

Settler Justice: How Colonial Institutions Shape Canadian Corrections Populations

Abstract

This paper seeks to address and question common practices in the Canadian criminal justice system, specifically how it relates to Indigenous peoples. The paper uses an interview by former USA president Barack Obama and the issue of overrepresentation of Black males in the criminal justice system in the USA to compare the American situation to Canada's overrepresentation of Indigenous peoples in the criminal justice system. Possible reform and international examples will conclude this comparison.

Key words: Canada, Indigenous, criminal justice system, jury reform, peremptory challenges, police reform

Kelsey Drummond, B.A. Candidate
Carleton University
2019

In a Vice News interview, then-President of the United States Barack Obama sat down and talked to inmates in a prison about the justice system and non-violent drug charges.¹ The clear overrepresentation of African-American men in the corrections system is observed in the video.² While the details of the crimes themselves differ, the issue of overrepresentation of a minority group is an issue in Canada with Indigenous individuals.³ This paper will look at policing methods, jury trials, and corrections statistics to prove that Indigenous people are overrepresented in the criminal justice system because of colonial institutions in Canadian society. By observing international examples, potential reforms will be explored as well.

Issues

The initial point of contact in the criminal justice system is the police. Historically, the police have been a colonial institution used to govern Indigenous communities in hopes to assimilate Indigenous peoples into European settler culture.⁴ The Royal Canadian Mounted Police (RCMP) claim that they are committed to work with Indigenous communities across Canada,⁵ but there is a dark history of abuse from the RCMP towards Indigenous peoples. The RCMP has been documented violating the rights of Indigenous people: violently encountering and allegedly raping and sexually assaulting Indigenous women and girls has been an issue that the Human Rights Watch has brought to light recently.⁶ The RCMP treat Indigenous men the same way: a Siksika man from Alberta was badly beaten and humiliated by being marched through a local police detachment naked in 2018.⁷ In light these incidents, provincial governments have now moved towards Indigenous self-administered policing methods, hoping to end racist behaviour towards Indigenous individuals during the criminal justice process.⁸

Once an Indigenous person is involved in the criminal justice process, justice itself is hard to obtain. Wrongful convictions can occur from a combination of errors made throughout the justice process, like bad policing. Jason George Hill was an Indigenous man accused of ten robberies and convicted of one.⁹ All nine other charges were withdrawn because of new evidence that the real robbers, “Frank” and “Pedro” were laughing at Hill because he was being held responsible for crimes that they had actually committed.¹⁰ There was also evidence that two very similar crimes were committed by the perpetrators while Hill was in custody.¹¹ Hill was convicted on the single robbery

¹ Vice News. *We Followed Obama During His Visit To A Federal Prison | HBO Special Report*, ed (2016). [Vice News]

² Ibid.

³ Malakieh, Jamil. *Adult and youth correctional statistics in Canada, 2016/2017*, Juristat (Statistics Canada, 2018). [Juristat]

⁴ Human Rights Watch. *Submission to the Government of Canada: Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence* (Human Rights Watch, 2017). at p. 3

⁵ "Strategic priorities - Royal Canadian Mounted Police", (2018), online: *Royal Canadian Mounted Police* <http://www.rcmp-grc.gc.ca/prior/index-eng.htm#ac>.

⁶ Rhoad, Meghan. *Those who take us away*, ed ([New York, N.Y.]: Human Rights Watch, 2013) at p. 7-8.

⁷ Grant, Meghan. "After being beaten and marched naked through RCMP detachment, Siksika man sues Mounties", *CBC News* (2018), online: https://www.cbc.ca/news/canada/calgary/lawsuit-rcmp-gleichen-christian-duckchief-injuries-naked-1.4514553?fbclid=IwAR38X-NFsK_lm-mtB9o3CPkVW1zqVAqq2ahPusWyESJoHC3cCA1s7EtS4gA

⁸ Kiedrowski, John. *Trends in Indigenous policing models*, (Public Safety Canada, 2014) [Kiedrowski].

⁹ *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 [Hill] at para 5-10

¹⁰ Ibid. at para 7.

