

11

Incarceration and the Aboriginal Offender: Potential Impacts of the Tackling Violent Crime Act and the Corrections Review Panel Recommendations

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Introduction

Currently, there are numerous initiatives at the federal level that promise to transform criminal law and corrections across the country. In that regard, it is crucial to consider their potential impacts on the Aboriginal population since they are already overrepresented in Canada's justice system.

Canada has an overall incarceration rate of 130 per 100,000 adults, including both provincial and federal institutions. The estimated incarceration rate for Aboriginal people in Canada is 1,024 per 100,000 adults and for non-Aboriginal persons it is 117 per 100,000 adults (Office of the Correctional Investigator 2006a). Aboriginal people are almost 9 times more likely to be imprisoned than non-Aboriginal peoples. From 2006 to 2007, Aboriginal offenders represented 17% of the total federal offender population while Aboriginal adults represent 2.7% of the Canadian adult population. Over the same time period, Aboriginal offenders accounted for 19.6% of the incarcerated population and 12.9% of the conditional release community population (Public Safety Canada 2007). Perhaps even more startling is that between 1997 and 2007, the Aboriginal population under federal jurisdiction increased by 27.4% (Public Safety Canada 2007).

Because the Aboriginal population is much younger than the overall Canadian population and is growing at a faster rate, the problem of Aboriginal overrepresentation in the criminal justice and corrections systems appears poised to only worsen in absence of substantive ameliorative measures.

A. Tackling Violent Crime Act

The *Tackling Violent Crime Act* (the Act) (Bill C-2, 2008), having received Royal Assent on February 28, 2008, reforms criminal law. This paper briefly canvasses four broad categories of changes to the *Criminal Code* (1985): 1) escalating mandatory sentences of imprisonment for serious firearm offences; 2) increasing penalties for impaired driving; 3) reverse onus on those seeking bail when

accused of serious offences involving firearms and other regulated weapons; and 4) reverse onus for having someone declared a dangerous offender.

The *Tackling Violent Crime Act* is likely to have a disproportionate impact on Aboriginal offenders and, accordingly, on the Aboriginal community.

I. Firearms: Escalating Mandatory Minimums

The Act imposes increased minimum terms of imprisonment for certain firearm offences, particularly where the offence has been committed with a restricted or prohibited firearm,¹ in connection with a criminal organization, or by an individual with a previous conviction for a firearm-related offence. For example, subsection 8(2) of the Act increases the mandatory minimum sentence from one year to three years for the first offence and introduces a new minimum of five years for the second or subsequent offences for possession of a prohibited or restricted firearm with ammunition (section 95 of the *Criminal Code*).

According to 2007 data, a greater proportion of Aboriginal offenders than non-Aboriginal offenders were serving sentences for violent offences (80.6% vs. 66.6%, respectively). Of those serving a sentence for murder, 15.8% were Aboriginal. Among those serving a sentence for a Schedule I offence,² 63.4% were Aboriginal compared to 47.9% among non-Aboriginals (Public Safety Canada 2007).

Increased mandatory minimums for certain firearm related offences provided for in the *Act* will result in longer periods of incarceration, which may contribute to growing overrepresentation of Aboriginal peoples in the corrections system since Aboriginal peoples receive a disproportionate number of convictions for violent crimes. Aboriginal gangs are considered to be criminal organizations under the law and are a growing problem, particularly on the Prairies. Aboriginal overrepresentation in the prison system is linked to the increase in numbers and size of Aboriginal gangs in Canada (Grekul and LaBoucane-Benson 2007). The increase in minimum sentences will apply to anyone convicted in the commission of a gang-related crime. Indeed, Aboriginal street gangs feed off prison gangs and vice versa.

There is a contradiction between the parliamentary intent underlying subsection 718.2(e) of the *Criminal Code* and the *Gladue* line of cases, which require that judges consider the circumstances of Aboriginal offenders when making sentencing decisions, and mandatory minimums. Subsection 718.2(e) provides that all available sanctions other than imprisonment that are reasonable should be considered for all offenders, with particular attention to Aboriginal offenders. Arising from concerns about the overuse of incarceration to address crime, particularly for Aboriginal people, conditional sentencing was enacted in 1995. Subsection 718.2(e) has facilitated the imposition of restorative or community justice in lieu of prison time by allowing courts to take a more culturally relevant, contextual approach to sentencing Aboriginal offenders. However, where an individual has been convicted of an offence with a mandatory minimum term of imprison-

ment, a conditional sentence is not available (*Criminal Code* 1985). Mandatory minimums require judges to impose incarceration for a minimum set period of time, which removes judicial discretion in dealing with individual offenders and their circumstances. Mandatory minimums do not allow judges to consider sentencing alternatives to incarceration as mandated by subsection 718.2(e).

In the seminal case of *R. v. Gladue* (1999), the Supreme Court of Canada concluded that subsection 718.2(e) is designed to ameliorate the serious problem of Aboriginal overrepresentation in prisons and to encourage judges to undertake a restorative approach to sentencing. The Court recognized that Aboriginal offenders are: 1) influenced by a unique set of systemic and background factors; 2) more adversely affected by incarceration; 3) less likely to be rehabilitated by it; and 4) imprisonment is often culturally inappropriate and facilitates further discrimination in the justice system. Subsequently, the Ontario (*R. v. Jensen*, 2005) and Alberta (*R. v. Abraham*, 2000) Courts of Appeal have subsequently held that the law requires that *Gladue* analysis be performed in all cases involving an Aboriginal offender, regardless of the seriousness of the offence. To date, there is no definitive Supreme Court of Canada decision on the constitutionality of mandatory minimums for Aboriginal offenders in light of subsection 718.2(e) o, *Gladu*, and Aboriginal overrepresentation throughout the justice system.

