**Introduction**

The Government of Canada is pleased to contribute to the Special Rapporteur’s development of a thematic report on Indigenous peoples’ own systems of justice, access to justice and Indigenous peoples in the ordinary justice system.

As the Special Rapporteur points out, the maintenance, development and promotion of Indigenous institutions and structures, including those relating to justice, is a key component of the right to self-determination which is highlighted in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). Furthermore, the Government of Canada recognizes that access to justice and the interaction of Indigenous peoples with the justice system generally implicate important aspects of international human rights standards. The following questionnaire response provides information and examples of the various approaches and arrangements that exist in Canada, as well as ongoing efforts related to the administration of justice, access to justice and the justice system generally as they relate to Indigenous peoples.

**Context**

As a federal state, Canada is comprised of a federal government, as well as ten provincial and three territorial governments, each of which has its own parliament or legislature and its own role with respect to the administration of justice generally. The Canadian Constitutionassigns responsibility for the administration of justice to the provinces, while substantive criminal law is within federal jurisdiction.[[1]](#footnote-1) The exercise of Aboriginal rights, including treaty rights, which are recognized and affirmed in the Constitution, may be used as a defence against prosecution under both federal and provincial laws.[[2]](#footnote-2) In addition, there are a number of self-governing and other Indigenous groups with a variety of arrangements and legal authority with respect to matters associated with justice systems.

The Truth and Reconciliation Commission of Canada, which was tasked with examining the history and legacy of residential schools in Canada, released a report in 2015. To address the legacy of residential schools and advance reconciliation, the report includes 94 Calls to Action directed at various levels of government, educational and religious institutions, civil society groups and all Canadians. On December 15, 2015, the Prime Minister reiterated the Government of Canada’s commitment to implement the recommendations of the Commission. A number of these recommendations relate to Indigenous justice systems and Indigenous peoples in the justice system.[[3]](#footnote-3) Of particular relevance are:

Call to Action 30

We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

Call to Action 31

We call upon the federal, provincial, and territorial governments to provide sufficient funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

Call to Action 38

We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

Call to Action 40

We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.

Call to Action 41

We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls. The inquiry’s mandate would include:

1. Investigation into missing and murdered Aboriginal women and girls.
2. Links to the intergenerational legacy of residential schools.

Call to Action 42

We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.

*Call to Action 50*

In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

The approaches and activities described below are among the steps that contribute to progress on these Calls to Action and build on earlier Canadian initiatives relating to justice and Indigenous peoples.[[4]](#footnote-4)

**Part 1 – Indigenous Justice Systems**

1. Approaches to Indigenous Justice Systems in Canada (Questions 1, 2, 4, 5 and 8)[[5]](#footnote-5)

Administering justice in the context of a federal state with multiple legal traditions requires coordination and collaboration among the various jurisdictions in order to ensure effective and accessible justice systems. In Canada, a variety of approaches have been taken to develop and strengthen Indigenous justice systems while reflecting a coordinated and collaborative relationship. Each of these approaches emphasizes the importance of negotiation and collaboration and includes supporting Indigenous self-governments in developing their own systems of justice. As part of the broader work of rebuilding Indigenous Nations, the Government of Canada is exploring ways to partner with Indigenous peoples on the recognition and implementation of their justice systems.

For example, the Indigenous Justice Program (IJP) is a federally-led Department of Justice Canada initiative that supports 196 community-based justice programs serving over 750 communities across the country in partnership with all 13 provinces and territories. Funded programs provide alternatives to the general Canadian justice system and their activities can fall at any point within the criminal justice system process including: prevention, pre-charge, post-charge and reintegration. The core objectives of the IJP are:

* to assist Indigenous people in assuming greater responsibility for the administration of justice in their communities;
* to reflect and include Indigenous values within the justice system; and,
* to contribute to a decrease in the rate of victimization, crime and incarceration among Indigenous people in communities with community-based justice programs funded by the IJP.

The Government of Canada also pursues a range of negotiated arrangements that address justice issues, as generally described below.

*Comprehensive Claims Agreements / Modern Treaties*

In the parts of Canada where historic treaties (negotiated between 1700 and 1923) were not negotiated, Canada has entered into negotiations with willing and interested Indigenous peoples towards the development of modern treaties (since the 1970s). Modern treaties define ongoing rights to land and natural resources, and often include Indigenous self-government. As part of such self-government arrangements, the administration of justice can also be negotiated.

In general, the self-government component of a modern treaty is intended to clarify the jurisdiction of the Indigenous government, including as it relates to the administration of justice. Such agreements can also include institutional elements to facilitate the administration of justice by the Indigenous government, including technical and financial assistance. Also included in these types of negotiated arrangements are provisions addressing the interaction between the institutions and processes of the Indigenous justice system and those of the general justice system, which can include various appeal and judicial review procedures, as well as arrangements for the enforcement and prosecution of Indigenous laws.

