

# Onashowewin and the Promise of Aboriginal Diversionary Programs

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## ABSTRACT

This article focuses on the use of Indigenous diversionary programming by Onashowewin, an Indigenous non-profit organization in Winnipeg. An analysis of 100 case files finds a recidivism rate of 30%. That is a very positive outcome, especially when compared to numerous studies that have found high recidivism rates for Indigenous offenders. What is particularly encouraging is the possibility that programs like Onashowewin can lead Indigenous persons to more positive lifestyles after their earliest contacts with the justice system, and thereby avert patterns of reoffending that frequently lead to incarceration in federal penitentiaries. Onashowewin also incorporates Indigenous cultures and spirituality into its programming. Part of Onashowewin's promise is the ability to contribute to cultural revitalization, even if limited in scale. Onashowewin, and other programs like it, can also provide a foundation upon which Indigenous self-determination can eventually be built.

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## I. INTRODUCTION

The problem of over-incarceration of Indigenous women, men and youth remains a very serious one in Canada. The phenomenon is a product of a myriad of factors. Some of those factors are systemic to the justice system itself, including over-policing of Indigenous peoples, inadequate legal representation for Indigenous accused, and inadequate correctional services for Indigenous peoples. Other factors pertain to broader patterns of inequality and injustice facing Indigenous people, to a large extent as the consequence of colonialism and discrimination. Those include socio-economic factors such as poverty, substance addictions, and Fetal Alcohol Syndrome Disorder (FASD). They also include the loss of culture, and correspondingly a lack of positive self-esteem. Having entered into the justice system in this way, many Indigenous persons become caught up in lifelong patterns of higher rates of offending or recidivism.

One approach to this problem has been diversionary programs that attempt to resolve offenders' cases without resorting to trial or standardized sentencing processes within the court system itself, with an emphasis on Indigenous culture and spirituality as vehicles of rehabilitation. The usual first step is that a prosecutor approves an offender for participation in a program based on certain criteria such as the offence being a minor one, the offender not having previously been through the program, and whether the accused is willing to accept responsibility for the offence – although many diversionary programs allow an accused to accept responsibility for an offence without prejudicing his or her right to plead not guilty at a later time.<sup>1</sup> The court then typically adjourns the case for a period of months or even in excess of a year. During this time, the offender is required to perform certain tasks or meet conditions with a view towards correcting behaviour. In diversionary programs with an Indigenous emphasis, this can include attending counseling for certain types of behaviour, meetings with the victim(s) under appropriate conditions in order to resolve differences, performing community service hours, participating in cultural activities, and attending meetings with Indigenous Elders for spiritual guidance. If an offender successfully completes the required steps then the prosecutor will withdraw the charge on the next court date. If the accused is unsuccessful

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<sup>1</sup> Church Council on Justice and Corrections, *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures* (Ottawa: Church Council on Justice and Corrections, 1996) at 83–102.

and the prosecutor is not willing to extend another chance, the case is returned to the court system.<sup>2</sup>

The focus of this article is on a specific Indigenous diversionary program offered within Winnipeg. Onashowewin Inc. is a non-profit community based organization, which takes its name from an Ojibwe word that translates to “the way we see justice.”<sup>3</sup> Onashowewin’s mandate is to use the principles of restorative justice in its delivery of programs to Indigenous persons living in Winnipeg who have been in conflict with the law.<sup>4</sup> Programs are designed in a holistic, culturally appropriate and sensitive manner.<sup>5</sup> The programs focus on repairing the harm caused, dealing with responsibility, learning and healing.<sup>6</sup> Onashowewin aspires to both break the cycle of recidivism for Indigenous people who become involved with the criminal justice system, and to set them on more positive pathways in life that contribute to their healing.<sup>7</sup> Both objectives are interrelated.

This article is based on a research project that evaluated and examined the recidivism rates of clients who completed diversion within Onashowewin’s justice circles during the time period of April 1, 2011 to March 31, 2012. These clients included men, women, and youth. Factors such as age, gender, Indigenous identity (Status, Metis, Non-Status, Inuit or other) and number of programs completed were examined, to determine if these variables might have contributed to the success or recidivism of the client. The study measured recidivism based on convictions for new offences following the initial charge that led to the accused becoming a client of Onashowewin.

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<sup>2</sup> Note that this is often, but not always, the case. There are examples of programs where, once a matter is diverted, the offender remains accountable only to members of the Indigenous community while the Crown has no further role. See for example Ted Palys & Winona Victor, “‘Getting to a Better Place’: Qwi:Qwelstom, the Sto:lo, and Self-Determination” in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 12.

<sup>3</sup> Erika Miller, “Staying Charges, Changing Lives,” *Community News Commons* (29 November 2013), online: <<http://www.communitynewscommons.org/our-city/staying-criminal-charges-changing-lives/>>.

<sup>4</sup> Onashowewin Justice Circle, “About” (30 May 2018), online: <[onashowewin.com](http://onashowewin.com)>.

<sup>5</sup> *Ibid.*, “Workshops.”

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

<sup>7</sup> Onashowewin Justice Circle, *supra* note 4.

There are challenges in attempting to measure recidivism. Does one count being charged as recidivism or only conviction? Does one include a revocation of a supervision order, which does not always require a conviction? Any measure chosen will have a substantial effect on the rate of recidivism that is revealed.<sup>8</sup> Further, no method can account for crimes that go undetected and therefore do not lead to arrest or conviction<sup>9</sup> or for wrongful arrests and convictions.

Another important question is the length of the follow-up period. A short study period inevitably skews the results.<sup>10</sup> For example, a recidivism study in Norway found that a one-year follow-up period found a reconviction rate of 20.4% while a four-year follow-up period found a reconviction rate of 37.8%.<sup>11</sup> However, longer periods require more resources and may end up losing relevancy if the period is too long.<sup>12</sup> A two-year follow-up period was selected for the initial analysis of Onashowewin case files. Two years is a commonly used time period and allows comparison to many other studies.

Whether or not an individual reoffends is itself not a complete picture of their success in rehabilitation. Michael Maltz argues that there are other indicators of success that provide a more complete and nuanced picture. For example, what employment or educational attainments has the accused attained after the initial conviction? What improvements in mental health or emotional well-being has the accused displayed since then?<sup>13</sup> A qualitative study based on interviews with accused may be better suited to capturing

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<sup>8</sup> Ruggero, Dougherty & Klofas, "Measuring Recidivism: Definitions, Errors and Data Sources" (2015) Center for Public Safety Initiatives Working Paper No 2015/03 at 4-6; Ruben Castillo et al, "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines" (2004) United States Sentencing Commission, Research Series on the Recidivism of Federal Guidelines, Release 1 at 4.

<sup>9</sup> Alfred Blumenstein & Richard Larson, "Problems in Measuring and Modeling Recidivism" (1971) 8:2 *Journal of Research in Crime & Delinquency* 124.

<sup>10</sup> Harris et al, "A CJCA White Paper: Defining and Measuring Recidivism" (2009) Council of Juvenile Correctional Administrators at 10-11; Synøve Nygaard Andersen & Torbjørn Skardhamar, "Pick a Number: Mapping Recidivism Measures and their Consequences" (2017) 63:5 *Crime & Delinquency* 613 at 619-620.

<sup>11</sup> Nygaard Andersen & Skardhamar, *supra* note 10 at 623.

<sup>12</sup> *Ibid* at 619-620.

<sup>13</sup> Michael Maltz, *Recidivism* (Orlando, Fla: Academic Press, 1984) at 23-24.

these nuances, in comparison to the statistical emphasis of measuring recidivism.

Nonetheless, recidivism is a very commonly used success metric. It is often used by organizations providing restorative justice programming, not only to evaluate their own effectiveness, but to also gauge if improvements to programming can be made.<sup>14</sup> That was indeed part of Onashowewin's motivation for commissioning the recidivism data that forms the basis of this article. The hope was to demonstrate a low recidivism rate so as to maintain a confident and positive relationship with Onashowewin's primary funder, the Manitoba Department of Justice.

The other reason to focus on recidivism is that it provides a basis for comparison with other studies. The Onashowewin study found an overall recidivism rate of 30%, which is substantially lower than the rates found in other studies on Indigenous recidivism which we will review in detail. The basis for comparison is admittedly not perfect, since those studies typically involved more serious offences than what Onashowewin deals with. However, consider that Indigenous recidivists very often have lengthy criminal histories preceding their incarceration in the federal penitentiary system. The insight that can be taken from the comparison is that the low recidivism rate shown by Onashowewin holds out the promise of having its clients avoid the sustained patterns of numerous convictions and recidivism that is so often seen with Indigenous prisoners in the federal system. And indeed the two year follow-up period we used is the same as seen in the other studies on Indigenous recidivism, which can make the comparison even more meaningful.

