RE-INVENTING CRIMINAL JUSTICE:

THE TWELFTH NATIONAL SYMPOSIUM

FINAL REPORT

Marriott Chateau Champlain

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National Criminal Justice Symposium 2020

Alternatives to Short-Term Custody

Report of Proceedings

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Executive Summary

The 12th National Criminal Justice Symposium was convened in Montreal on January 24-25, 2020. The Symposium, supported by the Department of Justice Canada and the Canadian Association of Chiefs of Police, is an annual forum for justice leaders to share candid perspectives and solutions regarding the challenge of fashioning a responsive, accessible and accountable criminal justice system. The Symposium topic – "Alternatives to Short-Term Custody" – drew nearly 100 justice leaders together from across Canada including criminal justice practitioners and professionals, Indigenous-serving organizations, non-profit executives, advocates, researchers and other experts.

The Symposium agenda was designed in the context of accumulating research on the ineffectiveness of incarceration and more positive outcomes associated with community-based alternatives; the acknowledged crisis of overrepresentation in Canada's jails of Indigenous people, people with mental disorders and other vulnerable groups; the damaging and counter-productive effects of administration-of-justice offences; and concerns over the "revolving door" aspect of a justice system where the typical jail sentence is too short to allow rehabilitation but long enough to cause serious disruption to stabilizing aspects of offenders' lives and to their families and communities. Participants heard from international and Canadian experts and deliberated on many of the key issues concerning Canada's current reliance on short-term custody as a sentencing outcome.

The recommendations to policymakers commonly made by participants were as follows (note that unanimity should not necessarily be inferred).

1. Facilitate a shift away from short-term custody by funding and expanding community alternatives.
2. Take steps to reduce incarceration of young adults, recognizing that jail can be a "school for crime."
3. Eliminate counter-productive conditions, with meaningful implementation of Bill C-75.
4. Design a holistic approach to diversion and consider allocating greater discretion to corrections.
5. Legislate a presumption against short sentences.
6. Strengthen and facilitate emergence of Indigenous community-based justice approaches.
7. Educate professionals and the public about the benefits of community alternatives to build support.
8. Make data available nationally to support transition to community alternatives.
9. Study and invest more heavily in electronic monitoring as an alternative to institutional incarceration.

In January 2021, the Symposium will return to the theme of Indigenous Justice.

Introduction

In January 2020, the National Criminal Justice Symposium convened for the twelfth time. The Symposium, supported by the Department of Justice Canada and the Canadian Association of Chiefs of Police, is an annual forum for justice leaders to share candid perspectives and solutions regarding the challenge of fashioning a responsive, accessible and accountable criminal justice system. Every year, the Symposium focuses on a different topic and on relevant reforms aimed at improving or "reinventing" the criminal justice system.

This year, the Symposium addressed the topic of "Alternatives to Short-Term Custody." The Symposium brought nearly 100 leaders together – drawn from criminal justice practitioners and professionals, Indigenous-serving organizations, non-profit executives, advocates, researchers and other experts – to consider a range of issues central to the use of and alternatives to short-term custody in Canada, and to develop relevant recommendations for reform of the criminal justice system. The Symposium was chaired by the Honourable Judge Raymond Wyant of the Manitoba Provincial Court and facilitated by Mr. Harold Tarbell.

Background to the Symposium: Short-term custody in Canada

The effectiveness of custody relative to other forms of correctional supervision, rehabilitation and/or treatment programming in reducing offending and keeping Canadians safe is a critically important issue. In Canada and in other countries around the world, research has shown custody to be very limited in terms of its ability to deter future criminal behaviour or rehabilitate those who have committed criminal acts. Moreover, the cost of incarcerating offenders within custodial institutions is high: 2016-17 national data show an average of $109,971 annual expenditure per federal inmate, and between $51,830 and $203,670 per provincial/territorial inmate. Alternative offender management approaches can normally be offered at a fraction of this cost.

High levels of incarceration since the 1970s have been a significant factor in the erosion of Indigenous community and family life in Canada, compounding the intergenerational effects of residential schooling and child welfare removals, and adding to the challenges faced by Indigenous communities. Indigenous women and men are now heavily overrepresented in federal and provincial custody. Corrections facilities are often located at great distance from many Indigenous communities. The culturally alien aspects of jail in relation to traditional Indigenous community approaches creates a significant stumbling block on the path to reconciliation between Indigenous peoples and the federal, provincial and territorial governments of Canada.

Agenda design

In designing the Symposium agenda, organizers chose to focus on short-term custody specifically. In Canada, short-term custody is the typical custodial experience. The median length of custody for all offences in Canada in 2014/15 was 30 days, and 81% of the custodial sentences were six months or less. Research continues to accumulate concerning the disruptive effect of short terms of incarceration on employment, housing, medical treatment regimes, and

family life, effects which are then felt repeatedly in communities as many offenders move through "the revolving door." Meanwhile, the short duration of the typical jail sentence means that the window afforded departments of corrections for effective needs-based offender programming is far shorter than may be required.

On day one, the Symposium agenda began with consideration of the patterns of custody and its outcomes as currently applied in Canada, drawing on recent research, aggregate empirical analysis as well as lived experience. Participants then heard examples of alternate approaches to custody employed in other jurisdictions and considered the implication of these examples for Canadian criminal justice policy and practice. The day concluded with a consideration of the rights and interests of victims of crime when considering changes to our approach to custody. At the evening reception, participants heard remarks from Catherine Latimer on the challenge of paradigm shifts in criminal justice. On day two, participants discussed specific strategies for decarceration of vulnerable and overrepresented groups in the custodial system, including Indigenous women and men and Canadians with mental health and substance use disorders. The Symposium concluded with participants identifying practical steps towards changing the custody paradigm in Canada.

The intent of the Symposium was not simply to discuss these issues, but to foster a commitment to effect meaningful change, encourage participants to provide local leadership among criminal justice system actors in their home provinces and justice systems, and in doing so increase the likelihood that ideas for reform are both implemented and sustained. This report contains practical recommendations for action made by participants for the attention of those responsible for the administration of the criminal justice system at the federal, provincial and territorial levels of government, and for the consideration of the public.

Friday, January 24th

Welcome and opening remarks

Judge Wyant welcomed participants to the Symposium, noting at the outset that the Canadian justice system continues to criminalize social problems. Criminal justice has been procedurally driven, focusing on offences rather than people, and this has led to a significant loss of public confidence in the criminal justice system. We need to focus more on people, taking a more holistic approach, and must be willing to experiment notwithstanding the risk of failure. Statistically, failure is already apparent: two decades after the *Gladue* ruling, 30% of the custody population is Indigenous. The system is also cycling (and propelling) offenders through the revolving door of incarceration. Judge Wyant referred participants to recent research in British Columbia conducted by Simon Fraser University and BC Corrections which found the median custodial sentence to be 30 days and pointed to the role of incarceration in increasing rather than reducing the likelihood of future offending, particularly for young adults.[1]

Session 1: Custody, its effectiveness and its impacts on the person

The first key discussion of the Symposium focused on the current situation with respect to the use of custody, from an empirical-criminological perspective as well as from the lived experience viewpoint. First, Dr. James Bonta provided participants with an overview of the science surrounding the use of custody, deterrence and the risk of reoffending. The overall theme of his remarks centered on the valuable role of robust risk assessment practices in expanding the viability of alternatives to custody.

