Eighth Edition

Criminal Justice in Canada

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CONTENTS

LIST OF EXHIBITS

CHAPTER 14

Learning Objectives

After completing this chapter, you should be able to:

- Outline the reasons why Bill C-75 was introduced.
- Summarize the proposed changes to preliminary inquiries.
- Describe why bail is viewed as problematic and the proposed changes to this system.
- Explain why peremptory challenges to potential jurors were proposed to be eliminated.
- Explain why juror representation became a major issue in our criminal justice system.
- Explain why mandatory minimum sentences are considered a major issue.
- Outline how systemic and gendered racism leads to the overrepresentation and overincarceration of Indigenous and Black people.
- Outline the government's reasons for decriminalizing the recreational use of cannabis.

Contemporary Issues in the Canadian Criminal Justice System

Canada's Criminal Justice System: The Call for Changes

The 2016 Supreme Court of Canada case ruling in *R. v. Jordan* (see Chapter 10) recognized that major problems existed in the processing of criminal court cases, and in its opinion the court noted that a "**culture of complacency**" existed within the criminal justice system. This ruling led to the establishment of strict time limits for criminal trials: 18 months for provincial and territorial court proceedings and 30 months for Superior Court cases. After the Supreme Court ruling the provinces and territories began to look for ways to meet the new time limits. This led to country-wide consultations between the then federal Minister of Justice, Jody Wilson-Raybould, and her counterparts in the provinces and territories to identify a number of practices that would reduce the backlog of cases in the criminal justice system.

This issue was already a concern for the federal government. In his November 2015 mandate letter to Minister Wilson-Raybould, Prime Minister Justin Trudeau had directed her to deliver on what he considered to be her top priorities, including the creation of a new law for physician-assisted death (see Chapter 1) and an inquiry into missing and murdered Indigenous women and girls in Canada (see Chapter 4). Furthermore, the letter stated that she should conduct a review of the changes in our criminal justice system, particularly the sentencing reforms introduced during the past decade by the previous Conservative government. It was his intent to "assess the changes, ensure that we are increasing the safety of our communities . . . and ensuring the current provisions are aligned with the objectives of the criminal justice system" as well as exploring "sentencing alternatives and bail reform" and addressing "gaps in services to Aboriginal people and those with mental illness throughout the

criminal justice system" (Trudeau 2015). Later, the federal government promised to review numerous mandatory minimum sentences in the Criminal Code, many of which had been passed by the previous government. At the end of April 2017, the provincial and territorial justice ministers met with the federal Minister of Justice and her officials to create a "cultural shift" in the criminal justice system through the sharing of best provincial practices and ultimately changing a number of the legal processes. The goal was to put forward some "substantive solutions that would benefit from targeted criminal law reform" (Zilio 2017:A13). At the end of the meeting, it was agreed that officials would focus on four main areas in order to make the criminal justice system more efficient: preliminary inquiries, bail, the **reclassification** of certain offences, and mandatory minimum sentences. Three of these areas were to be at the core of the recommendations sent to the House of Commons by the Minister of Justice as Bill C-75.

Bill C-75

On March 29, 2018, the federal government introduced Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, to the House of Commons. According to the Minister of Justice, the bill represented the government's legislative response to the Supreme Court's decision in R. v. Jordan (2016). In that case, the Supreme Court noted that it wanted all criminal justice system actors to undertake real, transformative change, calling for an end of the "culture of complacency" found within the courts. Bill C-75 was developed so it would contain a group of criminal justice reforms including changes in the criminal justice system thought to overcome some of the impediments of the culture of complacency as well as proposing tougher criminal laws and bail conditions in intimate partner cases. Bill C-75 proposes to do the following:

- modernize and clarify bail provisions;
- provide an enhanced approach to administration of justice offences, including for youth;
- abolish **peremptory challenges** of jurors and modify the process of challenging a juror for cause and of judicial stand-by;
- restrict the availability of preliminary inquiries;
- streamline the classification of offences;
- expand judicial case management powers;
- enhance measures to better respond to intimate partner violence;
- provide additional measures to reduce criminal justice system delays and to make criminal law and the criminal justice system clearer and more efficient;
- restore judicial discretion in imposing victim surcharges;
- facilitate human trafficking prosecutions, and allow for the possibility of property forfeiture;
- remove provisions that have been ruled unconstitutional by the Supreme Court of Canada; and
- make consequential amendments to other Acts.

Preliminary Inquiries

Historically, **preliminary inquiries** have played an important role for defendants to obtain and assess evidence against them prior to a trial. They were developed during the 1800s in England and came into force in Canada in 1893 to ensure the courtroom vetting of criminal allegations in order to make sure there existed enough evidence to put an accused individual on trial. They also gave the accused early disclosure of the case against them prior to the trial (see, e.g., the case of Susan Nelles in Chapter 10).

In general, a preliminary inquiry occurs when an accused charged with an indictable offence elects to be tried in a superior court and requests an inquiry. It is used to assess whether there is enough evidence to put the accused on trial for an offence. Over time, however, preliminary inquiries have been used for other functions, such as providing the parties involved to examine and cross-examine witnesses and evaluate their credibility. Preliminary inquiries have been substantially modified only once in Canada since they were introduced. This occurred in 2001, when the Criminal Law Amendment Act came into effect. This Act made preliminary inquiries available on request rather than being automatic, and hoped to encourage the parties involved to consider whether or not a preliminary inquiry was necessary. According to the president of the Canadian Association of Crown Counsel, a concern is that preliminary inquiries have now become tools for "the defence to really attack the credibility of witnesses and that's not what they're meant to do" (Woodburn, in Fine, 2017b:A11).

What are some of the issues related to preliminary inquiries that add to the length of a trial? These include the creation of delays leading to potential memory lapses among witnesses and the potential for re-traumatizing victims, such as victims in sexual assault cases, "by subjecting them to an extra round of cross-examination for the purpose of trapping them in inconsistent statements" (Fine 2017b:A11). In terms of their impact upon the accused, they make some individuals charged with a crime spend a longer time in pretrial custody. Many judges and lawyers feel that recent developments within the various criminal justice agencies have diminished the preliminary inquiry to the point that it is rarely needed today. The key developments they mention are (1) the improvements in police expertise and

investigations; (2) the changes in disclosure, where the Crown now has to disclose to the defence lawyers the evidence gathered by investigators that will be used in court (see *R. v. Stinchcombe* (1991) in Chapter 8), and the fact that Crown prosecutors routinely assess potential criminal cases and screen out weak ones; and (3) budget limitations that mean weaker cases are no longer prosecuted. In addition, budget limitations mean that instead of a preliminary inquiry being held the majority of trials now proceed by way of direct indictment.

As a result of the ruling in *R. v. Jordan* (2016), in which the Supreme Court suggested preliminary inquiries may no longer be needed, many provincial Ministers of Justice began to think that eliminating preliminary inquiries would make the time limits of cases easier to obtain. It is seen as a major issue in the length of many trials. For example, the Chief Justice of Manitoba pointed out that every month there are 20 to 25 cases that have a preliminary inquiry, and they typically take 18 to 24 months to go to trial. He also added that Indigenous persons are especially harmed by the delay as they are overrepresented among the inmates in a remand centre waiting for their trial to start (Fine 2017c). In order to comply with the presumptive ceilings for indictable offences as stipulated in *Jordan*, it means that the courts then have about six months to schedule a case.

The call to end most preliminary inquiries in Canada has existed for a lengthy period of time: in Manitoba, the Aboriginal Justice Inquiry recommended the elimination of these inquiries in its final report in 1991 (Hamilton and Sinclair 1991). Most, if not all, prosecutors today see the need for preliminary inquiries to continue, but only for complex cases. For example, James Driskell, whose case proceeded to trial by way of direct indictment and who was wrongfully convicted for murder in

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Serial killer Bruce McArthur (second from the right) appears in court October 22, 2018. In a rare move, McArthur waived his right to a preliminary hearing and was ordered to stand trial on eight counts of first degree murder. He would later plead guilty and was sentenced to life in prison.

1991, spent 12 years in prison before his conviction was overturned. Manitoba was not alone with its concerns: Alberta reduced the number of preliminary inquiries by 17 percent between 2013 and 2016 to speed up trials as well as changing its protocols in this area (Fine 2017d).

When Bill C-75 was introduced into the House of Commons, the federal government pointed out that Part XVIII (Procedure on Preliminary Inquiry) of the Criminal Code outlines the purposes as well as the procedural rules of preliminary inquiries. They cited the Supreme Court's statement in *R. v. S.J.L.* (2009) that no constitutional guarantee of a preliminary inquiry exists as long as the prosecution's evidence and a summary of the witness's statements are disclosed. They pointed out that preliminary inquiries are associated with a small number of the total number of completed cases in Canadian criminal courts—approximately 3 percent of all completed cases, an amount that had decreased over the previous 10 years (Maxwell 2018). It was also reported that charges when a preliminary inquiry occurred accounted for only 7 percent of all the charges that exceeded the presumptive ceilings for delay in 2015–16, but these took a much longer time to reach a final decision (a median of 433 days) than those cases that did not have a preliminary inquiry (a median of 106 days). Cases that included a preliminary inquiry required a greater number of court appearances to reach a final decision (a median of 13 appearances compared to six appearances for those charges that did not include a preliminary inquiry). In addition, when a preliminary inquiry was held, there were a greater average number of days between court appearances (an average of 38 days) in comparison to those that did not have a preliminary inquiry (an average of 27 days).

What were the proposals made for preliminary inquiries advanced in Bill C-75? It would not eliminate these inquiries, but rather they would be restricted. The restriction would be that only those adults accused of an offence with a punishment that has the possibility of life imprisonment could have a preliminary inquiry. In these cases, the amendments found in this section of Bill C-75 would limit the issues that could be explored as well as the number of witnesses who could appear at an inquiry. It is believed that these changes would narrow the number and scope of preliminary inquiries by making them more efficient and effective, while maintaining certain benefits such as discovery at the earlier stage of the criminal justice system.

However, defence lawyers were not as enthusiastic about limiting the number of preliminary inquiries. The head of the Canadian Bar Association's criminal justice group, Regina Crown attorney Loreley Berra, said that "any connection between court delays and the preliminary inquiry is speculative at best" (Berra, in Editorial 2017:A10). And the Canadian Bar Association also noted that, based on recent research, preliminary inquiries are used infrequently in the criminal justice system. They stated that only 2 percent of eligible cases have a preliminary inquiry and that the number of cases with a preliminary inquiry is under 5 percent of court caseloads in every part of Canada. Furthermore, when there are preliminary inquiries they take only two days or less. Some defence lawyers predicted that people will start pleading not guilty more as they won't be able to test the strength of the evidence.

The Criminal Lawyers' Association also stated that they did not support the elimination of preliminary inquiries for most offences. They pointed out that, based upon Statistics Canada data, preliminary inquiries decreased by 37 percent between 2005 and 2015 and that those cases involving inquiries accounted for only 7 percent of the cases that exceeded the presumptive ceiling for delay in 2015–16 (Criminal Lawyers' Association 2018). They said that if the preliminary inquiry were to be taken away from most trials it would actually increase delays and create new pressures on the criminal justice system. The head of the Criminal Defence Lawyers Association of Manitoba stated that preliminary inquiries "allow the Crown and defence to 'streamline' what will happen at trial." And if there isn't a preliminary hearing, it may take four weeks in an actual trial "just to know what you're fighting about. Most homicide preliminary hearings are done in two weeks or less" (Newman, in Rollason and Martin 2017:A4).

Bail Hearings

As discussed in Chapter 9, the police can release someone charged with most criminal offences with a promise to appear. The police are also able to detain the accused and bring them before a justice of the peace where they have a right to a **bail hearing** to determine whether or not they can be released. And when someone is released, there can be conditions that the accused is required to follow until their trial ends. Bail is intended to ensure that three things will happen: (1) persons charged with a criminal offence will attend court to answer to the charge; (2) the accused will not pose a risk to public safety before the trial; and (3) confidence in the criminal justice system is maintained with respect to whether the accused is detained prior to the trial. When a justice refuses to grant bail, it is typically because one of these reasons is not satisfied.

The issues within the criminal justice system, specifically as they impact remand as well as the **overrepresentation** of Indigenous persons and other marginalized groups, who oftentimes are disadvantaged when they attempt to access bail, have led to a reassessment of bail. In 2018, Statistics

Investigating: Issues within the Bail System—*R. v. Antic*

The proposed bail amendments found in Bill C-75 have been developed by considering (1) the rights of accused persons as per s. 11(e) of the Charter and (2) the presumption of innocence and the right to liberty. If someone is denied bail, they will have to wait the entire period in remand or jail prior to their case. This leads some individuals to accept a plea bargain so they can be released. Those who will have a trial face a number of issues in preparation, for example, access to a lawyer and obtaining materials required to prepare for trial.

A key case dealing with the efficiency of the bail system was *R. v. Antic* (2017). This case involved the denial of Kevin Antic's bail application by the justice who heard it. Antic was arrested for drug and firearm offences in Windsor, Ontario, during the summer of 2015. At his first bail hearing, the justice decided that Antic was a flight risk and denied bail. Antic then applied to the Ontario Superior Court for a review of his detention order and was allowed a second chance to obtain bail. By the time of his second attempt Antic had served over two months in jail and had pleaded guilty to the drug charges, but the justice still was of the opinion he was a risk to flee, so once again Antic was returned to custody. He again applied to the Superior Court for a review of his detention order and was allowed another chance to obtain bail. When Antic applied for bail the third time, he pointed out that s. 515(2)(e) of the Criminal Code allows a justice to have the discretion to grant a release of an individual who lives within 200 kilometres. The judge then decided to make Antic obtain a surety and give a cash deposit of $100,000, which he ultimately was able to obtain but which he could accumulate only after almost a year. On July 15, 2016, he was released on bail. The Crown then appealed this decision to the Supreme Court (the Crown does not have a right to appeal a bail review decision to a provincial court of appeal).