II. Drug- and Alcohol-Impaired Driving

The Act introduces a new regime for drug-impaired driving and increases the penalties for impaired driving via subsection 21(1). For a first offence, the minimum fine will increase from \$600 to \$1,000; for a second offence, the minimum term of imprisonment will increase from 14 to 30 days; and, for each subsequent offence, the minimum term of imprisonment will increase from 90 to 120 days.

Although Aboriginal peoples have among the highest rates of abstinence from alcohol, and drink less often than the general population, there are high levels of heavy use, such as binge drinking (Dell and Lyons 2007). The proportion of heavy drinkers among First Nations adults is higher than in the general Canadian population (Assembly of First Nations 2007). Studies also indicate that Aboriginal Canadians, as a group, experience disproportionately high rates of non-medical drug abuse (Dell and Lyons 2007). The documented rate of illicit drug use was 7.3% among First Nations, which is more than double the 3.0% rate of the general Canadian population (Assembly of First Nations, 2007).

There do not appear to be Aboriginal-specific conviction rates for impaired driving. However, one study found that Aboriginal people made up 35% of a sample group of drunk drivers in Alberta despite being only 5% of the population. Registered Indians, in particular, made up 24% of the sample group (Weinrath 1997). Registered Indians were also more likely to drink and drive repeatedly. This finding was attributed to the indirect influence of other social factors such as lack of employment, education, or social support (Weinrath 1997). Similarly, a

1997 study carried out on Aboriginal crime in Saskatchewan³ concluded that the Aboriginal rate was five times higher than the non-Aboriginal rate (142 versus 29) for impaired driving offences (Quann and Trevethan 2000).

Aboriginal communities are more vulnerable to the devastating effects of alcohol and drugs because of geographic and social isolation, lack of economic opportunities, and the loss of culture, identity, and language as a result of historic policies of assimilation. Problematic substance use is linked to high rates of poverty, family breakdown, unemployment, and poor social and economic structures among First Nations, Inuit, and Métis (Dell and Lyons 2007). Fetal Alcohol Spectrum Disorder (FASD) also disproportionately affects the Aboriginal communities. One study established that among adults with Fetal Alcohol Effects (FAE), 53% of males and 70% of females experienced substance abuse problems. This rate is more than five times that of the general population (Streissguth, Barr, Kogan, and Bookstein 1996). The Supreme Court recognized the interrelatedness of these factors in *Gladue*. Substance abuse was recognized as another reason for the unbalanced ratio of imprisonment for Aboriginal offenders (Gladue, Para 65). On the other hand, it has also been duly noted by the Ontario trial court that some Aboriginal communities have zero tolerance for impaired driving and that these communities deserve the same protection as other communities (*R. v. Boissoneau* 2006).

It may realistically be inferred that with much higher rates of both alcohol and drug abuse, Aboriginal offenders are likely to be disproportionately represented as impaired driving offenders. The mandatory minimum terms of imprisonment are likely to result in an increase in Aboriginal persons in provincial correctional institutions where fewer programs are available due to the shorter duration of sentences. Given the role of addictions in the commission of these offences, any absence of culturally relevant addictions programs in rehabilitation is cause for concern.

In addition, the increase in the minimum fine for a first impaired driving offence is also likely to impact Aboriginal offenders disproportionately. Sections 718.3 and 787(2) of the *Criminal Code* both provide for the imposition of a term of imprisonment in default of payment of a fine. The disadvantaged socioeconomic circumstances of many Aboriginal offenders may result in their incarceration for non-payment of fines. Recent national statistics on Aboriginal fine default were unavailable, however, a Government of Canada study recently concluded:

Fines are most commonly issued for driving while under the influence and for such moral charges as soliciting for the purposes of prostitution. The vast majority of people admitted to prison because of fine default are there because they have no money to pay the fine, and a disproportionate number are Aboriginal. (Addario 2007, section 1.1.6)

The Aboriginal Justice Inquiry of Manitoba reported fine defaulters made up about 25% of the prison populations at any given time and of those 60% were Aboriginal (Aboriginal Justice Implementation Commission 1999).

Given the combination of higher rates of Aboriginal alcohol and drug abuse, widespread Aboriginal socio-economic disadvantage, and mandatory minimum fines and terms of imprisonment, Aboriginal offenders are likely to be disproportionately affected by the impaired driving provisions of the Act.

III. Reverse Onus for Bail

In most cases, if the accused was detained following arrest, the judge must, in principle, release the accused at the bail hearing after he or she has signed an undertaking without conditions. It is the prosecutor who must provide justification to the judge for imposing release conditions or for keeping the accused in custody pending trial. The Act restricts the judicial interim release (bail) of a person charged with certain serious offences involving firearms or other regulated weapons. It reverses the onus in bail hearings for these offences.⁴ In other words, the accused will be required to demonstrate that he or she should be released pending trial (clause 37 (2)).