Punishment, deterrence, and rehabilitation have been central to the historical rationale for the use of custody and had been seen as key to the reduction of recidivism. However, pessimism about the effectiveness of early rehabilitation approaches has grown over time, with some researchers and practitioners coming to a conclusion that "nothing works." It is now understood that the key factors in effective offender intervention are related to the level of risk of reoffending, the criminogenic needs of the offender, and the offender's responsivity to different types of treatment. In order to reduce our reliance on custody it is important to identify low-risk offenders and keep them low-risk, which raises the question of how to assess risk in a valid and replicable way.

The science of risk assessment has progressed from less reliable clinical approaches to more reliable use of actuarial techniques. It is now established that eight general risk/need factors have strong predictive power with respect to reoffending:

- criminal history of the offender;
- antisocial personality pattern;

[1] For context, please see a discussion of pre-publication insights from this research in a two-part video interview with Professor Julian Somers of the Faculty of Health Sciences at Simon Fraser University, conducted on January 20th, 2020: Part 1 and Part 2. These videos were prepared by the Symposium organizing committee and shared with participants prior to the Symposium.

- pro-criminal attitudes;
- pro-criminal associates;
- family and marital circumstances;
- education and employment;
- leisure and recreation; and
- substance use.

Three principles are central to the Risk-Need-Responsivity (RNR) model of offender rehabilitation:

1. *Risk principle*. Match treatment services to the risk level, with an emphasis on delivering intensive treatment to higher-risk individuals. Excessive intervention with the low-risk category can be counter-productive. With high-risk offenders, as the number of risk/need factors increases more effort to modify is required.

2. *Need principle*. Interventions must target the criminogenic needs of the offender, such as pro-criminal attitudes and associations, family relationships, self-control/anger, education and skills. Not all needs are criminogenic and targeting non-criminogenic needs such as self-esteem without addressing criminogenic factors can result in, for example, greater personal confidence but no decrease in the propensity to offend.

3. *Responsivity principle.* The treatment must be matched to the offender's learning style and include building rapport to increase responsiveness to treatment. Cognitive-behavioural therapy has proven an effective treatment approach for addressing criminogenic factors.

The more these principles are applied, the greater the reduction in recidivism. Critically, it is also evident that RNR-based treatment is approximately twice as effective in preventing recidivism when applied as part of community supervision as opposed to a correctional institution.

RNR approaches can be applied at four points in the criminal justice system:

- at the bail/remand stage to inform decision making with actuarial assessments;
- at the sentencing stage to prepare pre-sentence reports and case management plans;

- at the supervision/security stage (i.e., how closely to supervise and security placements); and
- at the case closure/early release stage (e.g., parole release, probation case closure).

RNR insights can be used to avoid harm stemming from excessive intervention practices with low-risk clients and to predict the likelihood of new offences being committed.

Dr. Bonta's comments were complemented by Mr. Peter Brown of the Seven Steps Society who shared his own personal and lived experience as an offender and custody client of the Canadian criminal justice system. Mr. Brown's personal story is his own to tell and is not reproduced here. The theme of his remarks was that there is no "correction" in corrections, and that jail functions at times as the "university of bad habits" for offenders. Mr. Brown's meaningful personal account was well-received by participants, underscoring and illustrating with detail the many practical and developmental obstacles the use of custody can place in the path of young adults caught up in the system.

In a question-and-answer period, participants and the two panelists engaged over a number of related issues:

The relevance of the sentencing principle of taking responsibility/being accountable.

Effective rehabilitation, treatment and reintegration are directly linked to accountability. RNR-based analysis and interventions require listening to the person and in turn ensuring maximum responsiveness. We have tried "telling" people what to do and dwelling on repercussions, and that does not work. We need to listen actively and respectfully and teach offenders how to change their lives in ways that are effective for each person.

How to make RNR insights more easily applied on the front line as a predictive tool.

Can we take some of the guess work out of the "front end"? Police as the entry point into the criminal justice system must make complex decisions in a short timeframe. In principle decisions such as these may be more reliable if actuarial/probabilistic information (in the field, or in training) were used to supplement. The challenge is in practical implementation. Police are already using actuarial risk scales in responding to domestic calls in Ontario.

Incarceration as a disproportionately disruptive influence on the offender and on society.

There is an increasing amount of research exploring the impact on neighbourhoods and families when people are incarcerated. It is obviously disruptive to the person incarcerated and often interferes with or severs positive relationships and influences. It can also disrupt families, employers, and communities. Whole communities can change as a result of incarceration; and when people are released from prison, they normally go back to same community, bringing with them additional trauma and the antisocial influence of prison. For families left behind, the need for social services can grow.

Session 2: Aspirations regarding the use of short-term custody

The second session of the Symposium invited participants to have an initial discussion of the current use of custody in Canada. Participants were asked to express, in principle and at a high level, their view of the desired future state regarding the use of short-term custody. Common observations which emerged from the table dialogues and subsequent plenary discussion were as follows.

Acknowledging the prevalence of short-term custody as a sentencing outcome

There is a need to acknowledge (and internalize in our planning and communications) that the great preponderance of custodial sentences in Canada are less than six months in duration. These time periods offer little or no opportunity for beneficial inmate programming to be applied but may be accompanied by much of the disruptive and anti-social influence of incarceration, now increasingly understood as a gateway to continued justice involvement.

Applying evidence-based analysis to restrict the use of short-term custody

Given the likelihood of custody creating negative and counter-productive outcomes for offenders and communities over the longer term, we should become more selective, cautious and evidence-based in our use of it – particularly in the case of low-risk offenders, and including more effective triage of offenders with mental health and substance use (MHSU) disorders into health-based interventions. Short-term custody loses effectiveness relative to sentencing objectives when it fails to factor in the needs of the offender. If we are to use it, it should only be in circumstances where we have a clear empirical understanding of where/when/why it works and for which category of offender, and not as the default disposition available to the court.

Adopting actuarial approaches such as RNR and overcoming the challenge of doing so

The traditional approach to risk assessment has been to use professional judgment, which on its own is inherently subjective and relatively unreliable in predicting reoffending. More recently a body of science has emerged supporting a more objective actuarial approach. We need to move to more reliable methods of predictive decision-making. Our system faces the cultural and professional challenge of becoming more receptive to the actuarial approach at various key decision points, not only at the point of sentencing.

