# Indigenous Peoples in the Canadian Criminal Justice System: Over-representation & Systemic Discrimination

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**Abstract**

Indigenous peoples are significantly over-represented in the Canadian Criminal Justice System. The over-criminalization and over-incarceration of Indigenous men and women is a major issue in Canadian justice. This article explores the systemic discrimination, stemming from colonial processes and socioeconomic marginalization of Indigenous peoples, which has impacted their representation and experiences in the criminal justice system as offenders. The article also explores some of the strategies and initiatives implemented by the justice system to address Indigenous over-representation, and the possible downfalls of such strategies which have impacted their effectiveness.

**Keywords:** Indigenous, criminal justice system, systemic discrimination

## INTRODUCTION

Indigenous populations in Canada have been, and continue to be, over-represented in the criminal justice system as both offenders and victims of the law. This phenomenon is a longstanding issue, and the debate continues over its possible causes and explanations. Research in the field of Criminology indicates that Canada's colonial history continues to negatively impact Indigenous peoples; the intergenerational trauma of the residential schools, and continued marginal conditions in Indigenous communities and reserves, may have an impact on offense rates of this group (Adjin-Tettey, 2007). Others explain criminalization and victimization rates in terms of age, education, and employment levels in Indigenous populations compared to the general population of Canada (Brzozowski, Taylor-Butts, Johnson, 2006).

Another area of debate related to over-representation surrounds what action should be taken to address causal factors and to prevent the continuation over-representation. The Canadian criminal justice system itself faces criticism for its response to this issue. Attempts to make the justice process more inclusive for Indigenous peoples include the implementation of the Gladue principles during sentencing (*R v. Gladue*, 1999), restorative justice, alternative sentencing options for accused Indigenous offenders (Combs, 2018), and Indigenous community reintegration strategies for offenders upon release (Office of the Correctional Investigator, 2012). These justice strategies, however, have been largely ineffective in addressing and remedying the issue of overrepresentation, as they are often underused by judges. Institutionalized racism within the justice system is also a prevalent issue when considering factors which influence Indigenous over-representation, especially in the policing sector.

This paper seeks to shine a spotlight on the scope of Indigenous overrepresentation in the context of victimization and criminalization by looking at some of the explanations that have been proposed by scholars in the field of criminology. It provides a global look at the criminalization and victimization of all Indigenous peoples in Canada, as well as an analysis of how these processes affect Indigenous women specifically. The paper also critically engages with the justice strategies in place to remedy overrepresentation. There has been ample research exploring the causes and effects of Indigenous over-representation in the justice system;

however, more work must be done to find logical and effective solutions to this problem. Actions such as the implementation of the *Gladue* principles by the government, or use of healing lodges in Indigenous communities are a good step towards change, but must be implemented properly and consistently throughout the system. In order to see this phenomenon remedied, the government must take more serious steps to understand the root of this issue, and to address the problem through funded programs and legal changes in relation to Indigenous accused, convicted offenders, and victims.

## OVER-REPRESENTATION OF INDIGENOUS PEOPLES IN CORRECTIONS

According to census data, in 2016, the Indigenous population in Canada was 1,673,785, or about 4.9% of the country's overall population (Statistics Canada, 2017). However, in 2018 and 2019, there were 68,814 Indigenous admissions to adult remand centers, sentenced facilities, or community custody, with the national total admissions of all populations being 226,048 (Statistics Canada, 2021). Accordingly, Indigenous peoples made up 30.40% of the total adult custody admissions in 2018/2019, when they represented less than 5% of the entire Canadian population. The statistics for Indigenous women specifically are even more disproportionate. According to an overview of adult and youth correctional statistics in the fiscal year of 2018/2019 Indigenous women represented 42% of female admissions to provincial and territorial custody, and 41% of female admissions to federal custody (Malakieh, 2020). The male statistics that same year were 28% of admissions to provincial/territorial, and 29% federally (Malakieh, 2020). The gap between Indigenous representation in the general population versus the correctional population of Canada is concerningly wide, particularly for women. This disproportionate representation of Indigenous peoples in the correctional system must be critically analyzed and addressed systematically by the various levels in the justice system.

## EXPLANATIONS FOR OVER-REPRESENTATION

### *Age, Education, and Employment*

Crime and correctional statistics show a prevalent Indigenous over-representation, which is often erroneously associated with 'more Indigenous crime'. First, it is important to note that perceptions of crime and the portrayal of crime statistics can be misleading. Mass media

exposure has a significant influence over how people see and understand crime statistics, and so any bias within major media outlets may impact societal understandings of criminality (Kitchen, Williams, 2010). That being said, there may be a greater focus on Indigenous people's representation in crime statistics by Canadian media, considering that many residents still hold discriminatory attitudes towards this group; this, in turn, may reinforce the idea that Indigenous peoples are more likely to commit crime. There are some possible explanations for Indigenous over-criminalization which take into account the influence of Canada's colonial history on both Indigenous peoples and the functioning of the justice system.

