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# Rethinking the “Crisis” of Indigenous Mass Imprisonment

Efrat Arbel\* 

## Abstract

In *R v Gladue*, the Supreme Court of Canada famously remarked that the incarceration of Indigenous people represents a “crisis.” Since Gladue’s release, the language of “crisis” has been used with frequency in Canadian legal discourse. In this article, I analyze how this language has shaped the broader legal understanding of Indigenous mass imprisonment. My focus is not on specific iterations or uses, but on the cumulative impact of the language of “crisis” over the last twenty years. I suggest that however well-meaning these representations may be, their cumulative impact is harmful. In the face of the relentless intensification of Indigenous mass imprisonment, the language of “crisis” has operated to subtly entrench the colonial structures it purports to disrupt. Urging a shift away from its use, I argue that the language of “crisis” is not only ill suited to address the problem, but is part of the problem.

**Keywords:** Indigenous corrections, prison law and policy, crisis, Canadian law, colonialism, sentencing

## Résumé

Dans l’arrêt *R. c. Gladue*, la Cour suprême du Canada constate que l’incarcération des peuples autochtones représente une « crise ». Depuis la publication de l’arrêt Gladue, l’expression « crise » a été fréquemment utilisée dans le discours juridique canadien. Dans le présent article, j’analyse comment ce langage a façonné une compréhension juridique plus extensive de l’emprisonnement de masse des autochtones. Je ne me concentre pas sur des itérations ou des utilisations spécifiques, mais bien sur l’impact cumulatif du langage de « crise » au cours des vingt dernières années. Je suggère que, aussi bien intentionnées soient-elles, ces représentations ont un effet cumulatif néfaste. Face à l’intensification incessante de l’emprisonnement de masse des autochtones, le langage de « crise » a opéré un enracinement subtil des structures coloniales qu’il prétend entraver.

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Exhortant à l'abandon de son utilisation, j'affirme que le langage de « crise » est non seulement mal adapté pour répondre à ce problème, mais plus encore qu'il fait partie dudit problème.

**Mots clés :** Peine carcérale pour autochtones, droits et politiques pénitentiaires, crise, droit canadien, colonialisme, détermination de la peine

## Introduction

In its 1999 decision in *R v Gladue*, the Supreme Court of Canada famously remarked that the incarceration of Indigenous people in Canada represents a “crisis.”<sup>1</sup> In this landmark case, as well as in its 2012 follow up decision in *R v Ipeelee*,<sup>2</sup> the Court altered the methodology for sentencing Indigenous people, with the goal of reducing incarceration rates, remedying injustice, and addressing systemic disparities. But in the twenty years since *Gladue*'s release, Indigenous mass imprisonment has only intensified. The gap between Indigenous and non-Indigenous people within corrections continues to grow, with Indigenous people routinely serving longer sentences under much harsher conditions of confinement. The injustices, inequalities, and prejudices that characterized the legal system in *Gladue*'s time continue to thrive. The “crisis,” as it were, persists.

While *Gladue* and *Ipeelee* did not meaningfully alter the Canadian incarceration landscape, they are not without impact. One of their most significant contributions has been to entrench the characterization of Indigenous mass imprisonment as “crisis” in Canadian legal discourse. Since *Gladue*'s release, courts, independent bodies of inquiry, the media, and others, have labelled and conceptualized Indigenous mass imprisonment as “crisis.” In this article, I analyze how this language has shaped the broader legal understanding of Indigenous mass imprisonment. My focus is not on specific iterations or uses, but rather on the cumulative impact of the language of “crisis” as deployed in the dominant Canadian legal discourse over the past twenty years. Viewed individually, some of the decisions, research reports, or media pieces surveyed below use the language of “crisis” in a thoughtful manner, in an effort to address the problem and usher in change. As a settler, I have deployed the language of “crisis” in these same well-meaning—albeit misdirected—ways. I suggest that however well-meaning these representations may be, their cumulative impact is harmful. More specifically, I argue that the language of “crisis” is not only ill-suited to address the problem, but is in fact part of the problem.

I make two central claims in support of this proposition. First, I argue that the term “crisis” is a misnomer. “Crisis” implies that Indigenous mass imprisonment is somehow exceptional—an unstable phenomenon that is, as crises are, transient and unique. While this language may be effective in capturing the urgency or severity of the problem, it also mischaracterizes its nature and thus impedes understanding. Unlike crisis, Indigenous mass imprisonment is neither anomalous nor transitory. Rather, like colonialism itself, it is entrenched in the fabric

<sup>1</sup> *R v Gladue*, [1999] 1 SCR 688, at para 64.

<sup>2</sup> *R v Ipeelee*, [2012] 1 SCR 433.

of the Canadian legal system. There is nothing extraordinary about the steadily rising rates of Indigenous incarceration; they are as predictable and fixed as the colonial structures that produce them. As deployed, the language of “crisis” obscures this fact. By presenting Indigenous mass imprisonment as atypical, this language makes it more difficult to recognize Indigenous mass imprisonment as colonial violence.

Second, the language of “crisis” suggests that Indigenous mass imprisonment is capable of resolution through a decisive change or juncture, as crises are. Labelling Indigenous imprisonment as “crisis” registers as a call to arms that, as *Gladue* asserts, demands “recognition” and “response.”<sup>3</sup> To that end, both *Gladue* and *Ipeelee* outline a sentencing methodology designed to reduce the high rates of Indigenous incarceration. But even as this methodology identifies some of the embedded structures that produce “crisis,” it does little to challenge the operation of Indigenous mass imprisonment or disrupt its ordering. More specifically, neither *Gladue* nor *Ipeelee* meaningfully assign legal responsibility for “crisis,” and instead, disperse responsibility for its production. In doing so, both decisions take part in what Gordon Christie terms colonial ordering: the Court deploys the same colonial justificatory framework it ostensibly critiques, with the result of deepening and strengthening Canada’s colonial narrative.<sup>4</sup> The effect is to distance, and even disappear legal responsibility for ongoing colonial violence.<sup>5</sup> With every iteration, and in the face of the relentless intensification of Indigenous mass imprisonment, the language of “crisis” loses whatever value it might have had and operates to subtly entrench the very colonial structures it purports to disrupt.

Following this introduction, I discuss the *Gladue* and *Ipeelee* decisions in some detail. I then briefly analyze how the language of “crisis” has proliferated since *Gladue*’s release through court decisions, reports, and media accounts. Following this, I survey the extent to which Indigenous mass imprisonment continues to intensify. I then explain why I view the language of “crisis” as ill-suited to address Indigenous mass imprisonment and urge a move away from its use. Before proceeding with this analysis, however, I pause to reflect on terminology. To date, most Canadian legal actors,

<sup>3</sup> *Gladue*, *supra*, note 1, at para 64.

<sup>4</sup> Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw*, and *Haida Nation*,” *Windsor Y.B. Access Justice* 23, no. 1 (2005): 17.

<sup>5</sup> For a discussion of the simultaneous assignment of responsibility and proliferation of irresponsibility see: Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge: Abingdon, 2007), discussed in more detail below.

<sup>6</sup> But see, e.g.: Meghan R. Rao, *Theorizing Mass Incarceration: Analysing Aboriginal over-representation in light of Section 718.2(e) of the Canadian Criminal Code* (Master of Arts in Sociology, Queens University, 2017) [unpublished]; New Democratic Party, “NDP at the UN: Advocates Condemn Mass Incarceration of Indigenous Women in Canada” (15 March 2018). <<https://www.ndp.ca/news/ndp-un-advocates-condemn-mass-incarceration-indigenous-women-canada>>. When David Garland coined the term “mass imprisonment” to describe the high rates of imprisonment in the United States, he identified two of its essential defining characteristics. The first is “sheer numbers,” that is, a “size of prison population that is markedly above the historical and comparative norm for societies of this type.” The second is the systematic and targeted use of imprisonment to impact not individuals but entire groups of the population. For such groups, Garland explains, “imprisonment has become normalized. It has come to be a regular, predictable part of experience, rather than a rare and infrequent event.” See David Garland, *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001), at 1–2. Indigenous people are not only incarcerated in extreme numbers, but have also long experienced imprisonment as inevitable in the Canadian state. For many, prison has become “the contemporary equivalent of what the Indian residential school represented for their parents.” See Michael Jackson, “Locking Up Natives in Canada,” *UBC Law Review* 215 (1988–89): 23.