At the Supreme Court hearing, Antic's lawyers pointed out that variations exist in terms of how bail is dealt with in different provinces. They noted that the courts in Ontario require a surety bail more commonly than in all other provinces, but that since the sections of the Criminal Code that govern bail apply to all provinces and territories equally this shouldn't be the case. The Supreme Court reaffirmed the principle that the starting position of a justice of the peace or judge at a bail hearing should be an unconditional release, and it is only the circumstances of the accused and case that would require conditions and financial requirements to be added. While the Supreme Court reversed the bail justice's decision to strike down the geographical limitation (s. 515 (2)(e)), the Supreme Court found that the justice assessing bail erred by failing to adhere to the "ladder principle" by refusing to consider other forms of release beyond a surety and cash.

Mr. Justice Wagner (now Chief Justice), writing for the Supreme Court, stated that the bail review justice's errors were "symptomatic of a widespread inconsistency in the law of bail," with the result that "remand populations and denial of bail have increased dramatically in the Charter era." The majority reaffirmed that "release is favoured at the earliest reasonable opportunity on the least onerous grounds," while criticizing justices who make bail difficult to obtain. According to Justice Di Luca of the Ontario Superior Court, "underlying Canada's broken bail system is a culture of risk aversion within the criminal justice system" (Di Luca, in Fine 2018b:A6). This case impacts an important aspect of the Canadian criminal courts, specifically that most people who are charged "with criminal offences are marginalized in some way . . . [and] . . . [t]he surety system of bail . . . hurts those with a low income . . . [and exacerbates] . . . the marginalization that already exists within the system" (Ebert 2017).

Questions

1. Why was Antic denied bail?
2. What was the ruling by the Supreme Court of Canada when it made its decision in the *Antic* appeal?

Canada indicated that 60 percent of adults in provincial/territorial correctional facilities were denied bail and then placed in a remand centre. The existing bail provisions found within the Criminal Code have not been comprehensively revised since they were first introduced in 1972, although they have been evaluated more recently due to the increase of persons placed to remand. In addition, many bail rules today are complex and as a result add to criminal justice delays without necessarily contributing to public safety. Almost 60 percent of adults in provincial jails across Canada are waiting for their trials and have not been found guilty of any offence.

The proposed amendments in Bill C-75 intend to modernize and streamline bail while making sure that public safety is protected, as well as to maintain public confidence in the criminal justice system. The amendments attempt to

- streamline the process by increasing the types of conditions police can impose on the accused, so as to divert unnecessary matters from the courts and reduce the need for a bail hearing when one is not warranted;
- provide guidance to police on imposing reasonable, relevant, and necessary conditions that are related to the offence and consistent with the principles of bail;

- legislate a "principle of restraint" for police and courts to ensure that release at the earliest opportunity is favoured over detention;
- require that the circumstances of Indigenous accused and of accused from vulnerable populations are considered at bail hearings in order to address the disproportionate impacts that the bail system has on these populations;
- create a new process, the "judicial referral hearing," to streamline out of the traditional court system certain administration of justice offences where no harm has been caused to victims; and
- consolidate various forms of police and judicial pretrial release to modernize and simplify the release process.

Numerous critics of this approach are concerned about women who are victims of domestic violence. When domestic violence occurs there are "indicators of violence, which is very escalating in nature" (Mattoo, in Fine 2018b, A6). This appeared to reaffirm a 2011 Justice Department study suggesting a significant number of men released on bail after allegedly being violent toward their partners return home and continue their violent behaviour. According to the study, violent offences involving an intimate partner "present a unique challenge as victims often have ongoing contact with the accused . . . which may increase the risk that the violence may be repeated or that it may escalate" (Huffpost 2011).

SUMMING UP AND LOOKING FORWARD

How do we make sure that our criminal justice system operates in an efficient manner? The Supreme Court considered this issue and said it was experiencing a "culture of complacency" that led to difficulties in having criminal court cases proceed in a timely fashion. Bill C-75 was proposed in order to bring about significant changes in our criminal justice system. Two areas that inspired some of the most controversial comments involved preliminary hearings and bail. Preliminary inquiries would be limited to only those adults accused of an offence that had the possibility of life imprisonment upon conviction. If this proposal became part of the Criminal Code it would limit the issues that could be explored as well as the number of witnesses that could appear at an inquiry. The bail proposals found within Bill C-75 would be the first major changes to the bail system since they were first introduced almost 50 years ago and would modernize and streamline the bail process. What would be the result of these changes to bail? Fewer people would be placed into a remand centre and more people would be granted bail. A number of other proposals are found in Bill C-75, including abolishing peremptory challenges to potential jurors, reclassifying a number of criminal offences, and improving the response to intimate partner violence. These are discussed in the next section.

Review Questions:

1. Identify the changes for preliminary inquiries as proposed in Bill C-75.
2. What are the three things that bail is supposed to ensure?

Jury Selection

The rules governing peremptory challenges during the selection of jurors are found in section 634 of the Criminal Code. As we saw in Chapter 8 and will see again later in this chapter when the Gerald Stanley case is discussed, peremptory challenges may be used at the discretion of lawyers in order to exclude a potential juror from the panel without providing any reasons. Discrimination in jury selection has been documented by retired Supreme Court Justice Frank Iacobucci. In his report *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, he recommended further consideration of this issue with a view to possible Criminal Code amendments to prevent the discriminatory use of peremptory challenges (see Chapter 8). He advised the Ontario government to ask Ottawa, through changes made to the Criminal Code, "to supervise the exercise of peremptory challenges and to enable judges to disallow their apparent use to discriminate against Indigenous people," pointing out that any attempts to reform the underrepresentation of Indigenous peoples on juries wouldn't work as long as the legal system can use peremptory challenges in a discriminatory manner (Iacobucci 2013). And Roach (2018a) points out that "despite the fact that equality rights under Canada's Charter of Rights and Freedoms have been in force since 1985, defence lawyers and prosecutors have failed to challenge the discriminatory use of peremptory challenges." Minister Wilson-Raybould said she would consider the advice of Frank Iacobucci when creating new proposals.

When Bill C-75 was introduced it contained proposals on jury selection, with Minister Wilson-Raybould stating that "we need a jury selection system that has the confidence of all Canadians" (Friesen 2018b:A3) and that "our criminal justice system must be fair, equitable and just for all Canadians" (Smith and Omand 2018:A4). It recommended changing the jury selection process in four ways:

- abolish peremptory challenges
- alter the challenge for cause process

- allow judges to stand aside potential jurors in order to maintain public confidence in the administration of justice; and
- allow trials to continue by judge alone, with the consent of the parties, where the number of jurors is reduced below 10.

Bill C-75 would abolish peremptory challenges as it noted that discrimination in the jury selection process has been documented, from Manitoba's Aboriginal Justice Inquiry (1991) through to retired Supreme Court Justice Frank Iacobucci's report to the Attorney General of Ontario in 2013. It also noted that abolishing peremptory challenges would address the concern that its use in the selection of a jury could be used to discriminate and it would therefore strengthen public confidence.

To make the selection process fairer, the federal government recommended making changes in the **challenge for cause** process. Currently, a challenge for cause (s. 638 of the Criminal Code) occurs when the Crown prosecutor or defence lawyer attempts to exclude a potential juror on the basis of one or more of the following:

- the name of the juror does not appear on the panel;
- the juror is considered to be biased;
- the juror has been convicted and sentenced to more than 12 months' imprisonment;
- the juror is not a Canadian citizen;
- the juror is physically unable to perform the duties of a juror; and
- the juror does not speak the official language of the trial.

With the exception of a name not being on the jury panel, which is determined by the trial judge, all other challenges for cause are decided by two lay persons called "triers" who are not trained in law. This process sometimes involves the same two triers or different triers who are rotated, which has led to confusion and delays in jury trials (and led to Criminal Code amendments to deal with this issue in both 2008 and 2011). The proposed change would shift the responsibility to judges to observe the challenge for cause process in order to improve the efficiency and effectiveness of the process.

Currently, judges are allowed to set a number of prospective jurors to be stood aside for reasons of personal hardship or any other reasonable cause. Bill C-75 would expand this to include "maintaining public confidence in the administration of justice" by attempting to ensure that a jury will be impartial, representative, and competent. In addition, the bill would amend the challenge for cause based on a juror's prior criminal record, which is currently 12 months. Bill C-75 recommends increasing the length of criminal sentences to two years before someone can be removed, as this means that more jurors with criminal records for minor offences could be included by eliminating challenges for cause in these situations.

Representation on Juries

Before the federal government could introduce Bill C-75 into the House of Commons the issue of representation on juries came under scrutiny in a high-profile case. This dealt with the death of Colten Boushie and the ensuing criminal case, *R. v. Stanley* (2018), which raised issues about the impartiality and representativeness of the jury. In Canada, the jury is viewed as a cornerstone of individual liberty (*R. v. Turpin* (1989)), largely due to the fact that an accused's guilt or innocence is determined by their "equals and neighbours, indifferently chosen, and superior to all suspicion" (*R. v. Kokopenace* (2015)). As such, the jury is considered beneficial as it is the ultimate arbiter of the guilt or innocence of the accused (*R. v. Finta* (1992)).

In its 1982 publication *Report on the Jury*, the Law Commission of Canada stated that the jury system serves five important functions in our criminal justice system. These functions focus on the role of the jury in terms of representing the community within a criminal trial. The five functions are as follows:

- First, because the jury comprises a number of people with a wide diversity of experience and because it reaches a collective decision only after deliberating seriously and often robustly about the evidence, the jury is likely to be an excellent fact finder.
- Second, because it represents a cross section of the community, the jury is able to act as the conscience of the community, ensuring that individual criminal cases are justly resolved.
- Third, the jury can act as the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law. When a properly instructed jury acting judicially acquits an accused, no judge can reverse its decision.
- Fourth, because the jury involves the public in the central task of the criminal justice system, it provides a means whereby the public can learn about, and critically examine, the functioning of the criminal justice system. For the public, it acts as a window on the criminal justice system.
- Fifth, by involving the public in judicial decision making, the jury undoubtedly increases the public's trust in the system (Law Reform Commission of Canada 1982:5).

A trial by jury enables members of the community to participate in the criminal justice process. It also enhances public confidence in our criminal justice system

as it allows cases to be decided by the defendant's peers rather than by legal professionals. Jurors are also not "case hardened" in the same way that prosecutors, defence lawyers, and judges are, as they typically have no prior experience within our criminal justice system. In addition, the random selection of jurors is said to produce a more representative panel of adjudicators.

The right to an impartial jury is guaranteed in s. 11(d) of the Charter of Rights and Freedoms, which states that only those who are found guilty are to be ultimately condemned by the criminal justice system. This protects the innocent person in two ways: (1) it guarantees the right of any individual charged with an offence to be presumed innocent until proven guilty beyond a reasonable doubt, and (2) it guarantees that the process in which the guilt of an accused is determined will be fair. **Impartiality** refers to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" as well as to the absence of bias in the mind of the adjudicator (*Valente v. The Queen* (1985)). Bias has been found in a number of areas, including a personal interest in the case being tried (*R. v. Hubbert* (1975)), pretrial publicity or the notoriety of the accused (*R. v. Sherratt* (1991)), and prejudice against members of an accused's social or racial group (*R. v. Williams* (1998)). With respect to jurors, in order to establish that a potential juror is partial, it must be shown that a bias could incline a juror to a certain party or conclusion that is unfair (*R. v. Fine* (2001)).

The individuals called for jury duty benefit from a presumption of impartiality. The trial judge has considerable discretion in determining how and in what circumstances that presumption is invalid, and how far the challenges to potential jurors will be allowed. Case law in Canada does not require the need "for a broad entitlement in every case to challenges for cause based on the racial *sympathy* for the victim as distinguished from racial *hostility* toward the accused. The interracial nature of a crime may be a factor but it is not necessarily so" (italics in original) (Department of Justice 2018:4).

Representativeness focuses upon the processes used to compile the jury array and not on its ultimate composition. There is no right to a jury array of a particular composition, nor one that is proportional to all the diverse groups in society. Representativeness is satisfied when the government provides a fair opportunity to a broad cross section of society to participate in the jury process. The Supreme Court of Canada originally held the position that juries must represent the larger community "as far as is possible and appropriate in the circumstances" (*R. v. Sherratt* (1991)). This position was later narrowed in *R. v. Kokopenace* (2015) when the majority of the Supreme Court ruled that representativeness occurs when the government makes reasonable efforts to (1) compile the jury pool using random selection from source lists that draw on a broad cross section of society, and (2) deliver jury notices to those that have been randomly selected. The majority also noted that representativeness of a jury means that the defendant is only entitled to a fair and honest process of a random jury selection. However, in their dissent, Justice Thomas Cromwell and Chief Justice Beverley McLachlin argued that the failure to have a jury that didn't include on-reserve Indigenous persons was a violation of the constitution. Justice Cromwell noted that an Indigenous man on trial for murder "was forced to select a jury from a roll which excluded a significant part of the community on the basis of race—his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process" (*R. v. Kokopenace* (2015)).

This concern about the representativeness of juries had existed for a number of years. In the Aboriginal Justice Inquiry (AJI), Chief Justice Alvin Hamilton and Judge Murray Sinclair found the jury system in Manitoba to be an "example of systemic of discrimination against Aboriginal people" (Hamilton and Sinclair 1991:378). Of particular concern to them was the way in which Indigenous people are excluded from juries. Both prosecutors and defence attorneys were found to have used peremptory challenges and stand-asides to screen Indigenous people out of the jury system. And while removing potential jurors without having to give any reason is allowed by the Criminal Code, they challenged the existence of this practice to continue "when its application can prevent Aboriginal people from sitting on a jury because they are Aboriginal" (Hamilton and Sinclair 1991:385). The AJI recommended that the policy of allowing peremptory challenges be ended. An example of excluding Aboriginals by peremptory challenges discussed in the AJI was the Helen Betty Osborne case in The Pas, Manitoba. Six Indigenous persons selected for the jury pool in this case were called forward but peremptorily challenged by the defence counsel. This raised concerns, particularly as Indigenous persons made up at least 50 percent of residents in the area.