Some research attempts to connect the disproportionate representation of Indigenous people in crime with corrections statistics to other statistical phenomena. One risk factor associated with offending is age, where young adults between 15-24 are more likely to offend than any other age group (Brzozowski, Taylor-Butts, Johnson, 2006). Between the years 2006 and 2016, the Indigenous population had grown by 42.5%, which is over four times the growth rate of the general Canadian population (Statistics Canada, 2017. This may be because it is common and celebrated culturally among many Indigenous communities to have high fertility rates, especially in comparison to the low fertility rate of 1.6 births per woman seen in the general population of Canada. As a result, Indigenous peoples are a relatively young population; in 2001 their median age was 24.7 years compared to the general populations median age of 37.7 years (Brzozowski, Taylor-Butts, Johnson, 2006). This means that "high proportions of the Aboriginal population are now entering the age range where people are more at risk of conflict with the law" (Perreault, 2009, p.11), which could influence their representation in criminal data.

The Indigenous population of Canada has been consistently disadvantaged in the capitalist system, with lower levels of education, and higher unemployment rates compared to the non-Indigenous population, and as a result, obtain lower incomes overall (Brzozowski, Taylor-Butts, Johnson, 2006). Fundamental socioeconomic disadvantages, and stigmatisms against Indigenous peoples, triggered by colonialism, may inhibit opportunities for legitimate employment to provide basic life needs such as food or housing for themselves and their families. According to Agnew's general strain theory, the inability to achieve one's goals, and in this case to obtain

sufficient funds to provide basic needs, may lead to a greater propensity for crime. Another strain explored by Agnew is the "occurrence of aversive or negative treatment" (Seymour, 2006, p. 110) by other individuals in the society. Indigenous peoples have a long history of maltreatment by Canada's colonial history, and racism, discrimination, and oppression against this group are still prevalent in today's society. Agnew argues that experiencing strain leads to the experience of a series of negative emotions, and this experience in turn pressures those affected to commit crime (Seymour, 2006). This is not to say that all Indigenous peoples are pushed towards a life of crime through their experience of strain, nor that all Indigenous peoples experience strain; however, it is one possible explanation for their over-representation in crime statistics and justice system involvement.

According to LaPrairie (2002), these patterns of education level and unemployment in Indigenous populations are mimicked in offender data as well: "adult aboriginal offenders are generally younger, have less education, and are more likely to be unemployed than are non-aboriginal offenders" (p. 189). The economic and social problems faced by these offenders due to disadvantaged socio-economic statuses are argued to be major influences on their criminality (Finn et al., 1999). Perreault (2009) also found research supporting the influence of poor socio-economic status in explaining Indigenous representation in correctional custody. Connecting age, education, and employment risk factors resulting from colonialism and its associated negative impacts in Indigenous populations to their overrepresentation in justice is one way that researchers have attempted to explain the disparity.

*Impact of Colonialism*

The history of colonialism in Canada has been recognized to have had a significant impact on Indigenous well-being in numerous contexts. There are ongoing effects from the economic and social destruction of Indigenous societies and culture by the Canadian government, and these effects may play out in criminality. Throughout the early stages of colonization, notably beginning in the early 1870s, many Indigenous communities "were moved off highly productive land onto marginally productive land" (p. 84) which led to the underdevelopment of their local economies, and ultimately has resulted in Indigenous economic

subordination (LaPrairie, 1989). Indigenous communities were relocated from their traditional lands where "they were able to carve out a renewable resource living" (p. 85), through hunting, fishing, and other agricultural endeavors, and the new land they were forced to live on lacked the properties and natural resources needed to maintain subsistence (LaPrairie, 1989). Following relocation and failing economic conditions, Indigenous peoples were exposed to "the corrosive influence of the welfare state" (p. 85), meaning that in their vulnerability in adjusting to a new, foreign way of living, they came to rely on the provisions of the government (LaPrairie, 1989). LaPrairie (1989) argues that this dependency is inconsistent with traditional Indigenous views of status and power; by losing the distinct roles and occupations in the community, Indigenous men and women also lost their sense of purpose, worth, and status. The sense of community built within Indigenous groups by their inter-reliance on other members was dissolved with the loss of their lands and ways of life, subsequently resulting in a loss of self-esteem. LaPrairie (1989) believes that the loss of self-worth, purpose, and self-esteem is important for considering the significance of trauma in shaping the lives on Indigenous populations.

Indigenous culture has also suffered at the hands of European colonization and the Canadian government. After the domination of present-day Canada by settlers in the 1870's, Indigenous peoples were encouraged to assimilate to this new culture and way of living, thereby forcibly abandoning their traditional roles and values (LaPrairie, 1989). This created a disconnection from their identities (Combs, 2018), and led to disintegration of communities and traditional cultures and roles (LaPrairie, 1989). Indigenous communities were not only removed from their traditional home lands and subject to the strain of assimilating to a foreign culture, but as children, many were torn from their homes and families and forced to attend residential schools. The use of residential schools as means to further assimilate Indigenous peoples has had long-lasting, detrimental impacts on Indigenous communities. The schools "contributed to the marginalizing of Indigenous peoples by reducing their self-determination and suppressing their traditional culture, religions, and languages", which has had a lasting impact on Indigenous identities (Hoffart and Jones, 2018, p.25-26). This system served to separate generations of children from their families and native language, thereby denying them community and family connections and experiences in their childhood years (Combs, 2018). The forcible teaching and