Numerous studies have documented that Aboriginal people experience discrimination throughout the justice system, including in the granting of bail. The Aboriginal Justice Inquiry of Manitoba found that Aboriginal detainees had a 21% chance of being granted bail, while non-Aboriginal detainees had a 56% chance (Aboriginal Justice Implementation Commission 1999). Aboriginal accused: 1) are more likely to be denied bail, 2) spend more time in pre-trial detention, 3) are more likely not to have legal representation at court proceedings, 4) spend less time with their lawyers, and 5) are more than twice as likely to be incarcerated as non-Aboriginal offenders (Canadian Criminal Justice Association 2000).

Factors such as employment, family ties, whether the accused has a fixed address and links with the community are traditionally considered by judges when determining whether to grant bail because subsection 515(10) of the Code requires an assessment of the likelihood of the accused attending future court dates. Aboriginal persons are less likely to have these factors because of their disadvantaged position and, therefore, are less likely to be granted bail. For example, many Aboriginal people have lower levels of access to employment and are less likely to have a steady employment history, which means they are more likely to be considered a flight risk. In addition, judges consider the effect of a loss of employment upon dependants. Those with less established employment histories may be less likely to be seen as breadwinners (Aboriginal Justice Implementation Commission 1999).

In addition to socio-economic considerations that may make it difficult for Aboriginal accused to convince a judge they merit bail, the reverse onus provision creates a greater legal obligation for the accused, which enhances the need for access to counsel. Yet Aboriginal inmates spend far less time with their lawyers before and during their trials, especially when trials are conducted in remote communities. In many cases, persons with an Aboriginal first language are unable to communicate effectively with police and lawyers or to follow court proceed-

ings. Having interpreters present only partly alleviates this difficulty because many Canadian legal words and concepts do not translate well into Aboriginal languages (Government of Manitoba n.d.).

Aboriginal persons' socio-economic and cultural circumstances are likely to impact them disproportionately in the granting of bail where reverse onus provisions come into play; both as a factor considered by the judge and in their ability to provide adequate arguments in rebutting the reverse onus. In addition, as discussed above, Aboriginal offenders may be disproportionately represented as those charged with firearms offences for which reverse onus for bail hearings would apply.

The Ontario Superior Court has stated that *Gladue* principles apply to bail hearings (. *v.s Bain* 2004). Reverse onus provisions for bail, as applied to Aboriginal accused, while not completely obviating *Gladue* principles (in that the offender may still be granted bail) appear contradictory. Given the disproportionate representation of Aboriginal accused who are denied bail, and the impact of their socio-economic circumstances on both meeting the criteria for bail and in their ability to adequately argue their case, it can be inferred that Aboriginal offenders are disproportionately impacted by reverse onus provisions.

IV. Dangerous Offenders

The Act also amends the *Criminal Code* to facilitate the declaration of certain convicted persons as dangerous offenders by creating a reverse onus for repeat offenders. Sub clause 42(2) provides that anyone convicted a third time for a primary designated offence⁵ (for which a term of imprisonment of at least two years was imposed for each offence) is presumed to be a dangerous offender. The prosecutor applies for this designation with the presumption rebuttable by the offender on a balance of probabilities. Dangerous offenders are considered as being at highest risk to re-offend and it is believed that there is no possible treatment that could control this risk in the community. Accordingly, a dangerous offender will have to serve a prison sentence of indeterminate lgth. A dangerous offender will be eligible for ordinary parole after seven years; however, paroled dangerous offenders are monitored for the rest of their lives. If they continue to present an unacceptable risk to society, they will stay in prison for life (Barnett, MacKay, and Valiquet 2007).

Between 1978 and April of 2007, 427 people have been designated as dangerous offenders. On April 8, 2007, there were 370 active dangerous offenders of which 349 were incarcerated (representing approximately 2.6% of the total federal inmate population). Aboriginal offenders account for 23% of dangerous offenders and 17% of the total federal offender population (Public Safety Canada 2007). It should be recalled that Aboriginal people constitute 3% of the Canadian population. While, on average, urteen14 people a year are designated dangerous offenders, that number has increased in recent years; rising from 8 between 1978 and 1987 to 22 offenders between 1995 and 2004 (Valiquet 2006). Aborigi-

nal offenders are also more likely than non-Aboriginal offenders to be serving time for their third adult conviction for sexual offences and other violent crimes (Correctional Service of Canada n.d.). Given that the dangerous offender designation is most often applied to sexual offences, the reverse onus provisions relating to dangerous offender status will disproportionately impact affect Aboriginal accused.

It is clear from 2007 statistics that Aboriginal offenders are grossly overrepresented among those receiving dangerous offender designations, even taking into account their higher than expected numbers in the total federal offender population. Simultaneously, the application of the dangerous offender designation is increasing, which indicates that this disproportionate representation of Aboriginal offenders will only continue to worsen, particularly in light of reverse onus. Estimates of the additional number of offenders who will be affected by the new measures range from 30 to 50 per year, according to the government's figures, up to 300 according to some observers (Valiquet 2006).