*Stand-Alone Self-Government Agreements*

Canada has also negotiated self-government agreements separate from comprehensive land claims. These agreements are diverse, representing various approaches over time and between groups. In some cases, a self-government agreement and comprehensive land claim agreement are closely linked elements of a unified package, and in others they may be pursued as more distinct arrangements, at different times. Canada recognizes self-government as one of the rights protected by section 35 of the *Constitution Act, 1982*, and negotiations have been guided by the Inherent Right Policy since 1995.[[6]](#footnote-6) While this policy is currently the subject of a collaborative renewal process with Indigenous peoples, it has led to the successful conclusion of a number of self-government agreements across the country.

Like the self-government aspects of comprehensive modern treaties, these negotiated agreements set out the law-making authority of the Indigenous government and provide mechanisms to ensure that Indigenous laws operate in harmony with federal and provincial laws. The specific content of each agreement varies depending on the needs, priorities and vision of the Indigenous peoples involved.

*Recognition of Indigenous Rights and Self-Determination Tables*

Over the last few years, the Government of Canada has also been working with Indigenous groups across the country to explore new ways of working together to advance the recognition of Indigenous rights and self-determination. Currently there are over 75 discussion tables, representing more than 380 Indigenous communities and a population of more than 700,000 people. Designed to bring greater flexibility to negotiations, these discussion tables represent an opportunity to explore new ideas and ways to reach agreements that will support the recognition of the rights of Indigenous groups and advance self-determination for the benefit of their communities and all Canadians.

These discussions are community-driven and respond to the unique rights, needs and interests of participating First Nations, Inuit and Métis groups.[[7]](#footnote-7) For some groups, this includes exploring issues associated with justice systems. While the details of specific negotiations are confidential, the process has so far led to the signing of several memoranda of understanding and framework agreements, some of which include justice issues among the priorities to be explored by the parties moving forward.[[8]](#footnote-8)

*Sector Specific Administration of Justice Agreements*

Building on the existing Recognition of Indigenous Rights and Self-Determination process, the federal government has also negotiated a Memorandum of Understanding with the Red Earth Cree Nation specific to advancing discussions toward developing a stand-alone administration of justice arrangement.[[9]](#footnote-9) This type of stand-alone administration of justice agreement could outline in practical and meaningful ways how an Indigenous community assumes control for the management of justice. For example, the enforcement and adjudication of Red Earth Cree’s laws, as well as how they relate to federal and provincial laws.

1. Specific Examples of the Approaches used in Canada (Questions 4-8)

Overall, there are 22 self-government agreements across Canada, involving 43 Indigenous communities. In addition, there are about 50 self-government negotiation tables at various stages of the negotiation process, and several specific administration of justice discussions. Some of these agreements and negotiations are part of a comprehensive modern treaty process, while others are not. The result is that different forms of self-governance have been, and continue to be, negotiated in Canada.

One example is the **Nunavut Agreement**,**[[10]](#footnote-10)** a modern treaty (comprehensive land claim agreement) where the self-government aspirations of Inuit are expressed through public government. This agreement resulted in the establishment of the territory of Nunavut, one of three territories located in Canada’s North. The self-government aspect of this comprehensive agreement is unique in Canada in that the Nunavut government represents all the people residing in the territory. As a public government, the Nunavut government has its own territorial justice system, composed of the **Nunavut Court of Justice, the Court of Appeal, as well as youth and small claims courts.**

**The Nunavut Court of Justice** is both the superior court and territorial court of Nunavut. It was established on April 1, 1999 as Canada's only "unified" or single-level court, through the consent of Canada, the Office of the Interim Commissioner of Nunavut, and Nunavut Tunngavik Inc (the Inuit Land Claims representative organization). The Nunavut Court of Appeal is headed by a Chief Justice and is comprised of judges from the Nunavut Court of Justice and the Courts of Alberta, the Northwest Territories, and the Yukon. The Nunavut courts have jurisdiction over all individuals in the territory, whether Indigenous or non-Indigenous.

The Nunavut Agreement also includes specific provisions regarding the hiring of Indigenous persons within the territorial government – including the justice system. These provisions address issues of under-representation and seek to ensure that the systems of governance reflect the population and contribute to socio-economic development.[[11]](#footnote-11)

Treaties and associated negotiated arrangements can also evolve over time, as demonstrated by the **Cree Nation of Eeyou Istchee** agreements.[[12]](#footnote-12) The Cree Nation is one of the Indigenous signatories to the James Bay and Northern Quebec Agreement (JBNQA) – the first modern treaty which was reached in 1975. Since then, the JBNQA has been amended by over 20 complementary agreements. In addition to these amending agreements, there is the 2008 New Relationship Agreement between Canada and the Cree Nation. This agreement included the assumption of responsibilities relating to justice by the Cree Nation Government and ultimately led to the Cree-Canada Governance Agreement which came into force in 2018. This Governance Agreement sets out the power of the Cree First Nations to make laws on a wide variety of local governance matters, including environmental protection, public order and safety, and land and resource use and planning. The Agreement also sets out the power of the Cree Nation Government to make laws on regional governance matters. The Cree Constitution is the companion to these agreements and sets out arrangements regarding the exercise of the Cree right of self‑government in relation to the internal management of the Cree First Nations and the Cree Nation Government. These arrangements concern subjects such as procedures for making laws and resolutions, elections, meetings and referenda, financial administration and amendment of the Cree Constitution.