exposure to European values and knowledge (LaPrairie, 1989) not only isolated these children from their own culture, but it disconnected them from their worldviews and identities (Combs, 2018). After removal from their homes and families, many Indigenous children experienced physical, sexual, and emotional abuse taking place within the schools, affecting children both as victims and witnesses to the violence (Hoffart and Jones, 2018). The trauma experienced within the walls of these schools has had a continued effect “not only [on] those who attended the schools, but survivors’ children, grandchildren, and their broader communities” (Combs, 2018). This effect is referred to as intergenerational trauma, which denotes shared trauma as being ingrained in community relations, practices and family structure (Hoffart and Jones, 2018). Cycles of violence that began in residential schools continue to play out in many Indigenous communities and families through domestic violence, child, and sexual abuse (Combs, 2018). The colonial impact on Indigenous peoples has been immense, and the influence of intergenerational trauma has served to destroy families and communities, as well as contributing to socioeconomic disadvantages. Although colonialism is often spoken of as a past phenomenon, it is clear that this is an ongoing process of discrimination, trauma, and inequitable treatment by Canadian society, and especially by the justice system (Hoffart and Jones, 2018). Colonialism continues to work through patterns of institutional racism within the criminal justice system, which contributes to Indigenous over-representation by leading to over-policing of Indigenous populations, and disadvantaging them throughout charging, trial, and sentencing (Chartrand, 2019).

*Systemic Racism in Canadian Justice*

Systemic racism against Indigenous peoples in all levels of the justice system is a prevalent issue in Canada. According to the Ontario Human Rights Commission, systemic racism or discrimination is the pattern of practice, policy, and behavior that make up an organizational structure, and “creates or perpetuates disadvantage for racialized persons” (2005, para 2). The commission further identifies this issue based on three main factors: numerical data showing a disproportionately smaller or larger representation of a racial group in a specific area, discriminatory policies and practices which may have led to this discrepancy, and the overall organizational culture which may intentionally or unintentionally marginalize a racial group

(2005). The numerical data which represents Indigenous over-representation in the justice system is explored at the beginning of this paper, and although on its own is not proof of institutional discrimination, is strong evidence of such an issue. When analyzing the data in consideration of the continuing process of colonization, it is clear that Indigenous over-representation in the justice system is a problem that was created and is perpetuated by racial discrimination in Canadian society, especially within the organization of the justice system itself.

More evidence pointing to a justice system-wide discrimination against Indigenous peoples lies in the policies and practices of the various levels of the justice system, which have consistently disadvantaged Indigenous peoples. According to Chartrand, the justice system disadvantages Indigenous peoples from the time they come into contact with the police, all the way through their bail hearings, trials, sentencing hearings, incarceration, and conditional releases (2019). The most influential level of justice in contributing to Indigenous over-representation, however, is policing. As the first point of contact for justice, police, or more specifically police discretion, is ultimately the deciding factor on whether or not an accused will be arrested, charged, or brought before the courts. Indigenous peoples are consistently disadvantaged by decisions made by police across Canada; police discretion appears to generally work against Indigenous accused (Harding, 1991). Issues within police forces which may lead to a prevalence of over policing and discriminatory policing may include individual prejudices among officers, but more likely reflects an organizational culture which fosters discrimination. According to Harding (1991), police may serve as officers of oppression by ignoring cultural differences and perpetuating the prejudicial stereotypes prevalent in both the society and the organizational structure. In this way, discrimination against Indigenous peoples reaches the front lines of justice, thereby bringing more Indigenous peoples into contact with the justice system in the first place. Over-policing of Indigenous peoples and communities begins with an institutionalized form of racism and discrimination, and the continued over-representation of this group in the justice system only serves to reinforce a harmful stereotype about Indigenous peoples and their propensity to commit crime.

*Canadian Criminal Justice System versus Indigenous Justice Understandings*

Current criminal justice practices in the Canadian context are drastically different from a traditional Indigenous understanding of justice, and as a result, accused Indigenous people may be disadvantaged in navigating this system. Adjin-Tettey (2007) argues that the "outlawing of Aboriginal legal traditions and norms" (p.180) has been a negative colonial influence on Indigenous populations in terms of over-incarceration, and that this effect should be counteracted by "legitimizing Aboriginal justice traditions" (p.180). She states that high Indigenous incarceration rates are a result of domination by white settler society which marginalizes Indigenous populations, and judicial sentencing must be remedied by taking into account cultural differences that may influence their effectiveness (Adjin-Tettey, 2007). Recognizing the legitimacy of Indigenous legal systems could be a good step towards creating a "diverse and dynamic system that is capable of responding" to various cultural considerations, and sentencing to fit that diversity (Adjin-Tettey, 2007).