As noted earlier, reverse onus provisions create a greater legal obligation for the accused and accompanying need for access to counsel. The disadvantaged socio-economic conditions and cultural differences of Aboriginal offenders will likely impact them disproportionately in their ability to make arguments rebutting the presumption of dangerous offender designation. It is also clear that dangerous offender designations may engage subsection 718.2(e) of the Code and *Gladue* considerations. The Ontario Court of Appeal extended the engagement of *Gladue* principles to whenever a decision-maker is dealing with the liberty of an Aboriginal person at any stage of the justice system (*R. v. Sim* 2005). In one case, the Ontario Superior Court imposed a long-term, rather than a dangerous offender designation, on an Aboriginal offender who suffered from FASD (*R. v. Mimford* 2007). However, the Ontario Court of Appeal has also upheld an indeterminate sentence imposed upon a dangerous Aboriginal offender where the facts supported the indeterminate sentence (*R. v. S. (G)* 2001). The courts do have discretion under new subsections 753(4) and (4.1) of the Code not to sentence a dangerous offender to indefinite detention where the court is satisfied that another sentence would adequately protect the public. Accordingly, where a dangerous offender finding is made, the court may decide to impose a less severe sentence by making a long-term offender finding or imposing a sentence for the underlying. Ultimately, less judicial discretion in making the dangerous offender finding, as well as a reverse onus provision, combined with the existing disproportionate representation of Aboriginal people as dangerous offenders will likely compound the disproportionate numbers of Aboriginal designations. Nonetheless, judicial discretion exists in sentencing where a dangerous offender finding is made, and it is here that Aboriginal-specific considerations under subsection 718.2 (e) and *Gladue* may come into play. While it may be argued that the actual numbers of offenders impacted is negligible, the disproportionate representation of Aboriginal people as dangerous offenders is not. In absence of meaningful ameliorative measures including culturally relevant rehabilitation programming, these

measures will feed Aboriginal disproportionate representation within corrections contrary to the intent of subsection 718.2(e) of the Code and *Gladue* principles.

B. Corrections Review Panel Report

In 2007 the Government of Canada released the Corrections Review Panel (the Panel) report, *A Roadmap to Strengthening Public Safety* (the Report), outlining recommendations for Correction Service Canada's (CSC) priorities, strategies, and business plans. The report contains 109 recommendations focusing on five key areas: 1) offender accountability, 2) eliminating drugs from prisons, 3) developing employability, 4) renewing physical infrastructure, and 5) earned parole. These areas are considered in this paper for their relevance to Aboriginal offenders.

I. Offender Accountability

The Panel viewed the rehabilitation mandate as a shared responsibility of CSC and the offender. It is therefore recommended by the Panel that the *Corrections and Conditional Release Act (CCRA)* (1992) be strengthened to further emphasize offender responsibility and accountability by adding a substantive section entitled "Offender Accountabilities," which would require active participation in CSC programs. While few would argue with the idea that offender accountability is a critical component of rehabilitation, notions of accountability and responsibility are culturally laden. There is no unanimous notion of what offender accountability and responsibility looks like. Indeed, the Royal Commission on Aboriginal Peoples (1996) stated:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice. (309)

Accordingly, correctional approaches involving restorative justice principles and Aboriginal communities combined with culturally relevant programming both in and outside institutions will facilitate greater accountability and responsibility in Aboriginal offenders as well as greater program participation.

Sections 79 to 84 of the *CCRA* require the National Parole Board and the CSC to develop policies and programs sensitive to Aboriginal needs and circumstances. Section 81 provides for general custody agreements for the transfer of an Aboriginal offender to an Aboriginal community in a non-institutional setting with supervision, treatment, and programming provided under 24-hour supervision of community members. Three other types of arrangements are also possible under section 81 to facilitate the transfer of an Aboriginal offender to a spiritual or healing lodge, or other treatment facility. Section 84 provides Aboriginal communities with the opportunity to participate in an offender's release plan from a penal institution. Despite these and other meaningful initiatives,⁶ it appears

that Aboriginal-specific corrections programming is not meeting demand, which factors into other significant issues, including lower Aboriginal parole rates.

In the 2005 to 2006 Annual Report, the Correctional Investigator noted that:

The Correctional Service does not meet its statutory obligation to ensure the rights of Aboriginal offenders to effective assistance in reintegrating into the community. The Correctional Service's own statistics confirm that the situation of Aboriginal offenders is deteriorating in many areas that the Correctional Service could positively influence. That includes significant delays in timely and safe reintegration into the community; under-representation in minimum-security institutions and over-representation in maximum-security institutions and administrative segregation; limited use of legislative provisions designed to enhance Aboriginal reintegration; and a high ratio of detention referrals. (Office of the Correctional Investigator 2006a, introduction page2)

Aboriginal offender accountability and participation in corrections programming is culturally laden. Culturally relevant programs and restorative justice corrections options that involve the Aboriginal community must be readily available if full Aboriginal offender participation is to be expected. True accountability for many Aboriginal offenders is unlikely without the availability of restorative justice processes that resonate with the offender. It would appear that meeting the Panel's accountability goals would require, at the very least, the expansion and utilization of existing Aboriginal-specific corrections initiatives.

II. Eliminating Drugs from Prison

Drug abuse and trafficking is an issue within penitentiaries given that, according to the Panel, about four out of five offenders now arrive at a federal penitentiary with a serious substance abuse problem. Accordingly, the Panel recommended that CSC strengthen its interdiction initiatives via: enhanced perimeter control; increased use of technology; more drug detector dogs; better searching of vehicles and individuals entering the penitentiary; and intelligence gathering and sharing.