Lastly, while there is a body of literature critiquing efforts to achieve justice for Indigenous peoples within dominant, colonial structures, we would argue that Onashowewin has clearly demonstrated that the use of traditional culture and laws has made a significant difference in setting its clients on better pathways in life. A future qualitative study may be useful in verifying this assertion, but the assertion even now is reasonable. Furthermore, Indigenous self-determination over criminal justice can and will not be realized overnight. Programs that have a positive impact like Onashowewin, and draw upon traditional cultures and laws in doing so, can become at least a partial foundation for Indigenous self-determination

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<sup>14</sup> Ruggero, Dougherty & Klofas, *supra* note 8 at 1; Harris et al, *supra* note 10 at 5–6.

going forward. Now we begin with a detailed overview of Indigenous over-incarceration and its numerous causes.

## II. INDIGENOUS OVER-INCARCERATION

### A. The Numbers

The problem of over-incarceration of Indigenous peoples in Canada remains a very serious one. Indigenous persons as of 2016 represent 26% of admissions to provincial and territorial jails, and 28% of admissions to federal penitentiaries, despite being only 3% of the Canadian population.<sup>15</sup>

Most studies suggest that the rates for recidivism for Indigenous persons are also higher than for non-Indigenous persons, although studies vary on the degree of difference. The numbers for Indigenous recidivism, historically and consistently, have been high as well. For example, a 1989 study by James Bonta found almost no difference between Indigenous and non-Indigenous offenders released from provincial jails.<sup>16</sup> In contrast, a 1986 study by Harman and Hann found that Indigenous parolees were almost twice as likely (51% to 28%) to have parole revoked in comparison to non-Indigenous parolees.<sup>17</sup> Indigenous prisoners released from federal penitentiary were 12% to 19% more likely to commit an indictable offence following release in comparison to non-Indigenous prisoners.<sup>18</sup> An analysis of 1993 data for offenders released from federal penitentiaries that included 243 Indigenous offenders and 271 non-Indigenous offenders found that Indigenous offenders had a higher recidivism rate (66%) compared to non-Indigenous offenders (47%).<sup>19</sup>

Another study was based on three separate sets of study groups, one each for the years 1994/1995, 1995/1996 and 1996/1997.<sup>20</sup> There were

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<sup>15</sup> Julie Reitano, "Adult Correctional Statistics in Canada, 2015/2016" 37:1 *Juristat* (Ottawa: Statistics Canada, 2017) at 5.

<sup>16</sup> James Bonta, "Native Inmates, Institutional Response Risk, and Needs" (1989) 31 *Can J Crim* 49.

<sup>17</sup> William Harman & Robert Hann, *Full Parole Release: An Historical Descriptive Analysis* (Ottawa: Solicitor General of Canada, 1986).

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

<sup>19</sup> William Harman & Robert Hann, *Predicting Release Risk for Aboriginal Penitentiary Inmates* (Ottawa: Correctional Service of Canada, 1993).

<sup>20</sup> James Bonta, Tanya Ruggie & Mia Dauvergne, *The Reconviction Rate of Federal Offenders*,

7,343 released offenders in the 1994/1995 year, 7,399 in the 1995/1996 year and 7,259 in the 1996/1997 year.<sup>21</sup> The study followed up the files for 2,400 non-Indigenous male offenders in each of the latter two years, while following up on 933 male Indigenous offenders for the 1995/1996 year and 1,063 for the 1996/1997 year.<sup>22</sup> The study tracked recidivism over a two-year period following release. The recidivism rates for the 1994/1995 cohort were 58.3% for male Indigenous offenders and 42.2% for non-Indigenous male offenders.<sup>23</sup> The recidivism rates for the 1995/1996 cohort were 56.8% for male Indigenous offenders and 41.2% for non-Indigenous male offenders.<sup>24</sup> The recidivism rates for the 1996/1997 cohort were 52.7% for male Indigenous offenders and 39.1% for non-Indigenous male offenders.<sup>25</sup>

A more recent study was based on all offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation, in the 2004 calendar year.<sup>26</sup> The sample included 1,274 male Indigenous offenders and 418 female Indigenous offenders.<sup>27</sup> The recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders.<sup>28</sup> The rates amongst Indigenous offenders by gender were 60.7% for male offenders and 45.9% for female offenders.<sup>29</sup>

A 1992 study by Bonta, Lipinski and Martin was based on a sample of 282 Indigenous prisoners with a follow-up period of 3 years after having served time in a federal penitentiary.<sup>30</sup> Sixty-six percent had re-offended.<sup>31</sup> It

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2003–02 (Ottawa: Solicitor General of Canada, 2003).

<sup>21</sup> *Ibid* at 7.

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

<sup>23</sup> *Ibid* at 13.

<sup>24</sup> *Ibid.*

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

<sup>26</sup> J Stephen Wormith & Sarah Hogg, *The Predictive Validity of Aboriginal Offender Recidivism with a General Risk/Needs Assessment Inventory* (Saskatoon: University of Saskatchewan, 2012) at 5.

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

<sup>28</sup> *Ibid* at 20.

<sup>29</sup> *Ibid* at 21.

<sup>30</sup> James Bonta, Stan Lipinski & Michael Martin, “The Characteristics of Aboriginal Recidivists” (1992) 34:3–4 *Can J Crim* 517.

<sup>31</sup> *Ibid* at 518.

was found that the most significant predictors of offending were, in order of frequency, previous incarcerations, having committed a break and enter offence, and having been of a younger age on first conviction.<sup>32</sup> Recidivism is clearly an important factor in Indigenous over-incarceration. We will now examine other factors that contribute to the problem of over-incarceration.

## B. Factors Intrinsic to the Justice System Itself

There are numerous contributors to Indigenous over-incarceration that feature at every stage of the criminal process. It in fact manifests at the very start of the process in the form of discriminatory police attention. This phenomena of increased police scrutiny is described by the term “racial profiling,” the practice of assigning a racial group negative stereotypes that involve increased propensity towards criminal behaviour so as to justify increased surveillance. The practice is by now well known.<sup>33</sup> Official public inquiries have confirmed that Canadian police forces have engaged in discriminatory practices against Indigenous peoples, including increased surveillance on the basis of race.<sup>34</sup> A 2008 study by Carol LaPrairie found that Indigenous persons are seven times more likely than non-Indigenous persons to be identified as offenders by the police,<sup>35</sup> demonstrating a culture that countenances a lack of respect for Indigenous peoples.

Sentencing principles developed in response to the over-incarceration of Indigenous peoples have provided little, if any, relief for the majority of those charged. Section 718.2(e) of the *Criminal Code* reads in part:

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<sup>32</sup> *Ibid* at 519.

<sup>33</sup> David Tanovich, “Using the Charter to stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall LJ 145; Scot Wortley & Julian Tanner, “Data, Denials, and Confusion: The Racial Profiling Debate in Toronto” (2003) Can J Corr 367; Scot Wortley & Julian Tanner, “Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor’s Critique of Racial Profiling Research in Canada” (2005) Can J Corr 581.

<sup>34</sup> Alvin Hamilton & Murray Sinclair, *The Justice System and Aboriginal People: The Report of the Aboriginal Justice Inquiry* (Winnipeg: Indigenous Justice Inquiry, 1991); Justice David H Wright, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatoon: Commission into Matters Relating to the Death of Neil Stonechild, 2004). See also Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Winnipeg: Fernwood Press, 2012).

<sup>35</sup> Carol LaPrairie, “The Neighbourhood Context of Urban Aboriginal Crime” (2008) 50:5 Can J Corr 523.

A court that imposes a sentence shall also take into consideration the following principles: ...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders.<sup>36</sup>

In *R v Gladue*,<sup>37</sup> the Supreme Court stated that this provision was enacted in response to alarming evidence that Indigenous peoples were incarcerated disproportionately to non-Indigenous people in Canada.<sup>38</sup> Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to reduce incarceration of Indigenous offenders, and seek reasonable alternatives for Indigenous offenders.<sup>39</sup> A judge must take into account the background and systemic factors that bring Indigenous people into contact with the justice system, such as poverty, substance abuse, and “community fragmentation,”<sup>40</sup> when determining sentence.<sup>41</sup> A judge must also consider the role of these factors in bringing a particular Indigenous accused before the court.<sup>42</sup>

Nonetheless, lower courts following *Gladue* still demonstrated a clear preference for incarceration sentences in order to give effect to deterrence and retribution. Andrew Walsh and James Ogloff analyzed 691 reported sentencing decisions to determine the effects of s. 718.2(e).<sup>43</sup> They found that Indigenous status did not have any correlation with receiving either a custodial or non-custodial sentence.<sup>44</sup> The strongest correlates instead were the presence of standard aggravating or mitigating factors recognized by sentencing law prior to the passing of s. 718.2(e), with the frequent result

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<sup>36</sup> *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

<sup>37</sup> *R v Gladue*, [1999] 1 SCR 688.

<sup>38</sup> *Ibid* at paras 58–65.

<sup>39</sup> *Ibid* at para 64.

<sup>40</sup> *Ibid* at para 67.

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

<sup>42</sup> *Ibid* at para 69.

<sup>43</sup> Andrew Walsh & James Ogloff, “Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Indigenous Status in Sentencing Decisions” (2008) 50:4 *Can J Corr* 491.

