



# Guilty pleas among Indigenous people in Canada

Angela Bressan and Kyle Coady

Research and Statistics Division

2017



*The views expressed in this publication are those of the authors and do not necessarily represent the views of the Department of Justice Canada or the Government of Canada.*

- Information contained in this publication or product may be reproduced, in part or in whole, and by any means, for personal or public non-commercial purposes, without charge or further permission, unless otherwise specified.
  
- You are asked to:
  - exercise due diligence in ensuring the accuracy of the materials reproduced;
  - indicate both the complete title of the materials reproduced, as well as the author organization; and
  - indicate that the reproduction is a copy of an official work that is published by the Government of Canada and that the reproduction has not been produced in affiliation with, or with the endorsement of the Government of Canada.
  
- Commercial reproduction and distribution is prohibited except with written permission from the Department of Justice Canada.

For more information, please contact the Department of Justice Canada at: [www.justice.gc.ca](http://www.justice.gc.ca).

©Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, 2017

## Table of Contents

Acknowledgments.....	4
Executive summary.....	5
Introduction .....	6
Method .....	8
Findings .....	9
Why Indigenous people plead guilty .....	9
Understanding and experience.....	9
To get it over with.....	10
Bail and remand .....	10
Plea bargaining and legal representation .....	11
Culture and community .....	12
Social vulnerabilities .....	13
How pleading guilty affects Indigenous people.....	14
Employment and housing .....	14
Family and community.....	14
Incarceration .....	14
Re-contact with the justice system.....	15
Justice system supports .....	16
Research and data gaps .....	18
Conclusion.....	19
Appendix A – Interview guide .....	20
References .....	22

## Acknowledgments

We thank participants for their contribution to this research. They shared their valuable insights related to the experiences of Indigenous people in contact with the criminal justice system. We are grateful for their time, stories, and views. We also thank our colleagues in the Department of Justice Canada's Policy Sector who helped recruit participants and reviewed this report.

## Executive summary

The overrepresentation of Indigenous people in custody is a serious challenge that confronts Canada's justice system. One factor that may contribute to this overrepresentation is a higher rate of guilty pleas among Indigenous people. The Research and Statistics Division at the Department of Justice Canada interviewed justice system professionals to explore the circumstances under which Indigenous people plead guilty.

First, there are aspects of the justice system that can incentivize a guilty plea for anyone accused of a crime. These include delays and adjournments, "unreasonable" bail conditions, remand, plea bargaining, and barriers accessing legal aid. Some of these issues may disproportionately affect Indigenous people. Second, like other marginalized groups, Indigenous people may be at greater risk of justice system contact and guilty pleas because of social vulnerabilities related to income, housing, addictions, and mental health. Finally, there are unique aspects of Indigenous culture and community that may contribute to guilty pleas, including language barriers, a distrust in the justice system, and a "cultural premium" placed on agreement, cooperation, and taking responsibility. These cultural values can lead Indigenous accused to plead guilty even if they are not legally guilty, to provide full confessions to police, and to agree in court whether they agree or even understand.

Three key factors – justice system incentives, social vulnerabilities, and culture and community – interact to contribute to guilty pleas among Indigenous people. The resulting criminal record and incarceration can have adverse consequences, including loss of employment and housing, loss of family and community, trauma from incarceration, and increased risk of re-contact with the justice system. Effects may be worse in remote communities with language barriers, limited employment opportunities, over-policing, and challenges accessing courts and social services. According to participants, many Indigenous people in the justice system go through a vicious cycle of re-contact for failing to comply with conditions that criminalize their addiction and other social issues.

This research suggests that addressing inequities in the justice system that contribute to guilty pleas would help reduce the rate of incarceration of Indigenous people. Participants described initiatives that support Indigenous people in the criminal justice system that are culturally and community appropriate and responsive to their needs. Examples include the Indigenous Courtwork Program, legal aid, specialized courts, Gladue reports, restorative justice, cultural competency training for justice system professionals, and court transportation services. Addressing gaps in services to Indigenous people in the justice system and front-end social supports related to poverty, housing, addiction, and mental health would help reduce Indigenous people's contact with the criminal justice system.

## Introduction

The overrepresentation of Indigenous people in custody is a longstanding issue for Canada's criminal justice system. Almost two decades ago, the Supreme Court of Canada referred to the overrepresentation of Indigenous people in custody as "a crisis in the Canadian criminal justice system," and Canada's prisons as the "contemporary equivalent" of residential schools (*R. v. Gladue*, [1999] 1 SCR 688; citing Jackson, 1988 at para 60). Reducing the rate of incarceration of Indigenous people is a priority for the federal government and a "call to action" of the Truth and Reconciliation Commission of Canada (Office of the Prime Minister, 2015; Truth and Reconciliation Commission of Canada, 2015).

The overrepresentation of Indigenous people in custody is described as "only the tip of the iceberg," a result of their overrepresentation "in virtually all aspects of the system" (*R. v. Gladue*, [1999] 1 SCR 688 at para 61). This overrepresentation is attributed to colonialism, culture clash, systemic discrimination, socioeconomic and demographic conditions, victimization, substance abuse, and a lack of social services (Boe, 2002; Cunneen, 2001, 2006; La Prairie, 2002; Latimer & Foss, 2004; Rudin, 2007). There are also concerns that Indigenous people are "more inclined to plead guilty even if they are innocent or have a valid defence" (Roach, 2015, 215), and "not applying for bail and not entering a not-guilty plea when, in many cases, they should be" (Clark, 2016, 4). The Indigenous Courtwork Program began in the 1960s in part to ensure Indigenous people were not just pleading guilty to get out of the process without understanding the consequences (Department of Justice Canada, 2008).