Aboriginal Canadians are at a particularly high risk of substance misuse and injection drug use due to their many social disadvantages, including poverty, low levels of education, unstable family structure, physical abuse, weaker social support networks, discrimination, the after-effects of residential schools, and barriers to health care (Health Canada 2001). Aboriginal offenders are more likely to have alcohol and drug problems than non-Aboriginals, which affects both the extent and severity of their crimes and their chances of recidivating (Varis 2005). Larger proportions of incarcerated Aboriginal offenders are assessed as: being high need (80% versus 64%); having particularly high levels of personal or emotional issues (96%); and having substance abuse problems (92%) (Trevethan, Moore, and Rastin n.d.).

Accordingly, there is a pressing need for Aboriginal-specific, substance abuse prevention and treatment programs. The CCRA clearly requires that CSC provide programs designed to address the needs of Aboriginal offenders. While CSC does provide Aboriginal-specific programs, they must be accessible and adequate. Such

programs need be available nationally and delivered consistently, while allowing for cultural diversity. In addition, attention needs to be directed to maintenance programs and the specific needs of Aboriginal women offenders (Varis 2005). Effective Aboriginal programs dealing with drug abuse and addictions should offer continuity of care both inside and outside of corrections institutions. Aboriginal drug abuse and addictions programs should be holistic and linked to programs that address the root causes of the abuse and addiction, such as abuse, residential schools syndrome and intergenerational effects, and FASD. Any program for eliminating drug use within the Aboriginal offender population needs to be linked to a comprehensive anti-gang strategy.

What is unclear from the Panel's recommendations to eliminate drugs from prisons is the role of harm reduction strategies. It appears that Aboriginal offenders and communities have the most to gain from harm reduction strategies and the most to lose from their absence. Prisoners who inject drugs do not have access to sterile syringes and consequently are at high risk of infection with blood-borne pathogens such as HIV and Hepatitis C. Indeed, needle sharing has been found to be more common inside prisons than outside. There is concern regarding impacts on the larger community as prisoners flow back and forth between the prison system and the community where they may spread blood-borne pathogens (Health Canada 2001).

The overrepresentation of Aboriginal peoples in correctional facilities and among substance abusers are two factors behind the high rates of HIV infection among Aboriginals. The proportion of people with AIDS who are Aboriginal has increased from 1% before 1990 to 15% in 1999. Aboriginal peoples with AIDS are younger, more likely to be women, and more likely to be infected by injection drug use compared to those who are not Aboriginal (Health Canada 2001). Prison has been referred to as a breeding ground for HIV/AIDS, particularly in the Aboriginal community:

The large numbers of Native people in the prison system, high rates of IVDU (intravenous drug use) and needle sharing in prisons, presence of HIV in the prison population, and the increasing proportion of Aboriginal AIDS cases attributed to IVDU all point to an emerging HIV epidemic in Aboriginal communities. The dramatic overrepresentation of Aboriginal people in prison is a serious problem; it has its roots in social inequity. What has not been recognized is that imprisonment itself is contributing to the increase of HIV in Native communities. (Lachmann 2002, 1592)

A policy geared towards eradication of drugs in prison must involve adequate, accessible, culturally relevant programming for Aboriginal offenders that also address the root causes of the addiction. It should be tempered, at least in the short-term, by a realization that drug usage will continue among incarcerated offenders. Complete eradication, if even feasible, will not be immediate. Given the implications for Aboriginal offenders, Aboriginal communities, and non-Aboriginal society via increased exposure to HIV and other illnesses transmitted through intravenous drug use, harm reduction strategies should not be dismissed

as condoning drug use. Indeed, such neglect is very likely to have a disproportionate impact on Aboriginal offenders and the Aboriginal community.

III. Developing Employability

According to the Panel, intake assessments identified that: 1) more than 70% of all offenders at admission had unstable work histories; 2) over 70% had not completed high school; and 3) more than 60% had no trade or skill knowledge. The Panel recommended that employment be the first priority in supporting Aboriginal offenders in returning to the community. Additionally, completion of programs should bear on decision-making regarding release of the offender.

When compared to non-Aboriginal offenders, research has found that Aboriginal offenders are more likely to have lower levels of education and are less likely to be employed when admitted to custody. This disparity has remained stable over the years, despite efforts to improve the situation (Rugge 2006). In addition, efforts to deliver Aboriginal programming within corrections appear to have been inadequate. The Correctional Investigator found a shortage of Aboriginal-specific program delivery, limited access to programs in the community, delays in evaluation and national implementation of Aboriginal programming, and a chronic shortage of Aboriginal-specific core programming in maximum-security institutions, which means that Aboriginal offenders cannot carry out their correctional plans and transfer to lower-security institutions where Aboriginal programs are available (Office of the Correctional Investigator 2007).

With Aboriginal offenders frequently over-classified in terms of institutional security level at the start of their terms and overrepresented among those placed in maximum security or solitary confinement, they may be deprived of the educational and rehabilitation programs they need to be granted parole. Accordingly, the Correctional Investigator has called for prison officials to adopt a new security classification process to reduce the number of Aboriginal people being held in maximum security (Office of the Correctional Investigator 2007). Thus, in addition to the critique that educational and employment programming for Aboriginal offenders needs to be culturally relevant, it must also be made readily accessible and artificial or discriminatory barriers within the corrections system to Aboriginal participation need be removed.

