

# THE MISINFORMED VERSUS THE MISUNDERSTOOD: CONTINUED OVERINCARCERATION OF INDIGENOUS YOUTH UNDER THE YCJA

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## INTRODUCTION

In 2003, Parliament replaced the *Young Offenders Act*<sup>1</sup> with the *Youth Criminal Justice Act*<sup>2</sup> in an effort to divert young offenders away from the court system and to restrict the use of custody as a response to youth crime.<sup>3</sup> This change in legislation symbolized a philosophical shift toward restorative justice and a commitment to neutralize the negative effects that resulted from the overincarceration of youth under the YOA.<sup>4</sup>

Much has been written about the success of the YCJA since its inception; several scholars have noted the overall decrease in the youth incarceration rate under the YCJA as an indication of its legislative success.<sup>5</sup> What remains problematic, however, is the continued overincarceration of Indigenous youth.<sup>6</sup> Under the YCJA, Indigenous youth remain more likely to be held under remand custody and receive harsher custodial sentences than their non-Indigenous counterparts.<sup>7</sup> Likewise, Indigenous youth are less likely to be diverted from the criminal justice process in comparison to non-Indigenous youth.<sup>8</sup> Although researchers continue to disagree on the exact causes of Indigenous overincarceration, scholars suggest that it cannot be explained by one factor alone (e.g., the higher incidence of crime in Indigenous communities).<sup>9</sup>

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<sup>1</sup> RSC 1985, c Y-1, as repealed by *Youth Criminal Justice Act*, SC 2002, c 1, s 199 [YOA].

<sup>2</sup> SC 2002, c 1 [YCJA].

<sup>3</sup> Nicholas Bala, Peter J Carrington & Julian V Roberts, “Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success” (2009) 51:2 Can J Corr 131 at 133.

<sup>4</sup> *Ibid* at 134-135.

<sup>5</sup> Nate Jackson, “Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence” (2015) 52:4 Alta L Rev 927 at 934.

<sup>6</sup> *Ibid* at 928.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* at 937.

<sup>9</sup> See e.g. *ibid*.

This paper attempts to unpack the complex nature of the overincarceration of Indigenous youth. The paper's ultimate goal is to identify ways to eliminate the barriers that continue to prevent the *YCJA* from successfully addressing this issue. Toward realizing this goal, this paper will first provide contextual information by exploring the *YCJA*'s legislative history and the reasoning behind its restorative provisions. Second, it will provide statistics on the continued overincarceration of Indigenous youth and attempt to explain why this issue persists. Finally, the paper will conclude with a discussion of potential remedial strategies, such as the implementation of more Aboriginal Youth Courts, to address the current causes of overincarceration.

## I. THE *YCJA*: REDUCING A CUSTODIAL RESPONSE TO YOUTH CRIME

When Parliament drafted the *YCJA*, one of its primary objectives was to divert young offenders who commit minor offences away from the formal process of the criminal justice system.<sup>10</sup> Parliament formulated this objective as a response to the alarming incarceration rate for young offenders.<sup>11</sup> As identified by the Department of Justice, "Canada's youth incarceration rate was double the rate in the US and 10 to 15 times higher than the adult incarceration rate in Canada."<sup>12</sup> Under the *YOA*, judges too frequently relied on custodial sentences as a response to youth crime. This was, in part, because the *YOA* did not explicitly mandate the consideration of alternative measures when dealing with young offenders.<sup>13</sup> As a result, "under the *YOA*, a substantial number of first-time and non-serious offenders, including probation breaches or failure to appear in court, received prison sentences."<sup>14</sup>

Parliament deliberately responded to the *YOA*'s failure by repealing it altogether in favour of a new act. As stated in *R v BWP*,<sup>15</sup> Parliament, in drafting the *YCJA*, "did not simply amend its predecessor, the *YOA*, it repealed it."<sup>16</sup> Following the *YOA*'s repeal, the *YCJA* came into effect to encourage the use of non-custodial sentences through a variety of newly drafted provisions. This change in legislation resulted in what is now considered to be "the most systematic attempt in Canadian history to

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<sup>10</sup> Raymond R Corrado, Sarah Kuehn & Irina Margaritescu, "Policy Issues Regarding the Over-representation of Incarcerated Aboriginal Young Offenders in a Canadian Context" (2014) 14:1 Youth Justice 40 at 43.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> 2006 SCC 27 [*BWP*].

<sup>16</sup> *Ibid* at para 19.

structure judicial discretion regarding the sentencing of juveniles.”<sup>17</sup> The changes included provisions that extensively regulate sentencing options by specifically including restorative sentencing principles and placing mandatory restrictions on the use of custody.<sup>18</sup>

In particular, Justice Charron in *BWP* noted that, unlike the *YOA* before it, the *YCJA* deliberately excluded general deterrence as a sentencing principle in order to focus on protecting the public through an “individualized process” of sentencing, “focussing on the underlying causes, rehabilitation, reintegration, and meaningful consequences *for the offender*.”<sup>19</sup> This marked a principled departure from the *YOA*’s sentencing considerations, which went beyond the circumstances of the individual offender. As a result, under the *YCJA*, judges can no longer impose harsher sentences to “send a message to others who may be inclined to engage in similar criminal activity.”<sup>20</sup>

The restorative tone of the *YCJA* is set first through its preamble. Among other things, the preamble states that the “youth justice system should reserve its most serious interventions for the most serious crimes and reduce the overreliance on incarceration.”<sup>21</sup> Additionally, several provisions within the *YCJA* itself delineate where custodial sentences are inappropriate. As explained in *R v CD*,<sup>22</sup> “[t]he goal of restricting the use of custody for young offenders is also reflected in the scheme of the [YCJA],” where there are “only four ‘gateways’ to custody,” as outlined in section 39:<sup>23</sup>

39(1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

- (a) the young person has committed a violent offence;
- (b) the young person has failed to comply with non-custodial sentences;
- (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or *the Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
- (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the

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

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

<sup>19</sup> *Ibid* at para 31.

<sup>20</sup> *Ibid* at para 2.

<sup>21</sup> *YCJA*, *supra* note 2, Preamble.

<sup>22</sup> 2005 SCC 78.