including the Supreme Court of Canada, have spoken of the “over-representation” of Indigenous peoples in corrections. Few have deployed the term “mass imprisonment” as I do here.<sup>6</sup> As Robert Nichols explains, the rhetorical focus on the *over*-representation of Indigenous people in Canadian prisons inaccurately presents the problem as one of proportionality. Rather than call attention to the “colonial function of the carceral form,” Nichols argues, this approach erroneously depicts Indigenous mass imprisonment as a “general extension of racialized criminality.”<sup>7</sup> Too often dehistoricized—and therefore also depoliticized—this approach risks obscuring mass imprisonment’s colonial core, by being insufficiently attentive to “the linkages between carcerality, state formation and territorialized sovereignty.”<sup>8</sup> By focusing on the *mass* character of Indigenous imprisonment—rather than the *over*—I hope to more effectively situate the problem in its historical and political context and gesture toward more effective approaches.<sup>9</sup>

### Crisis Declared

While the Supreme Court of Canada declared the existence of “crisis” in its 1999 decision in *R v Gladue*, Indigenous mass imprisonment had been documented for decades prior.<sup>10</sup> It was in *Gladue*, however, that the matter first assumed the status of “crisis” in mainstream Canadian legal discourse. In this case, the Court was asked to interpret s. 718.2(e) of the *Criminal Code*, a provision introduced as part of the 1996 *Criminal Code* reforms that instructs sentencing judges to consider all available sanctions other than imprisonment for all offenders, paying “particular attention to the circumstances of Aboriginal offenders.”<sup>11</sup> In interpreting this provision, the Court explained that s. 718.2(e) is remedial in nature, designed to ameliorate the high rates of Indigenous incarceration, and amounts to clear direction from the government to the judiciary to inquire into, and seek to remedy, the problem. The Court then identified the problem as a “crisis” and, after reviewing statistics about Indigenous incarceration rates, famously stated:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The *figures are stark and reflect*

<sup>7</sup> Robert Nichols, “The Colonialism of Incarceration,” *Radical Philosophy Review* 17, no. 2 (2014): 435, at 441.

<sup>8</sup> *Ibid.*, at 444.

<sup>9</sup> Building on Garland’s analysis as outlined in *supra*, note 6, I maintain that the unyielding rise in Indigenous incarceration, combined with the normalized, expected fact of incarceration renders that imprisonment “mass.” This formulation focuses more directly on the role of the state in producing incarceration.

<sup>10</sup> In 1967, the Canadian Corrections Association presented the *Indians and the Law* report to the Department of Indian Affairs and Northern Development, providing statistical evidence that Indigenous people were grossly overrepresented in provincial and federal facilities—a situation it characterized as being “of serious magnitude.” Canadian Corrections Association, Canada: Department of Indian Affairs and Northern Development, *Indians and the Law: A Survey Prepared for the Honourable Arthur Laing* (Ottawa: Canadian Welfare Council, 1967). See also: Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1987) (Chair: Judge J. R. Omer Archambault); David Daubney, Standing Committee on Justice and Solicitor General, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Queen’s Printer for Canada, 16–17 August 1988); David Daubney and Gordon Parry, “An overview of Bill C-41 (the Sentencing Reform Act),” as cited in Julian V. Roberts and David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31. It was after *Gladue*’s release, however, that the language of “crisis” meaningfully took hold.

<sup>11</sup> *Criminal Code*, RSC 1985, c. C-46, s. 718(2)(a).

what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.<sup>12</sup>

In addition to declaring a “crisis,” the Court also recognized that the high incarceration rates reflect a complex set of factors, including “widespread racism” and “systemic discrimination.”<sup>13</sup> The “unbalanced ratio of imprisonment,” it stated, flows from the combination of dislocation, poverty, substance abuse, lack of education, social and economic disparities, a lack of employment opportunities, ingrained institutional bias, as well as “systemic and direct discrimination.”<sup>14</sup>

Recognizing that “sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system,” the Court altered the method of analysis that sentencing judges must use in determining a fit sentence for Indigenous peoples. The *Gladue* methodology requires sentencing judges to take judicial notice of the above-noted factors, and asks counsel to submit case-specific information about the accused to aid the Court in crafting a fit sentence.<sup>15</sup> The methodology also requires sentencing judges to consider the accused’s unique systemic or background factors, as well as the “types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”<sup>16</sup> The Court emphasized the need for sentencing courts to consider restorative justice principles and urged the need for community-based sanctions.<sup>17</sup> As Hadley Friedland explains, one of *Gladue*’s most important legacies lies in the Court’s recognition that Indigenous “understandings, ideals and conceptions of sentencing procedures and sanctions were important for Canadian courts to consider.”<sup>18</sup> Indeed, the Court clearly stated that in “all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.”<sup>19</sup>

Many of *Gladue*’s insights are significant and worthwhile. When applied with rigour, the *Gladue* methodology is effective at highlighting some systemic disparities in the legal system and encouraging sentences other than imprisonment. Importantly as well, law reform efforts initiated in *Gladue*’s aftermath have led to the creation of *Gladue* courts, as well as other community-based and grass-roots initiatives to address the problem, such as court worker services, problem-solving

<sup>12</sup> *Gladue*, *supra*, note 1, at para 64 [emphasis added].

<sup>13</sup> *R v Williams*, [1998] 1 SCR 1128, at para 58, “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.” Quoted in *Gladue*, *supra*, note 1, at para 61.

<sup>14</sup> *Gladue*, *supra*, note 1, at paras 65 and 68.

<sup>15</sup> *Ibid.*, at paras 83–84.

<sup>16</sup> *Ibid.*, at para 66.

<sup>17</sup> *Ibid.*, at para 74.

<sup>18</sup> Hadley Friedland, “Navigating Through Narratives of Despair: Making space for the Cree reasonable person in the Canadian Justice System,” *University of New Brunswick Law Journal* 67 (2016): 269, at 289. See also: *R v Wells* 2000 SCC 10, [2000] 1 SCR 207, where the Supreme Court of Canada held that in cases involving serious crimes, the background circumstances of the offender and the principles of restorative justice are likely to be less applicable. Notably however, the Court also emphasized the need to consider community perspectives and conceptions of sentencing.

<sup>19</sup> *Gladue*, *supra*, note 1, at para 74

and therapeutic courts, Aboriginal courts and community-based restorative justice or healing programs.<sup>20</sup> The significance of these initiatives cannot be discounted. But while *Gladue* remains, as Jonathan Rudin maintains, one of the “most significant developments in the criminal law for Aboriginal people,” it has failed to transform the incarceration landscape.<sup>21</sup> Despite these developments, as David Milward and Debra Parkes wrote in 2011, the “crisis of Aboriginal over-incarceration in Canada has continued unabated.”<sup>22</sup>

The Court reflected on *Gladue*’s failures in its 2012 decision in *R v Ipeelee*, a case that considered the interpretation of s. 718.2(e) anew.<sup>23</sup> In this case, the Court revisited *Gladue*’s application, again emphasizing the urgency and severity of “crisis.” The Court engaged in a more nuanced analysis than it did in *Gladue*, drawing a direct link between high incarceration rates and the “history of colonialism, displacement, and residential schools.”<sup>24</sup> This marks a shift away from an established pattern on the part of Canadian courts of denying the impact of colonialism or concealing the legal system’s role in maintaining its violence.<sup>25</sup> *Ipeelee* explicitly instructs sentencing judges to take judicial notice of colonialism, and of the ways its legacy “continues to translate” in the present day.<sup>26</sup> Importantly as well, by locating the crisis in the legal system, as opposed to, for example, Indigenous communities or offending behaviour, *Ipeelee*, like *Gladue*, appropriately assume a level of responsibility for the production of “crisis.” *Ipeelee* thus reads as a powerful reinforcement of *Gladue* and its principles. It also clarifies ambiguities in the *Gladue* methodology and its application, providing additional guidance for courts and counsel to effectively implement s. 718.2(e). Finally, *Ipeelee* also recognizes the limits of this methodology in addressing “crisis,” citing Rudin to ask: “If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?”<sup>27</sup>

### Crisis Proliferates

One of *Gladue* and *Ipeelee*’s most enduring legacies has been to entrench the language of “crisis” as characteristic of Indigenous mass imprisonment. In the twenty

<sup>20</sup> Jonathan Rudin, “Addressing Aboriginal Overrepresentation Post-*Gladue*: A realistic assessment of how social change occurs,” *Criminal Law Quarterly* 54, no. 4 (2009): 447.

<sup>21</sup> Jonathan Rudin, “Aboriginal Over-Representation and *R. v. Gladue*: Where we were, where we are and where we might be going” *Supreme Court Law Review* 40 (2008): 687.

<sup>22</sup> David Milward and Debra Parkes, “*Gladue*: Beyond myth and towards implementation in Manitoba,” *Manitoba Law Journal* 35, no. 1 (2011): 84. For further critiques, see: Marie Andree Denis Boileau and Marie-Eve Sylvestre, “*Ipeelee* and the Duty to Resist,” *UBC Law Review* 51, no. 2 (2018): 548; Jonathan Rudin, “There Must Be Some Kind of Way Out of Here: Aboriginal overrepresentation, Bill C-10, and the *Charter of Rights*,” *Canadian Criminal Law Review* 17 (2013): 349; Kent Roach, “One Step Forward, Two Steps Back,” *Criminal Law Quarterly* 54, no. 4 (2009) 470; Renée Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons,” *Osgoode Hall Law Journal* 39, no. 2–3 (2001): 469.