¹¹ Ibid.

charge because witnesses picked him out of a lineup: a lineup of him with eleven white men.¹² The eyewitnesses were adamant in their identification of Hill, and even though nine charges were dropped and evidence was stronger against Frank Sotomayer, a Hispanic man, Hill was convicted of the charge.¹³ The reason Hill was convicted was because of his brown skin, and is an obvious example of an avoidable miscarriage of justice. There were a number of procedural missteps and failures by the police force regarding reinvestigation,¹⁴ but it was ultimately the Crown's immovable determination to put Hill behind bars, despite minimal evidence, that resulted in his conviction.¹⁵

Unfortunately, this is not the only story of a miscarriage of justice due to inadequate police work. The case against Donald Marshall Jr., a Mi'kmaq man from Sydney, Nova Scotia is arguably Canada's most famous wrongful conviction case, highlighting failures in the justice system.¹⁶ A shoddy investigation, weak - and even false - witness testimonies, and a non-Indigenous jury lead to a conviction of Marshall Jr.¹⁷ He spent eleven years in prison for a murder he did not commit.¹⁸

Similarly, Connie Oakes, an Indigenous woman from Saskatchewan was convicted of second-degree murder in 2013.¹⁹ In 2016 on appeal, Oakes' conviction was overturned, and a new trial was ordered,²⁰ but the Crown dropped the charges.²¹ The trial produced contradicting testimonies and presented no forensic evidence,²² yet Oakes was convicted by a non-Indigenous jury.²³ Both the *Oakes* and *Marshall* cases emphasize the issues with our jury system in Canada, specifically non-Indigenous juries.²⁴

Non-Indigenous juries in cases involving Indigenous people break a fundamental principle of the jury system: that juries should be representative.²⁵ As Justice L'Heureux-Dubé pointed out in *R v Sherratt*, the jury is not a tool that can be used by either side to create a desired outcome, but that it should represent the different people living throughout Canada.²⁶ Unrepresentative juries not only wrongfully convict, but have been discussed lately regarding acquittals.

In the well-known case of *R v Stanley*, Gerald Stanley was accused of second degree murder in the death of a young Indigenous man, Colten Boushie.²⁷ Stanley was acquitted of these charges by

¹² Ibid. at para 6.

¹³ Ibid. at para 7-10.

¹⁴ Ibid. at para 13.

¹⁵ Ibid. at para 9

¹⁶ *R v Marshall*, [1983] Carswell 312 [*Marshall*]

¹⁷ McMillan, L Jane. *Truth and Conviction*, ed (Vancouver: UBC Press, 2018). 11-17 [*McMillan*]

¹⁸ *Marshall*, *supra* note 9 at para 10.

¹⁹ *R v Oakes*, [2016] ABCA 90 [*Oakes*] at para 63.

²⁰ Ibid. at para 92

²¹ Grant, Meghan. "'She's coming home': Connie Oakes free after murder charge stayed by Alberta Crown", *CBC* (2016), online: <<https://www.cbc.ca/news/canada/calgary/connie-oakes-murder-charge-stayed-wendy-scott-1.3557995>>.

²² Ibid.

²³ Barrera, Jorge. "Connie Oakes sues Alberta Crown, Medicine Hat police for \$1M over wrongful murder conviction", *CBC* (2018), online: <<https://www.cbc.ca/news/indigenous/connie-oakes-lawsuit-wrongful-conviction-murder-1.4642379>>.

²⁴ Roach, Kent. *Canadian justice, Indigenous injustice*, ed (Montreal, QU: McGill-Queen's University Press, 2019). [*Roach*] at p 8.

²⁵ Iacobucci, Frank. *First Nations Representation on Ontario Juries* (Ministry of the Attorney General, 2013) [*Iacobucci Report*] at para 104.

²⁶ *R v Sherratt*, [1991] CarswellMan 7 [*Sherratt*] at para 31.