Overcoming the challenge of implementation

For some cases and some kinds of offender, custody contributes to public safety by removing people who pose a danger and achieving other societal goals. However, in general custody achieves very little, either for the individual or for the community at large. There are many alternative community-based approaches which are well-supported by research (such as restorative justice), but implementation can be tremendously hard to achieve, with many obstacles along the way. It will require a focused effort, clearly taking into account the evidence supporting the new efforts and executed with integrity at the implementation stage. We will also need to combat the perception that the choice not to prioritize punishment is a failing of

the system and we may be able to use the YCJA experience to make the case. This is not just about putting short sentences aside; we must replace them with something plainly credible.

Introducing a presumption against short sentences (or removal of the short-sentence option)

There is a range of possible approaches to decreasing or eliminating short-term custodial sentences. These may include legislation to rule out jail for sentences of less than a set minimum (*e.g.* six months) possibly combined with a presumption of restorative justice and/or engagement with Indigenous justice approaches where applicable, or expanding categories of offence where custody is not available as a sanction Some participants suggested introduction of more actuarially-derived guidelines on sentencing.

Session 3: Reducing reliance on short-term custody – international approaches

This session provided participants with an opportunity to hear about and discuss three comparative international approaches to the use of custody: Scotland, Denmark and Norway. In advance of the Symposium the organizing committee identified these three jurisdictions as being of interest, as Scotland has recently been experimenting with legislating a presumption against short sentences, and both Norway and Denmark have exhibited amongst the lowest per capita incarceration rates (60 and 71 per 100,000 population, respectively)[2] amongst OECD nations. Norway also has one of the world's lowest recidivism rates at 20% over a two-year follow-up.[3] To begin the discussion, participants heard presentations from visiting experts from each of these countries.

Scotland

The first presentation was that of Professor Gill McIvor of the University of Stirling. Professor McIvor noted that prison is still central to thinking about justice in Scotland, one of the most custody focused countries in western Europe with an incarceration rate of 151/100,000 population.[4] In Scotland, community orders fulfill the function performed by conditional sentence orders in Canada. The government has been focused on sentencing alternatives to incarceration, but short-term custodial sentences (under 12 months) are still widely used. Key developments in recent decades include full funding in 1991 for criminal justice social work services to create alternatives to prison; the creation of Mandatory Supervised Attendance Orders in 2007 as an alternative to imprisonment for fine default; and more recently, electronic monitoring services to facilitate non-custodial Restriction of Liberty orders.

Scotland introduced a presumption against short custodial sentences (PASS) of three months or less in 2011. There was pessimism in some quarters (see figure 1) about the effectiveness of

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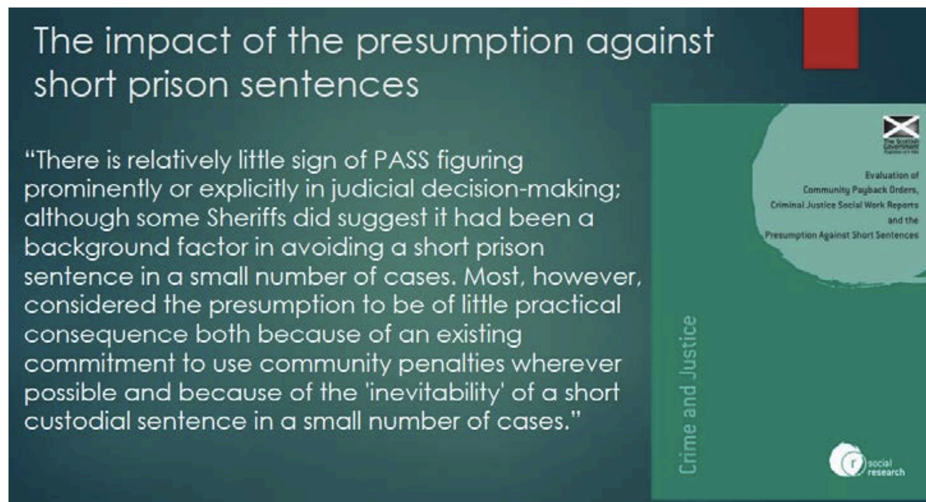
[2] Data per *World Prison Brief*, accessed 2020-03-26. *World Prison Brief* is a global database on incarceration maintained by the Institute for Crime and Justice Policy Research at the University of London.

[3] D. Yukhnenko et al., 2019. "A systematic review of criminal recidivism rates worldwide: 3-year update." *Wellcome Open Research,* accessed 2020-03-26. Wellcome Open Research is an Open Research platform supported by the Wellcome Foundation.

[4] For purposes of comparison, the Canadian incarceration rate in 2017-18 was 131 per 100,000 population. See Jamil Malakieh, Adult and youth correctional statistics in Canada, 2017/2018 (Statistics Canada, 2019).

this step; in Western Australia the same had been attempted with the result that the average custodial sentence length actually increased. The judiciary were sceptical as it was felt they were already doing this. This scepticism has been borne out: shortly after PASS introduced there was an increase in longer sentences. Judges are imposing longer sentences than they would have done previously in order to circumvent PASS.



1. Initial system reaction to presumption against custodial sentences of 3 months or less, Scotland. [G. McIvor, 2020. Used with permission.]

Recent developments point in two different directions. The use of custody is rising overall, and there are now more people in prison than before. A slight increase in community sentences has been offset by an increase in longer custodial sentences, with the latter rising by 20% over ten years. New orders for lifelong restrictions have been introduced, driven by considerations of risk; early release arrangements for long-term prisoners have been restricted; and due to a high profile incident there has been a tightening of eligibility for early release on electronic monitoring (home detention) to exclude anyone with a conviction for a violent offence.

However, there are also a number of developments aimed at reducing reliance on imprisonment. There is greater interest in introducing "problem-solving justice" approaches, expanding electronic monitoring to better integrate it with social work supervision and legislated provision for other monitoring technologies like GPS and alcohol monitoring. Perhaps the most significant change occurred in 2019 when the Scottish parliament agreed to extend PASS from 3 months to 12 months, a change which may be less susceptible to adaptation by the judiciary. To be effective, however, such a change must be accompanied by meaningful community alternatives.