There are no national statistics on guilty pleas in Canada. Some estimate that approximately 90% of criminal cases are resolved with a guilty plea (Kellough & Wortley, 2002). A guilty plea can benefit both the justice system and the accused (e.g., increased efficiency, reduced cost, more lenient sentence) (*R. v. Anthony-Cook*, [2016]; King et al., 2005; Piccinato, 2004; Verdun-Jones & Tijerino, 2002). Factors related to guilty pleas include the number of charges and nature of evidence, plea bargaining, pressure from defence counsel and judges, length and cost of legal proceedings, and pre-trial detention (Albonetti, 1990; Baldwin & McConville, 1979; Erickson & Baranek, 1982; Euvrard & Leclerc, 2016; Feeley, 1979; Kellough & Wortley, 2002; McConville et al., 1994; Roach & Mack, 2009). Pre-trial detention is described as "an instrument of pressure by the system," "a source of coercion," and a strategy to extract guilty pleas in exchange for a reduced sentence (Euvrard & Leclerc, 2016; Kellough & Wortley, 2002; Vacheret et al., 2015, 120). According to Canadian research, accused held in remand were twice as likely to plead guilty as those released on bail (Kellough & Wortley, 2002). Interviews with Canadian remand prisoners illustrates, "The difficult conditions (dead time without participation in programs, overcrowding, etc.) and the stress, anxiety, and uncertainty associated with remand led the accused to feel that they had no choice but to plead guilty in order to escape a difficult situation" (Euvrard & Leclerc, 2016, 8).

Vulnerable people experiencing mental health or addictions issues, cognitive impairments, poverty, or homelessness may face added pressure to plead guilty. They may be less likely to have a surety in court and be released on bail (Webster, 2015). They may plead guilty to access alternative justice processes or specialized courts (e.g., drug treatment court, mental health court) (Clark, 2016). People with Fetal Alcohol Spectrum Disorder (FASD) may have a heightened degree of suggestibility that contributes to false confessions and guilty pleas (Roach & Bailey, 2009).

Race/ethnicity may be a factor in guilty pleas. Some studies revealed that black and Hispanic accused are more likely to go to trial (plead not guilty) than white accused because they have less trust in the plea bargain process or are offered fewer plea deals (Albonetti, 1990; Frenzel & Ball, 2007; Johnson, 2003; LaFree, 1980, 1985).

Indigenous people may have unique cultural considerations for pleading guilty, including language barriers and values around reconciliation and taking responsibility. The words 'guilty' and 'innocent' do not translate in many Indigenous languages, and one can interpret the question "How do you plead: guilty or not guilty?" as "Are you being blamed?" (Clark, 1989, 47-48; Rudin, 2007; Zimmerman, 1992). Other cultural considerations include the Indigenous phenomenon of 'gratuitous concurrence,' that is "when a person appears to assent to every proposition put to them even when they do not agree" (Legal Services Commission of South Australia; Roach, 2015; Rudin, 2007).<sup>1</sup> In addition, the fact that Indigenous people are more likely to be denied bail and overrepresented in remand may contribute to a higher rate of guilty pleas (Correctional Services Program, 2017; Manitoba Aboriginal Justice Inquiry, 1991). Moreover, the impact of colonialism and residential schools has left some Indigenous people distrustful of the justice system. According to the Manitoba Aboriginal Justice Inquiry (1991),

When they do engage the legal system, or become engaged by it, the manner in which their problems are dealt with often is out of tune with their unique position as Aboriginal people. As a result, they have come to mistrust the Canadian legal system and will avoid it when possible. Even when they do have to deal with it, we find that they simply minimize their exposure to it. This can take the form of inappropriate guilty pleas, failure to attend court appearances and a perpetual passivity that manifests itself in an apparent air of indifference about what happens to them in court.

To explore the issue of guilty pleas among Indigenous people, the Research and Statistics Division at the Department of Justice Canada interviewed justice system representatives from the Indigenous Courtwork Program, legal aid, and prosecutions. This research supports the Department's mandate to review the criminal justice system, including the overrepresentation of Indigenous people in custody and gaps in services to Indigenous people.

---

<sup>1</sup> According to the Legal Services Commission of South Australia, "For many Indigenous people, using gratuitous concurrence during a conversation is a cultural phenomenon, and is used to build or define the relationship between the people who are speaking. For example, it may indicate respect towards a person, cooperation between people, or acceptance of a particular situation."

## Method

The Research and Statistics Division at the Department of Justice Canada conducted semi-structured, open-ended telephone interviews with 25 justice system professionals between November 2016 and January 2017. Participants included courtworkers, lawyers, and representatives from provincial and territorial governments and program delivery agencies. They were recruited through the Federal-Provincial-Territorial Permanent Working Group on Legal Aid, the Tripartite Working Group of the Indigenous Courtwork Program, and the Federal-Provincial-Territorial Heads of Prosecutions Committee.<sup>2</sup> Participants were available from all provinces and territories except New Brunswick and Newfoundland and Labrador.

The interview consisted of 12 questions about the participants' experiences and knowledge of Indigenous people in the criminal justice system. Participants reflected on how Indigenous accused/clients understand the justice system, the circumstances under which they plead guilty, the implications, justice system supports, and research and data gaps.<sup>3</sup> An interview guide was shared with participants before the interview (Appendix A).

Interviews lasted approximately 30 minutes and were audio-recorded to help with transcription and analysis. Transcripts and notes were analyzed using thematic analysis.<sup>4</sup> The themes emerged from the literature (top-down approach) and immersion in the interviews (bottom-up approach). This report foregrounds the voices of participants in several quotations to illustrate their rich and nuanced observations. This research followed ethical guidelines on anonymity, confidentiality, and data storage.

---

<sup>2</sup> The Federal-Provincial-Territorial Permanent Working Group on Legal Aid is a forum for national information sharing, research, and joint policy development and discussions on matters of shared interest respecting legal aid, as well as for the negotiation of the federal contribution for legal aid. The Tripartite Working Group of the Indigenous Courtwork Program is a forum to address policy and operational issues related to the Indigenous Courtwork Program. The Federal-Provincial-Territorial Heads of Prosecutions Committee promotes the assistance and cooperation among prosecution services on operational issues related to criminal prosecutions.