<sup>23</sup> *Ipeelee*, *supra*, note 2.

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

<sup>25</sup> See, e.g., the Truth and Reconciliation Commission of Canada, which stated in its final report, that “Canada’s laws and associated legal principles fostered an atmosphere of secrecy and concealment. When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequences of horrific truths.” Summary of the Final Report of the Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (2005), at 202.

<sup>26</sup> *Ipeelee*, *supra*, note 2, at para 60.

<sup>27</sup> *Ibid.*, at para 62, citing Rudin, *supra* note 20.

years since *Gladue*’s release, courts have deployed the language of “crisis” with frequency. Many have cited *Gladue* without much discussion—stating simply that the rates of Indigenous incarceration “are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system.”<sup>28</sup> Others have acknowledged the existence of “crisis,”<sup>29</sup> analyzed the nature of the “crisis,”<sup>30</sup> or emphasized their broader “duty to endeavour to remedy the crises of drastic overrepresentation,”<sup>31</sup> or “explore realistic options to incarceration in an effort to address this growing crisis.”<sup>32</sup> Some have sought to address “crisis” by urging the need to “take a restorative approach to sentencing and look to the indigenous community for help to achieve it,”<sup>33</sup> or to “give proper weight to the systemic factors unique to the offender... and take a restorative approach in sentencing while at the same time balancing other sentencing principles.”<sup>34</sup> Others have noted *Gladue* and *Ipeelee*’s identification of the root causes of crisis as consisting of “alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and bias

<sup>28</sup> See, e.g., *R v VB*, 2018 QCCQ 3870 at para 64; *R v Woodcock*, 2017 ONCJ 3, at paras 4 and 56; *R v Morrisseau*, 2017 ONCJ 307, at para 56; *Twins v Canada (AG)*, 2016 FC 537, at para 48; *R v Willier*, 2016 ABQB 241 at para 65; *R v Eli*, 2015 BCSC 926, at para 37; *R v McCook*, 2015 BCPC 1, at para 162; *R v KE*, 2015 ONCJ 68, at para 40; *R v Joseph*, 2013 BCPC 199, at para 35; *R v Rose*, 2013 NSPC 99, at para 42; *R v Gouda*, 2013 ABQB 121, at para 1; *R v DVJS*, 2013 MBPC 34, at para 40; *R v FAB*, 2012 BCPC 362, at para 21; *R v Johnson*, 2011 ONCJ 77, at para 62; *R v Auger*, 2000 ABQB 450, at para 60; *R c Diamond*, 2006 QCCQ 2252, at para 20; *R c Pópabano*, 2005 CanLII 48584, at para 19. These cases move the law in a direction contrary to that suggested by Mary Ellen Turpel-Lafond in “Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R v Gladue*,” *Criminal Law Quarterly* 43 (1999–2000): 34.

<sup>29</sup> See, e.g., *R v Napope*, 2019 SKPC 23, at para 49, stating “At the time of *Gladue*, the rate of incarceration of Aboriginal offenders is described as a ‘crisis’”; *R v Louie*, 2019 BCSC 368, citing *Gladue* at paras 22–23 of *R v Harry*, *infra*, note 34; *R v McKay*, 2019 MBPC 11, at para 60 stating “The Supreme Court’s decisions in *Gladue* and *Ipeelee* were a judicial response to the over-incarceration of Indigenous people and direction to sentencing judges to address the crisis.” See also *R v Callihoo* 2017 ABPC 40, at para 53; *R v Branconnier*, 2018 MBPC 50, at para 59.

<sup>30</sup> *R v Cook*, [2014] OJ No 6372 (QL), at para 10: “*R. v. Gladue* ... declared that the overrepresentation of aboriginal offenders in Canadian jails was a crisis in the Canadian criminal justice system, and called upon sentencing judges to address this crisis to the extent possible during the sentencing process”; *R v Sinclair*, 2014 MBPC 13, [2014] MJ No 95 (QL), at para 44, stating “In 1999 the Supreme Court of Canada in *Gladue* instructed sentencing judges on how to apply s. 718.2(e) which was enacted to remedy the crisis of over-representation of Aboriginal people in Canada’s prisons”; *R v Campbell*, 2013 MBPC 19, [2013] MJ No 104 (QL), at paras 59–60: “In 1999 the Supreme Court, in *Gladue*, instructed sentencing judges on how to apply section 718.2(e), which was enacted to remedy the crisis of over-representation of aboriginal people in Canada’s prisons. Unfortunately, judges did not fully embrace the direction and the problem actually worsened. In 2012 the Supreme Court re-affirmed its earlier decision in *Ipeelee*...”; *R v Elliott*, 2013 BCPC 270, [2013] BCJ No 2162 (QL), at para 30: “[Section 718.2(e) of the *Criminal Code*] was thoroughly considered by the Supreme Court of Canada in *R. v. Gladue* [1999] 1 S.C.R. 688. It was at that time that the Supreme Court of Canada said that there was a crisis in the Canadian criminal justice system exhibited by the statistics on the over-representation of aboriginal persons in our jails.”

<sup>31</sup> *R v RL*, [2004] 2 CNLR 204 (Sup Ct J), at paras 19 and 23, stating further: “The Supreme Court labeled this reality as “a crisis in the Canadian criminal justice system”; *R v Willier*, 2016 ABQB 241 at para 65, citing *Gladue* as setting out a “direction to the judiciary.”

<sup>32</sup> *R v RJN*, 2016 YKTC 55, at para 44. See also *R v Sharma*, 2019 ONSC 1141, at para 26, noting that mandatory minimum sentences “can contribute to exacerbating the current over-incarceration crisis for Indigenous people.”

<sup>33</sup> *R v Dusome*, 2019 ONCJ 444, at para 41, stating “The Supreme Court of Canada has been very clear, there is an over-incarceration of indigenous offenders in our jails. This crisis must be addressed. To address it judges must take a restorative approach to sentencing and look to the indigenous community for help to achieve it.”

<sup>34</sup> *R v Sutherland-Cada*, 2016 ONCJ 650, at para 45.



experienced by indigenous Canadians as a result of Canada's colonial history and destructive assimilationist policies such as the operation of Indian Residential Schools," noting further that the two decisions "changed the way indigenous offenders are sentenced, though not necessarily the result."<sup>35</sup> At least three courts have cited *Ipeelee's* citation of Rudin's query that "[i]f Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?"<sup>36</sup> Several courts have discussed the existence of "crisis" without citing either case.<sup>37</sup>

Some courts have discussed the problem at length. In *R v Kokopenace*, the Ontario Court of Appeal referenced years of efforts on the part of the judiciary to address the "crisis."<sup>38</sup> In *R v Elliott*, the British Columbia Provincial Court emphasized the need to adopt a restorative approach to sentencing to "avert the crisis."<sup>39</sup> Some courts have also used "crisis" to describe Indigenous communities, for example, identifying certain communities as being "in crisis,"<sup>40</sup> or as immersed in "crisis."<sup>41</sup> Many have done so in a lamenting tone, characterizing the "crisis" as "tragic"<sup>42</sup> or "sad,"<sup>43</sup> or as a reality that should "shame us and should make us weep and do better."<sup>44</sup>

Courts have also deployed the language of "crisis" outside the sentencing context, on the rationale that *Gladue's* "underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system."<sup>45</sup> As the

<sup>35</sup> *R v Harry*, [2018] BCSC 2069, at paras 22–23.

<sup>36</sup> *R v Iserhoff*, 2019 QCCQ 2339; *R v LLB*, 2013 SKPC 165, at para 41; *R v Dicker* (2013), 333 Nfld & PEIR 72.

<sup>37</sup> *R v George*, 2012 ONCJ 756, [2012] OJ No 5910 (QL), at para 11: "In all instances, regardless of the crime, the court must endeavor to address what has been described as a crisis in the Canadian criminal justice system, which is the over-representation of aboriginal people not only in correctional facilities, but in the criminal justice system generally. These are the reasons section 718.2(e) was enacted, with Aboriginal people in a very clear way being set apart"; *R v Ahenakew*, 2001 SKCA 71, at para 22: "While having the protection of the public always in mind, we must take every opportunity to emphasize rehabilitation over any other principle of sentencing in an attempt to address this crisis in our system"; also cited in *R v Ahenakew*, 2007 SKPC 108, at para 10.

<sup>38</sup> *R v Kokopenace*, 2013 ONCA 389, 115 OR (3d) 481, at para 141.

<sup>39</sup> *R v Elliott*, 2013 BCPC 270, at para 32.