Prowse (2012) takes the stance that Indigenous "cultural ethics" (p.251), which influenced the development of an emphasis on reconciliation and restoration, negatively impact Indigenous peoples in the context of the prevailing Canadian adversarial justice system. These are "described as the ethics of non-interference, individual autonomy, emotional restraint, non-competitiveness, sharing, and the concept of time" (p.252), and while not fully explored here, Prowse (2007) argues that these understandings not only influence how Indigenous peoples understand the Canadian justice system, but also their behavior as offenders throughout the justice process. The ethics are suited for conflict resolution and reconciliation in a way that maintains collective cohesion, and are not suited to admissions of guilt or innocence, and serious sanctions or punishments for those found guilty (Prowse, 2007). Indigenous peoples are disadvantaged by a conflict in understanding what is deemed an offense, as well as what conveys respect in a European context versus their own collectivist structure (Prowse, 2007). These misunderstandings or culture conflicts may escalate situations such as an arrest (and therefore increase the severity of the charges), or cause officers, lawyers, or judges to misinterpret behavior as disrespectful or passive, when the accused believes it is appropriate or respectful.

*Female Indigenous Offenders*

Indigenous over-representation in correctional custody, whether it is remanded, sentenced, or community sanctions, is even more pronounced for the female population. According to the fiscal year 2018/2019 statistics, Indigenous females represent 42% of admissions to provincial/territorial custody, and 41% to federal custody, while they represent less than 5% of the Canadian female population (Malakieh, 2020). LaPrairie (1989) argues that part of this stems from the history of colonization, which ultimately has led to the migration of many women from their home communities to more urban centres. She says that their "usually low level of skills and education, combined with discrimination by the larger society, may relegate them to the ranks of the unemployed" (LaPrairie, 1989, p. 87), which may influence them to turn to behaviors of drug or alcohol abuse, or prostitution. All of these effects combine to create a situation where women in these positions are more at risk of being in contact with law enforcement (LaPrairie, 1989). Once they do come into contact with the law, Combs (2018) says that "Indigenous women are often misunderstood by players of the legal system" (p. 168). By this she means that throughout the various stages in the criminal justice system, their words and other outward expressions are often misconstrued by the others involved (ie: police, judges). The courts do very little to accommodate for Indigenous languages, or to explain court processes and proceedings in a manner that could be easily understood by the accused, which may lead to misunderstandings about legal direction and action in the courtroom. Demeanor, body language, and spoken words may also be misinterpreted by legal players due to cultural differences in expression and what is deemed appropriate in formal circumstances such as court (Combs, 2018). Combs (2018) argues that as a result of this, and other disadvantages, "Indigenous women are more likely to be charged with more than one offence, more likely to plead guilty and are more likely to be convicted of criminal activity than non-Indigenous women" (p. 168). Indigenous women are also subject to intersectional discrimination, "a compounding of discrimination in specific ways brought about by race and gender" (Stubbs, 2011, p.48), which may come into play in the criminal justice system.

One issue which may compound Indigenous women's over-representation in criminal justice is the lack of specific programming available. Indigenous women occupy a unique space

while there is Indigenous specific programming and female specific programming in the correctional system, there is very little programming which takes into account the intersection of the two (Stubbs, 2011). Combs (2018) found that Indigenous women are harmed by racism in federal centres, and that to address this, “programming for Aboriginal women must be tailored to their specific needs and provided in ways that are meaningful to them” (p. 170). The Community and Correctional Release Act contains sections which allow for the provision of Indigenous run programming and institutions. Section 81 and 84 of the CCRA allows Indigenous communities to play a role in the rehabilitation of offenders through programming, in s. 81 agreements with Correctional Services Canada (CSC) to house them in Indigenous healing lodges, or s. 84 agreements for communities to supervise Indigenous clients on conditional release (Office of the Correctional Investigator, 2012). Unfortunately, while Indigenous women are perhaps the population most at risk of being incarcerated, the underutilization of sections 81 and 84 of the CCRA affects them the most. Until September 2011, incarcerated women lacked access to Indigenous healing lodges according to section 81 of the CCRA, despite the fact that the legislation was enacted in 1992, almost 20 years earlier (Office of the Correctional Investigator, 2012). Currently, the Buffalo Sage Wellness House (BSWH) has 16 beds, and the Okimaw Ohci Healing Lodge has 56 beds (Combs, 2018). However, due to issues in over-classification, these have operated at 90% capacity, despite a need and desire to utilize their services (Combs, 2018). CSC has created programming for Indigenous women specifically, however programs have limited availability across centres, and although a good first step, have been critiqued as representing Indigenous culture as hegemonic. (Combs, 2018). By this she means to critique the justice systems approach to Indigeneity as a singular identity, when in reality there are hundreds of Indigenous dialects, groups, tribes, and communities across Canada with different cultural practices and understandings, which cannot all be represented under one ‘Indigenous’ program. CSC has also created a security classification tool for female offenders which considers more specific factors for women, but this is frequently overridden by staff, limiting its effectiveness (Combs, 2018).