<sup>3</sup> The terms Indigenous 'client' and Indigenous 'accused' were used interchangeably in interviews and writing this report.

<sup>4</sup> Thematic analysis is a form of qualitative research analysis that identifies and describes patterns or "themes" in the data.



## Findings

The findings are presented in four sections: 1) Why Indigenous people plead guilty; 2) How pleading guilty affects Indigenous people; 3) Justice system supports; and 4) Research and data gaps.

While this research focuses on Indigenous people, other accused or marginalized groups may share similar experiences.

### Why Indigenous people plead guilty

Participants identified several factors related to guilty pleas among Indigenous people: 1) Understanding and experience; 2) To get it over with; 3) Bail and remand; 4) Plea bargaining and legal representation; 5) Culture and community; and 6) Social vulnerabilities.

There was a general sense among participants that Indigenous people sometimes plead guilty even if they are innocent (or “innocent to a degree”), have a valid defence, or have grounds to raise *Charter* issues. Despite lawyers and judges conducting a plea inquiry to confirm that the accused understands and is not merely pleading guilty to get it over with, there were reports that Indigenous people plead guilty because of disadvantages in the justice system, social vulnerabilities, and a cultural sense of responsibility. A participant captured this sentiment by noting,

Wrongful convictions happen every day in court when people plead guilty to things they didn't do because they're denied bail or their sense of responsibility is different from criminal responsibility and people are pleading guilty because they feel responsible for something even though they might not in fact be criminally responsible.

### Understanding and experience

There was a general sense among participants that most accused have a limited understanding of the justice system and that it depends on previous contact with the system. First-time accused may be “lost if they haven't been to court.” Complicated court “lingo” (i.e., legal jargon) presents a language barrier for many accused (e.g., section 334, surety, summons, bail hearing, forfeiture of bail). Even justice system professionals can find court orders difficult to understand.

In general, participants described greater challenges for Indigenous accused understanding the justice system. A participant explained,

When I look at individuals coming into court, anybody new, just the average person off the street, they don't understand the system. It's not particular to Indigenous, it's a very difficult system to understand. Adding to that, individuals living in more of a sheltered environment, on the First Nation, language, understanding their worldview compared to the system's worldview, and when those two clash, there's little understanding from both sides, from the individual who may have committed something and the justice system understanding where that individual is coming from.

Participants identified Indigenous language barriers, especially in the North and among older generations. Some legal concepts, including the word ‘guilty,’ do not translate directly into Indigenous languages. Participants described Indigenous clients not understanding their criminal charges, legal rights, the role of their lawyer (e.g., lawyer speaks on their behalf), requirements to attend court and follow conditions, and the implications of a criminal record. A participant noted that many Indigenous youth do not understand that an impaired driving charge is more serious than a traffic ticket.

Another participant explained that Indigenous people understand the system, but understand it differently based on their experience and the experience of their peers and parents. The participant described a client with a long criminal record who never had a bail hearing or trial and always consented to his detention, he always pled guilty based on the advice he received. He “understood the system as it worked for him, but he might not understand the theoretical system as one that in theory gives you all these rights.”

Participants described accused who plead guilty because they already have a criminal record, “the damage is already done.” A participant explained, “The first time really gets them in trouble with employment.” With repeated contact with the justice system, accused have less hope in being acquitted regardless of their culpability. Participants described other cases where accused with a criminal record want to fight the charges because they are facing a serious sentence or “know how to play the system” and “set for trial on the basis that the witness won’t show up and they’ll get off.”

### To get it over with

Pleading guilty “to get it over with” was described as common. Accused “just want to deal with it and not have to go back to court.” Participants described clients frustrated with court delays and adjournments who plead guilty without obtaining legal representation or reviewing the disclosure. They “might say ‘yes, ma’am, yes, sir’ [to the judge or justice of the peace] even if they don’t understand what’s happening in court because they’re scared and just want to get out,” because “it’s easier to say ‘yep, yep’ and nod their heads instead of saying ‘I don’t understand what you’re asking me.’” A participant explained,

Sometimes they’ll plead guilty just to get it over with because they’re standing in a courtroom that makes them very uncomfortable, very nervous, creates a lot of stress within them, and they just want to run out of there, but the fastest way out is to plead guilty and agree to everything that’s said to you. Think of yourself whenever you’ve been in a very uncomfortable situation and your fight or flight response.

Participants described a distrust in the justice system given Indigenous people’s history with residential schools and discriminatory laws. A participant explained that until the 1950s, it was illegal for Indigenous people to hire a lawyer, and now some Indigenous people believe their lawyer works for the government or the police. A participant described,

Because of the historical treatment of Indigenous people, perceiving that this is just going to continue, people just want to get it over with. People feel like it’s just part of growing up... discrimination at the police level, Crowns, judges, JPs, even lawyers. They feel like the odds are stacked against them, so what’s the point.

Indigenous people in remote communities may face added pressure to plead guilty because of court delays and transportation issues. A participant explained,

Sometimes court can take four to five times before it’s resolved. A lot of people live an hour or [more] away....and it’s costing them forty dollars each way [by taxi], and they only receive a hundred and eighty dollars every two weeks. [Accused thinks] “If I plead guilty today, what are the chances I won’t have to come back?” Or “what would I get, probation?” They just want to get it over with, go on their probation, and never go back.

### Bail and remand

The denial of bail was described as a key factor for Indigenous people pleading guilty: “Once denied bail, pleading guilty becomes a rational decision.” A participant explained, “You’re supposed to be innocent

until proven guilty. In remand, you have to prove you're innocent." Remand was described as time "in limbo" without programming and "a tool to accelerate time and a half" where the accused receives a sentence discount for time served (e.g., 1.5 days custody credit for each day in remand). This sentence discount attempts to compensate for the difficult conditions in remand (e.g., overcrowding, no access to treatment or rehabilitation).