<sup>40</sup> *R v Bouchard*, 2012 ONCJ 425, at para 7: "In many ways Ms. Bouchard is also a product of her community. To say that Long Lake 58 First Nation is in crisis would be an understatement. Many in this community, including members of Ms. Bouchard's family, attended residential schools, and they and their offspring continue to suffer the consequences of that experience. Many individuals returned from their experience damaged, angry and resentful and were unable to provide the nurturing needed to raise their own children. As a result, children were raised in environments characterized by abuse, violence and neglect. Unfortunately, that cycle continues to this day."

<sup>41</sup> *R v Killiktee*, 2011 ONSC 5910. See, also, *R v MJH*, 2019 YKTC 11, at para 9, describing the living conditions of the accused.

<sup>42</sup> *R v Swanson*, 2013 ONSC 3287, at para 27–28, citing a *Globe and Mail* editorial referencing the "crisis" of Indigenous incarceration and concluding that the "national incarceration rate approaches tragic levels." See also *R v Quannaaluk*, 2018 QCCS 5179, at para 72, noting, in relation to a *Gladue* report submitted on behalf of the accused, that her "life is tragic. It is tragic because in a few decades the Inuit lived through and continue to live through a major crisis in the restructuring of their society."

<sup>43</sup> *R v Cake*, 2014 ONCJ 126.

<sup>44</sup> *R v Killiktee*, *supra*, note 40, at para 15. See also para 13: "Nunavut's inhabitants are experiencing profound social misery. There are inadequate systemic resources to deal with these escalating problems, including in the Nunavut Court of Justice system where its Chief Justice in 2010 warned of an "impending crisis." Approximately 50% of social worker positions in Nunavut are reportedly vacant (p. 7). The crisis is upon us."

<sup>45</sup> *R v Kokopenace*, 2013 ONCA 389, 115 OR (3d) 481, at para 42, overturned on other grounds in *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398.

Ontario Court of Appeal explained in *R v Kokopenace*, such an approach was implicitly endorsed in *Gladue* and *Ipeelee* in their recognition that “sentencing innovation alone would not solve the greater alienation of Aboriginal people from the criminal justice system.”<sup>46</sup> The most prominent example arises in *United States of America v Leonard*, a judicial review of extradition orders for two Indigenous men facing drug charges in the United States.<sup>47</sup> There, Sharpe JA noted that the “tragic personal and family histories and current circumstances of both applicants closely correspond with many of the systemic factors identified by the Supreme Court in *R v Gladue*... as requiring special consideration on account of the crisis in the Canadian criminal justice system arising from the disproportionate incidence of incarceration amongst Aboriginal peoples.”<sup>48</sup>

Ultimately concluding that *Gladue* could be applied, Sharpe JA explained that “insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons.”<sup>49</sup> This statement has been cited with frequency by subsequent courts.<sup>50</sup> Other courts have applied the language of “crisis” in cases involving curative discharge,<sup>51</sup> sentencing for civil contempt,<sup>52</sup> orders that Indigenous children be made Crown wards without access,<sup>53</sup> dispositions of persons found not criminally responsible on account of mental disorder,<sup>54</sup> or sentencing of Indigenous youth.<sup>55</sup>

The language of “crisis” also appears in *Inglis v British Columbia*,<sup>56</sup> a constitutional challenge to the cancellation of the “mother-baby” program at Alouette Correctional Centre for Women. The program allowed new mothers, many of whom were Indigenous, to maintain contact with their infants while serving time in provincial jail. In this case, Ross J referenced “crisis” as a relevant factor in supporting the conclusion that the cancellation of the program violated the *Charter*’s equality rights provision. In *R v Cake*, a case involving a publication ban application following a guilty plea to obstructing justice, the Ontario Superior Court of Justice

<sup>46</sup> *Ibid.*, at para 43.

<sup>47</sup> *United States of America v Leonard*, 2012 ONCA 622.

<sup>48</sup> *Ibid.*, at para 1.

<sup>49</sup> *Ibid.*, at para 60.

<sup>50</sup> See, e.g., *R v Abram*, 2019 ONSC 3383; *R v Heathen*, 2018 SKPC 29; *R v Hope*, 2016 ONCA 648, 133 OR (3d) 154; *R v McCrady*, 2016 ONSC 1591; *R v Daybutch*, 2015 ONCJ 302, 325 CCC (3d) 568; *R v Cake*, 2014 ONCJ 126; *R v Kokopenace*, 2013 ONCA 389; *Law Society of Upper Canada v Robinson*, 2013 ONLSAP 18.

<sup>51</sup> *R v Daybutch*, 2015 ONCJ 302, 325 CCC (3d) 568.

<sup>52</sup> *Frontenac Ventures Corp. v Ardoch Algonquin First Nation*, 2008 ONCA 534, leave to appeal to SCC refused [2008] SCCA No. 357.

<sup>53</sup> *Children’s Aid Society of Hamilton v KC*, 2016 ONSC 2751.

<sup>54</sup> *R v Sim* (2005), 78 OR (3d) 183, at paras 16–17, stating: “Describing the situation of disproportionate incarceration of aboriginal offenders at para 64 as ‘a crisis on the Canadian criminal justice system,’ the court in *Gladue* focused on the interpretation of s. 718.2(e) and the sentencing of aboriginal offenders, but suggested that the principles motivating its decision could have wider ramifications.... I do not think that the principles underlying *Gladue* should be limited to the sentencing process and I can see no reason to disregard the *Gladue* principles when assessing the criminal justice system’s treatment of NCR accused.”

<sup>55</sup> *R v ZP*, 2010 ONCJ 31, at para 65.

<sup>56</sup> *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309.

stated that *Gladue* and *Ipeelee* “speak directly to larger systemic issues impacting aboriginal people.”<sup>57</sup> The Court referenced the “crisis” within the administration of justice in Ontario, citing Frank Iacobucci’s 2013 report *First Nations Representations on Ontario Juries*, which I discuss below.<sup>58</sup> In *Law Society of Upper Canada v Robinson*, the plaintiff was disciplined by the Law Society of Upper Canada for engaging in conduct unbecoming of a lawyer. The plaintiff challenged the penalty, on grounds that the hearing panel failed to appreciate his Indigeneity and related circumstances. After citing *Leonard, Gladue, and Ipeelee*, the panel concluded that such questions of discipline are “unconnected to incarceration or the crisis identified in *Gladue*.”<sup>59</sup>

The Supreme Court of Canada deployed the language of crisis outside the sentencing context on at least two occasions. First, in *R v Kokopenace*, the Supreme Court overturned the Ontario Court of Appeal’s decision that a jury roll had inadequately ensured representative inclusion of Aboriginal on-reserve residents.<sup>60</sup> While neither majority nor dissent deployed the language of “crisis,” Karakatsanis J, in her partially concurring opinion, stated that “addressing the disengagement of Aboriginal peoples from the jury system is an important step in addressing the larger web of problems—described ...[in] the Iacobucci Report as a crisis.”<sup>61</sup> Second, in *Sauvé v Canada*, a *Charter* challenge to the prisoner disenfranchisement provisions of the *Voting Act*,<sup>62</sup> then Chief Justice McLachlin, writing for the majority in a five–four split, referenced the “crisis” of Indigenous incarceration. Cautioning that the disenfranchisement provisions would have a “silencing” effect on Indigenous prisoners, McLachlin CJC struck down the law.<sup>63</sup> Gonthier J, writing in dissent, also referenced the “crisis” of Indigenous incarceration but with a different effect. Upholding the disenfranchisement provisions, Gonthier J maintained that the law did not target Indigenous peoples. “If there is a problem with the overrepresentation of Aboriginal people in our criminal justice system and prisons,” Gonthier J explained, that problem must be addressed through sentencing and by “addressing some of the root causes of the overrepresentation identified by this Court in *Gladue*.”<sup>64</sup>

Numerous reports and commissions of inquiry have also documented, addressed, and critiqued the mass imprisonment of Indigenous people through the language of “crisis.”<sup>65</sup> In its 2002–2003 Annual Report, for example, the Office of the Correctional Investigator concluded, “disproportionate barriers to safe, timely release of aboriginal

<sup>57</sup> *R v Cake*, 2014 ONCJ 126, [2014] OJ No 1258 (QL), at paras 46–51.

<sup>58</sup> See also *R v Kennedy*, 2013 ONSC 6419, 118 OR (3d) 60, in which the Court references the same report by Frank Iacobucci but distinguishes its application.

<sup>59</sup> *Law Society of Upper Canada v Robinson*, 2013 ONLSAP 18, [2013] 4 CNLR 129 at para 69. See also 2018 LSBC 33, a British Columbia Law Society disciplinary hearing decision that the hearing panel be reconstituted to include an Indigenous person.

<sup>60</sup> *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398.