One reason why Indigenous people were not serving on juries was because oftentimes they were left off the jury roll. Up until 2001 the Department of Indian and Northern Affairs Canada compiled lists of First Nations members on the list of potential jurors when band electoral lists were not available. Starting in 2001, it no longer compiled these lists due to privacy concerns. In Ontario, concerns were raised by First Nations peoples about the jury selection process. This led to a government investigation into this issue. As noted previously in this section, the final report on the investigation, *First Nations Representation on Ontario Juries* (2013),

was written by former Supreme Court of Canada Justice Frank Iacobucci (see Chapter 8). Among his conclusions was that the jury selection system for identifying potential jurors in Ontario was unrepresentative of First Nations peoples living on reserves. He added that while his study focused exclusively on Ontario, this issue also exists in other Canadian provinces as well as other countries (e.g., Australia and the United States).

Criminal Justice Focus

The Issue of Jury Representativeness: *R. v. Stanley*

The issue of jury representativeness, in particular the use of peremptory challenges that would need no reasons to be used, was a key issue in *R. v. Stanley* (2018). This case involved Gerald Stanley, a White male, who was charged with second degree murder in the shooting death of Colten Boushie, a Cree male. All members selected to serve on the jury appeared to be White. One factor that potentially explains the underrepresentation of Indigenous persons on the jury was that, while attempts were made in January 2018 to contact 750 individuals who would then appear as prospective jurors, only 178 of these individuals were able to appear. According to Roach (2019:96), it is likely that "Indigenous people were over-represented among those who did not appear, or were excused by provincial authorities, on the basis that they were disqualified for jury duty." Although this jurisdiction has a substantial Indigenous population, it was winter and many of these individuals lived in areas more than 300 kilometres north of Battleford, Saskatchewan, making it difficult for many to appear. It is estimated that at least 28 Indigenous persons were among the panel of prospective jurors who appeared in Battleford on January 29, 2018. Of these prospective Indigenous jurors who were available for jury duty, approximately a dozen were excused by the judge for hardship reasons, three were excused because they were related to Boushie, and five were subject to peremptory challenges by the defence.

In addition, the prosecution never requested the judge to ask, through a challenge of cause, all potential jurors about whether or not racist bias and pretrial publicity would prevent them from impartially deciding the case. Since the selection of the jury in the *Stanley* case did not use any questions about race and racism, all of the individuals who appeared for prospective jury duty were never questioned if they were able to judge the case impartially. In addition, some feel that Stanley should not have been able to use peremptory challenges "to exclude the five visibly Indigenous persons who were called to serve on his jury" (Roach 2019:124). This use of peremptory challenges eliminating any objections coming from either the judge or prosecution concerned Boushie's family and other Indigenous persons and groups in Saskatchewan and across Canada. This ultimately sparked a national controversy that led to peremptory challenges being introduced into Parliament as part of Bill C-75, which recommended abolishing them.

Liam Richards/The Canadian Press

Gerald Stanley

Ryan Remiorz/THE CANADIAN PRESS

People take part in a vigil in support of Colten Boushie's family.

Criminal Justice Focus (*Continued*)

The trial started on January 30, 2018, and during the trial the defence argued that Boushie was killed by hang fire—that is, there was a delay between when the trigger was pulled and when the bullet exited the firearm. Eleven days later, on February 9, the jury acquitted Stanley (see Exhibit 14.1 for a timeline of this case). After the verdict, much criticism was directed toward the Canadian criminal justice system by Indigenous peoples, leaders, and organizations as well as the general public and some lawyers. Following the verdict, Prime Minister Trudeau tweeted that he couldn't "imagine the grief and sorrow the Boushie family is feeling right now"; Justice Minister Wilson-Raybould also tweeted that she felt the pain of the family, and that "Canada can and must do much better" (Friesen 2018a). Two days after Stanley's acquittal, three members of Boushie's family travelled to Ottawa where they spoke to Prime Minister Trudeau and three federal cabinet ministers. On February 13, the federal government announced it would be examining the way juries are selected, including the use of peremptory challenges. And at the end of March 2018, changes to these types of challenges were part of the proposals of Bill C-75 when it was introduced into Parliament. This bill was aimed at overhauling various aspects of the criminal justice system, and included a recommendation to eliminate peremptory challenges.

Questions

1. What is the reason for having representation on juries?
2. How do you think the policy of having representation on juries could be improved?

EXHIBIT 14.1 Timeline of the *R. v. Stanley* Case

August 9, 2016	The RCMP receive a phone call from the Stanley farm near Biggar, Saskatchewan. The RCMP respond and discover Colten Boushie dead with a bullet wound to the back of his head. As part of their investigation, the RCMP then proceed to arrest everyone they found on the farm when they arrived. Some are released soon after (e.g., Mrs. Stanley and her son, Sheldon Stanley), while others are detained.
August 10, 2016	Stanley is interviewed by a member of the RCMP. He is subsequently charged with second degree murder and manslaughter by way of assault or careless use of a firearm. He is held for 10 days.
August 18, 2016	Stanley appears at court in North Battleford, Saskatchewan and pleads not guilty to the charges. His lawyer requests that Stanley be granted bail.
August 19, 2016	Stanley is granted bail by a Court of Queen's Bench judge. His bail is set at $10,000 and includes a number of conditions: he cannot possess any firearms; he cannot contact anyone who could have been a potential witness (except his wife and son); and he cannot have any contact with Boushie's family or any other member the Red Pheasant First Nation where Boushie and his family resided.
April 3, 2017	The preliminary inquiry begins to determine whether enough evidence exists to send the case to trial.
April 6, 2017	The trial judge commits Stanley to stand trial on a charge of second degree murder.
August 2, 2017	The trial date is set for January 29, 2018.
January 16, 2018	The judge denies a motion to allow television cameras to film the trial.
January 29, 2018	Jury selection starts; a jury consisting of seven women and five men is selected, all of whom appear to be White.
January 30, 2018	The trial starts.
February 8, 2018	Closing arguments are made by the defence and prosecution. The jury begins to deliberate at 4 P.M.
February 9, 2018	After 13 hours of deliberation, the jury finds Stanley not guilty of second degree murder.
March 7, 2018	The Saskatchewan Attorney General's office decides not to appeal the case stating it found no legal basis on which to appeal.
April 16, 2018	Stanley pleads guilty to unsafe storage of an unrestricted firearm. He is fined $5,000 and receives a 10-year ban on possessing a firearm.

Investigating: *R. v. Khill* and *R. v. Cormier*

Two other cases occurred at approximately the same time as the *Stanley* case that both involved a White male being accused of second degree murder for the death of an Indigenous person. The first trial occurred in Hamilton, Ontario and involved a White male charged with second degree murder for the shooting death of an Indigenous male, while the second involved a White male charged with second degree murder in the killing of a young Indigenous woman in Winnipeg.

R. v. Khill

A trial that was similar to the *Stanley* case in a number of ways began in Binbrook, Ontario in June 2018. Peter Khill was charged with second degree murder for the killing of Jonathan Styres of Ohsweken, Ontario, located on Six Nations, on February 4, 2016—six months prior to Colten Boushie being killed. According to the police, Styres was attempting to steal Khill's truck at about 3 A.M. Khill, who had been trained as a military reservist, awoke, grabbed his shotgun, and went out to see what was happening, and twice shot Styres at close range. Khill's girlfriend heard the shots and called 911. Police arrived within minutes of the shooting, and Khill was arrested and charged with second degree murder.

Khill was released on bail three days later with a number of conditions, including posting $100,000 and not possessing any weapons or having any contact with the victim's family. When it was time to select the jury, there were at least two differences between this and Stanley's case (which had been completed four months earlier). First, the Crown requested that all prospective jurors be asked whether or not they could make impartial decisions in this case as it involved a White male (Khill) and an Indigenous male (Styres). This approach was based on the decision by the courts to allow an Indigenous man to ask a question about the impartiality of a prospective juror in relation to race (*R. v. Williams* (1998)). Once given permission by both the judge and defence lawyer, the prosecutor was able to ask a single question about race. A few prospective jurors said that they had issues due to the number of thefts in the area as well as being involved in similar experiences. These individuals were then excused from serving on the jury. Second, while the defence used peremptory challenges there were no criticisms that they were used to exclude visibly Indigenous prospective jurors.

Colin Perkel/The Canadian Press

Peter Khill

The trial started on June 12, 2018, during which Khill used the legal defence of self-defence. During closing arguments, the defence lawyer stated that, because it was dark outside, Khill did not know that Styres was Indigenous and as such race was not a factor in the case. In his closing argument to the jury, the prosecution stated that Khill had fired two shots, one when Styres was on the ground, dying. Prosecutors argued that Mr. Khill should have remained in his house and called the police. The jury acquitted Khill of the charge on June 27, 2018. According to Roach (2018b), the acquittal shows why so many Indigenous people "do not have confidence in a criminal justice system that fails them; characterized by overrepresentation among both crime victims and prisoners, and underrepresentation on juries and other positions of power. Such distrust should not be dismissed or denied, but taken seriously." The Ontario Attorney General appealed this case on July 20, noting that the judged erred in his charge to the jury about self-defence by allowing opinion evidence "from a non-expert witness who testified about the effects that Khill's military training would have had upon him many years later, in a non-military scenario" (Hayes 2018:A4).

R. v. Cormier

On August 17, 2014, Tina Fontaine's body was found wrapped in a duvet cover in the Red River in Winnipeg, eight days after she had been reported missing. During their investigation the Winnipeg police found out that she had been seen with Raymond Cormier prior to her disappearance. After talking to Cormier but not finding any evidence against him they decided to start an undercover operation to see if they could link Cormier to the death of Ms. Fontaine. This undercover investigation took six months to complete, and it involved putting Cormier into a bugged apartment and an undercover police officer moving into a room on the same floor. The Crown built

Investigating: *R. v. Khill* and *R. v. Cormier* (*Continued*)

Graham Hughes/THE CANADIAN PRESS

its case around statements made by Cormier that were recorded during the undercover operation, which involved a Mr. Big sting (see Chapter 7) (Macdonald 2018:A14). The police were able to record Cormier telling other people why he thought Ms. Fontaine was murdered. One recording heard Cormier telling a woman that there was "a little girl in a 'grave someplace screaming at the top of her lungs for me to finish the job. And guess what? I finished the job'" (Canadian Press 2018a). Later he told the undercover police officer that he had beaten two murders and the way to do that was to follow three rules to crime: "deny, deny, deny" (Canadian Press 2018a). Many of the recordings were made when music was playing in the background and so it was hard to hear what everyone was saying.

Cormier was charged with second degree murder in December 2015; his case did not involve a preliminary inquiry as it proceeded directly to trial on a direct indictment. When the jury was selected in January 2018, "(m)ore than two-thirds of the jurors appeared to be members of a visible minority group or Indigenous" (Macdonald 2018:A14). The case against Cormier was circumstantial and was considered by many to have a number of issues, including that there was no crime scene, no forensic evidence linking Cormier to the murder, and no established cause of death—pathologists who testified could not be definitive about her death, only narrowing it to either drowning or smothering. Cormier's lawyer told the jurors in his closing argument that Cormier had never admitted to the killing and that "justice for Tina cannot come at the expense of justice for Cormier" (ibid).

The jury found Cormier not guilty of second degree murder on February 22, 2018, after deliberating for 13 hours. In their reaction to the jury's decision, First Nations leaders stated that "Canadian society failed Tina Fontaine . . . Everybody . . . across this country, should be ashamed of themselves for the injustice that just happened here" (Macdonald 2018:A14). In March 2018, the Crown announced it would not file an appeal of the case, and the Manitoba government announced it would not hold a public inquiry into Tina Fontaine's death.

Questions

1. What are some of the similarities between the criminal cases of Peter Khill and Gerald Stanley?
2. What are the two main differences found between the *Khill* case and the *Stanley* case in terms of what potential jurors were asked about the issue of race?

SUMMING UP AND LOOKING FORWARD

A jury trial involves the selection of 12 people who will determine the outcome of a trial. In a jury trial, the judge rules on questions of law and presides over the trial, while the jury is responsible for a number of issues including questions of fact, how much weight to give to the testimony of a witness, as well as the final decision concerning the guilt or innocence of the accused. The right to a jury trial is found within the Charter of Rights and Freedoms. Juries are designed to provide a trial by one's peers. Trial by jury is supposed to guarantee that the verdict is reached by having impartial jurors and that the jurors are representative of the social composition in the jurisdiction.

Peremptory challenges in juries weren't originally thought of as an issue, but after the issue of jury representation became a central one in *R. v. Stanley* it was included in the Bill C-75 proposals. The recommendations for juries included abolishing peremptory challenges as well as allowing judges to stand aside potential jurors in order to maintain public confidence in the administration of justice. The potential discriminatory effect of peremptory challenges had been found to be a reason for the overrepresentation of Indigenous peoples in the criminal justice system. This led many to argue that our system of trial by jury should be reformed. In the next section, two other key proposed changes in Bill C-75 are discussed: the reclassification of offences and intimate partner violence.

Review Questions:

1. What does impartiality mean for juries?
2. What does representativeness mean for juries?
3. What was the representation of the jury in the *R. v. Stanley* case?

Reclassification of Offences

The classification of offences determines where a case can be heard depending on the seriousness of the conduct, the background of the alleged offender, as well as the impact on the victim(s). The majority of criminal cases are processed as summary conviction cases through provincial courts, while indictable offences are heard in both provincial and superior courts. Typically, cases heard in provincial courts tend to proceed much quicker than if they were heard in superior court. When Bill C-75 was introduced, provincial court cases had a median case length of 120 days and a median of five court appearances, while superior court cases had a median case length of 565 days and a median of 15 court appearances (Maxwell 2017).