Participants described bail conditions as "onerous," "unreasonable," "unrealistic," and "setting accused up to fail." Examples include no contact, stay away from family/community, and abstain from alcohol. A participant explained, "It's quite common to see abstinence as a condition or non-possession [for an accused with a substance abuse problem], a condition that criminalizes their addiction."

Participants described how court delays and bail conditions contribute to guilty pleas. For example,

If someone is charged in January, their court date might not be until March, then maybe set over until May. If they haven't spoken to a lawyer and they're waiting, held in remand, or out on conditions. Conditions may stipulate the person can't drink, so the person thinks if I don't plead out today, I can't drink.

Again, the pressure to plead guilty may be especially significant in northern communities where court (e.g., circuit court) only sits a few times a year, and the accused is "waiting, on bail conditions, or sitting in jail for months." A participant described,

Denial of bail or conditions are so onerous or they live in a community so far away that they have to be flown out, there are no sureties because they don't know anyone. If you're not getting out on bail, then they're more likely to want to plead guilty and maybe serve a short period of time rather than wait at the bail stage. What's unique is being removed from the community and on remand. It's going to lead to guilty pleas to get it over with, particularly in the North.

### Plea bargaining and legal representation

Participants described clients who plead guilty as part of a plea deal to a lesser charge or in exchange for a reduced sentence or admission to an alternative justice program. A participant explained that in remand, clients are more likely to plead guilty to get a sentence outside of custody. In this case, "a guilty plea is not an aggravating factor, it's a mitigating factor. A guilty plea keeps them out of jail."

Participants noted that lawyers and judges are careful in trying to guard against inappropriate guilty pleas by making the necessary inquiries (plea verification) and acting only on "properly informed guilty pleas."

Participants expressed mixed sentiments about lawyers representing Indigenous people. While some reportedly take the time to understand their clients and seek information from courtworkers, others "just process the case" and "rush, plead them out, make a deal." Participants described lawyers "swamped with cases" and clients "herded through the [legal aid] program like cattle." A participant explained, "With all the cuts to legal services, clients are more and more directed to enter a guilty plea rather than go to trial, even if the lawyer and client don't have the disclosure in its entirety."

Participants noted that Indigenous communities are not as well represented by counsel because lawyers are unable to meet clients in the community or jail. A participant described issues with the legal aid application process, including long wait times on the phone and barriers for accused without phone or computer access.

## Culture and community

Participants described Indigenous people's alienation from the justice system and the justice system as "one more thing that is just done to them." They discussed a conflict in fundamental concepts of justice between Indigenous societies and the criminal justice system, "like two worlds colliding." A participant explained,

What most of my clients find off-putting, the main reason they don't want to be in court is because of the way the criminal justice system works, based on western philosophical cultural values and notions about how you find the truth and the adversarial process is not conducive to the participation of Aboriginal people. So, when they come into court, they kind of tune out. They appear to understand everything, but you can tell they don't have a clue, their eyes are glazed over, they're stressed out, they're not listening. I ask after what happened and they have no idea, because it's not culturally appropriate. And if people don't fundamentally accept those values, they don't accept the process and they don't participate in it. Just the idea that the way you deal with somebody who's done wrong is to isolate them from the community is completely contrary to the goals of the [sentencing] circles, which is reconciliation.

Participants described a "cultural premium placed on taking responsibility and admissions of wrongdoing," as well as reconciliation, agreement, and cooperation. According to participants, Indigenous accused often show remorse and acknowledge what they have done wrong in attempt to reconcile with their family, the victim, and the community. A participant explained, "Often in Indigenous communities you are to take responsibility for what you've done, so pleading guilty is a way of doing that and pleading not guilty to something you've done seems like an odd thing to do." Participants discussed cultural differences in notions of responsibility and guilt. In Indigenous societies, the understanding is that everyone has responsibility when harm is done, people are "taught to take responsibility, whether you physically did it or were part of it, you're all part of it." Another participant explained, "A lot of individuals in court when asked to provide a plea, their thoughts are about right and wrong and not about what can be proven and what cannot be proven. Somebody may have done something, but in a court of law they couldn't prove it. But they'll still plead guilty."

Participants described Indigenous female clients who plead guilty even if they have a valid self-defence claim. A participant described an Indigenous female client who explained, "Yes, it was mutually violent. What I did to him is what he did to me. I made him take responsibility, so now I have to take responsibility."

Indigenous people may face community pressures to plead guilty to lessen the impact of criminal proceedings on their community. A participant explained, "A lot of people will plead guilty because they don't want to involve the witnesses. For example, ten people subpoenaed and now everyone has to take a day off work, away from their families or communities. It's going to inconvenience a lot of people."

Participants described a tendency among Indigenous accused to candidly speak to police and provide incriminating statements that are admissible as evidence and contribute to guilty pleas:

Accused don't understand they don't need to say anything to police, just need to say "I have no comment, I'd like to go back to my cell," and notwithstanding getting advice not to, through translators or courtworkers, [Indigenous people] tend to give inculpatory statements. Think it's honesty to a fault, and police can't throw that out, and it becomes hard to argue admissibility. This speaks largely to an [Indigenous] societal value of trying to potentially remedy the situation.

[Indigenous accused] will talk to the police and give very full and complete confessions. I've heard anecdotally that has to do with different Aboriginal cultures and the idea that you don't lie, and somebody in authority you listen to and obey. The vast majority of my files include statements from the accused, begins with the officer confirming the person had a chance to talk to a lawyer, and the accused will blurt out "yes, I did and he said I shouldn't say anything to you" and the officer says "That's really good, that's good advice, but I just want to talk to you a little bit." And the next thing you know, twenty pages later, the person's given a full confession. And that can end up affecting whether they want to plead guilty because if you're in a situation where it's a weak or shaky Crown case, often that confession makes a difference between the Crown being able to proceed or not.