<sup>61</sup> *Ibid.*, at para 171.

<sup>62</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

<sup>63</sup> *Ibid.*, at para 60.

<sup>64</sup> *Ibid.*, at para 204.

<sup>65</sup> See, e.g., Paul Chartrand and Wendy Whitecloud, Commissioners *Final Report of the Aboriginal Justice Implementation Commission* (Winnipeg: Government of Manitoba, 2001). <[http://www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html)>; Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (Government of Manitoba, 1999). <<http://www.ajic.mb.ca/volume.html>>

offenders constitute a continuing crisis and an embarrassment.”<sup>66</sup> A 2005 report titled *Aboriginal Peoples and the Criminal Justice System* emphasized that Indigenous overrepresentation “is one of the clearest markers of what the Supreme Court of Canada has referred to as ‘a crisis in the Canadian justice system.’”<sup>67</sup> In a 2006 address to Parliament, in his capacity as the Federal Correctional Investigator, Howard Sapers emphasized the “growing crisis regarding Aboriginal inmates,” identifying this as “Canada’s national disgrace.”<sup>68</sup> In a 2009 report titled *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*, the Office of the Correctional Investigator urged the need for urgent action and expeditious mobilization to reduce the gap between Indigenous and non-Indigenous offenders, cautioning that absent such efforts the “situation may devolve into crisis.”<sup>69</sup> A 2012 report commissioned by Public Safety Canada identified the incarceration of Indigenous women as “nothing short of a crisis” noting further that “it has been a crisis for quite some time now.”<sup>70</sup>

In 2013, former Supreme Court Justice Frank Iacobucci released an independent report, *First Nations Representation on Ontario Juries*, on the lack of representation of First Nations peoples living in reserve communities on Ontario juries.<sup>71</sup> Iacobucci arrived at a series of scathing conclusions, stating that: “the justice system as it relates to First Nations peoples... is in crisis.”<sup>72</sup> He further stated that “relations between the justice system and First Nations have reached the crisis stage,” and urged action, stating that a continuation of the *status quo* will only “aggravate what is already a serious situation” and diminish any “hope of true reconciliation.”<sup>73</sup> Citing the “tragic history of Aboriginal people, with many examples of mistreatment, lack of respect, unsound policies, and most importantly a lack of mutual trust,” Iacobucci called for systemic reform, emphasizing the need for a “top down approach for the Attorney General to seek the candid advice and wisdom of those directly affected.”<sup>74</sup> In 2014, in its report titled *Over-Represented and Over-Classified: Crisis of Aboriginal Women in Prison*,<sup>75</sup> the Ontario Women’s Justice Network stated that the incarceration of Indigenous women in federal

<sup>66</sup> Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2002–2003*. <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20022003-eng.aspx>>

<sup>67</sup> Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto: Ipperwash Inquiry, 2005).

<sup>68</sup> Howard Sapers, Speaking Notes for 33rd Annual Report to Parliament (16 October 2006).

<sup>69</sup> Michelle M. Mann, *Good Intentions, Disappointing Results: A Progress report on federal aboriginal corrections*, Report of the Office of the Correctional Officer (2009). <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20091113-eng.aspx>>

<sup>70</sup> Mandy Wesley, *Marginalized: The Aboriginal Women’s Experience in Federal Corrections* (Ottawa: Public Safety Canada, 2012). <<http://www.publicsafety.gc.ca/cnt/rsrsc/pblctns/mrgnlzd/mrgnlzd-eng.pdf>>

<sup>71</sup> Ministry of the Attorney General, *First Nations Representation on Ontario Juries*, Report of the Independent Review Conducted by the Honourable Frank Iacobucci (February 2013). <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html)>

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

<sup>73</sup> *Ibid.*

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

<sup>75</sup> Ontario Women’s Justice Network, “Over-Represented and Over-Classified: Crisis of Aboriginal Women in Prison” (June 2014). <[http://owjn.org/owjn\\_2009/jasons-test-submenu-page/367](http://owjn.org/owjn_2009/jasons-test-submenu-page/367)>

corrections constitutes a “crisis.”<sup>76</sup> These accounts represent only a sampling; many more such reports have been issued to date.<sup>77</sup>

With the release of each report, media outlets have discussed, analyzed, and bemoaned the existence of “crisis.” In 2012, the release of *Marginalized* prompted *The Globe and Mail* headline “Tory Crime Agenda Fueling ‘Crisis’ Of Aboriginal Women In Prison,”<sup>78</sup> and *CBC News* headline “New Report Describes Growing ‘Crisis’ For Aboriginal Women.”<sup>79</sup> After the release of Iacobucci’s 2012 report, the language of “crisis” again appears in the headlines, with the *Toronto Star* reporting “Ontario’s Justice System In A ‘Crisis’ For Aboriginals,”<sup>80</sup> and numerous other outlets reporting the same. Iacobucci also used the language of “crisis” when engaging with media after the report’s release, stating: “I have called it a crisis, a serious crisis. And I am not an alarmist. We are talking about the lives and liberties of people. I don’t know if you can get more of an important issue subject than that.”<sup>81</sup>

Even when reports did not utilize the language of “crisis,” media accounts often have. Soon after the release of *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act*,<sup>82</sup> for example, *The Globe and Mail*, *Toronto Star*, and *CTV News* used the language of “crisis” to describe its results.<sup>83</sup> Media outlets have also used the language of “crisis” to describe the lack of Gladue report writers,<sup>84</sup> or ongoing disparities in incarceration rates.<sup>85</sup> Add to this the editorials and opinion

<sup>76</sup> Ibid. The report identified key problems with the Custody Rating Scale and its use in classifying Indigenous women in corrections.

<sup>77</sup> The *Final Report of the Truth and Reconciliation Commission* is one such example, and it deploys the language of “crisis” at several points in its treatment of Indigenous imprisonment. See *Final Report of the Truth and Reconciliation Commission of Canada, Volume 5: The Legacy*. <[http://www.trc.ca/assets/pdf/Volume\\_5\\_Legacy\\_English\\_Web.pdf](http://www.trc.ca/assets/pdf/Volume_5_Legacy_English_Web.pdf)>, at, e.g., 220, 221, 254. The TRC Final Report was produced and operates in a different manner than most of the representations I survey in the piece, in that it is neither depoliticized nor dehistoricized, and reflects the lived experience of Indigenous people. This does not immunize the Final Report from critique but, rather, clarifies that the specific critiques advanced here do not apply to the Report in the same measure.

<sup>78</sup> *The Globe and Mail*, “Tory Crime Agenda Fueling ‘Crisis’ Of Aboriginal Women In Prison,” 27 September 2012.

<sup>79</sup> *CBC News*, “New Report Describes Growing ‘Crisis’ For Aboriginal Women,” 27 September 2012.

<sup>80</sup> *The Toronto Star*, “Ontario’s Justice System In A ‘Crisis’ For Aboriginals,” 26 February 2013.

<sup>81</sup> Tanya Talaga, “Ontario’s Justice System in a ‘Crisis’ for Aboriginals: Frank Iacobucci Report,” *Toronto Star*, 26 February 2013 <[https://www.thestar.com/news/canada/2013/02/26/ontarios\\_justice\\_system\\_in\\_a\\_crisis\\_for\\_aboriginals\\_frank\\_iacobucci\\_report.html](https://www.thestar.com/news/canada/2013/02/26/ontarios_justice_system_in_a_crisis_for_aboriginals_frank_iacobucci_report.html)>. Despite being cited and adopted by several courts, as noted above, the use of the word “crisis” was not without incident. Soon after the report’s release, for example, then serving Attorney General John Gerretsen seemed to question Iacobucci’s use of the word “crisis.” As cited by the *Toronto Star*, Gerretsen stated: “That’s his terminology.... I’m not sure whether it’s a crisis or not. I’m not going to disagree with him. I’m going to study the report.”

<sup>82</sup> Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (22 October 2012). <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx>>

<sup>83</sup> Gloria Galloway, “Prison Watchdog Expected to Fault Ottawa for Failing Natives,” *The Globe and Mail* (7 March 2013) (citing Shawn Atleo, the National Chief of the Assembly of First Nations, referring to the report as recounting “a widely recognized crisis and tragedy in so many respects”); *Toronto Star*, “Prison Watchdog Calls Soaring Aboriginal Population in Jail a ‘Critical Situation,’” 7 March 2013 (stating: “Canadian prisons are filling with aboriginal peoples, warns a scathing new report that urges immediate action to defuse a growing social crisis”); *CTV News*, “Canada failing Aboriginal inmates, watchdog says,” 7 March 2013 (using the headline “Corrections System Crisis”).

<sup>84</sup> *CBC News*, “Lack of Gladue report writers in northwest a ‘crisis,’” 20 November 2013.