The Grand Council of the Crees and the Cree Nation Government have also entered into an agreement with the Province of Quebec on the Administration of Justice for the Crees. Signed in 2007, this agreement establishes the Cree-Quebec Judicial Advisory Committee and sets out funding-related parameters for Cree Government initiatives related to the justice and correctional system.[[13]](#footnote-13) The Cree Justice and Correctional Services Department provides a variety of programs and services to support members in the nine Cree communities it serves, addressing such things as crime prevention, reintegration of offenders, victim assistance and youth conflict management, and engagement. The Cree communities also receive itinerant court services as part of the Quebec court system, within the particular context of the Cree communities. The circular community courtrooms used by the itinerant court represent the Cree value that justice is about community and is an inclusive process.

In the **Yukon**, the territory in the northwest of Canada, self-government agreements were concluded with 11 of the 14 First Nations in the territory between 1993-2005. These self-government agreements include law-making authority in four general areas:

* 1. Internal management of the First Natio and administration of certain rights and benefits under the Agreements (s.13.1);
  2. Taxation of interests in Settlement Land and direct taxation of persons residing on Settlement Land (s.14);
  3. In relation to First Nation citizens residing in the Yukon (programs and services (s.13.2));
  4. Of a Local or Private nature on Settlement Land in relation to listed matters (s.13.3).

The second and fourth areas of law-making authority can include matters applicable to both citizens of the relevant First Nation, as well as others (including non-Indigenous persons) who are in Settlement Land as defined in the agreements. The third area of authority listed above covers a wide range of program and service responsibilities, while the fourth category relates to a range of land use, human activity and resource management matters.

Among the specific matters included under the umbrella of “matters of a local or private nature” is the administration of justice. However, the self-government agreements contemplate the negotiation of administration of justice-specific agreements and provide a number of interim provisions. Negotiations of these specific agreements must deal with such matters as: adjudication, civil remedies, punitive sanctions including fines, penalties and imprisonment, prosecution, corrections, law enforcement, the relationship of First Nation courts to other courts, and any other matter related to Aboriginal justice to which the Parties agree.

To date, one administration of justice agreement has been concluded with a Yukon First Nation – the **Teslin Tlingit Council** – and a number of the other Yukon First Nations with self-government agreements are at various stages of taking on the administration of justice. The Teslin Tlingit Council agreement is primarily focussed on the establishment of the community’s Peacemaker Court, and includes provisions relating to enforcement and corrections.[[14]](#footnote-14) The agreement specifies that Teslin Tlingit Council intends its justice system to be founded upon the traditional Teslin Tlingit clan processes for resolving disputes and to be guided by the principles of Ha Kus Teyea which embody respect, fairness, integrity, honesty, responsibility and accountability.

The Teslin Tlingit Council Peacemaker Court has a number of powers and processes, many of which are similar to those of a Yukon territorial court. The Peacemaker Court has the jurisdiction to provide consent-based dispute resolution services – this aspect of the Court is presently operational. It also has the jurisdiction to resolve and adjudicate disputes under Teslin Tlingit law or violations of such laws and hear appeals or reconsiderations arising from administrative decisions under Teslin Tlingit law. This will be the next phase of operation of the Court. In the future, there is also the ability, by way of agreement, to enable the Peacemaker Court to hear cases arising under specific Canadian federal or Yukon laws. The Peacemaker Court is also designed to reflect standards of judicial independence and impartiality, fairness and procedural standards within the Tlingit cultural context.

The agreement also outlines the interaction between the Peacemaker Court and the general justice system, enabling the transfer of matters between the Peacemaker Court and Small Claims court, territorial court or the Supreme Court. Appeals of a final order or decision of the Peacemaker Court go to the Supreme Court of the Yukon, and orders of the Peacemaker Court, enforceable on settlement land, can also be made an order of the Supreme Court if filed with the registrar of that court – becoming enforceable throughout the Yukon.

Since the vision, objectives and priorities of each Yukon First Nation vary in relation to the administration of justice, the Government of Canada and the Yukon government continue to engage with willing and interested communities in various ways, from periodic meetings and dialogue to exploratory discussions. Regardless of the specific models that may ultimately be negotiated, the goal is effective, sustainable and culturally relevant approaches that respect the rights of Indigenous peoples and individual Canadians.

