1 Introduction

Why write a book about Indigenous people as part of a Criminal Law Series—and why is there a need for a second edition? The *Criminal Code*[1] makes only four references to Indigenous people[2]—three in the sentencing provisions and one relating to bail. Section 718.2(e) of the Code, passed in 1996, directs judges when sentencing an offender to examine the following:

> [A]ll 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.

The other three amendments were all passed in 2019. The two sentencing amendments—sections 718.04 and 718.201—deal specifically with Indigenous women as victims of crime, and the bail amendment—section 493.2—requires judges and justices of the peace to consider the "circumstances of Aboriginal accused."

Outside of those specific sections, one would have no idea from a reading of the Code that there are any particular issues with regard to Indigenous people and the justice system. Law school courses on criminal law may touch on Indigenous issues, particularly in the context of sentencing—or they may not. Advanced law school courses that specifically look at sentencing will generally have one class, or part of a class, on section 718.2(e) and the cases of *R v Gladue*[3] and *R v Ipeelee*,[4] but that's about it.

1 RSC 1985, c C-46 [Code].

2 This book will use the terms "Aboriginal" and "Indigenous" interchangeably.

3 [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue*].

4 2012 SCC 13 [*Ipeelee*].

The need for a book like this comes not from a close reading of the Code but rather from a shift in our gaze from the statutes to a look at what is happening in this country's courts and jails. While criminal law in Canada is, on its face, the same for everyone, Indigenous people disproportionately bear the brunt of the most punitive aspects of the criminal justice system. In 2019, Indigenous people made up 31 percent of inmates in provincial and territorial jails, and 29 percent of inmates in federal penitentiaries. Overall, Indigenous people made up only 4.5 percent of the Canadian population.[5] The figures are even worse for Indigenous women, who made up 42 percent of the provincial and territorial female inmate population, and 41 percent of the penitentiary population.[6]

If the focus shifts to the number of people imprisoned per 100,000 of the population, the problem becomes even more apparent. In 2017-2018, the imprisonment rate of non-Indigenous Canadians was 78.6 per 100,000, while for Indigenous Canadians, the rate was 677 per 100,000.[7] This means Indigenous people are almost nine times more likely to be imprisoned than non-Indigenous people.

The "crisis" of Indigenous overrepresentation in prison, to use the words of the Supreme Court of Canada in *Gladue*,[8] has been recognized on several occasions by the federal government. In 2001, Prime Minister Jean Chrétien's government said the following in its Throne Speech:

> It is a tragic reality that too many Aboriginal people are finding themselves in conflict with the law. Canada must take the measures needed to significantly reduce the percentage of Aboriginal people entering the criminal justice system, so that within a generation it is no higher than the Canadian average.[9]

5 Statistics Canada, "Adult and Youth Correctional Statistics in Canada, 2018/2019" by Jamil Malakieh, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, December 2020) at 5, online (pdf): <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.pdf>.

6 *Ibid* at 5.

7 Jane B Sprott, Cheryl Marie Webster & Anthony N Doob, "Criminal Justice Reform and the Mass Imprisonment of Indigenous People in Canada" in Kathryn M Campbell & Stephanie Wellman, eds, *Justice, Indigenous Peoples, and Canada: A History of Courage and Resilience* (Abingdon, Oxon: Routledge) [forthcoming in 2022].

8 *Supra* note 3 at para 64.

9 House of Commons, Speech from the Throne by Governor General Adrienne Clarkson, 37-1 (29 January 2001) at 11, online: <https://www.poltext.org/en/part-1-electronic-political-texts/canadian-throne-speeches>. The texts used come from the collection of political texts made available at <https://www.poltext.org> by Lisa Birch, Jean Crête, Louis M Imbeau, Steve Jacob, Mathieu Ouimet, and François Pétry, with the financial support of the Fonds de recherche du Québec—Société et culture (FRQSC).

At the time that promise was made, Indigenous people were 19 percent of the provincial and territorial jail population, and 17 percent of the penitentiary population.[10] Not only have the numbers not decreased over the years, they have continued their upward trend.