<sup>85</sup> Amanda Coletta, “Canada’s indigenous population is overrepresented in federal prisons—and it’s only getting worse,” *Washington Post*, 1 July 2018.

pieces that have lamented the existence of "crisis" in Canada's legal system and urged the need for reform.<sup>86</sup>

In each of these decisions, reports, and media pieces, the language of "crisis" functions differently. In some, the language carries little rhetorical value, being used as descriptor. In others, the language conveys outrage or horror, serving to communicate disapproval or condemnation. In others still, the language of "crisis" forms part of what Sarah Clark refers to as "shock and awe" terminology, namely, the deployment of discourses, policies, and practices that perpetuate statistics of shock and horror to justify colonial control and intervention.<sup>87</sup> In most, as Vicki Chartrand's analysis suggests, Indigenous experiences are "symptomized as an unfortunate but inevitable consequence, while the structural and systemic manners in which Indigenous people continue to be colonized are rarely explored."<sup>88</sup> In such representations, the language of "crisis" operates to imply an exceptional, rather than normal, operation of colonialism. In some, however, the language of "crisis" is deployed in good faith, and is central to, and formative of, the analysis or conclusion as reached. In these representations, the language helps expose the operation of colonialism in the production of "crisis." While each representation reads and functions differently, the language of "crisis" weaves them together.

<sup>86</sup> See, e.g., Jacqueline Briggs, "Shameful Anniversary Should Spur Action on Aboriginal Justice Crisis," *Toronto Star*, 3 April 2016 <<https://www.thestar.com/opinion/commentary/2016/04/03/shameful-anniversary-should-spur-action-on-aboriginal-justice-crisis.html>>; Mary Agnes Welch, "25 Years after the Aboriginal Justice Inquiry Began, Much of Its Promise Has Yet to Be Realized," *Winnipeg Free Press*, 14 September 2013 <<http://www.winnipegfreepress.com/local/slow-road-to-justice-223729431.html>>; Kristy Kirkup, "Feds Failing Aboriginal Inmates: Watchdog," *Brantford Expositor*, 7 March 2013 <<http://www.brantfordexpositor.ca/2013/03/07/feds-failing-aboriginal-inmates-watchdog>>; Britnae Purdy, "Disproportionate Number of Aboriginals in Canadian Jails Indicates Crisis," *First Peoples Worldwide*, 11 April 2013 <<http://firstpeoples.org/wp/disproportionate-number-of-aboriginals-in-canadian-jails-indicates-crisis/>> <<https://www.thestar.com/opinion/contributors/2018/07/03/little-being-done-about-the-staggering-number-of-indigenous-people-in-jail.html>> Notably, a review of newspaper articles issued immediately after *Gladue's* release suggests it takes time for the language of "crisis" to catch on. The most prominent headlines at the time were: "Top Court Appalled as Natives Fill Canada's Jails" (*The Globe and Mail*, 24 April 1999 <<http://fact.on.ca/newspaper/gm990424.htm>>) and "Judges too quick to jail offenders, top court rules, urging special efforts for Aboriginals" [*Toronto Star*, 24 April 1999]. Notably as well, media outlets have also used the language of "crisis" in connection with other issues impacting Indigenous communities. See, e.g., discussion of soaring child welfare rates (Jorge Barrera, "Indigenous Child Welfare Rates Creating 'Humanitarian Crisis' in Canada, Says Federal Minister," *CBC News*, 2 November 2017; Katie Hyslop, "How Canada Created a Crisis in Indigenous Child Welfare," *The Tyee*, 9 May 2018); opioid use (*CBC News*, "Alberta Friendship Centres Get \$400,000 to Fight Indigenous Opioid Crisis," 30 August 2018); suicide rates (Marc-André Cossette, "'We Matter a Lot': Indigenous Youth Gather in Ottawa to Tackle Suicide Crisis," *CBC News*, 2 January 2018); lack of housing (Courtney Dickson, "Concerns Mount over Federal Government's Indigenous Housing Contest," *CBC News*, 13 August 2018); lack of water supply (Jorge Barrera, "Ottawa's Promise to Fix First Nations Water Crisis Still Falling Short: Report," *CBC News*, 8 February 2018; John Millar and Bob Rae, "Money Alone Won't Solve the Water Crisis in Indigenous Communities," *MacLean's Magazine*, 29 March 2018; Angus Reid, "Want common ground on First Nations Issues? Start by Fixing the Water Supply," *MacLean's Magazine*, 7 June 2018); or missing and murdered Indigenous women (Angela Bosse, "A Mile in Her Moccasins: Annual healing walk raises awareness on MMIWG," *CBC News*, 19 October 2018).

<sup>87</sup> Natalie Clark, "Shock and Awe: Trauma as the New Colonial Frontier," *Journal of Humanities*, 5, no. 1 (2016): 1, at 3.

<sup>88</sup> Vicki Chartrand, "Unsettled Times: Indigenous incarceration and the links between colonialism and the penitentiary in Canada" *Canadian Journal of Criminology and Criminal Justice* 61, no. 3 (2019): 67, at 79.

Whichever way they are analyzed, it is clear that, as regards Indigenous incarceration, the language of “crisis” has taken hold.

### Crisis Persists

In *Gladue*'s aftermath, Indigenous incarceration has not only increased, it has skyrocketed. The structures of inequality and alienation that *Gladue* and *Ipeelee* criticized are as embedded in the Canadian legal system now as they were then. At the risk of reinforcing the same rhetorical strategy I critique above, namely, the focus on Indigenous imprisonment as *over* rather than as *mass*—I briefly turn to some statistics. I do so mindful of Nichol's reminder that in the context of “ongoing occupation, usurpation, dispossession, and ecological devastation, *no* level of representation in one of the central apparatuses of state control and formalized violence would be proportionate.”<sup>89</sup>

A brief survey of the numbers is nonetheless important to highlight the intensity of the problem. As of 2017, Indigenous people made up less than 5% of the Canadian population, but comprised 26.4% of the federal inmate population. The Office of the Correctional Investigator has reported an increase in the federal incarceration rate of Indigenous peoples every single year over the last three decades.<sup>90</sup> Between 2007 and 2016, the Indigenous prison population increased by 39%. In the period between 2007–2008 and 2016–2017, the rate of incarceration for Indigenous women increased by 60%.<sup>91</sup> Calculated differently, in the period between 2001–2002 and 2011–2012, the rate of incarcerated Indigenous women increased by 109%.<sup>92</sup>

The gap between Indigenous and non-Indigenous inmates continues to widen in every aspect of corrections. Year after year, the Correctional Investigator reports that Indigenous people are more likely to be subject to the use of force in corrections; are less likely to receive parole, and are more likely to return to prison on revocation of parole.<sup>93</sup> Indigenous people are more likely to be classified as high-risk and therefore incarcerated in maximum-security institutions.<sup>94</sup> For example, in 2017, while Indigenous women represented 37% of all women behind bars, they made up 50% of maximum-security classifications.<sup>95</sup> In part due to this over classification, Indigenous people are also more likely to be segregated in solitary confinement. As of March 31, 2017, for example, there were 414 offenders in solitary confinement across federal institutions, and 151 of them (36.5%) were Indigenous. The percentage of segregated Indigenous inmates increased by 31% between 2005 and 2015, compared with a growth of 1.9% for non-Indigenous inmates.<sup>96</sup> Indigenous

<sup>89</sup> Nichols, *supra* note 7, at 445 [emphasis in original].

<sup>90</sup> Office of the Correctional Investigator, 2016–2017 *Annual Report*, at 48.

<sup>91</sup> *Ibid.*, at 58.

<sup>92</sup> Office of the Correctional Investigator, *Aboriginal Issues*. <<http://www.oci-bec.gc.ca/cnt/priorities-priorites/aboriginals-autochtones-eng.aspx>>

<sup>93</sup> Office of the Correctional Investigator, 2016–2017 *Annual Report*, p 42, 48–40. For a comprehensive analysis of the use of force in corrections, and of the impact on Indigenous prisoners, see Prisoners' Legal Services, West Coast Prison Justice Society, *Damage/Control: Use of Force and the Cycle of Violence and Trauma in BC's Federal and Provincial Prisons* (June 2019). <<https://prisonjustice.org/wp-content/uploads/2019/06/use-of-force-report-online-1.pdf>>

<sup>94</sup> *Ibid.*, at 58.