Bill C-75 proposed to make more offences **hybrid offences** (i.e., they can be processed by way of either a summary or indictment offence), allowing prosecutors the ability to proceed summarily for a larger number of offences thereby leaving the more serious cases to be heard by superior courts. It was believed this would help to make more cases be heard more quickly. There are 136 indictable offences that Bill C-75 is attempting to hybridize. Of these, 40 are punishable by a maximum of five years' imprisonment, while 41 are punishable by a maximum of two years' imprisonment. In addition to hybridizing offences, Bill C-75 also proposes to change the maximum penalty for summary conviction offences from six months to two years less a day of imprisonment. As well, it would change the limitation period (i.e., the time within which a charge has to be laid) to 12 months from 6 months. This would ensure that the police have the time to investigate the more complex cases and give the Crown the time to proceed in provincial court for a greater number of less serious cases. This will have the impact of bringing the accused to trial within a reasonable time as required by the Charter and is also expected to reduce delays in the superior courts by allowing more time for the police and prosecutors to investigate and prosecute cases. With this greater number of hybridization of cases, it will put less pressure on the criminal justice system.

Intimate Partner Violence

Despite increased efforts to address violence against intimate partners, victimization by an intimate partner is a common form of police-reported violent crime committed against women (Burczycka and Conroy 2017). While there is no specific offence of **intimate partner violence** in the Criminal Code, it includes a range of conduct as well as offences that can be committed against intimate partners including homicide, assault, kidnapping, forcible confinement, sexual assault, criminal harassment, and uttering threats. In 2016, 28 percent of police-reported violent crimes involving victims aged 15 and older were victimized by an intimate partner. This included both current and former spouses (12 percent), current and former dating partners (15 percent), and other intimate partners (0.4 percent). In addition to intimate partner violence, 34 percent of all violent crime victims had been victimized by a friend or acquaintance, 25 percent by a stranger, and 14 percent by a family member other than a spouse.

Over 93,000 victims of intimate partner violence were reported in 2016; the largest number (79 percent) of victims were women. Women accounted for eight in ten victims of violence by a current spouse, former spouse (79 percent), current dating partner (79 percent), and former dating partner (80 percent). Intimate partner violence was the leading type of violence experienced by women in 2016 (42 percent of female victims of violence; see Tables 14.1 and 14.2).

TABLE 14.1 Victims of Police-Reported Violent Crime, by Sex of Victim and Relationship of Accused to Victim, Canada, 2016

	Female victims		Male victims		Total victims	
Relationship of accused to victim	*number*	*percent*	*number*	*percent*	*number*	*percent*
Intimate partner	73,400	42	19,847	12	93,247	28
Current spouse[1]	23,142	13	6,446	4	29,588	9
Former spouse[2]	8,656	5	2,333	1	10,989	3
Current dating partner[3]	25,841	15	6,974	4	32,815	10
Former dating partner[4]	14,767	8	3,607	2	18,374	5
Other intimate partner[5]	994	1	487	0.3	1,481	0.4
Non-spousal family[6]	25,998	15	19,830	12	45,828	14
Friend or acquaintance	49,446	28	63,953	40	113,399	34
Casual acquaintance[7]	31,646	18	39,589	25	71,235	21
Business relationship	4,583	3	6,713	4	11,296	3
Friend[8]	7,923	5	8,250	5	16,173	5
Criminal relationship[9]	320	0.2	1,746	1	2,066	1
Authority figure[10]	4,974	3	7,655	5	12,629	4
Stranger	26,697	15	56,215	35	82,912	25
Unknown[11]	845	…	256	…	1,101	…
Total	176,386	100	160,101	100	336,487	100

. . . not applicable
[1]Refers to violence committed by current legally married spouses and common-law partners. Includes victims aged 15 to 89.
[2]Refers to violence committed by separated or divorced spouses and former common-law partners. Includes victims aged 15 to 89.
[3]Refers to violence committed by current boyfriends and girlfriends. Includes victims aged 15 to 89.
[4]Refers to violence committed by former boyfriends and girlfriends. Includes victims aged 15 to 89.
[5]Refers to violence committed by a person with whom the victim had a sexual relationship or a mutual sexual attraction. Includes victims ages 15 to 89.
[6]Includes all other family members related by blood, marriage (including common-law) or adoption. Examples include grandparents, uncles, aunts, cousins, and in-laws.
[7]Includes neighbours.
[8]Includes roommates, which was added as a relationship category in 2013.
[9]Includes relationships with the victim based on illegal activities, such as drugs or prostitution.
[10]Includes persons in a position of trust or authority who are not family members. Includes authority figures and reverse authority figures (e.g., student-to-teacher, patient-to-doctor, teen-to-youth counsellors/group home workers, prisoner-to-guard). "Reverse authority figures" was added as a relationship category beginning in 2013.
[11]Includes incidents where the relationship between the victim and the accused was reported by police as 'unknown.' Note: Intimate partner violence victims under the age of 15 years are included in the category 'unknown relationship' and not in the categories related to intimate partner violence. Victims refer to those aged 89 years and younger. Victims aged 90 years and older are excluded from analyses due to possible instances of miscoding of unknown age within this age category. Excludes victims where the sex or the age was unknown. Excludes a small number of victims in Quebec whose age was unknown but was miscoded as 0. Percentages have been calculated excluding victims where the accused-victim relationship was unknown. Percentages may not total 100% due to rounding.

Source: M. Burcyzcka and S. Conroy, "Family Violence in Canada: A Statistical Profile, 2016." *Juristat* (January 17, 2018), Table 3.1, p. 61, Statistics Canada Catalogue No. 85-002-X, www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54893-eng.pdf. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada.

TABLE 14.2 Victims of Police-Reported Intimate Partner Violence, by Type of Intimate Partner Relationship and Age Group of Victim, Canada, 2016

	Female victims						Male victims						Total victims of intimate partner violence
	Victims of spousal violence[1]		*Victims of dating violence*[2]		*Victims of other intimate partner violence*[3]	*Total female victims of intimate partner violence*	*Victims of spousal violence*[1]		*Victims of dating violence*[2]		*Victims of other intimate partner violence*[3]	*Total male victims of intimate partner violence*	
Age group of victim	Current	Former	Current	Former			Current	Former	Current	Former			
						percent							
15 to 19 years	10	7	53	29	2	100	10	7	48	31	5	100	100
20 to 24 years	19	9	46	25	1	100	19	7	48	23	2	100	100
25 to 29 years	28	10	38	22	1	100	26	9	41	21	2	100	100
30 to 34 years	35	13	32	19	1	100	31	12	37	18	2	100	100
35 to 39 years	39	16	27	17	1	100	37	15	31	16	2	100	100
40 to 44 years	41	15	27	15	1	100	38	15	29	16	2	100	100
45 to 49 years	41	15	27	15	1	100	39	14	28	15	3	100	100
50 to 54 years	47	14	23	14	2	100	40	14	29	14	3	100	100
55 to 59 years	53	14	20	11	2	100	43	11	28	14	4	100	100
60 to 64 years	61	11	15	11	1	100	49	12	20	14	5	100	100
65 years and older	69	10	9	10	1	100	59	9	20	9	4	100	100
Total	**32**	**12**	**35**	**20**	**1**	**100**	**32**	**12**	**35**	**18**	**2**	**100**	**100**
						number							
Total	23,142	8,656	25,841	14,767	994	73,400	6,446	2,333	6,974	3,607	487	19,847	93,247

[1]Refers to violence committed by married, separated or divorced spouses and common-law partners (current and former). Includes victims aged 15 to 89.
[2]Refers to violence committed by boyfriends and girlfriends (current and former). Includes victims aged 15 to 89.
[3]Refers to violence committed by a person with whom the victim had a sexual relationship or a mutual sexual attraction. Includes victims ages 15 to 89.
Note: Intimate partner violence refers to violence committed by legally married, separated or divorced spouses, common-law partners (current and former), dating partners (current and former) and other intimate partners. Victims refer to those aged 15 to 89. Victims aged 90 years and older are excluded from analyses due to possible instances of miscoding of unknown age within this age category. Excludes victims where the sex or the age was unknown or where the accused-victim relationship was unknown. Percentages may not total 100 percent due to rounding.

Source: M. Burcyzcka and S. Conroy, "Family Violence in Canada: A Statistical Profile, 2016." *Juristat* (January 17, 2018), Table 3.2, p. 62, Statistics Canada Catalogue No. 85-002-X, www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54893-eng.pdf. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada.

In terms of intimate partner violence, Bill C-75 proposes a number of amendments to the Criminal Code that would

- create a reverse onus at bail for an accused charged with a violent offence involving an intimate partner if they have a prior conviction for violence against an intimate partner;
- require courts to consider prior intimate partner violence charges when determining whether to release the accused or impose bail conditions;
- clarify that strangulation constitutes an elevated form of assault and a more serious form of sexual assault;
- define "intimate partner" for all Criminal Code purposes and clarify that it includes current or former spouse, common law partner, and dating partner;
- make clear that current sentencing provisions, which treat abuse against a spouse or common law partner as an aggravating factor, apply to both current and former spouses/common law partners and dating partners; and
- allow a higher maximum penalty involving a repeat intimate-partner violent offender.

SUMMING UP AND LOOKING FORWARD

Bill C-75 proposes to reclassify numerous criminal offences in order to speed up cases through the justice system. The classification of an offence factors into where a case can be heard, and where a case is heard can determine how quickly it proceeds. Bill C-75 proposes to reclassify more offences to allow prosecutors to proceed summarily. The majority of criminal cases are summary conviction cases, and as summary cases are heard by provincial courts; this would leave more serious cases to be heard by superior courts. Bill C-75 also proposes to change the time within which a charge has to be laid as well as the maximum penalty for summary conviction offences.

In addition to reclassifying offences, revisions to intimate partner violence are proposed in Bill C-75, including a reverse onus at bail hearings for those individuals with a prior conviction for violence against an intimate partner and having a higher maximum penalty when the offence involves a repeat intimate partner violent offender.

One of the most anticipated changes proposed by Bill C-75 was in regard to mandatory minimum sentences, which eliminated judicial discretion in certain cases. These types of sentences had significantly increased during the previous federal government, and many individuals wanted to reduce their number and allow judges to use their discretion when sentencing individuals. These types of sentences are reviewed in the next section.

Review Questions:

1. What does the classification of offences refer to?
2. What will be the impact of making more offences hybrid in terms of processing cases through our criminal justice system?
3. What are some of the offences that usually include crimes against intimate partners?

Mandatory Minimum Sentences

One of the issues that the Liberal government wanted to address when it gained power was to reduce the use of **mandatory minimum sentences** and return to judges their discretion over punishment. The federal Conservatives passed 60 mandatory minimum sentences, typically involving firearms, drugs, and sexual offences. Many people were opposed to such sentences as they prevented judges from taking into account the intricacies of a case. For Justice Minister Wilson-Raybould reforming mandatory minimum sentences was a priority, although she did not identify which ones would be revised. As part of these reforms, judges were to be given the "appropriate discretion to be able to impose sentences, engage and understand—as they do better than anybody else—the individual that is before them" (Wilson-Raybould in Fine 2016). If the number of mandatory minimum sentences were going to be reduced it was believed there would be an overall reduction in the number of people incarcerated, including the number of Indigenous people incarcerated. "The data are clear. The increased use of [mandatory minimum sentences] over the past decade has contributed to the overrepresentation … of Indigenous people, racialized communities and female offenders" (Wilson-Raybould in Fine 2017a). Her comments reflected her commitment to reduce the number of mandatory minimum sentences.

In the fall of 2016, Wilson-Raybould addressed the Criminal Lawyers' Association and stated to those in attendance to expect legislation that would address these sentences in the very near future as the "examination and reform of the current use of mandatory minimum penalties is a priority to me." She later indicated that legislation would be introduced in early 2017 but this did not occur. According to Fine and Anderssen (2019:19), this happened because the "Cabinet wasn't onside," and there was nothing in Bill C-75 that dealt with mandatory minimum sentences, or any statement saying that a new approach would soon be announced. It appears to date

that the federal government has made the decision "to let judges handle the heavy lifting of bringing sanity back to Canada's sentencing laws" (Editorial 2018:A14).

Mandatory minimum sentencing laws have been in existence ever since Canada's first Criminal Code was proclaimed in 1892. At that time, six criminal offences, all of which focused upon preventing abuses of public institutions—for example, stealing post office bags—were subject to mandatory minimum sentences that ranged from one month to five years in prison. The number of these types of sentences gradually increased; by 1927, there were 13 of them. Between 1927 and 1981, the Criminal Code was amended a number of times in order to create a mandatory minimum sentence. One of these changes occurred in 1976, when Parliament abolished the death penalty and introduced in its place a mandatory minimum sentence of life in prison for the offences of murder and treason. After the Charter of Rights and Freedoms was introduced in 1982, the number of mandatory minimum sentences did not increase substantially until 1995. In that year, the federal Liberal government introduced Bill C-68, which introduced 18 mandatory minimum sentences into the Criminal Code. By 1999, there were a total of 29 offences in Canada with mandatory terms of imprisonment (Crutcher 2001).

In 2005, the federal Conservative government started to increase the number of mandatory minimum sentences. In 2005 it passed legislation, An Act to amend the Criminal Code (Protection of Children and Other Vulnerable Persons), which increased the number of mandatory minimum sentences to 40 (see Exhibit 14.2). This Act amended a number of statutes related to consent of sexual acts, sexual offences, and child abuse. One of these established sexual voyeurism as an offence, while another expanded the definition of child pornography to include audio recordings "which described, for a sexual purpose, sexual activity with a person under the age of 18 years." And in 2008 the Conservative government passed the Tackling Violent Crime Act (2008), which introduced harsher penalties and increased mandatory minimum sentences of imprisonment for serious firearm sentences. In 2012, the Safe Streets and Communities Act passed and it included mandatory minimum sentences for non-violent drug offenders. This was followed by the Protection of Communities and Exploited Persons Act in 2014 and the Tougher Penalties for Child Predators Act in 2015. The Protection of Communities and Exploited Persons Act introduced a number of mandatory minimum offences into the new prostitution legislation (see Chapter 2), while the Tougher Penalties for Child Predators Act increased the mandatory minimum penalties for a number of sexual offences against children. By 2016, there were almost 80 mandatory minimum sentences, as well as another 26 in the Controlled Drugs and Substances Act. As a result of these changes, the mandatory minimum penalties for certain crimes increased (see Table 14.3 for mandatory minimum penalties for child pornography charges).