More recently, in 2015, Prime Minister Justin Trudeau directed the Minister of Justice to

> conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade … . Outcomes of this process should include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians.[11]

While this is a more modest goal than the one set by the Chrétien government, to date, little progress has been made on this front, and rates of Indigenous overrepresentation continue to rise.

There is no question that the causes of Indigenous overrepresentation are complex and rooted in the history of colonialism in Canada. But the causes of overrepresentation are not all in the past, and they are not all the result of socio-economic factors. The Supreme Court has been clear that Indigenous people face direct and systemic discrimination in the justice system itself and that discrimination is a factor in overrepresentation.[12] This problem brings us to the role of lawyers and the purpose of this book.

Virtually all criminal law practitioners represent Indigenous clients—although often they may not know their client is Indigenous, and that fact, in itself, is a problem. To represent their Indigenous clients, lawyers need to know about their clients, and they need to know the relevant law—that is why this book was written.

The need for lawyers to better represent Indigenous clients was one of the concerns of the Truth and Reconciliation Commission of Canada (TRC). In its 2015 Executive Summary (discussed more extensively in Chapter 2), Calls to Action 27 and 28 were directed specifically to the legal profession:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of

10 Statistics Canada, "Adult Correctional Services in Canada, 2000/01," by Dianne Hendrick & Lee Farmer, in *Juristat*, Catalogue No 85-002-XIE, vol 22 no 10 (Ottawa: Statistics Canada, October 2002) at 11, online (pdf): <https://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0100285-002-XIE.pdf>.

11 Mandate letter from Prime Minister Justin Trudeau to Minister of Justice and Attorney General of Canada (12 November 2015), online: <https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter>.

12 *Gladue*, *supra* note 3 at paras 58-65; *Ipeelee*, *supra* note 4 at paras 57-63; *R v Williams*, [1998] 1 SCR 1128 at para 58, 1998 CanLII 782 [*Williams*].

> residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples* [GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (13 September 2007)], Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.
>
> We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[13]

This book is not a substitute or alternative to the broad-based education that the TRC advocates for members of the legal profession. The book seeks to provide concrete information that is relevant to criminal law practitioners' day-to-day work. However, as the TRC notes, defence counsel must understand some of the broader issues facing Indigenous people in order to properly represent them, Crown prosecutors need this information in order to take more informed positions, and judges clearly must understand these contextual factors in order to properly discharge their responsibilities under section 718.2(e) and the more recent amendments.

For all the reasons outlined above, this is why, before launching into a detailed examination of relevant case law, it is important to step back and understand the landscape in which we are all working. Chapter 2 looks at the 15 commissions and inquiries that have been held nationally and provincially since 1989 and that have looked at the issue of Indigenous people and the criminal justice system. These inquiries have raised important issues that lawyers must be aware of as they represent or prosecute Indigenous people before the courts. In addition to gaining an insight into how the criminal justice system disadvantages Indigenous people in particular parts of the country, these reports also provide suggestions for how to solve some of these problems—they are not intractable. The chapter can of course highlight only some of the relevant observations and recommendations from these inquires, and you may want to look more specifically at the inquiries from your particular region. The chapter ends with a discussion of major themes that have arisen in virtually all the inquiries—namely, the causes of overrepresentation and the impact of colonialism.

Chapter 3 addresses issues relating to working with Indigenous people in the justice system. That work begins with knowing that a person is Indigenous, and so the chapter starts with a discussion of Indigenous identity and discusses how to ask

13 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 168, online (pdf): *National Centre for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.

questions about identity so that they elicit useful information, because not all questions about identity are equally effective. The chapter then discusses the concept of Aboriginal English and how assumptions about people based on the way they speak can and do influence people's attitudes and approaches to Indigenous people before the courts. Finally, the chapter discusses how accommodation for Indigenous cultural practices can occur in the court.

In Chapter 4, there is a detailed discussion of the three major Supreme Court cases addressing Indigenous people and the criminal justice system—*Williams*, *Gladue*, and *Ipeelee*. Before delving into those cases, however, the chapter starts with a look at cases from Alberta in 1917 and Ontario from 1969 to put the more recent cases into a broader context.