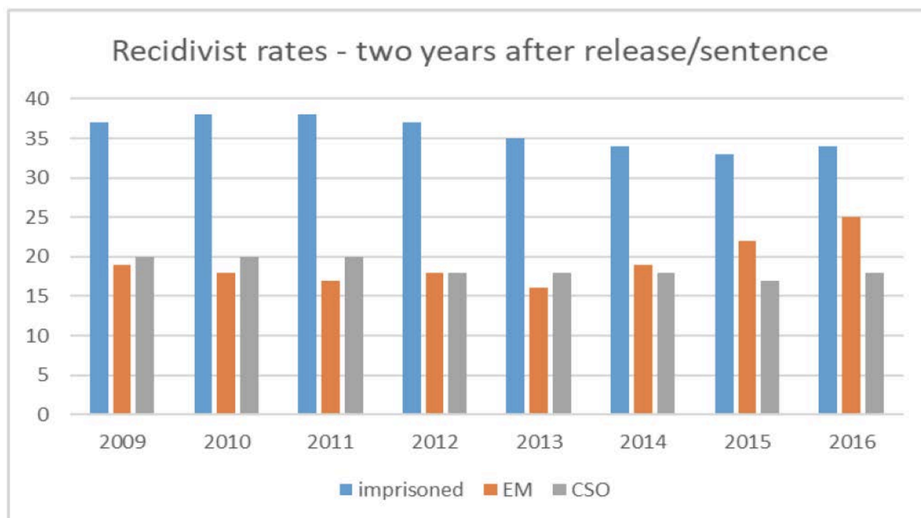
Denmark

The Danish perspective was provided by Professor Anette Storgaard of the University of Aarhus. Denmark has one of the lowest rates of imprisonment in the world but one of highest in Scandinavian countries. Its correctional philosophy is human rights-based, seeking the least

restrictive response possible, with operational aims of control and security, and support and respect.

Short prison sentences in Denmark represent less than half of all prison sentences. Alternatives to prison include Community Service Orders (CSOs), a form of conditional sentence imposed by the courts, and more recently electronic monitoring, which is determined by the prison system. CSOs are used extensively for road traffic breaches, including impaired driving without injury, and recent legislative change allows these orders to be applied to less serious assaults. They are not available to those with serious drug issues, and are more likely to be applied to older, employed offenders. With respect to electronic monitoring, the prison service has the latitude to change the location of a custodial sentence from prison to the home. Housing, education and employment status must be appropriate for electronic monitoring. The offender must be monitored by their employer or teacher and consent to unannounced control visits.

An examination of recidivism shows that two years after release, reoffending is markedly lower when alternatives to imprisonment are employed (see figure 2). Although these data should be treated with care as people are chosen carefully for a CSO and electronic monitoring, Professor Storgaard noted that there is significantly less recidivism by persons eligible and sentenced to a CSO if the crime was assault, drugs, robbery etc. than for persons eligible for CSO but sentenced to imprisonment.



2. Two-year recidivist rates, Denmark. [A. Storgaard, 2020. Used with permission]

Norway

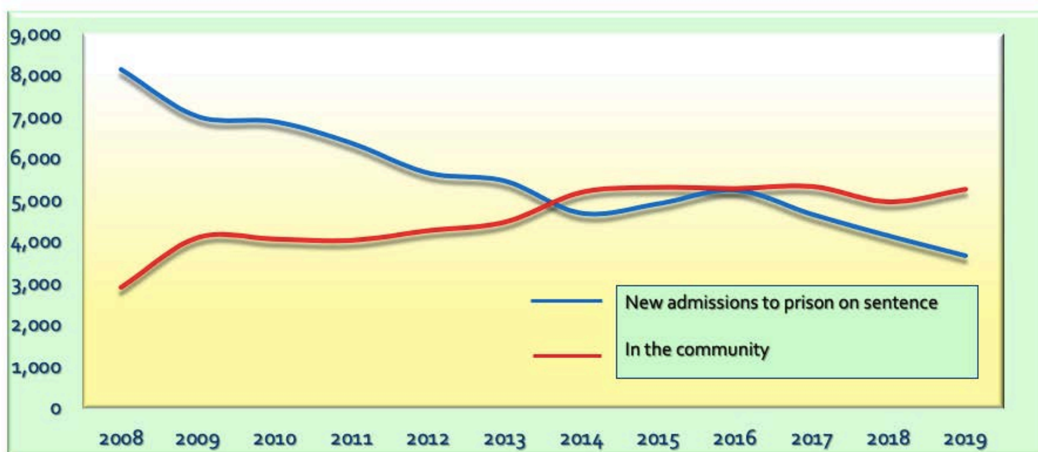
The situation in Norway was summarized by Dr. Gerhard Ploeg, Senior Advisor to the Norwegian government's Directorate for Correctional Services. The Norwegian corrections philosophy is to ensure that people are able to serve sentences as close to home as possible, and therefore there are a relatively large number of small prisons spread over country, together with related resources such as probation officers. The most common sentence in Norway is a custodial sentence, with fines and/or CSOs employed in relatively small number of cases. 60%

of custodial sentences are for less than three months, and 85% are for less than a year. Norway's "one person, one cell" policy means that there is no overcrowding; if prisons are full, convicted persons are sent home until there is a cell available. This has led to the phenomenon of a waiting list for jail, which carries with it its own particular disruptive effect on people's lives and has been managed by renting or constructing new jail capacity as needed.

The size of the jail population is also managed through the discretionary powers of the Correctional Service, which are significantly broader than in Canada. The Correctional Service can decide independently if offenders will serve their sentences in prison or community. Pre-sentencing reports cannot contain recommendations to judges regarding the nature of sentences: how sentences will be served is up to the Correctional Service, which also assesses the progress being made. For example, offenders with serious addictions may ask the Correctional Service to order the sentence be served in a drug treatment institution. Similarly, the Correctional Service is responsible for prosecuting breaches of conditions.

Norway uses electronic monitoring as an alternative to prison custody, although without GPS technology: a "front and back door" model. The focus is on normal, healthy activity and there is an obligation when on electronic monitoring to be active during the daytime (*e.g.* out in the day, at work, or going to school, with breaches for those at home when required to be outside). These methods are associated with very low recidivism (8%) and drop out (5%) rates. The rise in use of electronic monitoring in turn has been linked to a rise in the proportion of sentences which are served in the community, which is not simply a by-product of technology but a conscious choice.

As a consequence, there has been a marked decline in number of people going to prison. In 2008, approximately three times as many sentences were served in custody as opposed to community. By 2019, as figure 3 shows, a clear majority of sentences were being served in the community.



3. Trend towards more sentences being executed in the community, Norway. [G. Ploeg, 2020. Used with permission.]

Serving sentences in the community serves the Correctional Service's "principle of normality." Offenders have the right to be treated as normally as possible, and Correctional Services must explain limitations on their rights. Services given in prison are provided by the outside world with no specialized prison staff – for example, health services are provided by those in community. This is cost effective, normalizing, and contributes to post-sentence continuity. In terms of employment, offenders are dealing with outside employment agencies who become familiar with the history of offender.

Discussion

Upon conclusion of the presentations, participants engaged at their tables to discuss questions related to the themes raised by the panel, but also other approaches with which they were familiar. Common observations arising from the table dialogues and subsequent plenary discussion were as follows.

