A YELLOWHEAD INSTITUTE SPECIAL REPORT

Twenty-Five Years of Gladue:

Indigenous 'Over-Incarceration' & the Failure of the Criminal Justice System on the Grand River

by **HAYDEN KING with PAULA HILL**

Yellowhead Institute

JULY 2024

Authors

Hayden King
Anishinaabe,
Beausoleil First Nation

Paula Hill
Cayuga Nation (Wolf Clan)
Six Nations of the Grand River

Designer

Yumi Numata

Cover Artist

Shayde Sandy
Haudenosaunee,
Six Nations of the Grand River

Artist Statement

Just Spiritual Things: A N8V Still Life highlights the importance of traditional medicines and spiritual tools within indigenous culture. These sacred traditions and tools allow us to strengthen our connection to the mind, body and spirit. Indigenous Health is not only about physical and mental well-being but also spiritual.

Yellowhead Institute is based in the Faculty of Arts at Toronto Metropolitan University.

This work is licensed under Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International.

Acknowledgements

This report follows a day-long workshop hosted by the Brantford Regional Indigenous Support Centre (BRISC) and held at Six Nations Polytech in Brantford, Ontario. BRISC is a Friendship Centre but one that provides front-line program and service delivery for the Indigenous community on the Grand River, specifically the urban Indigenous community. Thanks are owed to all the speakers and participants at the workshop, who shared their views and experiences with generosity and care. We hope this report reflects the urgency and immensity of the challenges they are confronting. Last but not least, thank you to BRISC Executive Director, Shelly Hill, for her leadership and support.

Abstract

Twenty-Five Years of Gladue: Indigenous 'Over-Incarceration' & the Failure of the Criminal Justice System on the Grand River, a collaboration between the Brantford Regional Indigenous Support Centre (BRISC) and Yellowhead Institute, examines the emergence of the Gladue Principle and its application in Canada, with specific attention to Gladue on the Grand River. We find that despite the attempt to incorporate elements of restorative justice in the courts and consider the systemic impacts of colonialism in sentencing, Gladue has not realized its promise. This was the conclusion of participants at a BRISC workshop in March 2024. They identified four key challenges: 1) disorganized processes and a lack of information, 2) limited resources for rehabilitation, restoration and Gladue Workers, 3) the rise of self-identification and identity fraud, and 4) failure to support victims, families and communities. These concerns reflect broader national challenges, which are also addressed in the report with a review of recent policy literature on Gladue. Ultimately, the report finds that without significant changes, including improved resource allocation and community support, the criminal justice system will continue to drive contemporary colonialism in Canada. In contrast, the report reflects the advocacy of participants at the BRISC workshop calling for a compassionate, community-driven approach that acknowledges intergenerational trauma and the need for genuine restorative justice and systemic change.

This report is a collaboration with the Brantford Regional Indigenous Support Centre.

Table of Contents

4 Introduction

5 A Brief Legal History of Gladue

7 The Gladue Process in Theory

8 Does Gladue Reduce Incarceration or Help Rehabilitate?

10 Gladue on the Grand River: The BRISC Workshop

11 Four Primary Concerns

- 12 #1 Disorganized & Unclear Gladue Processes
- 13 #2 Limited Resources for Rehabilitation, Restoration & Gladue Workers
- 15 #3 The Rise of Self-Identification & Identity Fraud
- 16 #4 Failure to Support Victims, Families & Communities

18 Conclusion: Restoration (but Justice, too)

Introduction

The application of the Gladue Principle has largely failed.

This is the conclusion of numerous expert reports, also confirmed by community members involved in the justice system at a workshop held by the Brantford Region Indigenous Support Centre (BRISC) in March 2024. In response to a number of ongoing challenges with few solutions in sight, BRISC brought together court workers, Gladue writers, Justices of the Peace, criminal lawyers, police chiefs, justice students, as well as those formerly incarcerated or affected by violent crime, to address those challenges. Over the course of the event, experts in the application of Gladue offered their perspectives, and a team from Yellowhead Institute facilitated a conversation that ultimately shaped the conclusions of this report.

While the Gladue Principle — a guideline established by the courts to inform sentencing of Indigenous individuals convicted of criminal offences — is intended to reduce the wildly disproportionate incarceration of Indigenous peoples, the uneven application of Gladue, lack of related infrastructure, and near absent support for community justice initiatives has resulted in a process that now reproduces a myriad of harms it was initially designed to prevent.

Those at the BRISC workshop identified four primary concerns regarding the effectiveness of the Gladue Principle. While these perspectives are local to the Six Nations of the Grand River, Brantford, the literature on Gladue reveals that these concerns are common across the country.