Much discussion and debate has focused on whether mandatory minimum penalties reach their goals. Those who support such an approach state that these sentences are an effective general deterrent to crime, they prevent reoffending by putting people in prison, and they ensure greater amounts of certainty and predictability in sentencing outcomes by eliminating as much as possible those disparities found in sentencing (Caylor and Beaulne 2014). In addition, some argue they respond to public perception that the law and the courts have been too lenient for some serious offences and that they are a way of ensuring just sentencing by providing certainty and predictability in sentencing outcomes, reducing disparities in sentencing (including differences by race or gender) (Allen 2017:3).

EXHIBIT 14.2 Legislation Involving Mandatory Minimum Sentencing in Canada, 2005–15

2005—An Act to amend the Criminal Code (Protection of Children and Other Vulnerable Persons)
2008—Tackling Violent Crime Act
2012—Safe Streets and Communities Act
2014—Protection of Communities and Exploited Persons Act
2015—Tougher Penalties for Child Predators Act

These laws established new or longer minimum penalties for drug offences, impaired driving, firearms offences, and sexual offences involving children as well as child pornography. For some of these offences, mandatory minimum sentences are triggered by aggravating circumstances such as the age of the victims, use of firearms, repeat offending, type of drug (for drug offences), or location of the incident (e.g., a school). For other offences, such as child pornography and sexual violations against children, mandatory minimum sentences apply in all circumstances where the offence is committed (Allen 2017:3).

Source: M. Allen, "Mandatory Minimum Penalties: An Analysis of Criminal Justice System Outcomes for Selected Offences." *Juristat* (August 29, 2017), Statistics Canada Catalogue No. 85-002-X, p. 3, https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54844-eng.pdf?st=swpBxuk0. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada.

TABLE 14.3 Mandatory Minimum Sentences for Sexual Violations against Children

Offence and Criminal Code section	Mandatory minimum penalty in 2005	Mandatory minimum penalty in 2012	Mandatory minimum penalty in 2015
Sexual interference (s. 151)			
Summary	14 days	90 days	Change to maximum penalty
Indictable	45 days	1 year	
Invitation to sexual touching (s. 152)			
Summary	14 days	90 days	Change to maximum penalty
Indictable	45 days	1 year	
Sexual exploitation (s. 153)			
Summary	14 days	90 days	Change to maximum penalty
Indictable	45 days	1 year	

Source: M. Allen, "Mandatory Minimum Penalties: An Analysis of Criminal Justice System Outcomes for Selected Offences." *Juristat* (August 29, 2017), Text table 1, p. 6, Statistics Canada Catalogue No. 85-002-X, www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54844-eng.pdf?st=swpBxuk0. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada.

Others believe that mandatory minimum penalties lead to inequitable outcomes and that their impact on certain groups such as Indigenous people, Black people, and the cognitively impaired can result in their overrepresentation in prison. They can also lead to the loss of discretion held by judges, eliminating the chance that they could reduce the burden of penalties based on the facts of the case. Others point out that they could lead to more and longer court cases as individuals who are charged with a mandatory minimum sentence will be more likely to appear to contest the charge(s). And opponents to mandatory minimum sentences argue that they shift discretion from judges to prosecutors through the use of Crown election procedures and plea bargaining (particularly where prosecutors decide to proceed summarily or by indictment for hybrid offences (see Investigating: Mandatory Minimum Sentences). A number of Canadian research studies as well as studies in other Western jurisdictions have found that there "is no credible evidence that enactment or application of mandatory penalties reduces crime rates" (Tonry 2011:733).

In Canada, those who oppose this increase in mandatory penalties point out that a mandatory minimum sentence could not be struck down on the basis of showing that there was a violation of section 12 of the Charter. This was because the Supreme Court of Canada established that a challenge to a mandatory minimum sentence requires two steps: (1) the court must first determine what is a proportionate sentence for the offence and (2) the mandatory minimum sentence makes a judge impose a sentence that is grossly disproportionate. At the end of 2016, the federal Justice Department was watching more than 100 constitutional challenges to mandatory minimum penalties.

Using this approach, a number of recent cases focusing upon mandatory minimum sentences have been struck down by the courts. For example, in *R. v. Nur* (2015), the Supreme Court held that the three-year mandatory minimum penalty for illegally possessing a firearm was unconstitutional as it could result in a disproportionate sentence. The following year, in *R. v. Lloyd* (2016), the Supreme Court ruled that the one-year mandatory minimum penalty for drug trafficking by a non-violent drug offender was unconstitutional. Both of these were leading cases as they made other offences with mandatory minimum penalties vulnerable to constitutional challenges under s. 12 of the Charter. For example, in *R. v. EJB* (2017), the Alberta Queen's Bench decided the one-year mandatory minimum penalty for sexual exploitation to be of no force. And in *R. v. Sharma* (2018), a judge struck down a two-year mandatory minimum sentence for drug traffickers, calling them a type of "cruel and unusual punishment" for Indigenous peoples involved in a "tragic history" within the criminal justice system (Fine 2018a:A1).

A concern raised was that mandatory minimum sentences for some offences would result in longer trials as the accused would go to court in the hope of avoiding the minimum sentence. In her analysis of sexual violations against children, including sexual interference (s. 151), invitation to sexual touching (s. 152), and sexual exploitation (s.153), Allen (2017) reported that since 2005 there had been a small increase in the proportion

Investigating: Mandatory Minimum Sentences

Some offences in the Criminal Code are hybrid offences, meaning that they can be processed by way of either summary or indictment. These include child pornography, sexual violations against children, and some firearms offences, where the offence is "deemed indictable unless and until the Crown has elected to proceed summarily" (*R. v. Dudley* (2009)). This decision is referred to as "Crown election" and occurs prior to the accused entering a plea. In *R. v. Dudley* (2009), the Supreme Court stated that "Parliament's enactment of dual procedure [hybrid] offences recognizes that certain crimes can be more or less serious depending on the circumstances and provides the Crown with discretion to choose the most appropriate procedure and range of potential penalties."

When offences have mandatory minimum penalties Crown election provides some discretion for prosecutors to pursue proportionate sentencing for less serious cases by summary conviction, especially where an offender agrees to plead guilty. This is the basis of one of the arguments that has been cited against mandatory minimum penalties: that they increase the discretionary power of prosecutors through Crown election (Mangat 2014). For example, by using plea bargains prosecutors may be able to offer a lesser minimum sentence by electing to proceed summarily. It should be noted, however, that Crown election is often subject to policies and guidelines. The Public Prosecution Service of Canada Deskbook, for example, sets out guidelines for federal prosecutors describing the circumstances of the offence and background of the accused that the Crown Counsel must consider in electing to proceed summarily or by indictment. Guidelines also exist for various offences at the provincial level. For example, Manitoba and British Columbia set out prosecutor guidelines with respect to firearms.

Questions

1. What is a "Crown election" and what is it subject to?
2. How are prosecutors sometimes able to use their discretion when an accused is charged with an offence?

of summary cases of certain violent crimes resulting in a finding of guilt (from 72 percent to 77 percent) but a significant increase in custody sentences for guilty cases (from 37 percent to 85 percent). The report also found an increase in the amount of time it took to process these cases through the courts (see Figure 14.1). Between 2000–01 and 2014–15 there was "a continuing increase in the proportion of sexual violations against children cases that took two or more years to complete in court" (Allen 2017:8). Michael Spratt, a criminal defence lawyer, pointed out that mandatory minimum sentences "offer no incentive for those guilty of crimes to resolve charges . . . [and] . . . they offer a perverse incentive for innocent people to plead guilty to lesser charges in order to avoid a higher minimum sentence . . . [furthermore] . . . they don't deter others from committing crimes" (Raymer 2017).

SUMMING UP AND LOOKING FORWARD

Judges have traditionally had a wide degree of freedom when determining the sentence of someone convicted in their court. Although in some matters (such as first degree murder) they have no chance to give an alternate sentence, in most others they hold considerable choice. The degree of discretion available to the courts has been viewed as a key reason behind the emergence of mandatory minimum sentences. When these sentences are introduced it is argued that everyone will know that a specific punishment will follow a conviction for a criminal offence. Parliament stipulates that anyone convicted of a specified offence will receive a minimum number of days or years of incarceration. This sentence is mandatory and it is expected to deter potential offenders. While it is hoped that this will lead to a reduction in the number of crimes brought to trial, some commentators have pointed out that the opposite will oftentimes happen as more people may be willing to go to court to contest the charges rather than pleading guilty.

One reason why Bill C-75 was introduced was that some laws were seen as being the cause of increasing numbers of Indigenous peoples and Black individuals in both remand and in federal and provincial correctional institutions. Some critics claimed this is the result of systemic and gendered violence, issues discussed in the next section.

Review Questions:

1. What were the reasons why the Minister of Justice wanted to include mandatory minimum sentences in Bill C-75?
2. What are the reasons why people support mandatory minimum sentences?
3. What are the reasons why people don't support mandatory minimum sentences?

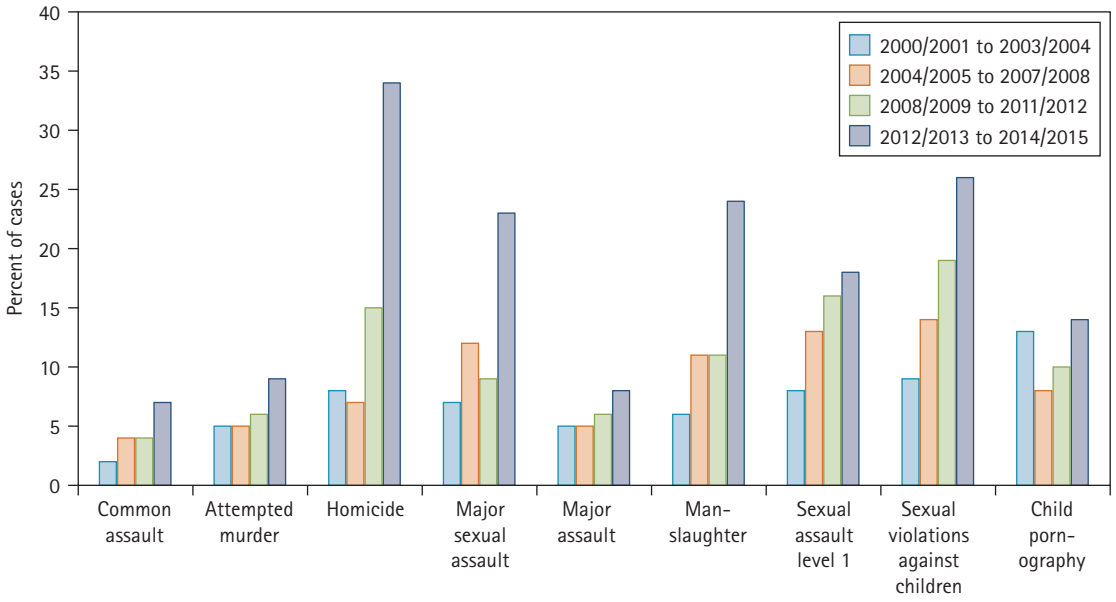

FIGURE 14.1 Percentage of Indictable Cases of Selected Offences Taking Two or More Years to Complete in Court, by Year of Case Completion

Source: M. Allen, "Mandatory Minimum Penalties: An Analysis of Criminal Justice System Outcomes for Selected Offences." *Juristat* (August 29, 2017), Chart 1, p. 7, Statistics Canada Catalogue No. 85-002-X, www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54844-eng.pdf?st=swpBxuk0. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada.

Systemic and Gendered Racism in the Canadian Criminal Justice System

Indigenous Inmates

A reason why Bill C-75 was introduced was because many of the areas mentioned above (such as peremptory challenges and bail) were leading causes of the overrepresentation of Indigenous peoples in remand and their **overincarceration** in correctional facilities. In fact, their overrepresentation in correctional facilities has continually increased, even as the Canadian crime rate decreases. Notably, in 2015–16 the overrepresentation of Indigenous adults was higher among females than males. Indigenous females accounted for 38 percent of female admissions to provincial and territorial sentenced custody, whereas Indigenous males accounted for 26 percent of male admissions to provincial and territorial sentenced custody. In the federal correctional services during the same period, Indigenous females accounted for 31 percent of female admissions to sentenced custody, whereas the figure for Indigenous males was 23 percent. Further still, as documented by the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF), this pattern is increasing at an alarming rate. Currently, Indigenous women are the fastest growing prison population, representing more than 35 percent of the federal population of women prisoners.

Still, according to Human Rights Watch (HRW), these alarming statistics do not capture the whole story. For example, HRW pointed out that Indigenous women comprise a higher percentage of the short-term detention population although they were not always charged with an offence. In its Saskatchewan report, HRW stated that such practices are the result of "entrenched and institutionalized stereotyping of Indigenous women by the police" (HRW 2017:8).

LEAF and IAAW contend that the overrepresentation of Indigenous women and girls in the criminal justice system, and their disproportionate violent victimization, is due to gendered racism and enduring colonialism (e.g., environmental degradation, militarization, **systemic racism**, and continued theft of Indigenous lands). The Inter-American Commission on Human Rights (IACHR) report on *Missing and Murdered Indigenous Women in British Columbia* puts it best: "The story of how so many Aboriginal women came to be locked up within federal penitentiaries is a story filled with a long history of dislocation and isolation, racism, brutal violence as well as enduring a constant state of poverty" (IACHR 2014).

While court and police data are not officially available by Indigenous identity, corrections data persistently reveal that Indigenous adults are more likely to be imprisoned than non-Indigenous adults. In 2015–16, Indigenous adults comprised 28 percent of admissions to federal custody and 27 percent of admissions to provincial/territorial custody. Meanwhile, at provincial/territorial levels, the overrepresentation of Indigenous offenders surpasses their percentage in the general population from double to nearly seven times as much (see Figure 14.2).