<sup>44</sup> *Ibid* at 505.

that aggravating factors rendered an offence too serious for *Gladue* to justify a non-custodial sentence.<sup>45</sup>

The Supreme Court recently attempted to provide a corrective to this trend in its decision, *R. v. Ipeelee*,<sup>46</sup> stating that offence bifurcation limiting the applicability of *Gladue* to a small range of less serious offences amounted to: "a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."<sup>47</sup> Unfortunately, the trajectory that was observed with respect to *Gladue* continues with *Ipeelee*. At the time of writing, an examination of cases that have applied *Ipeelee* indicates that the clear majority of these cases have continued to use terms of incarceration, again emphasizing deterrence and retribution as important considerations.<sup>48</sup> There are cases where courts have applied *Ipeelee* to use a conditional sentence, a term of probation, or a sentence of time served, but these are clearly in the minority.<sup>49</sup>

Furthermore, there are procedural problems with realizing *Gladue*, for which many defence lawyers representing Indigenous accused share responsibility. A key vehicle for implementing *Gladue* is a report that sets out in full detail the life circumstances of an Indigenous accused and any other information the court needs to give full consideration to s. 718.2(e). This represents a considerable burden, which legal counsel may be reluctant to shoulder, for the reasons discussed below. An over-burdened legal aid system is a contributing factor.

A full *Gladue* report requires a more substantial period of preparation in comparison to a standard Pre-Sentence Report (PSR), both because of the greater number of persons to be interviewed, and also the information that has to be obtained. Individual interviews often have to be both in-person and lengthier due to the nature of the information being gathered,

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<sup>45</sup> *Ibid* at 503–505.

<sup>46</sup> *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

<sup>47</sup> *Ibid* at para 63.

<sup>48</sup> See e.g. *R v Perrot*, 2015 ABCA 209; *R v Lawson*, 2012 BCCA 508, 105 WCB (2d) 86; *R v HL*, 2012 MBPC 80, 104 WCB (2d) 986; *R v John*, 2012 YKTC 73, 103 WCB (2d) 588; *R v Matte*, 2012 ONCA 504, 111 OR (3d) 791; *R v Scott*, 2014 SKQB 307, 116 WCB (2d) 645; *R v Simon*, 2015 NWTTC 10, 121 WCB (2d) 610; *R v Sack*, 2014 NSPC 107, 118 WCB (2d) 417.

<sup>49</sup> See e.g. *R v Rockwell*, 2012 MBQB 280, 285 Man R (2d) 290; *R v Key*, 2014 SKPC 122, 448 Sask R 99; *R v Johnson*, 2012 YKTC 75, 103 WCB (2d) 564; *R v FR*, 2012 NWTTC 5, 100 WCB (2d) 734; *R v SG*, 2014 ONSC 6309.

but also to establish a meaningful rapport with members of the Aboriginal community. A standard PSR tends to limit the background information to interviews with the accused's immediate family, and possibly an employer or a select few other persons close to the accused. A meaningful *Gladue* report requires much more extensive interviewing to understand and locate the accused's background in the context of systemic factors facing Indigenous people generally. Persons who should be interviewed include not just the immediate family, but also the accused's broader relations, as well as other members of the community. A reason for this is to impress upon the court that what is troubling the accused may in fact be troubling the community at large as well. Interviews with the accused's relations must also reach back to previous generations so that the accused's background can be connected to historical phenomena that have acted as oppressive forces on Indigenous peoples generally, such as residential schools or the "Sixties Scoop." Elders or other culturally important members of the community may also have to be interviewed to obtain information about what may be troubling the accused, how the community may want to approach the problem, and what options may be available for dealing with the problem.<sup>50</sup>

A sociology master's thesis by Rana McDonald at the University of Manitoba, which included interviews with several defence lawyers in Manitoba, revealed that they cited s. 718.2(e) and *Gladue* infrequently during sentencing submissions for various reasons. Some of those reasons convinced lawyers that *Gladue* should not even enter into consideration as to how to represent their Indigenous clients.<sup>51</sup> These included:

- (i) A perception that *Gladue* extended a sentencing discount that was inconsistent with the legal system's emphasis on equality.<sup>52</sup>
- (ii) An uncertainty as to which clients might be Indigenous aside from those living on First Nations reserves.<sup>53</sup>
- (iii) A preference for a "race-neutral" approach to advocacy.<sup>54</sup>

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<sup>50</sup> David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 88.

<sup>51</sup> Rana McDonald, *The Discord Between Policy and Practice: Defence Lawyers' Use of Section 718.2(e) and Gladue* (MA Sociology Thesis, University of Manitoba, 2008) [unpublished].

<sup>52</sup> *Ibid* at 85-92.

<sup>53</sup> *Ibid* at 88-90.

<sup>54</sup> *Ibid* at 90-91.

(iv) A belief that the *Gladue* factors described mitigating factors for many offenders irrespective of race and were not necessarily unique to Indigenous offenders.<sup>55</sup>

(v) A belief that the seriousness or violent nature of the offence, and/or the presence of significant aggravating factors, especially a prior record for the same kind of offence for which the accused is being sentenced, will denude *Gladue* of any meaningful practical value during a sentencing hearing.<sup>56</sup>

Even when the defence lawyers in McDonald's study thought that *Gladue* had potential applicability to their clients, they had concerns about practical utility should they attempt to raise *Gladue* in court. These included:

(i) Some lawyers were not convinced that *Gladue* could be an effective "bargaining chip" during plea bargaining with the Crown.<sup>57</sup>

(ii) Some were concerned that seeing through preparation of *Gladue* submissions and information for the Court's consideration would unduly extend the amount of time their clients spent in remand custody.<sup>58</sup>

(iii) At the time of the study, some rehabilitative services grounded in Aboriginal cultures were available in Winnipeg. These include, for example, the Metis Justice Strategy and the Interlake Peacemakers Project. These programs had limited capacity, however, and this often convinced the defence lawyers that they could not make meaningful submissions for non-custodial sentences.<sup>59</sup>

There are also economic disincentives to lawyers in Manitoba making fulsome *Gladue* submissions on behalf of their clients, particularly those related to legal aid funding. By way of background, there is considerable empirical evidence suggesting that guilty pleas by accused persons who are factually innocent may be a very serious and pervasive problem.<sup>60</sup>

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<sup>55</sup> *Ibid* at 91-94.

<sup>56</sup> *Ibid* at 95-103.

<sup>57</sup> *Ibid* at 105-109.

<sup>58</sup> *Ibid* at 109-114.

<sup>59</sup> *Ibid* at 114-120.

<sup>60</sup> At least 20 instances of wrongful convictions stemming from a guilty plea were documented in Samuel R Gross et al, "Exonerations in the United States 1989 Through

Christopher Sherrin argues that there is a lack of monetary incentive to go ahead with trials, and this can often lead to defence lawyers pressuring clients to plead guilty irrespective of the actual merits of the prosecution's case.<sup>61</sup> This lack of incentive to enter not guilty pleas and go to trial certainly includes Indigenous accused as well, who are also over-represented among wrongful convictions in Canada.<sup>62</sup> Sherrin recommends increasing available legal aid tariffs so that defence lawyers have the incentive to properly assert their clients' innocence, especially when the case merits it.<sup>63</sup>

Similar arguments can be extended to *Gladue*. The legal aid tariffs in Manitoba for cases resolved by guilty pleas are set based on the category of offence.<sup>64</sup> A tariff of \$1,250 is provided for a sentencing hearing for aggravated sexual assault, culpable homicide offences, attempted murder, and organized crime offences.<sup>65</sup> A tariff of \$860 is provided for a broad category of either indictable offences or hybrid offences.<sup>66</sup> A tariff of \$450 is provided for all other offences.<sup>67</sup> It will often be considerably more work

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2003" (2005) 95 J Crim L & Criminology 523 at 533-536. Twenty-three percent of accused persons who had pled guilty and were interviewed by Richard V Ericson and Patricia M Baranek maintained their innocence: see Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 158. Other researchers have found significant numbers of people who have pled guilty while maintaining their innocence: 43 percent in John Baldwin & Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977) at 62-63; 18 percent in Anthony Bottoms & John McClean, *Defendants in the Criminal Process* (London: Routledge & Kegan Paul, 1976) at 120; 44 percent in Susanne Dell, *Silent in Court: The Legal Representation of Women Who Went to Prison* (London: Bell & Sons, 1971) at 30-31; over 51 percent in Abraham S Blumberg, "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1:2 Law & Soc'y Rev 15 at 33-35.

<sup>61</sup> Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1 at 19.

<sup>62</sup> Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 Flinders LJ 202.

<sup>63</sup> Sherrin, *supra* note 61 at 19; see also Andrew D Leipold, "How the Pretrial Process Contributes to Wrongful Convictions" (2005) 42 Am Crim L Rev 1123.

<sup>64</sup> Man Reg 225/91, Part 2.

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

<sup>66</sup> *Ibid.*

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

for a lawyer to properly make use of *Gladue* in comparison to other cases resolved by guilty plea, as MacDonald's thesis hints. It will often require more research, more preparatory work, advocating for the production of a *Gladue* report, and making more extensive submissions based on the *Gladue* factors and their role in an individual client's case. And yet there will be no tariff adjustments in recognition of the greater amount of work that *Gladue* cases will require.