Some provincial court systems have also established specialized approaches to Indigenous justice. In **Alberta**, for instance, the provincial court holds special hearings in different Indigenous communities. At the Alexis Nakota Sioux Nation, a restorative court model, started in 1993, promotes community involvement in the court process. A local justice committee provides recommendations for sentencing options as well as assistance to the court in identifying appropriate community-based alternatives.

At the Siksika Nation, the Provincial Court of Alberta sits on the reserve and has been served since 1998 by a judge of Aboriginal heritage and a dedicated Crown prosecutor. This arrangement permits the Crown prosecutor to form a close working relationship with the Nation and supports the provision of culturally sensitive prosecution services.

Alberta is also home to the first court that brought together a provincial court system and an Aboriginal peacemaking process. The Tsuu T’ina First Nation Court (or Peacemaking Court) was established in October 2000 and has jurisdiction over criminal, youth, and by-law offences committed on the Tsuu T’ina reserve. The Tsuu T’ina Court is a marriage of two separate systems: the Alberta Provincial Court and the Peacemaker process, which work together in a unique way.

In 1938, the Government of Alberta set aside significant tracts of land for the exclusive use and occupation of Metis. In 1989, following years of conferences and negotiations, the *Alberta-Metis Settlements Accord* was passed. The Accord provided a framework for the creation of provincial statutes.  These statutes—of which there are four—provided tools for local and collective Metis governments to make their own binding laws. In effect, it provided a platform for self-governance.

The Metis Settlements General Council and local Settlement Councils were established in 1990 to represent Settlement members and to develop collective and local laws. The Metis Settlements Appeal Tribunal was also established in 1990 to act as a court-like body ruling on land, membership and other matters.[[15]](#footnote-15)

Courts bringing together provincial court systems and the unique circumstances of Indigenous communities can also be found in other provinces. The first such court in the province of **British Columbia** was established in November 2006 in New Westminster. Since then, five more Indigenous Courts have been established: the North Vancouver First Nation Court (February 2012), the Cknúcwentn First Nation Court in Kamloops (March 2013), the Duncan First Nations Court (May 2013), the Merritt First Nations Court (October 2017), and the Prince George Indigenous Court (April 2018). All of these Courts involve a commitment to restorative justice or to a non-adversarial and non-retributive approach to justice that focuses on healing, holding the offender accountable, and involving the victim whenever possible. To various degrees, they all seek the active participation of the Indigenous community. Community engagement is sought through the participation of Elders and through community agencies who offer specialized or culturally responsive support services to the offenders prior to, during, and following, sentencing.

The Cree-speaking Circuit Court was established in northern **Saskatchewan** in October 2001. Part of the provincial court system, the Cree court is based in Prince Albert and travels to Pelican Narrows, Sandy Bay, Montreal Lake, and Big River First Nation. The court includes a Cree judge, court clerk, Crown prosecutor, and Legal Aid lawyer. All members of the Cree-speaking court are able to speak Cree, and the participants are able to request to speak in either English or Cree. The Cree-speaking Court will use peacemaking where appropriate. In December 2006, the first Dene-speaking Court commenced circuit court sittings from Meadow Lake. The court will provide service in both the Cree and Dene languages with the assistance of translators. This court will also include a restorative justice approach. The presiding judge is also Cree and speaks Cree. Court services will also be provided to English River, Buffalo River, Canoe Lake, and Big Island Lake.

In **Ontario**, the AkwesasneCourt has been in operation for over ten years but was re-instituted by Akwesasne in 2016 under Akwesasne’s inherent right to self-government. It currently hears matters arising from *Indian Act* by-laws and Akwesasne laws on Akwesasne reserve lands in Canada.[[16]](#footnote-16) Akwesasne is an *Indian Act* band with reserve lands straddling Ontario, Quebec, and the state of New York. Although Akwesasne is engaged in self-government negotiations with the federal government, effective recognition of the Akwesasne Court within the Canadian judicial system requires the participation of the provinces as well as the federal government. To this end, a quadripartite technical working group on the administration of justice was established to explore some of the technical issues relating to the interaction of the Akwesasne and provincial courts. This working group is composed of the Mohawk Council of Akwesasne, the provinces of Ontario and Quebec, and the federal government. The working group recently (December 2018) made a number of recommendations to the Parties on matters related to the development of the Akwesasne Court. These recommendations will be used to inform ongoing discussions amongst the Parties related to the coordination of the Akwesasne Court with the broader Canadian court system.

In addition to the above institutional and negotiation-based examples, the Government of Canada continues to explore approaches to the maintenance and strengthening of Indigenous justice systems together with Indigenous communities in Canada. For example, to support Indigenous law institutes, Budget 2019 proposes to provide $9.1 million over three years, starting in 2019–20, to support the construction of an Indigenous Legal Lodge at the University of Victoria, as well as $10 million over five years, starting in 2019–20, to support Indigenous law initiatives across Canada through the Justice Partnership and Innovation Program. These initiatives are part of the Government of Canada’s acknowledgement of the importance of Indigenous legal systems to a vibrant and pluralistic legal system with space to reflect the diversity of Canada and its history.