Following the discussion of the leading cases, Chapter 5 focuses particularly on the issue of sentencing offenders. The chapter looks at how the courts have addressed the issue of Indigenous identity. It then looks at how information about the Indigenous offender—or "*Gladue* information," as it is often referred to—can be gathered. This then, of necessity, leads to a discussion of Gladue Reports: what they are, where and how they can be obtained (and where they cannot be obtained), and what distinguishes them from pre-sentence reports.[14] The chapter also discusses what *Gladue* factors should be brought to the court's attention. This obviously includes things like family history of attendance at a residential school, but it also addresses the issue of dislocation from the Indigenous community, an issue that has led to conflicting case law from appellate courts in Ontario, Alberta, and Manitoba.[15] The chapter then looks at how *Gladue* information should be provided to the court. This is an important issue, because lawyers and judges are not always aware of the way in which this information can retraumatize the offender or put roadblocks into community reintegration. Next, the chapter discusses how courts should address plea bargains in the wake of the Supreme Court's decision in *R v Anthony-Cook*[16] and the different issues that courts should consider when deciding whether to jump or undercut a proposed sentence. Then there is a discussion of the significance of the Supreme Court's decision in *R v Lacasse*,[17] a sentencing decision that, on its face, has no relevance to the sentencing of Indigenous offenders but is in fact hugely important. The chapter closes with discussions of the relationship between *Gladue* and victims, including a discussion of

14 To help in this regard, see Appendix B, which contains a mock Gladue Report written by Kim Whiteduck of Aboriginal Legal Services (ALS) for an Ontario youth Crown conference in 2016. While not a real Gladue Report (which for reasons of confidentiality could not be reproduced), this report gives an excellent example of what a Gladue Report looks like.

15 See *R v Kreko*, 2016 ONCA 367 [*Kreko*]; *R v Laboucane*, 2016 ABCA 176; *R v Rennie*, 2017 MBCA 44.

16 2016 SCC 43.

17 2015 SCC 64.

the Code's recent amendments that make specific reference to Indigenous women as victims of crime. The chapter concludes with a discussion of the often-misunderstood concept of waiving *Gladue* considerations.

While many lawyers think that the relevance of a person's Indigenous identity arises only at sentencing, this is no longer the case, and Chapter 6 looks at *Gladue* beyond sentencing. Specifically, the chapter examines the following: bail, firearms prohibitions, dangerous offender hearings, military justice, review board hearings, corrections, parole, civil contempt, extradition, professional discipline, and trial issues. It also looks at an area where *Gladue* was found not to apply—the exercise of Crown discretion. The chapter concludes with an examination of how the *Gladue* principles have been used to ground Charter[18] challenges against specific sections of the Code.

Chapter 7 is new to the second edition and focuses on Fetal Alcohol Spectrum Disorder (FASD). FASD is a medical term that seeks to capture the permanent negative impacts of prenatal alcohol exposure on the brain. FASD is not unique to Indigenous people—it is found throughout Canadian society. At the same time, the case law shows that a hugely disproportionate percentage of those coming before the court who are, or are suspected of being, affected by FASD are Indigenous. The intersection of FASD and *Gladue* as well as the particular challenges FASD presents to the court are examined in some detail.

Chapter 8 looks at the evolution of sentencing circles in Canadian courts, from the first significant case that relied on a sentencing circle, *R v Moses*[19] in 1992, to sentencing circles of the present day. The chapter looks at two waves of sentencing circles. It begins with a discussion of the first wave, from 1992 to what is argued was the end of such circles following *R v Pauchay*[20] in 2009. What follows is a look at the challenges these circles faced, particularly regarding victims and the somewhat fraught attempt to develop criteria for the holding of such circles. The chapter then addresses the second wave of sentencing circles and highlights the salient differences between the two, including the holding of such circles outside of the formal court process altogether. The chapter ends with a discussion of not only the advantages of second wave circles but also the challenges that still persist in terms of slowing their more widespread acceptance into the court process.

