Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story[1]

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Abstract

Sentencing in Canada is beset by many problems yet one weakness stands above the rest: the disproportionately high rates of Aboriginal incarceration. This article documents current and historical trends in levels of Aboriginal incarceration at the provincial/territorial and federal levels since 1978. We pay particular attention to the years following two important Supreme Court judgments (in 2001 and 2012) which directed courts to use custody with greater restraint when sentencing an Aboriginal offender. The primary data derive from the annual Adult Correctional Services (ACS) Survey conducted by Statistics Canada. In 2014, Aboriginal persons accounted for just over one quarter of all provincial and territorial admissions, significantly higher than the percentage recorded in 1978 (16%). In fact, over the last 20 years all jurisdictions save one have experienced an increase in the percentage of Aboriginal admissions to provincial correctional institutions. Despite judgments from the Supreme and provincial courts of appeal, and a number of other remedial interventions such as the creation of so-called 'Gladue' courts and an alternate form of custody served in the community, the problem of Aboriginal over-incarceration has worsened, not improved.

Key Words: imprisonment, Aboriginal peoples, Indigenous peoples, sentencing

Sentencing in Canada is beset by many problems, including disparity, the absence of a commission to provide consistent research and guidance, little transparency, a general over-use of custody as a sanction, and low levels of public confidence. Yet one weakness stands above the rest: the high number of Aboriginal persons in prison. Awareness of the problem is relatively recent: Aboriginal incarceration was not identified as a problem until a seminal 1984 report regarding sentencing (Government of Canada 1984). Courts, in contrast, have long grappled with the question of whether the conventional approach to sentencing was suitable for Aboriginal offenders.[2] Almost 30 years have passed since the report of the Standing Committee on Justice and Solicitor General (Daubney 1988) acknowledged the problem and proposed some remedies. A number of subsequent reports (e.g., the Royal Commission on Aboriginal Peoples [RCAP] 1996) and Commissions of Inquiry (e.g., RCAP and the Ipperwash Inquiry in 2007) also addressed the issue and advanced various solutions. Most recently, (in 2015), the Truth and Reconciliation Commission further underlined the scale of the problem, while suggesting relatively limited solutions (Canada 2015b).[3]

Despite this succession of official reports and academic commentary, remedial reforms implemented to date have been few and modest in scale. The only legislative attempt to reduce the use of incarceration for Aboriginal offenders emerged in 1996 when Parliament codified special consideration for Aboriginal offenders as part of an omnibus sentencing reform Act, Bill C-41 (see Daubney and Parry 1999; Murdocca 2013). Section 718 states that: 'A court that imposes a sentence shall also take into consideration the following principles:…

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

Section 718.2(e) was subsequently the basis of litigation to the Supreme Court as well as the subject of much academic commentary.[4] This legislative provision, in turn, led to several

Supreme Court judgments (including *Gladue* and *Ipeelee*) which were specifically intended to ameliorate the problem of Aboriginal over-incarceration. In Gladue for example, the Court took the view that a different methodology was appropriate when sentencing an Aboriginal offender, one which would be more likely to result in a noncustodial option (although ultimately the Court upheld the term of imprisonment on the offender). Bill C-41 also created the conditional sentence of imprisonment (CSI), a community-based form of custody. While not explicitly designed to address the issue of Aboriginal incarceration, there was an expectation that Aboriginal defendants in particular would benefit from the new sanction, and that this would contribute to a reduction in Aboriginal admissions to provincial custody.[5] Have these reforms succeeded? Research documenting trends in the use of CSIs indicates that Aboriginals have not experienced the benefit originally expected. Most recently, Reid (2016) explored trends in the use of the sanction among Aboriginal and non-Aboriginal offenders across 10 provincial and territorial jurisdictions. In the combined jurisdiction trend, only minor differences were noted between the two offender groups and Aboriginals were found to have experienced a lower use of the sanction in the most recent four-year period (2009 to 2013). More detailed analyses found that several jurisdictions where Aboriginal incarceration had historically been among the most overrepresented, had lower use of CSIs with Aboriginals. Because no research has empirically evaluated the impact of the CSI on Aboriginal imprisonment, however, a more detailed consideration of recent imprisonment trends is warranted.

An examination of trends in the use of custody is timely from several perspectives. First, a generation has now passed since the landmark sentencing reform of 1996 (Bill C-41). Second, the last scholarly exploration of Aboriginal and non-Aboriginal correctional trends was published over a decade ago (Roberts and Melchers 2003). Evaluations of the 1996 reform have

been very limited in scope (e.g., Welsh and Ogloff 2008), and there has been no recent historical analysis of trends. Third, recent legislative amendments (e.g., Bill C-10) restricting alternatives to custody appear to conflict with efforts aimed at reducing the use of incarceration for Aboriginal offenders (Rudin 2013). Fourth, the Truth and Reconciliation Commission recently called for Canada to eliminate the over-representation of Aboriginal people in custody 'over the next decade' (Canada 2015a: 219). Whether this ambitious and laudable objective is attainable depends upon knowing the true scale of the problem. Finally, the current federal government, (elected in 2016), has expressed a clear intention to address the complex and to date, seemingly intractable problem of the high rate of Aboriginal Canadians incarceration.

A Global Problem

Aboriginal incarceration is a problem confronting many jurisdictions (see Cuneen 2014; Jeffries and Stenning 2014). Visible and indigenous minorities account for disproportionate numbers of admissions to custody in all western nations – a fact that has been documented for years now (e.g., Tonry 1997). Aboriginal persons in Australia and New Zealand, for example, have been found to be disproportionately represented in correctional statistics (Jeffries and Bond 2012a; Jeffries and Bond 2012b; Jeffries and Stenning 2014). In Australia, age-standardized rates of Aboriginal incarceration have been found to be approximately 15 times higher than that of non-Aboriginals. While Aboriginal people constitute just 3% of the estimated resident population, they represent 25% of the total population incarcerated (Jeffries and Stenning 2014). Aboriginal over-incarceration is also apparent in New Zealand. In 2015, New Zealand's Māori population stood at just 15% while 50% of all sentenced prisoners were identified as belonging to that ethic group (New Zealand Department of Corrections 2015; Statistics New Zealand 2015). The Canadian experience therefore has relevance for several other western jurisdictions.

Overview of Article

This article documents current levels of Aboriginal admissions to custody and reviews changes in the volume and proportion of Aboriginal admissions since 1978. Roberts and Melchers (2003) explored sentencing trends for Aboriginal and non-Aboriginal admissions up until 2001; this article brings that analysis up to date. The analysis includes the new jurisdiction of Nunavut, summarizes trends regarding remand detention, and also explores for the first time the limited federal statistics currently available. We pay particular attention to the years following important Supreme Court judgments in 2001 and 2012. Our purpose is primarily descriptive rather than explanatory; explaining the trends nationally and regionally will take a more fine-grained analysis. The first step in understanding the phenomenon is to place the current position within an historical context. The article concludes by briefly proposing remedial options. Finally, it is important to note that the correctional statistics presented and discussed here aggregate First Nations individuals within a single category 'Aboriginal'. This is clearly an oversimplification of the diverse communities of indigenous peoples across Canada, and indeed the variation within communities (e.g., urban versus rural). A clear next step for researchers is to understand the differential impact that criminal justice has upon diverse communities, but this is for the future. Our purpose is to take stock of the historical trends to date on a national level.