As part of these broader efforts, on May 14-15, 2019, the Government of Canada hosted a forum on the topic of “Exploring Indigenous Justice Systems in Canada and around the World”. This two-day event brought together academics, officials and Indigenous peoples to discuss various aspects of Indigenous justice systems, including the recognition and revitalization of Indigenous laws, Indigenous courts, interaction between Indigenous and non-Indigenous legal systems, and examination of some international experiences, including tribal courts in the United States. One of the objectives for this event was to generate a dialogue on the present and future of Indigenous justice systems and ideas for recognizing and supporting their development. The event offered a chance to examine opportunities and practical challenges associated with supporting Indigenous justice systems and thinking through how they interact with the non-Indigenous justice system. A copy of the agenda for this event is included at Annex A. Following the forum, a report summarizing the issues raised and discussed will be publicly released. The Government of Canada would be pleased to forward a copy of this report when it becomes available in further contribution to the development of the thematic report.

As a final example, and in response to the Truth and Reconciliation Calls to Action, and calls for action from Indigenous families, communities and organizations, as well as non-governmental and international organizations, the Government of Canada launched an independent National Inquiry into Missing and Murdered Indigenous Women and Girls in September 2016.[[17]](#footnote-17) Composed of four Commissioners, the National Inquiry is a legal process independent from federal, provincial and territorial governments, Crown corporations, and Indigenous forms of government. The Commissioners’ mandate is to gather evidence, and to examine and report on the systemic causes of all forms of violence against Indigenous women and girls and 2SLGBTQQIA[[18]](#footnote-18) individuals in Canada by looking at patterns and underlying factors. The Inquiry has indicated that it will deliver its final report to the federal, provincial and territorial governments at a public closing ceremony in Gatineau, Quebec on June 3, 2019.[[19]](#footnote-19)

1. Interaction between Indigenous Justice Systems and the General Canadian Justice System and Relevant Jurisprudence (Questions 3, 9)

In addition to the specific modes of interaction addressed in the previous section, arising from the various approaches to supporting Indigenous justice systems, the Government of Canada has also taken steps that more generally support the recognition and development of such systems.

In particular, in July 2017 the *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples* (Principles) were released. As part of the Government’s commitment to reconciliation with Indigenous peoples, the ten principles are based on the recognition of Indigenous peoples, governments, laws, and rights, including the right to self-determination and the inherent right of self-government. The Principles are rooted in section 35 of the *Constitution Act, 1982* and the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and are informed by the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission’s Calls to Action. In addition, they reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights. They will guide the work required to fulfill the Government’s commitment to renewed nation-to-nation, government-to-government, and Inuit-Crown relationships.

While the Principles do not directly address Indigenous justice systems, the Principles as a whole support a recognition-based approach. Many of the Principles support and complement the various processes and arrangements relating to justice discussed throughout this submission. Of particular note, Principle 1 recognizes that relations with Indigenous peoples “need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.” This Principle, grounded in section 35 of the *Constitution Act, 1982*, also reflects articles 3 and 4 of the UN Declaration. Similarly, Principle 4 acknowledges that Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government, and Principle 5 reflects that treaties, agreements and other constructive arrangements between Indigenous peoples and the Crown are acts of reconciliation based on mutual recognition and respect.[[20]](#footnote-20)

An additional tool relevant to the thematic study is the *Directive on Civil Litigation involving Indigenous peoples* (Directive)*.* Issued in January 2019,this Directive promotes the Government’s commitment to reconciliation by establishing guidelines that every litigator must follow in the approaches, positions, and decisions taken on behalf of the Attorney General of Canada in the context of civil litigation regarding section 35 of the Constitution Act, 1982 and Crown obligations towards Indigenous peoples. Litigation is by its nature an adversarial process, and it cannot be the primary forum for achieving reconciliation and the renewal of the Crown-Indigenous relationship. As a result, a core theme of the Directive is to advance an approach to litigation that promotes resolution and settlement and seeks opportunities to narrow or avoid potential litigation. In this context, the Government of Canada is committed to pursuing dialogue, co-operation, partnership and negotiation based on the recognition of rights.

The Directive notes that Indigenous peoples are entitled to choose their preferred forum to resolve legal issues and that some matters will require legal clarification. Where litigation arises, this Directive instructs that the Government of Canada’s approach should be to assist the court constructively, expeditiously, and effectively so that it may provide direction on the matters in issue.