In the end, the sentencing of Indigenous accused continues to follow a definite trajectory even in the wake of some quite strong statements coming from the highest court in *Ipeelee*. The overall framework for Canadian sentencing law remains fundamentally and heavily tilted in favour of deterrence and retribution. This tilt translates into a certain inertia in sentencing decisions such that any statements the Supreme Court provides, whether it is in *Gladue* or *Ipeelee* or any other case thereafter, will have minimal purchase with lower courts. That in turn means that Indigenous accused continue to be routinely incarcerated for a very wide range of offences.

There are also problems with the correctional system itself, even allowing for the presence of initiatives that are meant to address the needs of Indigenous prisoners. Section 80 of the *Corrections and Conditional Release Act* mandates that Correctional Service Canada (hereinafter the CSC) shall “provide programs designed particularly to address the needs of Aboriginal offenders.”<sup>68</sup> One purpose of this provision is provide services, such as life skills training or substance abuse treatment, which include the inculcation of Indigenous cultural values as part of the treatment or training.<sup>69</sup> Another mandate is to facilitate prisoner participation in cultural activities, such as training in traditional spiritual practices or sweat lodge ceremonies.<sup>70</sup> These services are often delivered by Elders or other members of Indigenous communities with similar cultural authority.<sup>71</sup> The rationale behind these approaches is that the CSC identifies the loss of cultural identity as the underlying cause of Indigenous criminality.<sup>72</sup>

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<sup>68</sup> *Corrections and Conditional Release Act*, SC 1992, c 20, s 80 [CCRA].

<sup>69</sup> Correctional Service Canada, “Aboriginal Offenders,” Commissioner’s Directive No 702 (Ottawa: CSC, 12 November 2013).

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

<sup>71</sup> *Ibid.*

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

Sections 84 and 84.1 allow Indigenous prisoners to apply for parole and release, typically under supervised conditions, into an Indigenous community with a view towards re-integration with that community.<sup>73</sup> Notice to the Indigenous community is required, which provides the Indigenous community an opportunity to propose a plan of supervision and re-integration.<sup>74</sup>

Despite these legislative and programming accommodations, there remain considerable problems with Indigenous prisoners being denied access to meaningful programming and opportunities for parole. In 1996/1997, it was found that Indigenous offenders were granted parole at a rate of 34% in comparison to 41% for non-Indigenous offenders.<sup>75</sup> A ten-year period from 2007 to 2016 saw non-Indigenous offenders obtain day parole at a rate of 70.1% and full parole at a rate of 26.4%. Indigenous offenders during that same period received day parole at a rate of 66% and full parole at a rate of 17.3%.<sup>76</sup> In 1998 it was found that Indigenous prisoners waived their right to a parole hearing at a rate of 49% in comparison to 30% for non-Indigenous offenders.<sup>77</sup> Reasons that have been suggested for these shortfalls include Indigenous prisoners often lacking knowledge of the parole process<sup>78</sup> and Indigenous prisoners often mistrusting correctional staff such as to lack hope in the process.<sup>79</sup>

One study found that there were too few halfway houses operated by the CSC that provided programming specifically for Indigenous offenders. For example, there is only one half-way house in Saskatoon that provides such services, an urban centre with a significant Indigenous population.<sup>80</sup>

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<sup>73</sup> CCRA, *supra* note 68, ss 84, 84.1.

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

<sup>75</sup> Andrew Welsh & James P Ogloff, "Full Parole and the Aboriginal Experience: Accounting for the Racial Discrepancies in the Release Rates" (2000) 42:4 Can J Crim 469 at 472.

<sup>76</sup> Public Safety Canada, *2016 Annual Report: Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety Canada, 2017) at 85.

<sup>77</sup> Solicitor General of Canada, *Canadian Correctional Release Assessment, 5 Year Review: Indigenous Offenders* (Ottawa: Minister of Supply and Services, 1998).

<sup>78</sup> JC Johnston, *Northern Aboriginal Offenders in Federal Custody: A Profile* (Ottawa: Correctional Service of Canada, 1994).

<sup>79</sup> JC Johnston, *Aboriginal Offender Survey: Case Files and Interview Sample* (Ottawa: Correctional Service of Canada, 1997).

<sup>80</sup> *Issues in Urban Corrections for Aboriginal People: Report on a Focus Group and an Overview of*

Another lost opportunity is s. 81 lodges, half-way house facilities that are operated directly by Indigenous communities to meet the needs of Indigenous prisoners. The Correctional Investigator of Canada released a report in 2012 titled *Spirit Matters* that condemns the inadequacy of Canada supporting only four s. 81 lodges, offering a total of 68 available bed spaces.<sup>81</sup> A key reason behind the condemnation was that in 2000, \$11.9 million was allocated for the construction of new s. 81 lodges.<sup>82</sup> However, the Waseskun House in Montreal was the only new s. 81 lodge to be built under this fund.<sup>83</sup> The remainder was instead used to create interventions for Indigenous prisoners inside existing federal penitentiaries.<sup>84</sup>

Even with existing s. 81 lodges, there are real concerns with the amount of support and resources available to them. Crutcher and Trevethan explain:

One of the most pressing concerns noted by all Section 81 healing lodges is the lack of resources. At the basic level, Section 81 lodges are in need of some physical improvements. Furthermore, the lack of funding has affected recruitment, training, and retention of lodge staff. Recruitment is especially difficult as Indigenous people with the required skill sets are in high demand and the lodges cannot afford to pay what the market dictates. In terms of training, most Section 81 lodges do not have the funds to adequately train their staff regarding CSC procedures.

Programming is another area that has been affected by lack of funds. Smaller facilities do not offer structured programs as they do not have the resources to offer programs given the small number of residents who need them.<sup>85</sup>

The *Spirit Matters* report also notes the inadequacy of funding. CSC controlled-healing lodges received \$21,555,037 in funding, in comparison to \$4,819,479 in funding for s. 81 lodges.<sup>86</sup> The report adds:

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*the Literature and Experience* (Ottawa: Solicitor General, 1998) at 23; Prairie Region Halfway House Association, "Facility Index" (8 March 2018), online: <<http://halfwayhouses.ca/en/region/prhha/facilities/>>.

<sup>81</sup> Howard Sapers, *Spirit Matters: Indigenous People and the Corrections and Conditional Release Act* (Ottawa: Office of the Correctional Investigator, 2012) at 15–17 [*Spirit Matters*].

<sup>82</sup> *Ibid* at 15.

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

<sup>84</sup> *Ibid* at 15–16.

<sup>85</sup> Nicole Crutcher & Shelley Trevethan, "An Examination of Healing Lodges for Federal Offenders in Canada" (2002) 14:3 *Forum on Corrections Research* 52 at 56.

<sup>86</sup> *Spirit Matters*, *supra* note 81 at 20.

Chronic under-funding of Section 81 Healing Lodges means that they are unable to provide comparable CSC wages or unionized job security. As a result, many Healing Lodge staff seek employment with CSC, where salaries can be 50% higher for similar work. It is estimated that it costs approximately \$34,000 to train a Healing Lodge employee to CSC requirements, but the Lodge operators receive no recognition or compensation for that expense.<sup>87</sup>

The report calls for more s. 81 lodges, and greater support for s. 81 lodges.<sup>88</sup> Indeed, the report suggests that financial support should not be any less than an increase of \$11.6 million to reflect the fund that was initially allocated in 2001 for s. 81 lodges, adjusted for inflation.<sup>89</sup>

Even after release, there may be concerns about the lack of available services that can assist Indigenous parolees with effective re-integration. A study by Jason Brown found that Indigenous parolees often faced a lack of adequate housing, or racist discrimination from prospective landlords.<sup>90</sup> They were therefore vulnerable to residential instability, which increased their risk of re-offending.<sup>91</sup> The study stresses the needs for increased community supports so that Indigenous parolees can find adequate housing.<sup>92</sup> The *Spirit Matters* report also notes that there have been numerous problems with the implementation of s. 84 of the *Corrections and Conditional Release Act* that is meant to facilitate effective parole and release for Indigenous prisoners.<sup>93</sup> The provision has been under-utilized. For example, in 2010-2011 there were 99 s. 84 releases, even though 593 Indigenous offenders had expressed interested in a s. 84 release.<sup>94</sup> The problems involved include:

- (i) There are only 12 Indigenous Community Development Officers who are employed to develop bridges between Indigenous communities and Indigenous prisoners. These face excessive

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<sup>87</sup> *Ibid* at 4.

<sup>88</sup> *Ibid* at 34.

<sup>89</sup> *Ibid*.

<sup>90</sup> Jason D Brown et al, "Housing for Indigenous Ex-Offenders in the Urban Core" (2008) 7:2 *Qualitative Social Work* 238.

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

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

<sup>93</sup> *Spirit Matters*, *supra* note 81 at 24.