Employment programs should also be holistic and designed to work with marginalized Aboriginal offenders who face multiple barriers, such as poverty, homelessness, racism, exclusion, substance use, mental health issues, different cognitive abilities, histories of abuse, physical health challenges, low educational levels, and criminal records. Fetal Alcohol Spectrum Disorder within the Aboriginal offender population is another specific challenge. One study found that, among Aboriginal individuals with FASD aged twenty-one and older, 80% experienced problems with employment and 70% had disrupted school experience (suspension, expulsion, or drop out) (Streissguth, Barr, Kogan, and Bookstein 1996).

Even the concept of employment is culturally laden. For example, raising children, hunting, fishing, and other forms of economically valuable (and often essential work) may be done outside the cash economy and, therefore, not be considered “employment.” Additional challenges to employability relate to high mobility rates in the Aboriginal population, both within and between urban centres and between urban centres and reserves, which makes it difficult to establish stable employment patterns. Systemic racism in hiring also clearly plays a role in Aboriginal employment. The Aboriginal offender in addition to having the stigma of a criminal record must also face potential discrimination in hiring based on race.

IV. Renewing Physical Infrastructure

The Panel recommended the development and implementation of large regional complexes across the country alongside a move away from smaller stand-alone facilities. One goal of such regional complexes would be the reinforcement of an overall correctional management model stressing offender accountability to follow their correctional plans. Within the single complex, offenders could move between different security levels depending on their participation in their correctional plans. However, these larger facilities would mean that inmates would come from a large regional jurisdiction, which would mean longer distances to home communities for many.

The geographical distance between Aboriginal women offenders and their communities and families has been frequently criticized as contrary to rehabilitation goals. As noted by the Task Force on Federally Sentenced Women (1990), which facilitated the closure of the Prison For Women in Kingston, Ontario, in 2000, “the distant geographic separation of federal female offenders from their families and community support not only makes the pain of imprisonment harsher than is reasonable, but also undermines their prospects for successful reintegration” (chapter 2, page 1).

Extrapolating from the documented experience of Aboriginal women, we can foresee how Aboriginal offenders might be impacted by regional institutionalization. Indeed, the Aboriginal Justice Inquiry of Manitoba observed that:

Our correctional system should reinforce community involvement and responsibility. To this end, facilities ought to be smaller and closer to Aboriginal communities—not large institutions in some faraway place. Most Aboriginal offenders ought to be dealt with in their own community, and the programs that are offered to them should be designed and provided by Aboriginal people. This means that for any reforms to be meaningful, the Aboriginal communities affected must play a major role in designing and controlling a reformed corrections system. (Aboriginal Justice Implementation Commission 1999, volume 1, chapter 11)

Aboriginal inmates already tend to be incarcerated farther away from their home communities. According to the Correctional Investigator, Aboriginal inmates face routine over-classification resulting in their disproportionate

placement in maximum and medium security institutions, which is a problem “because it means inmates often serve their sentences far away from their family and the valuable support of other community members, friends and supports such as elders” (Office of the Correctional Investigator 2006d).

A plan to move towards regional institutions at a great distance from many Aboriginal offenders’ home communities, while simultaneously stressing offender accountability, appears contradictory. Aboriginal offender involvement with their community and family can be pivotal in their rehabilitation. Additionally, access to the community and traditional practices can be an important facet of taking accountability for Aboriginal offenders. They may be disproportionately affected by such a move given the overall socio-economic circumstances of Aboriginal people in Canada because family and community members may not be able to afford to travel to see the offender.

There is also increasing awareness of the role that fatherhood plays in the well-being of Aboriginal men and their children. Work on Aboriginal fatherhood indicates the cyclical nature of absentee fathers through incarceration compounds the socio-historical, economic, and emotional challenges for the next generation (Ball 2008). Creating greater geographical distance between Aboriginal offenders and their families impedes the role of Aboriginal offenders as parents, generally to the detriment of themselves and their children and communities.

Finally, regional institutionalization could obstruct the goals of section 84 of the CCRA, which provides Aboriginal communities with the opportunity to participate in an offender’s release plan from a penal institution. Community members may be hindered in their desire to meet with the inmate and the Parole Board where the offender is far away. It is also unclear what impact a move towards regional institutionalization would have on section 81 of the CCRA dealing with community corrections agreements, which currently allow offenders to serve their sentences in smaller stand-alone community institutions or in the community itself.

V. Earned Parole

The Panel posits that true accountability requires that offenders earn their way back to their home communities by demonstrating to the National Parole Board that they have changed. The Panel cites statistics that approximately 40% of statutory releases, which require offenders to serve the final third of their sentence in the community, are not successfully completed. Of these unsuccessful releases 30% are revoked for breach of conditions and 10% for new offences. In addition, violent re-offending rates are three times higher for statutory releases versus parole releases. The Panel concluded that presumptive release is a key disincentive to offender accountability and, accordingly, recommended that statutory release be abolished and replaced with an earned parole system. This change would be supported by significant enhancements to programs that engage and support offenders.

