non-Aboriginal and Aboriginal Youth**

	Non-Aboriginal Phase II Youth	Aboriginal Phase II Youth
Secure Detention	37%	40%
Secure Custody	4.3%	15%
Open Residence	4.4%	7.5%
Community Disposition	54.3%	37.5%

What these figures indicate is that while non-Aboriginal and Aboriginal youth receive secure detention (or remand) orders at basically the same rate, Aboriginal youth are much more likely to receive secure custody sentences than non-Aboriginal youth and are less likely to receive community dispositions than non-Aboriginal youth.

Since the data is collected for dispositions for all criminal charges against Phase II youth, one possible explanation for this disparity could be that Aboriginal youth are more often convicted of offences where secure custody is a likely outcome. In order to control for this variable, the following four tables look at dispositions on an offence basis, with a focus on offences that are more likely to give rise to a sentence of secure detention—break and enter, theft and possession of property, assault and related offences, and administration of justice offences (including fail to appear, fail to comply, escape custody, and so on).

**Table 5: Dispositions Received by Non-Aboriginal and Aboriginal Youth—Break and Enter & Related Offences<sup>36</sup>**

	Non-Aboriginal Phase II Youth	Aboriginal Phase II Youth
Secure Detention	37.9%	35.4%
Secure Custody	5.5%	12.4%
Open Residence	5.0%	11.1%
Community Disposition	51.6%	41.0%

<sup>36</sup> Totals may be slightly above or below 100% due to rounding.

**Table 6: Dispositions Received by Non-Aboriginal and Aboriginal Youth—Theft/Possession**

	Non-Aboriginal Phase II Youth	Aboriginal Phase II Youth
Secure Detention	27.9%	38.7%
Secure Custody	4.8%	13.5%
Open Residence	4.8%	6.1%
Community Disposition	62.5%	41.6%

**Table 7: Dispositions Received by Non-Aboriginal and Aboriginal Youth—Assault and Related Offences**

	Non-Aboriginal Phase II Youth	Aboriginal Phase II Youth
Secure Detention	22.9%	35.9%
Secure Custody	3.0%	15.9%
Open Residence	4.2%	8.4%
Community Disposition	70.0%	39.7%

**Table 8: Dispositions Received by Non-Aboriginal and Aboriginal Youth—Administration of Justice**

	Non-Aboriginal Phase II Youth	Aboriginal Phase II Youth
Secure Detention	55.1%	48.0%
Secure Custody	5.0%	16.4%
Open Residence	5.8%	6.6%
Community Disposition	34.1%	28.9%

While the data shows some variation in whether Aboriginal youth receive remand custody more than non-Aboriginal youth, the data is unequivocal in showing that Aboriginal youth receive custodial sentences following findings of guilt at a rate of at least twice that of non-Aboriginal youth. In the case of administration of justice offences, Aboriginal youth are three times more

likely to be sentenced to a term of imprisonment, and in the case of assault-related offences, they are five times more likely to be sentenced to a term of imprisonment. The stereotype of Aboriginal people as violent referred to at the beginning of the paper might well provide some explanation for the significant reliance on jail for Aboriginal youth convicted of assault. Conversely, community dispositions are used much more frequently for non-Aboriginal youth.

The tables above looked at Aboriginal admissions to custody as a percentage of all admissions. However, focusing solely on these figures might blind us to other more general trends. It is therefore helpful to look at the trends in absolute numbers as well. Table 9 compares non-Aboriginal and Aboriginal admissions to correctional services in the 2001/02 period and the 2003/04 period.

**Table 9: Non-Aboriginal and Aboriginal Youth Admissions to Custody—2001/02 and 2003/04**

	Non-Aboriginal Phase II Youth 2001/02	Non-Aboriginal Phase II Youth 2003/04	Aboriginal Phase II Youth 2001/02	Aboriginal Phase II Youth 2003/04
Secure Detention	5,892	5,031	653	609
Secure Custody	1,468	584	257	228
Open Residence	1,288	595	181	114
Community Disposition	7,346	7,364	531	570

These figures tend to mirror the findings in Roberts and Melchers for adult admissions to custody in recent years. Despite specific admonitions in the YCJA regarding the incarceration of Aboriginal youth, the decline in Aboriginal youth in custody over the period in question is much less than the decline in non-Aboriginal incarceration.<sup>37</sup> Thus while the incarceration rate for Aboriginal youth has declined 11.3 percent in this period, the incarceration rate for non-Aboriginal youth has declined 60.2 percent. It is not surprising then to see that Aboriginal youth are making up an ever-increasing percentage of Phase II youth in custody.

The recent trend showing Aboriginal rates of incarceration dropping, but at a much lower rate than the rate of non-Aboriginal incarceration,<sup>38</sup> suggests that the problem of Aboriginal

<sup>37</sup> It must also be remembered that prior to the coming into force of the YCJA, the sentencing provisions of the *Criminal Code* held sway in youth court matters and thus, from 1996, s. 718.2(e) and the *Gladue* decision were still the applicable law.

<sup>38</sup> It may be that the downward trend in incarceration rates is ending. In 2001 the number of sentenced adult inmates in Canada increased from 85,208 to 87,192 and then in 2002 the number increased yet again to 88,129. It appears that Ontario is driving this upward trend as the provincial figures for 2001 increased by almost 1,000—from 30,999 to 31,980 and then by over 1,000 in 2002 to 33,050.

overrepresentation in prison will remain with us for the foreseeable future. In fact, given the current demographic trends, we might expect to see rates of overrepresentation rise in the next few years.<sup>39</sup> A further rise in Aboriginal overrepresentation will mean that Canada's prisons will move increasingly to become the exclusive preserve of Aboriginal people. While this is not likely to occur in Ontario's adult prisons soon, it certainly is a possibility for youth facilities—indeed, with respect to young women, where just under 60 percent of those in custody are Aboriginal, it has already occurred. Meaningful action is required to address this problem. What that action might include will be discussed later in this paper.

## II. THE CAUSES OF OVERREPRESENTATION

Aboriginal overrepresentation in prison is often used as a justification for urging reforms—both minor and major—to the way in which the criminal justice system deals with Aboriginal offenders. The fact of overrepresentation itself is seen as a spur to reform. However, without further analysis into the causes of overrepresentation, it is not possible to develop any coherent set of reforms. The situation is analogous to that of a person with a fever. The fact of the fever gives rise to a need to respond—to do something—but in order to respond effectively we need to know what caused the fever. In the case of overrepresentation of Aboriginal people in prison, we must try to understand why the phenomenon exists before we can attempt to address the problem.

This section will critically examine three prominent theories used to explain Aboriginal overrepresentation. Prior to undertaking this task, however, it is necessary to stop once more and re-examine the figures on overrepresentation to determine if the problem is truly what it seems.

A re-examination of Aboriginal overrepresentation in prison was occasioned by the publication by the Saskatchewan Law Review in 2001 of a paper by Professors Phillip Stenning and Julian Roberts entitled “Empty Promises: Parliament, the Supreme Court and the Sentencing of Aboriginal Offenders.”<sup>40</sup> The article was largely a critique of Parliament's introduction of section 718.2(e) of the *Criminal Code* and the Supreme Court of Canada's analysis of the section in the case of *R. v. Gladue*. Both the section and the decision will be discussed in greater detail later in this paper. Stenning and Roberts also discussed Aboriginal overrepresentation itself and the causes of the overrepresentation. With respect to overrepresentation, the paper made a number of points—among them that

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<sup>39</sup> The average age of Aboriginal people is approximately 10 years younger than the average age of non-Aboriginal people, and a greater percentage of Aboriginal people are under 15 years of age (Statistics Canada, *Aboriginal Peoples in Canada*, p. 4).

<sup>40</sup> P. Stenning and J. Roberts, “Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64 *Saskatchewan Law Review* 137.

[d]ata were available to demonstrate considerable regional variation in the “over-representation” of Aboriginal people in Canadian penal institutions, and clearly indicated that in some regions (e.g. Quebec) Aboriginal people were not “over-represented.”<sup>41</sup>

... [T]here is evidence that, with respect to the federal prison population, at least, the problem is getting worse. However, the over-representation is restricted to certain provinces primarily in the Prairies.<sup>42</sup>

... [T]here is strong evidence that the over-representation of Aboriginal offenders varies significantly from one region of the country to another, and that in some regions they are not over-represented in prisons at all.<sup>43</sup>

Unfortunately, other than making these generalized statements, Stenning and Roberts did not provide any data to support their conclusions. Looking at the tables regarding Aboriginal overrepresentation in the previous section, we certainly find regional variation in the statistics; however, the fact of Aboriginal overrepresentation is found across the country. In 1995, it appeared that overrepresentation was not an issue only in Quebec. By 2001, that province too had joined with the rest of the country in having Aboriginal people in jails in a greater proportion to the Aboriginal population of the province as a whole.

The idea that Aboriginal overrepresentation is somehow a phenomenon of significance primarily in the west and the north can only be understood if what is being examined is solely the percentage of Aboriginal people in jails in the province or territory. On that basis, in 2001, clearly Manitoba, Saskatchewan, and the three territories were by far and away the “leaders” in Aboriginal overrepresentation as over half of the jail population in those provinces and territories was Aboriginal. But as was noted earlier, an understanding of the overrepresentation numbers can only come about by comparing the Aboriginal prison population with the Aboriginal population in the area as a whole. So while over 90 percent of the jail population in the Northwest Territories and Nunavut are Aboriginal, this is not particularly surprising as Aboriginal people make up over half the population of those territories. As was noted earlier, however, when we look at the rate of Aboriginal overrepresentation, Ontario ranks third, just below Saskatchewan.

We can be confident then that Aboriginal overrepresentation in Canadian prisons does exist. The question of why this phenomenon is with us, however, remains. The Royal Commission on Aboriginal Peoples (RCAP) discussed three theories that provided some explanation for this tragic development, and they are worth examining again in this context.<sup>44</sup> The three theories developed by RCAP were culture clash, socio-economic, and colonialism. Each theory has its merits.

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<sup>41</sup> Ibid., 142.

<sup>42</sup> Ibid., 142.

<sup>43</sup> Ibid., 165.

<sup>44</sup> Royal Commission on Aboriginal Peoples, *Bridging*, pp. 39–53.

The culture clash theory was one of the first theories advanced to explain the overrepresentation phenomenon. This 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. There is not the space in this paper to outline the differing concepts of order and social control that lie behind the differing concepts of justice in Aboriginal and non-Aboriginal society. This topic has been addressed by other writers, and readers with an interest in this area should look to those sources.<sup>45</sup>

A few examples may help illustrate the way in which this culture clash contributes to overrepresentation. In Aboriginal society there is a great emphasis on taking responsibility for one's actions. In the criminal justice system taking responsibility means pleading guilty. However, being responsible for an event occurring is not necessarily the same as being legally guilty of the offence—that distinction may be lost on Aboriginal people who thus plead to offences for which they may have valid defences. The idea of guilt itself is one that is foreign to many Aboriginal peoples. Aboriginal languages cannot translate words like “guilty” or “innocent” as they have no analogues.

Culture clash may also come about as a result of non-Aboriginal people not understanding the cultural norms in an Aboriginal community. Rupert Ross, a Crown Attorney in Kenora, has written extensively on this topic. He gives the example that in the Aboriginal communities in which he works, it is a sign of disrespect to look a person who is of some regard directly in the eye. When prosecuting in these areas, he assumed that the failure to look him in the eye when he was cross-examining a witness was a sign of the witness's evasiveness or guilt—an impression that those raised with Western values would hold. Ross felt satisfied when these individuals were found guilty as their demeanour on the witness stand further buttressed his opinion of the individual's blameworthiness. When he discovered that his assumptions were flawed and based on seeing the world through “white eyes,” he became concerned about the justice that was being meted out to Aboriginal people.<sup>46</sup>

If the problem of overrepresentation is caused by culture clash then what is the response? One response is to find ways to make the criminal justice system understandable to Aboriginal people. It was for this reason that the Aboriginal Courtworker program began in Canada in the 1970s. Aboriginal Courtworkers work with Aboriginal accused, their families, and Aboriginal victims and explain to them how the court process works. They also assist accused to find counsel and often liaise with counsel and the client. Courtworkers also play a role explaining relevant Aboriginal issues to counsel and judges. The development of the Aboriginal Courtworker program provides some evidence that, on a governmental level, culture clash is seen as a cause of overrepresentation.

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<sup>45</sup> For example, see the Indigenous Knowledge Forum held by the Ipperwash Commission, online: <[www.ippewashinquiry.com](http://www.ippewashinquiry.com)>. Also, M. Sinclair, “Aboriginal Peoples, Justice, and the Law,” and R. Ross, “Duelling Paradigms?: Western Criminal Justice Versus Aboriginal Community Healing” in R. Gosse, J. Henderson, and R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publications, 1994).

<sup>46</sup> R. Ross, *Dancing With a Ghost* (Markham: Octopus Publishing, 1992), p. 4.

Other initiatives that have been undertaken to address culture clash have also attempted to make the criminal justice system more amenable to Aboriginal people. In Ontario, the Aboriginal Justice of the Peace (J.P.) program was established to ensure that Aboriginal people had a role in the courts other than as accused persons or victims.

RCAP described programs such as Aboriginal Courtworkers and J.P.s as examples of indigenization. Indigenization programs are important as a way of ensuring that the criminal justice system recognizes the unique issues facing Aboriginal people enmeshed in that system.<sup>47</sup> Critics of indigenization programs do not doubt the need for Courtworkers and the like, but ask why the response to culture clash has to be to look to accommodate Aboriginal people within the current criminal justice system. Another way to address culture clash issues is to allow Aboriginal people to have their matters dealt with in a culturally appropriate setting.<sup>48</sup> Thus the development of Aboriginal justice alternatives can also be seen as a response to culture clash.

Certainly the reality that Aboriginal people have differing views on the way justice should be done is now widely accepted. The development and enhancement of indigenization programs and of Aboriginal alternative justice programs speaks to this issue. As well, parliamentary discussion of the issue of Aboriginal overrepresentation also often focuses on themes arising from culture clash. However, the culture clash theory is not a complete one and, for example, cannot explain how a significant number of Aboriginal people find themselves in the criminal justice system.

If the culture clash theory largely explained Aboriginal overrepresentation, then one would expect that the Aboriginal people who were behind bars would be those who were raised in a traditional way, who lived on the reserve, and who spoke their Aboriginal language. While certainly those people are among the Aboriginal people in jail, many Aboriginal people in the system have very little knowledge of Aboriginal traditions—the only worldview they know is the Western worldview. Under the culture clash theory you would not expect these individuals to be before the courts, but they are there, in ever increasing numbers.

When the Royal Commission on Aboriginal Peoples visited the Saskatchewan Penitentiary in Prince Albert, they met with the members of the Native Brotherhood—the Aboriginal people incarcerated there. Information provided to the Commission at the visit indicated that 95 percent of the Aboriginal inmates in the penitentiary had either been in foster care or a group home.<sup>49</sup> Demographic statistics from Aboriginal Legal Services of Toronto's Community Council program—an Aboriginal alternative justice program that has been operating since 1992—shows that 45 percent of those diverted to the program had been adopted or placed in foster care. Further, 57 percent had no involvement with the Aboriginal community in Toronto or elsewhere. Finally, the statistics show that 45 percent of those diverted had lived in Toronto for over 10 years.<sup>50</sup> While we cannot assume that everyone who was adopted or placed in care was cut off

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<sup>47</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 93.

<sup>48</sup> M. Sinclair, "Aboriginal Peoples, Justice, and the Law."

<sup>49</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 129.

<sup>50</sup> Aboriginal Legal Services of Toronto, *Community Council Statistics to September 30, 2004* (Toronto, 2004).



from Aboriginal traditions, we know that this is the case for many. Similarly, those raised in the city need not lose Aboriginal teachings, but it does often occur.

If the culture clash theory held true then we would not expect many people who were raised in non-Aboriginal settings to come into conflict with the law. Those individuals, we would assume, would only really know Western values. While it is true that family dislocation is a predictor of criminal involvement, and thus we should not be surprised that Aboriginal adoptees are in prison, a study by Correctional Services Canada and the Assembly of First Nations suggests that the effect of adoption and/or placement by a child welfare authority has a greater impact on Aboriginal people coming into conflict with the law than it does for non-Aboriginal people.<sup>51</sup>

The second theory explaining Aboriginal overrepresentation is the socio-economic theory. It is this theory that Stenning and Roberts appear to suggest is the best explanation for overrepresentation.<sup>52</sup> The socio-economic theory is grounded in the incontrovertible reality that if you want to know what group in society is at the bottom of the ladder you need not consult any statistical data; all you have to do is look at who is in prison. Inevitably those at the lower end of the socio-economic scale find themselves in conflict with the law and in jail.

Proponents of this theory would argue that Aboriginal people are overrepresented in jail because they are overrepresented in terms of social dislocation. Year after year, statistics confirm that Aboriginal people have lower life expectancies, higher rates of infant mortality, lower levels of education, lower levels of income, higher incidences of poverty and disease, and so forth.<sup>53</sup> It is these facts, the argument goes, that explain Aboriginal overrepresentation.