*Victimization of Indigenous Women*

Another significant issue facing Indigenous people in Canada is the pervasive, violent victimization of Indigenous women. According to Brennan, in 2009, 13% of all Indigenous women over the age of 15 reported being violently victimized at some point in their lifetime. She found that "overall, the rate of self-reported violent victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women" (p.5) as of a 2009 self-report survey. Missing and Murdered Indigenous Women and Girls (MMIWG) account for 11.3% of missing women, and 16% of female murder victims between 1980 and 2012 (K.R., 2015), despite the fact that they make up less than 5% of the female population in Canada. Violence leads to mortality for Indigenous women three times more often than for non-Indigenous women (Dylan, Regehr, and Alaggia, 2008). K.R. (2015) found that violence against Indigenous women is occurring at a disproportionate rate, and is getting progressively worse over time. In 1984, 8% of murdered women were Indigenous, however by 2012 that number increased to 23% (K.R., 2015), which is, extremely disproportionate to their representation in the population. As a result of this the Government of Canada launched a National Inquiry into MMIWG in December 2015, looking at the systemic issues which may have led to this crisis situation for Indigenous women.

Indigenous women have experienced victimization in various contexts, many resulting from the detrimental effects of European colonization, and the residual, systemic racism in Canada. Substance abuse is often linked to coping with trauma, and is prevalent in Indigenous communities as a result of experienced and intergenerational trauma from the residential school era (Hoffart and Jones, 2018). "A number of scholars also report that substance abuse is significantly related to the occurrence of [Intimate Partner Violence]" (Hoffart and Jones, 2018, p.28), some reporting numbers as high as 50% of cases. LaPrairie (1989) points to the breakdown of traditional family and community roles as a major factor leading to Intimate Partner Violence (IPV), an issue experienced by Indigenous women at a disproportionate rate (Boyce, 2016). The breakdown of traditional family roles and values throughout Indigenous communities is a result of numerous factors. LaPrairie (1989) argues that men and women played traditional, distinct roles in their families, which enforced solidarity, cooperation and stability

within the family. The forced migration of Indigenous communities from their homelands and forced assimilation to European norms led to a disintegration of these roles, leading to confusion and frustration, and ultimately the breakdown of family and community values (LaPrairie, 1989).

The Residential School System was also a considerable factor in Indigenous familial and community breakdown. The removal of Indigenous children from their home communities served to take away the influence of parents, and affected children grew up with little to no parental role model (LaPrairie, 1989). Even after the schools were shut down, communities were not provided with the social and economic resources needed to aid with the residual trauma (Kaiser-Derrick, 2012). This experience has had an intergenerational effect on Indigenous communities, where violence and abuse experienced within the walls of the schools also comes to fruition in families and homes (Combs, 2018). Kaiser-Derrick (2012) describes this as a "cycle of dysfunction" (p.144), where the connections within Indigenous communities and families have been fractured by violence, experienced and intergenerational trauma, poverty, and systemic racism. The resulting impact of family and community breakdown is a prevalence in violent victimization of Indigenous women, particularly in cases of IPV. IPV is the most extensive form of victimization experienced Indigenous women, with 24% reporting they have been victims of domestic violence (2.5 times the national average) (Hoffart and Jones, 2018).

Systemic discrimination against Indigenous women also influences their risk of being victimized. Combs (2018) argues that "settler colonialist policies created gendered harms that disempowered Indigenous women and subjected them to catastrophic rates of exploitation and violence" (p. 167), and that this violence is perpetuated systemically. Canadian social structure and policy has shifted Indigenous women's role in society, and Combs (2018) argues that violence against women "is continually accepted and embedded" (p. 167) in a Canadian context, and has now "permeated relations in Indigenous communities" (p.167) as well. Balfour (2013) finds that "twenty-one percent of Aboriginal women experience much higher levels of spousal violence by current or ex-partners than non-Aboriginal women (6%) . . . suggesting that the prevalence of family violence is more extensive in Aboriginal communities" (p.93). Women in small or rural Indigenous communities often lack access to support services or emergency

shelters to escape from violent homes or situations, further compounding the issue (Balfour, 2013). In this way, colonization has subjected many Indigenous women to state and personal victimization as a result of their race, gender, and position of severe social and economic disadvantage within Canadian society.

*Intersection of Victimization and Criminalization*

Some feminist theorists connect women's experience as a victim of crime or violence to their later expressions of criminality; a phenomenon referred to as the victimization-criminalization continuum (Kaiser-Derrick, 2012). This theory is most often applied to domestic violence cases, but the argument has been made that other experiences of violent victimization may lead women to commit acts of violence themselves (Kaiser-Derrick, 2012). While this theory is applicable to all women, violent victimization is particularly acute for Indigenous women, especially domestic violence as explored in the above section. Women are most likely to commit acts of violence against their abuser, often as a form of self-defense (Kaiser-Derrick, 2012). Since domestic violence is a serious issue for Indigenous women, especially those lacking supports and shelter in their communities, Indigenous women may be more likely to act out violently against their abuser. In this way, the Indigenous women's victimization may very well be linked to their rates of over-incarceration, especially if Gladue factors are not properly taken into account in the sentencing stage.