In summary, they are:

1. **Disorganized Gladue Processes and a Lack of Information**
2. **Limited Resources for Rehabilitation, Restoration, and Gladue Workers**
3. **The Rise of Self-Identification & Identity Fraud**
4. **Failure to Support Victims, Families & Communities**

In this Special Report, we describe each of these issues, pairing the existing research on the application of Gladue with perspectives shared by experts and community members at the BRISC workshop to confirm the long-held belief that the criminal justice system continues to perpetuate violence against Indigenous communities – even with efforts to include elements of restorative justice. But it begins with an overview of the Gladue Principle, from its emergence and evolution in the courts to its effectiveness throughout its 25-year application.

The vision of Gladue is a system of support for offenders and communities that takes into consideration the longstanding and ongoing colonial violence experienced by Indigenous people, on and off-reserve, throughout their lives and that can lead to their involvement with the justice system…

Gladue has been interpreted to be a manifestation of restorative justice.

Yet, in practice, the vision has not materialized.

A Brief Legal History of Gladue

Just over 25 years ago, on April 23, 1999, the case of Jamie Tanis Gladue made its way through the Canadian criminal justice system, eventually being heard by the Supreme Court of Canada (R. v. Gladue).

While 19-year-old Gladue had already pled guilty to the murder of her common-law husband, the case was actually about the fairness of her sentence for the crime, given many mitigating factors, including her path through colonialism and the broader structural factors that contributed to her social, cultural and economic circumstances.

The Supreme Court of Canada (SCC) was challenged to confront how the legacy and ongoing effects of colonialism were resulting in rising incarceration rates among Indigenous people. While avoiding the question in specific terms, they nonetheless confirmed that these structural factors do indeed contribute to higher rates of violent crime, with the SCC writing that the sentencing judge in this case had not "considered the systemic or background factors which may have influenced the accused to engage in criminal conduct."

As the Gladue decision and *Gladue Principle* was applied in numerous subsequent cases, it emerged as a strategy to address the over-incarceration of Indigenous offenders in Canada's criminal justice system.

In 1999, while making up just 3 percent of the population, Indigenous offenders made up **12 percent of those in custody**. Taking Canada's history of cultural genocide and intergenerational trauma into consideration when considering an offender's case at sentencing was seen as an opportunity to establish a more holistic and restorative approach to criminal justice, creating options for diversion, reducing recidivism within Indigenous communities, and bringing down the disproportionate rates of incarcerated Indigenous people.

By 2012, these numbers had increased, and the **Supreme Court** was asked once again to consider Gladue. Two Indigenous offenders, Manasie Ipeelee and Frank Ralph Ladue, had challenged the sentencing decisions in their long histories in the criminal justice system. In this case, the SCC was asked to consider how Gladue is applied in instances of re-offence and supervisory conditions for Indigenous offenders. They found that the Gladue Principle must apply in all sentencing regimes for all classes of offences, even serious ones, because while "poverty and other incidents of social marginalization may not be unique…how people get there is. No one's history in this country compares to Aboriginal people's." Once again, the structural factors produced by colonialism must be considered when sentencing and/or diverting Indigenous offenders.

The Gladue Process in Theory

Following the 2012 affirmation of the Gladue Principle, all levels of government were compelled to enact it by providing resources and infrastructure for implementation.

So, given this directive, how is the Gladue Principle *supposed* to unfold in criminal courts?

Today, Gladue is meant to **apply at** various stages of an Indigenous offender's path through the criminal justice system, typically between bail hearings and sentencing. Gladue Courts, such as Old City Hall in Toronto, appoint judges with knowledge of Gladue "factors" such as a family history of attending an Indian Residential or Indian Day School, the overrepresentation of Indigenous children within the **child welfare system**, and high levels of addictions and **mental health issues** within Indigenous populations, both on and off reserve, compared to non-Indigenous ones.

Indigenous Courtworker programs offer support to Indigenous offenders throughout the court process and in creating healing and bail plans and connecting them with support. In some cases, community justice and healing programs can divert Indigenous offenders to serve within the community rather than a custodial sentence. There are also healing and/or sentencing circles that allow the offender, community members, and members of the Court to speak and be heard when discussing the impacts of the person's actions and an appropriate sentence.

Finally, there are **Gladue Reports** that tell the offender's life story, as well as those of their family members and communities, to draw attention to the "systemic and background factors" — or, more plainly, experiences of intergenerational trauma resulting from colonialism — that have led the offender to appear before the Courts.