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

<sup>96</sup> *British Columbia Civil Liberties Association et al. v Canada*, 2018 BCSC 62, at para 467.

women comprise 50% of placements in solitary confinement.<sup>97</sup> By all accounts, the Corrections Services of Canada have not effectively considered Indigenous social histories to reduce the impact of solitary confinement on Indigenous inmates.<sup>98</sup> The extreme rates of classification and isolation also contribute to higher rates of violence and harm among Indigenous inmates, both to self and to others.<sup>99</sup>

The above-cited figures only account for incarceration rates of Indigenous peoples in Federal corrections, for sentences of two years or more. At the provincial level, the figures are just as stark. The 2014 statistics show that in Saskatchewan, the rate of Indigenous incarceration was 77% (up from 61% in 1978), in Manitoba the rate was 76% (up from 50% in 1978), in British Columbia the rate was 34% (up from 15% in 1978), and in Newfoundland and Labrador the rate was 32% (up from 3% in 1978).<sup>100</sup> While Ontario’s 12% incarceration rate appears relatively low, given the high population rates in Ontario, the province accounts for the second-highest total number of Indigenous admissions into custody, representing roughly 3,000 individuals.<sup>101</sup> In Nunavut, the Indigenous incarceration rate is 100% in every year in which statistics were kept. While the rate has remained the same, the numbers behind it have increased, rising from an average of 290 from 2001 to 2005 to 470 between 2011 and 2014.<sup>102</sup> Indigenous peoples are also grossly over-represented in the remand population. In 2014–2015, Indigenous people represented 25% of remand admissions, a sharp increase from the 16% rate reported one decade prior.<sup>103</sup> Every aspect of corrections records similar disparities. As Julian Roberts and Andrew Reid conclude, when it comes to Indigenous incarceration: “every picture tells the same story.”<sup>104</sup> The “crisis,” as it were, persists.

### The Limits of Crisis

The above-cited figures are devastating. To use the language of *Gladue*, they truly are “stark,” “drastic,” and revealing of a “sad and pressing social problem.”<sup>105</sup> But do they represent a crisis? No. However effective the language of “crisis” may be in capturing the urgency and severity of Indigenous mass imprisonment, it has proven ineffective. So many legal actors have lamented the existence of “crisis” for so many years now that the term has lost its value. In *Minding the Law*, Anthony Amsterdam and Jerome Bruner warn against the dulling effect of repetition, stating: “when our ways of conceiving of things become routine... they disappear from consciousness and we cease to know *that* we are thinking in a certain way or *why*

<sup>97</sup> *Ibid.*, at para 470.

<sup>98</sup> *Ibid.*, at para 483. As the Court held: “There is a box to be ticked on a form and it is ticked. Meaningful results have not followed.”

<sup>99</sup> Government of Canada, *Annual Report of the Office of the Correctional Investigator* (2012–2013), Section IV, p. 30.

<sup>100</sup> Julian V. Roberts and Andrew A. Reid, “Aboriginal Incarceration in Canada since 1978: Every picture tells the same story,” *Canadian Journal of Criminology and Criminal Justice* 59, no. 3 (2017): 313–345, at 327–331.

<sup>101</sup> *Ibid.*, at 328.

<sup>102</sup> *Ibid.*, at 332.

<sup>103</sup> *Ibid.*, at 318.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Gladue*, *supra*, note 1, para 64.



we are doing so.”<sup>106</sup> With every repetition, the language of “crisis” has not only dulled the severity of the problem, it has also normalized its existence, and too often served as a substitute for action.

On a rhetorical level, the language of “crisis” is both inappropriate and misleading, in that crises, by definition, do not persist. The *Oxford English Dictionary* defines crisis as a “time of intense difficulty or danger; time when a difficult or important decision must be made,” while the thesaurus also offers: “critical point”; “turning point”; “crossroads”; “crux”; “culmination”; “moment of truth”; “point of no return.”<sup>107</sup> The *Merriam-Webster* dictionary defines crisis as “an unstable or crucial time or state of affairs in which a decisive change is impending; a situation that has reached a critical phase.”<sup>108</sup> The *Merriam-Webster* thesaurus also offers “boiling point”; “breaking point”; “conjecture”; “crunch time”; “juncture.”<sup>109</sup> Common to these definitions is some measure of transience, and a tipping point. In the case of Indigenous mass imprisonment, neither holds true. Indigenous people have been imprisoned in mass numbers for decades, long before *Gladue*. The problem has not reached its highest point, and shows no signs of decisive change, turning point, culmination, or juncture.

The issue here is not simply that of inadequate definition but, rather, of a fundamental mischaracterization. The language of “crisis” suggests that Indigenous mass imprisonment is somehow exceptional or temporary, as crises are. Whereas in fact, like colonialism, Indigenous mass imprisonment is embedded in the Canadian legal system, it is an ordinary and predictable by-product of systemic and systematized colonial violence. As far back as 1999, the Supreme Court of Canada stated that reports about Indigenous incarceration rates were “disturbingly common.”<sup>110</sup> Twenty years out, we have come to expect the persistence of “crisis.” Part and parcel of the fabric of the Canadian legal system, Indigenous mass imprisonment, like the colonial structures that produce it, is “here to stay.”<sup>111</sup>

Writing of crisis as political discourse, Jessica Lawrence explains that a distinguishing feature of the language of crisis is its call for action.<sup>112</sup> Crisis, she maintains, demands a response or solution.<sup>113</sup> To speak of crisis, then, “is to evoke a moment in which decisions must be made; a moment of political opportunity.”<sup>114</sup> Colin Hay similarly speaks of crisis as a moment of transformation, “in which a

<sup>106</sup> G. Anthony Amsterdam and Gerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), 1.

<sup>107</sup> *Oxford English Dictionary*, 2nd ed., s.v. “crisis.”

<sup>108</sup> Merriam-Webster, 10th ed., s.v. “crisis.”

<sup>109</sup> Ibid.

<sup>110</sup> *Gladue*, *supra* note 1, para 62.

<sup>111</sup> See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, where Lamer, CJC, famously remarked that we are all “here to stay.” For a critical reflection on the Court’s use of this language, see Johnny Mack, “Hoquotist: Reorienting through storied practice,” in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, Hester Lessard, Rebecca Johnson, and Jeremy Webber ed. (Vancouver: UBC Press, 2011), 287.

<sup>112</sup> Jessica C. Lawrence, “The EU In Crisis: Crisis Discourse as a Technique of Government,” *Netherlands Yearbook of International Law* 33 (2013): 187.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

decisive intervention *can* and perhaps *must* be made.”<sup>115</sup> Ulrich Beck maintains that a defining feature of the language of crisis is the impression that crisis can be overcome, or that reverting to a pre-crisis state is possible.<sup>116</sup> But the persistence of Indigenous mass imprisonment reveals that reverting to a pre-crisis state is neither viable nor realistic. To move away from crisis would require much more than a change in sentencing protocol; it would require a dismantling of the central tenets of the colonial state. As Chartrand writes: “Without changing the underlying colonial relationship, we not only ignore the ways that colonialism continues to exist today; we also continue to offer colonizing arrangements as part of the remedy.”<sup>117</sup> *Gladue* and *Ipeelee* may register as issuing a call to arms or ushering in decisive change, but in fact, both only offer the same colonial arrangements they criticize.

Nichols’ analysis of the Canadian legal system’s flawed understanding of Indigenous mass imprisonment is instructive here. As Nichols writes, critiques of mass incarceration have “insufficiently attended to the centrality of colonialism to the origins, scope, scale, and legitimation techniques of carceral power in North America.”<sup>118</sup> The depoliticized, dehistoricized detachment of Indigenous mass incarceration from the “longer colonial history of the state itself” has enabled it to be routinized, bureaucratized, and thus more “effectively and smoothly enacted.”<sup>119</sup> Ultimately, this approach has failed to meaningfully consider what Nichols identifies as the quintessentially territorial foundation of prison expansion.<sup>120</sup> And indeed, while both *Gladue* and *Ipeelee* make inroads in recognizing the systemic prejudices and widespread racism of the Canadian legal system—with *Ipeelee* also identifying colonialism and the legacy of residential schools—neither decision assumes responsibility for the production of Indigenous mass imprisonment as colonial violence. Even at their most progressive and laudable moments, and even as they criticize the Canadian legal system, both turn to that same system to resolve the problem.<sup>121</sup> They do so despite the fact that the legal system is responsible for producing not just Indigenous incarceration and alienation, but also persistent and normalized trauma, violence, death, and harm.<sup>122</sup>

<sup>115</sup> Colin Hay, “Crisis and the Structural Transformation of the State: Interrogating the process of change,” *British Journal of Politics and International Relations* 1, no. 3 (1999): 318.

<sup>116</sup> Ulrich Best, Risk, class, crisis, hazards and cosmopolitan solidarity/risk community—conceptual and methodological clarifications, 2013. FMSH-WP-2013-31. <<https://halshs.archives-ouvertes.fr/halshs-00820297/document>>

<sup>117</sup> Chartrand, *supra*, note 86, at 79.

<sup>118</sup> Nichols, *supra* note 7, at 437.

<sup>119</sup> *Ibid.*, at 448.