Method

Data Sources

Ideally, the over-incarceration for Aboriginal Canadians (or any other group) would be established by comparing annual population statistics to correctional statistics such as annual admissions, or average prison or community supervision populations. This research strategy has been adopted in the limited comparative analyses of national trends (e.g., Walmsley 2015). However, the absence of reliable, annual Aboriginal population statistics precludes such an

approach in Canada. We present limited population-based comparisons for three years, and then focus on annual admissions to custody, comparing trends for Aboriginal and non-Aboriginals. We document the principal indicator of Aboriginal incarceration, namely the percentage of all such admissions involving an Aboriginal person.[6] Yet it is also necessary to explore the absolute numbers of Aboriginal and non-Aboriginal admissions, since a higher increase in non-Aboriginal admissions (relative to Aboriginal offenders) would necessarily reduce the percentage of Aboriginal offenders.

The principal source of data is the annual Adult Correctional Services (ACS) Survey, conducted by Statistics Canada. Our focus is upon provincial sentenced admissions to custody.[7] Although the ACS includes some data on admissions to federal penitentiaries, almost all (96%) of terms of imprisonment in Canada are under two years, and are served in provincial and territorial institutions. The consequence of this is that remedial efforts directed at reducing the number of Aboriginal offenders admitted to federal custodial facilities would have very little impact on the total population in custody. Nevertheless, we analyse the limited federal data that are currently available.

Ambit of Inquiry

The historical analysis excludes statistics relating to custodial remand or custody involving youth, although we begin by summarizing the latest data regarding Aboriginal and non-Aboriginal remand populations. This accomplished the analysis focus on sentenced admissions and populations. Although remanded prisoners constitute an important source of Canada's custodial population, the decision to remand is very different from the decision to sentence an individual to custody and therefore worthy of independent consideration. Similarly, although Aboriginals are also over-represented in custodial populations of young offenders[8],

differences between adult and youth sentencing processes justify separate analyses. Finally, the analysis does not differentiate male and female offenders. Subsequent research should examine these groups separately, as there is clear evidence that gender interacts with sentencing decisions and in particular the application of section 718.2(e) (see discussion in Williams 2007; Balfour 2013).

Results

Remand

Although the principal focus of this article is upon sentenced admissions, it would be a mistake to overlook the remand prison population, as Aboriginal overrepresentation is a problem here too. Table 1 summarises Aboriginal and non-Aboriginal admissions to provincial and territorial remand over the period 2000-01 to 2014-15. As can be seen, in the most recent year for which data are available, Aboriginal persons accounted for one quarter of remand admissions. Moreover, in a pattern which will echo our findings with respect to sentenced admissions, the over-representation of Aboriginal persons in the remand admission statistics has become worse over the past decade. Thus in 2004-05, 16% of remand provincial/ territorial admissions were aboriginal, rising to the 25% statistic reported a decade later (Table 1). Table 2 also confirms a pattern which emerges with respect to sentenced admissions: Aboriginal admission rates vary greatly across the country, being highest in Nunavut, the Northwest Territories, Saskatchewan, and the Yukon (Table 2). In short, the problem of the high number of First Nations peoples in Canada's prisons is by no means restricted to the sentencing stage; this finding carries important consequences for remedial solutions. At this point we turn to the latest and historical trends with respect to sentenced admissions.

Insert Tables 1 & 2 here

Canada-wide Trends: The Big Picture

As noted in the introduction, annual population based statistics are unavailable at present and for this reason we shall shortly focus on the relative proportions of Aboriginal and non-Aboriginal offenders in prison populations. However, Table 3 summarises population-based comparisons for three specific years, 2001, 2006 and 2011. This Table may be summarised in the following way. First, the Aboriginal admission ratio -- namely the population based proportion of Aboriginal admissions compared to the proportion of non-Aboriginal admissions – was 5.68 in the first of the three years. This means that Aboriginal persons were almost six times more likely to be admitted to prison than non-Aboriginal Canadians, based upon their general population statistics. Second, this over-representation of Aboriginal persons was worse in 2006 (rising to 7.82) and worst in the most recent year (9.12). This deteriorating picture is consistent with the trends emerging from non-population based statistics that we will shortly describe and discuss in more detail. Third, there was great variation in admission rates and rate ratios among the provincial/territorial jurisdictions. In 2011, for example, the Aboriginal rate ratio was 2.93 in Newfoundland and Labrador. In Saskatchewan, however, the rate ratio was 19.95, meaning Aboriginals were close to 20 times more likely to be admitted to prison than non-Aboriginals in that province.

Before leaving the population data we can note that the latest statistics (from the National Household Survey, NHS) revealed that in 2011, 4.3% of the total Canadian population classified themselves as Aboriginal.[9] We begin by comparing the proportion of Aboriginal admissions in the latest data (2014-15) to the earliest available year (1978-79) before focussing on the last 15 years. Table 4 provides the percentage of provincial and territorial custodial admissions in three one-year snapshots, 1978-79, 2000-01, and 2014-15. As can be seen, in the most recent year,

Aboriginal persons accounted for just over one quarter (26%) of all admissions, significantly higher than the percentage recorded in 1978-79 (15%) or 2000-01 (15%).

Table 4 about here

Before delving into trends in the intervening years, we can conclude that despite the remedial initiatives noted earlier, and notwithstanding the heightened public[10] and professional awareness of the problem, Aboriginal over-incarceration persists in Canada. Indeed, the problem has worsened over the years. The proportion of Aboriginal admissions to provincial custody in 2014-15 was the same or higher than 2000 in all jurisdictions. The average percentage of Aboriginal admissions over the most recent decade (2005-2014) was 25%, significantly higher than the average recorded in the first decade included in the analysis (1978-1987: 13.7%).

The second observation is that the specific jurisdictions reporting the highest rates of Aboriginal admissions were the same in both time periods. Nunavut, which did not exist in 1978, reported a 100% Aboriginal admission rate in 2013-2014, with the Northwest Territories almost the same (87%). Thereafter, Saskatchewan and Manitoba recorded the highest Aboriginal incarceration rates, at 77% and 76% respectively. In contrast, Quebec and Prince Edward Island reported very small percentages of Aboriginal admissions (both 3%). The ranking of jurisdictions in terms of the proportion of Aboriginal admissions remained stable, but the overall magnitude of the problem has not: With the exception of Prince Edward Island, all provinces for which comparative data are available reported a higher rate in the most recent time period (Table 4). Figure 2 summarizes the proportion of Aboriginal sentenced admissions over the entire period, from 1978 to 2014, in the provinces and territories. As can be seen, the proportion of Aboriginal admissions was relatively stable for the first 30 years, varying little from a mean of

17%, and never exceeding 19%. Over the past decade, however, the extent of over-incarceration became worse, rising to the current high of 26% of all sentenced admissions.