<sup>23</sup> *Ibid* at para 39.

imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.<sup>24</sup>

Consequently, if a young person's offence does not fall within the purview of section 39, a youth court is prevented from imposing a custodial sentence.<sup>25</sup> Section 38(2)(e)(i) of the *YCJA* also mandates that a sentence must be the least restrictive sentence that is capable of achieving the general purpose of youth sentencing.<sup>26</sup> The theme of reducing the reliance on custodial restraint is further expressed in section 39(2), which limits a youth court from imposing custodial sentences unless the court has considered all reasonable alternatives to custody.<sup>27</sup>

In conjunction with section 39, which limits reliance on custodial sentences generally, the *YCJA* contains provisions that specifically prohibit youth courts from imposing custodial sentences on *Indigenous* youth. This specific consideration for Indigenous youth is for good reason, as they currently account for approximately 46 percent of youth admissions to correctional facilities, while representing only 8 percent of Canada's youth population.<sup>28</sup> Thus, as a response to the overrepresentation of Indigenous youth in custody, Parliament included provisions within the *YCJA* that specifically address the overincarceration of Indigenous youth. For example, although the *YCJA* distinguishes its own sentencing principles from that of the *Criminal Code*,<sup>29</sup> it makes an exception for section 718.2(e).<sup>30</sup> Section 718.2(e) of the *Criminal Code* states that "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."<sup>31</sup>

The Supreme Court of Canada (SCC) has interpreted section 718.2(e) of the *Criminal Code* as having a "remedial purpose," drafted in response to the overincarceration of Indigenous people.<sup>32</sup> In coming to this decision, the SCC in *Gladue* devoted a lengthy discussion in their analysis to the problem of Indigenous overincarceration in Canada. The SCC cited troubling provincial and national statistics, and recognized that Indigenous people are "overrepresented in virtually all aspects of

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<sup>24</sup> *YCJA*, *supra* note 2, s 39(1).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, s 38(2)(e)(i).

<sup>27</sup> *Ibid.*, s 39(2).

<sup>28</sup> Statistics Canada, "Adult and Youth Correctional Statistics in Canada, 2016/2017," by Jamil Malakieh, *Juristat* 38:1, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018).

<sup>29</sup> RSC 1985, c C-46.

<sup>30</sup> *YCJA*, *supra* note 2, s 50(1).

<sup>31</sup> *Criminal Code*, *supra* note 29, s 718(2)(e).

<sup>32</sup> *R v Gladue*, [1999] 1 SCR 688 at para 32 [*Gladue*].

the system.”<sup>33</sup> *Gladue* also provided an explanation for what it means to consider “the circumstances of Aboriginal offenders.”<sup>34</sup> The court distinguished that the circumstances of Indigenous people are not unique in that they are not the only community of people to face systemic issues (e.g., low education and high unemployment);<sup>35</sup> however, the court explained that, unlike other marginalized communities, Indigenous people have faced and continue to face discrimination in the form of cultural genocide and other unique abuses.<sup>36</sup>

In *Ipeelee*, the SCC further strengthened the ruling of *Gladue* in determining that a “sentencing judge has a statutory duty, imposed by section 718.2(e) of the *Criminal Code*” to consider any and all available sanctions aside from incarceration and that a “failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation.”<sup>37</sup> Ultimately, this ruling clarified that *Gladue* considerations must apply in all cases involving an Indigenous offender, including those where a serious offence is committed.

In addition to including section 718.2(e) in the *YCJA*’s sentencing principles, section 38(2)(d) of the *YCJA* instructs judges that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of Aboriginal young persons.”<sup>38</sup> By deliberately including the words “young persons” in the provision, Parliament intended to reiterate the importance of curtailing a custodial response to Indigenous youth offenders.

Last, the *YCJA* also directs sentencing judges to impose sentences that consider the needs of “Aboriginal young persons.”<sup>39</sup> For instance, in *R v TDP*,<sup>40</sup> the court identified that understanding the needs of a particular Indigenous young offender will necessitate the discovery of relevant *Gladue* principles through *YCJA* mechanisms, such as a conference.<sup>41</sup> In *TDP*, Justice Whalen ordered a sentencing circle pursuant to section 19 of the *YCJA* to determine the appropriate sentence for the accused, who was a first-time offender charged with two robberies.<sup>42</sup>

In his judgment, Justice Whalen explained that the sentencing circle gave the court the opportunity to discover relevant information about the young person that

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<sup>33</sup> *Ibid* at para 61.

<sup>34</sup> *Ibid* at paras 36–37.

<sup>35</sup> *Ibid* at para 68.

<sup>36</sup> *Ibid*.

<sup>37</sup> *R v Ipeelee*, 2012 SCC 13 at para 87 [*Ipeelee*].

<sup>38</sup> *YCJA*, *supra* note 2, s 38(2)(d).

<sup>39</sup> *Ibid*, s 3(1)(c)(iv).

<sup>40</sup> 2004 SKPC 57 [*TDP*].

<sup>41</sup> *Ibid* at paras 27–28.

<sup>42</sup> *Ibid* at paras 1, 4.

would not have come to light had a conference not been called.<sup>43</sup> Some of the *Gladue* factors that arose during the sentencing circle included a “multi-generational alcohol addiction problem in TDP’s family,” and that he was, shortly after moving away from his reserve, victimized by a violent theft in his home where cherished personal belongings were taken from him.<sup>44</sup> In considering the *Gladue* factors that the sentencing circle and the pre-sentencing report brought about, Justice Whalen imposed an appropriate sentence of a one-year probation with several conditions.<sup>45</sup> As is evident through the provisions within the *YCJA* and related judgments, the *YCJA* was formed as a restorative response to the overincarceration of young people—particularly, Indigenous youth—that was occurring under its predecessor, the *YOA*.

## II. POST-YOA: CONTINUED OVERINCARCERATION OF INDIGENOUS YOUTH

Despite the specific attention placed on the issue of Indigenous overincarceration and the deliberate inclusion of specific provisions of the *YCJA* to address this issue, the problem of Indigenous youth overincarceration continues. Admittedly, the *YCJA* has led to a considerable decrease in overall youth custody as well as Indigenous youth custody; however, what continues to be troubling is that “the proportion of Aboriginal youth admitted to correctional services has grown under the *YCJA*.”<sup>46</sup> In other words, under the *YCJA*, Indigenous youth account for a greater percentage of the total youth incarceration rate than they did under the *YOA*.<sup>47</sup>

In attempting to understand why the crisis of Indigenous overrepresentation has continued to persist post-*YOA*, Indigenous legal scholar Jonathan Rudin specifically examined the overrepresentation of Indigenous youth in Ontario for the two years following the enactment of the *YCJA*.<sup>48</sup> In conducting his research, he used data provided by the Ministry of Correctional Services to examine the rate of incarceration for Indigenous youth within the province and to determine the offences for which Indigenous youth are sentenced to jail.<sup>49</sup> The data he obtained allowed him to make “some tentative conclusions as to why Aboriginal incarceration rates are ... rising.”<sup>50</sup>

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<sup>43</sup> *Ibid* at para 29.