For advocates of this theory, the answer to Aboriginal overrepresentation does not lie in reforming the criminal justice system or creating Aboriginal alternative justice systems. Rather, the answer lies in improving the lot of Aboriginal people in an economic sense. The history of Canada and the United States is one in which members of particular immigrant groups arrive in the country with few skills and find themselves living in poverty. While living in these conditions, members of the group get caught up in criminal activity and find themselves before the courts and in jail. But this is a transitory development. Over time, as members of the group achieve a better living standard, they move out of the poorer parts of town and get better jobs. Their life improves in all ways, and we then discover that members of that group are no longer overrepresented among those in jail. It is not reforms to the criminal justice system that lead to this development, rather it is economic improvements among the group itself.

In this context, initiatives such as Aboriginal self-government and increased Aboriginal control over matters of concern to the community still are important. However, the focus shifts from social service issues to economic development concerns. For advocates of this theory, energy

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<sup>51</sup> S. Trevethan, S. Auger, J.-P. Moore, M. MacDonald and J. Sinclair, *The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates* (Ottawa: Correctional Services of Canada, 2001), online: <[http://www.csc-scc.gc.ca/text/rsrch/reports/r113/r113\\_e.pdf](http://www.csc-scc.gc.ca/text/rsrch/reports/r113/r113_e.pdf)>, .p. 2.

<sup>52</sup> “We propose an alternate model for considering the plight of socially disadvantaged offenders, including many Aboriginal offenders” (Stenning and Roberts, “Empty Promises,” p. 137).

<sup>53</sup> Statistics Canada, *Aboriginal Peoples in Canada*, pp. 4–6.

should be put into addressing economic barriers to Aboriginal participation in the workforce rather than on reforms to the justice system. Without a change in the economic life of Aboriginal people, justice reform will never have a significant impact. As with culture clash, this theory undoubtedly has some validity. Poverty is one of the best predictors of the chances of an individual coming into conflict with the law. To the extent that Aboriginal people are overrepresented among the poor, as they are, they will also be overrepresented among those in jail.<sup>54</sup>

The problem with the socio-economic theory is that it begs a larger question. The experience of immigrant groups to Canada certainly shows that, over time, as upward mobility occurs, rates of incarceration among members of the particular group decrease. While this process takes time, it appears to have an impact over two or three generations. If this process works for other groups, why has it not worked for Aboriginal people? Why, in the words of the RCAP, are Aboriginal people “poor beyond poverty”?<sup>55</sup> This is a crucial issue, for it suggests that the process of addressing overrepresentation is not as one-dimensional as shifting focus to look at economic self-sufficiency for Aboriginal people. Rather what must be looked at are the factors that have continued to keep Aboriginal people at the bottom of all socio-economic indicators and to determine how those factors can be overcome.

It was the conclusion of the Royal Commission—and other commissions that have looked at this issue—that the best explanation for the persistence of disadvantage among Aboriginal people, and thus the best explanation for Aboriginal overrepresentation, was the impact of colonialism.<sup>56</sup> Unlike groups who immigrated to Canada, the experience of Aboriginal people since contact has been unique.

In the early 1800s, British government policy with regard to Aboriginal people was governed by the belief that over time, they would simply be eradicated as a people due to the impact of settler migration.<sup>57</sup> When that did not occur, colonial governments prior to 1867 and Canadian governments since that time pursued a generally single-minded policy aimed at ensuring the disappearance of Aboriginal people in Canada. That the disappearance was to be accomplished primarily through assimilation—and a forced assimilation at that—rather than the physical destruction of a people does not lessen the immorality of the process. Nor does the manner in which the process was undertaken mean that there was not significant harm imposed on generations of Aboriginal people—harm that continues to be felt today.

That Canada’s express policy with respect to Aboriginal people was to hasten their disappearance was never really in question. Duncan Campbell Scott, the powerful and influential

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<sup>54</sup> Aboriginal people are more likely to have incomes below \$10,000 than non-Aboriginal people (46 percent for Aboriginal people, 27 percent for non-Aboriginal people), and overall the average income for Aboriginal people was 62 percent of the average income for non-Aboriginal people (Statistics Canada, *Aboriginal Peoples in Canada*, p. 6).

<sup>55</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 46.

<sup>56</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 47.

<sup>57</sup> Testimony of Joan Holmes, Ipperwash Inquiry, online: <[http://68.146.188.247/trans/ipperwash/aug\\_17\\_04/text.htm](http://68.146.188.247/trans/ipperwash/aug_17_04/text.htm)>, p. 80; and <[http://68.146.188.247/trans/ipperwash/aug\\_19\\_04/text.htm](http://68.146.188.247/trans/ipperwash/aug_19_04/text.htm)>, p. 58.

Deputy Superintendent General of Indian Affairs, said in 1920, “Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.”<sup>58</sup>

There is not space in this paper to fully outline all of the ways that the government pursued an agenda aimed at the destruction of Aboriginal people.<sup>59</sup> Included in the process was the relocation of Aboriginal people to often marginal land bases, criminalization of spiritual practices, severe restrictions on fundamental rights and liberties of Aboriginal people with respect to freedom of speech and assembly, mobility, and voting. *Indian Act* provisions regarding enfranchisement forced Aboriginal people who had ambitions to move outside of the

reserve community and to give up their status, and discriminated against Aboriginal women and their children on the basis of the status of the man the woman married.

The disappearance of Aboriginal people as a people was also explicitly to be hastened by the development of the residential school system. The core belief of this system was that the future for Aboriginal children could only be assured by working hard to remove their Aboriginal self-identity. The residential school experience, as all of Canada now knows, was a failure in almost every respect. It succeeded, however, in alienating thousands upon thousands of Aboriginal people from their communities and from their sense of themselves.

As the use of residential schools in Canada began to decrease in the 1960s and 1970s, a new challenge faced Aboriginal people—the expansion of the jurisdiction of provincial child welfare agencies to include reserve communities. This expansion led to what has been referred to as the “60s sweep” or “60s scoop” where many Aboriginal communities lost most, if not all, of their children to the care of child welfare agencies. Those children who were successfully placed for adoption were almost never placed in Aboriginal homes, but rather were raised by non-Aboriginal families. Those children who were not adopted often found themselves living in a succession of foster or group homes, often neglected or abused.

In summing up the history of Aboriginal people in Canada since contact, the Aboriginal Justice Inquiry of Manitoba said: “Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has been a central policy of Canadian governments since Confederation.”<sup>60</sup>

The result of express, long-standing colonialist practices did not result in the disappearance of Aboriginal people. It did, however, lead to great harm to Aboriginal people who were the victims of such practices, to their children and to their communities. That harm, perpetrated by state and by non-state agents, must be remedied if Aboriginal overrepresentation is to be

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<sup>58</sup> J. Leslie and R. Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Treaties and Historical Research Centre, Indian Affairs and Northern Development, 1978), p. 115.

<sup>59</sup> See Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* (Ottawa: Canada Communications Group, 1995) for a detailed discussion of the destructive role of the *Indian Act* and the residential school system on Aboriginal people.

<sup>60</sup> Aboriginal Justice Inquiry, *Justice System*, p. 96.

reduced. As will be discussed later in this paper, it is not possible for the state that brought this harm about to remedy the harm on its own. The healing must come from Aboriginal communities. The state, at the federal and provincial level, has the opportunity to support such initiatives, however, and such support is vital. As Mary-Ellen Turpel-Lafond has written:

One cannot erase the history of colonialism, but we must, as an imperative, undo it in a contemporary context.... We have to accept that there are profound social and economic problems in Aboriginal communities today that never existed pre-colonization and even in the first few hundred years of interaction. Problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime—these are indications of a fundamental breakdown in the social order in Aboriginal communities of a magnitude never known before. A reform dialogue or proposals in the criminal justice field have to come to grips with this contemporary reality and not just retreat into a pre-colonial situation.<sup>61</sup>

Earlier in this section, reference was made to the conclusions of various reports that the experience of colonialism best explains Aboriginal overrepresentation. While it is not necessary to quote each report in detail on this topic, it is useful to reflect on the words of the Royal Commission on Aboriginal Peoples in its report on criminal justice, *Bridging the Cultural Divide*:

... [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.

... Locating the root causes of Aboriginal crime and other forms of social disorder in the history of colonialism has other important implications related to the nature of the interventions most likely to bring about significant changes and improvements in Aboriginal peoples' lives rather than provide merely short-term palliative relief of the underlying problems.

... [R]esponding to the historical roots of Aboriginal crime and social disorder points directly to the need to heal relationships both internally within Aboriginal communities and externally between Aboriginal and non-Aboriginal people.<sup>62</sup>

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<sup>61</sup> M.E. Turpel-Lafond, "Reflections on Thinking Concretely About Criminal Justice Reform," in R. Gosse, J. Henderson, and R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994), p. 208–209.

<sup>62</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 52–53.

### III. OVER-POLICING AND UNDER-POLICING

Much of the focus on the failings of the criminal justice system in relation to Aboriginal people looks at the issue of Aboriginal overrepresentation in prison. It is not necessarily the case that overrepresentation is the most egregious example of the failings of the criminal justice system or that overrepresentation represents the most serious problem Aboriginal people face in the system. The reason for the focus on overrepresentation is that it is the only aspect of Aboriginal involvement in the criminal justice system that is consistently and easily measured. Just as important, perhaps more important in many cases, are issues relating to Aboriginal involvement with police—after all, it is the result of that interaction that leads to Aboriginal people coming before the justice system.

Because the issue of Aboriginal people and police does not lend itself as neatly to empirical research, there is much less information on the topic. Nevertheless, it is an issue that must be addressed if we are serious about looking for reforms in the justice system. The problem with focusing primarily on the sentencing aspect of the process, as many have interpreted *Gladue* and s. 718.2(e) to say, is that this process only comes into play after many other decisions by justice system actors have been made. While it is important to look at sentencing, it is equally important to look at the steps that lead up to an Aboriginal person becoming enmeshed in the system.

Looking at policing is important not only because it is the starting point for involvement in the justice system, but also because the police play a more prominent and pervasive role in the lives of Aboriginal people than any other actor in the justice system. Aboriginal people are more likely than non-Aboriginal people to have contact with the police for serious matters such as being the victim of a crime, a witness to a crime, or being arrested on suspicion of committing a crime.<sup>63</sup> Understanding Aboriginal attitudes toward the justice system and the justice system's attitudes toward Aboriginal people cannot be achieved by focusing only on the role of judges, Crown Attorneys, and defence counsel. We must also look at the important role of the police. In this regard, there is evidence to suggest that Aboriginal people are both over-policed and under-policed.

#### OVER-POLICING

Over-policing refers to the practice by the police of focusing their attention inordinately in one particular geographic area (or neighbourhood) or on members of one particular racial or ethnic group. Over-policing is also tied in to the exercise of police discretion. Police do not necessarily lay charges every time that they find a statute is being broken. In some cases they may turn a

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<sup>63</sup> Aboriginal people are more likely than non-Aboriginal people to come into contact with the police as victims (17 percent vs. 13 percent), as witnesses (11 percent vs. 6 percent), and as arrestees (4 percent vs. 1 percent) (Statistics Canada, *Aboriginal Peoples in Canada*, p. 8).

blind eye to the behaviour and in other cases they may warn an individual but not arrest the person. For example, the police may not charge attendees at a rock concert with possession of a controlled substance even though they might see the use of the substance right in front of them. In the same vein, the police may decide not to lay charges against people for drinking in public if, for example, there is a spontaneous celebration on the street or it is a family pouring some wine during a picnic in the park. There are any number of reasons why the police would opt not to lay charges in such cases. They might feel that doing so would incite unrest at an otherwise peaceful event. They might also feel that the laying of a charge would simply not serve the public interest.

On the other hand, the police may also decide to follow the dictates of the law to the letter and to charge people with any minor infraction of the *Criminal Code*, the *Controlled Drug and Substances Act*, or provincial or municipal bylaws. Often decisions to engage in this type of policing are linked to broader public order concerns. For example, it is not unusual to see the police stop every motorcycle rider to check for safety violations when people are expected to attend an event held by a group the police would characterize as a gang. On another occasion there may be a desire on the part of some members of the public and politicians to “clean up an area” and remove persons that some people see as undesirable elements. In such cases, the strict enforcement of laws against things such as drinking in a public place or trespassing are a way of checking up on the identity of individuals and in general making life so difficult for the objects of the police activity that they decide to move elsewhere. In Toronto, this type of police activity is known as “target policing” and has been adopted explicitly by the police in certain neighbourhoods over the past few years.

Over-policing, as noted earlier, is often associated with the targeting of individuals living in a specific neighbourhood, particularly in poor neighbourhoods. In this regard, it is not surprising to find that Aboriginal people are over-policed. This explanation for over-policing fits with the socio-economic explanation for Aboriginal overrepresentation in prison discussed earlier. But Aboriginal people have experienced a type of over-policing that is unique—over-policing in furtherance of government goals for the assimilation and colonization of Aboriginal people.

In Canada, it is the police who are most often called upon by the government to address disputes regarding the exercise of Aboriginal rights by way of arresting those attempting to exercise those rights. In this way, the police are used by government in an overtly political way—to short-circuit what is a political or legal dispute by using police action in advance of any court ruling on the validity of the claim being pressed. The use of the police in this manner cannot help but have an impact on the way in which the police are perceived by Aboriginal people.

Due to the nature of what might broadly be called Aboriginal rights disputes, the role the police play differs from their role in other public protests. In most (but not all) cases of police involvement with demonstrations, the role of the police is to maintain order during the demonstration itself. The way in which the police might attempt to control the protest can vary from event to event depending on a number of factors. In general, however, the police role is to contain the demonstration and to allow a balance between permitting some form of expression and public disruption and/or violations of the law.

On occasion, demonstrators engage in actions of civil disobedience. Civil disobedience occurs when individuals decide that it is necessary to break a law to bring attention to wider and more significant problems in society. Those engaging in civil disobedience know that they are breaking the law but do so in the hope of drawing attention to the actions of the state and encouraging broader public debate of the issues. In Canada, since the advent of the Charter of Rights, those engaged in civil disobedience also, on occasion, maintain that although they might be violating a particular law, that action is justified under one or more heads of protection under the Charter. In such cases, individuals often look to be arrested in order to go to court to obtain a judicial determination of the matter.

The use of police in what might broadly be considered to be Aboriginal rights disputes does not follow along the lines described above. Rather, in these cases, the police are used to intervene on the side of the government and to crush or quash the protest on the assumption that the claim of rights being advanced is wrong prior to any determination by the courts as to the ultimate validity of the claim itself.<sup>64</sup>

One of the first examples of the use of police in an Aboriginal rights dispute was the federal government's response to the Riel rebellions. In an attempt to put down the rebellions, involving both Métis and First Nation peoples in the west, the government called on what is now the RCMP. Reconsideration of the legitimacy of the claims of the Aboriginal peoples in the west make us challenge the correctness of the governmental response. It is now recognized that the Métis and First Nation peoples had legitimate grievances, and the use of police force to arrest those leading or participating in the protests made the situation worse. It also meant that the validity of the protests were ignored at the time. Not coincidentally, the use of police in this setting further enhanced the government's desire to colonize the western provinces at the expense of the Aboriginal people who lived there.

This example of government use of police to resolve an Aboriginal rights dispute is not simply an historic one. The Oka crisis of 1990 follows in the same vein. When the town of Oka, Quebec, sought to expand their golf course, the members of the Kahnésatake Mohawk Territory objected on the grounds that the land selected included sacred territory that belonged to them. The municipal government decided to press on, regardless of the claim to the land. In response, the Mohawks put up blockades to prevent the expansion. Rather than attempting to resolve the dispute peacefully, by, for example, determining the validity of the claim made by the members of Kahnésatake, the municipal government obtained an injunction declaring those manning the roadblocks to be guilty of trespassing—a violation of a provincial offence carrying a minimal penalty. When the blockades did not come down, the police were called to take the barriers down by force. During the attempt to do so, shots were fired and an officer of the Surêté du Québec, Marcel Lemay, was killed.<sup>65</sup> The police action failed, the barriers remained, troops were called

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<sup>64</sup> Gordon Christie would argue that this historic use of the police in dealing with Aboriginal–state relations is diametrically opposed to the state's constitutional obligations to Aboriginal people. See G. Christie, "Police-Government Relations in the Context of State–Aboriginal Relations", online: <[http://www.ipperwashinquiry.ca/policy\\_part/pdf/Christie.pdf](http://www.ipperwashinquiry.ca/policy_part/pdf/Christie.pdf)>.

<sup>65</sup> Two others died as a result of the conflict, both elderly men. One died as a result of a heart attack brought on by a

out, and after months of serious disruption the military took down the barricades and many of the Mohawk protesters were arrested. At the end of the day, however, the validity of the belief of the Mohawks was upheld—the land was not made into a golf course but rather turned over to the Mohawks of Kahnésatake.

The dispute at Burnt Church, N.B., in 2000 followed a similar path. In the wake of the decision of the Supreme Court of Canada in *R. v. Marshall*,<sup>66</sup> members of the Mi'kmaq Nation at Burnt Church believed that they had an Aboriginal right to harvest lobster. In furtherance of that right, they placed lobster traps in the bay without permission from the Department of Fisheries and Oceans (DFO). DFO took up the traps and had the police charge the lobster fishers of Burnt Church with violating provisions of the *Fisheries Act*. Once again police were called out in massive numbers, and there was great disruption to both the Aboriginal and non-Aboriginal communities in the area. In the end, an agreement between Burnt Church and the federal government was arrived at. The fact that an agreement was signed indicates strongly that, in fact, the Mi'kmaq people were correct—they did have an Aboriginal right to harvest lobster. In the dispute that arose prior to the resolution of this matter, the police were initially called on to support the unilateral (and ultimately incorrect) position of the DFO that such rights did not exist.