²⁷ *R v Stanley*, [2017] SKQB 367 [*Stanley*]

an all-white jury.²⁸ With nearly 30% of the judicial district's population being Indigenous, there should not have been a problem having Indigenous jurors appear in the *Stanley* case.²⁹ However, only 11% of the prospective jurors *may* have been Indigenous, and none served on the jury in the trial.³⁰ This jury was crafted by the defence through the use of peremptory jury challenges to exclude five visibly Indigenous jurors.³¹ There were no reasons given as to why these jurors would be unfit to sit on this trial, and there were no objections made by the judge or by the Crown prosecutors.³²

Unfortunately, *Stanley* is not the only example of a jury with no visible Indigenous peoples to be acquitted of a charge involving an Indigenous victim. In *R v Khill*, Peter Khill was a white man accused of second-degree murder in the death of an Indigenous man, Jonathan Styres.³³ In this case, the jurors were screened for potential racism and still found Khill not guilty of the charges he was facing.³⁴ It should be noted that while there were two visible minorities on the jury, there has been no clarification as to whether there were any Indigenous jurors.³⁵

In both of these cases, self-defence and protection of property were used as defenses.³⁶ Institutionalised racism and stereotypes of "dangerous" Indigenous men in rural areas has been attributed to these defenses and may have influenced the juries of both trials.³⁷ This idea is important to the outcome of these cases, but is too expansive to explore in the context of this paper.

Issues with juries aside, while convicted, Oakes, Marshall, and Hill represented the truth of overrepresentation in Canadian prisons. The issue of overrepresentation of minorities that Obama examined in the video is not a unique problem experienced only in the United States. Indigenous people represent 27% of the population in federal correctional services while only representing 4.1% of the Canadian adult population.³⁸ In ten years, this number has increased 8% while total adult incarceration rates have steadily decreased since 2012.³⁹ This is comparable to African-Americans representing 34% of correctional populations in the United States in 2014.⁴⁰ Obama discussed that most of these men were convicted of non-violent drug crimes.⁴¹ The men serving time in the United States serve longer sentences with a lower chance for parole.⁴² Indigenous men in Canada face the same issue: in 2016, they served 50.5% of their sentence before being released on parole as opposed

²⁸ *Roach, supra* note 24 at p 5.

²⁹ *Ibid.* at p 95.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *R v Khill*, [2018] ONSC 4149 [*Khill*] at para 1 and 12.

³⁴ Clairmont, Susan. "Peter Khill found not guilty", *The Hamilton Spectator* (2018), online: <<https://www.thespec.com/opinion-story/8699815-peter-khill-found-not-guilty/>>.

³⁵ Editors. "Clarification", *The Hamilton Spectator* (2018), online: <<https://www.thespec.com/news-story/8705150-clarification/>>.

³⁶ *Roach, supra* note 24 at ch 3 (p 38-68) and *Khill, supra* note 30 at para 7.

³⁷ *Roach, supra* note 24 at ch 3 (p 38-68).

³⁸ *Juristat, supra* note 3 at 4.

³⁹ *Ibid.* at 3.

⁴⁰ "NAACP | Criminal Justice Fact Sheet", (2019), online: *NAACP* <<https://www.naacp.org/criminal-justice-fact-sheet>>. [*NAACP Fact Sheet*]

⁴¹ *Vice News, supra* note 1.

⁴² *Ibid.*

to 46% for their white counterparts.⁴³ Indigenous women make up an even greater percentage of custody admissions: 43% of woman prison admissions are of Indigenous women.⁴⁴

Possible Reform and International Comparison

Overrepresentation in the criminal justice system has been explored to be caused in part by poor policing and non-Indigenous juries in this paper. What these two institutions have in common is that they are colonial structures that have been used historically to oppress Indigenous communities.⁴⁵ In order to ameliorate the overrepresentation of Indigenous peoples in every step of the criminal justice process, power must be shifted from colonial powers to Indigenous communities. New Zealand, which has a similar history of colonialism, experiences overrepresentation of Māori people in their criminal justice system and has taken action to fix this.⁴⁶