### Social vulnerabilities

Participants described vulnerabilities among Indigenous accused. Participants explained, "A lot of the crimes are driven by poverty, mental health issues, overcrowding, and food insecurity" and that "mental health issues, mostly undiagnosed FASD [Fetal Alcohol Spectrum Disorder] or brain injuries, which usually tie in with substance abuse issues... all those combined leads to them showing up at court because they're undiagnosed and don't have supports." Participants identified accused with FASD and learning difficulties as especially vulnerable to breaching conditions. Without a support system, they "get lost in the system," "fall through the cracks and end up in jail." Some participants indicated that accused with mental health or cognitive issues are more likely to receive special attention from legal services.

Participants described Indigenous clients experiencing homelessness and addictions:

Some with lengthy records are pretty well versed and use the justice system to meet their needs. [Client breached a 'no-go' condition] Got himself arrested to get ten days in custody, off the streets and in a bed with some meals, to get some clean time. He already has a record, so thinks, "What's one more charge?" They will detox in custody. If they have any health issues, they'll get that taken care of, too.

Sometimes clients are entering guilty pleas so they have a place to go [custody], where they have three meals a day, a bed, and a roof over their heads. Or their addiction is so heavy and so hard that they just want to plead guilty to go into cold turkey withdrawal.

For Indigenous people experiencing social vulnerabilities, especially in remote communities, a participant explained,

The whole criminal justice process isn't as relevant, especially when dealing with intergenerational trauma, substance abuse, poverty.... It's kind of an after-thought for a lot of the remote communities dealing with boil water advisories, suicide... The intersection with mental health, poverty, access to services, whether there is a greater prevalence of some of those factors in Indigenous communities really needs to be considered.

## How pleading guilty affects Indigenous people

Participants described the impact of a guilty plea and contact with the justice system in the following areas: 1) Employment and housing; 2) Family and community; 3) Incarceration; and 4) Re-contact with the justice system.

### Employment and housing

Participants described a criminal record as a barrier for education and employment. For example, “having that record really creates a loss of livelihood and loss of opportunity in the future.” Participants discussed pronounced effects for Indigenous people, remote communities with limited job opportunities, and Indigenous youth moving to a city for education or employment. A participant explained,

Because of the many other barriers Aboriginal people face in terms of getting jobs, etc., I think the criminal record has more of an impact because they're already more likely to be unemployed and living in poverty and then you add a criminal record and that's one more stroke against them and one more anchor holding them back.

Criminal charges can restrict travel in terms of crossing the border to hunt or fish and the loss of a driver's license. Pleading guilty can affect access to housing and social services. Participants explained that people in custody are not entitled to social assistance and may lose their low-income housing or spot on a wait list for housing.

### Family and community

Participants described how detention in custody breaks family and community connections. For example, losing custody of children and how the loss of a mother or father “becomes a way of life for children.” Some Indigenous people lose connections to cultural practices and experience shaming and alienation from the community.

Participants described the effects of incarceration on families and communities:

Don't see too often individuals sentenced to custody who come out more positive, looking to lead a better life. That's the exception. Communities must learn to deal with these individuals and what they've learned in custody and sometimes that's not very good. For example, the language learned in jail can become the new language in the family home as children grow up.

We hear from our partners in the North, when somebody's flown out of their community, especially the small communities, they're an integral part of that community, so when they're taken away, there's nobody to go hunting and fishing and get food for the community, or go to the well to haul water. The loss of that person is detrimental to the community as a whole.

### Incarceration

Participants discussed the psychosocial effects of incarceration. For example, “Being away from their loved ones and circle of help and support, I would imagine that takes a huge toll on one's mind.” A participant described a client upon release from prison,

They're a totally different person, more institutionalized. You could tell that something happened while he was inside. He wouldn't ever tell us what, but we saw the change in his attitude, the way he held himself, and personality traits. There are some good things

that come with some time in custody, but there's also the bad things, like the connections you make, if you get beat up, or anything else far worse.

Another participant explained,

Most of the impacts of a guilty plea are felt in respect of how long you end up in jail, whether the court pays attention to Gladue factors, and your ability to avoid being inculcated into a gang, making it more likely if arrested again you're going to be on a reverse onus for your bail hearing. A lot of negative downstream impacts to a finding of guilt or a plea.<sup>5</sup>

According to participants, the impact of incarceration is more pronounced for Indigenous people because of a lack of cultural programming and community connections, racial abuse by other inmates and staff, and the resulting trauma that increases their risk of reoffending when released.

### Re-contact with the justice system

Participants described a "vicious cycle" of re-contact for many Indigenous people in the justice system. In particular, an "administration of justice offence cycle with enhanced effects on Aboriginal communities." A participant explained, "Clients are scared, so they don't show up for court. They don't understand the consequences and then it snowballs into fail to appear, fail to comply. They don't realize the more they plead guilty to get it over with, the longer their criminal record gets, and now they're a long-term offender." Participants attributed the high number of breach charges in Indigenous communities to addictions and over-policing:

It's not uncommon to see offenders who have significant histories of breaches related to criminalizing addiction. What that does is increase the likelihood that the offender is going to be sentenced to jail because they have that apparent record of not being able to comply with conditions in the community. This is a feature of a great many Indigenous offenders.

One thing we see up here is the number of breach charges that get laid. For example, no drinking, no contact. Accused may have one substantive offence and five or six breach charges, a criminal record with two or three substantive offences interspersed with seven to fifteen breach charges. Because of the small communities, because the police know everyone and their status.

The justice system was described as "a revolving door, just pumping clientele through." A participant explained, "People don't think much about probation conditions and how it leads to a cascade of other offences, like breaches, when maybe it's not necessary and keeps people jammed up in the system."