In essence, Gladue Reports document the offender's lived experiences and make appropriate, often community-focused and culturally-informed recommendations for the judge to consider during sentencing in lieu of further time in custody (for example, an offender attends an Indigenous healing lodge to address their mental health, substance use issues, in the place of incarceration).

The vision of Gladue is a system of support for offenders and communities that takes into consideration the longstanding and ongoing colonial violence experienced by Indigenous people, on and off-reserve, throughout their lives, which can lead to their involvement with the justice system. In so doing, it promises a chance for offenders to be heard and understood, and it offers an opportunity for rehabilitation and reconnection in a system that historically neglects the value of either concept. Moreover, it emphasizes that Indigenous legal and cultural practices be included and tailored to the specific needs of all involved. Gladue has been interpreted to be a manifestation of restorative justice.

Yet, in practice, the vision has not materialized.

Does Gladue Reduce Incarceration or Rehabilitate?

Since its conception in 1999 and after it was further refined and reinforced in 2012, Gladue has been intensively studied, and themes on the findings listed above in the introduction have been reported by government agencies, community members, and Indigenous offenders alike.

Fundamentally, Gladue has proven ineffective at its stated goals of reducing recidivism and over-incarceration and providing pathways to rehabilitation.

The overrepresentation of Indigenous offenders was called a crisis in *R v Gladue* when they made up 12 percent of the incarcerated population. However, by **2020**, the **Correctional Investigator of Canada** confirmed that Indigenous inmates under federal sentence had surpassed 30 percent. Those numbers were even higher in **2023** when Indigenous inmates were found to comprise nearly 33 percent of federal inmates, and Indigenous women make up 50 percent of the **female federal prison population**. These numbers are shockingly high considering the proportion of Indigenous people in the **general population**, with Indigenous women comprising about 3 percent. Ivan Zinger, Correctional Investigator of Canada, **reported** in 2023 that "the plight of Indigenous peoples behind bars has become steadily and progressively worse. Indeed, Canada's correctional population is becoming disturbingly and unconscionably Indigenized."

The Indigenization of incarceration for Indigenous people in provincial and territorial jails, or even specific jails and prisons, is even more unconscionable when some prison and jail populations are **estimated** to be as high as 99 percent Indigenous.

When they leave prison (while still in the justice system), there are also higher rates of recidivism among Indigenous offenders. In 2019, Correctional Services Canada **noted** that "Indigenous women had re-offending rates higher than both non-Indigenous women and men (i.e., 47%, 21% and 39% respectively)." Another study in the same year **found** that, "nearly 38% of all federal offenders released in 2011–2012 reoffended within 5 years and about 60% of Indigenous men reoffended in this time period."

The key driver of incarceration generally is the attack on Indigenous social organization, culture, and economic structures that have pushed Indigenous people to the lowest socio-economic indicators in the country and exponentially increased encounters with police. For Indigenous women, gender violence compounds the trend. Canada's Corrections Ombudsman **argues** this drives recidivism as well: "There is clear evidence that Corrections Services Canada needs to do much more to address the needs of Indigenous women, a large part of which is making effective services available and accessible."

That support is currently limited. It is rare for institutions to have a Native Inmate Liaison Officer (NILO), and if they do, they are frequently at capacity and cannot fully support Indigenous people inside. There is limited culturally appropriate programming (sometimes all inmates can access is an occasional smudge, for example). The **Pathways Program**, designed to support Indigenous people, has been found to be **lacking**, healing lodges are underfunded, and Elders who work with offenders are **not paid enough**. This is all in the context of overcrowded and, oftentimes, decrepit institutions.

With this knowledge, how can the criminal justice system fail so tremendously? Stephen J. Ford, Mohawk Criminal Defence Lawyer, remarked at the BRISC workshop,

> **The Court has said racism does exist against Indigenous people in Canada, and that has manifested itself with discrimination in the criminal justice system and is a crisis. In my view, it remains a crisis because when we look at one of the metrics of its operation — the disproportionate over-incarceration of Indigenous peoples — the problem has gotten worse in the last 25 years. It would seem to be that the systemic racism at the core, the root of the problem, has not been addressed sufficiently at all. If anything, it's gotten worse.**

Considered under this framework, could Gladue merely be a superficial or performative attempt to address the structural and direct racism ongoing in Canadian society and the Canadian criminal justice system? While there are **continued calls for alternatives to incarceration**, increasing **culturally appropriate resources** for federal inmates, and resources for community-based initiatives, those calls may not go far enough to address the challenges identified over the past 25 years. At least, that's the opinion forming among community members exhausted by the failure of Gladue.