Police Reform

There is an abundance of benefits to a diverse police force. Empathy and communication are improved, tensions between the police and marginalized groups is lessened, and there may be an increase in public trust.⁴⁷ A number of steps have been taken to include Indigenous peoples in police forces. Since the mid-1960s, changes to on-reserve police forces have gradually changed to include a more direct-policing approach.⁴⁸ In 1991, the First Nations Policing Program was implemented to ensure that police services are fitted to the community.⁴⁹ In 2009, Public Safety Canada conducted a review that communication between the community and the police force about culture and Indigenous approaches would help strengthen the police services.⁵⁰

New Zealand has made similar changes in dividing the centralized police force into smaller districts to encourage cultural understanding and initiatives with the Māori peoples.⁵¹ Unfortunately, there is still a cultural gap in the New Zealand Police, lacking Māori women in the force.⁵²

Jury Reform

There is a gap in education about the criminal justice system in Indigenous communities.⁵³ Since some Indigenous people do not understand how the jury system works in the overall criminal justice framework, they can be reluctant to participate in it.⁵⁴ However, when they do attempt to participate, efforts should be made to include them in a jury. Diverse juries have been observed to deliberate longer and make fewer factual mistakes.⁵⁵ Different backgrounds allow for more personal

⁴³ Percentage of sentence served before first full parole in Canada in fiscal years 2006 to 2017, indigenous identity. "Share of sentence served before first parole, by indigenous identity Canada 2006-2017 | Statista", (2018), online: *Statista* <<https://www.statista.com/statistics/563253/percentage-of-sentence-served-before-first-parole-canada-by-aboriginal-identity>>.

⁴⁴ *Juristat*, *supra* note 3 at 5.

⁴⁵ *Roach*, *supra* note 24 at ch 2 (p 16-37).

⁴⁶ *Kiedrowski*, *supra* note 8 at p 38.

⁴⁷ Loving, Kathryn. "Advantages in A Diversified Force", (2014), online: *Criminal Justice Degree* <<https://www.criminaljusticedegree.com/advantages-in-a-diversified-force/>>.

⁴⁸ *Kiedrowski*, *supra* at note 8 at p 5.

⁴⁹ *Ibid.* at p 7.

⁵⁰ *Ibid.* at p 11.

⁵¹ *Ibid.* at p 38-39.

⁵² *Ibid.* at p 40.

⁵³ *Jacobucci Report*, *supra* note 25 at para 28.

⁵⁴ *Ibid.*

⁵⁵ Sommers, Samuel R. "On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations" (2006) 90:4 *Journal of Personality and Social Psychology*, online:

experiences to be related and considered, which could allow for a more just outcome.⁵⁶ In cases involving race or culture, counsel has a number of “peremptory challenges”, allowing for a prospective juror to be dismissed without reason.⁵⁷ In the *Stanley* case, these challenges were used to dismiss the only visible Indigenous prospective jurors, allowing for an entirely white jury to acquit Stanley.⁵⁸ Former Justice Iacobucci recommended that the *Criminal Code of Canada* be reformed to prohibit the use of peremptory challenges to discriminate against Indigenous peoples serving on a jury.⁵⁹

In New Zealand, the justice system is also a colonial institution forced upon the Māori peoples.⁶⁰ The Māori people have the same issues with representation on juries as Canada’s Indigenous peoples. The New Zealand Law Commission conducted a study into how to include more Māori peoples in juries, but both solutions, using broader selection methods and ensuring proportion, were rejected.⁶¹ Peremptory challenges were not examined, and proper jury reform has yet to happen.

Gladue and Restorative Justice

Section 718.2(e) of the *Criminal Code of Canada* gives Indigenous peoples certain sentencing rights.⁶² This is an attempt to avoid systemic discrimination that leads to the overrepresentation of Indigenous peoples in the criminal justice system.⁶³ A Gladue report can include the personal history of the Indigenous accused and can make a recommendation on sentences.⁶⁴ Gladue also allows for a restorative justice approach.⁶⁵ In Canada, Gladue mainly affects bail and sentencing, without impact on trials.⁶⁶

Restorative justice focuses more on the rehabilitation rather than the punishment of an offender.⁶⁷ Traditionally, harmony and healing are more in line with Indigenous views of justice, and so moving towards restorative justice when dealing with Indigenous offenders would see a change in the representation of Indigenous peoples in prisons.⁶⁸ Restorative justice has successfully been used in Canada since 1991 in Indigenous communities.⁶⁹ Victims say that they feel heard, respected, and

<<https://search-proquest-com.proxy.library.carleton.ca/docview/614485710/fulltextPDF/4F646D00136A4E72PQ/1?accountid=9894>>.