Currently, most federal offenders are eligible for full parole after serving one-third of their sentence, or seven years, whichever is less, at the discretion of the Parole Board. In contrast, statutory release automatically entitles most offenders who have not been granted parole to serve the final one-third of their sentence in the community. Evidence demonstrates that a gradual, controlled, and supervised release is the most effective way of ensuring public safety (National Parole Board 2001). Offenders fare better when released into the community supervised and on parole rather than unsupervised after serving their full sentence.

In addition to their disproportionate representation within the criminal justice system, Aboriginal offenders are less likely to be granted parole and more likely to serve more of their sentence before receiving parole. They are disproportionately represented among offenders in receipt of statutory release (Office of the Correctional Investigator 2006b). Between 2006 and 2007, the full parole grant rate for Aboriginal offenders was 28.8%, which is 16.6% lower than that for non-Aboriginal offenders. The percentage of time served until full parole supervision was lower for non-Aboriginal offenders than for Aboriginal offenders (39.2% vs. 42.3%, respectively) (Public Safety Canada 2007).

The Correctional Investigator found that longer periods of incarceration and more statutory releases for Aboriginal offenders have contributed to less time in the community for programming or intervention than for non-Aboriginal offenders. The proportion of Aboriginal offenders under community supervision (31%) is significantly less than the proportion of non-Aboriginal offenders (41%) serving their sentences on conditional release in the community. Aboriginal offenders also continue to be overrepresented as a proportion of offenders referred for detention at parole and detained compared to the other offender groups. From 2004 to 2005, Aboriginal offenders accounted for 30.4% of all offenders referred for detention and 30.7% of offenders detained, although they represented 18.5% of the federally incarcerated population serving determinate sentences (Office of the Correctional Investigator 2006b).

The nature of the underlying offence is certainly one factor in later parole rates for Aboriginal offenders, given their proportionately higher representation in the commission of violent crime. Yet, it is unlikely that this alone accounts for disproportionate rates. Systemic racism, culturally laden notions of accountability, and a lack of availability of Aboriginal-specific programs while incarcerated may all play a role.

The Correctional Investigator has noted that “the higher rate of recidivism for Aboriginal offenders is in part due to the Correctional Service’s failure to manage Aboriginal inmates in a culturally responsive and non-discriminatory manner” (Office of the Correctional Investigator 2006c, ?1). Accordingly, he has recommended that CSC: 1) end the over-classification of Aboriginal offenders; 2) increase timely access to programs and services that will significantly reduce time spent in medium and maximum security institutions; 3) increase the number of Aboriginal offenders housed at minimum security institutions; and 4) increase

the number of Aboriginal offenders appearing before the National Parole Board at their earliest eligibility dates (Office of the Correctional Investigator 2006a).

One reason why Aboriginal offenders may be detained longer and serve less time in the community relates to the appropriateness of risk assessment measures such as the Reintegration Potential Reassessment Scale (RPRS). The RPRS has not undergone validation in the Aboriginal context and has been questioned as to whether it propagates cultural bias within the corrections system (Sioui, Thibault, and Conseil 2001). There are significant differences in the profiles of federally sentenced Aboriginal and non-Aboriginal offenders. Aboriginal offenders compared to non-Aboriginal offenders are more often scored as high-risk to re-offend (41.6% compared to 22.6%) (Sioui et al., 2001). Over two-thirds (69%) of incarcerated Aboriginal offenders are rated as having low reintegration potential at the time of intake, compared to 36% of non-Aboriginal offenders (Treveltham et al. n.d.). Further, the parole process may not be sensitive to cultural differences that may influence the Board's perception of factors such as accountability. The presence of an Aboriginal Cultural Advisor is an alternative approach to the traditional parole hearing that was introduced by the National Parole Board to ensure that conditional release hearings were sensitive to Aboriginal cultural values and traditions. However, from 2006 to 2007, the number of hearings held with an Aboriginal Cultural Advisor decreased 2.3% from the previous year (Public Safety Canada 2007).

Less likely to be granted parole and more likely to be released on statutory release than non-Aboriginal offenders, Aboriginal offenders are likely to be disproportionately impacted by any move away from statutory release to earned parole. While the detention of disproportionate numbers of Aboriginal offenders until statutory release is far from a best practice, a move to earned release without a thorough approach to the myriad factors that influence delayed parole will only further Aboriginal disproportionate detention and incarceration rates. Such an approach would include: 1) adequate and culturally appropriate Aboriginal corrections programs, particularly for high need Aboriginal offenders; 2) revisiting culturally laden notions of accountability at parole hearings with enhanced use of Aboriginal cultural advisors; and 3) revisiting initial risk classification and the RPRS for cultural adaptation and enhanced access to and use of section 84 of the CCRA, involving Aboriginal communities in an offender's release plan. Given the trend in case law indicating that *Gladue* principles come into play whenever the liberty of an Aboriginal offender is at stake, they could also be applied to a parole process that results in disproportionate Aboriginal detention rates.

C. Conclusion: The Tackling *Violent Crime Act* and the Corrections Review Panel Report

Taken together, the *Tackling Violent Crime Act* and the recommendations of the Corrections Review Panel, when implemented, will impact Aboriginal offenders

and the Aboriginal community disproportionately. Inherent contradictions can be seen to emerge for the Aboriginal offender. We can contrast the increased imprisonment contained in and resulting from the Act and the likelihood of a disproportionate impact on Aboriginal offenders with the thread of offender accountability that runs throughout the Panel recommendations.