Figures 1 and 2 about here

Canada-wide Trends: 2000-2014

Several conclusions may be drawn from the national trends. First, over the most recent four years (2011-14), the volume of both Aboriginal and non-Aboriginal admissions declined. Non-Aboriginal admissions fell 25% from 60,638 in 2011 to 45,737 in 2014. The volume of Aboriginal admissions to custody also declined – by 32% from 24,161 to 16,309. Yet the proportion of Aboriginal admissions was significantly higher at the end of the 15-year period. The percentage in the most recent quadrennial (2011-14) was 27%, notably higher than in the first four-year period (16%; see Table 3). The trend is represented graphically in Figure 2.

Table 5 about here

Table 5 provides the total period average for both Aboriginal and non-Aboriginal admissions. The period average constitutes an anchor with which to understand and contextualise the latest trends. Across the jurisdictions captured by this analysis, by 2014, non-Aboriginal admissions had declined by 19% relative to the period average. In contrast, the 2014 data for Aboriginal admissions reveal a decline of only 2%. Total committals to custody were down, largely due to declining crime rates, yet there is no evidence that Aboriginals benefitted from interventions designed to reduce admissions for that category of offender.

Federal Trends

The limited federal statistics present a comparable picture. Aboriginal[11] admissions have accounted for an increasing percentage of federal admissions (see Figure 1). In the earliest year for which federal data are available (1982-83), Aboriginal persons accounted for 9% of federal

warrant of committal admissions. This percentage rose steadily thereafter, reaching an historic high of 19% percent in 2006-07. The most recent data pertain to 2008-09, and reveal that 18% of the admissions involved an Aboriginal person. The total volume of admissions tells the same story. In 2009-10 there were 2,919 Aboriginal persons in the federal correctional population (Public Safety Canada 2015: Table C-16). The number has increased since then, reaching 3,660 in 2014-15, the most recent year for which data are available (Public Safety Canada 2016: Table C-16). This represents a 25% increase in a five-year period.

Figure 2 about here

Trends of Selected Provinces and Territories: 2000-2014

At this point we examine selected jurisdictions in more detail, focusing on the most populous provinces and those which have historically experienced the highest rates of Aboriginal incarceration. Although Alberta has a relatively high rate of Aboriginal incarceration, we do not present data for this province due to data limitations during the period covered by this article. Specifically, data were not provided by Alberta institutions to the ACS for years prior to 2005-06 and the period 2012-13 to 2013-14. That said, the limited data available suggest that the national trends are replicated in Alberta. In 1978, only one quarter of provincial admissions were Aboriginal. In the most recent year for which Alberta data are available (2011), Aboriginal admissions accounted for 43% of total admissions.

a) Saskatchewan

As noted in Table 4, Saskatchewan is the province which currently and historically has experienced the highest rate of Aboriginal incarceration: in 1978, almost two-thirds (61%) of admissions were Aboriginal. Table 6 shows that the percentage of Aboriginal admissions was significantly higher than this throughout the most recent period covered (2000-14). The

proportion of admissions involving an Aboriginal person remained stable over the period. As can be seen, the percentage has not dropped below 77% between 2000 and 2014. However, the volume of Aboriginal admissions has increased during the past decade. The pattern was little different for non-Aboriginal admissions, which were significantly higher in 2014 than a decade earlier. The trend in Saskatchewan is surprising; given the traditionally high rate of Aboriginal admissions and the endorsement of s. 718.2(e) by the Saskatchewan Court of Appeal[12], one might have expected the provision to have lowered the rate of Aboriginal admissions, relative to non-Aboriginal offenders. In terms of trends relative to the period average, until the most recent year, non-Aboriginal and Aboriginal admissions increased at approximately the same rate. In 2014, however, the former rose further while the latter declined.

Table 6 about here

b) Manitoba

Manitoba is the other province which has long experienced particularly high Aboriginal incarceration rates. The trends in this province also reveal no evidence of progress in reducing Aboriginal incarceration. In 1978, Aboriginal admissions accounted for half of all admissions to provincial custody in the province. By 2000 this had risen to 64%, and rose still higher to 76% by the most recent year (2014). As with Saskatchewan, the Manitoban trend has been stable, varying little over the entire period. In terms of volumes of committals to custody, Aboriginal admissions have actually increased, and at a faster rate than non-Aboriginals. Using the total period average as an anchor, in 2014, Aboriginal admissions were 51% higher; in contrast, non-Aboriginal admissions were only 23% higher (see Table 7).

Table 7 about here

c) Ontario

Canada's most populous province accounts for the second highest total number of Aboriginal admissions to custody. As can be seen in Table 8, although only 12% of the Ontario admissions were Aboriginal in 2014, this represents almost 3,000 individuals.[13] In addition, and consistent with the national trend, Aboriginal admissions have risen over the period, from 9% in 2000 to 12% in 2014. Relating the latest years to the period average reveals a significant decline in non-Aboriginal admissions, down 22% from the average. In contrast, Aboriginal admissions in 2014 had declined by only 5%. Once again, Aboriginal persons seem worse off than non-Aboriginal offenders.

Table 8 about here

d) British Columbia

The trends in British Columbia are the worst. In 1978, 15% of provincial admissions to custody in BC were Aboriginal; this statistic rose to 20% in 2000. By 2014 this statistic had more than doubled, to 34%. Table 9 summarizes the trends. The average over the most recent four years was 33%, up significantly from the 20% average across the first four years of the series (2000-04). As elsewhere in Canada, the percentage of Aboriginal admissions was significantly higher at the conclusion of the period in which a number of initiatives were launched to ameliorate the problem. Comparing the two categories of offenders with reference to their period averages reveals that by 2014 non-Aboriginal admissions were down by 7%. Over this period, Aboriginal admissions, in contrast, were 37% higher in 2014. The divergent patterns become even more apparent by comparing 2014 to 2000. Aboriginal admissions increased by 65%, from 1,931 to 3,193 admissions. Non-Aboriginal admissions, in contrast, actually declined by 17%, from 7,589 to 6,325 (Table 9).

Table 6 about here

e) Newfoundland and Labrador

Table 10 summarizes trends for Newfoundland and Labrador. In 1978, Aboriginal admissions to custody represented only 3% of total admissions. This percentage then increased, and by 2000 this statistic had risen to 7% of admissions. This then rose steeply to the current level of 32%. The absolute numbers of individual offenders may be relatively small (360), yet it represents a striking increase over the 70 Aboriginal admissions recorded in 2000. Again, comparisons to the period average are revealing. The volume of non-Aboriginal admissions in 2014 was at the period average, having declined since a period high in 2010. In contrast, Aboriginal admissions in 2014 had more than doubled from the period average.