[Sommers] at p 604.

⁵⁶ Ibid at p 604-605.

⁵⁷ *Iacobucci Report*, *supra* note 25 at para 101.

⁵⁸ *Roach*, *supra* note 24 at p 95.

⁵⁹ *Iacobucci Report*, *supra* note 25 at para 44.

⁶⁰ Ibid at para 186.

⁶¹ Ibid. at para 188.

⁶² *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*] s. 718.2(e)

⁶³ "Gladue and Aboriginal Sentencing", (2019), online: *Justice Education Society* <<https://www.justiceeducation.ca/about-us/research/gladue-and-aboriginal-sentencing>>.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Rudin, Johnathan. *Gladue Information Video*, ed (Achimok Film & TV Inc).

⁶⁷ "Restorative Justice", (2019), online: *Justice Education Society* <<https://www.justiceeducation.ca/about-us/research/aboriginal-sentencing/restorative-justice>>.

⁶⁸ *Iacobucci Report*, *supra* note 25 at para 210-212.

⁶⁹ Evans, Jane, Richard Gill & Susan MacDonald. *Restorative Justice: The Experiences of Victims and Survivors*, Victims of Crime Research Digest (Department of Justice, 2018).

satisfied with the outcome.⁷⁰ With restorative justice, there is a follow-up plan that leads to lower rates of reoffending.⁷¹

Restorative justice aligns with traditional Māori beliefs as well. New Zealand has been using restorative justice successfully since 1989 in its youth justice system.⁷² This system diverts cases away from the court system, supports remedial outcomes rather than punishment, is more cost effective than the prison system, and has Māori-specific courts.⁷³ These courts are presided by Māori judges and local elders sit as advisors.⁷⁴ This encourages offenders to reconnect with their ancestors, family, and wider community and can also lead to lower rates of reoffending youth.⁷⁵ Restorative justice has made its way to adult offences: the greater the offence, the greater need for healing.⁷⁶ Victim healing can begin in restorative justice efforts.⁷⁷

Through examining the comparison between New Zealand's Māori peoples, possible reforms to the Canadian justice system can be applied in order to address the systemic racism in the criminal justice system. Indigenous peoples in Canada are overrepresented in prisons because of colonial institutions, like the police and juries, that are enforced upon them. This overrepresentation has been seen and observed by former-US president Barack Obama, and it is clear that it is not an issue unique to the American criminal justice system.

Bibliography

LEGISLATION

Criminal Code, RSC, 1985, c C-46, s. 718.2(e)

JURISPRUDENCE

Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board, 2007 SCC 41

R v Khill, [2018] ONSC 4149

R v Marshall, [1983] Carswell 312

R v Oakes, [2016] ABCA 90

R v Sherratt, [1991] CarswellMan 7

R v Stanley, [2017] SKQB

SECONDARY MATERIALS: BOOKS

McMillan, L Jane. *Truth and Conviction*, ed (Vancouver: UBC Press, 2018). 11-17

Roach, Kent. *Canadian justice, Indigenous injustice*, ed (Montreal, QU: McGill-Queen's University Press, 2019).

SECONDARY MATERIALS: REPORTS AND STATISTICS

Evans, Jane, Richard Gill & Susan MacDonald. *Restorative Justice: The Experiences of Victims and Survivors*, Victims of Crime Research Digest (Department of Justice, 2018).

Human Rights Watch. *Submission to the Government of Canada: Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence* (Human Rights Watch, 2017).

Iacobucci, Frank. *First Nations Representation on Ontario Juries* (Ministry of the Attorney General, 2013).