In Kaiser-Derrick (2012), trauma and victimization are also seen as risk factors influencing other types of offending, and there is "widespread research documenting the extensive trauma and abuse histories of female offenders" (p.52-53). Kaiser-Derrick sees victimization as serving to further harm already marginalized populations, and certain criminal behaviours, such as addictions to illicit substances, prostitution, violence, or fraud may be caused by this victimization, or mechanisms to cope with the trauma. Being victimized by domestic partners may push women away from their homes, and without the availability of shelter or support, their options for survival are constrained (Kaiser-Derrick, 2012). In this way, "Indigenous women's experiences of poverty and violence often shape their propensity for criminalization" (Combs, 2018, p.167). Indigenous women also experience state violence at

"heightened levels and state violence affects the crimes Indigenous women commit" (Combs, 2018, 167). By this Combs (2018) means that many of the acts committed by Indigenous women are a result of their marginalization by the state, and the legislation criminalizing drugs or sex work makes the labor more underground, and more dangerous. Kaiser-Derrick (2012) argues, similarly, that Indigenous women "come into heightened vulnerability to criminalization through their experiences of victimization" (p. 54), which may include violence, sexual abuse, or marginalization by the state. It has been found that "by the time Indigenous women arrive in the criminal justice system, they are more likely to have survived severe forms of personal violence and sexual abuse than any other demographic grouping" (Combs, 2018, p. 167), which supports the theory of the victimization-criminalization continuum, particularly in relation to the experiences of Indigenous women.

## RESPONSES TO OVER-REPRESENTATION

### *Changes to Sentencing*

Canadian criminal legislature takes into account Indigenous over representation in corrections, and their unique circumstances within the justice system. According to the Criminal Code of Canada "s. 718.2 (e): all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (1985). In R. v. Gladue (1999) the Supreme Court majority interpreted this section of the criminal code as a remedial approach "to encourage sentencing judges to have recourse to a restorative approach to sentencing", particularly in cases of Indigenous offences. The precedents set by the Court in this case, now termed 'Gladue Principles', are as follows:

> In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. (para. 5)

In order to do so effectively, judges are to be provided, pre-sentencing, a report which details the unique history of the Indigenous offender in question. They must take into account the

experiences and trauma which may have impacted the offender, and pass down a sanction with the greatest likelihood to rehabilitate or prevent recidivism in that particular offender. This has "stressed the need to consider all possible alternatives to imprisonment for aboriginal offenders" (Roach and Rudin, 2000, p.357), in sentencing attempts to reduce recidivism and over-incarceration.

Despite this decision and its attempt to remedy the issue of Indigenous over-representation, the Gladue principles have been largely ineffective in reducing the proportion of Indigenous peoples incarcerated since their inception. It has been found that "between 1998 and 2008 the proportion of Aboriginal peoples admitted to custody increased from 13% to 18%" (Balfour, 2013, p.87), and in 2018/2019 Indigenous adult custody made up 30.40% (Statistics Canada, 2021). This means that despite the Gladue decision, Indigenous representation in corrections has actually increased 16% since its inception. Rudin (2009) found that, alarmingly, Gladue principles are not having a significant impact on the sentencing and proportional incarceration of Indigenous people, as "the total number of people sentenced to custody from 2001/02 to 2006/07 declined by 9%, [but] there was a 4% rise in the rate of incarceration of Aboriginal people" (p. 452). It seems that the Gladue decision has not impacted or reduced the incarceration rate of Indigenous peoples. This could be due to a number of serious issues surrounding both the decision, and its implementation into the justice system. Judges may be reluctant to rely on the Gladue principles during sentencing if taking into account conflicting mandates under the criminal code, the confusing and contradictory case law following this decision, and an ineffective and underfunded process for gathering the necessary background information to pass down an informed sentence.

Even from the initial implementation of the Gladue Principles, legal scholars were skeptical of their success. A reluctance among judges to invoke Gladue principles may be due to a conflicting mandate written into the criminal code. One major issue inhibiting sentencing judges' use of Gladue principles is the failure by the SCC to address section 718.1 of the Criminal code in their 1999 Gladue decision (Anand, 2000). S. 718.1 of the Canadian Criminal code addresses sentencing proportionality, stating that the sentence passed down by the judge

must be “proportional to the gravity of the offence, and the degree of responsibility of the offender” (1985). Both Anand (2000) and Rudin (2009) argue that the judges in the Gladue decision failed to properly outline how sentencing judges are to weigh the importance of sentencing proportionality and Gladue principles when sentencing for more serious offences. As a result, many judges may not consider alternative sentencing, instead applying proportional sentences including long-term incarceration for serious and violent offences (Rudin, 2009). This limits the effect of Gladue for Indigenous peoples accused of more serious crimes, thereby limiting the overall effectiveness of the Gladue decision in reducing Indigenous over-incarceration.