Success in introducing PASS depends on appropriate alternatives and a holistic approach

In Scotland, a concerted policy effort has been made with the goal of reversing the growth in the incarcerated population. This includes use of electronic monitoring and introduction of a presumption against short sentences (PASS) of up to 3 months. However, failure to fund programming to complement the desired lower rate of incarceration has led the judiciary to maintain prior levels of custodial sentences. PASS on its own, disconnected to other lateral initiatives, is not the answer. A systemic, holistic approach is required to avoid unintended consequences of an isolated change in approach. The media environment is opposed to perceived leniency in reforms, but there may still be grounds for optimism. Participants discussed how such an approach would work in Canada, suggesting that as in Scotland the time threshold and the availability of funded alternatives are key variables. The shift of funding from incarceration to alternatives has already occurred in Canada under the YCJA and should be considered for the adult population.

Cultural and philosophical differences inform systems design

There are cultural differences between Canada and Scandinavia, particularly the relative emphasis placed on respect for the individual and community integrity. In Denmark and in particular Norway, correctional goals are more communitarian and socially defined than in Canada, with a greater priority visibly placed on the dignity of the individual, maintenance of normality and adherence to minimum viable levels of control. The Scandinavian models show a system, policies and physical space which together inhibit growth of the prison population beyond a set threshold. The goal is "no mass incarceration," and the system is designed to achieve that goal.

Many participants were impressed by this approach and with the "principle of normality." It was frequently noted that capacity would need to be built in the community for such an approach to be adopted in Canada, and better linkages developed between the justice system and the community, but that change is clearly possible. Participants also identified a need in this country to change the political and public discourse around incarceration, to re-emphasize

the principles in the *Criminal Code* which are consistent with such a change and educate the public. There is a role for courageous leadership in our system, as opposed to continued risk-aversion. Finally, it was also noted that justice reform in the Canadian federal context can be more complex to enact compared to the relatively unitary political environments of Scotland, Denmark and Norway, and this complexity will need to be considered in any strategy going forward.

Resources matter

Norway's path to a more progressive and resource-intensive approach is admirable but we must recognize it has been facilitated by investment of recent surpluses derived from oil export revenues.

Changing people's minds matters – but is possible – when seeking a paradigm shift.

There has been a strong will in Norway and Denmark to find community solutions for the sentenced population, though such solutions were counterintuitive for segments of the population. The existing system is resilient and hard to change, and so education of the public has been essential to acceptance of this approach. Imaginative approaches to limiting the prison population have also been implemented. Norway and Denmark both have a practice of deferring incarceration post-sentence until adequate cell space has become available.

One lesson many participants drew from Scandinavia is that it is possible to integrate prison into the community, making prison a social institution as opposed to a punishing institution and shifting the focus away from retribution. It was noted that this has been demonstrated through research in the Scandinavian countries on public attitudes regarding justice and punitiveness. With minimal information, research participants indicated they wished for harsher sentences. With greater knowledge and exposure, attitudes shifted towards greater comfort with different types of sentences.[5] Research in Scotland has arrived at similar conclusions.[6]

Community sentences appear to yield better outcomes

Norwegian data show that even when controlling for crime type and eligibility for community sentencing, offenders exhibit significantly better personal downstream outcomes after community service versus time in custody, as well as lower rates of recidivism.

Greater discretion for corrections in Scandinavia may be a model for Canada

In Norway and Denmark, the role and mandate of correctional services are distinct from those in Canada. Staff have more discretion than the counterparts in Canada, and additional training; there is a sense of prison's mission as a social institution rather than as a punitive one. Discretion over the character of sentences (i.e. community vs. custody and early release) which would normally be exercised by judges and/or boards in Canada are matters of correctional discretion in these countries. In Canada, we could bring corrections more directly into the

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[5] See F. Balvig et al., 2015 "The public sense of justice in Scandinavia: A study of attitudes towards punishments," *European Journal of Criminology*, vol. 12 no. 3. Full text available here.

[6] N. Hutton, 2005. "Beyond Populist Punitiveness?" *Punishment & Society*, vol. 7 no. 3.

decision-making, direction-setting and educational aspects of the system (including at the Symposium).

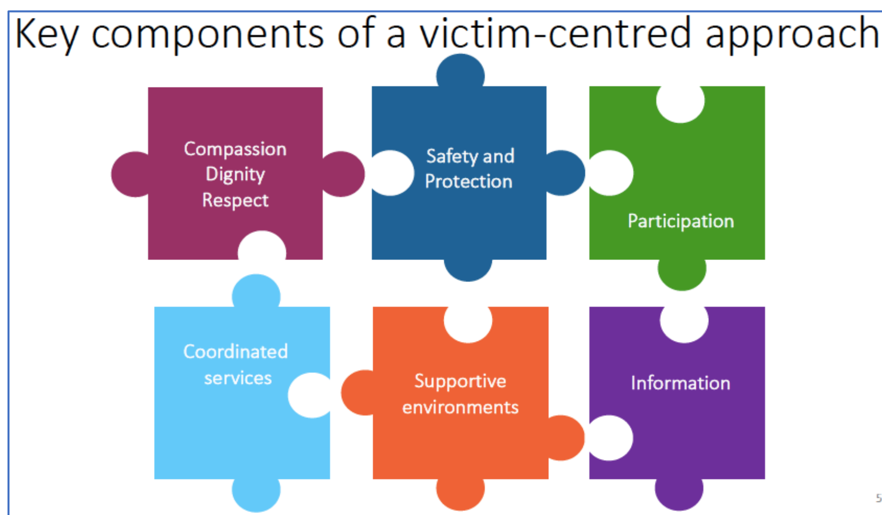
Electronic monitoring shows promise as an affordable, effective alternative to custody

Many participants were interested in the gains made using electronic monitoring in Europe and felt this option should receive more attention in Canada. It has immediate appeal as an efficient means of advancing alternative approaches to custody, though costs and who bears them need to be better understood. Monitoring does not necessarily have to ordered and authorized by court but could be applied by corrections taking the lead. Canadian use of electronic monitoring should not simply be focused on interrupting behaviours, but on correcting behaviours by coordinating monitored release with positive, beneficial programming.

Session 4: Alternatives to short-term custody and victims of crime

This session applied a victims' lens to the discussion of alternatives to short-term custody. Participants heard an address from Ms. Sue O'Sullivan, Chair of the International Network Supporting Victims of Terrorism and Mass Violence, who is the former Federal Ombudsman for Victims of Crime.

Ms. O'Sullivan noted to begin that the Canadian Victims' Bill of Rights guarantees victims of crime the right to information, the right to participation, the right to seek restitution, and the right to protection. These rights are foundational for a truly victim-centered approach (see figure 4).



4. Key components of a victim centered approach. [S. O'Sullivan, 2020. Used with permission.]

With respect to alternatives to short-term custody, the starting point must be to be inclusive of victims and treat them with respect. Good-quality, clear communication can broaden the appeal of options such as restorative justice, which many victims see as potentially positive. But it is important that the victim be able to control their own path, including being able to withdraw at any time without repercussions or danger. Restorative justice for its part should not be dismissed out of hand in cases involving serious offences. Victims of serious crimes who

are well informed and supported by qualified people can be far more willing to consider this approach than is commonly assumed.