<sup>120</sup> Central to every act of colonialism is its appropriation of Indigenous land and sovereignty, and in Nichols’s analysis, *supra*, note 7 mass imprisonment is no exception. As Patrick Wolfe states, “Territoriality is settler colonialism’s specific, irreducible element,” Patrick Wolfe, “Settler Colonialism and the Elimination of the Nature,” *Journal of Genocide Research* 8, no. 4: 387–409, at 388, cited in Nichols, at 451. See also Glen Coulthard, “From Wards of the State to Subjects of Recognition? Marx, Indigenous Peoples, and the Politics of Dispossession in Denendeh,” in *Theorizing Native Studies*, ed. A. Simpson and A. Smith (Durham, NC: Duke University Press, 2014), cited in Nichols, at 450.

<sup>121</sup> This approach has been criticized by many; see, e.g. Rudin *supra*, note 20 (2009), at 454. As Rudin queries, how would a system that had, “advertently or inadvertently, created a crisis, ... resolve that crisis if nothing about how that system operated was going to change?”

<sup>122</sup> See, e.g., Jaskiran K. Dillon, “Indigenous Girls and the Violence of Settler Colonial Policing” *Decolonization: Indigeneity, Education & Society* 4, no. 2 (2015): 1.

In Scott Veitch's analysis, this dual move is common to legal institutions attempting to reconcile large-scale suffering.<sup>123</sup> Such institutions, Veitch posits, operate simultaneously in two contradicting ways. On one hand, they organize responsibility for suffering by holding legal actors responsible for harm. *Gladue* and *Ipeelee* do this well. But on the other hand, and at the same time, they also distance responsibility by facilitating its dispersals and disavowal. In Veitch's analysis, when legal institutions attribute responsibility for harms in ways that fail to respond to the conditions on which they operate—as *Gladue* and *Ipeelee* do—the effect is to distance responsibility for harm. Understanding this simultaneity, Veitch maintains, is central to understanding how seemingly neutral and well-meaning legal actors contribute to “normalizing the production of suffering.”<sup>124</sup>

Christie's analysis of Canadian courts' unwavering commitment to colonial narratives and colonial frameworks helps to make sense of this approach. Analyzing decisions involving Aboriginal rights and title, Christie identifies several moments at which the courts attempt to make sense “of the exercise of unbridled colonial power.”<sup>125</sup> In grappling with the exercise of state power, Christie demonstrates, the courts simultaneously justify and maintain its authority.<sup>126</sup> Bringing Christie's insights to bear on *Gladue* and *Ipeelee* reveals the Court deploying a method of analysis that partakes in the proliferation of irresponsibility that Veitch identifies, and operates to reinforce the same “colonial conceptual framework.”<sup>127</sup> At the very moment they assign responsibility to the Canadian legal system for the production of “crisis,” *Gladue* and *Ipeelee* proliferate irresponsibility by turning to that same system to overcome the conditions it has created and continues to enforce. Veitch calls this the “transference” of responsibility,<sup>128</sup> that is, assigning responsibility to an institution that, by the Court's own admission, is incapable of meaningfully assuming that responsibility. The effect is to disappear responsibility, and to normalize harm.

Where then, can the Canadian legal system turn? How can it come to terms with its own role in perpetuating the “crisis” it so adamantly disavows? Writing in a different setting, Johnny Mack urges a shift away from what he identifies as the normalized and un-reflexive absorption of colonial stories and perspectives.<sup>129</sup> A shift away from the language of “crisis” could reorient the legal understanding of Indigenous mass incarceration in the dominant Canadian legal discourse. In “The Crisis in Education,” Hannah Arendt writes of crisis as opportunity. For Arendt, crisis does not invite its critic to indulge in outrage, rather, it compels the critic “to explore and inquire into whatever has been laid bare of the essence of the matter.”<sup>130</sup> This task, she maintains, requires tearing away façades and prejudices, and trying to see things as they are.<sup>131</sup> To do otherwise is to indulge in crisis and, in Arendt's

<sup>123</sup> Veitch, *supra*, note 5.

<sup>124</sup> *Ibid.*, at 2.

<sup>125</sup> Christie, *supra*, note 4, at 22.

<sup>126</sup> *Ibid.*, at 22.

<sup>127</sup> *Ibid.*, at 21.

<sup>128</sup> Veitch, , *supra*, note 5, at 3.

<sup>129</sup> Mack, *supra*, note 111.

<sup>130</sup> Hannah Arendt, “The Crisis in Education” in *Between Past and Future: Eight Exercises in Political Thought* (London: Penguin Books, 2006), at 170.

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

analysis, turn crisis into disaster. “Simple, unreflective perseverance,” she writes, “whether it be pressing forward in the crisis or adhering to the routine that blandly believes the crisis will not engulf its particular sphere of life, can only, because it surrenders to the course of time, lead to ruin.”<sup>132</sup> To respond to crisis with “performed judgments”—as *Gladue* and *Ipeelee* do—is to sharpen the crisis and, in Arendt’s words, to forfeit the “opportunity for reflection it provides.”<sup>133</sup>

What opportunity for reflection does Indigenous mass imprisonment provide? What, to further echo Arendt’s words, is laid bare by the essence of this matter? At issue here is not only poor word choice but, far more profoundly, a deep-seated defensive anxiety that shapes the Canadian legal understanding of Indigenous mass imprisonment. This anxiety finds expression in and through the language of “crisis.” Its use operates to distance and disappear responsibility, reinforce colonial structures, and intensify and perpetuate suffering.

Moving away from the language of “crisis” will do little to dismantle the colonial structures that produce Indigenous mass imprisonment. A surface adjustment to the discourse that leaves the substantive situation untouched will only cause more harm. Such a shift will not decrease the relentless intensification of Indigenous incarceration, nor will it dismantle the colonial structures at its core. But a meaningful shift in the understanding of Indigenous mass incarceration—and the state’s central role in its production—might help move away from the unquestioned acceptance of colonial orderings. It might help instil responsibility rather than disappear it, and drive towards a more honest understanding of Indigenous mass imprisonment as colonial violence. As Leanne Betasamosake Simpson powerfully argues, the task of the colonial state is not to “save” Indigenous people, but to restructure itself in a way that does not continue to injure Indigenous people and dispossess their lands.<sup>134</sup> A shift away from the language of crisis might be a small step in this restructuring. At the very least, it might help unpack the defensive anxiety that haunts this field of law and place the legal understanding of Indigenous mass imprisonment on more candid, stable ground.

## Conclusions

A few years back I collaborated on a case involving the treatment of incarcerated women, most of whom were Indigenous. I advocated for the use of the language of “crisis” in the submissions. As I maintained then, it was important for the court to situate the claim in the broader context of Indigenous mass imprisonment. The language of “crisis,” I argued, would impress upon the court the urgency and severity of the matter, and drive towards an effective remedy. The “crisis” argument proved persuasive and informed the court’s reasoning. The court issued the remedy I hoped for, one that meaningfully benefits many incarcerated women.

Looking back, the language of “crisis” was not necessary for the argument to succeed. This language did not advance the court’s understanding, nor yield a

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017).

uniquely effective remedy. Rather, by deploying the language, I partook in the tacit, normalized absorption of colonial stories and perspectives that Mack so persuasively criticizes.<sup>135</sup> Immersed in those narratives, my work on that case invited the court to situate its analysis in a quintessentially colonial frame. Upon reflection, it might have been more persuasive to call the court's attention to the structural manifestations and lived experience of colonial violence in a more pointed way. Maybe the better approach would have been to seek a remedy designed to disrupt the structures that enable that violence, or to draw the court's attention to Indigenous mass incarceration as ongoing cultural and territorial dispossession. A different argument, a different approach, a different understanding might have generated an effective remedy without contributing to the harmful mischaracterizations I critique above.

Perhaps a different approach would have opened up other possibilities for more effective remedies, more meaningful assignments of legal responsibility, or for resistance, defiance, and opposition. As Jarrett Martineau and Eric Ritskes write, one of colonialism's most pervasive harms is in conditioning possibility—in ordering the world to limit possibility and normalize the un-reflexive absorption of colonial violence as settled and sensible.<sup>136</sup> As deployed over the last twenty years, and analyzed against the persistent rise in Indigenous mass imprisonment, the language of “crisis” has done just that. Rather than reveal the violence of colonialism, it tacitly obscures it; rather than disrupt the authority of colonialism, it maintains its force; rather than entrench responsibility, it helps disperse irresponsibility; rather than demand change, it invites complacency. To continue to indulge in this language, rather than rethink its use, is to perpetuate Indigenous mass imprisonment and to reinforce the colonial structures that enable it to thrive.

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<sup>135</sup> Mack, *supra*, note 111.

<sup>136</sup> Jarrett Martineau and Eric Ritskes, “Fugitive Indigeneity: Reclaiming the terrain of decolonial struggle through Indigenous art” *Decolonization: Indigeneity, Education & Society* 3, no. 1 (2014): 1.