"The Court has said racism does exist against Indigenous people in Canada, and that has manifested itself with discrimination in the criminal justice system and is a crisis. In my view, it remains a crisis because when we look at one of the metrics of its operation — the disproportionate over-incarceration of Indigenous peoples — the problem has gotten worse in the last 25 years."

- STEPHEN J. FORD, MOHAWK CRIMINAL DEFENCE LAWYER, BRISC WORKSHOP PARTICIPANT

Gladue on the Grand River: The BRISC Workshop

The incarceration rates and involvement of Indigenous people, families, and communities in the criminal justice system on the Grand River — specifically at Six Nations and Brantford — echoes the situation in many parts of the country.

In fact, given that Six Nations is the largest First Nation in Canada, the challenges are more acute. Violent crimes, including homicides, happen occasionally in the communities as well, leaving deep and lasting wounds. When offenders of these crimes — sometimes members of those same communities — have the Gladue Principle applied in the absence of any restitution or restoration, there is a sense that justice is not served, amplifying the pain.

Six Nations is the largest First Nation by population and has among the longest history with colonialism in this country. The Haldimand Tract, deeded to the Haudenosaunee in 1784, has been chipped away by colonial governments "by hooks and crooks," as Cayuga Chief Deskaheh (Levi General) once said. This has included repeated attacks on authentic governance structures as well as Haudenosaunee laws and cultural and social norms. The Mohawk Institute, based in Brantford, was the longest-operating residential school in Canada, stealing and abusing Haudenosaunee (and other Indigenous children) from 1830 to 1970. If there were any place that the Gladue Principle could address the structural forces of colonialism, it would be on the Grand River.

This is the context that the organizers of the BRISC Gladue Workshop sought to address as they work toward a community consensus on a new approach to criminal justice. This initial workshop offered a space for community members and justice workers to share their experience and expertise on Gladue. They identified disorganized Gladue processes and lack of information; limited resources for rehabilitation, restoration & Gladue Workers; the rise of self-identification and identity fraud; and a failure to support victims, families and communities of violent crime.

Four Primary Concerns
Regarding the Effectiveness of the Gladue Principle

CONCERN #1

Disorganized Gladue Processes
& a Lack of Information

CONCERN #2

Limited Resources for Rehabilitation, Restoration
& Gladue Workers

CONCERN #3

The Rise of Self-Identification & Identity Fraud

CONCERN #4

Failure to Support Victims, Families
& Communities

CONCERN #1

Disorganized & Unclear Gladue Processes

Depending on the jurisdiction, Gladue implementation can vary.

Participants at the BRISC workshop described a lack of information and coordination as a core challenge in Brantford and Six Nations. This was reported by those travelling from the Ottawa region and others with experience across the country. On the other hand, Hamilton and Toronto tend to have clearer processes in place. In Toronto, the Indigenous People's Court (IPC) is engaged and operates on a daily basis. In these latter communities, there is a broader criminal justice infrastructure, helping to explain the smoother implementation.

But on the Grand River, as Jaime Montour, a paralegal at Six Nations, remarked, "There's a lack of information when it comes to IPC and a lack of information when it comes to applying Gladue […] Organizations that write reports are backlogged." The two issues identified here are the lack of information on Gladue Processes and a lack of capacity to implement Gladue.

The Department of Justice documented the former in their 2023 "**Spotlight on Gladue**" report: "Gladue application is often ad hoc, varying significantly from one jurisdiction to another, which leads to a lack of predictable outcomes for Indigenous offenders… [and] uneven application across the country. This lack of clarity and coordination undermines the effectiveness of the Gladue principles." Because provincial, territorial and federal governments are operating — ironically — without legislation or concrete policy framework, they tend to interpret the Gladue Principle differently, leading to different outcomes. That's why the process varies from Hamilton to Ottawa and Ontario to B.C.

However, it also means varying degrees of information are available from these jurisdictions for Gladue implementation. Many Indigenous offenders are not aware they can opt for the Gladue Process or lack access to resources to understand what it may mean for them.

At the BRISC workshop, participants frequently spoke of the lack of clarity from provincial or federal officials as well as court administration.

For those tasked with implementing Gladue in jurisdictions where there is a lack of information or process, they are often scrambling to accommodate requests in the absence of a framework, meaning Gladue reports take much longer to write, are not taken into consideration and, importantly, are written without the corresponding support for offenders in what is often a retraumatizing process: Being asked to relive the experiences that led to encounters with the criminal justice system in the first place can be harmful, especially in the absence of knowledge about how this information will be used.