Table 10 about here

f) Nunavut

We conclude our review of select jurisdictions by noting trends in the territory created at the beginning of the period covered by our analysis. In light of the general Nunavut population it is unsurprising that in every year since 2001 Aboriginal persons accounted for all admissions to custody (see Table 11). What is striking about the Nunavut statistics is the increasing absolute number of Aboriginal admissions – rising from an average of 290 in the first four years of the period (2001-2005) to 470 in the most recent four-year period (2011-2014). This represents an increase of 62%. With respect to the period average, 2014 admissions were 32% higher.

Table 11 about here

Summary and Discussion

We can summarise the trends described in this article in the following propositions:

- As of 2014-2015, the most recent year for which correctional data are available, Aboriginal Canadians represented a disproportionate number of admissions to provincial,

territorial and federal custody. While they constitute only approximately 4% of the general population, they account for almost 30% of all sentenced admissions to custody (federal and provincial/territorial combined).

- Compared to 1978, the first year for which reliable correctional statistics are available, Aboriginal persons accounted for a significantly higher percentage of custodial admissions in 2014.
- Trends over the most recent decade (2005-14) indicate that the problem of Aboriginal incarceration is getting worse, not better.
- The picture varies across jurisdictions. In some provinces such as British Columbia, the volume of Aboriginal admissions was strikingly different and higher than non-Aboriginal admissions.
- The deterioration of the problem has occurred, paradoxically, during a period which has seen a number of remedial initiatives launched, and a series of important judgments from the Supreme Court of Canada.

Explaining the Increase in Over-Representation

The trends seem clear enough – Aboriginal over-incarceration has become worse in most provinces and territories over the past decade, even though the total volume of Aboriginal and non-Aboriginal admissions declined. Yet the explanations for these trends remain elusive. A wide range of explanations need to be considered. Some of these relate to demographic differences in the Aboriginal and non-Aboriginal communities. Others relate to the differential engagement of Aboriginal communities in crime and criminal justice, and are likely to give rise to remedial reforms. For example, to what extent are mandatory sentencing provisions and restrictions on the use of conditional sentences more likely to affect Aboriginal defendants? An

effective response can only emerge from a clearer understanding of the factors driving the use of incarceration for Aboriginal offenders.

A Global Failure?

It is important to note that Canada is not alone in having failed to ameliorate the problem**.** A closer look at trends in Australia reveals an extraordinarily similar picture to the Canadian experience. The Royal Commission into Aboriginal Deaths in Custody appointed by the Australian Government in 1987 triggered the collection of national statistics on the rate of Aboriginal and Torres Strait Islander incarceration. The Commission set out to investigate the death of dozens of Indigenous persons in custody but ended up focusing on the larger issue of Indigenous over-representation in the criminal justice system. In the final report, 339 recommendations were made, many of which concerned criminal justice system responses. Among these, several were aimed at the sentencing process including the development of alternative sanctions to custody (Johnston 1991). Over the years, many diversion programs (both generic and Indigenous-specific) have also been developed, including Aboriginal courts (e.g., Closing the Gap Clearinghouse 2013: Appendix B). Despite these remedial efforts, national trends in the imprisonment of Indigenous people in Australia remain comparable to that of Canada. Although an increasing population size has contributed to a rise in the number of Indigenous prisoners, the rate of imprisonment has also seen a dramatic increase. The rate of Indigenous imprisonment rose by 64% between 2000 and 2012 (Closing the Gap Clearinghouse 2013: 3). That is in sharp contrast to a 5% increase in the non-Indigenous rate during the same period.

Specific jurisdictions in Australia have revealed trends similar to the national pattern. Nearly a decade after the final report of the Royal Commission (Johnston 1991), the Queensland

Aboriginal and Torres Strait Islander Justice Agreement (in 2000) formed part of a response to a 1997 resolution between the Queensland Government and Aboriginal and Torres Strait Islander community representatives. The Agreement set out a long-term goal of reducing the rate by which Aboriginal and Torres Strait Islander people came into contact with the criminal justice system to 'at least the same rate as other Queenslanders' (Queensland Government 2001: 11). More specifically, the objective was 'a reduction by 50% in the rate of Aboriginal and Torres Strait Islander peoples incarcerated in the Queensland criminal justice system by the year 2011' (Queensland Government 2001: 11). In a recent assessment of the 2000 Agreement, the government acknowledged that these objectives were not met. In fact, the proportion of Aboriginal persons incarcerated rose from 23% to 29% during the ten-year period (Queensland Government 2011: 10).

New Zealand's experience is comparable. In 1985 a number of legislative amendments were introduced in an effort, at least in part, to curtail the over-incarceration of Māori. Specifically, the Criminal Justice Act (1985) increased the number of available community-based sentences. It also introduced section 16 (subsequently repealed in 2002) which allowed an offender to request the court hear witnesses who may speak about the way that cultural or ethnic background may have been related to the commission of the offence, and the way that it might help avoid future offending (New Zealand Ministry of Justice 1997). Trends in the use of incarceration among Māori, however, have not improved over the years. Between 1983 and 2013, the number of Māori starting a prison sentence increased from 2,879 to 4,311 while the number of Europeans decreased from 2,419 to 2,409 (New Zealand Department of Corrections 2013: 4). That represented an increase in the proportion of Māori starting a prison sentence from 47% to 56% during that 30-year period.

These examples demonstrate striking similarities between the historical trends of Aboriginal incarceration in different western countries; despite numerous remedial initiatives, the problem of Aboriginal over-incarceration has been getting worse.

The Failure to Date in Canada

What is responsible for the high (and rising) rates of Aboriginal admissions to custody during the period which encompassed important Supreme Court judgements affirming the significance of Aboriginality at sentencing? Several explanations may briefly be offered for the failure of remedial efforts, principally with a view to stimulating further explanatory research. One possibility is that the statutory provision and the subsequent direction of the Court has been inadequately implemented by courts (see Balfour 2012; Pelletier 2001). It is possible that defence advocates have been slow to bring this provision (and the related judgments) to the attention of courts at sentencing – business as usual, in other words. Writing for the Ipperwash Inquiry, Rudin (2008) suggested that courts were not receiving the information necessary for them to implement the direction in Gladue. If this were the case, it would help to explain the failure to address the problem. This explanation would seem more plausible during the early years following the Gladue decision, and less likely to explain the more recent upswing in Aboriginal incarceration.

A more radical possibility is that the provision has been systematically invoked in sentencing submissions and subsequently applied by judges across Canada, but the problem is beyond the power of the courts to remedy. This critique has been cited by scholars for many years now (e.g., LaPrairie 1990). A final possible explanation is that the relatively modest nature of section 718.2(e) means that it was never likely to achieve the sea change in the sentencing of Aboriginal persons that would be necessary to significantly reduce the over-incarceration

problem. Yet none of these explanations can account for the worsening of the problem in recent years.