<sup>44</sup> *Ibid*.

<sup>45</sup> *TDP*, *supra* note 40 at para 3.

<sup>46</sup> Jackson, *supra* note 5 at 934–935.

<sup>47</sup> *Ibid*.

<sup>48</sup> Jonathan Rudin, “Incarceration of Aboriginal Youth in Ontario 2004 to 2006: The Crisis Continues” (2007) 53:2 *Crim LQ* 260 at 262.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at 263.

Rudin discovered that “[while] the total number of youth dealt with by the system declined from 2004–05 to 2005–06 the percentage of those youth who were Aboriginal remained constant.”<sup>51</sup> Indigenous youth represented about 5.9 percent of all young offenders who were given some form of punitive sentence in both years (e.g., probation, community service order, conditional discharge, deferred custody, and custody).<sup>52</sup> Although the percentage seems reasonable on its face, when considering that Indigenous youth represented only 1.7 percent of the total Ontario population at the time of the study, the involvement rate represents a “significant over-involvement with the system.”<sup>53</sup> Additionally, Indigenous youth were found to be severely under-represented in receiving lighter sentences, such as conditional discharges or community service orders.<sup>54</sup>

In terms of custody, Rudin also discovered that Indigenous youth received a custodial sentence at a rate that is “twice as much as their numbers would suggest.”<sup>55</sup> For instance, in 2005–6, “13.7% of all youth who received custody were Aboriginal although, again, Aboriginal youth made up only 5.9% of the youth offending population.”<sup>56</sup> Finally, Rudin also found that while the absolute number of non-Indigenous youth in custody dropped considerably from 851 in 2004–5 to 611 in 2005–6 (i.e., a 28.2 percent drop), Indigenous youth in custody decreased only from 107 to 97 over the same period—a drop of 9.3 percent.<sup>57</sup>

Other recent statistics reveal a similar trend to the findings above. According to Statistics Canada, overall youth in custody in eleven jurisdictions experienced a consistent decline from 2005–6 to 2015–16, but Indigenous youth incarceration either increased or remained the same.<sup>58</sup> In 2015–16, the percentage of Indigenous youth in custody increased from 33 percent the year before to 35 percent of total custodial admissions. Furthermore, despite the mandate of the *YCJA* to limit custody, with particular attention paid to the circumstances of Indigenous youth, 54 percent of all Indigenous youth admitted to correctional services were placed into custody while the percentage was only 44 percent for non-Indigenous youth in 2015–16.<sup>59</sup> These statistics

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<sup>51</sup> *Ibid* at 264.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Rudin, *supra* note 48 at 265.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Statistics Canada, “Youth Correctional Statistics in Canada, 2015/2016,” by Jamil Malakieh, *Juristat* 37:1, Catalogue No 85-002-X (Ottawa: Statistics Canada, 1 March 2017).

<sup>59</sup> *Ibid* at 5.

demonstrate the trend that the “proportion of Aboriginal youth admissions to custody has grown over time.”<sup>60</sup>

Unfortunately, the overrepresentation of Indigenous youth in custody is even more pronounced for female youth. In 2015–16, Indigenous female youth “accounted for 43% of all female youth admitted to correctional services.”<sup>61</sup> On the other hand, Indigenous male youth “accounted for 31% of all male youth admitted.”<sup>62</sup> These statistics illustrate that the overincarceration of Indigenous youth remains a salient issue today.

### III. UNDERSTANDING THE ISSUE: DIFFERENTIAL INVOLVEMENT VERSUS DIFFERENTIAL TREATMENT

Even with the backing of the SCC in cases such as *Gladue* and the implementation of the *YCJA*, which specifically addresses the overincarceration of Indigenous youth, the continued and growing overincarceration of Indigenous youth remains a perplexing and complicated issue. The persistence of this issue has prompted researchers to ask whether the issue is simply a matter of disproportionate involvement in crime (i.e., Indigenous youth are committing more serious crimes than non-Indigenous youth) or a matter of systemic discrimination in the criminal justice process.<sup>63</sup>

Research on this topic is rapidly expanding, but current explanations for the overrepresentation of Indigenous youth in the criminal justice system are generally classified under two competing hypotheses: the differential involvement hypothesis and the differential treatment hypothesis. The differential involvement hypothesis suggests that the overrepresentation of visible minority youth in the system is due to “their higher rates of involvement in crime and/or in the types of crime that have the highest priority for police; for example, serious violent crime.”<sup>64</sup> Conversely, the differential treatment hypothesis posits that overrepresentation of minorities in the justice system “... results from decision-making processes that operate differently for members of different races/ethnicities at various stages of criminal justice processing.”<sup>65</sup>

Rudin observes that a popular and “obvious explanation as to why Aboriginal youth continue to be over-incarcerated is that they commit more serious offences” that

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Britney Barker et al, “Aboriginal Street-Involved Youth Experience Elevated Risk of Incarceration” (2015) 129:12 *Pub Health* 1662 at 1664.

<sup>64</sup> Peter J Carrington & Robin T Fitzgerald, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” (2011) 53:4 *Can J Corr* 449 at 452.

<sup>65</sup> *Ibid.*



inevitably attract more police attention.<sup>66</sup> This potential explanation is consistent with the differential involvement hypothesis and would explain the disproportionate rate of Indigenous youth in custody.