Another major issue inhibiting the effectiveness of the Gladue decision is a lack of court resources provided to properly implement these principles. As stated above, in order to make a decision judges are to be provided with extensive background information about the Indigenous accused, and consider all factors that may have contributed to the criminalization of this person. Adjin-Tettey (2007) found “that Gladue is routinely considered in cases involving Aboriginal offenders” (p.202), but judges are not always satisfied of the causal link between offender’s life circumstances and the commission of their crime. This influences their perception of what would be a fit sentence under the circumstances, and may lead them to decide that a more retributive sentence is fit, moving towards incarceration rather than more restorative measures (Adjin-Tettey, 2007). Rudin argues that the federal government has responded to the Gladue decision with a “business as usual” (p. 455) mentality. There has been a failure by the government and justice system to enact and fund a systemic approach to creating Gladue reports, and so judges may be unlikely to rely on the resulting flawed or inadequate reports during sentencing (Anand, 2000). By failing to enact change which would provide the systemic process necessary to provide judges with unique background information on Indigenous offenders, the government of Canada has essentially ignored the SCC decision (Rudin, 2009). Legal players are lacking both funding and time to properly inquire into and assess an offender’s life circumstances in a Gladue report, which may further discourage judges from giving the reports their proper weight in their sentencing decision (Anand, 2000). The current state of progress since the inception of the Gladue Principles, then, can be partially attributed to a governmental lack of action.

Lastly, the Gladue decision is limited by confusing case law which followed its inception. The Gladue decision of 1999 failed to provide insight on how the precedent should be carried out in sentencing courts, leaving judges with little guidance in navigating contradictory case law related to their cases (Anand, 2000). For example, in cases with aggravating factors related to the crime itself, and mitigating factors related to the Indigenous person's past, there is no guide for which factors should hold more weight in the judges sentencing decision (Roach, Rudin, 2000). As a result, judges may be reluctant to rely on Gladue reports to warrant alternative sentences, and instead more inclined to follow precedents which support harsher sentencing in cases with aggravating factors. This ambiguity between conflicting precedents is another factor which may contribute to the overall ineffectiveness of the Gladue principles thus far. Judges are not only faced with weighing aggravating versus mitigating factors, but they also must take the safety of the community into consideration when making sentencing decisions. Judges may be unlikely to decide in favor of a community or alternative sentence in more serious or violent cases, as they strive to protect the community. There is a "shortage of community programs to provide alternatives to imprisonment" (Roach, Rudin, 2000, p.357), so judges are likely to be reluctant to pass down alternative sentences for serious offences

Although, based on the current statistics, Gladue has been largely ineffective, there is some hope that the decision will make an influence eventually. The benefits of the Galdue decision are numerous. By considering an Indigenous offenders background in relation to the ongoing harms of a colonialist state, the courts and justice system are attempting to remedy the injustices experienced by this group for over a century. Moving towards alternative and community sentences is a step in the right direction to recognizing the validty and need for Indigenous restorative justice principles within the justice system. The Gladue decision, however, must be systemically and equally applied for all Indigenous offenders. In order for the benefits of this decision to create change on a national scale there must be funding for Gladue courts and legal positions, to provide judges with well-developed Gladue reports. Rudin (2009) points to the establishment of Gladue Courts in Ontario, and the funding of positions for Gladue case and court workers throughout the province. He stresses the need for paid positions working strictly on Gladue reports and with those offenders and families, in order to provide sentencing

judges with the background material necessary for an informed decision- the onus cannot lie only on the courts. He sees this as an example of how changes within the system can influence the impact of the Gladue decision, and hopes that other jurisdictions will see the need to enact change (Rudin, 2009). The Gladue decision itself and surrounding case law must be clarified for judges, so that Gladue reports are given the proper weight and consideration in sentencing decisions. Lastly, there must be an increase in development of community programs and alternative sentencing initiatives available to Indigenous offenders to promote their rehabilitation and reintegration into their communities.

*Changes to the Correctional System*

Another area where legislation attempts to combat Indigenous over-incarceration is in the Correctional system. The Corrections and Conditional Release Act (CCRA) is federal legislation which outlines the purpose, principles, guidelines, and powers of federal correctional services (1992). It contains legislation specific to Indigenous offenders (s. 79-84), which establishes their rights while in federal custody, as well as mandates for Correctional services to provide specific programming for Indigenous peoples incarcerated. It also allows for the Minister to enter into agreements with Indigenous communities, so they may take on offenders for the duration of their community sentence or conditional release from custody (CCRA, 1992). As discussed earlier, Section 81 and 84 of the CCRA provides an opportunity for Indigenous communities to play a role in the rehabilitation of offenders, through s. 81 Indigenous healing lodges, or s. 84 Indigenous community conditional releases (Office of the Correctional Investigator, 2012). The Royal Commission on Aboriginal People (RCAP) recognized the need for "community-based and community controlled Aboriginal programs that build upon the work done inside the prisons" (Office of the Correctional Investigator, 2012, p.12). However, Combs (2018) argues, that "contrary to legislative intent, the [CSC] has impeded access to section 81 and 84 agreements through over-classification, insufficient Gladue application and misdirection of funds" (p. 164).