Our preliminary conclusion would be that the federal and provincial governments need to consider all three levels of explanation. First, a much greater effort is needed to ensure consistent application of the principles enunciated by the Supreme Court in *Ipeelee* and related cases. Second, a more ambitious sentencing methodology is required, one which goes further than simply encouraging courts to consider alternatives (see below). Finally, neither of these solutions is likely to prove as successful as a holistic approach to addressing the social conditions giving rise to crime and convictions in First Nations communities.

Alternative Approaches to Reducing the Use of Custody for Aboriginal Canadians

What other legislative remedies exist for this intractable problem? It is beyond the scope of this article to provide a comprehensive review of remedial options for Canada. However, some potential solutions may be noted. The most radical approach would involve creation of a separate sentencing regime for Aboriginal offenders. This solution was recommended by RCAP many years ago and from time to time has been promoted by academics and advocates in the field. The strength of this approach is that it would permit a *de nouveau*, comprehensive approach to sentencing in cases involving Aboriginal offenders one which would return to first principles and could be conceived and developed in consultation with First Nations across Canada. At present, courts must grapple with applying sentencing objectives and principles designed for non-Aboriginal offenders.

A separate sentencing code for Aboriginal offenders may well ultimately reflect a very different set of objectives, principles and dispositions. For example, s. 718.1 identifies proportionality as the fundamental principle of sentencing. This principle derives from a censure-

based retributive sentencing philosophy (von Hirsch 1996). Yet can we assume that it is equally applicable to First Nations across Canada? Might the emphasis on proportionality prevent courts from giving sufficient weight to s. 718.2(e)? Balfour (2013: 98) for example, argues that 'judges remain tied to … punishment proportionate to the seriousness of the offence' with the consequence that sentencing reforms such as s. 718.2(e) have been rendered ineffective (see also Murdocca, 2013, pp. 58-60). There is a potential conflict between a principle which emphasises the components of culpability and harm as determinants of sentence severity and one which directs courts to consider a categorical factor such as Aboriginality or gender which courts may perceive as being unrelated to these components. Similarly, the range of sentencing options currently deployed by courts may not reflect the penal objectives of Aboriginal communities.

A second, more modest approach would involve simply strengthening the current wording of the statutory provision relating to the use of custody. The language of s. 718(2)(e) represents a relatively mild injunction to courts, simply to 'pay particular attention' to the circumstances of Aboriginal offenders. The provision could have been more robustly drafted, and there is an argument that this wording contrasts with the more ambitious objectives found in several leading judgments. How might the direction be strengthened? Parliament could have created a rebuttable statutory presumption against the use of imprisonment in cases involving adult offenders.

A third approach would entail a provision to regulate Aboriginal sentencing through the use of criteria which must be fulfilled before a term of custody is imposed. The Youth Criminal Justice Act (YCJA) may provide a useful model in this respect. One of the explicit aims of the YCJA was to reduce the use of custody as a sanction in youth courts, and hence the volume of juvenile admissions to custody. Evaluation research has clearly demonstrated that the YCJA

achieved a significant decline in the use of custody in youth courts (see Bala et al. 2012). This reduction resulted from creation of different sentencing objectives, principles and disposals, and a similar approach would likely prove successful in the Aboriginal context.

Might sentencing guidelines provide some assistance? Official reports from the 1980s (e.g., Canadian Sentencing Commission 1987; Government of Canada 1984; Canada, House of Commons 1988) as well as academics over the years (e.g., Doob, 1999; Roberts and Bebbington, von Hirsch, Tonry, and Knapp 1987) have recommended the adoption of sentencing guidelines in Canada. In the event that Canada ultimately adopts a guideline scheme, an Aboriginal sentencing guideline would represent another way of reducing the use of custody in cases involving Aboriginal offenders. A guideline applied in cases involving an Aboriginal offender would highlight the factors and considerations that have particular relevance for Aboriginal defendants as well as noting the sentencing options which may be most culturally apposite.

Finally, Parliament could consider adopting sentencing reforms which in themselves do not specifically target Aboriginal offenders, but which would through their application particularly benefit defendants from First Nations. One option would be to reinvigorate and expand the use of alternatives to custody, a reform long advocated (e.g., LaPrairie 1990) and which would be of particular benefit to Aboriginal offenders. A second proposal would amend the Code to direct courts to suspend all terms of custody under a particular threshold – say six months. In 2013-14, fully 87% of custodial sentences were less than six months; over half were less than one month (Maxwell 2015). The potential of such a reform to achieve a significant reduction in total admissions to custody (and in particular Aboriginal admissions) is therefore very significant. Other jurisdictions have adopted or considered adopting such a reform, in order to reduce the number of short prison sentences more generally. Short prison sentences provide

little or no opportunity to assist the prisoner, and have deleterious effects on an ex-offender's life and employment opportunities. Similarly, constraining the use of previous convictions as an aggravating circumstance may reduce the number of Aboriginal admissions to custody, as well as the average length of sentence. Aboriginal offenders tend to have longer criminal histories than non-Aboriginals (e.g., Welsh and Ogloff 2008) with the result that a reform of this nature would differentially benefit the former.

Coda

A generation ago, in 1996, the Royal Commission on Aboriginal Peoples noted in its report that 'the reality for Aboriginal people in 1996 is that the justice system is still failing them.'. The same observation could equally be made in 2016. In *Wells*, the Supreme Court noted in that 's. 718.2(e) … was intended to address the serious problem of over-incarceration of Aboriginal offenders in Canadian penal institutions. In singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), it is reasonable to assume that Parliament intended to address this social problem.'. Parliament should now be well aware that its promise to Aboriginal peoples remains unfulfilled. On the basis of the data reported here, the inescapable conclusion is that until one of these solutions or some other remedial steps are taken, the problem of Aboriginal over-incarceration will persist.

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Tables and Figures

Table 1: Admissions to provincial and territorial remand; Canada, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to remand	Non-Aboriginal (period average = 100)	Aboriginal admissions to remand	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	89278	86	19490	72	18%
2001-02	93316	90	17155	63	16%
2002-03	95884	92	18586	68	16%
2003-04	93058	89	18698	69	17%
2004-05	95779	92	18855	69	16%
2005-06	114716	110	27405	101	19%
2006-07	120112	115	29202	108	20%
2007-08	123831	119	30805	113	20%
2008-09	121665	117	32600	120	21%
2009-10	117984	113	34915	129	23%
2010-11	112641	108	35531	131	24%
2011-12	110691	106	37048	136	25%
2012-13	94267	91	29080	107	24%
2013-14	89566	86	28650	106	24%
2014-15	87708	84	29138	107	25%
Average	*104033*	*100*	*27144*	*100*	*20%*

Note: Data are unavailable in New Brunswick, Northwest Territories and Nunavut (2000-01 to 2001-02), Prince Edward Island (2004-05 to 2007-08), Alberta (2000-01 to 2004-05 and 2012-13 to 2014-15).