However, in attempting to verify the differential involvement hypothesis, Rudin identified the four types of offences that commonly lead to the incarceration of Indigenous youth: “administration of justice, assault, break and enter, and theft and possession.”<sup>67</sup> Rudin discovered that between the years of 2004 and 2006, 75 to 80 percent of all Indigenous youth who were given a custodial sentence were convicted of one of those four types of offences.<sup>68</sup> However, he also found that non-Indigenous youth were also given custody at nearly identical rates for the commission of the same four types of offences.<sup>69</sup> These findings reveal that one cannot explain the overrepresentation of Indigenous youth in the criminal justice system solely by “the types of offences that Aboriginal youth commit because they commit the same offences that non-Aboriginal youth commit.”<sup>70</sup>

Rudin’s findings were supported by a national study in which researchers found that “differential involvement in crime” could not explain the overrepresentation of minorities in the justice system.<sup>71</sup> Researchers discovered that, even after controlling for the type of crime, youth belonging to a high-risk visible minority category (e.g., Indigenous, Black, and West Asian) were approximately three times more likely to have had contact with the police in comparison to other youth.<sup>72</sup>

Moreover, another study conducted by Corrado and colleagues discovered that Indigenous offenders were “more likely to receive secure custody (i.e., the most restrictive form) and they were less likely than Caucasian young offenders to receive community sanctions.”<sup>73</sup> These findings remained consistent even after controlling “for the severity of the offences committed by Aboriginal young people.”<sup>74</sup> Corrado and colleagues also found that the rate of custody for Indigenous youth was three times higher than that of Caucasian young offenders for even the “least serious offences or administrative offences.”<sup>75</sup> Together, these findings suggest that the differential involvement hypothesis cannot, on its own, explain the overincarceration of Indigenous youth.

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<sup>66</sup> Rudin, *supra* note 48 at 267.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Rudin, *supra* note 48 at 268.

<sup>70</sup> *Ibid.*

<sup>71</sup> Carrington, *supra* note 64 at 472.

<sup>72</sup> *Ibid.*

<sup>73</sup> Corrado, *supra* note 10 at 45.

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

<sup>75</sup> *Ibid.*

Another common explanation, in line with the differential involvement hypothesis, has been that Indigenous youth simply commit *more* crimes than their non-Indigenous counterparts.<sup>76</sup> Providing support for this hypothesis is the contention that “research indicates that people of Aboriginal ancestry are engaging in criminal activity at a higher rate than non-Aboriginal people.”<sup>77</sup> There are, however, “key underlying structural factors that are known to contribute to this observation.”<sup>78</sup> These factors, including “residential instability, low levels of education, high levels of unemployment, alcohol and substance use issues, poverty, and severe family conflict,” have been shown to disproportionately affect Indigenous communities.<sup>79</sup> Nevertheless, Barker and associates concluded that Indigenous heritage was shown to be independently associated with incarceration after controlling for many of the risk factors mentioned above.<sup>80</sup> These findings further suggest that differential treatment, not involvement alone, may be a significant causal factor in the overincarceration of Indigenous youth.

One potential contributing factor to the overincarceration of Indigenous youth, which aligns with the differential treatment hypothesis, is the unequal distribution of extrajudicial measures (“EJMs”) in dealing with young offenders. Under the *YCJA*, the police have discretion when youth are apprehended for a relatively minor occurrence to either treat the incident informally through a diversionary method (e.g., a warning) or through a more formal process that involves the criminal justice system.<sup>81</sup> Although this practice has allowed police officers to divert many young offenders away from the justice system under the *YCJA*, it has also led to the collateral effect of differential treatment of Indigenous youth.

Certainly, Indigenous youth, like their non-Indigenous counterparts, have benefited from this increased practice of diversion; however, research has shown that non-Indigenous youth are more likely to be diverted from the justice system than Indigenous youth.<sup>82</sup> Additionally, although explicitly disallowed by the *YCJA* itself, research demonstrates that police officers will consider prior use of extrajudicial methods and criminal records in deciding whether to proceed with another diversionary

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<sup>76</sup> Barker, *supra* note 63 at 1664.

<sup>77</sup> Statistics Canada, *The Incarceration of Aboriginal People in Adult Correctional Services*, by Samuel Perreault, Catalogue No 85-002-X, vol 29, no 3 (Ottawa: Statistics Canada, July 2009) at 4–27; See also Statistics Canada, *Victimization and Offending Among the Aboriginal Population in Canada*, by Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, Catalogue No 85-002-XIE, vol 26, no 3 (Ottawa: Statistics Canada, July 2009) at 1–30.

<sup>78</sup> Barker, *supra* note 63 at 1664.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *YCJA*, *supra* note 2, s 6(1).

<sup>82</sup> Jackson, *supra* note 5 at 937.

method.<sup>83</sup> Given that Indigenous youth come into contact with the police more often than their non-Indigenous counterparts (due, in part, to factors such as over-policing), these informal considerations may further contribute to the overrepresentation of Indigenous youth in the justice system.<sup>84</sup> Adding to this issue is the fact that discriminatory attitudes toward Indigenous people may also influence a police officer's decision to use extrajudicial measures when dealing with Indigenous youth.<sup>85</sup> Racism toward Indigenous people is still common across Canada and, unfortunately, police are not immune to these discriminatory attitudes.<sup>86</sup>

#### IV. UNDERSTANDING THE ISSUE: A DIFFERENT PERSPECTIVE

Although much of the research on Indigenous youth incarceration has focused on either differential treatment or differential involvement, another potential cause for the continued overincarceration of Indigenous youth is simply a lack of knowledge regarding the circumstances of Indigenous young offenders on the part of legal professionals.<sup>87</sup> This explanation stresses the fact that restorative provisions limiting custodial responses against Indigenous youth cannot function unless legal professionals understand the context behind Indigenous offending. Without this knowledge, provisions specifically made to limit Indigenous incarceration may be viewed as being irrelevant, or even wrong, and custody can become a reflexive response to Indigenous offending.<sup>88</sup>

Currently, the creation of Gladue reports, which are reports prepared by Indigenous caseworkers that detail the background and history of an Indigenous offender, provides much of this contextual information to the courts. Unfortunately, sentencing hearings involving Indigenous youth are often conducted without these reports; thus, an important part of educating the legal actors involved in the sentencing of Indigenous offenders is missing.<sup>89</sup> One explanation of why *Gladue* considerations and Gladue reports are infrequently referenced in courts is that professional Gladue caseworkers are simply unavailable in most communities. In Toronto, Indigenous offenders are fortunate enough to be provided with caseworkers through Aboriginal Legal Services.<sup>90</sup> These caseworkers are able to interview Indigenous offenders and create extensive reports that provide information such as “the historical context of the

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<sup>83</sup> *Ibid* at 938.