<sup>94</sup> *Ibid*.

caseloads that often cause them to lose focus on an Indigenous prisoner's individual needs.<sup>95</sup>

- (ii) The process involved with applying for a s. 84 release has become very cumbersome and lengthy, requiring at least 25 tasks for completion.<sup>96</sup>
- (iii) Indigenous communities are often not compensated by the CSC for the costs of programming, or for monitoring or transporting an offender. This leads to resource deficiencies in the implementation of s. 84 release plans.<sup>97</sup>
- (iv) The validity of programs and services under s. 84 release plans, and whether it adequately addresses an offender's needs, are decided by the CSC and not Indigenous communities themselves. This is “viewed as patronizing by many [Indigenous] people and communities.”<sup>98</sup>

The report also calls upon the CSC to adjust its policies and resource allocations in order to fully implement Parliament's original legislative intent when the *Corrections and Conditional Release Act* was first passed in 1992.<sup>99</sup> It is apparent that there are many contributors to Indigenous over-incarceration that are intrinsic to the Canadian justice system itself. It turns out that there are also many extrinsic contributors as well.

### C. Loss of Culture

The Truth and Reconciliation Commission of Canada concluded that policies pursued by the Government of Canada in the 19<sup>th</sup> and 20<sup>th</sup> Centuries, including the imposition of the federal Indian Act, and the forced removal of children to attend residential schools, “were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.”<sup>100</sup> The

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

<sup>96</sup> *Ibid* at 25.

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

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at 33.

<sup>100</sup> 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* (June 2015) at 3.

legacy of this cultural genocide, the TRC wrote, continues to affect the lives of Indigenous persons, families and communities as follows:

It is reflected in the significant educational, income, and health disparities between Aboriginal people and other Canadians—disparities that condemn many Aboriginal people to shorter, poorer, and more troubled lives. The legacy is also reflected in the intense racism some people harbour against Aboriginal people and the systemic and other forms of discrimination Aboriginal people regularly experience in Canada. Over a century of cultural genocide has left most Aboriginal languages on the verge of extinction. The disproportionate apprehension of Aboriginal children by child welfare agencies and the disproportionate imprisonment and victimization of Aboriginal people are all part of the legacy of the way that Aboriginal children were treated in residential schools.<sup>101</sup>

For Indigenous peoples, loss of culture and language very often leads to low self-esteem and a lack of identity. This in turn can too often lead to unhealthy life style choices that result in conflict with the law. The loss of traditional culture and knowledge includes the loss of customary laws and norms that could have acted as a positive mechanism of restraint against criminal behavior. Carol LaPrairie, for example, explains with reference to the James Bay Cree:

Residential schools, the decline of traditional activities, the emergence of the reserve system which binds people together in unnatural ways, and the creation of band government which locates power and resources in the hands of a few have dictated the form of reserve life across the country and have profoundly affected institutions such as kinship networks, families, as well as the unspoken rules of behaviour in traditional societies. The lack of respect for others, and the absence of shame about one's bad behaviour and about harming another or the community were, to many Cree for example, the most troubling aspects of contemporary life.<sup>102</sup>

Harald Finkler also attributes the dramatic rise of crime and disorder among the Inuit in the Canadian north to the breakdown and erosion of traditional methods of social control, and their displacement by Western institutions.<sup>103</sup> There are other factors as well.

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<sup>101</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy* (2015) at 3.

<sup>102</sup> Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34 Can J Crim 281 at 287.

<sup>103</sup> Harald Finkler, "Community Participation in Socio-Legal Control: The Northern Context" (1992) 34 Can J Crim 503.

## D. Social and Economic Factors

There are also numerous social and economic factors that contribute to Indigenous over-incarceration. A phenomenon that is distinctive to Indigenous peoples is termed Intergenerational Trauma. What is involved is that many Indigenous children from previous generations were physically and/or sexually abused in residential schools. They also had their self-esteem and identity as Indigenous persons undermined by school practices that denigrated Indigenous culture and punished cultural practices. Those children from previous generations left the schools without the skills or qualifications to pursue livelihoods, with low self-esteem as Indigenous persons, in an angry and traumatized state of being, and vulnerable to substance abuse, violence, and other behaviour issues. Those children would take out their pain and problems and those nearest to them, their own family members. The next generation of children would be subjected to physical and sexual violence in abusive home environments, and therefore develop the same issues as the previous generation. And so the seeds planted by the residential schools pass on trauma from one generation to the next.<sup>104</sup> Jennifer Kwan estimates that at least 65% of Indigenous people in Canada have been affected to some degree by family violence.<sup>105</sup> She ascribes this rate to factors reflective of post-colonialism, such as poverty, unstable lifestyles, substance abuse and gender inequality.<sup>106</sup>

Annie Yessine and James Bonta's study, which compared Indigenous youth under probation in Manitoba compared to non-Indigenous youth, argues that Indigenous youth are incarcerated far out of proportion to their representation in the population because they come from disadvantaged social backgrounds that include poverty, unstable family setting, and negative peer associations (e.g. youth gangs).<sup>107</sup> James Waldram interviewed many Indigenous federal prisoners in the Regional Psychiatric Centre in

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<sup>104</sup> Peter Menzies, "Developing an Aboriginal Healing Model for Intergenerational Trauma" (2014) 46:2 *International J Health Promotion and Education* 41; Lloyd Hawkeye Robertson, "The Residential School Experience: Syndrome or Historic Trauma" (2006) 4:1 *Pimatisiwin* 1.

<sup>105</sup> Jennifer Kwan, "From Taboo to Epidemic: Family Violence Within Aboriginal Communities" (2015) 2:1 *Global Social Welfare* 1 at 3.

<sup>106</sup> *Ibid* at 2-5.

<sup>107</sup> Annie K Yessine & James Bonta, "The Offending Trajectories of Youthful Aboriginal Offenders" (2009) 51:4 *Can J Corr* 435.

Saskatoon, the Saskatchewan Penitentiary, and the Stoney Mountain Penitentiary and Rockwood Institution, in his study. Many prisoners in their interviews attributed their incarceration to various contributors, including severe poverty, racial persecution, having been violently and/or sexual abused in their home environments, loss of connection to their own cultures, loss of positive self-esteem as Indigenous persons, and substance abuse.<sup>108</sup>

It is this numerous array of contributing factors that Onashowewin seeks to counteract, even if to a limited degree, through the programs and services it offers. A detailed description of Onashowewin and the services it offers now follows.

### III. ONASHOWEWIN

Onashowewin is a diversionary program, located near downtown Winnipeg. Its community justice workers and support staff are all Indigenous persons, and its board of directors are representative of Winnipeg's Indigenous communities. It receives diversionary referrals for summary charges from the Crown Prosecutors' office in Winnipeg.<sup>109</sup> Onashowewin's programming implements the traditional laws of Anishnaabe, Ininew, Ojibway-Cree, Dene, Dakota, Inuit and Métis Nations in Manitoba in a meaningful way that addresses the needs of its clients, and by extension also addresses contemporary problems besetting Indigenous communities in Manitoba. In order to resolve charges outside of the formal court system, Onashowewin utilizes a number of processes and programs aimed at addressing the underlying issues which lead to criminal behaviour. These programs are designed to use culturally appropriate techniques to educate, mediate and mend relationships and prevent recidivism. Fundamental to Onashowewin's practice of restorative justice is the creation of individualized case plans for each referral that are designed to address the underlying causes of the criminal activity. The programs recognize that Indigenous crime is often a combination of both significant social stressors and negative choices, and therefore seeks to guide clients towards more positive choices in non-judgmental ways.<sup>110</sup>

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<sup>108</sup> James Waldram, *The Way of the Pipe* (Peterborough, Ont: Broadview Press, 1997) at 44.

<sup>109</sup> Miller, *supra* note 3.

<sup>110</sup> Sarah McCoy, *Indigenous Organizations in Manitoba: A directory of Groups and Programs*

Onashowewin offers the following programs: Mino-Bimadiziwin, Ikwe, Inini, Negative Energy, Sense of Belonging, One Life, Kim-Moo-Tin, Living in Balance and Ways of Being, each of which are described below.<sup>111</sup> An individual case plan may require a client to take multiple programs, particularly if an accused is facing multiple charges stemming from the same incident or if the charges themselves were more serious. The programs are now summarized just below.

Mino-Bimadiziwin or Healthy Decisions is available in adult and youth formats, in full day workshops or evening sessions. Participants discuss the negative impacts of the poor choices that have led to criminal offences and participants are encouraged to assume responsibility for their actions in an effort to help understand how to make positive and healthy life choices.<sup>112</sup> Ikwe derives its name from the Ojibway term for “woman.” This workshop describes women's teachings in a sharing environment and explores the special gifts that only women have and how to respect one’s self physically, mentally and emotionally.<sup>113</sup> The Inini program is a male-oriented counterpart to Ikwe. It focused its teachings on the role of men and their responsibilities and conduct within society. It also addresses the ways in which men should treat women and everybody else.<sup>114</sup> Negative Energy is a workshop broken into two two-hour sessions. It primarily focuses on anger and negative reactions to anger. Participants learn how to identify triggers to anger and how to control anger and their reactions to it.<sup>115</sup>

Sense of Belonging is a two-hour workshop aimed at the appeal of gang life and the many negative aspects gang membership brings. The workshop offers substitutes and resources that help prevent entering gangs and how one can leave the gang environment.<sup>116</sup> One Life is a two-hour workshop

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*Organized by or for First Nations, Inuit and Metis People* (Winnipeg: Indigenous Inclusion Directorate, Manitoba Education and Training, 2011) at 120–122.