The extent to which the tragic events at Ipperwash Provincial park follow this (mis)use of police is a matter that will be determined by the Inquiry. Still, the hallmarks of the use of police to resolve an Aboriginal rights dispute before the claims of the parties can be fully examined or litigated does appear to follow in this case as well.

Outside of these large-scale disputes, where the use of police by the government is to prevent the legitimate determination of claims of Aboriginal rights, the police have also played a major role in the day-to-day governmental objective of colonization of Aboriginal people. As noted earlier, government policy has, since the establishment of Canada as an independent nation, focused on the eradication of Aboriginal people as a distinct people. In furtherance of this objective, the police have played a leading role. Thus, while governmental laws and regulations targeted the activities of Aboriginal people in particular, it was the police that were the agents of the state. Examples of this practice abound.

With the passage of the first *Indian Act*, traditional Aboriginal practices of governance were outlawed, replaced by a requirement that First Nations elect Chiefs and band councillors on a one-man, one-vote basis. Many reserve communities followed the dictates of the law and replaced their traditional forms of leadership with an electoral system, but not all communities did so. At Akwesasne, John Ice, or Saiowisakeron as he was known, was shot and killed by police in 1899 while attempting to prevent the imposition of the elected band council system.<sup>67</sup>

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stone-throwing mob who pelted the cars of Kahnésatake residents as they left the community for the nearby community of Kahnawake. The other person died from tear gas poisoning from the initial SQ raid. See G. York and L. Pindera, *People of the Pines* (Toronto: Little Brown Canada, 1991), p. 405. See also the National Film Board of Canada film *Rocks at Whiskey Trench*, written, directed, and produced by Alanis Obomsawin.

<sup>66</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456.

<sup>67</sup> <<http://www.akwesasne.ca/communityprofile.htm>> (accessed January 2005).



Most famously, the Six Nations Mohawk Territory rejected the *Indian Act* processes and continued to choose Chiefs in the Longhouse according to their traditions. In response, the federal government engineered what is still referred to as “the ‘24 takeover”—an event that caused serious rifts in the community that continue today.

In September [1924] ... Duncan Campbell Scott, the deputy superintendent general of Indian Affairs, secured cabinet approval to establish an elected council. The chiefs and Col. C.E. Morgan, the local superintendent, had been holding council meetings in the agricultural exhibit hall in Oshweken while the council house underwent repairs. On the morning of 7 October 1924 they convened the proceedings in the normal way. Then, at noon, without prior notice to the chiefs, Colonel Morgan read the order-in-council removing the Confederacy from power. He then announced the date for the first election of the band council. Although they had expected the government to make such a move, the chiefs were unprepared for the announcement. When Morgan finished, the chiefs quietly disbanded and gathered outside in shock. On Morgan’s orders, the Royal Canadian Mounted Police (RCMP) seized the wampum used to sanction council proceedings and other council records from the council house, and deposited them in the safe at the Indian Office in Brantford. On the doors of the hall they posted a proclamation announcing the date and procedures for the first election.<sup>68</sup>

Under the provisions of the *Criminal Code*, Aboriginal spiritual practices were also prohibited. In particular, the practice of the potlatch and the Sundance were criminalized. When local Indian agents had reason to believe that ceremonies were taking place, police were dispatched to arrest the participants. This use of police power was particularly prevalent on the West Coast where communities persisted in holding potlatch ceremonies. Those arrested in these police raids were subject to jail sentences. However, what occurred in most cases was that in return for giving up sacred objects related to the ceremonies to the Indian agent, the participants were spared a jail sentence.

The police also played a major role in the furtherance of government policies not necessarily enshrined in law. For example, the sending of Aboriginal children to residential schools could not have been accomplished without the active role of the police. In many communities it was the police who rounded up children who were not voluntarily sent to residential schools and delivered them to the individuals who were responsible for the schools. In a similar vein, when the jurisdiction of provincial Children’s Aid Societies was expanded to cover reserve communities in the 1960s, it was the police who would accompany the social workers and apprehend the children who were deemed to be “in need of protection.”

The police also had a crucial role in the enforcement of other provisions of the *Indian Act*, provisions that denied Aboriginal people the same rights as non-Aboriginal people. For example, for a number of years the *Indian Act* prohibited Aboriginal people from leaving the reserve or

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<sup>68</sup> S. Weaver, “The Iroquois: The Grand River Reserve in the Late Nineteenth and Early Twentieth Centuries, 1875–1945” in E. Rogers and D. Smith, eds., *Aboriginal Ontario—Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994), p. 248.

gathering in groups of more than three without the permission of the Indian agent. In enforcing these rules, the Indian agent had the powers of a justice of the peace. While it was the Indian agent who passed sentence on those offending against the Act, it was the police, often acting on advice or information from the Indian agent, who made the arrests.

The use of police in furtherance of government policies aimed at the extinguishment of Aboriginal people as a distinct people might seem beyond what is commonly thought of as over-policing, but this activity by the police is precisely what over-policing is. In these cases, Aboriginal people were targeted by the police due to the fact that they were Aboriginal. They were subjected to an aggressive police presence in relation to minor offences—offences that could only be committed by Aboriginal people. Even activities that were not illegal in any form (i.e., being a child on a reserve) were met with police responses of the most extreme kind—responses that would not have been tolerated had they been aimed at members of any other community.

The *Indian Act* also criminalized the use of alcohol by Aboriginal people. Section 94 of the Act made it an offence for an Indian to have intoxicants in his or her possession or to be intoxicated. The provision remained in force until struck down by the Supreme Court of Canada in 1969 for violating the *Canadian Bill of Rights* in the case of *R. v. Drybones*.<sup>69</sup> The penalties for an Indian found drinking were not trivial. As the court pointed out in *Drybones*, the offence carried with it a minimum fine of \$10 and up to \$50 and a jail sentence of up to three months or both. In contrast, in the Northwest Territories, where Mr. Drybones was arrested, non-Aboriginal people only violated the law if they were drunk in a public place and even then there was no minimum fine and the maximum jail sentence that could be handed down was 30 days. At his initial trial, Mr. Drybones was fined \$10 plus costs, and if in default, he was sentenced to three days in jail.

Even after the Supreme Court struck down the provisions of the *Indian Act* criminalizing Aboriginal people for drinking alcohol, police relied upon provincial and territorial laws of general application to over-police Aboriginal communities. The way this was done was to rely on “drunk in public” laws. Every province and territory has a provision making it illegal to be drunk in a public place. In most provinces (and in Ontario until the early 1990s) one of the penalties for being drunk in public is a jail sentence.<sup>70</sup> Drunk in public laws are notoriously subject to the abuse of the exercise of police discretion. On any weekend, in any city, town, or village in Canada, individuals will be drunk in public places. Indeed, exhortations to those who have been drinking to take public transportation or hail a taxi are recommendations that people go out and be drunk in a public place. On one level, the idea that police would simply arrest everyone after the bars let out for the night and charge them for being drunk in a public place is absurd. The courts would be clogged up completely if police embarked on such a practice. And such activity would discourage individuals from looking for alternatives to driving after they have been drinking.

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<sup>69</sup> *R. v. Drybones*, [1970] S.C.R. 282.

<sup>70</sup> A jail sentence can be imposed either for the offence itself, or in the event the individual did not pay fines associated with previous convictions for the offence.

Nevertheless, police have routinely used the provisions of the drunk in public laws to target Aboriginal people. Because these offences are only quasi-criminal and are generally seen to be very minor types of offences, they are rarely the subject of judicial scrutiny. There is no question that this form of over-policing thrived, and continues to thrive today. An example of how this practice was carried out will illustrate the point.

In the 1970s in the town of Alert Bay, British Columbia, there were a number of bars. One of the bars was recognized as the Indian bar—it was the place that Aboriginal people could go to get a drink. Many communities had, and still have, Indian bars. These bars serve a largely Aboriginal clientele because the other establishments in town are not as welcoming to Aboriginal people. In fact, the staff and/or patrons of these other bars might well make life very difficult for an Aboriginal person who chose to try to enter there.

The Nimpkish Reserve is just outside of Alert Bay and the Aboriginal people from the reserve would often come to town on Fridays to drink. They would not be the only people out having a drink that evening, but unlike the non-Aboriginal residents of the town, they could be found at one particular establishment. As a matter of routine, the local RCMP detachment would wait outside the Indian bar on Friday night and arrest all of those people coming out that they thought were drunk in a public place. Those arrested generally spent at least one night in jail. The police did not put the patrons of the non-Aboriginal bars under such scrutiny.

As it happened, in 1972, some law students from the University of British Columbia were working over the summer at the reserve. They became aware of the practice of the local RCMP and the disruption these arrests had on the community and its members. In order to prevent such arrests, the students arranged to have a bus attend at the bar at regular intervals to take the Aboriginal residents of the reserve home, thus ensuring that the patrons of the bar were not in a public place and therefore not in violation of the law. In response to this development, the RCMP detachment told the students that if they persisted in bringing the bus to the bar they would be charged with obstructing justice. The students then called their supervisor, Professor Michael Jackson of the U.B.C. law school to inform him of the RCMP's threat. Professor Jackson paid a visit to the RCMP in the town and let them know in no uncertain terms that the provision of a bus to residents of the reserve broke no laws and advised them not to harass his students. His intervention had the desired result.

Nevertheless, interventions such as those by the law students and Professor Jackson are rare. The norm in such situations is that Aboriginal people continue to be over-policed and harassed. Professor Tim Quigley of the University of Saskatchewan has written on this practice:

Consider, for instance, the provincial offence of being intoxicated in a public place. The police rarely arrest whites for being intoxicated in public. No wonder there is resentment on the part of Aboriginal people arrested simply for being intoxicated. This situation very often results in an Aboriginal person being charged with obstruction, resisting arrest or assaulting a police officer. An almost inevitable consequence is incarceration.... Yet the

whole sequence of events is, at least to some extent, a product of policing criteria that include race as a factor and selective enforcement of the law.<sup>71</sup>

In Ontario, the NDP government of Bob Rae recognized the inherently racist practices that grew up around drunk in public laws and repealed the provisions of that law that allowed for an individual to be jailed for non-payment of fines for this offence.

The targeting of Aboriginal people for arrest under drunk in public laws might seem like a minor inconvenience, but the reality is that it continues to serve to put Aboriginal people in jail. Even in Ontario, where jail is no longer an option for those charged, the police can put individuals whom they think are so drunk that they are a danger to themselves or others in jail for a period of time to essentially protect them from themselves. The determination of whether an individual falls within these categories is made by the police. Once again, the reality of the exercise of this form of police discretion has been to disproportionately target Aboriginal people. What makes this process even more objectionable is that there is no reason to believe that placing a person who is very drunk in jail for a period of time to “sleep it off” will actually prevent harm coming to the person. A number of coroner’s inquests in Ontario involving the deaths of Aboriginal people held in custody on drunk in public charges have recommended changes to this process.<sup>72</sup>

The history of over-policing of Aboriginal people serves to indicate why Aboriginal people might distrust the presence of police. The use of police by government as an arm of an overt strategy of assimilation, both in the past and in contemporary settings, has meant that many Aboriginal people have serious doubts about the ability of the police to truly serve and protect Aboriginal people in Aboriginal communities.

In its report on racial profiling, *Paying the Price: The Human Cost of Racial Profiling*, the Ontario Human Rights Commission devoted a chapter to the impact of racial profiling on the Aboriginal community. Much of the chapter addressed the feelings of Aboriginal people who had been singled out by the police. One individual described what happened to a friend after an altercation with the police where he was the subject of racial slurs: “He hated the cops after that and he was intimidated by them. Like he quite school after this.”<sup>73</sup> Another respondent spoke about how he felt after he was beaten by the police during an arrest: “After that, I grew up with a lot of hatred towards the cops, especially white cops. And I forgot to mention also that they used racial slurs against us as they were beating us against the fence.”<sup>74</sup>

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<sup>71</sup> T. Quigley, “Some Issues in Sentencing Aboriginal Offenders,” in R. Gosse, J. Henderson, and R. Carter, eds., *Continuing Poundmaker and Riel’s Quest* (Saskatoon: Purich Publications, 1994), pp. 273–274.

<sup>72</sup> See for example, the recommendations to the Ontario Provincial Police and the Ministry of Public Safety and Security from the Coroner’s Inquest into the death of William Kitchkeesic in Armstrong, Ontario, December 13, 2002.

<sup>73</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2004), p. 58.

<sup>74</sup> *Ibid.*

Over-policing does not simply have an impact on the targets of such activity, however. It also has an impact on the police officers themselves. One of the more insidious aspects of over-policing is that it reinforces negative attitudes or stereotypes of Aboriginal people by police. The reality is that most police officers do not live in predominantly Aboriginal communities (unless they are stationed on or by a reserve). As a result, the interaction that officers have with Aboriginal people is largely, if not exclusively, in the context of policing matters. Where those policing activities primarily involve the arrest of Aboriginal people for a variety of offences, it is easy to see how negative attitudes can develop. The practical reality of the experience of a police officer with Aboriginal people will often trump the impact of any Aboriginal awareness programs the officer might have participated in.<sup>75</sup> Officers with limited experience working with Aboriginal people will then have their views shaped by officers “experienced” with Aboriginal people. It is this limited, but constant, exposure to a subset of Aboriginal people through over-policing that allows for overtly racist attitudes to flourish in a police force. Thus the racist epithets uttered by Ontario Provincial Police officers during the Ipperwash occupation and T-shirts produced by members of the force immediately following it are easily understood—though of course not condoned. This is not to say that all police officers are racist. However, it is difficult to overcome negative stereotypes when officers are given few practical counter-examples during their work. Further contributing to these attitudes are media images largely portraying Aboriginal people as dysfunctional and violent.

## UNDER-POLICING

In addition to being over-policed, Aboriginal people are also, in many ways, under-policed as well. The term under-policing refers to situations where the police choose not to act even where there is evidence that crimes have been committed. Aboriginal people in Canada are not only over-represented as offenders, but also as victims of crime.

Statistics Canada’s 1999 General Social Survey (GSS) found that 35 percent of Aboriginal people had been the victim of at least one crime in the past 12 months as compared to 26 percent of non-Aboriginal people.<sup>76</sup> Aboriginal people were also likely to be victimized more often. The GSS found that 19 percent of Aboriginal people had been victimized two or more times as opposed to just 10 percent of the non-Aboriginal population.<sup>77</sup> Although Aboriginal and non-Aboriginal people had the same rates of victimization for non-violent offences, Aboriginal people experienced violent crime at a rate three times greater than non-Aboriginal people.<sup>78</sup> With specific respect to spousal violence, the GSS found that 20 percent of Aboriginal people who

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<sup>75</sup> In fact, an extensive longitudinal study of the Winnipeg Police Force’s cross-cultural awareness program indicated that it led to worsening relations with Aboriginal people. Prairie Research Associates, *Evaluation of the Aboriginal Awareness Training Program: Phase II* (Winnipeg, 1995), cited in Human Sector Resources, “Challenge, Choice & Change: A Report of Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples,” research paper prepared for the Ipperwash Inquiry, 2004, p. 12.

<sup>76</sup> Statistics Canada, *Aboriginal Peoples in Canada*, pp. 6–7.

<sup>77</sup> Statistics Canada, *Aboriginal Peoples in Canada*, p. 7.

<sup>78</sup> Ibid.

were or had been in a spousal relationship in the previous five years had been assaulted by their spouse; for non-Aboriginal people, only 7 percent had been the victims of spousal assault.<sup>79</sup>

The Statistics Canada figures looked at Aboriginal people in general. Carol LaPrairie's book *Seen But Not Heard: Native People in the Inner City* provides a look at the world of urban Aboriginal people living at the margins—a group of people who would have regular interactions with the police. With respect to victimization, LaPrairie found that 70 percent of women and 60 percent of men had been the victim of a violent offence that resulted in personal injury.<sup>80</sup>

There is evidence to suggest, however, that Aboriginal people are viewed by the police as “less worthy victims” and therefore crimes against them are not investigated as thoroughly or prosecuted as vigorously. Once again, evidence of this behaviour is both historical and contemporary.

As most Canadians are now aware, Aboriginal children in residential schools were often subject to physical and sexual abuse. Despite the abuse that went on in these schools, abuse that continued for years and years, charges were never laid against those perpetrating the abuse while it was occurring. Aboriginal children were simply not viewed as credible victims of crime. The failure to recognize and prosecute those who engaged in this abuse cannot be laid solely at the feet of the police; however, it is a particularly egregious example of under-policing. What makes matters all the more sadly ironic is that the victims of this abuse were often arrested by the police in their later lives as they tried to cope, often through the use of alcohol and drugs, with the aftermath of the abuse.

In a contemporary sense, under-policing continues for Aboriginal people, particularly Aboriginal women. The Aboriginal Justice Inquiry in Manitoba was called to look at two specific incidents. The first, the shooting of J.J. Harper, was an example of over-policing. Mr. Harper was stopped by the police in the course of an investigation of a crime that did not involve Mr. Harper at all. In the course of the stop, matters escalated quickly, and Mr. Harper was shot and killed by a police officer.