Kiedrowski, John. *Trends in Indigenous policing models*, (Public Safety Canada, 2014)

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² McElrea, Fred. "Twenty Years of Restorative Justice in New Zealand", (2012), online: *Tikkun* <<https://www.tikkun.org/newsite/twenty-years-of-restorative-justice-in-new-zealand>>.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

Malakieh, Jamil. *Adult and youth correctional statistics in Canada, 2016/2017*, Juristat (Statistics Canada, 2018).

"NAACP | Criminal Justice Fact Sheet", (2019),

online: *NAACP* <<https://www.naacp.org/criminal-justice-fact-sheet>.

Rhoad, Meghan. *Those who take us away*, ed ([New York, N.Y.]: Human Rights Watch, 2013)

Percentage of sentence served before first full parole in Canada in fiscal years 2006 to 2017,

indigenous identity. "Share of sentence served before first parole, by indigenous identity Canada 2006-2017 | Statista", (2018), online: *Statista*

<<https://www.statista.com/statistics/563253/percentage-of-sentence-served-before-first-parole-canada-by-aboriginal-identity>.

SECONDARY MATERIALS: ONLINE ARTICLES

Barrera, Jorge. "Connie Oakes sues Alberta Crown, Medicine Hat police for \$1M over wrongful murder conviction", *CBC* (2018), online: <<https://www.cbc.ca/news/indigenous/connie-oakes-lawsuit-wrongful-conviction-murder-1.4642379>>.

Clairmont, Susan. "Peter Khill found not guilty", *The Hamilton Spectator* (2018), online:

<<https://www.thespec.com/opinion-story/8699815-peter-khill-found-not-guilty/>>.

Editors. "Clarification", *The Hamilton Spectator* (2018), online: <<https://www.thespec.com/news-story/8705150-clarification/>>.

"Gladue and Aboriginal Sentencing", (2019), online: *Justice Education Society*

<<https://www.justiceeducation.ca/about-us/research/gladue-and-aboriginal-sentencing>>.

Grant, Meghan. "After being beaten and marched naked through RCMP detachment, Siksika man sues Mounties", *CBC News* (2018), online: https://www.cbc.ca/news/canada/calgary/lawsuit-rcmp-gleichen-christian-duckchief-injuries-naked-1.4514553?fbclid=IwAR38X-NFsK_lm-mtB9o3CPkVW1zqVAqq2ahPusWyESJoHC3cCA1s7EtS4gA

Grant, Meghan. "'She's coming home': Connie Oakes free after murder charge stayed by Alberta Crown", *CBC* (2016), online: <<https://www.cbc.ca/news/canada/calgary/connie-oakes-murder-charge-stayed-wendy-scott-1.3557995>>.

Loving, Kathryn. "Advantages in A Diversified Force", (2014), online: *Criminal Justice Degree*

<<https://www.criminaljusticedegree.com/advantages-in-a-diversified-force/>>.

McElrea, Fred. "Twenty Years of Restorative Justice in New Zealand", (2012),

online: *Tikkun* <<https://www.tikkun.org/newsite/twenty-years-of-restorative-justice-in-new-zealand>>.

"Restorative Justice", (2019), online: *Justice Education Society* <<https://www.justiceeducation.ca/about-us/research/aboriginal-sentencing/restorative-justice>>.

Sommers, Samuel R. "On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations" (2006) 90:4 *Journal of Personality and Social Psychology*, online: <<https://search-proquest-com.proxy.library.carleton.ca/docview/614485710/fulltextPDF/4F646D00136A4E72PQ/1?accountid=9894>>.

"Strategic priorities - Royal Canadian Mounted Police", (2018), online: *Royal Canadian Mounted Police* <http://www.rcmp-grc.gc.ca/prior/index-eng.htm#ac>.

SECONDARY MATERIALS: OTHER ONLINE SOURCES

Rudin, Johnathan. *Gladue Information Video*, ed (Achimok Film & TV Inc).

Vice News. *We Followed Obama During His Visit To A Federal Prison | HBO Special Report*, ed (2016).