Victims with legitimate concerns for their safety may not be made aware when the accused person is released and what conditions may or may not be in place. When considering alternatives or release of an accused we need to ensure victims have information which allows them to make informed choices when it comes to safety planning and accessing protective victim services.

If victims are not informed when an accused is released, secondary victimization can often occur if the information is learned after the fact, via the news, or on the internet. Those most affected can experience a level of stress similar to that of the actual offence. In some cases where the victim is notified, it can happen too close to release, causing high levels of stress and anxiety and reducing the capacity for effective safety planning. In situations where a person accused of a violent, sexual and/or domestic violence offence is released from custody, ensure that identifiable victims are contacted and provided with information pertaining to the timing of the release as well as any bail conditions relating to victim security and safety, so that victims are better positioned to make informed safety planning decisions, and seek protective victim services as needed. With respect to restorative justice, this means ensuring that appropriate safety protocols are in place, from the point of screening for "fit" all the way through to safety planning following the process.

Changes to our approach to custody and the introduction of new alternatives can only be managed from a victim perspective through effective communication. Justice participants (whether police, crown, courts or corrections) must:

- be clear about the role they play and the types of assistance they can offer;
- ensure that victims are well informed about referral options and available services;
- inform victims about their rights;
- inform victims about the process – what is being done and why;
- provide choices and options (online resources are not enough; victims need to have real people available to talk with); and use trauma-informed, victim-centred interviewing methods with witnesses and victims.

Symposium reception: Keynote remarks

Participants gathered on the evening of Day One to hear from Ms. Catherine Latimer, Executive Director of the John Howard Society of Canada, who shared her thoughts on "the *Youth Criminal Justice Act* and paradigm shifts in the justice system." In her prior role with the Department of Justice Canada, Ms. Latimer had been instrumental in the development of Canada's overhaul of youth criminal justice in 2002.

Ms. Latimer noted that the YCJA can be seen as an example of how government develops and implements new legislation. Not all factors are easily controlled by government: questions of

timing, common objectives, the availability of expertise within government, cross-cabinet support for basic change objectives, and effective communications to address both expert and public opinion are all of great significance. These pieces need to be in place at the same time, with all the right people agreeing to move forward.

The initial goal in replacing the *Young Offenders Act* with the YCJA was to de-incarcerate youth custody by 30%. This was important as in the prior three decades there had been consistent efforts by Parliament to address rising crime rates by increasing penalties for youth. Penalties had been raised three times. A House Committee agreed that as the crime rate had been declining since the early 1990s, changes to youth justice penalties were needed. Once the YCJA was passed and implemented, the result made the original policy goal look modest: an 80% reduction in the youth incarceration rate has been achieved.

The key lessons identified by Ms. Latimer from this episode are to:

(a) *know the problem* you're trying to fix;
(b) *communicate the urgency of the issue*, and build support to get a solution;
(c) *create a clear vision* building from high level to the details;
(d) "*go big*," as tinkering will not result in substantial change;
(e) work hard to *secure and distribute resources* for implementation; and
(f) work hard to *educate and create allies* amongst the front-line implementers.

The first step to change centered around communications, with the goal of educating experts and the public about the likely positive effects of simultaneously lowering custody rates, engaging more community resources, and increasing police discretion. There was significant consultation with the non-profit, justice and service sectors. Following this work, a change in attitudes could be detected. The key changes in the legislation were then set out, which were focused on systemic diversion to extra-judicial approaches, and a built-in presumption that non-violent, non-repeat offenders would be given community-based sentences. Allowing a range of community sentencing options met the requirement of the judiciary for preservation of judicial discretion. The deciding factor in the discussion with the system itself was that the advocates of the new law had lots of data to support the changes – of which the most compelling statistic was perhaps that under the YOA, adults were on average receiving shorter sentences than youth for the same offences.

Saturday January 25th

Session 5: Alternatives to short-term custody for overrepresented groups

On the beginning of Day Two, Session 5 provided participants with an opportunity to consider how to reduce incarceration rates for Indigenous peoples, people with MHSU disorders, and other groups who are heavily overrepresented in prison relative to their percentage of the overall population. The session began with a panel discussion including Senator Kim Pate, former Executive Director of Elizabeth Fry Canada; Ontario Deputy Solicitor General Deborah

Richardson, responsible for Ontario Corrections; and Mr. Jonny Morris, Chief Executive Officer of the Canadian Mental Health Association British Columbia Branch.[7]

At the outset of the panel Senator Pate noted the massive rates of incarceration for Indigenous people, highlighting the 98% share of girls in custody in Saskatchewan. It is important to realize that the benefits of the YCJA have not been experienced to nearly the same degree by Indigenous youth, particularly girls and young women, and that solitary confinement, contrary to the YCJA, is still used. Canadian reformers are not lacking for recent, in-depth roadmaps for action, such as the Truth and Reconciliation Commission's Calls to Action, the Calls for Justice of the Inquiry into Missing and Murdered Indigenous Women and Girls, or the UN Sustainable Development Goals.

Senator Pate argued that key to changing the custody landscape is to recognize the linkage between criminal justice outcomes and key social supports. Consistent with the views of federal/provincial and territorial heads of corrections in the mid-1990s, 75% of those in jail are viable candidates for community sentences with proper supports, and the judiciary has room to be more assertive in demanding that those supports be made available – even if initially such rulings are appealed. In Los Angeles, there has been a recognition that social housing can reduce the rate at which homeless defendants are jailed. Greater social investments in Canada, such as a guaranteed livable basic income and more substantial educational opportunities, are also likely to have a downward effect on prison populations. Within the system, Canada should address the prevalence of pre-trial detention which promotes guilty pleas and thus wrongful convictions. Similarly, mandatory minimum penalties are arbitrary, not evidence-based, and serve to increase the prison population. She also underscored the urgent need for judicial oversight of conditions of confinement and correctional administration of sentences.

Deputy Solicitor General Richardson noted that Indigenous overrepresentation is a fact and in some locations the prevalence of Indigenous people amongst inmates is overwhelming. Many are in jail because of mental health issues and addiction issues, and jail is not a good setting for people with these issues. It is important to acknowledge the systemic failings at play: this is a result of colonization, the Indian Act, residential school system and years of intergenerational trauma. Canadian society has failed Indigenous people to the extent that many lack a sense of their own identity and suffer from loss of culture, violence, abuse and suicide. The deficits driving poor outcomes and high rates of incarceration are numerous, including lack of basic needs such as water, housing and plumbing. The justice system itself, combined with poor living conditions and social supports, fails the Indigenous population, with a lack of truly community-based policing, displacement from home communities when in custody, a lack of transportation back to the community upon release which often results in homelessness, and a demand for sureties who are often unavailable leading to unnecessary incarceration.