The other case that precipitated the calling of the Inquiry was the case of Helen Betty Osborne. The case of Ms. Osborne was a case of under-policing. Ms. Osborne was a 19-year-old Cree woman from Norway House First Nation who was going to school in The Pas. On November 12, 1981, she was abducted by four white men, sexually assaulted, and then brutally murdered. Sixteen years later, in 1987, one man was convicted of murder in her death, a second was acquitted, and the other two who took part in the abduction were not charged.

The Aboriginal Justice Inquiry found that racism toward Aboriginal people was rampant in the community and that the police reflected the non-Aboriginal community's attitude. The investigation of the murder, such as it was, showed the reluctance of the police to protect the Aboriginal residents of The Pas: “We know that cruising for sex was a common practice in The

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<sup>79</sup> Ibid.

<sup>80</sup> C. LaPrairie, *Seen But Not Heard—Native People in the Inner City* (Ottawa: Minister of Public Works & Government Services of Canada, 1994), p. 77.

Pas in 1971. We know too that young Aboriginal women, often underage, were the usual objects of the practice. And we know that the RCMP did not feel that the practice necessitated any particular vigilance on its part.”<sup>81</sup>

In his 1991 report to the Grand Council of the Crees of Quebec, Jean-Paul Brodeur concluded that “[i]n the Canadian context, Aboriginals are submitted to over-policing for minor or petty offences—e.g., drinking violations—and suffer from under-policing with regard to being protected from more serious offences, such as violent offences against persons (particularly within the family).”<sup>82</sup>

Sadly, under-policing, particularly of cases of violence against Aboriginal women, persists across Canada. For example, Pauktuutit, the Inuit Women’s Association of Canada, reported in 1995 that police in Labrador were not responding to the needs of women who were victims of violence.<sup>83</sup> The lack of urgency shown by the Vancouver Police with regard to the disappearance of women in the Downtown Eastside, many of them Aboriginal women, is another tragic example of under-policing.

The reality of under-policing in the case of Aboriginal women was recently highlighted by the publication in 2004 by Amnesty International Canada, of *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*. The report highlights nine cases of disappearances of Aboriginal women to illustrate the fact that they are viewed by society in general and the police in particular as less worthy. The report begins with the story of Helen Betty Osborne and includes the death of a cousin of Helen Betty Osborne, Felecia Velvet Solomon. Felecia disappeared from her Winnipeg home on March 25, 2003. Despite immediately contacting the police, little was done to investigate her disappearance until June 11, 2003, when what was later confirmed to be a part of Felecia’s body was found. The crime remains unsolved. The family is convinced that the police did not act promptly because of how they saw Felecia. Her grandmother said:

Just because our daughter was on welfare and she lived on the west side doesn’t mean that Felecia was a prostitute or a gang member or that she was a druggie You know, they label Aboriginal people right away. That’s the part that we didn’t like and I can’t say anything positive about the police because they were no help. We didn’t get help. We still don’t get help.<sup>84</sup>

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<sup>81</sup> Aboriginal Justice Inquiry, quoted in *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, AI Index: AMR 20/003/2004 (Ottawa: Amnesty International Canada, 2004), p. 39.

<sup>82</sup> J.-P. Brodeur, *Justice for the Cree: Policing and Alternative Dispute Resolution* (Grand Council of the Crees of Quebec, 1991).

<sup>83</sup> Pauktuutit (Inuit Women’s Association of Canada), *Inuit Women and Justice*, Progress Report No. 1 (Ottawa, 1995), p. 5–6.

<sup>84</sup> Amnesty International, *Stolen Sisters*, p.61.

As the Amnesty International Canada website points out in its pages on the report, the stories in *Stolen Sisters* “illustrate ... the frequent failure of police and the justice system to provide adequate protection to Indigenous women.”<sup>85</sup>

The consequences of under-policing can be as significant as those of over-policing. Aboriginal people who are over-policed often lose faith in the justice system as a whole. But under-policing also leads to a loss of trust in the police. The GSS study referred to earlier in this section found that Aboriginal people were less likely than non-Aboriginal people to find the police were doing a good job.<sup>86</sup> LaPrairie found that 75 percent of Aboriginal victims did not report their victimization to the police.<sup>87</sup>

The depth of the lack of trust felt by Aboriginal people toward the police caused by under-policing was recently revealed in the inquiry into the death of Neil Stonechild conducted by Mr. Justice David Wright of the Saskatchewan Court of Queen’s Bench. Even though the inquiry was into the death of an Aboriginal person who was taken by police and dealt with in an extra-judicial fashion, the report does not use this incident as the indicator of the two solitudes<sup>88</sup> existing in Saskatchewan. Rather, Justice Wright focuses on the testimony of Erica Stonechild, Neil Stonechild’s sister, on why she and her mother did not report matters to the police:

Q. In general terms, can you explain to us why ... you don’t go to the police?

A. In general terms. There was no trust established there at all, period. My mother tried to teach us children that under every circumstance that you need help, call the police. That’s their job, that’s what they’re there for. When you have conflict with that, what you’ve been taught all your life, but you’re experiencing a whole lot of other things that suggest otherwise, then I’m sorry—there were a few incidences in my personal life and our entire family’s. And I’m talking—when I say my entire family I’m talking about my mother and my brothers, you know, my uncle, my cousin, whoever happened to be most in our home at the—at that time. They were never reported simply because there is no trust. And it didn’t—and it’s not going to say that I’m slashing up the Saskatoon Police Force because, please, there is a lot of good people out there, I know that there is. But we can’t ignore the fact that they’re human, everybody’s a human being. We didn’t have no trust for the City Police. If we had more trust for the City Police, my mother would have been reporting them left, right and centre, every time they went AWOL from somewhere, every time they were UAL from somewhere, or run away from their community home where she was

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<sup>85</sup> <[www.amnesty.ca/stolensisters/index.php](http://www.amnesty.ca/stolensisters/index.php)> (accessed January 2005).

<sup>86</sup> Statistics Canada, *Aboriginal Peoples in Canada*, p. 8.

<sup>87</sup> LaPrairie, *Seen But Not Heard*, p. 67.

“Many people had serious physical injury but the majority of victims ... did not report their victimizations to the police. Nearly 30% thought the victimization was not important enough to report to police, 18% ‘didn’t want to rat’ ... 16% preferred to settle their own scores, 13% were afraid of retribution and 12% did not think police would act on it. A 20-year old ... Metis male said: ‘I don’t bother to go the police—wouldn’t be taken seriously anyway’” (LaPrairie, p. 429).

<sup>88</sup> Justice Wright intentionally used the term coined by Hugh MacLennan in the novel *Two Solitudes* to refer to the relations between Anglophones and Francophones in Canada in the context of the way in which Aboriginal and non-Aboriginal people in Saskatchewan view each other.



trying so hard to help them, you know, understand their cycle of life, or whatever you want to call it, they're way of being and holding themselves.<sup>89</sup>

In its report on racial profiling, the Ontario Human Rights Commission quoted an Aboriginal person discussing bringing matters to the attention of the police: “[A]fter a while people stop seeking help. They don’t want to go near them. They don’t want to have anything to do with them. Literally they just go, ‘I have had enough of this. Like they won’t hear me anyways, so I am not going.’”<sup>90</sup>

In many ways over-policing and under-policing are two sides of the same coin. Combined, the experiences build a lack of trust in the police. From the police perspective, over-policing gives rise to negative attitudes and stereotypes about Aboriginal people that can then be used to justify under-policing and the continued victimization of Aboriginal people.

On a more macro level, Aboriginal rights disputes provide stark examples of the relationship between these two phenomena. For example, at Oka and Burnt Church, Aboriginal people asserted claims of right over land and/or natural resources. As Aboriginal people are often seen as less worthy than others in Canadian society in the context of enforcing legal rights or obtaining police protection, those claims were ignored, in these cases by government rather than the police. In attempting to protect rights that were being ignored, the Aboriginal people became more assertive. The response to a more assertive claim of rights was to call out the police to summarily resolve the dispute by taking down roadblocks and lobster traps and thus dismissing the legitimacy of the claim. When those activities were then met with further actions by Aboriginal people, the police response escalated further. Under-policing, in the broadest sense, then begat over-policing.

#### **IV. GOVERNMENTAL AND JUDICIAL RESPONSES**

The many reports, studies, and commissions that have addressed the difficulties facing Aboriginal people in the criminal justice system have engendered a number of responses from governments at both the federal and provincial level. The fact that responses have been developed—whether successful or not—illustrates that this is an issue that governments and the judiciary wish to address. Some responses came in the form of new legislation, subsequently interpreted by the courts. Other initiatives supported the development of programs and services for Aboriginal people in conflict with the law. The extent to which these responses have been able to address some of the more significant and intractable aspects of this problem will be discussed in the following section.

In 1996, the federal government embarked upon the first comprehensive legislative reform of sentencing in Canada. Prior to 1996, sentencing was the exclusive purview of judges who

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<sup>89</sup> *Commission of Inquiry Into the Death of Neil Stonechild*, pp. 209–210.

<sup>90</sup> Ontario Human Rights Commission, *Paying the Price*, p.57. The Commission found that “Aboriginal ... communities consistently report that while they frequently feel the brunt of greater law-enforcement attention from the police, they also receive less peace-keeping and other types of assistance” (p. 61).

balanced the principles of deterrence, denunciation, incapacitation, and rehabilitation in their own personal fashion, subject only to appellate review. The 1996 reforms changed this process by instituting, in section 718 of the *Criminal Code*, a relatively comprehensive set of sentencing guidelines. The amendments to the Code were designed, among other things, to address the overuse of incarceration by Canadian courts. At the time of the amendments, Canada ranked in the top three countries in the Western world in terms of incarcerating its residents.<sup>91</sup> The enactment of section 718 was aimed to reduce this reliance on jail.

In addition to seeking to reduce reliance on incarceration generally, the amendments also specifically addressed Aboriginal overrepresentation in the criminal justice system. Section 718.2(e) of the *Criminal Code* states: “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.”

In discussing the need for s. 718.2(e), the government of the day was explicit that it sought to use the section to address the over-incarceration of Aboriginal people. The Minister of Justice at the time, Alan Rock, said before the Standing Committee on Justice:

[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal people make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada’s population, but they represent 10.6% of persons in prison. Obviously there’s a problem here.... What we’re trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it’s consistent with the protection of public—alternatives to jail—and not simply resort to that easy answer in every case.<sup>92</sup>

This particular section attracted some criticism from the opposition parties. During the debate on the bill, Pierette Venne, a Bloc Quebecois M.P. said: “Why should an Aboriginal convicted of murder, rape assault or uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?”<sup>93</sup>

The Reform Party (as it was then known) was very much opposed to what they characterized as “race-based sentencing.” Members of the party (and its successors, the Canadian Alliance and the

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<sup>91</sup> In *Gladue*, at paragraph 52, the court said: “Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada’s rate of approximately 130 inmates per 100,000 population places it second or third highest.”

<sup>92</sup> House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, no. 62 (Nov. 17, 1994), p. 62.

<sup>93</sup> *Hansard* (Sept. 20, 1994), 5876.

Conservative Party of Canada) have repeatedly introduced private members bills to remove the reference to Aboriginal people in s. 718.2(e).<sup>94</sup> Nevertheless, despite the criticisms, the amendments, including s. 718.2(e), were passed by Parliament.

As 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*. The decision was notable for the court's express condemnation of Canada's reliance on incarceration generally and with its concern with the very high rates of Aboriginal over-incarceration in particular. At paragraph 58, the court said: "If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians."

The court went beyond just decriing the current state of affairs. At paragraph 62 it also adopted the first conclusion of the Royal Commission on Aboriginal Peoples report on justice, *Bridging the Cultural Divide*:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people, on reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world view of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

As an express declaration of the court's concern for the way in which the justice system dealt with Aboriginal people, the decision was groundbreaking.<sup>95</sup> In terms of providing some practical guidance as to how s.718.2(e) was to be put into practice on a daily basis, the court was less definitive. The court was clear that the section applied to all Aboriginal people—Indian, Inuit, and Métis, in whatever court they find themselves.<sup>96</sup> Judges were instructed to take judicial notice of the systemic and background factors that have led to conditions under which Aboriginal people find themselves overrepresented in the criminal justice system.<sup>97</sup> The court then encouraged judges to look at how these systemic and background factors might relate to the situation of the specific Aboriginal offender before the court. Judges were asked to look at alternatives to incarceration that might better address the overall principles of sentencing found

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<sup>94</sup> The most recent effort in this regard was a motion by Conservative Party M.P. Myron Thompson, who on November 19, 2004, introduced Bill C-299 so that "the Criminal Code be amended where it requires that the circumstances applying to the offender, if he is aboriginal, be examined.... [R]ace should not be a basis for deciding what the sentence should be for any criminal offence of a violent nature" (38th Parliament, 1st Session, edited *Hansard*, no. 028 [Friday, November 19, 2004]).

<sup>95</sup> As was noted earlier in this report, the court had weighed in on this issue in the past, also in fairly dramatic terms, in *R. v. Williams* at paragraph 58 when it said: "Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity.... There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."

<sup>96</sup> *Gladue*, para. 91.

<sup>97</sup> *Gladue*, para. 83.

in s. 718.2(e) and in particular, to try to fashion a sentence that took into account restorative justice concepts. Even where incarceration may be required, the court indicated that the sentence for an Aboriginal offender might be less than that for a non-Aboriginal offender based on a number of factors, including that prison was a less rehabilitative place for Aboriginal people due to the racism found within jails.<sup>98</sup>

At the same time, the court also stated that s. 718.2(e) did not qualify an Aboriginal person automatically for a lesser sentence—the section did not mandate a sentencing discount for Aboriginal offenders. The court also suggested that in cases of serious violence, the sentences for Aboriginal and non-Aboriginal offenders would likely be similar.<sup>99</sup> In 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.<sup>100</sup>

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.

The federal government's commitment to addressing the issue of overrepresentation in the prison system was reiterated in the 2001 Throne Speech. The Speech stated: "Canada must take the measures needed to significantly reduce the percentage of Aboriginal people entering the criminal justice system so that within a generation it is no higher than the Canadian average."<sup>101</sup>

The month after the Throne Speech, February 2001, the government introduced its second attempt at reforming the youth justice regime with Bill C-7, the *Youth Criminal Justice Act*.<sup>102</sup> Interestingly, although the Act contained general declarations of principle regarding restraint in the use of incarceration and mentioned the needs of Aboriginal youth, the equivalent section to s. 718.2(e) was not found in the bill. The bill was amended by the Senate to include the wording of s. 718.2 (e) in December 2001. The amended bill passed the House in February 2002.

In addition to legislative responses, governments at the federal and provincial level have also funded justice initiatives by Aboriginal communities. The longest-running program of this type is

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<sup>98</sup> At paragraph 68, the court said: "...as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these systemic and background factors, more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."

<sup>99</sup> *Gladue*, para. 79.

<sup>100</sup> *R. v. Wells*, [2000] 1 S.C.R. 207. At paragraph 44, the court said: "...it will generally be the case, as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders." On the other hand, at paragraph 50 the court said: "The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application."

<sup>101</sup> Speech from the Throne, *House of Commons Debates*, vol. 1, no. 2 (January 30, 2001), pp. 14–15.

<sup>102</sup> The first attempt, Bill C-3, died on the order paper.

the Aboriginal Courtworker program, which has been in place since the 1970s. The role of Aboriginal Courtworkers was described earlier. The program is a jointly funded initiative between the province, through the Ministry of the Attorney General, and the federal government, through the Department of Justice. The Aboriginal Courtworker program is delivered in Ontario through the Ontario Federation of Indian Friendship Centres. Most, but not all, Courtworkers work out of Friendship Centres. Funding for the program was recently increased and additional Courtworker positions were funded in 2004.

In the 1990s government funding expanded to include what might broadly be termed Aboriginal justice programs. Aboriginal justice programs take a variety of forms. Some are diversion programs, some provide sentencing recommendations to the court through various mechanisms, and some offer post-sentence programs. The specific parameters of the programs are developed by the local Aboriginal community—reserve, rural, or urban—generally through negotiation with local justice personnel as well as officials from the relevant Ministries.

In the early 1990s, the Ministry of the Attorney General began funding Aboriginal justice programs in Ontario. Of the first three programs funded by the Ministry, two were in the far north—Attawapiskat and Sandy Lake—and the other was in Toronto. The Attawapiskat program had community Elders sitting with the judge or J.P. to provide suggestions during sentencing while the Sandy Lake and Toronto program were criminal diversion programs.<sup>103</sup> In the mid-1990s funding decisions and supervision of Aboriginal justice programs were consolidated in what is now the Aboriginal Issues Group in the Policy Branch of the Ministry. Currently the Ministry funds 14 programs across the province.

Also in the 1990s the federal government launched its Aboriginal Justice Strategy. The Strategy currently funds 28 programs in Ontario through the Aboriginal Justice Directorate. Some of the programs are funded jointly with the Ministry of the Attorney General and some are not. Funding

at both the federal and provincial levels is basically frozen at this point and there are no plans to fund new programs at this time.