<sup>84</sup> *Ibid* at 939.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Rudin, *supra* note 48 at 270.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 270–271.

<sup>90</sup> *Ibid* at 271.

experience of Aboriginal people,” while also making culturally appropriate recommendations that respond to the identified needs of the offender.<sup>91</sup> Evaluations on the efficacy of Gladue reports have shown that they meaningfully affect the types of sentences given to Indigenous offenders.<sup>92</sup> Unfortunately, the availability of caseworkers, albeit far greater than a decade ago, is still lacking in many jurisdictions in Canada.<sup>93</sup>

Until this type of legal service is available for smaller communities and other areas that have high concentrations of Indigenous people, it is unlikely that Gladue reports will be used regularly across Canada. If this is the case, a knowledge gap will continue to exist within the courts, and courts may fail to properly consider *Gladue* principles and relevant *YCJA* provisions when sentencing Indigenous youth.

## V. WHY SHOULD WE CARE ABOUT THE OVERINCARCERATION OF YOUTH?

### **Why the Incarceration of Youth is Troubling**

So far, this paper has identified the crisis of the overincarceration of Indigenous youth as well as some of its underlying causes. Missing from this discussion, however, is an explanation as to *why* youth incarceration is problematic and, specifically, why the overincarceration of *Indigenous* youth matters. While many of the problems associated with the overincarceration of youth apply to both Indigenous and non-Indigenous youth, there are some circumstances unique to Indigenous young people that make their incarceration particularly problematic.

One often cited reason for limiting custodial responses to youth crime is that it places impressionable young people in a highly criminalized environment. Research has confirmed that young people are simply “more susceptible to the negative effects of inmate subculture” than adults.<sup>94</sup> Therefore, placing young people into a prison environment can reinforce criminality and produce more hardened criminals upon release.

Second, incarceration may encourage recidivism. Recent research shows that young people are less likely to abstain from reoffending as they delve deeper into the youth justice system.<sup>95</sup> Further, the SCC has expressed a concern for the stigma associated with incarceration. In *FN (Re)*, Justice Binnie noted that “stigmatization or

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Ryan Newell, “Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration” (2013) 51 Osgoode Hall LJ 199 at 216.

<sup>94</sup> Bala, *supra* note 3 at 134.

<sup>95</sup> *Ibid* at 135.

premature ‘labelling’ of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system.”<sup>96</sup> As a result of this labelling, a young offender may render the stigma a self-fulfilling prophecy and consequently become trapped in a cycle of reoffending.<sup>97</sup> Similarly, the SCC in *FN (Re)* also expressed that preventing this labelling may act to protect society in the long run as “most young offenders are one-time offenders, and the less harm brought upon them from their experience with the criminal justice system, the less likely they are to commit further criminal acts.”<sup>98</sup>

Finally, custody has proven to be a costly method of dealing with youth crime. Increasing youth custody would only act to “increase the cost of youth justice services without increasing public safety.”<sup>99</sup> In this way, limiting custody present cost-saving opportunities for the justice system because community service orders and restorative sentences are viewed as more cost-efficient methods when handling first-time young offenders who have committed minor offences.<sup>100</sup>

### **Why the Incarceration of *Indigenous* Youth is Particularly Troubling**

In addition to the problems associated with incarcerating young people generally, there are specific factors that make the incarceration of *Indigenous* youth particularly troubling. To begin with, the Canadian government has been directly involved in creating many of the risk factors that affect the propensity for Indigenous youth to commit crimes. For example, the median income of Indigenous people is about 30 percent less than non-Indigenous Canadians,<sup>101</sup> and poverty (i.e., income) is a risk factor that contributes to a person’s involvement in criminal activity.<sup>102</sup> The conditions of poverty, however, cannot simply be construed as a self-inflicted problem; rather, the “social condition of Aboriginal people is a direct result of the discriminatory and repressive policies” that the government “directed towards Aboriginal people.”<sup>103</sup> Other risk factors that have contributed to the overrepresentation of Indigenous youth in the criminal justice system, such as family dislocation, intergenerational transfer of trauma, and high levels of substance abuse, can also be traced back to “the legacy of colonization and multicentury [*sic*] long, state-sponsored oppression.”<sup>104</sup>

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<sup>96</sup> 2000 SCC 35 at para 14 [*FN (Re)*].

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at para 17.

<sup>99</sup> Bala, *supra* note 3 at 160.

<sup>100</sup> *Ibid* at 134.

<sup>101</sup> Newell, *supra* note 93 at 206.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at 207.

<sup>104</sup> Barker et al, *supra* note 63 at 1664–65.

Along with elevated risks of criminal involvement, Indigenous youth are also far more likely to commit suicide in comparison to other youth in Canada.<sup>105</sup> In fact, Canada's Indigenous youth suffer from the highest suicide rate of any culturally identifiable population in the world.<sup>106</sup> Many of the conditions that elevate the risk of suicide in Indigenous communities are the same factors that influence offending behaviour. These conditions can be traced back to their colonial history and experience with discriminatory state policies as well.<sup>107</sup>

A further complication in the issue of Indigenous youth incarceration is that many Indigenous youth involved in the justice system suffer from some form of Fetal Alcohol Spectrum Disorder (FASD). In *R v FD*,<sup>108</sup> Justice Andrew, in sentencing an Indigenous youth with FASD, noted that out of the total reported youth cases, “89% of aboriginal young persons were suffering from FASD.”<sup>109</sup> FASD has emerged as a significant risk factor to youth offending, as young people suffering from FASD are “likely to have diminished capacity to foresee consequences, make reasoned choices or to learn from their mistakes.”<sup>110</sup> Consequently, youth with FASD do not respond to sentencing in the same way that other young people do, and harsher sentences appear to be completely ineffective in preventing future offending.<sup>111</sup> Furthermore, custody “may make matters worse and may be completely inappropriate for FASD offenders” who instead require proper treatment and care to manage their antisocial behaviour.<sup>112</sup> As with many of the risk factors that disproportionately affect Indigenous communities, FASD prevalence in some of these communities has also been linked to the trauma associated with residential schooling and systemic abuse. This connection was recognized in *R v FC*<sup>113</sup> by Justice Lilles who explained that “[a]lcohol abuse, including maternal alcohol consumption, was a significant social problem experienced by Indian residential school students who returned to their village of Ross River.”<sup>114</sup>

Clearly, given that many of the risk factors influencing Indigenous offending are linked to previous government policies, active reconciliation on the part of the criminal justice system is necessary. Simply maintaining the status quo, which has caused continued overincarceration of Indigenous youth, will only contribute to the legacy of

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<sup>105</sup> Jeff Shantz, “‘The Foundation of Our Community’: Cultural Restoration, Reclaiming Children and Youth in an Indigenous Community” (2010) 32:3 J Soc Welfare & Fam L 229 at 229.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* at 230.