---

<sup>5</sup> Gladue factors are relevant to sentencing Indigenous people as per the 1999 Supreme Court of Canada decision *R. v. Gladue*. The *Criminal Code* (s. 718.2(e)) directs sentencing judges to consider "the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" (e.g., low incomes, high unemployment, substance abuse, community fragmentation), and to consider all available sanctions other than imprisonment that are reasonable in the circumstances (*R. v. Gladue*, [1999]). For more information, see: [www.gladueprinciples.ca](http://www.gladueprinciples.ca)

## Justice system supports

Participants discussed initiatives that support Indigenous people in the criminal justice system. Some of the main ideas were summarized as follows:

The work of courtworkers, restorative justice programs, and funded support are invaluable, especially for people dealing with other trauma and issues. Having someone that understands their history and needs, and can guide them through the process, so people aren't feeling like they just want to plead, or not comply with conditions, or just stay in jail, because they feel like there is some hope of not just dealing with this justice issue but also their life issue.

Participants described the benefits of Indigenous courtworkers and community justice/outreach workers, including their presence in the community, trustworthiness, and support navigating the court process, finding a lawyer, and informing courts about the background of accused and available community services. A participant described courtworkers working with judges, counsel, and FASD networks to raise awareness about FASD and build capacity to identify and refer accused suspected of having FASD for assessment, and develop fairer bail conditions. There were calls for more Indigenous courtworkers and improved standards around language, accreditation, and translation and interpretation quality.

Participants described the benefits of legal aid services, duty counsel (immediate legal assistance), continuity in counsel, Indigenous legal clinics, and the practice of presumed eligibility in Nunavut and Northwest Territories (where everyone is presumed eligible for legal aid without a formal application). There were calls for more legal aid services including lawyer-client face-time in communities and jail, more support for legal aid applicants, cultural competency training for justice system professionals, and policy requirements for counsel representing Indigenous clients – that lawyers and courtworkers work together, and lawyers demonstrate an understanding of the case law and community resources available. The hallmark of strong legal representation was described as understanding the accused person's background, family history, Gladue factors, and available community services.

Participants called for greater access to public legal education and information, especially in remote areas. Suggested topics include criminal charges, including impaired driving, consequences of breaching conditions, the impact of a guilty plea and criminal record, and the benefits of obtaining counsel and self-identifying as an Indigenous person when applying for legal aid (e.g., referral to courtworker, Gladue factors).

Participants discussed the benefits of specialized courts, like First Nations court, Gladue court, domestic violence court, mental health court, wellness court, and the Downtown Community Court in Vancouver. Benefits include full-time duty counsel, links to community supports, accountability of offenders to elders and service providers, a wellness/healing plan that considers the root causes of justice system contact, and access to victim services and safety planning in domestic violence courts.

Gladue reports were described as an eye-opener for judges and prosecutors, valuable in helping courts determine an appropriate sentence and identify community services and gaps. A participant explained, "It's finding out what's out there, even if there's nothing out there, it signals supports need to be built." Participants called for an overarching policy/framework on Gladue reports with increased training, more Gladue reports at bail and sentencing, and reduced time to complete reports.

Participants discussed overarching changes to the criminal justice system's culture. A participant suggested, "Cultural anthropology is the education piece that has to happen. Maybe we should be learning something from Indigenous people about how to conduct an effective and appropriate criminal



justice system.” Participants described the value of restorative justice, sentencing circles, diversion, mediation, elders, spiritual caregiver and peacemaker programs, and other community justice programs tailored to Indigenous cultures and traditions.

Participants discussed broad policy ideas around reviewing who we label a criminal because the consequences can be lifelong and not necessarily in the interests of justice or the community, creating special policies for young adult offenders that recognize brain development continues into early adulthood, and extending the youth justice services/case team model to adults.

Participants called for increased access to justice through technology (e.g., videoconference equipment in police detachments, video link for lawyer-client meetings) and court transportation services to prevent accused having to hitchhike and put themselves at risk, or breach. There were calls for bail reform (e.g., more reasonable conditions, access to programs in remand), more alternatives to incarceration (e.g., community correctional facilities, halfway houses), and more focus on rehabilitation. A participant explained that the community suffers substantially more from punishing and isolating individuals than trying to rehabilitate them.

Participants described a “dire need” for social supports and services that address substance abuse, poverty, overcrowding, food insecurity, intergenerational trauma, abuse, and the impact of colonization and residential schools. A participant explained that if resources were allocated to address these needs, it would reduce the need for the criminal justice system.

## Research and data gaps

Participants identified data gaps with respect to Indigenous people in the justice system, including police charges, bail, guilty pleas, false guilty pleas, and wrongful convictions through false guilty pleas. Participants discussed a need for consistent counting strategies, definitions, and units of measurement across and within jurisdictions and sectors. Future research on guilty pleas could involve interviews with Indigenous people with previous justice system contact. Other research areas include alcohol and drug-related offences, specialized court and restorative justice outcomes, incarceration effects, costs of detaining a person for failing to appear compared to providing transportation to court, information on reserves/background factors for lawyers representing clients, Gladue reports, sentences in the context of *Gladue* and *Ipeelee*, intersections between the child welfare, mental health, and criminal justice systems, and the pardon/record suspension process.<sup>6</sup> Participants noted the importance of highlighting the voices and experiences of Indigenous people, and using a trauma-informed approach that considers the impact of residential schools and intergenerational trauma.

---

<sup>6</sup> In *R. v. Ipeelee* (2012), the Supreme Court of Canada reaffirmed and expanded upon the principles discussed in *Gladue* (1999): “Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society [Citation of example case omitted]. To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples” (*R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433 para 59 and 60).