Further, the Directive is a concrete manifestation of how the Principles are effecting transformative change. It promotes an approach to conflict resolution that reflects the goal of achieving reconciliation with Indigenous peoples and provides legal counsel with objectives and litigation guidelines to apply the Principles in litigation. The Directive itself identifies its objectives as including: (1) advancing reconciliation, (2) recognizing rights, (3) upholding the honour of the Crown, and (4) respecting and advancing Indigenous self-determination and self-governance. These objectives, and the guidelines for litigation counsel they promote, are interrelated.[[21]](#footnote-21)

While the Directive as a whole provides guidance in circumstances where Indigenous justice systems and Indigenous laws are implicated in litigation before the general Canadian court system, of particular relevance to the current thematic study, Litigation Guideline #17 instructs that oral history evidence should be a matter of weight, not admissibility. It explains that government counsel should take a respectful and cautious approach when testing oral history evidence through cross-examination and consider the development of an oral history protocol with opposing counsel in appropriate cases.

On a similar note, the Federal Court of Canada has also published *Practice Guidelines for Aboriginal Law Proceedings*. A product of the Federal Court Aboriginal Law Bar Liaison Committee[[22]](#footnote-22) which brings together representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice Canada, and the Canadian Bar Association, the Guidelines are a “living document” and will be updated from time to time to reflect experience as a litigation reference tool.

In 2009, the Federal Court hosted a Symposium on Oral History and the Role of Aboriginal Elders, opening a dialogue with Elders from across Canada along with representatives of the public and private Bar. In turn, these same Elders hosted a historic meeting in 2010 at Turtle Lodge to promote a better understanding of the Aboriginal perspective. This led to a judicial education seminar at Kitigan Zibi in late 2013, developed in collaboration with the Elders, on Aboriginal dispute resolution. The Federal Court Aboriginal Law Bar Liaison Committee then continued discussions with these Elders, whose input and advice were instrumental in the development of the Guidelines relating to elder testimony and oral history evidence, which were published initially in 2012. In general, the Practice Guidelines are intended to encourage flexibility, respect and due consideration of Aboriginal perspectives throughout judicial proceedings and include practical examples to assist in the application of the practice guidelines.[[23]](#footnote-23)

It is also important to note that the *Canadian Charter of Rights and Freedoms* sets out a number of human rights standards that serve to protect the human rights of all Canadians – including in the context of justice systems. These constitutionally-protected rights include fundamental freedoms, such as freedom of expression and of religion, equality rights, and the right to life, liberty and security of the person, as well as democratic, mobility, and minority language educational rights. Of particular relevance to this thematic study, the *Charter* also protects legal rights. These include rights to ensure that individuals are treated fairly throughout the justice process, such as rights to counsel, to be presumed innocent, not to be denied bail without just cause, not to be arbitrarily detained or imprisoned, not to be tried or punished again if finally acquitted of an offence, and the right to the assistance of an interpreter in any legal proceedings.[[24]](#footnote-24)

International human rights law, and particularly international human rights treaties ratified by Canada, are relevant in determining the ambit of rights protected by the *Charter*.  Canadian courts also refer to international human rights law to interpret ordinary (non-Constitutional) legislation, such as the *Criminal Code*, and administrative action. For example, courts will interpret ordinary legislation as though the legislature intended to comply with Canada’s treaty obligations, absent a clear intention to the contrary.

Federal and provincial and territorial human rights commissions and tribunals also have a role to play in identifying and remedying human rights issues and concerns in justice systems. Many of them have been given various degrees of responsibility for overseeing implementation of human rights covered in their respective human rights acts, and they can consider international human rights law when doing so. For example, the Canadian Human Rights Commission may receive and consider recommendations regarding human rights and freedoms, and, where appropriate, include them in its Annual Report.

*Jurisprudence* (Questions 12 and 16)

Indigenous justice systems and laws arise in the jurisprudence of the general Canadian justice system in a number of ways. In the criminal law context there are a number of points of intersection, including Gladue reports,[[25]](#footnote-25) sentencing conventions, and the use of restorative justice. In civil cases, the adjudication of Indigenous laws and the consideration of Indigenous systems and perspectives can also arise, as well as procedural considerations relating to elder testimony and oral history evidence. While the intersection of Indigenous justice systems and individuals with the criminal law will be addressed in more detail in the following section, highlighted below are a number of recent cases where the general court system considered issues arising from Indigenous justice systems, or intersecting with them, as well as some of the process approaches used in relation to elder testimony and oral history evidence.

It is important to note, however, that while jurisprudence such as that described below is one indicator of the interaction of Indigenous legal traditions and justice systems with the broader Canadian justice system, it cannot provide a complete picture. Other activities and processes like dialogue, academic exploration and study, and grassroots initiatives also make important contributions to the revitalization and development of Indigenous justice systems within the Canadian context. A few examples have been highlighted throughout this response, but other interesting and valuable work is being undertaken throughout Canada that contributes to the revitalization of Indigenous justice systems and legal traditions.[[26]](#footnote-26)

* *Frank v Blood Tribe,* 2018 FC 1016[[27]](#footnote-27)

A judicial review of the decision of the Land Dispute Resolution Appeal Tribunal of the Blood Tribe Chief and Council on the basis of procedural fairness. The Federal Court reiterated that: “Indigenous administrative bodies are particularly entitled to deference, as they are well-placed to understand the purposes that Indigenous laws pursue and are sensitive to the conditions of the particular community involved in the decision” (para 69). That said, the Court ruled that the Blood Tribe denied the applicants procedural fairness and returned the matter to the Appeal Tribunal of the Blood Tribe.