<sup>111</sup> Onashowewin Justice Circle, “Onashowewin Brochure” (8 March 2018), online: <<http://www.onashowewin.com/Onashowewin%20Brochure.pdf>>; see also Onashowewin Justice Circle, “Onashowewin Justice Circle – Aanii Kay Achi Mowin” (14 January 2015), online: YouTube <<https://www.youtube.com/watch?v=2Uv6iji6xGc&feature=youtu.be>>.

<sup>112</sup> McCoy, *supra* note 110 at 121.

<sup>113</sup> *Ibid* at 121.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid* at 122.

that addresses the issue of addiction, and seeks to explain its indicators, its impact on life, friends and family, and the resources available to fight addiction.<sup>117</sup> Ki-Moo-Tin is designed for participants who have Theft Under 5000 dollar offences. It defines theft, stealing, kleptomania, peer pressure and other aspects related to theft. Participants in this workshop learn about various community resources, employment centres, food banks, budgeting and other valuable tools.<sup>118</sup> Living in Balance is designed to promote healthy relationships. It defines and promotes healthy relationships, and how they can be achieved and maintained.<sup>119</sup> Ways of Being is a full day workshop in which participants learn how to build a sweat lodge as well as its significance, with the participant having an opportunity to join in a Sweat Lodge Ceremony and Sharing Circle.<sup>120</sup>

Onashowewin requested that a research project be undertaken related to their clients by Celeste McKay Consulting. The objective of the research is to provide an empirical determination of whether the programs and services succeed in its mandate. The results of the study are now summarized below.

#### IV. RESEARCH METHODOLOGY

The original research project sought to ascertain the level of recidivism of 100 clients who had completed Onashowewin programming during the one-year period of April 1<sup>st</sup>, 2011 to March 31<sup>st</sup>, 2012. The 100 cases were selected to provide roughly equal numbers of female youths, male youths, female adults, and male adults. (There were 25 female youth, 25 male youth, 28 female adults and 22 male adults in this sample. This discrepancy in the adult numbers is due to the fact that fewer adult men completed the program.) The Manitoba Justice Department gave special permission to examine its database to determine how many of the individuals had re-offended over a two-year follow-up period since completing the Onashowewin program.

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<sup>117</sup> *Ibid* at 121.

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

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

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

## V. ANALYSIS OF RESULTS

### A. Statistics related to Offences

VI. The 100 individuals examined in the study had been charged with the following offences;

- There were 37 charges of theft under \$5000, 3 were charged with theft over \$5000, 5 were charged with writing or uttering a forgery, 23 assault and assault related charges, 7 uttering threats charges, 18 mischief under \$5000 charges, 1 mischief over \$5000 charge, 6 charges for possession of control substances of underage alcohol, 7 weapons related charges, 7 break and enters, 4 possession of break and enter instruments charges, 2 robberies, 5 possession of property obtained by crime charges, 2 arsons, 1 obstructing or resisting an arrest charge, and 9 charges of failure to comply. These numbers do not include multiple charges against individuals for the same offence.

### B. Programming at Onashowewin

The number of programs completed by each of the participants in Onashowewin is a reflection of their personalized case plan and often the severity of their charges ranging from a single program to 6 programs. The numbers of programs completed are as follows: Of the 100 people sampled 8 completed 1 program, 16 people completed 2 programs, 43 completed 3 programs, 23 completed 4 programs, 8 completed 5 programs and 2 completed 6 programs.

### C. Overall Recidivism Statistics

Of the hundred people surveyed, a total of 30 were subsequently charged and convicted of new offences after completing the programme, representing a rate of recidivism of 30%. This finding is quite encouraging, when compared with the studies cited above which found recidivism rates between 50% and 60% for Indigenous men and higher than 45% for Indigenous women.<sup>121</sup> It is important to recognize certain limitations

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<sup>121</sup> Harman & Hann, *supra* note Error! Bookmark not defined.; Bonta, Ruge & Dauvergne, *supra* note 200; Wormith & Hogg, *supra* note 266.

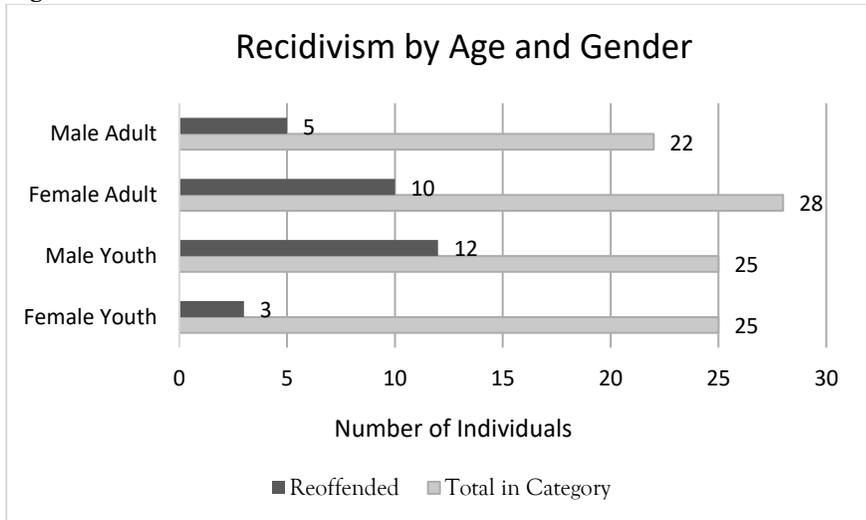
stemming from the study itself. For example, the study did not include a comparison group of Indigenous accused who did not go through Onashowewin programming for the same range of offences. The study itself is not capable of perfect comparisons to previous studies on Indigenous recidivism. Those studies included much larger sample sizes, and usually involved more serious offences. However, we maintain that the overall recidivism rate for Onashowewin clients is encouraging, and is capable of meaningful if not perfect comparisons to the other studies, for reasons that will be explained.

### 1. Recidivism Based on Age and Gender

Here is a breakdown of recidivism rates in the Onashowewin sample by age and gender:

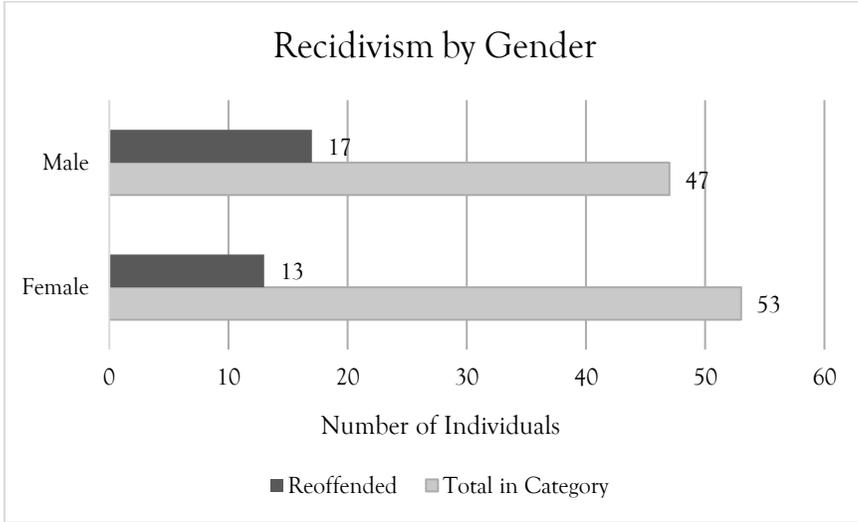
- Out of the 25 female youths who completed the Onashowewin program 3 re-offended, equalling a 12% rate of recidivism.
- Of the 25 male youths who completed the Onashowewin program 12 re-offended, equalling a 48% rate of recidivism.
- Of the 28 female adults who completed the Onashowewin program 10 re-offended, equalling a 36% rate of recidivism.
- Of the 22 male adults who completed the Onashowewin program 5 re-offended, equalling a 23% rate of recidivism.

Figure 1



- The overall recidivism rate for women of all ages was 25%.
- The overall recidivism rate for men of all ages was 36%.