All that is at the discretion of judges and Justices of the Peace (JP), some of whom are unfamiliar with Gladue processes. While a single JP attended the BRISC workshop, training and education on its implementation are likewise ad hoc and up to (overwhelmingly non-Indigenous) individual court administrators to pursue. The same can be said for crown and defence counsel. The result of this lack of awareness, paired with a lack of information, is the uneven and harmful application of Gladue in the region.

CONCERN #2

Limited Resources for Rehabilitation, Restoration & Gladue Workers

In some cases, Gladue shows potential

In some cases, Gladue shows potential. One BRISC participant, who was formerly court-involved, had the opportunity for a restorative approach – flowing out of Gladue – and spoke about how it made all the difference to a change in her trajectory. Now working in healing and wellness, she is an example of early diversion that Gladue can enable. There are other cases, most often for minor crimes, where diversion programming — such as the Indigenous Community Justice Program offered by some Friendship Centres — allows offenders to come together with those impacted by their actions in healing circles or sentencing circles, thus allowing them to hear first-hand about the impact and attempt to work toward resolution.

However, given that there are limited resources and the criminal justice system is overwhelmed with Indigenous offenders, it is not certain just how often they are given the opportunity to participate in (or even know about) these restorative diversion programs. (This is also the reality in "returning" programs where offenders are welcomed home, but these are rare in the broader application of Gladue).

As Stephen J. Ford asked at the BRISC workshop, "[W]hat resources are available in a particular circumstance for all parties? What is available for victims? What placement, be it residential treatment or other things, are available to the offender? Can these things work together to bring a satisfactory resolution? That's not always a clear-cut answer."

At Six Nations, a relatively **new healing centre** may help address the issues on the Grand River, but there is not yet data on its success rates.

In addition to the lack of support for implementing restorative justice initiatives, there is also a lack of resources when it comes to implementing Gladue practices. As Graeme McConnell has noted,

> **Even in jurisdictions where programs have been established, Gladue reports are not necessarily provided for all Indigenous offenders due to a lack of resources and awareness. Common problems include a limited number of Gladue report writers for the courts to utilize and insufficient funds to meet the demand for the reports. This shortage can result in a Gladue report that does not properly contextualize the offender's actions, a pre-sentence report with a minimal Gladue component, or the absence of a Gladue report or component altogether.**

Those who work in the courts at the BRISC workshop repeatedly noted their workload challenges and attempts to keep up with the demand. In rare instances, the infrastructure is growing to support the need, but those tasked with providing reports to judges are overwhelmed and at capacity on the Grand River. Paired with the lack of support for offenders and for victims and their families, the Gladue is plagued by chronic neglect by most jurisdictions.

The core issue is a lack of a process for confirming Indigenous identity. Upon sentencing, offenders are asked if they are Indigenous and if they respond in the affirmative, they are assigned a Gladue Writer with no questions asked.

According to Paula Hill, "there appears to be no process for discerning Indigeneity with inmates; they're just asked if they're Indigenous, and people say yes. It's like they won the lottery."

CONCERN #3

The Rise of Self-Identification & Identity Fraud

Related to ad hoc processes and the lack of capacity is the emergence of identity fraud.

As Indigenous people across the country confront the phenomenon of non-Indigenous Canadians claiming to be Indigenous with little to no ancestry or connection to Indigenous communities, it is impacting the criminal justice system in a very real way. As **the Spotlight on Gladue report** noted, "The identity of the offender as Indigenous can sometimes be based on self-identification without thorough verification, leading to potential misrepresentations and exploitation of the Gladue principles." At the BRISC workshop, numerous Gladue and court workers and justice coordinators expressed frustration. There appears to be a vacuum of policy and oversight about who can access Gladue and when, leading to – as mentioned above – an ad hoc and uncoordinated approach.

The core issue is a lack of a process for confirming Indigenous identity. In many cases at bail, the accused person is asked if they are Indigenous and if they respond in the affirmative, the court typically grants it, with little if any consideration towards the primary, secondary or tertiary grounds usually considered. There is no requirement to validate the accused's claim of Indigenous identity; rather, the Justice of the Peace and Crown Attorney agree to record that the Court has considered the circumstances of a particular "Indigenous" offender, based on the overrepresentation of Indigenous people in custody, and in complying with Gladue.

According to Paula Hill, "there appears to be no process for discerning Indigeneity with inmates; they're just asked if they're Indigenous, and people say yes. It's like they won the lottery." And, certainly, when confronted with prison, non-Indigenous offenders will often take this court-ordered luck and follow the Gladue process, contributing to the backlog of reports and stretching further the capacity of Gladue Writers.