<sup>108</sup> 2016 ABPC 40.

<sup>109</sup> *Ibid* at para 7.

<sup>110</sup> *Ibid.*

<sup>111</sup> *R v FD*, *supra* note 106 at para 8.

<sup>112</sup> *Ibid.*

<sup>113</sup> 2012 YKTC 5.

<sup>114</sup> *Ibid* at para 11.

abuse that has persisted since European contact. In an age of reconciliation, greater efforts must be made to restore Indigenous–government relations and ultimately reverse some of the conditions and attitudes that have contributed to the overincarceration of Indigenous young people.

## VI. ADDRESSING THE ISSUE: SPECIALIZED LEGAL PROFESSIONALS, AND THE EXPANSION OF DEDICATED ABORIGINAL YOUTH COURTS

As discussed above, differential treatment and a lack of knowledge and resources contribute to the continued overrepresentation of Indigenous youth in custody. The alleviation of this problem will necessitate the proper consideration of these identified issues. Therefore, in the spirit of the Truth and Reconciliation Commission, this paper calls for (1) a commitment by the justice system to provide more opportunities for legal professionals to learn about the history and culture of Indigenous peoples; and (2) the creation of a plan to implement more Indigenous Youth Courts across Canada to ensure that Indigenous young offenders are involved in a judicial process that respects and incorporates *Gladue* principles.<sup>115</sup>

### **The Role of Police Officers**

As expressed above, one of the contributing factors to the continued overrepresentation of Indigenous youth is the unequal distribution of EJMs. The police have the ability, under the *YCJA*, to divert youth away from the justice system. As such, police can play a considerable role in addressing the issue of overrepresentation with more frequent use of EJMs when dealing with Indigenous youth.<sup>116</sup> However, in order to encourage this behaviour, it is necessary to combat some unofficial considerations, such as past criminal involvement, that reduce the likelihood of police officers providing EJMs to Indigenous youth.

Lithopoulos and Ruddell’s study on the perspective of Canadian police officers in Indigenous communities suggests that educating police officers about Indigenous history and culture can encourage more restorative and culturally appropriate policing methods.<sup>117</sup> Lithopoulos and Ruddell discovered that officers in both accessible and rural Indigenous communities identified that “learning the Aboriginal culture or language(s), understanding Aboriginal methods of justice, and receiving Aboriginal

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<sup>115</sup> See Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

<sup>116</sup> See *YCJA*, *supra* note 2, s 10.

<sup>117</sup> Savvas Lithopoulos & Rick Ruddell, “Policing Isolated Aboriginal Communities: Perspectives of Canadian Officers” (2011) 34:3 *Policing: Intl J Police Strat & Mgmt* 434 at 434–35.

awareness training were key factors in ensuring culturally appropriate policing.”<sup>118</sup> Unfortunately, though, only half of the officers in remote communities and two-thirds of the officers in accessible communities reported being adequately trained in these areas.<sup>119</sup> It is thus imperative that police officers working in Indigenous communities are better trained to “understand Aboriginal history and culture and how those factors influence interpersonal relationships, pathways toward crime, as well as how individuals in First Nations respond to crime (both formally and informally) and their willingness to participate in restorative justice initiatives.”<sup>120</sup> In doing so, it may encourage police officers to divert Indigenous youth away from the formal justice system in favour of EJMs. As a result, the rate of Indigenous youth incarceration may decline in the way that was intended when the *YCJA* was first enacted.

### **The Role of Prosecutors**

Where the police forgo the use of an EJM and decide instead to formally charge a young offender, the Crown prosecutor then becomes an extremely important gatekeeper in limiting the use of incarceration by confining the “options available to an eventual sentencing judge.”<sup>121</sup> Currently, under the *YCJA*, prosecutors can limit the use of youth incarceration in one of two ways: (1) by administering warnings to young offenders instead of starting or continuing judicial proceedings,<sup>122</sup> or (2) by using extrajudicial sanctions (EJSs) as an appropriate non-court measure to hold young persons accountable for their actions.<sup>123</sup>

Although the ability to implement EJSs applies to all youth, Crown policy manuals often cite a youth’s Indigenous identity as a factor to consider when determining the appropriateness of an EJS.<sup>124</sup> This means that, theoretically, prosecutors are afforded greater deference to offer EJSs to Indigenous young offenders. Unfortunately, as expressed above, research has shown that Indigenous youth are less likely than non-Indigenous youth to receive lighter sentences for the same offences.<sup>125</sup>

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<sup>118</sup> *Ibid* at 446.

<sup>119</sup> *Ibid* at 447.

<sup>120</sup> *Ibid* at 437.

<sup>121</sup> Jackson, *supra* note 5 at 940.

<sup>122</sup> *YCJA*, *supra* note 2, s 8.

<sup>123</sup> See *ibid*, s 10; Ontario, Criminal Law Division—Ministry of the Attorney General, *Crown Prosecution Manual*, (Prosecution Directive), s 37(a).

<sup>124</sup> See *ibid*; see also British Columbia, Prosecution Service, *Crown Counsel Policy Manual: Youth Criminal Justice Act—Extrajudicial Measures* at 1, online (pdf): *Government of British Columbia* <[www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/you-1-4.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/you-1-4.pdf)>.

<sup>125</sup> Rudin, *supra* note 48 at 265.



This discrepancy between the intent and actual use of the restorative provisions in the *YCJA* suggests that prosecutors may not fully understand the importance or reasoning behind the use of EJMs and restorative sanctions for Indigenous youth. However, efforts are being made in some provinces to address this issue. For example, in 2016, the Ontario Ministry of the Attorney General established an Elders' council to "make the justice system more responsive to the needs of Indigenous people and support the reclamation of Indigenous legal systems."<sup>126</sup> In addition to the establishment of an Elders' council, the Ministry has also delivered Indigenous cultural competency training, known as "Bimickaway," to more than 700 Ministry staff since August 2016.<sup>127</sup> These types of initiatives will be important in filling in the knowledge gaps that may exist among Crown attorneys who would otherwise be unfamiliar with the culture and history of Indigenous peoples. The hope is that these sorts of programs and initiatives will encourage prosecutors to divert Indigenous youth from a custodial setting and into culturally appropriate and responsive sanctions.