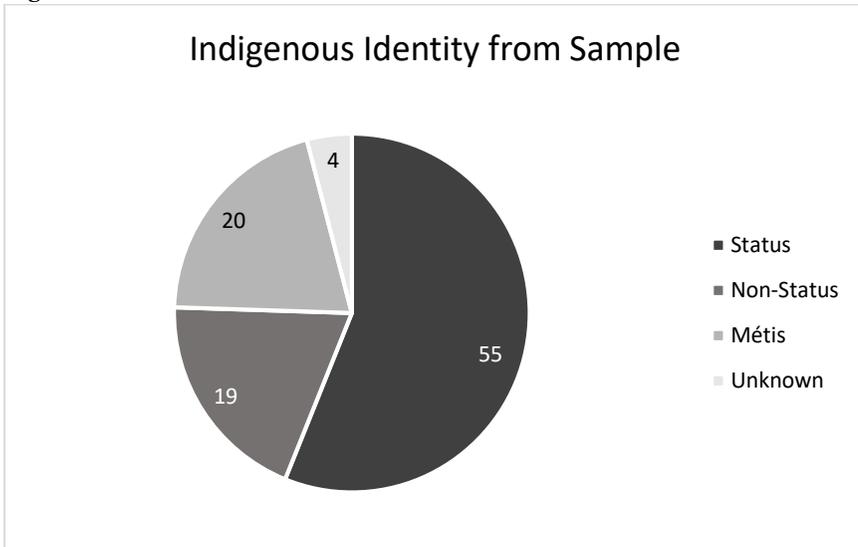
Figure 2



**2. Recidivism Based on Indigenous Identity**

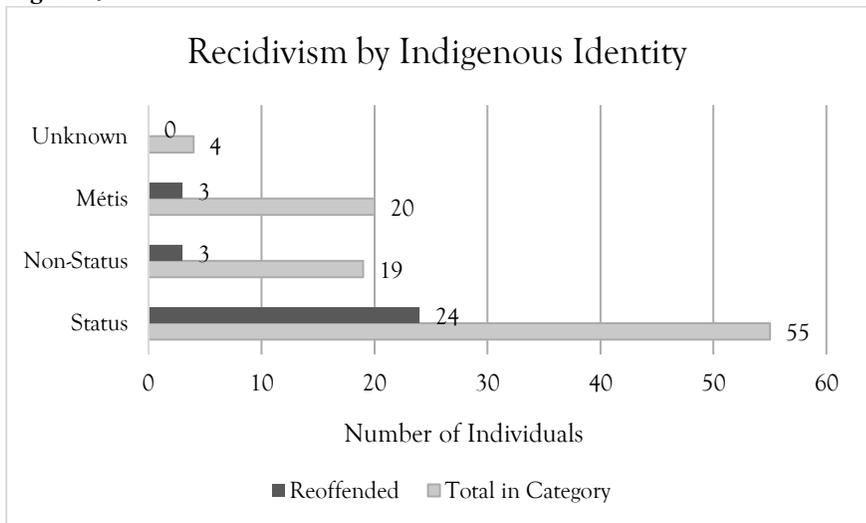
- Of the 100 people surveyed, 55 identified as Status, 19 identified as Non-Status, 20 identified as Métis, and 4 identified as unknown.

Figure 3



- Of the 55 people in the sample who identified as Status, 24 re-offended representing a 44% rate of recidivism in the Status group. Of the 22 who re-offended 11 were male youths, 2 were female youths, 8 were female adults, and 3 were male adults.
- Of the Non-Status group of 19 there were 3 people who re-offended in the Non-Status group. The three Non-Status individuals who re-offended were a male youth, a male adult, and a female adult.
- Of the 20 who identified as Métis, 3 re-offended. The 3 who re-offended were a female youth, a male adult, and a female adult.
- The unknown group contained 4 individuals and saw 0 re-offend.
- The number of Non-Status and Metis participants is not large enough to draw statistical conclusions.

Figure 4



### 3. Alcohol and Drug Related Charges, Issues, and Programs

Those who completed Onashowewin's programming who had alcohol or drug related charges or personal issues with substance abuse also completed the One Life program.

- Of the 100 people in the sample, 20 people completed the One Life program. Of these 20 people, 8 were female youths, 5 were male youths, 4 were female adults, and 3 were male adults.

- Recidivism amongst those who completed the One Life program was 5 out of 20 representing 25%.

## VII. DISCUSSION

### A. Recidivism and the Need for Further Research

The overall reduced recidivism rate of those who participate in Onashowewin's programs, 30% of the people who participated in the programming, is promising. As we have previously noted, the results of the Onashowewin study are not capable of perfect comparisons to other studies of Indigenous recidivism rates. And yet what comparisons can be made can reveal important connections. Certainly one important difference between the Onashowewin study and the previous studies is that the previous studies tended to focus on more serious offences. An implication that needs to be considered is the potential for diversionary programs like those offered by Onashowewin to set their clients on more positive paths in life after their earliest contacts with the justice system, thereby avoiding the recurring cycle of incarceration and recidivism seen amongst many Indigenous inmates in the prison system.

Studies have shown that the longer a person goes without re-offending after the first offence, the less and less likely the person will ever re-offend. In fact, there becomes no discernible difference in risk between those who have never been convicted of a crime and those who did offend but go for a significant period of time without re-offending.<sup>122</sup>

It should not be surprising to learn that many Indigenous offenders in the federal penitentiary system had extensive prior criminal histories. A study by James Moore shows that at least 80% of Indigenous federal prisoners had previously served terms in provincial jails compared to approximately 70% for non-Indigenous prisoners.<sup>123</sup> Inuit and First Nations

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<sup>122</sup> Megan C Kurylchek, Robert Brame & Shawn D Bushway, "Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement" (2007) 53:1 Crime & Delinquency 64; Megan Kurlychek, Robert Brame & Shawn Bushway, "Scarlett Letters and Recidivism: Does an Old Criminal Record Predict Future Reoffending?" (2006) 5:3 Criminology & Public Policy 483; Keith Soothill & Brian Francis, "When Do Ex-Offenders Become Like Non-Offenders" (2009) Howard J Crim Justice 373.

<sup>123</sup> John-Patrick Moore, *First Nations, Metis, Inuit and Non-Aboriginal Federal Offenders: A Comparative Profile* (Ottawa: Correctional Service of Canada, Research Branch, 2003) at 44.

federal prisoners were more likely to have served a previous adult community supervision sentence, at rates of 87% and 79% respectively, in comparison to 72% for non-Indigenous prisoners.<sup>124</sup> First Nations and Metis also have greater involvement with the youth justice system. First Nations offenders served terms in closed custody at a rate of 40%, terms in open custody at a rate of 39.5%, and underwent community youth supervision at a rate of 53%.<sup>125</sup> For Metis offenders, the rates were 45.9%, 42.3%, and 57.3%.<sup>126</sup> For Non-Indigenous offenders, the rates were 27.5%, 24.9%, and 34%.<sup>127</sup>

A 2014 study by Shanna Farrell MacDonald confirms that this overall trajectory among federal prisoners still persists. The rates for previous youth offences were 68.8% for First Nations, 61% for Metis, 47.7% for Inuit, and 43.9% for Non-Indigenous.<sup>128</sup> The rates for previous adult offences were 88% for First Nations, 85.9% for Metis, 87.9% for Inuit, and 79.3% for Non-Indigenous.<sup>129</sup> The rates for ending up in federal custody less than six months since the previous incarceration were 33.1% for First Nations, 28.2% for Metis, 29.8% for Inuit, and 20.8% for non-Indigenous.<sup>130</sup> The rates for not going at least a full year without crime leading up to the current federal term were 29.4% for First Nations, 24.3% for Metis, 23.5% for Inuit, and 16.7% for Non-Indigenous.<sup>131</sup>

It is also possible, but not a given, that programs like Onashowewin could help reduce the costs of incarceration over the long-term. As of 2016 it costs \$203 each day to keep a prisoner in provincial jail, making for a yearly cost of \$74, 095.<sup>132</sup> It costs \$283 each day to keep a prisoner in federal penitentiary, making for a yearly cost of \$103,295.<sup>133</sup> 80% of adult males under the CSC's supervisory mandate were under community supervision

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<sup>124</sup> *Ibid* at 16.

<sup>125</sup> *Ibid* at 17.

<sup>126</sup> *Ibid* at 17.

<sup>127</sup> *Ibid* at 17.

<sup>128</sup> Shanna Farrell MacDonald, *Profile of Aboriginal Men Offenders: Custody and Supervision Snapshots* (Ottawa: Correctional Service of Canada, 2014) at 10.

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

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

<sup>131</sup> *Ibid*.

<sup>132</sup> Reitano, *supra* note 15 at 6.

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

(e.g. conditional sentence or probation), while only 20% were in federal or provincial custody.<sup>134</sup> And yet 80% of the CSC's \$4.6 billion budget in 2016 was spent on federal and provincial custodial services, while 15% was spent on community supervision.<sup>135</sup>

Making a connection between significantly reduced prison expenditures and the results of the Onashowewin study is admittedly speculative, especially given the small sample size of case files. However, if programs like Onashowewin succeed in setting their clients on more positive pathways in life, that can potentially avoid the recurring patterns of incarceration that may otherwise result afterwards. Such programs may require a significant investment at the outset to make them effective, but that may ultimately be more cost effective for the justice systems, provincial and federal, at every level.

Lastly, we acknowledge that the study by Onashowewin is, although hopeful, not definitive either. In order to fully understand all the variables of why persons taking the Onashowewin program may or may not reoffend, it is our opinion that further studies must be undertaken. Another longer-term study with a larger sample size might be considered; perhaps this could include using 400 client cases, with 100 individuals from each of the 4 categories. This is in order to reduce the possibility of skewed data, which may emerge from a sample size of only 100. In addition, it is important to note that the act of re-offending does not in itself conclusively demonstrate that participation in the program was not beneficial, even in relation to involvement with the criminal justice system. It could, for example, have led to improvements in the participants' future healing and healthy lifestyle choices. A larger sample size will also show more definitively the trends present in the data. Other follow up studies might include qualitative interviews with individual clients that include closer examinations of clients' background and socio-economic situation, and reasons for non-compliance for those who do not complete the program. Furthermore, a longer period of study would provide a more accurate analysis of rates of recidivism. Nonetheless, it is hoped that at present, certain insights may be taken from our study.