While Indigenous Gladue writers will then be tasked with documenting their Indigeneity and offenders' path through colonization, a Justice Coordinator from a regional Indigenous organization, described the difficult situation: "We don't want to say who is Native and who is not." A relatively new process to deal with the issue has emerged. It involves a determination of a "No Gladue Report," which serves as a rebuttal to false claims of Indigeneity and ultimately puts the onus on the judge. Without Gladue Reports for these individuals, the fraud can be circumvented, and the "No Gladue Report" process is catching on.

Unfortunately, since many judges are not qualified to assess Indigeneity, it is believed that many non-Indigenous people are still accessing Gladue processes.

As one BRISC commenter remarked on this issue, "Colonization has stolen Indigenous people's lands, our governments, our social and cultural orders, and now these [non-Indigenous] people are coming for our very identities and exacerbating the challenges colonization wrought in the first place." To that point, as identity fraud challenges the capacity of Gladue infrastructure, actual Indigenous people in the criminal justice system are bumped from the queue by those who have been given the right numbers.

In fact, Paula Hill noted that on court video dockets – appearances via Zoom from jails – the overwhelming majority of offenders are racialized Indigenous people. These individuals are apparently not receiving bail or may not know to ask for a Gladue Process at bail.

CONCERN #4

Failure to Support Victims, Families & Communities

Whether an offender is Indigenous or not, Gladue is sometimes referred to as a "get out of jail free" card, often by advocates of tougher sentencing guidelines generally (Roach and Rudin 2000).

For portions of the BRISC workshop, representatives of local Police Services attended and spoke critically of Gladue. Darren Montour, Chief of Police at Six Nations, described the surprise of front-line officers re-arresting individuals soon after they had been convicted of a violent crime. In other words, and as mentioned above, Gladue does not reduce recidivism. So, Montour asked, "When does Gladue outweigh the safety of the public?"

Given the experiences of Indigenous people with police services generally, discrimination is a partial explanation of recidivism. But Montour's question was echoed by BRISC participants who frequently spoke of both the lack of justice for their families and the lack of safety felt in the community when offenders are released through Gladue processes. Amber Porter discussed her family's experience attempting to advocate for justice and safety against the backdrop of Gladue processes designed to reduce incarceration:

> **We have been in court for six years, and it still hits very hard. The court has tried to change my victim impact statement — I redid it seven times. I felt like they took my words away. I don't trust people; I don't trust policing; I don't trust counsel. The people responsible were released on bail. They dropped some charges, and they minimized some charges. We, as victims, the victims' families, have tried and tried for years — because some of those offenders were not even from our community and they are still allowed in our community — we wrote and tried to advocate, and we don't get any answers. We've asked for meetings [and] don't get them. We don't have those answers. And I see those offenders every day. They live beside us, across from us. They live around the corner from us. When I look at bail, and when I look at sentencing, there are no words that can really sum up the feelings or even how to process the trauma of things; it just retraumatizes.**

Many similar comments were shared at the BRISC workshop as well as a general sense that violent crime is increasing at Six Nations, including a number of homicides over the past year. The comments reveal a distrusty reveal a deep distrust of the criminal justice system — not because it incarcerates Indigenous people disproportionately, but because it fails to deliver any semblance of justice. This view is reflected in the findings of the Missing and Murdered Women and Girls Inquiry. While deeply critical of policing, **the Inquiry also found** the "use of Gladue reports and sentencing principles are not adequately explained to families and survivors. The manner with which prosecutorial discretion is exercised in cases involving Indigenous women, girls, and 2SLGBTQQIA people has left many families and Indigenous people to question the quality of prosecution and to believe racism and sexism have played a role in that" (719).

BRISC workshop participants echoed the feeling of lack of justice and support. While organizations throughout Ontario, such as **ONWA**, **Aboriginal Legal Services**, and **Six Nations**, offer programs and services for Indigenous victims of crime, like Gladue itself, accessing them comes with its own challenges. Victims do not feel supported, and when Gladue is engaged, the Court seems to favour the offender rather than the victims or community, who may be placed at

risk when the offender is released. In many cases, the offender is from the community and known to the victim and their families.

Discussions of restorative justice are essential, but they are less immediate in community contexts where efforts from above, like Gladue, fail to account for the need for justice in cases of violent crime.

Incarceration is likewise violent — a bleak solution to the consequences of colonization. But at the BRISC workshop, participants insisted that without community restoration efforts and support for victims and their families to accompany attempts to address incarceration rates in the criminal justice system, offenders avoiding incarceration redoubles the harm.