### **Training for Dual Roles: Counsel and Caseworker**

As discussed above, another barrier to successful diversion of Indigenous young offenders is simply the lack of Gladue caseworkers in certain jurisdictions in Canada. Caseworkers play an integral information-gathering role in the process of sentencing Indigenous offenders.<sup>128</sup> Without them, judges are often left to make sentencing decisions without a detailed Gladue report before them.<sup>129</sup> Despite the efforts of Aboriginal Legal Services in Toronto to extend their services to other cities in Southern Ontario, such as Hamilton, Brantford, Kitchener, and Guelph, the availability of caseworkers remains very limited.<sup>130</sup> In the meantime, it may be helpful to train lawyers and Crown counsel to prepare a proper Gladue report without the assistance of an external caseworker. Essentially, this will require counsel to play a dual role in which they are both professionally trained as lawyer and Gladue caseworkers.

A similar proposal was made in relation to the issue of "crossover youth" in which young offenders living under the care of a welfare agency are often "represented by one lawyer appointed by the Office of the Children's Lawyer for their child welfare matter, and another, different lawyer funded by Legal Aid Ontario for the Youth Court

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<sup>126</sup> Ontario, Ministry of the Attorney General, *Estimates Briefing Book 2017–2018* at 26.

<sup>127</sup> *Ibid* at 27.

<sup>128</sup> Newell, *supra* note 93 at 216.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

proceeding.”<sup>131</sup> The problem with this framework is that “the lack of facilitated communication between the systems affects the ability of each system to produce timely, appropriate results and instead, all too often, there is a delay, missing information, and duplication or lack of co-ordination in service provision.”<sup>132</sup>

In hypothesizing ways to deal with this issue, Bala and colleagues submitted that by having one specially qualified lawyer to deal with both matters, the lawyer “can have a better understanding of all of the legal issues affecting the youth, as well as the individual youth’s specific circumstances, which in turn would likely result in better outcomes for children.”<sup>133</sup> Similarly, by amalgamating the roles of Gladue caseworker and legal counsel, lawyers representing Indigenous youth can prepare their submissions in court with the requisite *Gladue* considerations in mind, without needing to rely on external services. Admittedly, training lawyers to assume a caseworker role in conjunction with their role as counsel will be difficult; however, as Indigenous legal issues become more readily discussed in law schools, incoming lawyers will be more prepared than ever to serve in this dual function.

### **Implementing More Aboriginal Youth Courts**

In advocating for better cultural training for legal professionals dealing with Indigenous youth matters, the goal is to create a broad enough pool of individuals to increase the availability of Aboriginal Youth Courts across Canada. These specialized courts aim to “move certain cases from the regular court process into a forum that allows unique needs to be identified and more effectively addressed by allowing for co-ordinated involvement by various agencies.”<sup>134</sup>

The aim of the Aboriginal Youth Court (AYC) is not only to ensure that court officials consider the provisions of the *YCJA* that pertain to Indigenous youth, “rather—and significantly—the aim of the court has been to actively engage the relevant provisions of the *YCJA*.”<sup>135</sup> This active engagement is what makes the AYC unique in Canada.<sup>136</sup>

In particular, the AYC in Toronto endeavours to achieve the following:

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<sup>131</sup> Nicholas Bala et al, “Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19:1 Can Crim L Rev 129 at 146.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Bala, *supra* note 131 at 148.

<sup>135</sup> Scott Clark, “Evaluation of the Aboriginal Youth Court, Toronto” (2016) at 10, [unpublished report no P-383, online (pdf): <[www.cerp.gouv.qc.ca/fileadmin/Fichiers\\_clients/Documents\\_depotes\\_a\\_la\\_Commission/P-383.pdf](http://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-383.pdf)>].

<sup>136</sup> *Ibid.*

- Directly address relevant requirements in the *Youth Criminal Justice Act*, specifically paragraphs 3(1)(c), 38(2)(d) and 50(1);
- Encourage effective alternatives to incarceration for Aboriginal youth, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal youth in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal youth.<sup>137</sup>

The AYC functions exclusively for young offenders who identify as Indigenous.<sup>138</sup> Duty counsel or the young person's own lawyer often undertake this identification process.<sup>139</sup> After a Justice at the AYC is made aware of the status of the young offender, counsel proceeds by referring the youth to an Indigenous courtworker.<sup>140</sup> The courtworker is then responsible for discovering personal information relevant to the young person's sentencing hearing.<sup>141</sup> This includes information such as "the personal background of the youth; his/her current living arrangements; whether s/he is status Indian, non-status, Metis or Inuit; the Band, reserve or community with which s/he is affiliated; who in the youth's family is Aboriginal; school attendance; and other relevant information."<sup>142</sup>

An evaluation of the AYC in Toronto was conducted between June 2012 and June 2015.<sup>143</sup> The purpose, as stated by Scott Clark, the evaluator, was fourfold:

- to assess the extent to which the objectives of the Aboriginal Youth Court at 311 Jarvis Street are being achieved;
- to assess the extent to which relevant sections of the *Youth Criminal Justice Act* are being realized;
- to identify and explain any unintended consequences resulting from Court processes and related programs;
- to identify possible modifications to Court processes and associated programs in order to increase objectives achievement, if warranted.<sup>144</sup>

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<sup>137</sup> *Ibid* at 13.

<sup>138</sup> *Ibid* at 21.

<sup>139</sup> *Ibid*.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid* at 22.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid* at 8.

<sup>144</sup> *Ibid*.