Provinces with the largest numbers of Indigenous people in the adult population consistently report a larger representation of Indigenous offenders in their sentenced admissions. The western provinces (British Columbia, Alberta, Saskatchewan, and Manitoba) account for the largest overrepresentation of Indigenous offenders in sentenced custody compared to their representation in the adult population. In response to these data, *Maclean's* magazine noted that "This helps explain why prison guard jobs are among the fastest-growing public occupation on the Prairies. And why criminologists have begun quietly referring to Canada's prisons and jails as the country's 'new residential schools'" (Macdonald 2016).

In Saskatchewan, Indigenous people are 33 times more likely to be incarcerated. What's more, in Prairie courtrooms it is not uncommon for Indigenous defendants to comprise 85 percent of criminal caseloads. According to recent data, at Manitoba's Women's Correctional Centre in Headingley as many as nine in ten women are Indigenous. At neighbouring Stony Mountain Institution, Indigenous men comprise 65 percent of the prison population. Frequently, they are incarcerated because they did not comply with a curfew or condition of bail or are trapped inside Canada's punitive mandatory minimum sentences for minor drug offences. The federal Conservative government (2006–15) passage of mandatory minimum sentences led to the raising of punishments for a wide-ranging list of crimes, all of which disproportionately affects Indigenous people and other racialized people (ibid.).

Chartrand (2018) effectively captured that the systemic reasons behind the overrepresentation of Indigenous people in the correctional system was due to acts that are associated with social issues such as, for example, the lack of educational and employment opportunities and histories of sexual abuse that contribute to their increased rates of criminalization and imprisonment. Prisons themselves are problematic:

> [P]risons are characterized by authoritarianism, power imbalances, restriction of movement and activities, isolation, lack of freedom of association and enforcement of sometimes arbitrary and trivial demands … [and] often reflect and even perpetuate the very trauma and violence experienced by Indigenous people.

Earlier still, in 1999 in *R. v. Gladue* the Supreme Court of Canada similarly explained the overrepresentation of Indigenous people in the correctional system, pointing out that a number of sources lead to the overincarceration of Indigenous people. The Supreme Court noted that this "arises from bias against Aboriginal people and from an

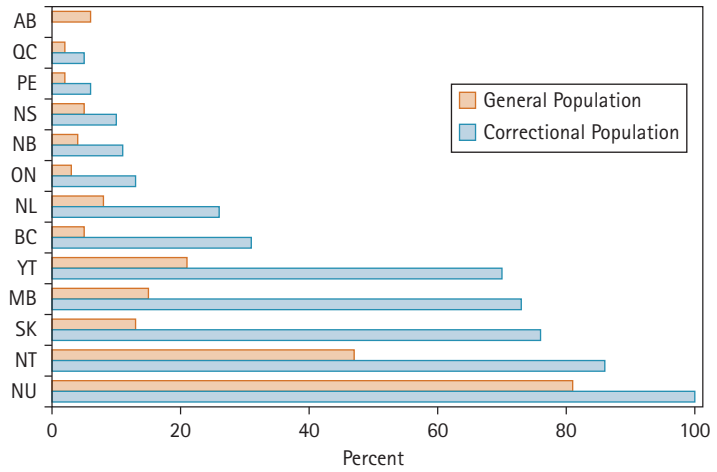

FIGURE 14.2 Percentage Indigenous Adult Admissions to Custody and General Population by Province/Territory, 2015–16

Note: Correctional data from Alberta is not available. Calculations where Indigenous identity is known.

Source: Department of Justice, The Canadian Criminal Justice System: Overall Trends and Key Pressure Points, (2017). Found at http://www.justice.gc.ca/eng/rp-pr/jr/press/

number TEN architectural group

Manitoba's Women's Correctional Centre in Headingley, where data showed that as many as nine out of ten inmates are Indigenous.

unfortunate institutional approach that is more inclined to refuse bail and longer prison terms for Aboriginal offenders" (cited in Borrows 2005:354). The Supreme Court further explained that "the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions" (*R. v. Gladue* (1999)). And in *R. v. Ipeelee*, the Supreme Court acknowledged the influence of Canada's colonial history on the overrepresentation of Indigenous people in the criminal justice system.

Chartrand (2018) has also recently shed additional light on Indigenous people as victims of systemic racism within the federal prison system:

> Around the time that Canada started receding its formal "Indian assimilation" policies in the 1950s … penitentiary and child welfare systems started to quietly assume a new role in the lives of Indigenous people. In fact, prior to the 1960s, Indigenous people only represented one to two per cent of the federal prison population. The rates have consistently increased every year since.

Yet, the gap between Indigenous and non-Indigenous offenders continues to widen on every imaginable indicator of correctional performance. Indigenous offenders serve disproportionately more of their sentence behind bars before initial release; are underrepresented in community supervision programs; are overrepresented in maximum-security institutions; and are more likely to return to prison on revocation of parole, while most are released on statutory release or warrant expiry as opposed to parole. Indigenous people are also more likely to be subjected to other highly restrictive sanctions, including segregation, involuntary interventions, greater security classifications, involuntary transfers, physical restraints, and self-harm. Further, they experience a disproportionate number of police checks, arrests, bail denial, and sentencing miscarriages (Chartrand 2018).

Similar to their representation in the general population, Indigenous adults in correctional services are generally younger than non-Indigenous adults. Data reported in 2018 by Public Safety Canada revealed that in federal institutions, Indigenous inmates are on average 3.4 years younger than non-Indigenous inmates. This was also the case for sentenced admissions in B.C., Saskatchewan, Manitoba, and Ontario, where more of the non-Indigenous group is 30 years of age or older. Nevertheless, the Indigenous remand population is mostly younger than the group on sentenced admissions, and this is particularly true for B.C. and Saskatchewan. In Manitoba, age differences are

most extreme due to a significantly larger group of non-Indigenous people 30 years of age or older.

Indigenous inmates are also more likely to have served prior youth and/or adult sentences; to be incarcerated more often for a violent offence; to have a high risk rating; to have higher need ratings; to be more drawn to gangs; to have more health problems, including fetal alcohol spectrum disorder (FASD) and mental health issues and addiction; and to have less formal education (Mann 2010; Public Safety 2018). On the last point, approximately three-quarters of all Indigenous adults involved in correctional services had not completed high school compared to one-third of non-Indigenous adults. Indigenous people were also less likely to have been employed at the time of their admission to correctional services compared to non-Indigenous people (35 percent versus 44 percent) (Brzozowski et al. 2006; Public Safety 2018).

Black Inmates

The federal offender population is becoming more diverse, as evidenced by a drop in the percentage of Caucasian offenders, from 62.8 percent in 2011–12 to 58.8 percent in 2015–16. Meanwhile, between 2011–12 and 2015–16, the Indigenous population increased by 16.6 percent, from 4,483 to 5,227. Like Indigenous people, Black people are overrepresented in the Canadian prison system. On a given day in 2015–16, out of an average of 14,615 prisoners in Canadian federal institutions, 9 percent were Black (26 percent were Indigenous). Between 2005 and 2016, the federal incarceration rate of Black people in Canada increased by 70 percent. Meanwhile, Black people constituted only 2.8 percent of the general Canadian population. This overrepresentation reflects how Black people, like Indigenous people, are regularly targeted and overpoliced in Canada.

A recent report revealed that while in prison Black inmates are subject to almost 15 percent of all use-of-force incidents and are overrepresented in segregation. In 2014, the Office of the Correctional Investigator concluded that "despite being rated as a population having a lower risk to re-offend and lower need overall, Black inmates are more likely to be placed in maximum security institutions" (McIntyre 2016).

The office of the correctional investigator's observation harkens back to the 1995 *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System.* The Commission found overwhelming evidence of systemic racism against Blacks at every stage of the province's criminal justice system (i.e., policing, courts, and correctional institutions). And yet, all these years later, the problem remains. In 2016, Howard Sapers, then Correctional Investigator of Canada, weighed in on the issue, contending that the disproportionate incarceration of Blacks in Canada is commonly ignored because while the Black prison population is growing rapidly, it is not the main distinguishable incarcerated group (Office of the Correctional Investigator 2016). While the rate of Indigenous incarceration is slowing in relation to other populations, growing by 50 percent between 2006 and 2016 compared to nearly 70 percent for Blacks, it remains a substantial and urgent problem.

The issue of Black inmates' overrepresentation in the offender population and systemic racism is reflected in another issue—"carding." African Canadian rights advocates and their allies have long argued that being stopped by the police on the street, asked for identification, and having one's personal information then catalogued in a database by the Toronto police without cause unduly targets Black individuals. Police records from 2013 support this assertion; while 8 percent of Torontonians are Black, this group was targeted in 27 percent of all carding episodes. Records examined by the *Toronto Star* from 2009 to 2010 also confirm that on average Black people were 3.2 times more likely to be carded in Toronto than White people, irrespective of being suspected of a crime. The police data were obtained by the *Toronto Star* via a Freedom of Information request. However, most Canadian police departments do not collect racial data on police interactions.

In part due to such data, a new policy went into effect in January 2017, which among other things stipulated that police are required to inform people that they have a right not to talk to officers or show identification in cases other than arrest, detainment, or when a search warrant is executed. While panned by some critics for not prohibiting carding completely, the new policy was designed in part to end arbitrary stops, principally those based on race, and to improve the relationship between the public and officers (CBC News 2018).

The data further showed that despite comprising less than 1 percent of the population of Vancouver, 4 percent of those carded in that city were Black. Josh Paterson, executive director of the B.C. Civil Liberties Association, remarked: "It is difficult for us to imagine any conclusion other than that street checks are being conducted in a discriminatory manner here in the city of Vancouver. We are asking for an immediate independent investigation to determine what is going on and how this can be fixed" (Canadian Press 2018b).

Toronto-based lawyer and African Canadian rights advocate Anthony Morgan has suggested that the irrelevance to most people of the disproportionate incarceration of Blacks in Canada originates in a deliberate denial of the existence of systemic racism in this country. On an individual level, Canadians generally

consider Black incarceration a uniquely U.S. problem. "It has a lot to do with what I've called Canadian racial exceptionalism," Morgan has said. He continues to say that "it is overwhelmingly Black kids who are being criminalized and punished. I think the generalized silence has to do with what we want to believe about ourselves as Canadians" (McIntyre 2016). Morgan contends that the overrepresentation of the Black prison population is actually somewhat more marked in Canada than in the U.S. (ibid.).

When it comes to resolutions, Morgan—like other African Canadian rights advocates and their allies—argues that attention to Black incarceration and systemic racism, à la Black Lives Matter, is a crucial step in solving the problem. But it is not enough. Morgan argues that the federal and provincial/territorial governments must work with Black communities to create stronger community and social foundations. He also argues that the federal government must craft an African Canadian Justice Strategy to tackle the growing Black prison population, akin to the 1991 Aboriginal Justice Strategy that did the same for the growing Indigenous prison population. An African Canadian Justice Strategy would employ community-based initiatives, such as restorative justice and diversion programs, and advance alternative sentencing options (ibid.).

To fully appreciate the urgency of Morgan's words, one needs to understand the profile of Black inmates. The following profile is based on information collected by the Office of the Correctional Investigator Canada (2013):

- From 2003–04 to 2012–13, the number of federally incarcerated Blacks increased by 80 percent (from 778 to 1,403).
- Four percent of Black inmates are women.
- The majority of Black inmates are incarcerated in federal correctional facilities located in Ontario (60 percent) and Quebec (17 percent).
- Approximately one-half of Black inmates are under the age of 30, and 8 percent are over the age of 50.
- Fifty-one percent of Black inmates were incarcerated for Schedule I (violent) offences and 18 percent for Schedule II (drug) offences.
- Black inmates are no more likely to be sentenced for a violent crime than any other group.
- The majority of Black offenders (81 percent) are not affiliated with a gang.
- Black offenders have higher completion rates for all conditional release programs.
- Black inmates are more likely than other inmates to be placed in maximum-security facilities as well as solitary confinement.
- Black inmates are more likely to have use of force against them from correctional officers.

The following information about Black inmates is based on interviews of 73 Black inmates (30 women and 43 men) by the Office of the Correctional Investigator Canada (2013):

- Nearly, all Black inmates reported being discriminated against by correctional officials. The most common type of discrimination was covert discrimination, which increases their marginalization, exclusion, and isolation.
- Black inmates are commonly stereotyped—as, for example, troublemakers and gang members—which impacts official decision making with regard to security classification, program enrollment, work assignments, and recommendations for conditional release programs.
- Most Black women had been convicted of drug trafficking, and reported that they were forced into trafficking drugs due to threats of violence against their families or to escape poverty.

SUMMING UP AND LOOKING FORWARD

Indigenous peoples are overrepresented and overincarcerated in our criminal justice system, and as a result a number of the proposals in Bill C-75 were directed at reducing the amount of representation and incarceration they experience. Court and police data are not officially available by Indigenous identity, but corrections data persistently reveal that Indigenous adults are more likely to be imprisoned than non-Indigenous adults. In 2015–16, Indigenous adults comprised 28 percent of admissions to federal custody and 27 percent of admissions to provincial/territorial custody. Meanwhile, at provincial/territorial levels, the overrepresentation of Indigenous offenders surpasses their percentage in the general population from double to nearly seven times as much. While there have been numerous efforts in the past to alleviate this situation they have not been able to solve these issues to the extent that the current federal government was hoping they would be able to. As a result, the federal government introduced the proposals in Bill C-75 to further reduce the overrepresentation and overincarceration of Indigenous people across Canada.

Blacks are also overrepresented and overincarcerated in the Canadian criminal justice system. In 2015–16, 9 percent of all inmates in Canadian federal institutions were Black, and between 2003–04 and 2012–13 the number of federally incarcerated Blacks rose by 80 percent. Black inmates are subject to almost 15 percent of all use-of-force incidents and are overrepresented in segregation. They are more likely to be placed in a federal maximum security institution although as a population they have a lower risk to reoffend. When they are released on a conditional release program, Black inmates have higher completion rates.