## Conclusion

The objective of this research was to examine the issue of guilty pleas among Indigenous people. Justice system professionals identified three key considerations for Indigenous people pleading guilty. First, there are aspects of the justice system that can incentivize a guilty plea for all accused and which may have a disproportionate effect on Indigenous people. These include the denial of bail, remand, and “unreasonable” bail conditions. Second, Indigenous people may be at greater risk of justice system contact and guilty pleas because of their social vulnerabilities related to income, housing, addictions, and mental health. Finally, there are unique aspects of Indigenous culture that may incentivize a guilty plea, including language barriers, a distrust in the justice system, and a “cultural premium” placed on agreement, cooperation, and taking responsibility. These cultural values can lead Indigenous accused to plead guilty even if they are not legally guilty, to provide full confessions to police, and to agree in court whether they agree or even understand.

There are many downstream impacts of a guilty plea, criminal record, and contact with the justice system. Impacts can include loss of employment and housing, loss of family and community, trauma from incarceration, and increased risk of re-contact with the justice system. The impact may be worse in remote communities with language barriers, limited employment opportunities, over-policing, and challenges accessing courts and social services. Participants described Indigenous people in the justice system enmeshed in a vicious ‘administration of justice offence’ cycle of re-contact because of an inability to follow conditions that “criminalize” their addiction or a wide range of otherwise non-criminal behaviours. Indigenous people are overrepresented among charges for administration of justice offences and more likely than non-Indigenous people to come into subsequent contact with the justice system (Alberta Justice and Attorney General, 2012; Brennan & Matarazzo, 2016). Criminal records with administration of justice offences can make it difficult to obtain bail if arrested again, and increase the likelihood of another guilty plea, custody sentence, and further contact with the justice system.

Addressing parts of the justice system that incentivize guilty pleas and further disadvantage Indigenous people would help reduce the rate of incarceration of Indigenous people. Participants called for a more culturally appropriate justice system and increased supports for Indigenous people within and outside the system. Programs like the Indigenous Courtwork Program, legal aid, and specialized courts help Indigenous people navigate the justice system and access community supports and services. Other initiatives like restorative justice, cultural competency training for justice system professionals, and Gladue reports help tune the current system to Indigenous perspectives. Moreover, front-end social supports for poverty, housing, addiction, and mental health help address the root causes of contact with the criminal justice system.

## Appendix A – Interview guide

### Research on guilty pleas – Discussion guide/questions

Questions are based on your experience/knowledge related to Indigenous accused proceeding through the criminal justice system. Questions are not meant to be exhaustive. You are free to skip any question(s) you wish.

#### Understanding the criminal justice system

- To what extent do Indigenous accused appear to understand the criminal justice system, including:
  - Procedures
  - Charges
  - Accused person's rights
  - Bail
  - Plea options
  - Consequences
- What activities assist Indigenous accused in understanding the criminal justice system?
- Has your organization implemented any initiatives specifically targeted at increasing Indigenous accused persons' understanding of the criminal justice system, including plea options and consequences before entering a plea? (If so, what are these initiatives?)

#### Factors contributing to guilty pleas

- What are some of the common reasons that Indigenous accused plead guilty?
- Do any of following factors contribute to Indigenous accused pleading guilty:
  - Offence / criminal history
  - Legal representation
  - Bail / Remand
  - 'To get it over with'
  - Reduced sentence
  - Alternative justice processes / Diversion / Specialized courts
  - Age
  - Gender
  - Culture
  - Language
  - Education / Employment
  - Urban / Rural location
  - Housing
  - Mental Health issues
  - Substance Abuse issues
  - Cognitive impairment (e.g., Fetal Alcohol Spectrum Disorder)
  - Other
- Is there a sense Indigenous accused sometimes plead guilty even if they are innocent or have a valid defence?

#### Impact of guilty pleas

- What are some of the implications for Indigenous accused who plead guilty? Examples: criminal record, missed educational opportunities, loss of employment, loss of housing, break in family/community links, increased risk of re-contact with the criminal justice system

#### Research ideas on guilty pleas among Indigenous people

- Any ideas for other research on this issue or to address the overrepresentation of Indigenous people in custody?
- Does your organization have data that could support research to improve understanding of this issue?
- Do you know of any Indigenous researchers who would be a good candidate(s) to conduct this research?

#### Policy / Program ideas on guilty pleas among Indigenous people

- Do you have any ideas for policy / programs / services to better support Indigenous accused entering a plea?

#### Other

- Is there anything else you would like to add about any of the topics we've discussed, or other areas we didn't discuss but you think are important?

## References

- Alberta Justice and Attorney General. (2012). Aboriginal administration of justice offences research project: A study of Aboriginal administration of justice offences as they relate to community supervision provided by probation officers in Alberta. Available online: [https://justice.alberta.ca/programs\\_services/aboriginal/Publications%20Library%20%20Aboriginal%20Justice/OffencesAgainsttheAdministrationofJusticeStatisticalSummary.aspx/DispForm.aspx?ID=23](https://justice.alberta.ca/programs_services/aboriginal/Publications%20Library%20%20Aboriginal%20Justice/OffencesAgainsttheAdministrationofJusticeStatisticalSummary.aspx/DispForm.aspx?ID=23)
- Albonetti, C. A. (1990). Race and the probability of pleading guilty. *Journal of Quantitative Criminology*, 6(3), 315-334.
- Baldwin, J., & McConville, M. (1979). *Negotiated justice: Pressures on defendants to plead guilty*. London: Martin Robinson.
- Boe, R. (2002). Future demographic trends may help Canada's Aboriginal youth. *Forum on Corrections Research*, 14(3), 13-16.
- Brennan, S., & Matarazzo, A. (2016). Re-contact with the Saskatchewan justice system. *Juristat*. Statistics Canada. Available online: <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14633-eng.htm>
- Clark, S. (1989). *The Mi'kmaq and criminal justice in Nova Scotia*. Report prepared for The Royal Commission on the Donald Marshall, Jr., Prosecution. Halifax, Nova Scotia.
- Clark, S. (2016). Evaluation of the Gladue Court Old City Hall, Toronto. Available online: <http://nccabc.ca/wp-content/uploads/2014/07/display-mbair-ipad-iphone.pdf>
- Correctional Services Program. (2017). Trends in the use of remand in Canada, 2004/2005 to 2014/2015. *Juristat*. Statistics Canada. Available online: <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14691-eng.htm>
- Cunneen, C. (2001). *Conflict, politics and crime*. Sydney: Allen and Unwin.
- Cunneen, C. (2006). Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: Some conceptual and explanatory issues. *Current Issues in Criminal Justice*, 17(3), 329-346.
- Department of Justice Canada. (2008). JustResearch Issue No. 15. Aboriginal Courtwork Program (p. 43-44). Available online: <http://www.justice.gc.ca/eng/rp-pr/jr/jr15/p10.html>
- Erickson, R.V., & Baranek, P.M. (1982). *The ordering of justice: A study of accused persons as dependants in the criminal process*. Toronto, ON: University of Toronto Press.
- Euvrard, E., & Leclerc, C. (2016). Pre-trial detention and guilty pleas: Inducement or coercion? *Punishment & Society, online first edition*, 1-18.
- Feeley, M. (1979). *The process is the punishment: Handling cases in a lower criminal court*. New York, NY: Russell Sage Foundation.
- Frenzel, E. D., & Ball, J. (2007). Effects of individual characteristics on plea negotiations under sentencing guidelines. *Journal of Ethnicity in Criminal Justice*, 5(4), 59-82.
- Jackson, M. (1988). Locking up Natives in Canada. *University of British Columbia Law Review*, 23(2), 215-300.