Other than the Ministry of the Attorney General, the Ministry of Community Safety and Correctional Services also provides some funding for Aboriginal programming in correctional institutions. This funding is primarily for Native Inmate Liaison Officers who work at correctional institutions providing a variety of services to Aboriginal inmates.

The Ministry also offers Aboriginal-specific programming at some correctional facilities. For example, at the Thunder Bay jail there is the “Completing the Circle” program. The Algoma Treatment and Remand Centre (formerly the Northern Treatment Centre) in Sault Ste. Marie also offers a number of Aboriginal-specific programs. These programs include teachings regarding Aboriginal culture and spirituality along with other forms of counselling and treatment. These programs are institution-specific—other correctional institutions do not offer similar programs. It

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<sup>103</sup> Of the three programs, only the Community Council in Toronto is still in operation.

is possible, however, for Aboriginal inmates at other institutions to request a transfer to Thunder Bay or Sault Ste. Marie for the purpose of attending these programs.

The province has not developed a specific position or goal in relation to Aboriginal justice initiatives similar to the pledge delivered by the federal government in the Speech from the Throne although a process is now underway that could lead to such a document.<sup>104</sup> Discussions are underway, however, regarding the way in which the province should address and/or encourage Aboriginal justice initiatives on at least two fronts.

The Crown Attorney's Office of the Ministry of the Attorney General is in the process of developing a framework for the negotiation of protocols for Aboriginal justice programs. This protocol would govern both existing and new programs. On a broader level, an inter-Ministerial working group is developing an overall framework for restorative justice programs in the province. Included in this framework will be Aboriginal justice programs. The Ontario document is based on a federal document, which in turn is based on material developed at the United Nations. To this point, the documents have been developed largely in-house. It is anticipated that there will be some consultation on these documents, including consultations with Aboriginal communities. There will be further discussion of these initiatives later in this paper.

The other major funder of Aboriginal justice programs in the province is Legal Aid Ontario (LAO). LAO has provided pilot funding for a number of Aboriginal justice projects similar to those funded by the Ministry of the Attorney General and the Department of Justice. LAO is funding the Ontario Federation of Indian Friendship Centres to develop programs in conjunction with local Friendship Centres. Funding allows for a needs assessment and development phase as well as startup operational funding. Where ongoing funding for these projects will come from remains a question. Currently LAO is funding five such projects. In addition, LAO is also funding Nishnawbe Aski Nation's Talking Together program. Talking Together is also a pilot program providing Aboriginal justice programs to five fly-in communities in the north.

Outside of largely government-funded initiatives, the other major development in Ontario with respect to Aboriginal justice is the Gladue (Aboriginal Persons) Court. The spur to the development of the Gladue Court was a conference of the Canadian Association of Provincial Court Judges in Ottawa in 2000. At the conference there was much discussion about the *Gladue* decision and the difficulties judges had in responding to it in their courts. A number of judges at the Old City Hall Courthouse began working with Aboriginal Legal Services of Toronto and Professor Kent Roach of the University of Toronto to respond to those concerns. In October 2001, the Gladue Court was launched at the Old City Hall Courts in downtown Toronto. The objective of the court is: "[t]o establish this criminal trial court's response to Gladue and s. 718.2(e) of the Criminal Code and the consideration of the unique circumstances of Aboriginal accused and Aboriginal offenders."<sup>105</sup>

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<sup>104</sup> The province has indicated that they will be developing an Aboriginal justice strategy. The strategy will be developed by a number of Ministries working with Aboriginal organizations.

<sup>105</sup> Gladue (Aboriginal Persons) Court, Ontario Court of Justice—Old City Hall, *Factsheet*, online: <[http://www.aboriginallegal.ca/docs/apc\\_factsheet.htm](http://www.aboriginallegal.ca/docs/apc_factsheet.htm)> (accessed January 2005).

The creation of the court primarily involved the reallocation of existing resources. Legal Aid Ontario hired a duty counsel specifically for the court, and both the provincial and federal Crown Attorney's office also designated specific Crowns for the court as well. Aboriginal Legal Services of Toronto (ALST), the organization responsible for the Aboriginal Courtworker program, and the Community Council, the Aboriginal criminal diversion program in Toronto, created the new position of Gladue Caseworker specifically to provide assistance to the court in the preparation of Gladue Reports.

Gladue Reports are written at the request of Crown, defence counsel, or the judge to assist in providing background information on the life circumstances of the offender, as well as to make recommendations as to possible sentencing options. The information contained in the Gladue Reports assists in seeing that all alternatives to incarceration are considered by the court at the time of sentencing as contemplated by the Supreme Court in *Gladue*.

Initially some of ALST's costs associated with the Gladue Caseworker position were covered by a grant from Miziwe Biik Aboriginal Employment and Training and by proceeds from fundraising. In April 2003, the Ministry of the Attorney General agreed to fund the position on a year to year basis.

LAO has also recently provided funding to ALST to expand its Gladue Caseworker program. The three-year grant allows for an additional Gladue Caseworker to be hired in the Toronto area to deal with Gladue Report requests from courts other than Old City Hall. The funding will also see another worker in the Hamilton/Brantford area. There is an evaluation component to the funding that will allow for some assessment of the impact of the position in a variety of court settings. There will be a further discussion of the Gladue Court in the following section.

## **V. PERSISTENCE OF THE PROBLEM**

As has been noted in this paper, the problem of overrepresentation of Aboriginal people in the prison system has been studied a great deal over the past 25 years. Since overrepresentation is something that can be measured, it has served as the focus for concern about problems with the criminal justice system in general. As the statistics reviewed earlier indicate, it is a problem that is not going away. Data regarding overrepresentation from across Canada suggests that sentencing reforms and judicial pronouncements are not making a huge impact in slowing rates of overrepresentation. Data from Ontario regarding Phase II young offenders, while admittedly early in the life of the YCJA, indicates that the Act's attempt to serve as a brake on reliance on incarceration as a response to youthful criminal behaviour is not having a significant impact on Aboriginal youth.

The persistence of overrepresentation, tied with the fact that the Aboriginal population is growing more quickly than the non-Aboriginal population, means that we may well be looking at prison populations where Aboriginal people make up a greater and greater percentage of the inmates. The social costs of such a development will be high.

What makes this development more puzzling is that it is not as if governments and the courts are not aware of the issue. As was noted in the previous section, in addition to statements indicating government resolve to eliminate overrepresentation within a generation, specific initiatives have been undertaken. Section 718.2(e) was enacted specifically to address overrepresentation, and the Supreme Court of Canada's decision in *R. v. Gladue* in 1999 set out guidelines to sentencing judges specifically to make the section meaningful and significant. Section 718.2(e) was subsequently incorporated in the YCJA. On the policy front, governments at all levels have funded a variety of alternative justice responses aimed at giving more responsibility to Aboriginal communities in the justice area.

Why do these varied responses appear to have so little impact? Is there a need for more money and programs? Is Aboriginal overrepresentation simply an intractable fact of life that cannot be addressed through government initiatives? Or are some of the issues relating to overrepresentation so deeply entrenched in the operations of the criminal justice system that current initiatives can not address them?

### **S. 718.2(E) AND GLADUE**

Let's begin with the sentencing reforms and the *Gladue* decision. There is no question that the 1996 sentencing reforms have had an impact on incarceration rates generally in Canada. For the most part, fewer people are being jailed in Canada than before, and more alternatives to custody are being contemplated at sentence. It is important to remember that s. 718.2(e) was only one part of the comprehensive range of sentencing amendments. To the extent that the amendments have slowed incarceration rates in Canada generally, the persistence of Aboriginal overrepresentation suggests that, despite s. 718.2(e), it is non-Aboriginal people who are benefiting more from the change in sentencing attitudes. As the Roberts and Melchers study and the data in Ontario regarding the YCJA show, as the rate of incarceration drops, it is dropping faster for non-Aboriginal people than for Aboriginal people. Thus, while there might be fewer people receiving jail sentences in Canada than in previous years—including fewer Aboriginal people—the percentage of Aboriginal people in the jails is increasing.<sup>106</sup> This trend creates the disturbing possibility that jails in Canada might increasingly become places where Aboriginal people find themselves exclusively. There are very real concerns in the western provinces that this development is leading to Aboriginal gangs taking over some prisons and using jail as an effective recruitment source for new members.

Why is it that s. 718.2(e) and the *Gladue* decision appear to have had so little impact on Aboriginal imprisonment rates? One major reason is that, as was discussed earlier, *Gladue* is much more than a decision that provides a sentencing discount for Aboriginal offenders. Indeed, the court went out of its way to dispel such thinking. What the court required was additional information to be provided to judges to inform their decisions. Such information would touch on the life circumstances of the Aboriginal offender and how those circumstances related to systemic issues faced by Aboriginal people generally and how they contributed to the

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<sup>106</sup> Although, as noted earlier, the past few years have seen increases in sentenced admissions.



individual's involvement with the criminal justice system specifically. Additionally, information would have to be provided to the judge as to sentencing alternatives that might better address the needs of the offender and the community, particularly in a restorative context.

What the decision did not do, however, was provide any sense of how this information was to come to the court. What process would be used to gather this information, synthesize it, and provide it to the sentencing judge? Assuming that the same system that had routinely processed Aboriginal offenders for years would suddenly reorient itself to make *Gladue* real seems simplistic. In many jurisdictions, in the years since *Gladue*, legal aid cutbacks have meant that defence counsel have less monetary incentive to spend more time with their clients to gather information they did not have before. Even where defence counsel are interested in trying to meet the dictates of *Gladue*, they are not necessarily equipped to ask clients the types of questions that would elicit a real picture of the person's life. Nor are defence counsel necessarily aware of programs and services available in the Aboriginal community, or in the community generally, that might prove to be a valid alternative to an incarceral sentence.

It might be thought that the logical place for such information to come from would be a pre-sentence report (p.s.r.) prepared by a probation and parole officer. Most probation services have not, however, changed their practices to actually take *Gladue* into account in the way that reports are prepared.

In many jurisdictions, probation officers have a set number of hours in which to prepare a p.s.r. In Ontario, for example, a p.s.r. for an adult offender is to take between eight to ten hours. That rather short period of time is generally insufficient to get to know a person enough to gather insights into their life that then might allow for suggestions as to alternatives to incarceration. Adding to the problem is that the purpose of a p.s.r. is not necessarily the same as that of a report done in fulfillment of the provisions of s. 718.2(e). In Ontario, for adult offenders, the focus of the p.s.r. is to determine the suitability of the person for a non-custodial sentence, not the type of non-custodial sentence that might be appropriate.

There also appears to be skepticism within the judiciary as to the ability of probation and parole officers to undertake this role. For example, the Manitoba probation services developed a response in light of *Gladue*, setting out a framework for probation officers to prepare what they refer to as Gladue Reports. On paper, it appears that the guidelines are quite comprehensive. Interestingly, since the decision in 1999, Manitoba probation has prepared fewer than 25 Gladue Reports.<sup>107</sup> Given the reality of Aboriginal overrepresentation in the province, that is a shockingly low number.

As was noted in the previous chapter, the Gladue (Aboriginal Persons) Court was developed specifically to respond to the Supreme Court's decision. There has not been a formal evaluation

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<sup>107</sup> Presentation by Louis Goulet, Executive Director, Devolution and Community Justice, Manitoba, at National Judicial Institute, Judicial Education Seminar, Problem Solving Skills for Judges in Aboriginal and Mental Health, Winnipeg, Manitoba, October 8, 2004. Subsequent to the conference it appears that judges are once again asking probation services to prepare Gladue Reports for offenders. Further reliance on probation services for this service will likely depend on the quality of the reports received.

of the court, although one will be undertaken as part of the three-year funding ALST recently received from Legal Aid Ontario. The sense from those involved with the court—judges, Crowns, defence counsel, and Aboriginal service agencies—is that the court is making a real difference in the sentences it delivers.

One of the hallmarks of the court is that it takes more time with cases than other courts in Toronto.<sup>108</sup> Time is a precious commodity in the court system. As concerns over potential court backlogs increase, judges are under pressure to deal with matters as quickly as possible. From the perspective of Crown and defence, there is increased pressure to resolve matters by way of joint submissions as to sentence.

The luxury of time is responsible, in some part, for the success of the Gladue Court. By not rushing matters through, Crown, defence, the Aboriginal Courtworker, the Gladue Caseworker, and other service providers are able to construct bail release plans or sentencing options for the court's consideration that would not otherwise develop. The lesson that the Gladue Court provides in this respect is that if systemic pressures in the criminal justice system are not addressed, then there is no reason to expect any changes in the way in which Aboriginal people are sentenced. In other words, if we expect change to occur without challenging the assumptions that pervade the system, then change will not occur.

While there has been interest in the court among other judges in both Toronto, Ontario, and the country, it is striking that the Gladue Court at Old City Hall remains the only one of its kind. Even in the face of a recommendation from a coroner's jury in Brantford that a Gladue Court be established in that city,<sup>109</sup> Toronto remains alone in this particular innovative response to s. 718.2(e). If the court represented one of a number of responses to the *Gladue* decision, this would not be problematic, but this is not the case. Sadly, across the province and the country, despite amendments to the *Criminal Code*, decisions of the Supreme Court, and promises from the Throne Speech, the sentencing of Aboriginal people seems to be done now as it was 10 years ago—it is business as usual.

The significant addition to the Gladue Court in terms of personnel was the creation of the Gladue Caseworker. It is the Caseworker's job to prepare Gladue Reports at the request of the judge, Crown, or defence counsel. Gladue Reports have been an invaluable resource for the sentencing judge. The reports provide a great deal of detail on the life of the offender and attempt, where possible, to place those details in the context of the experience of Aboriginal people in Canada. A judge who sits in the Gladue Court on a regular basis describes Gladue Reports as follows:

Gladue reports resemble pre-sentence reports in some ways, but differ in important aspects. The Gladue Court caseworker can in most cases establish a rapport with the

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<sup>108</sup> B. Knazan, "Sentencing Aboriginal Offenders in a Large City—The Toronto Gladue (Aboriginal Persons) Court," National Judicial Institute, Aboriginal Law Seminar, January 23–25, 2003, Calgary, Alberta, p. 15.

<sup>109</sup> "It is a strong recommendation of this Jury that the Gladue Court model that is operating at the Old City Hall Court in Toronto is essential to this region considering the large proportion of Aboriginals in this community and considering the number of aboriginal offenders in the court system" (Coroner's Inquest into the death of Benjamin Mitten, Brantford, Ontario, December 4, 2003, p. 2).

offender and elicit information about the offender's Aboriginal background by the very fact that they are themselves Aboriginal. They know what questions to ask; they know the significance of certain answers, such as where a person is originally from, or recently from, and how to follow up on apparently inconsequential information.

The reports provide information to assist the judge in understanding the particular circumstances of an Aboriginal offender so that the court can understand the factors that may have brought the person before the court. The report does not draw those conclusions for the Court, but does contain recommendations.

The purpose of the report is not to replace a pre-sentence report and the report cannot provide the same information as could a probation officer about the offender's previous history with the correctional system.<sup>110</sup>

Gladue Reports also provide very detailed recommendations as to sentencing options. For example, if a report recommends that an individual enter an alcohol or drug treatment program, the recommendation will be accompanied by an intake date for the client. In order to obtain this date, the Caseworker may have researched treatment centre options, discussed them with the offender, assisted the offender in completing an application form for the treatment centre, sent the application off, and lobbied on behalf of the offender with the treatment centre. ALST, as part of its commitment to the Gladue Court, also provides funds to transport offenders to treatment programs or other programs or services. Without this commitment of time and money, the Gladue Reports would have little impact on the sentencing process. It is clear from the experience of the Caseworker that expecting a probation officer to provide that level of detail or support is unlikely in most cases.

Gladue Caseworkers can perform these services in any court—there is no need for a Gladue Court to receive such information. In *Gladue* itself, the Supreme Court was clear that the decision applied to all Aboriginal people, wherever and whenever they were sentenced. ALST's expansion of the Gladue Caseworker program will see additional Caseworkers operating in Toronto and in southwestern Ontario where there are, as yet, no formal Gladue Courts.

The experience of the Gladue Caseworker at the Gladue Court suggests that this type of activity could logically be seen as a corollary to the Aboriginal Courtworker program. Currently, Aboriginal Courtworkers provide information to the court regarding the background of offenders and sentencing options, although generally in an informal setting and not through the preparation of Gladue Reports. While it is not be feasible to expect Aboriginal Courtworkers to take on the preparation of Gladue Reports as part of their current workload,<sup>111</sup> it would be feasible to create a program similar to the Aboriginal Courtworkers that would see Gladue Caseworkers prepare Gladue Reports at courts across the province. We will return to this option later in the paper. At the present moment, however, with the only Gladue Caseworkers in the country located at ALST,

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<sup>110</sup> Knazan, "Sentencing," pp. 9–10.

<sup>111</sup> A Gladue Report can take between 15 and 20 hours or work to prepare—a Courtworker who is expected to be in court on a daily basis simply does not have that sort of time.

it is not surprising that courts do not have access to the information they require to meaningfully implement the *Gladue* decision on a day-to-day basis.