"We have been in court for six years, and it still hits very hard. The court has tried to change my victim impact statement — I redid it seven times. I felt like they took my words away. I don't trust people; I don't trust policing; I don't trust counsel...

When I look at bail, and when I look at sentencing, there are no words that can really sum up the feelings or even how to process the trauma of things; it just retraumatizes."

- AMBER PORTER, BRISC WORKSHOP PARTICIPANT

Conclusion: Restoration (but Justice, too)

The imposition of criminal justice infrastructure in Canada (as well as the United States, Australia, and a number of other colonial contexts) has been a foundational pillar in the oppression of Indigenous people.

Historically, this infrastructure was deployed to discipline Indigenous people to the new rules, norms and laws of colonial society (Ford, 2011). And as that infrastructure grew, it consumed us. There are few Indigenous people in contemporary Canada who have not been impacted by the violence of the justice system or the violence of colonialism more generally, which has manifested in violence in communities.

This reality has been recognized and documented for many years and gave rise to the Gladue Principle 25 years ago. However, it has largely failed to meet or address the challenge in any systemic way. This has led Indigenous communities, organizations, and organizers alongside Black and racialized communities to **challenge the system of carcerality** with investments in approaches like restorative justice outside the Canadian justice system — some of these approaches have roots in Indigenous concepts of justice. They question the very concept of "over-incarceration" as if there is a reasonable amount of incarceration that is acceptable (Nichols, 2014).

And yet, despite Gladue, reform in the criminal justice system generally has not materialized for victims of violent crime and their families who face subsequent and ongoing harm in their attempts to advocate for and seek justice.

In other words, the modest, incremental, and ad hoc approaches to change in the system only bend it back toward the violence we're all so well acquainted with — and Indigenous families, communities, and Indigenous women especially — experience it disproportionately. This leads, in some cases at least, to a seemingly ironic call for incarceration.

Perhaps, in cases of non-violent crime, the challenges identified by the BRISC participants can be addressed to alleviate the crisis of incarceration: standardized and clear processes, knowledge and capacity among court workers and administrators, resources for restoration and rehabilitation, strategies to address identity fraud and the abuse of Gladue, and support for victims and their families. But they are not enough.

It is not a surprise that participants at the BRISC workshop advocated for alternatives. Josh Sault-Whitlow suggested Gladue is just an act, "all about political correctness and Canada maintaining its image on the world stage as great upholders of human rights [...] If our people want change, we have to stand up and push for it as a collective. We have to push for it and be loud about it because otherwise, nothing's ever going to get done." Jaime Montour added to this sentiment in a comment about the shape of that change:

> **We are faced with intergenerational traumas and family circumstances… [but] it's the system itself that needs to be more compassionate to the individual, more compassionate to the victims, more compassionate to the system as a whole. We're living in a world where the majority of it is filled with fear, and we've forgotten how to love, how to trust. We've forgotten what respect is. We have to remember that we're all human beings.**

How we get to a compassionate system was reflected to a degree in the MMIWG Inquiry testimony. Kassandra Churcher – arguing for alternatives – asserted that "First Nations, Métis, and Inuit communities must be engaged in the process of reenvisioning a system of justice that reflects their practices, beliefs, and cultures. They must also be given the funding to support community-led solutions to prevention and reintegration" (643).

Until Canada engages with this call for alternatives, it seems clear that attendees at the BRISC workshop and others involved in this work across the country will refuse to offer any excuses for the criminal justice system in Canada nor stop calling for accountability for the harm it is responsible for and continues to perpetuate, which is ultimately rooted in Canadians' failure to address the colonialism foundational to the system.

While communities, like those on Grand River, will keep working toward individual and collective healing, the advocacy will continue and increasingly under a different approach, reflected in closing words from Paula Hill: "Ask politely and you won't get very far. Sometimes you have to kick the goddamn door in."

Bibliography

Carver, Bronson. "'It's as if the people there are not human': Mamakwa on Kenora Jail." *Kenora Miner and News*, July 14, 2023. https://www.kenoraminerandnews.com/news/local-news/its-as-if-the-people-there-are-not-human-mamakwa-on-kenora-jail

CBC News. "Beyond 94: 30. Eliminate the overrepresentation of Aboriginal people in custody over the next decade." *CBC News*, May 1, 2024. https://cbc.ca/newsinteractives/beyond-94/eliminate-the-overrepresentation-of-aboriginal-people-in-custody-over-the-next-decade

Correctional Service Canada. "Correctional programming for Indigenous offenders." Modified Feb 29, 2024. https://www.canada.ca/en/correctional-service/programs/offenders/indigenous-corrections/correctional-programming-indigenous-offenders.html

Crown Relations and Northern Affairs Canada. "Indigenous peoples and communities." Modified Jan 16, 2024. https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303

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

Ford, Lisa. *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836*. Cambridge, MA: Harvard University Press, 2011.