- Johnson, B. D. (2003). Racial and ethnic disparities in sentencing departures across modes of conviction. *Criminology*, 41(2), 449-490.
- Kellough, G., & Wortley, S. (2002). Remand for plea: Bail decisions and plea bargaining as commensurate decisions. *British Journal of Criminology*, 42(1), 186-210.
- King, N.J., Soule, D.A., Steen, S., & Weidner, R.R. (2005). When process affects punishment: Differences in sentences after guilty plea, bench trial, and jury trial in five guidelines states. *Columbia Law Review*, 105(4), 959-1009.
- LaFree, G. D. (1980). Variables affecting guilty pleas and convictions in rape cases: Toward a social theory of rape processing. *Social Forces*, 58(3), 833-850.
- LaFree, G. D. (1985). Adversarial and nonadversarial justice: A comparison of guilty pleas and trials. *Criminology*, 23(2), 289-312.
- La Prairie, C. (2002). Aboriginal over-representation in the criminal justice system: A tale of nine cities. *Canadian Journal of Criminology*, 44(2), 181-208.
- Latimer, J., & Foss, L. (2004). A one-day snapshot of Aboriginal youth in custody across Canada: Phase II. Ottawa, ON: Department of Justice Canada.
- Legal Services Commission of South Australia. Working with Aboriginal defendants. How to assist an Aboriginal defendant. Available online: <http://www.lsc.sa.gov.au/dsh/ch03s04.php#Ch1245Se240074>
- Manitoba Aboriginal Justice Inquiry. Sinclair, C. & Hamilton, A. (1991). Report of the Aboriginal Justice Inquiry of Manitoba: Public Inquiry into the Administration of Justice and Aboriginal People. Volume I. The Justice System and Aboriginal People. Chapter 7. Aboriginal Justice Systems. Available online: <http://www.ajic.mb.ca/volumel/toc.html>
- McConville, M., Hodgson, J., Bridges, L., & Pavlovic, A. (1994). *Standing accused: The organisation and practices of criminal defence lawyers in Britain*. Oxford: Clarendon Press.
- Office of the Prime Minister (2015). Minister of Justice and Attorney General of Canada Mandate Letter. Available online: <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>
- Piccinato, M.P. (2004). *Plea bargaining*. Ottawa, ON: Department of Justice Canada. Available online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/pb-rpc/pb-rpc.pdf>
- R. v. Anthony-Cook*, [2016] 2 SCR 204
- R. v. Gladue*, [1999] 1 SCR 688
- Roach, K. (2015). The wrongful conviction of Indigenous people in Australia and Canada. *Flinders Law Journal*, 17(2), 203-262.
- Roach A. S., & Mack, K. (2009). Intersections between in-court procedures and the production of guilty pleas. *Australian & New Zealand Journal of Criminology*, 42(1), 1-23.
- Roach, K., & Bailey, A. (2009). The relevance of fetal alcohol spectrum disorder in Canadian criminal law from investigation to sentencing. *University of British Columbia Law Review*, 42(1), 1-68.

- Rudin, J. (2007). Aboriginal Peoples and the Criminal Justice System. Report prepared for the Ipperwash Inquiry (Ontario). Available online:  
[http://www.archives.gov.on.ca/en/e\\_records/ipperwash/policy\\_part/research/pdf/Rudin.pdf](http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf)
- Truth and Reconciliation Commission of Canada. (2015). Truth and Reconciliation Commission of Canada: Calls to Action. Available online:  
[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)
- Vacheret, M., Prates, F., & Cousineau, M.M. (2015). L'engagement des avocats de la defense. In M. Vacheret & F. Prates (Eds.), *La détention avant jugement au Canada: Une pratique controversée* (pp. 106-123). Montréal, QC: Presses de l'Université de Montréal.
- Verdun-Jones, S., & Tijerino, A. (2002). *Victim participation in the plea negotiation process in Canada: A review of the literature and four models for law reform*. Ottawa, ON: Department of Justice Canada.
- Webster, C. M. (2015). "Broken bail" in Canada: How we might go about fixing it. Available online:  
<https://www.scribd.com/document/307198427/Broken-Bail-in-Canada-How-We-Might-Go-About-Fixing-It>
- Zimmerman, S. (1992). The revolving door of despair: Aboriginal involvement in the criminal justice system. *University of British Columbia Law Review*, 26, 367-426. Available online:  
<https://www.sfu.ca/~palys/Zimmerman-1992-RevolvingDoorOfDespair.pdf>