[7] Readers should note that Senator Pate kindly accepted an invitation to make remarks in light of her career subject-matter experience, but (by agreement with organizers and consistent with Symposium practice) as a sitting politician did not otherwise attend or contribute to participants' discussions or recommendations at the event.

What can change this situation? What works? It is too rarely understood that Indigenous people have their own systems of governance and have the right to reassert those systems in their communities. An Indigenous justice strategy cannot just be about adjusting programs offered by the courts or in jails, but it must address the discrimination Indigenous people face in the justice system, and must be integrated with, led by and grounded in the communities themselves. Restorative justice, rooted in many Indigenous national cultures, has been proven to be effective, and should be supported in communities where now it is often underfunded and underutilized. Other culturally grounded and culturally safe practices such as access to sweat lodges or longhouses must be expanded, as should programming specific to women. The use of Healing Lodges should be expanded to provincial correctional institutions.

Progress on reducing Indigenous overrepresentation is possible if the justice system adopts genuinely greater respect for the person as opposed to the process. For instance, *Gladue* principles may be working against people when it comes to reducing incarceration, as mitigating circumstances such as homelessness or unemployment may actually work against being released on bail. Shifts in how people are characterized are important, such as St. Lawrence Valley Correctional and Treatment Centre, which is run by health care staff, where the focus is on treatment, and where people are considered residents as opposed to inmates. Initiatives that allow direct involvement with Indigenous communities and the justice system are critical, such as Indigenous bail verification and supervision programs and Indigenous bail beds programs that allow people who don't have social ties to be released into their community.

Mr. Morris highlighted the importance of systemic advocacy in addressing the overrepresentation of those with MHSU disorders in the correctional system. Between 60% and 80% of those incarcerated live with a mental illness or addiction. There is a significant amount of holistic work done now across the social and health sectors which sometimes engages justice (including some promising work involving BC Corrections and the Provincial Health Services Authority), but there is so much more that can be done. The justice system needs to link up with the rest of the social and therapeutic community; tinkering is no longer appropriate.

Mr. Morris drew participants' attention to the work done in the UK under Lord Bradley to seek diversion of those with mental health and learning disabilities out of the criminal justice system.[8] The focus of that work was on journeys through the system, and on understanding the key points where intervention is most useful, where needs can be identified soonest, and where opportunities are missed. The theme of Bradley's work is the same prescription that applies to Canada: we need to broaden our framework and conceive of justice as fundamentally operating in the same system as health, social care and welfare, rather than imagining that our programs exist in isolation. The gaps in care and the lack of integration actually end up placing far more stress on criminal justice than needs to be the case. We place huge levels of responsibility on police to deal with people experiencing mental health issues, with inadequate

[8] Home Office (UK), 2009. *The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*.

connections to the services and expertise required to support that population in a proactive and preventative manner.

Diversion and early intervention with children and youth, and their families, is also of paramount importance in avoiding a criminal justice trajectory as the person approaches adulthood. Police have a positive and influential role to play in diversion, as do prosecutors, defence counsel and judges at the charge, remand and sentencing phases. In order to achieve this, we must stop tinkering at the edges of the system, and "do diversion well."

Discussion

Following the panel, participants and panelists engaged in a facilitated dialogue. Key questions and panel responses were as follows.

- *The* Gladue *decision has not meant a reduction in Indigenous incarceration; quite the opposite. What are some practical things we can be doing now to turn the tide?*

  In provincial systems, administration-of-justice breach charges are a major driver of Indigenous women's incarceration. This is "low hanging fruit," and given the high remand numbers amongst the incarcerated we should be looking at bail supervision and remand programs. For Indigenous men, the most frequent charges (e.g. in Ontario) are for assault. This is a different challenge and needs to be addressed in terms of diversion – as we should also be doing for non-Indigenous people, for whom theft and possession represent the most common charges.

  Electronic monitoring and GPS have very negative connotations of colonial control. What we need is respect, human interrelation and connection; to go back to basic principles of early prevention, and early support for the community. *Gladue* contains a presumption against incarceration of Indigenous people, similar to YCJA principles – can we extend this more systematically?

- *We have talked about decreasing our reliance on custody for years. Where is the resistance coming from to a more holistic, community-focused approach?*

  Stigma has many different effects. There is a belief that incarcerated people shouldn't be part of the health care system. There is a tendency to "de-citizen" people who have entered the criminal justice system and thus to refuse (or segregate) care. There is also very low cross-system literacy, which serves to increase stigma. These are long-standing, difficult problems. Political rhetoric has been sloppy and ill-informed, on the part of all parties. There are phases of "tough on crime" rhetoric, but the evidence continues to show that the opposite works. Nationally, we have lacked a champion to speak the truth.

  Resistance comes from everywhere, because these problems are systemic, complex and inter-related. With sufficient and reallocated resources, we could easily have more people outside of jail and a focus on community-based resources. The problems we have are often

cultural, and there is a need to work with police, prosecutors and judges who often bring a punishment mindset to their decisions. The correctional system contains competing beliefs, as correctional officers tend more to a belief in punishment and control, whereas probation officers are focused more on rehabilitation.

- *Why are breaches/administration-of-justice charges still such a dominant feature of the criminal docket? Even with new federal legislation, we are not seeing rapid movement on that issue.*

  There has been a failure to translate legislative and policy initiatives to the case level. The "implementation gap" is real. For example, in Ontario the legislative intent of corrections legislation for remote communities – to set up relationships between the Ministry of Solicitor General and communities to set up progressive alternatives – has not been matched with implementation. The implementation gap is also extremely evident with respect to *Gladue*. Defence counsel in many cases are not using *Gladue*, and judges thus lose the ability to apply those principles to sentencing. *Gladue* refers to a right that Indigenous accused have, and there should be no reason why that right is not respected in all circumstances.

  We also continue to stigmatize and dehumanize those convicted, as if they are no longer part of the community. A recent documentary, "Conviction," featuring women in jail in Halifax, shows how the community falls apart around them. Work like that shows what it is like to be incarcerated and serves to humanize citizens. There is also much work to do in educating governments and the judiciary regarding the ineffectiveness of current approaches, and the range of available alternatives. The statistics don't lie, and it is time to hold ourselves accountable for what happens in the system.

Recommendations concerning the use of short-term custody in Canada

In the final facilitated session, participants discussed priority steps intended to decrease reliance on short-term custody in Canadian criminal justice. The principal recommendations made by participants are summarized below. Participants' comments in plenary have been synthesized as a supporting paragraph under each recommendation. Note that recommendations are included on the basis of being commonly suggested, but that unanimity should not be inferred.