Finally, Chapter 9 examines the rise of Indigenous-specific courts in Canada. For the most part, the term "Indigenous-specific courts" refers to mainstream courts that have altered their practices to better serve the Indigenous accused and offenders who

18 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

19 1992 CanLII 12804, 71 CCC (3d) 347 (Y Terr Ct).

20 2009 SKPC 4.

appear before them. In addition to looking at the specific examples of these courts across parts of this country, the chapter addresses what lawyers should be aware of when appearing in these courts.

In order to make the book as useful to defence counsel, Crown prosecutors, and judges as possible, at the end of most chapters is a best practices guide. The guide refers to particular pages in the chapter where you can find specific issues that often arise and suggestions on how those issues might be addressed.

If it has not yet become apparent, the issue of the development of distinct Indigenous justice systems is conspicuously missing from this book. There is no question, as many inquiries and commissions have noted, that if we are serious about ending Indigenous overrepresentation, then there must be space created to allow truly Indigenous-based justice systems to flourish. This is a vitally important issue, but it is outside the scope of this book. If you are interested in this issue, and I would hope that many of you are, see Appendix A, which was compiled by Zachary Biech and which contains an extensive bibliography of material that addresses distinct Indigenous justice systems. It provides links to treaties and to works on the reclamation and reinvigoration of Indigenous justice practices that are specific to particular nations as well as some that are more general in scope.

As with any criminal law text, there are many references to cases throughout the book. I have had the opportunity through my involvement with Aboriginal Legal Services (ALS, formerly Aboriginal Legal Services of Toronto) to be directly or indirectly involved in many of the cases cited in this book. I say this not to boast but to acknowledge that I have taken positions in court on many matters that are addressed in this book. Rather than indicate at every juncture where I have had some role, it made sense to list the relevant cases at the outset.

Specifically, I was counsel for one of the parties or an intervener in the following cases (in order of appearance starting with Chapter 2): *Ipeelee*, *R v TB*,[21] *R v Chickekoo*,[22] *R v Barton*,[23] *R v Anderson*,[24] *United States of America v Leonard*,[25] *R v Boutilier*,[26] *R v Peekeekoot*,[27] *R v CK*,[28] *Lewis v Canada (Public Safety and Emergency Preparedness)*,[29]

21 2011 ONCJ 528, aff'd *R v TMB*, 2013 ONSC 4019.

22 2008 ONCA 488.

23 2019 SCC 33.

24 2014 SCC 41.

25 2012 ONCA 622.

26 2017 SCC 64.

27 2014 SKCA 97.

28 2021 ONCA 826.

29 2017 FCA 130.

Law Society of Upper Canada v Terence John Robinson,[30] *R v MC*,[31] *R v Boudreault*,[32] *R v Sharma*,[33] and *R v Turtle*.[34]

In the interests of full disclosure, while not counsel of record, I played a role in the development of the arguments advanced by ALS counsel in the following cases: *Gehl v Canada (Attorney General)*,[35] *Williams*, *R v Chouhan*,[36] *Gladue*, *R v Wells*,[37] *Kreko*, *Ewert v Canada*,[38] *R v Powley*,[39] *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*,[40] *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*,[41] and *College of Massage Therapists of Ontario v Alana Grace Nahdee*.[42] Credit for successful outcomes in many of these latter cases is due to the superb work of counsel—I was just happy to help.

I believe that the passage of time and the different perspective I have taken in this book to the issues raised in the cases has allowed me to view them in a more dispassionate and less adversarial stance. In this, however, you will be the judge.

30 2013 ONLSAP 18.

31 2019 ONCA 502.

32 2018 SCC 58.

33 2018 ONSC 1141, rev'd 2020 ONCA 478.

34 2020 ONCJ 429.

35 2017 ONCA 319.

36 2021 SCC 26.

37 2000 SCC 10.

38 2018 SCC 30.

39 2003 SCC 43.

40 2008 ONCA 534.

41 2008 ONCA 620.

42 (26 October 2015), online (pdf): *CMTO* <http://www.cmto.com/assets/Alana-Grace-Nahdee.pdf>.