The discussion about the Gladue Court suggests that there are systemic and institutional barriers to the implementation of the goals of s. 718.2(e) and of the Supreme Court's decision in *R. v. Gladue*. Changing the sentencing regime for Aboriginal people cannot occur simply by legislative fiat or by way of a decision of the Supreme Court of Canada. The institutional pressures to move an already overburdened criminal justice system along means that there must be some real changes in the way information is gathered and presented regarding Aboriginal people for change to truly occur. Doing things the way they have always been done but with passing reference to the circumstances of Aboriginal people will change nothing.

However, the reasons that *Gladue* has not had the hoped-for effect on the sentencing of Aboriginal people cannot be laid solely at the feet of the court and those who work in that system. There are other systemic developments that have worked to frustrate the stated intention of Parliament and the Supreme Court.

## **BAIL, REMAND, AND CPIC DATA**

As noted earlier in this section, since the 1996 sentencing amendments, fewer people are sentenced to terms of imprisonment. On the other hand, despite this reduction, more and more people are finding themselves in prison. The reason for these seeming contradictory developments is that the number of individuals held in detention pending resolution of their matter has increased dramatically.

Those charged with criminal offences whom the police do not feel can be released on their own with a promise to appear in court at arrest, are held for a bail hearing. The purpose of a bail hearing is to determine if the person should be released on bail pending the resolution of the matter and, if so, what conditions might be suitable for that person's release. There are three grounds on which bail can be denied and/or conditions applied: 1) the person is not likely to attend court; 2) the person is a threat to the community at large or to specific individuals in the community; and 3) even though the person is likely to attend court when requested and even though they do not present a threat to anyone, the nature of the crime they are alleged to have committed is such that it would shock the public conscience if the person were released.

Over the past 20 years there has been a trend in Ontario, and across the country, to see more people spending time in jail while waiting a decision on bail or being denied bail. In fact, more people in Ontario now spend time in jail for this reason (generally referred to as remand) than due to convictions.

There are two ways of measuring the increasing number of people being held in custody for bail purposes. One is to look at admissions to jail over a period of time (typically a year) and the other is to look at the average population in jail at any one time (a one-day snapshot).

On the basis of total number of admissions to custody, 1991/92 marked the first time in Ontario that more people were sent to jail on remand (43,568) than by findings of guilt (41,193).<sup>112</sup> Since 1985/86 the number of people admitted to jail on remand has climbed almost every year. In 1985/86, 25,460 people were remanded into custody. By 2003/04, that number had more than doubled to 57,854.

The same trend is visible when we look at average daily jail populations. In 2000/01, for the first time, on an average day there were more people in jail in Ontario on remand (3,701) than serving a sentence (3,598). As with the total number of admissions, the average daily total has increased almost every year from 1985/86 to 2003/04 and has more than doubled in that period from 1,574 to 3,701.

This trend is not unique to Ontario but can be seen across the country. The Canadian Centre of Justice Statistics (Juristat) found that in 2000/01, 59 percent of all admissions to provincial or territorial jails were on remand and 41 percent were sentenced. On a daily basis 40 percent of those in custody across the country were on remand and 60 percent were sentenced.<sup>113</sup> These statistics should not be surprising given that Ontario is responsible for almost half of those held on remand in Canada on a daily basis.

What makes these figures so startling is that the remand numbers continue to rise even though, on an absolute number basis, fewer people across the country and in Ontario receive jail sentences for their crimes. In other words, even though the crime rate is dropping and the number of people sent to jail after conviction is dropping, in both Ontario and across the country, the number of people on remand continues to increase.<sup>114</sup> In Ontario, for example, in 1985/86 47,792 people were sentenced to jail following a finding of guilt. By 2003/04, that number had declined to 31,170.

As noted earlier, the result of a bail hearing may be that the person is denied bail absolutely. More often, the result of the hearing is that the person is eligible for release if they are able to meet certain conditions. One of the reasons that many people are not released as soon as possible, if at all, is that they might not be able to meet particular bail conditions. For example, a person may be required to have a surety—a person who is able to assure the court that the individual will attend court when requested and abide by their bail conditions. Sureties have to be approved and it is common to require that a surety be able to pay an amount of money to the court if the accused does not show for court and/or violates a bail condition. Individuals who do not know

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<sup>112</sup> All Ontario figures relating to remand and sentenced admissions to custody are from Statistical Services, Policy Planning Branch, Ministry of Community Safety and Correctional Services.

<sup>113</sup> S. Johnson, *Custodial Remand in Canada, 1986/87 to 2000/01*, Juristat—Canadian Centre for Justice Statistics, Catalogue no. 85-002-XIE, vol. 23, no.7 (Ottawa: Statistics Canada, 2003), p. 1.

<sup>114</sup> The Juristat study identified four possible explanations for the rise in remand rates in the face of a declining crime rate overall. They are: 1) a relative increase in violent crime; 2) court processing; 3) use of time-served sentences; and 4) legislative changes. A factor not mentioned in the Juristat study but subject to much comment by criminal lawyers are guidelines issued to Crown Attorneys from the Ministry of Attorney General that suggest that in certain types of offences, i.e., domestic assault, bail should always be contested. There is not the space in this paper to discuss these factors in any detail (Johnson, “Custodial Remand,” pp. 8–12).

any qualified sureties may stay in jail for that reason alone. In other cases, the person might need to find a suitable alternative address in order to be released. However finding such a place can be difficult if the person is in custody.

For this reason, some Ontario cities have Bail Programs established. A Bail Program works with individuals who might not ordinarily be released. For example, Bail Programs will take individuals who are not able to find a surety and supervise the person on release. Bail Programs provides referrals to counselling and housing sources. Thanks to Bail Programs, thousands of people who would otherwise spend time in custody on remand are released.

The importance of release on remand cannot be stressed. Numerous studies have shown that those held in custody on remand are more likely to plead guilty and be found guilty than those who are released pending trial. A study by Professors Gail Kellough and Scott Wortley found that 32 percent of those people who were released before trial ultimately had their charges dropped altogether.<sup>115</sup>

As with other systemic problems within the criminal justice system, the impact of the rise of remand populations appears to have a disproportionate impact on Aboriginal people. It is not unusual to see Aboriginal people detained on remand due to concerns regarding the first ground for refusal of bail—likelihood to attend court.

The reason Aboriginal people are detained on this ground follows from the systemic conditions of Aboriginal people. Many of those arrested have little income, no jobs, and are often homeless. In addition, these individuals may have previous convictions for failure to attend court or to comply with a bail condition or a probation order. All of these factors combine to make the Aboriginal accused person seem less likely to appear for court if released and thus either detained absolutely, or required to obtain a surety to gain release.

Obtaining definitive statistics on the extent to which Aboriginal people are held on remand is difficult as data is generally not collected on this aspect of the court process. The Aboriginal Justice Inquiry in Manitoba found that Aboriginal people were less likely to receive bail than non-Aboriginal people.<sup>116</sup> On the other hand, the Ontario data regarding Phase II young offenders referred to earlier in this paper suggests that Aboriginal youth are not necessarily any more likely to be remanded into custody than non-Aboriginal youth.

One of the consequences of an individual being held in custody awaiting trial is that there is then great pressure on the individual to plead guilty. One of the reasons that this pressure arises is that often, particularly if the substantive offence is relatively minor, the accused person will spend more time in custody awaiting trial than they would receive if they were convicted for the offence itself. On sentencing, Ontario judges generally count pretrial custody on a two-for-one basis with post-sentence custody. In other words, one month in pretrial custody is generally

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<sup>115</sup> G. Kellough and S. Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42 *British Journal of Criminology* 199. On the other hand, the study found that only 11 percent of those who are held in custody before trial have all of their charges dropped.

<sup>116</sup> Aboriginal Justice Inquiry, *The Justice System*, p. 86.

treated as a two-month post-sentence custodial term. As a result of these systemic pressures, those on remand, for other than very serious charges, tend to plead guilty and receive essentially time-served sentences.

To the extent that Aboriginal people are disproportionately placed on remand, the number of time-served sentences will be high. When someone is released on a time-served basis, the ability of the court to fashion a sentence in furtherance of the principles of s. 718.2(e) or *Gladue* is frustrated. It is for this reason that the Gladue Court in Toronto deals with bail applications. As Justice Brent Knazan, one of the judges in the court has said:

There are many charges, even involving some violence by Aboriginal offenders with criminal records, for which a sanction other than prison may be proportional to the gravity of the offence and responsibility of the offender. As any lawyer knows, in such cases the bail hearing becomes the most important proceeding, because a detention order will effectively pre-determine the sentence as one of imprisonment. Since credit should be given for pre-trial detention ... the sentence after a detention order is often a fine, suspended sentence or conditional sentence followed by the words “in view of time spent in custody”. Even if the sentence in such a case is technically a sanction other than imprisonment, the result of the detention order is an Aboriginal offender in prison and the imprisonment forms part of the sentence when credit is given for pre-trial custody. 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.<sup>117</sup>

The issue of whether the *Gladue* principles apply on bail applications was, until recently, an open question. The decision of Mr. Justice Archibald in the case of *R. v. Bain*—a bail review—appears to have settled the matter in Ontario. In that case Justice Archibald said: “[C]learly the principles of *Gladue* are overriding principles in the justice system from the time a person comes into the justice system to sentence.”<sup>118</sup>.

The frequency of time-served sentences also helps explain a phenomenon that Aboriginal accused face on bail and on sentence with respect to prior convictions. Sentencing in Canada, even with the amendments to the *Criminal Code*, tends to be based on the ladder principle. On the ladder principle, an individual’s first few brushes with the criminal justice system will tend to be dealt with in a non-custodial fashion. If the criminal behaviour is seen to be continuing, then the judge feels it necessary to move up the ladder and provide some custodial time. If the criminal behaviour continues, then increasing periods of incarceration are used.

In order to use the ladder approach, judges must know about the individual’s prior criminal history. That information is provided by way of the offender’s Canadian Police Information Centre (CPIC) record. The CPIC provides a list of all the convictions an individual has received

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<sup>117</sup> Knazan, “Sentencing,” pp. 11–12.

<sup>118</sup> *R. v. Bain*, Ontario Superior Court of Justice, February 18, 2004 (unreported, online: <<http://aboriginallegal.ca/docs/Bain.pdf>>), p. 3.

as well as the sentences for those convictions. The CPIC also includes a list of those charges that have been stayed or withdrawn against an individual. This latter information cannot be presented in court at sentencing and is referred to as “below the line” information as it appears on the CPIC report after the list of convictions. Obviously, the longer a person’s criminal record, the more likely the individual will receive a custodial sentence and/or a longer custodial sentence than a person with a shorter criminal record.<sup>119</sup>

CPIC data tends to be seen as a neutral, reliable, and objective information source as it records only the convictions that a person has amassed. CPIC data speaks for itself. CPIC data can also, however, hint at some systemic problems within the criminal justice system as it relates to Aboriginal offenders. As noted earlier in this section, there is a tendency for those who are denied bail to plead guilty to their offences at an early opportunity. Aboriginal offenders, as a group, also have a tendency to plead guilty to offences due to a cultural worldview that emphasizes the importance of the individual taking responsibility for his or her actions.<sup>120</sup> Additionally, the Aboriginal Justice Inquiry found that Aboriginal accused persons spent less time with counsel and relied upon duty counsel more often than non-Aboriginal people.<sup>121</sup> The result of these systemic factors is that, in many cases, Aboriginal offenders have a worse CPIC record than a non-Aboriginal offender who may have the same history of involvement with the police.

It is not uncommon for police to charge an individual with more than one offence in regard to a particular criminal act. For example, in a theft situation, the person may be charged with theft and possession of stolen property. If the person is on bail or probation at the time, the person will also likely receive a fail to comply charge. In a case where, for example, the accused spits at arresting police officers, the person will likely be charged with a separate charge for each police officer who was spat upon or almost spat upon. In the normal course of events, as part of the plea bargain process, some of the charges against the individual will be dropped or reduced in return for a guilty plea.

In the case of a person who, for example, pleads immediately upon arrest or after a detention order and without the benefit of counsel or at least the benefit of adequate counsel, particularly on the promise or the expectation of a short sentence or a sentence of time served, these assumptions fall away. That individual may well plead guilty to all offences. For that person, the issue is not so much what charges they are pleading guilty to as opposed to the time they will have to serve for those charges. As a result, while this individual may not receive a long sentence for those particular offences, the CPIC record will indicate that the person was convicted of a number of offences. The result of a number of such pleas is that the person may accumulate a very unenviable and serious-looking criminal record. If that record includes convictions for fail to appear or fail to comply, then it will be harder for that person to obtain bail again if arrested

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<sup>119</sup> There are, of course, other variables at play when relying on CPIC data. For example, if a person has not had any involvement with the criminal justice system for a number of years prior to an offence, then the importance of previous convictions may fade.

<sup>120</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 97.

<sup>121</sup> Aboriginal Justice Inquiry, *The Justice System*, p. 86.



and thus will increase the likelihood that the person will plead guilty to the charges, and the cycle continues. This phenomenon is one that is particularly noticeable with Aboriginal offenders.

This phenomenon is one that has not been the subject yet of detailed statistical analysis, if such analysis were possible. It has been remarked upon however by both defence counsel and Crown Attorneys who work with Aboriginal accused persons.<sup>122</sup> This phenomenon speaks to another problem in the operation of the criminal justice system. If courts continue to rely upon CPIC information as a major determinant in the sentencing process, as they appear to do, then the systemic factors that lead Aboriginal people to have significantly more serious CPIC records than non-Aboriginal people will, once again, trump the dictates of sentencing reform or decisions of the Supreme Court of Canada.

## **ABORIGINAL JUSTICE PROGRAMS**

The development of Aboriginal justice programs is another way in which Aboriginal overrepresentation might be addressed. It does not appear that these programs have had a particular impact on overrepresentation numbers. Does this mean the programs are not living up to their mandates?

It must be realized at the outset that Aboriginal justice programs are not particularly prevalent across Canada in general or in Ontario in particular. Many of these programs are in their early developmental stages and are not yet hearing cases with any regularity. Those programs that are operational do not generally deal with a large number of cases per year. ALST's Community Council program—the longest-running Aboriginal justice program in Ontario—dealt with over 150 cases in 2003/04, by far the largest total of any program.

In addition, not all those whose cases are heard by justice programs would otherwise be receiving jail sentences for their offences. At ALST, for example, approximately 25 percent of those whose cases are diverted are first offenders. In most cases, those individuals would not likely be facing a jail sentence even had their matters proceeded through the system. For other programs, the percentage of individuals who would not receive a jail sentence if their matter proceeded through the court is higher. This is due to the fact that access to Aboriginal justice programs is controlled by the Crown Attorneys in the jurisdiction where the program is located. For many Crowns, matters that might result in a jail sentence for an offender will largely stay in the system—the Aboriginal program deals mostly with cases where jail is not a likely outcome.

This is not to say that Aboriginal justice programs do not address the issue of overrepresentation at all. In some cases, individuals coming into the programs would be looking at custodial sentences. In other cases, the intervention of the program means that the person might be able to address some significant issues in their life and avoid further interaction with the courts. For example, an evaluation of ALST's Community Council program by the Department of Justice

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<sup>122</sup> Andre Chamberlain (Crown Attorney) and Catherine Rhinelander (defence counsel) on a panel on the Gladue (Aboriginal Persons) Court at the Indigenous Bar Association Annual Conference, Toronto, October, 17, 2002.

found that participation in the program reduced the likelihood of an offender recidivating by 33.7 percent.<sup>123</sup>

## VI. WHAT IS TO BE DONE?

The issue of the relationship between Aboriginal people and the criminal justice system has been the subject of many books, articles, and commissions. There is no shortage of recommendations as to how the system might be reformed to address the realities faced by Aboriginal people.

As a starting point it is worth revisiting the first conclusion of the Royal Commission on Aboriginal Peoples report on criminal justice, *Bridging the Cultural Divide*. This conclusion is echoed, in various forms, in virtually all of the justice reviews that have been undertaken in Canada since 1990.

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people—on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>124</sup>

The next four findings of the Commission are less remarked upon but are also worthy of note—particularly since they too reflect the tenor of other reports, both those written before and after the Commission reported.

Aboriginal people are over-represented in the criminal justice system, most dramatically and significantly in provincial and territorial prisons and federal penitentiaries.

Over-representation of Aboriginal people in the criminal justice system is a product of both high levels of crime among Aboriginal people and systemic discrimination.

High levels of Aboriginal crime, like other symptoms of social disorder such as suicide and substance abuse, are linked to the historical and contemporary experience of colonialism, which has systematically undermined the social, cultural, and economic foundations of Aboriginal peoples, including their distinctive forms of justice.

Responding to and redressing the historical and contemporary roots of Aboriginal crime and social disorder require the healing of relationships, both internally among Aboriginal people and externally between Aboriginal and non-Aboriginal people.<sup>125</sup>

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<sup>123</sup> E-mail from Phyllis Doherty, Department of Justice, to Jonathan Rudin, March 12, 2001.

<sup>124</sup> Royal Commission on Aboriginal Peoples, *Bridging*, p. 309.

<sup>125</sup> Royal Commission on Aboriginal Peoples, *Bridging*, pp. 309–310.

While there may be almost virtual unanimity regarding the problems facing Aboriginal people in the criminal justice system, responses are all over the map. As was noted earlier, Aboriginal overrepresentation and over- and under-policing are not intractable and insoluble. However meaningful responses to these issues have to be able to address the deep-rooted causes of these phenomena.