In addition to introducing Bill C-75, the federal government also passed Bill C-45, An Act respecting cannabis and to amend the Controlled Drug and Substances Act, which legalized the recreational use of cannabis. The next section overviews this Act and discusses some of the types of criminal offences when this Act was introduced.

Review Questions:

1. What is the role of institutional racism in the overrepresentation and overincarceration of Indigenous peoples in Canada?
2. Why does the gap between Indigenous and non-Indigenous offenders continue to widen on every imaginable indicator of correctional performance?
3. What is the impact of carding for Black individuals?
4. Explain why the disproportionate incarceration of Black individuals in Canada is commonly ignored.
5. Explain how systemic racism accounts for why Black people are overrepresented in corrections.

Bill C-45: The Cannabis Act

On October 17, 2018, the Canadian government passed Bill C-45, An Act respecting cannabis and to amend the Controlled Drug and Substances Act, which legalized the recreational use of cannabis. The Cannabis Act created a legal framework that allows adults to access legal cannabis through appropriate retail establishments that receive their cannabis from a regulated cannabis producer, or that is grown in limited quantities at home as per the regulations. The Cannabis Act is divided into four main areas: consumption, production, distribution, and penalties.

The federal legislation, which may be subject to provincial legislation (see below), allows anyone who is 18 years of age or older to consume cannabis, and they can legally possess up to 30 grams of legal dried cannabis or its equivalent while in public. In addition, they can also legally share up to 30 grams of legal dried cannabis or its equivalent with other adults. Provinces can raise the minimum age but cannot lower it. In terms of production, producers of legal and regulated cannabis must obtain a licence from Health Canada as well as make sure that all the legal cannabis they produce is of the required quality and safe to consume. Furthermore, it is the responsibility of the provinces and territories to

Adrian Wyld/The Canadian Press via AP

Federal ministers attend a news conference on the *Cannabis Act* in Ottawa, October 17, 2018.

establish a distribution model. Penalties exist for the possession of significant amounts of cannabis, as well as for trafficking and distributing it illegally. For example, there are a range of penalties for an offence, from ticketing adults who commit a minor production offence to a maximum of 14 years of imprisonment for a more serious offence.

There is also a distinction between the powers held by the federal and the provincial/territorial governments. The federal government is responsible for controlling and regulating how cannabis is grown, distributed, and sold. In addition, the federal government addressed drug-impaired driving by enacting new criminal offences (for driving with a blood-level concentration that is equal to or higher than the permitted concentration) and increasing certain maximum penalties and minimum fines. The provinces/territories have administrative powers over the distribution and sale of the legalization framework and can create more restrictions, such as:

- increasing the minimum age limit in their jurisdiction;
- lowering the possession amount for cannabis;
- creating more rules for growing cannabis at home, including not allowing any plants for recreational use; and
- restricting where cannabis can be consumed, for example, in public spaces.

What were some of the reasons why cannabis was legalized? Legalization occurred for a number of reasons, including the following:

- According to the 2015 Canadian Tobacco and Drugs Survey, the use of cannabis was 21 percent among youth aged 15 to 19 and just under 30 percent for young adults between the ages of 20 and 24 and 10 percent for those over the age of 30.
- The criminalization of cannabis leads to thousands of criminal records each year, which can have long-term consequences for those convicted, such as restricted employment opportunities.
- The criminalization of cannabis has also contributed to major backlogs within the criminal justice system.

EXHIBIT 14.3 A Selected Timeline of the Criminalization and Legalization of Cannabis in Canada

1923	Cannabis is outlawed in Canada, the result of the then federal Health Minister adding a new drug to the Opium and Narcotic Act.
1972	Increased use of cannabis leads to the federal government appointing a royal commission to explore the non-medical use of drugs. The Le Dain Commission (named after the chair of the commission, Gerald Le Dain) notes in its final report that there is no scientific evidence to support the criminal sanction for cannabis possession.
2000	The Ontario Court of Appeal strikes down a complete ban on medical cannabis, saying the current ban is unconstitutional (*R. v. Parker*).
2001	The federal government introduces new legislation allowing some people access to medical cannabis.
2002	A Senate subcommittee studying illegal drugs recommends the legalization of cannabis.
2003	The federal government introduces a bill (Bill C-38) that recommends the decriminalization of small amounts of cannabis. If a person possesses 15 grams or less they would receive a fine; if they possess between 15 and 30 grams they would be either ticketed or arrested based on the discretion of a police officer. In addition, the personal cultivation of up to seven plants would become a summary offence; the cultivation of more than seven plants would be an indictable offence. The bill did not pass as Parliament was prorogued.
2004	Bill C-10, an identical bill to Bill C-38, is introduced into Parliament but is not passed as the federal government is defeated.
2009	The federal government introduces legislation that would increase the penalties of cannabis trafficking by creating a mandatory minimum sentence upon conviction.
2013	The federal government passes new regulations with the intent of ending personal cannabis production and replacing it with government-licensed cannabis producers. Some medical cannabis users successfully challenge the regulations in federal court, arguing that the federal government's decision to end home cultivation and restrict patents to buy cannabis only from corporations violates their Charter rights to "life, liberty, and security of the person."
2016	The federal court rules the new federal regulations would infringe on Charter rights, holding that the evidence establishes most patients are able to produce their own cannabis as medicine without threat to their own health and safety or that of the public. Later that year, the federal government passes new regulations combining the personal cultivation program with regulated, commercial medical cannabis producers (*Allard et al. v. Her Majesty the Queen*).
2017	On April 13, 2017, Bill C-45, which would legalize recreational cannabis use, is introduced into Parliament.
2018	On June 19 the Senate passes Bill C-45, and Prime Minister Trudeau sets October 17, 2018 as the date for legalization.

In 2016, there were just over 44,250 offences involving adults reported to the police (the majority of which were for possession), representing a 6 percent decrease from 2015; in 2017 there were just under 38,500 possession offences involving adults, or a 15 percent decrease from the previous year. For youths, the police-reported crime rate for possession of cannabis was just under 8,000 offences in 2017 (Allen 2018). It was different for the number of court appearances for those adults charged with possession. For adults there were more court appearances in 2015–16 compared to 2014–15 (an increase of just under 21,000 court appearances, with a median of six appearances for each case in 2015–16) (Maxwell 2018).

- Cannabis possession arrests involved members of racial minorities being overrepresented within the criminal justice system (Browne 2018). Prime Minister Trudeau recognized that a disproportionate number of these individuals have experienced discriminatory enforcement when possession of small amounts of cannabis was prohibited.

In March 2019, Minister of Public Safety Ralph Goodale tabled a bill that would inform people how to apply for **pardons** (or record suspension) for those who were convicted of possessing less than 30 grams of cannabis. However, this bill was not going to expunge the criminal records of individuals convicted of possession, because **expungement** is valid only in "cases where there is a profound historical injustice that needed to be corrected" (Goodale, in Hager 2019:A19). However, Annamaria Enenajor, who is directing the national Cannabis Amnesty campaign, said this bill represents only the minimum of what the federal government could do, saying that "It's a lost opportunity, it's going halfway to where it needs to be" (Enenajor, in Hager 2019:A19).

Critical Issues in Canadian Criminal Justice

DISCRIMINATION, JUSTICE, AND THE FEDERAL APOLOGY TO SEXUAL MINORITIES IN CANADA

The majority of people think of criminal laws as being synonymous with justice, but the reality is much more complex. As Hurlbert (2011:29) points out, the law provides "a skeleton or framework for justice. It sets out certain attributes of the justice system, but it is only one social institution in the study of justice." By using social institutions Hurlbert is referring to the fact that many differences exist in how our social lives interact with justice. The law is a social institution, but it is only "one social institution that mediates relations between people and has influence on the actions and choices of people" (ibid.). Her point is that we must sometimes go beyond the criminal justice system to view justice in a social context. This allows us to view justice not just as an individual problem, but also as a social problem. When we do this, we can broaden our view of justice and injustice.

Adrian Wyld/The Canadian Press

Prime Minister Justin Trudeau and other federal ministers raise the pride and transgender flags on Parliament Hill in Ottawa.

Although the Charter of Rights and Freedoms wants justice and equality for all, types of injustice exist around us. For example, injustice occurs when formal justice is violated or not upheld. A common type of injustice surfaces when we think about how the criminal justice system responds to crime. Examples such as police–minority contact and inadequate jury representation and overrepresentation of minority groups that are incarcerated are all examples of injustices that interact with our criminal justice system.

An injustice was at the centre of an address given by Prime Minister Trudeau toward the end of November 2017, when he apologized in the House of Commons for the decades of organized discrimination of sexual minorities in Canada. As victims of the gay and lesbian purges from the federal public service watched from the gallery, the Prime Minister emotionally apologized in the House of Commons that "over our history, laws and policies enacted by the government led to the legitimation of much more than inequality—they legitimized hatred and brought shame to those targeted . . . It is with shame and sorrow and deep regret for the things we have done that I stand here today and say, we were wrong. We apologize, I am sorry. We are sorry."

Critical Issues in Canadian Criminal Justice (*Continued*)

His apology followed demands by the LGBTQ community for an apology and redress for decades of discrimination against sexual minorities by the federal government. From the 1950s through to the 1990s, government officials attempted to identify and then remove and/or discredit those persons thought to be a member of a sexual minority from the federal public service, the RCMP, and the military. One reason given for this discrimination was that the Canadian government was concerned gays and lesbians were potentially open to blackmail by the Soviet Union. During the 1960s, the investigations had gone deep into the federal public service, with an RCMP unit reportedly having a list of at least 9,000 "expected" gays and lesbians who were deemed to be "national security" threats. The Canadian government also commissioned a Carleton University professor to develop a homosexuality test—the so-called "fruit machine" test. In one test, people were exposed to pornographic images while a camera took pictures of their pupils to see if they dilated, which suggested excitement and therefore attraction to the same sex. This machine was used by the federal government throughout the 1960s, until the Defence Research Board eliminated funding in 1967 (CBC 2017). The last recorded dismissal of an individual for being gay or lesbian occurred in the 1980s.

The Prime Minister's decision to make an apology to the people who lost their jobs followed public outrage when *The Globe and Mail* published a report on the imprisonment of Everett Klippert, who had passed away in 1996. In 1966, Klippert was designated a dangerous sexual offender as he refused to stop having sexual relations with other men; in the opinion of a psychiatric group, he was an "incurable homosexual" (Ibbitson 2017a:A5). In 1967, the Supreme Court upheld Klippert's dangerous sexual offender designation (*Klippert v. The Queen* (1967)), and he spent a decade in prison before being released due to a change in the law. This change occurred during the late 1960s, when Justice Minister Pierre Trudeau introduced a bill in Parliament (which became law in 1969) decriminalizing homosexuality. Specifically, the government legalized consensual sex between two men over 21 conducted in a private space. Any other gay sex, however, continued to be illegal.

In 2016, Prime Minister Justin Trudeau promised to consider pardons and apologies for men convicted of gross indecency in response to numerous stories about government federal public service workers and members of the military who had been dismissed, including *The Globe and Mail*'s story on Everett Klippert. And in November 2016, the Prime Minister appointed MP Randy Boissonnault as his special adviser on LGBTQ issues. But this was still too slow according to members of the LGBTQ movement, who pointed out that Germany, Great Britain, and New Zealand had apologized, pardoned, and/or given financial compensation to men who in the past were convicted of committing homosexual acts (Ibbitson 2017b). As a result, they filed a $600 million class action lawsuit for claimants outside Quebec and an undefined amount for those inside Quebec, demanding an apology and redress (Brewster 2016). In 2017, an official statement announced an agreement in principle to settle the class action lawsuit. In the agreement, individuals whose careers were affected due to their sexuality prior to 1996, when the Canadian Human Rights Act was amended to prohibit discrimination based on sexual orientation, were to receive a minimum payment of $5,000 to a maximum payment of $150,000, depending on the amount of discrimination and/or harassment they experienced. The total cost of the settlement was estimated to be $145 million. In addition to the payments, the federal government introduced legislation to expunge the records of individuals who were criminally convicted during the years it was illegal to do so in order for the Parole Board of Canada to have the convictions expunged and their judicial records destroyed.

Bill C-66, the Expungement of Historically Unjust Convictions Act, passed unanimously in the House of Commons with some saying it would become "a springboard for action to remove ongoing discrimination" (Ibbitson 2017a:A5). Boissonnault told the House that those convicted "were systematically discriminated against and demeaned and they spent much of their lives with all of the repercussions of a criminal record, unable in some cases to find work or even to travel with their families" (Ibbitson 2017a:A5). While the bill took only three weeks to pass, some advocates for the rights of sexual minorities stated that the bill was flawed as it didn't allow the convictions for those individuals who were charged under the bawdy-house laws to be overturned. Between 1968 and 2004, it is estimated that over 1,300 men were charged with bawdy-house offences in police raids on 20 gay bathhouses in Toronto, Montreal, and Ottawa. Bill C-66 was criticized by many as it covers only a small number of the offences used to criminalize LGBTQ persons. Charges for gross indecency and buggery are the only offences that are able to be expunged, thereby leaving those individuals who were convicted of other criminal offences, such as the bawdy-house laws and indecent acts, unable to clear their names.

One example of the other types of criminal offences occurred in Toronto, where almost 300 men were arrested on February 5, 1981 in a series of raids involving 150 police officers at four bathhouses following a six-month investigation. At around 11 P.M., more than 100 police officers armed with crowbars

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Critical Issues in Canadian Criminal Justice (*Continued*)

and sledgehammers broke down the bathhouse doors, dragging men into the street and charging them with either being found in or owning a common bawdy house. Two hundred and eighty-six men were charged, but almost all of the charges against those arrested were ultimately dropped. Critics said the raids criminalized men for being gay and persecuted groups with no human rights protections, leading to many losing their jobs and being shunned by their families (Winsa and Powell 2016). The section of the Criminal Code outlawing bawdy houses allowed "the police to inscribe instances of gay sex into 'acts of indecency' in the bawdyhouse section to attempt to produce it as crime" (Kinsman 1996:341). On June 21, 2016, Toronto police chief Mark Saunders expressed his regrets for the police raids on the bathhouses and the arrest of the men. He said the raids were "one of the largest mass arrests in Canadian history" and acknowledged the "destructiveness" of the police action (Slaughter 2017).