Source: Statistics Canada, Adult Correctional Services Survey

Table 2: Average Aboriginal remand admission percent by province/territory, 2000-01 to 2014-15

Province/Territory	2000-01 to 2014-15 Average
Nunavut	100%
Northwest territories	88%
Saskatchewan	77%
Yukon	74%
Manitoba	68%
Alberta	37%
British Columbia	24%
Ontario	10%
Nova Scotia	10%
Newfoundland/ Labrador	23%
New Brunswick	10%
Quebec	4%
Prince Edward Island	5%

Note: Data are unavailable in New Brunswick, Northwest Territories and Nunavut (2000-01 to 2001-02), Prince Edward Island (2004-05 to 2007-08), Alberta (2000-01 to 2004-05 and 2012-13 to 2014-15).

Source: Statistics Canada, Adult Correctional Services Survey

Table 3: Custodial admission rates and Aboriginal rate-ratio for three federal census years, by jurisdiction.

	2001			2006			2011		
	non-Aboriginal Admission Rate	**Aboriginal Admission Rate**	**Aboriginal Admission Rate Ratio**	**non-Aboriginal Admission Rate**	**Aboriginal Admission Rate**	**Aboriginal Admission Rate Ratio**	**non-Aboriginal Admission Rate**	**Aboriginal Admission Rate**	**Aboriginal Admission Rate Ratio**
Canada	1.94	11.05	5.68	2.03	15.86	7.82	1.89	17.25	9.12
Saskatchewan	0.80	19.05	23.93	0.80	19.67	24.66	1.06	21.19	19.95
Manitoba	0.98	13.93	14.21	1.13	14.17	12.53	1.40	22.59	16.09
Ontario	2.63	14.75	5.60	2.47	11.47	4.65	2.26	12.36	5.48
British Columbia	1.99	11.17	5.61	1.90	10.48	5.51	1.43	12.58	8.79
Newfoundland and Labrador	0.24	0.96	3.94	1.72	8.36	4.86	2.07	6.06	2.93
Nunavut	0.00	13.25	---	0.00	15.45	---	0.00	14.99	---

Note: Rates are calculated per 1000 population.

Footnotes:

1. 2001 population data were retrieved from archived content published by Statistics Canada and included the following caution: “Information identified as archived is provided for reference, research or recordkeeping purposes. It is not subject to the Government of Canada Web Standards and has not been altered or updated since it was archived. Please contact us to request a format other than those available.” (Retrieved from: http://www12.statcan.gc.ca/english/Profil01/AP01/Index.cfm?Lang=E)
2. 2001 population data retrieved from tables published by Statistics Canada included the following footnote: “The Aboriginal identity population is composed of those persons who reported identifying with at least one Aboriginal group, that is, "North American Indian", "Métis" or "Inuit (Eskimo)", and/or who reported being a Treaty Indian or a Registered Indian, as defined by the Indian Act of Canada, and/or who were members of an Indian Band or First Nation.”
3. 2006 population data were retrieved from tables published by Statistics Canada and included the following footnote that applies to Canada, Ontario, Manitoba, Saskatchewan, and British Columbia: “excludes census data for one or more incompletely enumerated Indian reserves or Indian settlements.” (Retrieved from: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo60a-eng.htm)
4. 2011 non-Aboriginal population data were retrieved from tables published by Statistics Canada (Retrieved from: http://www12.statcan.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A)
5. 2011 Aboriginal population data were retrieved from tables published by Statistics Canada (Retrieved from: https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm)

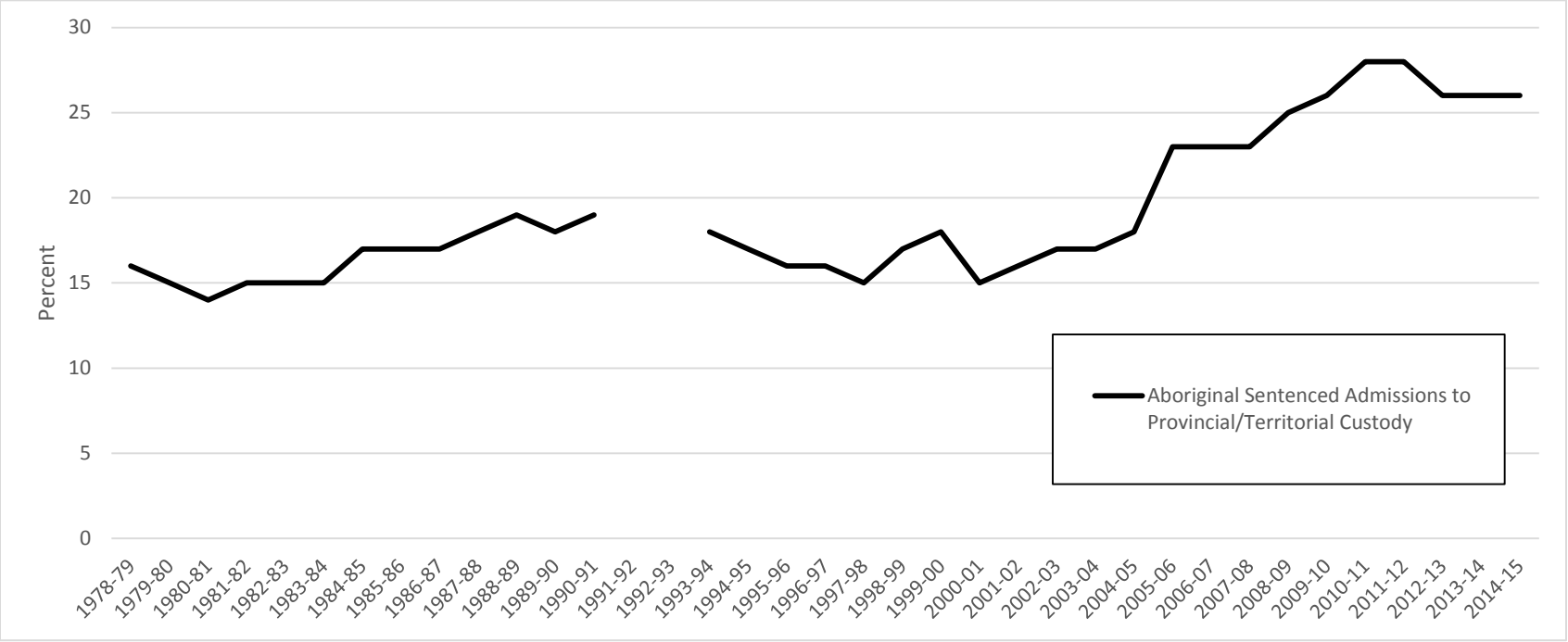
Table 4: Provincial variation in Aboriginal admissions to custody, 1978-79, 2000-01, and 2014-15

	Percent of total admissions 1978-1979	Percent of total admissions 2000-2001	Percent of total admissions 2014-2015
Nunavut	--	n/a	100%
Northwest territories	n/a	n/a	87%
Saskatchewan	61%	77%	77%
Yukon	51%	72%	72%
Manitoba	50%	64%	76%
Alberta	26%	*n/a*	*n/a*
British Columbia	15%	20%	34%
Ontario	9%	9%	12%
Nova Scotia	*n/a*	7%	10%
Newfoundland/ Labrador	3%	7%	32%
Quebec	1%	2%	3%
Prince Edward Island	3%	1%	3%
Provincial/ Territorial Total	*15%*	*15%*	*26%*

Notes: Excludes New Brunswick as data are unavailable. Data for Nunavut, Northwest Territories, Alberta, and Nova Scotia are limited due to unavailable data.