Some reports and commissions focus their recommendations on essentially tinkering with the current system. For example, the recent Wright Commission report into the death of Neil Stonechild in Saskatoon has relatively few recommendations, and most of them relate to increased Aboriginal awareness on the part of the police force and a better and more accessible police complaints mechanism.

The difficulty with the approach suggested by the Wright Report is that these changes are rarely able to get at the root causes of problems. As well-meaning and helpful as they are meant to be, tinkering with the system will not address systemic issues. As Christine Silverberg, the former chief of the Calgary Police Service wrote in *The Globe and Mail* following the release of the Stonechild Report:

To be ethical and act ethically is first and foremost a choice: If we want ethical behaviour we need a climate that fosters such behaviour. It won't happen by add-on programs alone, laudable as they may be. Introducing race relations programs into an intemperate environment may salve the conscience, but does nothing to change the fundamental structure, systems, and processes of the organization that support a discriminatory culture.<sup>126</sup>

At the other end of the spectrum, the Royal Commission on Aboriginal Peoples (RCAP) attempted to bypass criticisms of tinkering by proposing a radical reshaping of the relationship between Aboriginal people and Canadian institutions. RCAP found that Aboriginal people had an inherent right to develop their own distinct justice systems and it was the creation of such systems that provided the real answers to the problem.<sup>127</sup> The Commission reached its conclusion that such an inherent right exists from the decision of the Supreme Court of Canada in *R. v. Sparrow*<sup>128</sup> on the meaning of s. 35 of the *Constitution Act, 1982*.<sup>129</sup>

Since the Commission reported, the Supreme Court has retreated from the expansive notion of Aboriginal rights the decision envisioned. In subsequent decisions such as *Van der Peet*<sup>130</sup> the court has taken a more restrictive view of the sorts of activities that might be seen as inherent Aboriginal rights and thus be granted constitutional protection under s. 35 of the *Constitution*

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<sup>126</sup> Christine Silverberg, "After Stonechild: rebuilding trust," *The Globe and Mail*, October 29, 2004, A23.

<sup>127</sup> The Commission did not discount more incremental responses, but focused its report and recommendations on more far-reaching goals.

<sup>128</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>129</sup> Section 35(1) of the *Constitution Act, 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>130</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

*Act, 1982*. There have been no attempts to litigate the specific question of whether or not there is an inherent Aboriginal right to develop and implement justice systems, although at this stage, it would seem that the success of such a claim is very doubtful.

One reason that the Commission relied so heavily on constitutional interpretation to ground an Aboriginal right to justice is that the other way to establish the right—by way of a constitutional amendment—was clearly politically impossible at the time the Commission reported. It would appear that the climate for major constitutional change has not shifted much in the intervening years, and the prospects of change occurring in this fashion in the near term are virtually nil.<sup>131</sup>

The Commission did not dismiss the possibility that change could also happen within the existing system. It is possible for meaningful change to occur without requiring a recognition of the inherent right of Aboriginal people to control justice systems—a recognition that, if it ever occurs, is likely a long way away.<sup>132</sup> Such changes however, as Christine Silverberg notes, do require major shifts in focus and direction.

One of the key findings in this paper relates to the continued and persistent problem of Aboriginal overrepresentation in the prison system. What is striking about the overrepresentation data, particularly since the turn of the century, is that despite amendments to the *Criminal Code* and YCJA, and despite far-reaching decisions in cases such as *Gladue*, Aboriginal overrepresentation continues to be with us. Current data give little hope that the pledge from the Speech from the Throne in Ottawa in 2001 to see Aboriginal people represented in the prison system at the same percentage as they are in the population at large within a generation will be met.

Data regarding incarceration rates do show that on an absolute basis, fewer Aboriginal people are being incarcerated now than 10 years ago. The data also show, however, that the drop in the numbers of Aboriginal people being incarcerated pales in comparison with the drop in the incarceration rate of non-Aboriginal people. As a result, levels of overrepresentation remain static at best.

These data appear puzzling. What more can we expect the legislators and the courts to do about this issue? Specific admonitions in legislation to consider alternatives for everyone, but particularly for Aboriginal people, combined with strong support from the bench should lead to change, but that change has not occurred. Why?

In large part it is because change in this area cannot come solely by way of legislative or judicial fiat. As the Supreme Court noted in *Gladue*, the fact of overrepresentation and the failure of the criminal justice system to deal fairly with Aboriginal people reveals a “sad and pressing social

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<sup>131</sup> J. Rudin, “Aboriginal Self-Government and Justice” in J. Hylton, ed., *Aboriginal Self-Government in Canada*, 2d ed. (Saskatoon: Purich Publishing, 1999), p. 222.

<sup>132</sup> This is not to say that such claims are incorrect or a bad idea. However, in the current environment, absent a significant departure from current jurisprudence by the Supreme Court or a major change of heart from the federal government, true self-government in this area is simply not going to occur.

problem.” The problem is tied to the systemic issues faced by Aboriginal people throughout Canada, issues directly related to the continuing impact of colonialism on Aboriginal people.

Given this reality, the response of some critics of recent sentencing initiatives<sup>133</sup> is to say that the solutions to this problem lie outside of the criminal justice system altogether. Locating the crux of the problem of overrepresentation in systemic social dynamics suggests that the problem is not caused by judges being overly fond of incarceration for Aboriginal people and thus revealing hidden racial biases. Rather the fact is that Aboriginal people, for a number of reasons, commit more crimes than non-Aboriginal people and, therefore, not surprisingly find themselves before the courts in disproportionate numbers. Since the cause of the problem is not caused by the justice system, we should not expect the justice system to be able to solve the problem. The focus on sentencing to resolve this issue is misplaced.

On some levels this criticism has validity. It will be impossible to change the reality of Aboriginal overrepresentation if our focus is solely on how judges sentence guilty parties. Efforts need to be put into developing responses to the causes of social dislocation in Aboriginal communities and to preventing Aboriginal people from coming to the attention of the police and then the courts. This is not to say, however, that there is no role for the courts, because there remains a very significant role. As will be discussed later in this section, initiatives created to respond to needs identified through the court process can lead to the creation and enhancement of social programs serving a wide range of people, not just those with matters before the court.

The difficulty with both legislative reforms and judicial pronouncements decrying Aboriginal overrepresentation is these responses urge that the courts do their work differently but provide no additional resources in order to have this occur. *Gladue* makes clear that s. 718.2(e) is not a sentencing discount case but requires that judges look into circumstances of the life of the offender and search for resources that might address those circumstances and thus, it is hoped, keep the person out of the jail. The case is silent, however, on where this information will come from. How is it that a system that has provided Aboriginal people with substandard service will suddenly change its orientation? It is frankly unrealistic to think that without additional resources to the court that any change in the sentencing of Aboriginal people will occur. This is particularly the case in an environment where judges are expected to sentence individuals quickly and to accede to joint submissions on sentence as a matter of course.

It is unrealistic to expect that defence counsel or Crown Attorneys will be able to provide information to the sentencing judge about the life of the Aboriginal offender and the resources the individual might need to begin to change his or her life. The frustration of judges expressed at the Canadian Association of Provincial Court Judges conference in Ottawa in 2000 was precisely that the information that *Gladue* demanded that they take into account was not being provided.

A number of responses to this problem are possible, but few are being pursued with any vigour. The experience of the Gladue (Aboriginal Persons) Court in Toronto suggests that a dedicated

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<sup>133</sup> For example, Stenning and Roberts, “Empty Promises.”

court with a few additional resources might be able to sentence Aboriginal people in a manner in keeping with the spirit and the letter of the law and the dicta of the Supreme Court. Sadly, although the Gladue Court began hearing cases in October 2001, there have been no similar initiatives undertaken in any urban centre in Canada.

The development of a specific court may not be possible or feasible in all jurisdictions in the province or the country, but that does not mean that there are not alternative ways of providing information to the court regarding Aboriginal offenders. The Gladue Caseworker, an individual whose job is dedicated to providing such information to the courts, can fulfill that role. The experience of Aboriginal Legal Services of Toronto, an organization that has provided individuals who have performed that role, indicates the value of such a position. Gladue Caseworkers are a necessary extension of the Aboriginal Courtworker function.

The role of the Aboriginal Courtworker was described earlier in this paper. As was noted, it is generally not possible for a Courtworker to also research and write Gladue Reports for the court. The experience at the Gladue Court is that these reports take a significant amount of time. It is unrealistic to expect a Courtworker who is required to be in court on a daily basis to be able to undertake this task.

Aboriginal Legal Services has recently received three-year funding from Legal Aid Ontario to add two Gladue Caseworkers. Included in the funding is an evaluative component. The evaluation will likely provide valuable information on how best to use the services of a Gladue Caseworker and under what circumstances the work of the Caseworker is best accomplished. The evaluation will not be able to provide any definitive conclusions about the ability of the program to impact on Aboriginal overrepresentation, as such a study would require more time to track those who were the subject of a Gladue Report. To wait until definitive empirical evidence exists to show that Gladue Caseworkers will reduce over-incarceration is to waste valuable time and, more importantly, will mean that Aboriginal offenders will continue to be sent to jail although few people are under any illusion that such sentences will induce any positive change in behaviour.

There is no reason that a Gladue Caseworker program could not be developed along the lines of the Aboriginal Courtworker program. The role of Gladue Caseworker and Aboriginal Courtworker are complementary, but not identical. Because Gladue Caseworkers are writing reports that impact directly on the sentencing process, there is a real need to ensure that they are properly supervised. Supervision would include regular discussions and reviews of all reports to be submitted to the court.

In order to make the promise of s. 718.2(e) and the *Gladue* decision real, it is recommended that the province of Ontario establish a Gladue Caseworker program to provide this important resource to courts across the province. It is hoped that this initiative would be picked up by other provinces and would gain the financial support of the federal government. The development of this initiative is too important to wait for federal buy-in, however.

One of the purposes of the Gladue Report is to provide to the sentencing judge options to incarceration that would address the root causes of the individual's offending behaviour. In order to provide such options, however, there must be resources available. The *Gladue* decision makes clear that while it is preferable for an Aboriginal offender to have access to Aboriginal-specific resources, the absence of such resources should not frustrate the application of the principles of s. 718.2(e). Whatever appropriate resources exist should be relied upon. Sadly, in many communities in Ontario, particularly those in the north and in remote communities, there are few resources of any kind available. Even in many major urban centres, there is a lack of needed social services.

The issue of the provision of enhanced social services for Aboriginal people is, to an extent, outside the scope of this paper. On the other hand, looking at this issue holistically means that these issues must be addressed. Having a Gladue Caseworker in court whose reports highlight the lack of appropriate resources in a community can serve as an impetus for the development of needed programs. If organizations know that the court might consider using a particular program as an alternative to jail, there is an incentive to develop such a program. Once such programs are developed they are often open to all who can use the service and thus can perform a preventative role. The identification of a social problem through the court system can often engender meaningful community responses.

For example, the work of judges such as Madam Justice Turpel-Lafond in Saskatchewan has led to a much greater awareness of the problems facing young people with Fetal Alcohol Spectrum Disorder (FASD) who become enmeshed in the criminal justice system. While FASD is not exclusively an Aboriginal issue, due to the ongoing impacts of colonialism in Aboriginal communities, it is a very real and prevalent problem. Justice Turpel-Lafond and her colleagues have compelled the province to test young people they believe might have FASD as they feel it is impossible to properly sentence an individual if they do not have adequate and appropriate information. From 1998 to 2003 there have been over 150 referrals for diagnosis and over 80 percent have come back with a positive diagnosis.<sup>134</sup> Pressure from the bench to recognize the extent of this problem provides impetus for the development of solutions. This is but one example of how the recognition and identification of a social problem through the criminal justice system can lead to more broad-ranging, comprehensive, and community-wide responses.

As noted earlier in this paper, the Province of Ontario, in conjunction with the federal government and, in some cases, Legal Aid Ontario, funds a number of Aboriginal community justice programs in the province. The funding regime that these programs operate under varies and their long-term viability and survival is not assured. It is also not clear whether the province is willing to add to the programs already in place.

There certainly is the possibility that these programs can address aspects of the overrepresentation issue. If the programs deal with offenders who would otherwise be receiving a jail sentence, as opposed to just those individuals who would not likely receive incarceration

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<sup>134</sup> M.E. Turpel-Lafond, "Fetal Alcohol Spectrum Disorder: The Perspective of a First Nations Judge" in *Undue Trials: Justice Issues Facing Aboriginal Children & Youth*, a special report published by the Ontario Federation of Indian Friendship Centres (Toronto: Ontario Federation of Indian Friendship Centres, 2004), p. 7.

regardless of whether or not they were sentenced in court, then it is clear that these programs could well play a role.

The importance of Aboriginal community justice programs is that they are designed specifically to work with Aboriginal offenders and address some of the root causes of the person's offending behaviour. The programs are designed to integrate or reintegrate the person back into the community and help the individual develop the skills they need to minimize further conflict with the law. These programs can also act as incubators for additional social service programming in the community.

The Community Council Program at Aboriginal Legal Services of Toronto is the longest-running Aboriginal justice program in Ontario and deals with the largest number of cases. Given that over 70 percent of those coming into the program have prior criminal records and more than 50 percent have spent time in jail previously, there seems little doubt that the program reduces the number of Aboriginal people in custody. A recent evaluation of the program by Jane Campbell Associates found that the program worked with the most difficult of individuals in the criminal justice system. The success the program has had with these individuals is significant. The evaluation found that

[t]he interviewed clients saw the CCP as having helped them much more than the formal court system has. They described the various specific ways in which the CCP has assisted them to change their behaviour and life circumstances. From this evidence, the program has been able to reach Aboriginal offenders more effectively than has the court system and it does this based on Aboriginal cultural values.<sup>135</sup>

The importance and significance of Aboriginal justice programs is not just that they work to assist individual Aboriginal people who find themselves before the courts, but that these programs also play a vital role in community development. Restorative justice programs in Aboriginal communities have a broader mandate and set of goals and expectations than similar programs in non-Aboriginal communities. For Aboriginal communities, the development of restorative justice programs is part of a reclaiming of the process of social control and order maintenance—a process that was explicitly taken away from Aboriginal communities during the period of colonization. In this way, the development of restorative justice programs by Aboriginal communities is very much a part of decolonization—of reasserting the importance, vitality, and significance of Aboriginal community control over Aboriginal people.<sup>136</sup> The development of an Aboriginal community's capacity to address social dislocation in its midst is the sign of a strong and healthy community. Strong and healthy communities are more able to resolve a wide range of conflicts in a positive manner.

It is recommended that the province develop a concrete plan to expand the range of Aboriginal justice programs and commit to ongoing funding for such programs.

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<sup>135</sup> Campbell Research Associates, *ALST Community Council Program Evaluation* (2000), online: <<http://aboriginallegal.ca/docs/evales.htm>> (accessed January 2005).

<sup>136</sup> There is a very good discussion of this issue in Craig Proulx's book, *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich Publishing, 2004).



This report has also focused attention on the importance of the role of the police with Aboriginal people. As we have discussed, 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. One impact of over-policing is that police officers develop attitudes toward Aboriginal people based exclusively on their interactions with them as accused persons or victims. This skewed view of Aboriginal people helps to perpetuate attitudes toward Aboriginal people that reflect stereotypical views.

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. Inquests and inquiries looking at individual cases of Aboriginal people who have been victims of crime, Helen Betty Osborne and Neil Stonechild, for example, or at larger-scale claims of a denial of rights, such as the Ipperwash Inquiry itself, point to a society in which Aboriginal people are seen as less worthy victims.

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. These sorts of attitudes, when they are reflected among police officers, cannot be dealt with solely by way of better training or more Aboriginal awareness courses for officers. As Christine Silverberg noted above, there must be a real change in the way in which policing services are delivered to Aboriginal people. In some cases these changes will occur through the delivery of these services by Aboriginal police forces. In other cases, policing will remain the purview of municipal or provincial forces. In the latter case, a change in policing toward Aboriginal people would be part of a needed larger change in policing in general.

The issue of policing is the subject of other papers written for the Ipperwash Inquiry and so it will be left to those papers to advance substantive recommendations in this area. There is no question, however, that change in the policing area must be of a substantive nature. The addition of an Aboriginal awareness program or a push to recruit Aboriginal people to join the police force will have no impact if the dynamics within the police force itself do not change.

Before leaving this subject, a few comments must be made with regard to the provision of victims services to Aboriginal people. The area of victims services is a relatively new one. Ontario has recognized the needs of victims by creating a Victims Services Division in the Ministry of the Attorney General and by increasing funding for victim witness assistance programs and related initiatives. While there have been no definitive studies on how these programs and services have reached Aboriginal people, there is a sense that, not surprisingly, the needs of Aboriginal people have not been met by these programs.

One of the major reasons for this is that victims services programs tend to be an add-on to the court process and are driven by the charges that are laid and prosecuted. In this context, victims services are not able to deal with many of the most important issues in the Aboriginal

community. For example, under-policing is a victims issue. However, since this concern addresses charges that are not laid (or under-charging when charges are laid) victims services programs are generally not engaged. For many Aboriginal people, the victimization they suffered through the residential school experience is the significant victims rights issue. Government programs and services, however, do not generally provide assistance to residential school survivors.