EXHIBIT 14.4 Selected Timeline of Discrimination 1967–96

1967	Justice Minister Pierre Trudeau proposes amendments to the Criminal Code that would relax the laws against homosexuality.
1968	One bathhouse is raided by the Toronto police, with the majority of the criminal charges laid against men for the offence of being found in a common bawdy house.
1969	Prime Minister Pierre Trudeau's amendments pass into the Criminal Code, decriminalizing homosexuality in Canada.
1973	One bathhouse in Toronto is raided by police, with the majority of the criminal charges laid for the offence of gross indecency.
1975	One bathhouse in Montreal is raided by police, with all the criminal charges (found in a common bawdy house) laid against men.
1976	Five bathhouse raids occur: three in Montreal and one each in both Ottawa and Toronto. The majority of criminal charges laid are for being found in a common bawdy house.
1977	Quebec includes sexual orientation in its Human Rights Code, making it the first province to pass a gay civil rights law.
	Seven bathhouse raids take place, four in Toronto and three in Montreal. Most of the criminal charges are for being found in a common bawdy house.
1978	A new federal Immigration Act is passed with homosexuals removed from the list of inadmissible classes.
	One police raid of a bathhouse takes place in Montreal while another occurs in Toronto; all charges are for being found in a common bawdy house.
1979	Two police raids of bathhouses occur, one in Montreal and the other in Toronto. Just over half of all the charges are for being found in a common bawdy house.
1980	In May, Bill C-242, An Act to Prohibit discrimination on the Grounds of Sexual Orientation, gets its first reading in the House of Commons. The bill, which would place "sexual orientation" into the Canadian Human Rights Act, does not pass. MP Svend Robinson introduces similar bills in 1983, 1985, 1986, 1989, and 1991, but they also do not pass.
	One bathhouse raid takes place in Montreal with the majority of the criminal charges for being found in a common bawdy house.
1981	More than 300 men are arrested during the same evening following police raids at four gay bathhouses in Toronto. Most of the criminal charges are for being found in a common bawdy house. The next night, approximately 3,000 people march in downtown Toronto to protest the arrests.
	Three other bathhouse raids occur in Toronto and one in Edmonton, with the majority of criminal charges laid for being found in a common bawdy house.

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EXHIBIT 14.4 Selected Timeline of Discrimination 1967–96 … *continued*

1983	One bathhouse raid occurs in Toronto; most criminal charges laid are for being found in a common bawdy house.
1984	One bathhouse raid occurs in Montreal; most criminal charges laid are for being found in a common bawdy house.
1985	The Parliamentary Committee on Equality Rights releases a report entitled "Equality for All." The committee says it is shocked by the discrimination directed toward homosexuals in Canada. The report discusses the harassment, violence, physical abuse, psychological oppression, and hate that homosexuals live with. The committee recommends that the Canadian Human Rights Act be changed to make it illegal to discriminate based on sexual orientation.
1986	The federal government issues a report, "Toward Equality," in which it states that the government will take necessary measures to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.
1990	The Montreal police raid a bathhouse; eight protestors are arrested.
1991	Delwin Vriend, a lab instructor at King's University College in Edmonton, is fired because he is gay. The Alberta Human Rights Commission refuses to investigate the case because the Alberta Individual Rights Protection Act does not cover discrimination based on sexual orientation. Vriend takes the government to court, and in 1994 the court rules that sexual orientation must be added to the Act. On appeal in 1996, the provincial government wins and the lower court ruling is overturned.
	In November 1997, the *Vriend* case is heard by the Supreme Court of Canada, which on April 2, 1998, unanimously rules that the exclusion of homosexuals from Alberta's Individual Rights Protection Act is a violation of the Charter of Rights and Freedoms.
1992	The Ontario Court of Appeal, in *Haig v. Birch*, rules that the failure to include sexual orientation in the Canadian Human Rights Act is discriminatory. Federal Justice Minister Kim Campbell responds to the decisions by announcing the government will take steps to include sexual orientation in the Canadian Human Rights Act.
	The Federal Court lifts the ban on homosexuals in the military, allowing gays and lesbians to serve in the Armed Forces.
	The Federal Justice Minister introduces Bill C-108, which would add "sexual orientation" to the Canadian Human Rights Act, but it does not pass first reading.
1994	The police in Montreal raid a bathhouse; all criminal charges are for being found in a common bawdy house.
1996	The federal government passes Bill C-33, which adds "sexual orientation" to the Canadian Human Rights Act.
	The Toronto police raid a bathhouse; almost all of the criminal charges are for being found in a common bawdy house.

Summary

In the first chapter of the text, we discussed the basic functions of the criminal justice system as well as the existence of another type of system, the informal justice system. In addition, the various types of discrimination were also discussed. Both the informal justice system and discrimination were introduced to highlight how the law and the criminal justice system have each been used to protect as well as to repress the rights of different groups of people. Important questions to consider in this regard include (1) Does everyone have equal rights? and (2) Why or why not? When we try

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Critical Issues in Canadian Criminal Justice (*Continued*)

to answer these questions, it is important to try to understand how certain categories of difference exist and how they serve as a dividing line between various groups. In the case of LGBTQ groups in Canada, they have fought and continue to fight to attain equality in our criminal justice system.

Questions

1. Why did the government decide to apologize to sexual minority groups for their treatment by previous federal governments?
2. What was the *Klippert* case?
3. Why do some people believe the federal government approach to redressing the past wrongs to members of LGBTQ groups didn't go far enough?

SUMMARY

Key Points

1. Due to a "culture of complacency" within our criminal justice system the federal government had to develop and introduce into the House of Commons a number of ways to speed up the processing of criminal cases.
2. A trial by jury enables the community to participate in the criminal justice process. All jurors are supposed to be both impartial and representative.
3. The right to an impartial jury is guaranteed by s. 11(d) of the Charter of Rights and Freedoms. The meaning of the representativeness of juries has recently changed, with the most recent interpretation occurring in the Supreme Court decision of *R. v. Kokopenace* (2015).
4. Bill C-75 represents the federal government's legislative attempt to deal with the "culture of complacency" as noted by the Supreme Court of Canada. Their proposals included abolishing peremptory challenges and restricting the use of preliminary inquiries.
5. A preliminary inquiry occurs when an accused charged with an indictable offence elects to be tried in a superior court and requests an inquiry.
6. Bail hearings have contributed to the "culture of complacency" as too many individuals are awaiting their trials or sentences while they remain in a remand centre. Many of these individuals are Indigenous or members of marginalized groups.
7. Bill C-75 proposed to make more offences hybrid allowing prosecutors the ability to proceed summarily for a greater number of offences. The federal government also proposed to make tougher laws in the area of intimate partner violence.
8. Mandatory minimum sentences are considered by many to lead to more trials and many more individuals being sent to a correctional facility. But instead of making any proposals to this area in Bill C-75 it appears they let judges deal with this issue by finding such sentences unconstitutional.
9. Indigenous people are overrepresented in the criminal justice system as well as being overincarcerated. Currently the overrepresentation of Indigenous adults is higher among women than men.
10. Black individuals are also overincarcerated in federal Canadian correctional facilities. While Black people constitute less than 3 percent of the general Canadian population, 9 percent of the federal Canadian correctional system population is Black.

Key Words

bail hearing, 4

challenge for cause, 7

culture of complacency, 1

expungement, 27

hybrid offence, 13

impartiality, 8

intimate partner violence, 13

mandatory minimum sentence, 16

overincarceration, 20

overrepresentation, 4

pardon, 27

peremptory challenge, 2

preliminary inquiry, 2

reclassification, 2

representativeness, 8

systemic racism, 20

Critical Thinking Questions

1. What is the "culture of complacency"? Do you think there is a culture of complacency within our criminal justice system? If so, what was its impact on the Canadian criminal justice system? What cultural shifts are needed in Canada?
2. What is the importance of impartiality and representativeness for juries?
3. What are the differences held by criminal defence lawyers and the federal government about the impact of reforming preliminary inquiries and bail hearings?
4. Would abolishing peremptory challenges solve the problems associated with juries?
5. What was the extent to which criminal charges of possessing cannabis contributed to major backlogs within the criminal justice system prior to the legalization of cannabis?
6. To what extent do you think the changes to the bail system proposed in Bill C-75 will lead to greater efficiency and fairness in our criminal justice system?

Weblinks

The issue of whether there should be a pardon or an expungement of criminal records for possession of 30 grams of cannabis or less is a key concern. While the federal government favours pardons, others favour expungements. To hear about why an expungement is important see the following video on YouTube: "Investigating Pot Laws" with Annamaria Enenajor (15:30). To watch a video on the overrepresentation of Indigenous peoples in Canadian correctional facilities, watch the following video available on YouTube, "Indigenous Over-Incarceration" (23:28). The topic of mandatory minimum sentences is the topic of the following video available on YouTube, "Dirk Derstine Mandatory Minimum at Supreme Court of Canada" (42:23).

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R. v. Antic (2017), 1 S.C.R. 509

R. v. Cormier (22 February 2018), Winnipeg (Court of Queen's Bench)

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R. v. S.J.L. (2009), 1 S.C.R. 426

R. v. Stanley (2018), S.K.Q.B. 27.

R. v. Stinchcombe (1991), 3 S.C.R. 326, 68 C.C.C. (3d)

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GLOSSARY

Bail hearing. The purpose of a bail hearing is to make sure that the accused appears at the ensuing trial. In Canada today, the Criminal Code requires all individuals arrested to be brought before a justice of the peace, who decides whether the accused is to be released before trial. The justice of the peace is expected to release the accused unless the prosecutor supplies evidence to show either that the individual should not be released or that conditions should be attached to the release. When a hearing occurs which establishes that a defendant is dangerous to the community, the justice of the peace can deny bail. The accused may be released as long as they have a home, family, job, or other ties to the community. Those charged with first or second degree murder can be released on bail only by a superior court judge. *p.4*

Challenge for cause. Refers to a reason that has to be given for, and a determination made about, the validity of the challenge. When selecting a jury, the Crown prosecutor, the accused, and the last two jurors called to duty can challenge a prospective juror for cause, which means that they can question the presumption of juror impartiality by stating that a potential juror has a realistic potential for partiality. The purpose of a challenge for cause is the same as a peremptory challenge, which is to eliminate jurors considered by either side to be unqualified or not impartial. *p.7*

Culture of complacency. This term was used by the Supreme Court of Canada in *R. v. Jordan* (2016) when it imposed strict limits on criminal trials, noting that a significant number of delays in the criminal justice system are a result of government underfunding and/or a lack of reforms that ultimately lead to lengthy trials or decisions to decline a criminal trial. *p.1*

Expungement. When a criminal record is expunged, it is permanently destroyed or removed. The Parole Board of Canada is the only federal institution responsible for ordering or denying an application to expunge a conviction. *p.27*

Hybrid offence. Hybrid offences allow prosecutors to decide to proceed with a case either as a summary conviction case or as an indictable offence. *p.13*

Impartiality. This refers to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" as well as to the absence of bias in the mind of the adjudicator. *p.8*

Intimate partner violence. While there is no specific offence by this name in the Criminal Code, it is a reference that includes a range of conduct as well as offences that can be committed against intimate partners including homicide, assault, kidnapping, forcible confinement, sexual assault, criminal harassment, and uttering threats. *p.13*

Mandatory minimum sentence. Mandatory minimum sentences specify the minimum penalties for the most serious offences found in the Criminal Code, such as first degree murder. For some offences, sometimes under certain aggravating circumstances such a using a firearm, judges in adult courts are required by law to impose a specific punishment or length of sentence. Judges do not have the discretion to give out a sentence that is less than the mandatory minimum sentence. These also include fines, but do not apply to youths in youth court. *p.16*

Overincarceration. This refers to the prison population being socially and economically disadvantaged relative to the population generally. A finding of overincarceration means that inmates are disproportionately working class, or members of a specific racial or ethnic group. *p.20*

Overrepresentation. This refers to certain groups being more likely to appear in the criminal justice system either because they are more likely to be arrested due to overpolicing or because they are members of economically and socially excluded social groups. *p.4*

Pardon. A pardon (also known as a record suspension) clears the criminal record of an individual by removing their criminal record from the CPIC (Canadian Police Information Centre). There are a number of exceptions to this, for example an adult who committed a sexual offence against a minor will not be able to clear their criminal record. *p.27*

Peremptory challenge. Occurs where there is no questioning of a prospective juror and where no cause need be stated as to why a potential juror is being eliminated. The purpose of a peremptory challenge is the same as a challenge for cause, which is to eliminate jurors considered by either side to be unqualified or not impartial. *p.2*

Preliminary inquiry. In general, a preliminary inquiry occurs when an accused charged with an indictable offence elects to be tried in a superior court and requests an inquiry. It is used to assess whether there is enough evidence to put the accused on trial for an offence. A provincial court judge will commit the case for trial in Superior Court if the evidence is compelling and there is a reasonable expectation of a judgment against the accused. However, if the evidence is not convincing, the judge must stop the proceedings against the accused—and the court finding will be recorded as "discharged at preliminary." *p.2*

Reclassification of offences. This refers to a change in the categorization of a criminal offence. This occurs, for example, when an offence is changed from an indictable to a summary conviction or hybrid offence. *p.2*

Representativeness. Focuses upon the processes used to compile the jury array and not on its ultimate composition. There is no right to a jury array of a particular composition, nor one that is proportional to all the diverse groups in society. Representativeness is satisfied when the government provides a fair opportunity to a broad cross section of society to participate in the jury process. *p.8*

Systemic racism. Refers to discrimination (e.g., race and/or gender) existing in all aspects of the operations of our criminal justice system. It means that discrimination can consistently be found in the rates of arrest, the type of charges laid, and the decision to prosecute or stay charges, as well as in the conviction rates and types of sentences given to those convicted without any significant variation over a selected time period. *p.20*