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<sup>134</sup> *Ibid* at 3.

<sup>135</sup> *Ibid* at 6.

## B. Cultural Renewal

Note previously that we identified the loss of traditional culture and its ability to act as a restraint against criminal behaviour as a contributor to Indigenous over-incarceration. The low recidivism rates of Onashowewin clients may speak to not just the ability to prevent cycles of recidivism, but also the ability to counteract the negative effects of culture loss. It can perhaps be taken further and said that Onashowewin can contribute to cultural revitalization. The use of culturally appropriate delivery of programs may have contributed to client compliance and success in the diversionary programmes offered by Onashowewin, as traditional teachings and ceremonies are incorporated throughout all programs.

We note that there are limitations to making this kind of assertion though. The study itself did not focus specifically on establishing connections between whether clients developed an increased belief in their own cultures and spirituality and subsequent desistance from re-offending. The study was not able to examine many of these issues more closely, given the focus on recidivism rates. However, it would not be a stretch to imply a connection between the cultural content of Onashowewin's programs and the recidivism rate. It is likely that Onashowewin's holistic, culturally relevant programs and services help reduce recidivism by rebuilding positive self-esteem in Indigenous persons who came into trouble with the justice system. The recidivism rate suggests that Onashowewin programs can offer guidance to offenders to set their lives on a better path despite the powerful impetus in the multiplicity of factors behind Indigenous over-incarceration. These kinds of determinants should also be considered for future research.

Another limitation is the small scale of Onashowewin's operations and its client base. The extent of cultural loss for many Indigenous communities may be very significant. Many Indigenous communities, to no small degree, have suffered severe devastation to the extent that traditional laws and justice processes have fallen into disuse over the course of decades.<sup>136</sup> A program like Onashowewin by itself certainly cannot hope to completely reverse this phenomena on a sufficient scale. One reply to that reality is that Onashowewin still has a positive effect on the lives of its clients, whom we can reasonably conjecture leave Onashowewin with a renewed sense of

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<sup>136</sup> Denis C Bracken, Lawrence Deane & Larry Morrissette, "Desistance and Social Marginalization: The Case of Canadian Aboriginal Offenders" (2009) 13:1 *Theoretical Criminology* 61.

positive self-esteem in themselves as Indigenous persons. That in itself is still a positive outcome, even if the clients themselves are not that numerous in the grand scheme of things. That in turn can amount to a kind of cultural revitalization, even if by itself it is on a relatively small scale.

Imagine, however, if there were many more programs like Onashowewin with the capabilities and resources to provide their services to a greater number of Indigenous clients in need of them. Perhaps the enlarged scale of operations and client servicing in turn leads to cultural revitalization on a larger scale as well. That in turn raises the question of whether programs like Onashowewin can provide at least a partial foundation upon which Indigenous self-determination can be built, which leads to the next series of discussions.

### C. Indigenous Self-Determination

A criticism that is frequently made against existing restorative justice programs is that they represent the institutionalization of restorative justice by the state.<sup>137</sup> Similar criticisms have been made against Indigenous justice initiatives. Chris Andersen argues that contemporary Indigenous justice initiatives in Canada reflect an effort by the Canadian political hegemony to contain Indigenous aspirations for greater control over justice within certain parameters that in substance leave the status quo intact.<sup>138</sup> In other words, Andersen argues that Indigenous justice initiatives provide a medium that displays a veneer of community empowerment and accommodation of cultural difference. Andersen argues that it is however the Canadian state that provides the funding, and therefore calls the shots and sets the parameters of the justice initiatives.<sup>139</sup> Those parameters are that Indigenous accused must plead guilty or otherwise accept responsibility (for purposes of diversionary initiatives), and that the justice initiatives will usually only cover the less serious offences that the standard justice system would itself be willing to deal with by community-based sentences (e.g.

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<sup>137</sup> Barbara Hudson, "The Institutionalisation of Restorative Justice: Justice and the Ethics of Discourse" (2007) *Acta Juridica* 56.

<sup>138</sup> Chris Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31 *Crime L & Soc Change* 303.

<sup>139</sup> *Ibid* at 313, 319.

probation, conditional sentence) anyway.<sup>140</sup> The Canadian state thus accommodates Indigenous justice initiatives only to the extent that its own interests happen to converge with those of Indigenous communities.<sup>141</sup> Once there is no longer that convergence, for example when Indigenous communities may want to apply their own approaches to offences that the standard justice system would want to deal with by incarceration, then the accommodation will stop.<sup>142</sup>

Jesse Sutherland states: "A successful [Indigenous] Justice Strategy must go beyond participatory and indigenised justice processes. Rather, it must support healing and capacity building within First Nations' communities as well as endeavour to decolonize and repair the relationship with the Canadian state."<sup>143</sup> Taiaiake Alfred is even more scathing in his criticism. In his view, surface Indigenization leads some Indigenous participants into believing they are renewing Indigenous self-determination, when really they end up co-opted by the state apparatus.<sup>144</sup> The status quo ends up perpetuated.<sup>145</sup> These criticisms have also been specifically directed towards diversionary programs with an Indigenous emphasis.<sup>146</sup> Onashowewin's programs could certainly be open to similar criticisms. However, we would argue that there is more to the picture, not just for Onashowewin specifically but likely for other Indigenous-based diversionary programs as well.

It is understandable that some would decry diversionary approaches as inadequate. Those criticisms, however, beg the question of whether Indigenous peoples can afford to wait it out for idealized realizations of Indigenous models of justice, or whether immediate action is needed even if less than ideal for the time being. The problem of Indigenous over-

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<sup>140</sup> *Ibid* at 314.

<sup>141</sup> *Ibid* at 317–319.

<sup>142</sup> *Ibid*. See also Paul Havemann, "The Indigenization of Social Control in Canada" in Robert A Silverman & Marianne O Neilson, eds, *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Harcourt, Brace & Co, 1992) 113.

<sup>143</sup> Jesse Sutherland, "Colonialism, Crime and Dispute Resolution: A Critical Analysis of Canada's Aboriginal Justice Strategy" (October 2002), online: <<https://www.mediate.com/articles/sutherlandj.cfm>>.

<sup>144</sup> Gerald R Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont: Oxford University Press, 1999) at 70.

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

<sup>146</sup> Juan Tauri, "An Indigenous Commentary on the Globalisation of Restorative Justice" (2014) 12:2 *British J Community Justice* 35.

incarceration is a serious and pressing one, as we previously described. Part in parcel with that is that Indigenous persons have higher recidivism rates than non-Indigenous persons. Indigenous offenders have been found to be a significantly higher risk to reoffend following incarceration than non-Indigenous offenders.<sup>147</sup> They are also a significantly greater risk of falling into lifelong patterns of offending.<sup>148</sup>

Given the extent of cultural loss over decades, it may be unrealistic to expect that, even if Indigenous communities were to be suddenly granted full-determination over justice, that they would overnight be able to exercise that self-determination in such a meaningful and proficient way as though no disruption had ever occurred. The recovery of traditional laws that have been disrupted or fell into disuse is itself a process that takes time.<sup>149</sup> Adapting and implementing those laws and traditions for contemporary use in a changed world must itself be a process that also requires time. And indeed the Royal Commission argues that Indigenous peoples gaining control over criminal justice would not be an overnight affair.<sup>150</sup> There would have to be a transitory phase wherein Indigenous communities would have to remain in partnership with the standard justice system.<sup>151</sup> As Indigenous communities become more capable and more accustomed to administering justice, they can gradually assume full control over justice.<sup>152</sup> This is very much paving the way for full self-determination over justice for Indigenous peoples.

## VIII. CONCLUSION

The 30% recidivism rate for people who go through Onashowewin's programs is encouraging, although we are careful not to overstate its significance. We realize that there was no comparison group against which

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<sup>147</sup> Bonta, Ruge & Dauvergne, *supra* note 20.

<sup>148</sup> Yessine & Bonta, *supra* note 107.

<sup>149</sup> Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 17.

<sup>150</sup> Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: National Library of Canada, 1996) at 175-176.

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

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

to directly measure improvement. There are nonetheless significant connections that can be made. The 30% rate is certainly lower than the recidivism rates that have been found in numerous other studies, even if the comparison is not a perfect one. Furthermore, the first few years following a person's first offence are the most crucial in terms of whether the person will desist from further offences, or will continue to offend frequently afterwards. That suggests that Onashowewin can help its clients avoid persisting patterns of incarceration and recidivism seen with many Indigenous accused. The low recidivism rate is cause for optimism, and suggests that Onashowewin's programs may be successful in counteracting the myriad of factors that drive Indigenous over-incarceration.

We would also suggest that Indigenous diversionary programs can provide an immediate and meaningful vehicle for addressing Indigenous over-incarceration, and should not be rejected as simply an accommodation to the colonialist status quo. Onashowewin provides an example where diversionary programs are grounded in Indigenous cultures and in such a way as to offer positive outcomes for clients. Such programs can also provide a foundation for Indigenous communities to develop and practice control over justice, and in turn provide a foundation for greater evolution of self-determination over criminal justice.