Notions of accountability are culturally laden since they are derived from a particular world view. True accountability for many Aboriginal offenders is unlikely in absence of restorative and community justice processes that culturally resonate with the offender. Thus the increased incarceration of offenders via the Act can be seen, at least in the Aboriginal context, as contrary to the accountability goals enumerated in the Report Locking Aboriginal offenders up for increasing periods of time does not further their sense of accountability or their rehabilitation. This fact has been established in numerous seminal reports on Aboriginal justice over the years and was recognized by Parliament in the enactment of subsection 718.2(e) of the *Criminal Code* and in the *Gladue* line of cases.

Accountability in corrections raises questions pertaining to the availability and accessibility of culturally relevant, Aboriginal-specific programming within and outside institutions and alternative justice corrections options, such as those provided for in sections 81 and 84 of the CCRA. Currently, it appears that Aboriginal-specific corrections programming is not meeting demand. Proposals to move towards regional institutions, at a great distance from many Aboriginal offenders' home communities, need to be assessed against culturally relevant notions of accountability. Regional institutionalization also appears to be potentially obstructionist of the goals of sections 81 and 84 of the CCRA. Employment goals require holistic employment programming designed for marginalized Aboriginal offenders who face multiple barriers. Finally, the elimination of drugs from prison requires culturally relevant and accessible programming to address substance abuse and its root causes, and, at least in the interim, should include harm reduction strategies.

A move to earned release without thorough consideration of the myriad factors that influence Aboriginal delayed parole will only further disproportionate Aboriginal detention and incarceration rates. Systemic racism, culturally laden notions of accountability, and a lack of availability of Aboriginal-specific programs while incarcerated may all play a role in the denial of parole to Aboriginal offenders. The potentially culturally inappropriate nature of classification at intake and standardized risk assessment measures are another reason why Aboriginal offenders may be detained longer and serve less time in the community.

A catch-22 can be seen to emerge—Aboriginal offenders, facing a shortage of culturally relevant programming and corrections options and often prevented from accessing such programs due to over-classification and segregation, are then perceived as not accountable or rehabilitated and therefore detained longer until statutory release. If the recommendation of the Panel to eliminate statutory release

is implemented without addressing these factors, disproportionate numbers of Aboriginal offenders are likely to be detained until their warrant expiry date.

Fostering Aboriginal offender accountability requires more than reviewing programs and resources and implementing new. Programming for Aboriginal offenders needs not only be culturally relevant, it must also be made readily accessible and artificial or discriminatory barriers within the corrections system to Aboriginal participation need be removed. This would involve addressing the over-classification of Aboriginal offenders, their disproportionate segregation, and longer waits for parole. These systemic barriers do not foster accountability for most Aboriginal offenders, and impact their access to addictions and employment programming as mandated by the Panel's goals. Finally, they contribute to the overall disproportionate representation of Aboriginal offenders in federal institutions as decried over past decades by Parliament, the Canadian government, and the Supreme Court of Canada.

The Act, combined with the Panel recommendation, (particularly to move away from statutory release to earned parole, will continue to feed disproportionate Aboriginal representation within the corrections system, contrary to the intention of 718.2(e) of the *Criminal Code* and *Gladue* principles' meaningful ameliorative measures. In accordance with the Panel's emphasis on accountability and program participation, it is imperative that CSC meets its statutory obligation to ensure the rights of Aboriginal offenders to effective assistance in reintegrating into the community.

Endnotes

- 1 “Restricted firearms” is the legal classification for most handguns and some short-barrelled semi-automatic rifles (long guns) while “prohibited firearms” is the legal classification for some handguns (those with a barrel length of less than 4.14 inches) and certain types of long guns (for example, fully automatic firearms such as machine guns). Most firearms in Canada are classed as “non-restricted” (i.e., mostly hunting rifles and shotguns).
- 2 Schedule I is comprised of sexual offences and other violent crimes excluding first and second degree murder.
- 3 The study used data from Prince Albert, Regina, and Saskatoon.
- 4 The twelve indictable offences are as follows: weapons trafficking; possession of weapons for the purpose of trafficking; importing or exporting a firearm knowing it is unauthorized; discharging a firearm with the intent to cause bodily harm, etc.; attempted murder (with a firearm); sexual assault with a weapon, threats to a third party or causing bodily harm (with a firearm); aggravated sexual assault (with a firearm); kidnapping (with a firearm); hostage-taking (with a firearm); robbery (with a firearm); extortion (with a firearm); a criminal act involving firearms or other regulated weapons committed when the accused was under an order prohibiting him or her from possessing such weapons.
- 5 The definition of “primary designated offence” is contained in clause 40 of the Act and includes certain sexual offences against minors, sexual assault, attempted murder, assault with a weapon, causing bodily harm and kidnapping, with the addition of former sexual offences such as rape and indecent assault. A very high proportion of dangerous offenders have committed sexual offences.
- 6 Innovations introduced by the CSC include the hiring of native liaison officers, the provision of Elders’ spiritual services in institutions; and the operation of correctional facilities and healing lodges by Aboriginal communities. Federal institutions have introduced Aboriginal-focussed healing programs and curriculum and reintegration processes (within and outside the institution boundaries) for Aboriginal offenders administered and operated by Aboriginal communities.

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