Sources: Adapted from Table 2, Statistics Canada, *Adult Correctional Services in Canada, 2013-14* (Ottawa: Statistics Canada, 2015); Roberts and Melchers (2013).

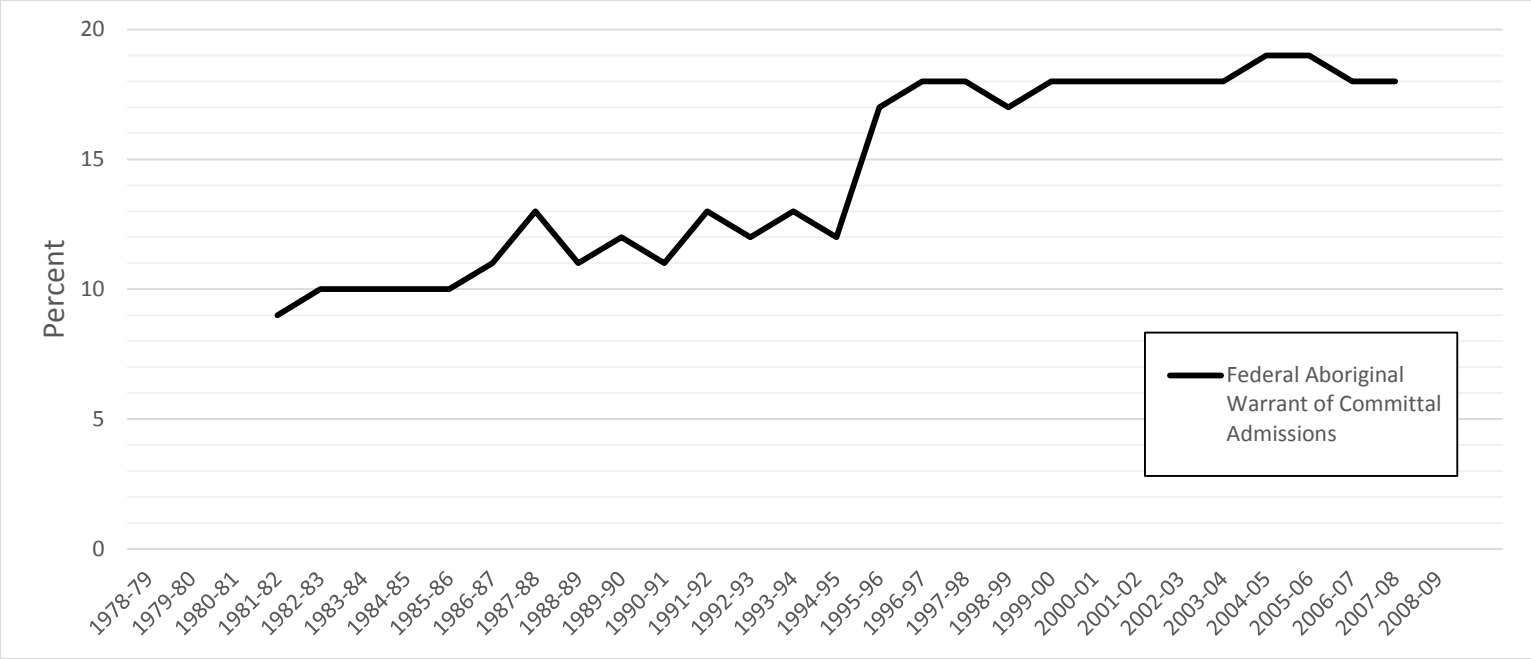
Figure 1: Aboriginal sentenced admissions as a percentage of all provincial and territorial sentenced admissions, Canada, 1978-79 to 2014-15



Notes: Excludes New Brunswick as data are unavailable. Data are unavailable in Nunavut and Northwest Territories (2000-01); Alberta (2000-01 to 2004-05); Prince Edward Island (2004-05 to 2007-08). The value for 2000-01 is not the same reported by Roberts and Melchers (2003) as data have been updated by Statistics Canada.

Sources: Adapted from Table 2, Statistics Canada, *Adult Correctional Services in Canada, 2013-14* (Ottawa: Statistics Canada, 2015); Roberts and Melchers (2013).

Figure 2: Percent Federal Aboriginal warrant of committal admissions, Canada, 1978-79 to 2008-09



Source: Statistics Canada, Adult Correctional Services Survey

Table 5: Admissions to provincial and territorial custody; Canada, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	55,161	98	9,603	58	15%
2001-02	55,733	99	10,787	65	16%
2002-03	56,427	100	11,433	69	17%
2003-04	53,836	96	10,920	66	17%
2004-05	51,438	91	11,170	67	18%
2005-06	61,119	109	18,291	110	23%
2006-07	61,722	110	18,597	112	23%
2007-08	62,310	111	18,413	111	23%
2008-09	62,258	111	20,375	123	25%
2009-10	61,051	108	21,789	131	26%
2010-11	60,435	107	23,380	141	28%
2011-12	60,638	108	24,161	146	28%
2012-13	48,902	87	16,826	101	26%
2013-14	47,563	84	16,843	102	26%
2014-15	45,737	81	16,309	98	26%
Average	*56,289*	*100*	*16,593*	*100*	*22%*

Notes: Excludes New Brunswick as data are unavailable. Data are unavailable in Nunavut and Northwest Territories (2000-01); Alberta (2000-01 to 2004-05); Prince Edward Island (2004-05 to 2007-08).
Source: Statistics Canada, Adult Correctional Services Survey

Table 6: Sentenced admissions to provincial and territorial custody, Saskatchewan, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	736	92	2,453	84	77%
2001-02	663	83	2,480	85	79%
2002-03	759	95	2,739	94	78%
2003-04	671	84	2,603	89	80%
2004-05	779	98	2,643	90	77%
2005-06	719	90	2,659	91	79%
2006-07	659	83	2,791	95	81%
2007-08	622	78	2,670	91	81%
2008-09	759	95	2,811	96	79%
2009-10	874	109	3,029	104	78%
2010-11	924	116	3,456	118	79%
2011-12	930	116	3,343	114	78%
2012-13	966	121	3,367	115	78%
2013-14	910	114	3,516	120	79%
2014-15	1,007	126	3,304	113	77%
Average	*799*	*100*	*2,924*	*100*	*79%*