The results of the evaluation were quite encouraging as “officials associated with the AYC, including judges, justices of the peace, Crowns and counsel who appear regularly” were found to be knowledgeable on “Gladue principles, the Aboriginal provisions in the *YCJA*, and the historical and current realities facing Aboriginal youth.”<sup>145</sup> As a result, during the entire evaluation period, only one youth out of a total of 390 charged was given a custodial sentence combined with probation.<sup>146</sup> Of the 390 charges, “229 charges were withdrawn, 91 charges were stayed, 26 charges resulted in a guilty plea and finding with probation, 24 charges were withdrawn with a peace bond, 19 charges resulted in a guilty plea and finding with a conditional discharge, and one charge resulted in a guilty plea and finding with custody and probation.”<sup>147</sup>

The research also discovered that “[o]f 56 diversions from the AYC during the evaluation period, 45 were to the Community Council at Aboriginal Legal Services.”<sup>148</sup> The council is set up in the Toronto AYC as a restorative circle where members of the community (including elders) talk to the youth about why the offence occurred.<sup>149</sup> This extrajudicial sanction, unlike others, involves active support and collaboration with the young offender to create a personalized rehabilitative program.<sup>150</sup> This process of collaboration gives the young person an opportunity to work in conjunction with an AYC courtworker and Aboriginal Legal Services to examine the personal circumstances of the young person and move toward a “restorative process with the Community Council.”<sup>151</sup> Scott Clark discovered that adherence to programs developed through the Community Council was generally high because of the autonomy given to the young person in determining the conditions of their own program.<sup>152</sup>

Additionally, Scott Clark noted several positive effects from the use of diversion. First, the diversionary program gave youth an opportunity to have their charges withdrawn and to ultimately avoid a criminal record.<sup>153</sup> Second, the Community Council programs encouraged youth to stay involved in their culture and community in a manner that was not available to them prior to diversion.<sup>154</sup> Finally, and perhaps most important to the interests of the justice system, reoffending rates were lower for youth who participated in the Community Council process. In some parts of Canada the rate

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<sup>145</sup> *Ibid* at 23.

<sup>146</sup> *Ibid* at 34.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid* at 38.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at 41.

<sup>154</sup> *Ibid*.

of reoffending can be as high as 85 percent, while the reoffending rate during the evaluation period was only 7 percent for youth diverted to the AYC.<sup>155</sup>

As a whole, Scott Clark discovered that the AYC in Toronto was successful in achieving their stated goals.<sup>156</sup> Not only did the court give youth reasonable opportunities to identify as Indigenous, its workers also showed a strong commitment to *Gladue* principles. Additionally, the court allowed for meaningful integration with court officials and members of Aboriginal Legal Services to provide consistent and culturally relevant EJMs.<sup>157</sup>

Although the overincarceration of Indigenous youth remains a salient problem under the *YCJA*, the success of special integrated courts, such as the AYC in Toronto, demonstrates that it may not be the *YCJA* itself that is insufficient; it is quite possible that youth court professionals simply lack the cultural understanding necessary to embrace the *YCJA*'s principles in a way that is conducive to its success. As noted by Scott Clark, the AYC is successful "in large part thanks to the justice professionals who work there."<sup>158</sup> It is their knowledge, experience, and commitment to Indigenous justice issues that allow a court to perform its restorative function successfully.<sup>159</sup> Perhaps most important, the Crown's ability to understand the issues and become familiar with the availability of Indigenous programs "provides assurance that *Gladue* principles will be applied and that the resources offered by [Aboriginal Legal Services] and other agencies serving Aboriginal people will be drawn upon."<sup>160</sup>

Given the significant success of the AYC in Toronto, it is without question that increasing the number of these specialized courts will have a direct effect in lowering the rate of Indigenous youth incarceration. Unfortunately, in more remote areas of Canada, where these courts do not exist, Indigenous youth are not assured the same full and meaningful consideration of *Gladue* principles. Although it would be ideal for these courts to be accessible to all Indigenous communities, it is likely that the widespread adoption of AYCs will require more resources and funding than what is currently available. Therefore, in the interim, it is necessary to educate a large enough number of legal professionals to ensure that Indigenous youth benefit from the *Gladue* principles notwithstanding their limited access to AYC.

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<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid* at 46.

<sup>157</sup> *Ibid* at 43–44.

<sup>158</sup> *Ibid* at 47.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid* at 43.

## CONCLUSION

More than a decade has passed since the *YCJA* replaced its predecessor, the *YOA*, in an active effort to limit the incarceration of young offenders in Canada. Unfortunately, just as it was an issue under the *YOA*, Indigenous youth continue to be overrepresented in custodial settings under the *YCJA*. As discussed, the issue has not persisted because of a problem with the legislation itself; the preamble and several provisions of the *YCJA* reserve the use of custodial sanctions for the most serious offences. Furthermore, the *YCJA* includes provisions that specifically address the unique circumstances of Indigenous youth. Therefore, rather than blaming the *YCJA*, a complex set of factors, including differential treatment and involvement, can help explain why Indigenous youth continue to be incarcerated at such high rates.

Another important factor to consider, and one that has been the primary focus of this paper, is the lack of legal practitioners who are both knowledgeable and passionate about the culture and history of Indigenous people in Canada. Without a strong understanding of how the legacy of colonialism and residential schooling affect the offending behaviour of Indigenous youth, it is unlikely that legal professionals, including police officers, judges, Crown attorneys, and defence lawyers, will participate in actively repressing a custodial response to Indigenous youth crime. As exemplified by the AYC in Toronto, when legal professionals understand the unique circumstances of Indigenous young offenders, the provisions of the *YCJA* can be used to successfully divert Indigenous youth to non-custodial, culturally relevant programs.

In any case, the problem of Indigenous overrepresentation cannot be “solved within the justice system alone.”<sup>161</sup> Addressing this issue will require much more than the implementation of more AYCs. The reality is that by the time the young person is in court, the offence has *already* been committed. Therefore, it is perhaps more important to identify and actively remove the causal factors of offending that continue to disproportionately affect Indigenous communities.

Nevertheless, a young offender’s future can change drastically depending on the type of sentence received. As such, the youth criminal justice system is responsible for making the right decision when responding to Indigenous youth crime. The *YCJA* has made it clear that this response must be restorative and culturally appropriate, but it is ultimately up to the individual actors within the system to adopt this approach—if for nothing other than to protect the misunderstood Indigenous youth who continue to be incarcerated at alarming rates.

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<sup>161</sup> John Edmond, “Incarcerating Aboriginal Youth: Some Issues” (2011) 36:2 *LawNow* 35 at 38, online (pdf): *LawNow* <[www.lawnow.org/wp-content/uploads/2011/11/LawNow36-2.pdf](http://www.lawnow.org/wp-content/uploads/2011/11/LawNow36-2.pdf)>.