For these reasons (among others) it is necessary to rethink how victims services are provided to Aboriginal people. It is recommended that the delivery of victims services to Aboriginal people be undertaken directly by Aboriginal organizations. In this context the concept of what constitutes victims services should be expanded to meet the real needs of Aboriginal people rather than just providing services for individuals who are victims of crimes that are proceeding through the courts. To insist that victims services be provided in the same manner to everyone in the province is to ignore the unique issues facing Aboriginal people and to continue to under-serve them and to send the message that they are unworthy victims.

We have already discussed the need to rethink policing on a larger level than just the relations between the officers on the beat and the Aboriginal people in the community being policed. Without looking at the issue at the macro level, substantive change will not occur. The same holds true with regard to Crown policies, both those aimed specifically at Aboriginal people and Aboriginal justice programs, and those policies of general application as well.

It is recommended that the province undertake substantive consultations with Aboriginal organizations that might be affected by the development of government policies regarding Aboriginal and restorative justice initiatives. It is further recommended that the province ensure that there is input from Aboriginal organizations with an interest and experience in the justice area from the outset as guidelines, protocols, and principles are developed. True consultation means that those whose work will be affected by the development of government policies will have input into the process from the beginning and not merely have an opportunity to comment on what might well be virtually a finished product.

It is also recommended that Crown policies of general application be examined for their impact on Aboriginal people charged with criminal offences. The suggestion here is not that these policies be revised specifically to exempt Aboriginal people from their operation, but rather the disproportionate impact these policies are having on Aboriginal people requires a rethinking of the policies in general.<sup>137</sup>

Of particular significance are Crown policies that have led to the rapid rise in the remand population in the province. As discussed earlier in the paper, Aboriginal people denied bail or facing unrealistic bail conditions often plead guilty to offences to avoid lengthy pretrial detention. The impact of these pleas is two-fold. First, the offender develops a longer and longer criminal record and thus increasingly finds it more difficult to obtain bail if arrested again. Second, on sentencing judges are more inclined to look at longer periods of detention.

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<sup>137</sup> The development of an Ontario Aboriginal Justice Strategy might well address these issues.

While it is important for the province to review why the growth in the remand population has boomed at a time when fewer crimes are being committed, there are also some immediate steps that can be taken. As was noted earlier, Bail Programs provide bail supervision to individuals who would not otherwise be released due to having no fixed address or no suitable sureties or a combination of these and other factors.

The Toronto Bail Program has, with the assistance of funding from Miziwe Biik Aboriginal Employment and Training and Aboriginal Legal Services of Toronto, created a position of Aboriginal Bail Program Supervisor. This individual works with Aboriginal people in the Gladue Court at Old City Hall as well as in the other courts at that location. Given the systemic factors facing Aboriginal accused persons, the Aboriginal Bail Program Supervisor has been granted more discretion in terms of taking on clients than other Supervisors.

After almost a year of operation, the program has been a success. At the same time, however, the Toronto Bail Program has become more aware of the need for an Aboriginal-specific program to truly serve the needs of Aboriginal people requiring bail supervision. The Toronto Bail Program is thus working to see the provision of these services taken on by an Aboriginal organization. Based on the experience in Toronto it is recommended that the province fund Aboriginal-specific Bail Programs in communities where numbers would support such a program.

Also, with respect to bail, it is recommended that the Ministry of the Attorney General accept the decision of Mr. Justice Archibald in *R. v. Bain* and instruct local Crowns that the *Gladue* principles apply at bail hearings. A recognition by the Crown of this ruling across the province might address the issue of excessive pretrial detention of Aboriginal people, at least to some extent.

It may not be immediately apparent how the recommendations in this report fit within the mandate of the Ipperwash Inquiry. For example, the enhancement and expansion of Aboriginal justice programs or the development of a Gladue Caseworker program seems far removed from the events at Ipperwash Provincial Park in 1995.

As this report has pointed out, the experience of Aboriginal people with the justice system over hundreds of years has generally been one of estrangement. The respected Ojibway Elder Art Solomon, a pioneer in the delivery of culturally appropriate programs to Aboriginal men and women in prison, referred to the Canadian legal system as the “just us” system. To Solomon, as for many Aboriginal people, the criminal justice system, from police to courts to prison, is a system whose objective is to continue the subjugation and colonization of Aboriginal people. While Royal Commissions and courts may not use precisely those words, study after study, decision after decision, have referred to the failure of the criminal justice system to meet the most basic needs of Aboriginal people—as victims and offenders.

Aboriginal people have little faith that the justice system is able to meet their needs—and for good reason. The historic reality and contemporary experience of Aboriginal people justifies that lack of faith. Unless the criminal justice system can find a way to respond to the needs of

members of Aboriginal communities in Ontario, this situation will continue. Under those circumstances, we should not expect that the results of a conflict such as the one at Ipperwash would be appreciably different today.

The purpose of the recommendations in this paper is to try to build on momentum for change that has been growing over the past 15 to 20 years. If the lived experience of Aboriginal people with the criminal justice system can mirror the more hopeful rhetoric from government and courts then perhaps there can be a bridging of the two solitudes that Justice Wright referred to in the Stonechild report.

The recommendations contained in this report are far-reaching. Some of them also carry with them a price tag. In an era of fiscal restraint, at least at the provincial level, it can be argued that there is no room for additional spending. While money is not the answer to solving the problems facing Aboriginal people in the criminal justice system, it is pointless to pretend that change will simply happen without a reallocation of some fiscal priorities. If the lack of response to the *Gladue* decision is illustrative of nothing else, it shows that the criminal justice system is a very difficult entity to turn around, even in the face of dicta from the Supreme Court of Canada. Money will not necessarily make the changes necessary in the system occur, but without additional resources, change is simply not going to happen. It is no longer possible to start discussions on this issue by saying “Let’s see how we can change the system, but let’s leave the issue of money aside.”

Without a commitment of funds (and we are not necessarily talking about huge sums of money) to go along with a commitment for change, change will not occur. The time for wringing our hands about the relationship between Aboriginal people and the criminal justice system is past. The current system does not work. Aboriginal people have known this for decades if not centuries—the Supreme Court of Canada has recently confirmed what Aboriginal people have known. If we do not deal with the problem it will get worse. To do nothing in the face of the overwhelming knowledge we have of the failure of the system is to say to Aboriginal people what has been said to them for years—we know you are suffering, we know there are problems, but we are not prepared to do anything about it. This is the message that the people of Stoney and Kettle Point received from government for decades, It was not an appropriate response then, and it is not an appropriate response now.

## **VII. SUMMARY OF RECOMMENDATIONS**

In order to make the promise of s. 718.2(e) and the *Gladue* decision real, it is recommended that the province of Ontario create a Gladue Caseworker program throughout the province.

It is recommended that the province develop a concrete plan to expand the range of Aboriginal justice programs and commit to ongoing funding for such programs.

The issue of policing is the subject of other papers written for the Ipperwash Inquiry, and so it will be left to those papers to advance substantive recommendations in this area. There is no question, however, that change in the policing area must be of a substantive nature. The addition of an Aboriginal awareness program or a push to recruit Aboriginal people to join the police force will have no impact if the dynamics within the police force itself do not change.

It is recommended that the delivery of victims services to Aboriginal people be undertaken directly by Aboriginal organizations. In this context the concept of what constitutes victims services should be expanded to meet the real needs of Aboriginal people rather than just providing services for individuals who are victims of crimes that are proceeding through the courts.

It is recommended that the province undertake substantive consultations with Aboriginal organizations that might be affected by the development of government policies regarding Aboriginal and restorative justice initiatives. It is further recommended that the province ensure that there is input from Aboriginal organizations with an interest and experience in the justice area from the outset, as guidelines, protocols, and principles are developed. True consultation means that those whose work will be affected by the development of government policies will have input into the process from the beginning and not merely have an opportunity to comment on what might well be virtually a finished product.

It is recommended that Crown policies of general application be examined for their impact on Aboriginal people charged with criminal offences. The suggestion here is not that these policies be revised specifically to exempt Aboriginal people from their operation, but rather the disproportionate impact these policies are having on Aboriginal people requires a rethinking of the policies in general.

It is recommended that the province fund Aboriginal-specific Bail Programs where numbers warrant.

It is recommended that the Ministry of the Attorney General accept the decision of Mr. Justice Archibald in *R. v. Bain* and instruct local Crowns that the Gladue principles apply at bail hearings. A recognition by the Crown of this ruling across the province might address the issue of excessive pretrial detention of Aboriginal people, at least to some extent.

## BIBLIOGRAPHY

### BOOKS, ARTICLES, MONOGRAPHS

- Aboriginal Legal Services of Toronto. *Community Council Statistics to September 30, 2004* (Toronto: ALST, 2004).
- Akwesasne Community Profile, online: <<http://www.akwesasne.ca/communityprofile.htm>>.
- Amnesty International (Canada). *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, AI Index: AMR 20/003/2004 (Ottawa: Amnesty International Canada, 2004), online: <[www.amnesty.ca/stolensisters/index.php](http://www.amnesty.ca/stolensisters/index.php)>.
- Brodeur, J.-P. *Justice for the Cree: Policing and Alternative Dispute Resolution* (Grand Council of the Crees of Quebec, 1991).
- Campbell Research Associates. *ALST Community Council Program Evaluation* (2000), online: <<http://aboriginallegal.ca/docs/evals.htm>>.
- Christie, G. *Police–Government Relations In the Context of State-Aboriginal Relations*, online: <[http://www.ipperwashinquiry.ca/policy\\_part/pdf/Christie.pdf](http://www.ipperwashinquiry.ca/policy_part/pdf/Christie.pdf)>.
- Gladue (Aboriginal Persons) Court, Ontario Court of Justice—Old City Hall, *Factsheet*, online: <[http://www.aboriginallegal.ca/docs/apc\\_factsheet.htm](http://www.aboriginallegal.ca/docs/apc_factsheet.htm)>.
- Gosse, R., J. Henderson, and R. Carter, eds. *Continuing Poundmaker and Riel’s Quest* (Saskatoon: Purich Publications, 1994).
- Hansard* (November 19, 2004).
- Hansard* (September 20, 1994).
- House of Commons Standing Committee on Justice and Legal Affairs. *Minutes of Proceedings and Evidence*, no. 62 (November 17, 1994).
- Human Sector Resources. “Challenge, Choice & Change—A Report of Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples,” research paper prepared for the Ipperwash Inquiry, 2004.
- Hylton, J. *Aboriginal Self-Government in Canada*. 2d ed. (Saskatoon: Purich Publishing, 1999).
- Ipperwash Inquiry. Indigenous Knowledge Forum held by the Ipperwash Commission, online: <[www.ipperwashinquiry.com](http://www.ipperwashinquiry.com)>.
- Ipperwash Inquiry. Testimony of Joan Holmes, online: <[http://68.146.188.247/trans/ipperwash/aug\\_17\\_04/text.htm](http://68.146.188.247/trans/ipperwash/aug_17_04/text.htm)>; <[http://68.146.188.247/trans/ipperwash/aug\\_19\\_04/text.htm](http://68.146.188.247/trans/ipperwash/aug_19_04/text.htm)>.
- Ipperwash Inquiry. Testimony of Stewart Bradley George, online: <[http://68.146.188.247/trans/ipperwash/nov\\_02\\_04/text.htm#p2513](http://68.146.188.247/trans/ipperwash/nov_02_04/text.htm#p2513)>.
- Jackson, M. “Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release” (1989) 23 *U.B.C. Law Review* 220.
- Johnson, S. *Custodial Remand in Canada, 1986/87 to 2000/01*. Juristat—Canadian Centre for Justice Statistics, Catalogue no. 85-002-XIE, vol. 23, no.7. (Ottawa: Statistics Canada, 2003).
- Kellough, G., and S. Wortley. “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42 *British Journal of Criminology* 199.

- Knazan, B. "Sentencing Aboriginal Offenders in a Large City—The Toronto Gladue (Aboriginal Persons) Court," National Judicial Institute, Aboriginal Law Seminar, Calgary, Alberta, January 23–25, 2003.
- LaPrairie, C. *Seen But Not Heard—Native People in the Inner City* (Ottawa: Minister of Public Works & Government Services of Canada, 1995).
- Latimer, J., and L. Foss. *A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II* (Ottawa: Department of Justice Canada, 2004).
- Leslie, J., and R. Maguire, eds. *The Historical Development of the Indian Act*. 2d ed. (Ottawa: Treaties and Historical Research Centre, Indian Affairs and Northern Development, 1978).
- Obomsawin, A. *Rocks at Whiskey Trench* (National Film Board of Canada, 2000).
- Ontario Human Rights Commission. *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2004).
- Pauktuutit (Inuit Women's Association of Canada). *Inuit Women and Justice: Progress Report*, No. 1 (Ottawa, 1995).
- Proulx, C. *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich Publishing, 2003).
- Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1., *The Justice System and Aboriginal People*, A.C. Hamilton and C.M. Sinclair, Commissioners (Winnipeg, 1991).
- Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild*, The Honourable David H. Wright, Commissioner (Regina, 2004).
- Report of the Mayor's Homelessness Action Task Force, *Taking Responsibility for Homelessness—An Action Plan for Toronto* (Toronto, 1999).
- Roberts, J., and R. Melchers. "Incarceration of Aboriginal Offenders—1978–2001" (April 2003) *Canadian Journal of Criminology and Criminal Justice* 211.
- Rogers, E., and D. Smith, eds. *Aboriginal Ontario—Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994).
- Ross, R. *Dancing With a Ghost* (Markham: Octopus Publishing, 1992).
- Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide* (Ottawa: Canada Communications Group, 1995).
- Royal Commission on Aboriginal Peoples. Vol. 1, *Looking Forward, Looking Back* (Ottawa: Canada Communications Group, 1995).
- Rudin, J. *Pushing Back—A Response to the Drive for the Standardization of Restorative Justice Programs in Canada*, online <<http://www.sfu.ca/cfrj/fulltext/rudin.pdf>>.
- Rudin, J., and K. Roach, K. "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 *Saskatchewan Law Review* 3.
- Silverberg, Christine, "After Stonechild: rebuilding trust," *The Globe and Mail*, October 29, 2004, A23.
- Speech from the Throne, *House of Commons Debates*, Vol. 1, No. 2 (January 30, 2001).
- Statistics Canada, Adult Correctional Services. *Admissions to Provincial, Territorial and Federal Programs, 1997–2001*, online: <[www.statcan.ca/english/Pgdb/legal30b.htm](http://www.statcan.ca/english/Pgdb/legal30b.htm)> (accessed January 2005).
- Statistics Canada, Adult Correctional Services. *Admissions to Provincial, Territorial and Federal Programs, 1998–2002*, online: <[www.statcan.ca/english/Pgdb/legal30a.htm](http://www.statcan.ca/english/Pgdb/legal30a.htm)> (accessed

- January 2005).
- Statistics Canada. *Aboriginal Identity, Population, 2001 Counts, for Canada, Provinces and Territories*, online:  
 <[www.12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?](http://www.12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?)>  
 (accessed January 2005).
- Statistics Canada. *Canadian Centre for Justice Statistics Profile Series—Aboriginal Peoples in Canada*, Catalogue no. 85F0033MIE (Ottawa: Statistics Canada, 2001).
- Stenning, P., and J. Roberts. “Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64 *Saskatchewan Law Review* 137.
- Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta. *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta (Canada)*, Vol. 1 (Edmonton: The Task Force, 1991).
- Trevethan, S., S. Auger, J-P. Moore, M. MacDonald, and J. Sinclair. *The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates* (Ottawa: Correctional Services of Canada, 2001), online: <[http://www.csc-scc.gc.ca/text/rsrch/reports/r113/r113\\_e.pdf](http://www.csc-scc.gc.ca/text/rsrch/reports/r113/r113_e.pdf)>.
- Turpel-Lafond, M.E. *Fetal Alcohol Spectrum Disorder: The Perspective of a First Nations Judge, in Undue Trials: Justice Issues Facing Aboriginal Children & Youth*, A Special Report Published by the Ontario Federation of Indian Friendship Centres (Toronto: Ontario Federation of Indian Friendship Centres, 2004).
- York, G., and L. Pindera, *People of the Pines* (Toronto: Little Brown Canada, 1991).

#### CASES

- Coroner’s Inquest into the death of William Kithkeesic in Armstrong, Ontario, December 13, 2002, online: <<http://aboriginallegal.ca/docs/Kitchkeesic.pdf>>.
- Coroner’s Inquest into the death of Benjamin Mitten in Brantford, Ontario, December 4, 2003, online: <<http://aboriginallegal.ca/docs/Mitten.pdf>>.
- R. v. Bain*, Ontario Superior Court of Justice, February 18, 2004, unreported, online: <<http://aboriginallegal.ca/docs/Bain.pdf>>, p. 3.
- R. v. Drybones*, [1970] S.C.R. 282.
- R. v. Gladue*, [1999] 1 S.C.R. 688.
- R. v. Marshall*, [1999] 3 S.C.R. 456.
- R. v. Sparrow*, [1990] 1. S.C.R. 1075.
- R. v. Van der Peet*, [1996] 2 S.C.R. 507.
- R. v. Wells*, [2000] 1 S.C.R. 207.
- R. v. Williams*, [1988] 1 S.C.R. 1128.