1. Facilitate a shift away from short-term custody by funding and expanding community alternatives

Jail does very little to rehabilitate and can really be a school for crime. In other words, jail doesn't deter crime, it enhances it. Decreased reliance on incarceration clearly requires credible, funded alternatives to short-term incarceration, as the positive outcomes of the YCJA have shown. Community-based alternatives and treatment are demonstrated to be more effective across a variety of sentencing objectives, although resources are disproportionately applied to incarceration. In particular, resourcing is scarce in northern and smaller communities

which rely to a great degree on volunteers. Canada, the provinces and territories should take steps to fund, expand and diversify community-based support structures and mental health services as an alternative to jail, taking a strategic approach to coordinating resource and operational transition.

2. Take steps to reduce incarceration of young adults, recognizing that jail can be a "school for crime"

Participants returned repeatedly in discussion to the counter-productive effects which incarceration can have on younger adults (*i.e.*, those in their late teens and early twenties). Recent evidence from British Columbia suggests that for those between 18 and 22, incarceration greatly increases the likelihood of subsequent reoffending, which seems to substantiate Peter Brown's description of jail as "the university of bad habits." Potential reforms discussed include raising the top applicable age under the YCJA, as well as enacting alternative (yet adult) sentencing considerations under section 718 of the *Criminal Code* for people under twenty-five years of age – for example, mandating that with some exceptions there should be a presumption against incarceration for someone under 25, with reasons required to be set out in judgment should the presumption not be followed.

3. Eliminate counter-productive conditions, with meaningful implementation of Bill C-75

Administration-of-justice offences make up a large percentage of appearances in Canada's criminal courts and are a common trigger for re-incarceration despite commonly being focused on compliance issues rather than inherently criminal activity. Participants encouraged meaningful provincial-level implementation of Bill C-75, an act to amend the *Criminal Code* designed in part to address this growing issue. The culture and traditions of the justice system are powerful and without active attention to implementation, discretionary choices at the case level made by police, crown and the judiciary may undermine the effectiveness of the Bill's provisions. The principle of restraint must be championed and asserted at the operational level.

4. Design a holistic approach to diversion, and consider allocating greater discretion to corrections

Canadian criminal justice systems have yet to develop a comprehensive and collaborative approach which places the justice system inside a network of broader government response. To divert effectively rather than pursuing incarceration, the decision-making structures of the system must be designed to address root causes of criminalization and do no harm through incarceration. Interaction between police, prosecutors, courts and mental health/social services needs to be the default assumption. Serious attention should be given to the possibility of significantly increased discretion over community release being allocated to those actors – particularly, departments of corrections – best able to apply evidence-based decision-making in a direct client-management framework. Operational and strategic brainstorming between justice, health, social housing and the non-profit community-based service sector should occur as regular business, to design and refine credible, secure and accountable systems of diversion based on RNR and other evidence-based approaches and are designed to decrease offending and overrepresentation of vulnerable groups.

5. Legislate a presumption against short sentences

Participants frequently noted support for development and introduction of a federally legislated presumption against short sentences. There were differing opinions as to the merits of defining "short" as three, six, or twelve months, and participants noted that the process of identifying the appropriate threshold should take into consideration all available international experience, research and caveats. It was commonly observed that such legislation would need to be coordinated with resource provisions at the federal and provincial levels concerning community and treatment-based alternatives to short-term custody. It was further observed that such legislation could and should be coordinated with repeal or reform of some more recently enacted mandatory minimum sentences.

6. Strengthen and facilitate emergence of Indigenous community-based justice approaches

Participants frequently expressed the importance of a distinct focus on Indigenous community alternatives to custody, within any broader move to reallocate attention and resources from short-term custody to community approaches. There are numerous benefits to such a focus which should mitigate the effects of the colonial justice system while supporting and making space for the (re)emergence or expansion of Indigenous-led justice models. These include minimizing the extent to which people are taken from their communities and territories, expansion of restorative justice where culturally appropriate, development of trauma-informed community mental health services, greater application of traditional healing practices, and positive collateral effects on the development of a strong cohort of community-based service providers.

7. Educate professionals and the public about the benefits of community alternatives to build support

Good evidence continues to accumulate about the limitations and negative consequences of short-term incarceration, bolstered by comparative international examples where alternatives have been pursued. As participants learned, Norway has found that having fewer people in jail has not raised the crime rate, and efforts to change the culture of acceptance at a national level have been very effective. In other words, public confidence in the justice system has not been damaged by a decreased reliance on custody. However, examples such as this and the body of knowledge which underpins such reforms have yet to be effectively communicated in Canada, whether within the justice system or more broadly to the public. As a consequence, myths and invalid assumptions around the effectiveness of short-term custody are still commonly expressed with little opposition, creating ongoing harmful stigma and hampering efforts to develop and fund more effective alternatives. Federal, provincial and territorial justice systems should develop well-grounded and well-resourced education campaigns around alternatives to short-term incarceration and the benefit of diversion to individuals and the community and align these messages with expertise from the health and social sectors. These campaigns should be targeted to justice professionals across the system to promote the emergence of champions for change, and then subsequently to the public to build support for evidence-based reform.

8. Make data available nationally to support transition to community alternatives

In making the case for a strategic, operational and resource transition away from short-term custody and towards community sentencing alternatives, champions of change within the criminal justice system require access to high-profile, clear and easily communicated information on the benefits of this transition and the limitations of the status quo. This information should be grounded in research and practice in Canadian jurisdictions as well as comparable international jurisdictions and must be more accessible to an informed lay audience than existing information sources (such as Statistics Canada or academic publications, as important and necessary as these are). The goal should be to support and promote evidence-based decision-making and could be accompanied by national or provincial level standards and/or report cards. The success of this data venture would be enhanced by the identification of a national champion for evidence-based criminal justice decision-making.

9. Study and invest more heavily in electronic monitoring as an alternative to institutional incarceration

Canadian justice systems are currently deploying electronic monitoring as an alternative to custody. Justice leaders can and should do more to research and implement the most effective models of applying this technology, ring-fencing savings to be reallocated into community-based resources. It must be recognized that monitoring may not be appropriate in all cases, may carry stigma and may also be culturally inappropriate with respect to Indigenous offenders.

Closing

Prior to adjourning, participants heard reflections from Boyd Peters of Sts'ailes First Nation, who spoke also as a member of the British Columbia First Nations Justice Council.

Mr. Peters reminded all participants of the importance of community, culture and spirituality as we seek progress on incarceration and on the overrepresentation of Indigenous people in jail. The conversations which have been held in the justice system need instead to be held in communities themselves. Participants' discussions at the Symposium about segregation and confinement are a symbol of the shell into which Indigenous people have withdrawn. Traditional, sacred approaches, which reconnect people to culture and the land, are effective in bringing Indigenous people harmed by the colonial system back in touch with who they are. True partnership between Indigenous peoples and government, as is happening more now in British Columbia, can lead to positive things and all of us should do more of that. Looking ahead and moving forward, self-determination of nations and in terms of justice systems is the objective, and those who work in the justice system must come to understand this.

Mr. Tarbell then drew the proceedings to a close, advising participants that the topic for the 2021 Symposium will return to the theme of Indigenous Justice.