Indigenous Services Canada. "Reducing the number of Indigenous children in care." Modified May 24, 2024. https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851

Lavalley, J., S. Kastor, J. Valleriani, and R. McNeil. "Reconciliation and Canada's overdose crisis: responding to the needs of Indigenous Peoples." *CMAJ: Canadian Medical Association Journal* Vol. 190, no. 50 (2018). https://doi.org/10.1503/cmaj.181093

McConnell, Graeme. *Indigenous People and Sentencing in Canada*. Ottawa, ON: Library of Parliament, 2020. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/202046E

National Inquiry into Missing and Murdered Indigenous Women and Girls. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1a. Canada, 2019. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

Nichols, Rob. "The Colonialism of Incarceration." *Radical Philosophy Review* Vol. 17, no. 2 (2014): 435-455. https://philpapers.org/rec/NICTCO-9

Office of the Correctional Investigator [OCI]. "Correctional Investigator Releases Updated Findings on the State of Indigenous Corrections in Canada: National Indigenous Organizations Issue Statements of Support." *OCI*, November 2, 2023. https://oci-bec.gc.ca/en/content/correctional-investigator-releases-updated-findings-state-indigenous-corrections-canada

Office of the Correctional Investigator. "Summary of Ten Years since Spirit Matters: Indigenous Issues in Federal Corrections (Parts I & II)." Modified Nov. 1, 2023. https://oci-bec.gc.ca/en/content/backgrounder-summary-ten-years-spirit-matters-indigenous-issues-federal-corrections-parts

Public Safety Canada. "Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge." January 21, 2020. https://www.canada.ca/en/public-safety-canada/news/2020/01/indigenous-people-in-federal-custody-surpasses-30-correctional-investigator-issues-statement-and-challenge.html

R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 SCR 688, <https://canlii.ca/t/1fqp2>, retrieved on May 15, 2024.

R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/8000/index.do>, retrieved on May 15, 2024.

Richard, Chantell. "Over-representation of Indigenous people in federal prisons reaches 'disturbing' historic high." *CBC News*, January 21, 2020. https://www.cbc.ca/news/indigenous/indigenous-overrepresentation-prison-oci-statement-1.5434712

Roach, Kenneth and Jonathan Rudin. "Gladue: The judicial and political reception of a promising decision." *University of Toronto Press Journals.* Vol. 22, Iss. 3. (2000): 355-388. https://doi.org/10.3138/cjcrim.42.3.355

Shepherd, Stephane M., and Thalia Anthony. "Popping the Cultural Bubble of Violence Risk Assessment Tools." *The Journal of Forensic Psychiatry & Psychology* no. 29, vol. 2 (2018): 211–20. https://doi.org/10.1080/14789949.2017.1354055

Stewart, Lynn A., Geoff Wilton, Sebastian Baglolem, and Ryan Miller. "A comprehensive study of recidivism rates among Canadian federal offenders: August 2019." Ottawa, ON: Correctional Service of Canada, 2019. https://www.canada.ca/en/correctional-service/corporate/library/research/report/426.html

Toth, Katalina. "Indigenous Healthcare in Canada." *Harvard International Review.* March 4, 2022. https://hir.harvard.edu/indigenous-healthcare-in-canada

Urbanoski, Karen A. "Need for equity in treatment of substance use among Indigenous people in Canada." *CMAJ : Canadian Medical Association journal*. Vol. 189, no. 44 (2017). https://doi.org/10.1503/cmaj.171002

Zinger, Ivan. *Office of the Correctional Investigator Annual Report 2020-2021*. (2021). Ottawa, ON: OCI, 2021. https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2020-2021

Zinger, Ivan. *Office of the Correctional Investigator Annual Report 2022-2023.* (2023). Ottawa, ON: OCI, 2023. https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2022-2023#s9

Zinger, Ivan. *Ten Years Since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada.* (2023). Ottawa, ON: OCI, 2023. https://oci-bec.gc.ca/sites/default/files/2023-10/Spirit%20Matters%20EN%20%C3%94%C3%87%C3%B4%20Web.pdf

TWITTER
@yellowhead_

FACEBOOK
fb.me/yellowheadinstitute

INSTAGRAM
@yellowheadinstitute

WEBSITE
yellowheadinstitute.org