The over classification of Indigenous offenders seems to be a major issue in the underuse of section 81 and 84 of the CCRA (Combs, 2018). Combs (2018) found that "Indigenous persons

incarcerated in federal institutions are more likely than their non-Indigenous counterparts to be classified at higher security levels and referred to correctional programs" (177), which is problematic because it makes them less likely to be considered for both s. 81 releases to healing lodges, and s.84 conditional releases to Indigenous communities. S.81 Healing lodges limit intake to minimum security or low-risk medium security offenders, a policy which "excludes almost 90% of incarcerated Aboriginal offenders from even being considered for transfer" (Office of the Correctional Investigator, 2012). This is compounded by the fact that "as of March 2012, there were only 68 Section 81 bed spaces in Canada" (Office of the Correctional Investigator, 2012, p.3), although that same year, 337 offenders met the security requirement that would allow them to transfer to an Indigenous facility. With a critical lack of space available for s. 81 releases, and constricting security requirements which do not consider the over classification of Indigenous offenders, s. 81 of the CCRA is grossly underutilized. The over classification of Indigenous offenders is largely rooted in the misapplication of Gladue principles (Combs, 2018). Although it has been recommended that CSC staff consider Gladue factors when determining security classification of Indigenous offenders, it has been found that they "had not received adequate guidance or training" (Combs, 2018, p. 179) resulting in its impact being "fundamentally limited" (p. 179). The Office of the Correctional Investigator (2012) also found that "Gladue principles are not well-understood within CSC and are unevenly applied" (p. 5), further limiting the effectiveness of provisions under the CCRA.

Another major issue impacting the effective implementation of s. 81 and 84 of the CCRA is the misdirection of funding (Combs, 2018). The Office of the Correctional Investigator (2012) found that funds were grossly misallocated to CSC run Healing Lodges, making the operation of Indigenous Community Healing Lodges more difficult and less desirable. Although not intended as a replacement for s. 81 Healing lodges, the CSC-run lodges have taken the majority of funding and clients, while negotiations with Indigenous communities for the running of their lodges have fallen through (Office of the Correctional Investigator, 2012). This underfunding limits the effectiveness of functioning of s. 81 lodges, as well as reducing their permanency in ability to function. As well, funding originally meant to help with Indigenous reintegration into communities in s. 84 conditional releases, has been largely misused in creating interventions and

programming for Indigenous inmates within correctional centres (Office of the Correctional Investigator, 2012). While the goal of s.84 and subsequent funding was to reduce the population of Indigenous inmates, it instead was spent on programming inside centres, thereby keeping the inmates inside. Lack of resources and sufficient knowledge in Indigenous communities about s.84 releases have largely limited their implementation. As a result of high security classifications in many Indigenous offenders, due to a lack of understanding of Gladue Principles, and the misdirection of funding within the CSC for healing lodges and Indigenous communities, s.81 and 84 have been fundamentally underutilized. These sections were intended to have a positive impact on the over incarceration problem of Indigenous peoples, however, have again been largely ineffective.

## CONCLUSION

It is clear that Indigenous peoples are over represented in the criminal justice system, and that this disproportion is a significant issue that must be tackled. The continued marginalization of Indigenous peoples, beginning with colonization, residential schools, and now perpetuated by socioeconomic disadvantage, plays out in criminal behavior, victimization, and justice. The abuses and intergenerational trauma experienced by Indigenous communities at the hands of the Canadian government are lasting, and leading to high rates of victimization and criminalization within and outside of Indigenous communities. Indigenous women have suffered particularly as a result of this, and their extensive victimization often leads them to come into contact with the criminal justice system. Methods to address this issue have been largely ineffective so far. The Gladue principles, while on the right track in focusing on restoration rather than retribution, has been under applied, and is often not considered in more serious cases. Judges are reluctant to apply these principles in light of confusing and conflicting case law and legislation, as well as a lack of funding and due process in creating extensive Gladue reports. The CCRA sections 81 and 84, which involve Indigenous communities in the cultural and community based rehabilitation of their offenders, are underutilized and underfunded. Indigenous peoples are often over classified and over incarcerated, and the justice system is largely ineffective in reducing recidivism.

Female offenders are even more disadvantaged, and their unique status as both Indigenous and female is not often not taken into consideration in sentencing and in correctional programs. Indigenous women are also the population most vulnerable of victimization, and this extensive pattern of abuse and marginalization may impact their likelihood of offending. Overall, it seems that resolving this issue will involve far more research into the causes and effects of Indigenous representation in the justice system, and attempting to generate more specific strategies to address it. Considerations of personal and state victimization, and the lingering impacts of colonialism should be included in this process, especially for Indigenous women. There must be a more systematic, government-involved approach to discovering the root causes to Indigenous over-representation. Once these causes have been established, specific actions should be taken to remedy longstanding disadvantages facing Indigenous peoples in Canadian society, especially concerning the ongoing colonial impact on these peoples. Finally, there must be serious action taken, with the funding and implementation strategies to back it, to reduce Indigenous presence in the justice system through criminal law, legal system, and correctional system changes to better accommodate the uniquely disadvantaged experience of Indigenous peoples in Canada.

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