Source: Statistics Canada, Adult Correctional Services Survey

Table 7: Sentenced admissions to provincial and territorial custody, Manitoba, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	1047	88	1854	59	64%
2001-02	935	78	2090	66	69%
2002-03	1070	90	2246	71	68%
2003-04	998	84	2141	68	68%
2004-05	1050	88	2458	78	70%
2005-06	1078	90	2670	85	71%
2006-07	1101	92	2486	79	69%
2007-08	1104	92	2506	80	69%
2008-09	1087	91	2717	86	71%
2009-10	1235	103	3302	105	73%
2010-11	1373	115	3955	126	74%
2011-12	1421	119	4425	141	76%
2012-13	1488	125	4732	150	76%
2013-14	1451	122	4865	155	77%
2014-15	1471	123	4758	151	76%
Average	*1,194*	*100*	*3,147*	*100*	*72%*

Source: Statistics Canada, Adult Correctional Services Survey

Table 8: Sentenced admissions to provincial and territorial custody, Ontario, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	28311	101	2688	88	9%
2001-02	29203	105	2777	90	9%
2002-03	30043	108	3007	98	9%
2003-04	28593	102	2764	90	9%
2004-05	27978	100	2758	90	9%
2005-06	28863	103	2728	89	9%
2006-07	29435	105	2782	91	9%
2007-08	29803	107	2980	97	9%
2008-09	29313	105	3071	100	9%
2009-10	28283	101	3168	103	10%
2010-11	28104	101	3578	117	11%
2011-12	28338	101	3727	121	12%
2012-13	26577	95	3772	123	12%
2013-14	24388	87	3336	109	12%
2014-15	21923	78	2922	95	12%
Average	*27,944*	*100*	*3,071*	*100*	*10%*

Source: Statistics Canada, Adult Correctional Services Survey

Table 9: Sentenced admissions to provincial and territorial custody, British Columbia, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	7589	112	1931	83	20%
2001-02	7363	109	1900	82	21%
2002-03	6848	101	1723	74	20%
2003-04	6919	102	1703	73	20%
2004-05	7093	105	1784	77	20%
2005-06	7162	106	1871	80	21%
2006-07	7447	110	2055	88	22%
2007-08	7976	118	2094	90	21%
2008-09	7115	105	2424	104	25%
2009-10	5951	88	2669	115	31%
2010-11	5896	87	2751	118	32%
2011-12	5967	88	2922	126	33%
2012-13	5946	88	2937	126	33%
2013-14	6052	89	2936	126	33%
2014-15	6325	93	3193	137	34%
Average	*6,777*	*100*	*2,326*	*100*	*26%*

Source: Statistics Canada, Adult Correctional Services Survey

Table 10: Sentenced admissions to provincial and territorial custody, Newfoundland and Labrador, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	874	112	70	40	7%
2001-02	119	15	18	10	13%
2002-03	308	40	71	40	19%
2003-04	614	79	131	75	18%
2004-05	931	119	154	88	14%
2005-06	893	115	154	88	15%
2006-07	829	106	196	112	19%
2007-08	809	104	200	114	20%
2008-09	843	108	172	98	17%
2009-10	996	128	158	90	14%
2010-11	1026	132	227	129	18%
2011-12	992	127	217	124	18%
2012-13	855	110	255	145	23%
2013-14	833	107	252	143	23%
2014-15	771	99	360	205	32%
Average	*780*	*100*	*176*	*100*	*18%*

Source: Statistics Canada, Adult Correctional Services Survey

Table 11: Sentenced admissions to provincial and territorial custody, Nunavut, 2000-01 to 2014-15

Year	Non-Aboriginal admissions to custody	Non-Aboriginal (period average = 100)	Aboriginal admissions to custody	Aboriginal (period average = 100)	Aboriginal admissions as % of all admissions
2000-01	---	---	---	---	---
2001-02	0	0	301	79	100%
2002-03	0	0	314	82	100%
2003-04	0	0	269	71	100%
2004-05	0	0	279	73	100%
2005-06	0	0	409	107	100%
2006-07	0	0	385	101	100%
2007-08	0	0	336	88	100%
2008-09	1	350	376	99	100%
2009-10	0	0	400	105	100%
2010-11	0	0	386	101	100%
2011-12	0	0	410	108	100%
2012-13	1	350	417	109	100%
2013-14	2	700	549	144	100%
2014-15	0	0	504	132	100%
Average	*0*	*100*	*381*	*100*	*100%*

Note: Data are not available for 2000-01.
Source: Statistics Canada, Adult Correctional Services Survey

Notes

[1] The authors are grateful to the anonymous reviewers of the journal for helpful comments on a previous draft.

[2] For an early example (1971) of a court addressing the sentencing of an Aboriginal offender see R. v. *Fireman*.

[3] The Commission called for enhanced cultural competency training for lawyers, and for federal, provincial and territorial governments to 'commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade' (Canada, 2015b p.3). Yet few specific solutions were offered which directly invoke the sentencing process. The calls to action were aspirational rather than practical in nature. In fact, only two clear proposals were made. First, the report urges governments to 'provide stable and sufficient funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders'. Second, the federal government is encouraged to allow courts to depart from mandatory minimum sentences and restrictions on conditional sentences. Both reforms are to be welcomed; neither will effectively or expeditiously reduce the rate of Aboriginal admissions to custody.

[4] For an exchange of contrasting views, see the colloquy on the subject contained in volume 65, number 2 of the *Saskatchewan Law Review*.

[5] The conditional sentence has a statutory 'ceiling' of two years less one day, with the result that offenders sentenced to a term of imprisonment in excess of this are ineligible.

[6] The percentage of all admissions involving an Aboriginal person is calculated using the count of Aboriginal sentenced admissions as the numerator and the sum of Aboriginals and non-Aboriginals as the denominator. As a result, this measurement does not include sentenced admissions where the Aboriginal identity of an offender is unknown.

[7] Although the conditional sentence of imprisonment (CSI) is, as the term implies, a term of imprisonment we do not include conditional sentence offenders in our analysis. Data trends are less reliable for the CSI, and following a number of legislative amendments in recent years the CSI accounts for a very small percentage of sentenced cases.

[8] The most recent data from Statistics Canada reveal that there were almost 6,000 Aboriginal youth admitted to correctional services in nine jurisdictions in 2014/2015. This represented one-third of all admissions while Aboriginal youth (aged 12 to 17) account for about 7% of the youth population in the nine reporting jurisdictions (Statistics Canada 2015).

[9] http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm.

[10] Aboriginal over-incarceration is one of the few correctional problems of which the public seem aware. A nationwide survey conducted almost 20 years ago found that when asked to estimate the percentage of prisoners who were Aboriginal the median estimate from the public was 20% (Roberts, Nuffield, and Hann 1998).

[11] At the federal level, the category 'Aboriginal' includes persons who have classified themselves as Innuit, Innu, Metis and North American Indian.

[12] See for example para 69 of the judgement R. v. Laliberte, [2000] 4 WWR 491, and discussion in Manson et al. (2008), Chapter 16.

[13] We use the word ‘potentially’ because a small yet unknown number of these annual admissions involve the same individual being re-admitted to custody (see text). 1/11