See also similar cases such as: *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796.[[28]](#footnote-28)

* *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701[[29]](#footnote-29)

In a case involving the interpretation of treaty provisions requiring the payment of an annuity, the court considered the perspectives of the Anishnaabe peoples as they relate to land, the treaty relationship, and the common intention of the parties to the treaty, including the particular context in which it was negotiated.

* *Henry v Roseau River Anishinabe First Nation Government*, 2017 FC 1038[[30]](#footnote-30)

A custom elections case in which the Federal Court supplemented oral judgment with written reasons because (para 4) “this particular proceeding offers an opportunity to address  not only the intersection of Indigenous law with Canadian jurisprudence but also the alternative Indigenous process of seeking resolution through agreement as contrasted with the process of litigation and adjudication.” This case is an example of the use of flexible procedures by the Federal Court in disputes involving Indigenous governance processes, and the application by the court of the relevant Indigenous laws of the community involved.

See also similar cases: *Pastion v Dene Tha’ First Nation*, 2018 FC 648[[31]](#footnote-31)and *Okemow v Lucky Man Cree Nation*, 2017 FC 46.[[32]](#footnote-32)

* *Ignace v British Columbia (AG)*, 2019 BCSC 10[[33]](#footnote-33)

The plaintiff sought declarations that they hold Aboriginal rights and title to a piece of land. The case raised issues regarding the balance to be sought between procedures for taking evidence under British Columbia Supreme Court Civil Rules, specifically depositions, and the need to accommodate non-traditional methods of giving evidence in the Indigenous context – including the role of interpreters/word spellers and certain Elders testifying as part of a panel.

See also similar cases: *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 131 ff[[34]](#footnote-34) and *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44[[35]](#footnote-35)

* *Wesley v Canada,* 2017 FC 725[[36]](#footnote-36)

Indigenous legal traditions may come into play in determining who represents rights-holders for Crown consultation.

* *Alderville First Nation v Canada,* 2014 FC 747[[37]](#footnote-37)

In the course of dealing with a question on the exclusion of some evidence from an expert, Justice Mandamin discusses (paras 21-29) the history of the common law giving effect to customary Indigenous laws, citing cases from as early as 1867 in which custom marriages were valid at common law. Also cited are early cases recognizing customary adoption. He concludes that Aboriginal customary law is given effect in Canadian domestic law in a number of ways.

* *R v Ippak*, 2018 NUCA 3[[38]](#footnote-38)

Berger JA examines the exclusion of evidence under the Canadian Charter of Rights and Freedoms ‘’through the concurrent application of Inuit and Canadian law’’ and concludes that Canadian law and Inuit law both would favour the exclusion of the evidence obtained in violation of the accused’s Charter rights.

**Part 2 – Indigenous People in the General Canadian Justice System**

*Overview (Questions 10 and 14)*

As outlined in Part 1 of this submission, the Government of Canada has committed to implementing all the Calls to Action of the Truth and Reconciliation Commission. Calls to Action #30 and #38 specifically speak to eliminating the overrepresentation of Indigenous people in the criminal justice system. The current circumstances faced by Indigenous people in the criminal justice system are inseparable from the historic and contemporary impacts of colonialism and the denial of Indigenous rights. Reducing the rates of overrepresentation is a shared priority for Canada’s federal, provincial and territorial governments.

Indigenous peoples are overrepresented in the Canadian criminal justice system as accused, offenders, victims and survivors of crime. In fact, Indigenous peoples are more likely to be victims of crime and homicide, and are far more likely to be arrested, prosecuted and incarcerated than non-Indigenous people. Available data demonstrates a growing concern as it pertains to Indigenous peoples in conflict with the law:

* **Indigenous adults are overrepresented in the correctional system:** In 2016/2017, Indigenous adults accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population.[[39]](#footnote-39)
* **Indigenous adults are overrepresented in custody:** Indigenous adults accounted for 30% of admissions to custody and 25% of admissions to community supervision among the provinces and territories in 2016/2017.[[40]](#footnote-40) Indigenous adults accounted for 27% of admissions to custody and 26% of admissions to community supervision in federal correctional services.
* **Indigenous adults are overrepresented in remand:**[[41]](#footnote-41)In 2016/2017, Indigenous adults accounted for 29% of admissions to remand, while representing 4.1% of the Canadian adult population.[[42]](#footnote-42)
* **Indigenous youth are overrepresented in the correctional system:** Indigenous youth accounted for 46% of admissions to correctional services in 2016/2017, while representing 8% of the Canadian youth population (aged 12 to 17). [[43]](#footnote-43)
* **Indigenous youth are overrepresented in custody:** Indigenous youth are overrepresented in both custody (50% of admissions) and community supervision (42% of admissions).[[44]](#footnote-44)
* **Indigenous youth are overrepresented in pre-trial detention:**[[45]](#footnote-45) Indigenous youth accounted for 48% of admissions to pre-trial detention in 2016/2017, while representing 8% of the Canadian youth (aged 12 to 17) population.[[46]](#footnote-46)
* **Indigenous women make up a greater proportion of custody admissions:** Indigenous adult females made up a greater proportion of custody admissions than their male counterparts, accounting for 43% of admissions to custody (compared to 28% of admissions to custody for Indigenous adult males).[[47]](#footnote-47) Indigenous female youth also made up a greater proportion of custody admissions among youth, relative to their male counterparts, accounting for 60% of admissions to custody compared to 47% of admissions for Indigenous male youth.

As part of ongoing efforts to reduce the overrepresentation of Indigenous peoples, the Government of Canada is undertaking a broad review of Canada's criminal justice system to ensure that it is just, compassionate and fair, and promotes a safe, peaceful and prosperous Canadian society. Part of this transformation includes looking at how to better address the needs of Indigenous people who are disproportionately represented in the criminal justice system. The Government of Canada remains committed to reviewing the criminal justice system and identifying approaches that contribute to the elimination of this overrepresentation.

In Budget 2016, the annual funding for the Indigenous Courtwork Program was increased. This program provides funding to help provincial and territorial governments to deliver Indigenous Courtwork Services. As part of these services, Indigenous Courtworkers assist Indigenous people involved in the criminal justice system by providing information and support, as well as referrals to culturally relevant options, such as restorative justice and Indigenous community justice alternatives.

In Budget 2017, the Indigenous Justice Program received a permanent mandate with an ongoing investment of $11 million annually. The program supports alternatives to imprisonment for Indigenous people, such as restorative justice and community-based justice programs rooted in the unique traditions and cultures of each community. These programs are developed and led by Indigenous communities and aim to address the needs of victims and offenders. A 2016 evaluation of the Indigenous Justice Program found that Indigenous people who completed a community-based alternative through the program were significantly less likely to re-offend than those who did not.

Also, in 2017, the Department of Justice Canada provided $10 million over 5 years for the Indigenous Community Corrections Initiative with Public Safety Canada. This program supports the development of community-based alternatives to incarceration, as well as the healing and rehabilitation of Indigenous offenders.

As recognized by the Truth and Reconciliation Commission, many of the ways to reduce overrepresentation will be found outside the criminal justice system continuum. Therefore, work being undertaken in response to many other Calls to Action, such as those relating to housing, child welfare, health services, education and Fetal Alcohol Spectrum Disorder, will further contribute to implementing Call to Action 30. As such, the Government of Canada collaborates closely with Indigenous partners, provinces and territories to align efforts, resources and data that address factors and underlying causes of overrepresentation.

1. Challenges faced by Indigenous peoples in terms of accessing the ordinary justice system (Questions 10, 13 and 14)

Canada’s 2016 Census indicated that over 1.6 million people self-identified as being Indigenous, representing 4.9% of the Canadian population.[[48]](#footnote-48) To understand the trend of overrepresentation of Indigenous people in the criminal justice system, it is necessary to consider the context in which it is occurring. Numerous studies, inquiries and commissions that have been undertaken since the 1970s, as well as judicial and program responses implemented to address overrepresentation, have highlighted four key factors that have contributed to this overrepresentation: colonialism, systemic discrimination, socio-economic marginalization, and cultural differences.

Examples of these factors, for an Indigenous person implicated with the criminal justice system, could include:

* Language barriers and lack of Indigenous interpretation services.
* Lack of transportation, including lack of safe transportation for those living in remote and rural areas. The lack of transportation affects their ability to attend court and meet conditions of bail and probation, for example, leading to administration of justice offences.
* Issues in Northern areas where justice services are lacking. For example, some communities have no access to regular sitting courts and are served by fly-in courts. Individuals are taken from their home communities and put in remand centres and can find themselves unable to get back to their own communities once released from custody.
* Lack of services to help clients understand the process and explain their rights and responsibilities; given that the justice system and court proceedings can be complex.
* Lack of culturally relevant services and assistance.
* Lack of information to support *Gladue*[[49]](#footnote-49) principles.

Over the last 30 years, systemic discrimination throughout the criminal justice system, including policing, in the courts and in corrections, has been identified as a serious issue by the Supreme Court of Canada[[50]](#footnote-50) and by several commissions and inquiries.[[51]](#footnote-51) Examples have included over- and under-policing; increasing proportions of Indigenous adult admissions to custodial facilities over the past 10 years; and Indigenous people spending more of their sentence in a custodial facility than non-Indigenous people.[[52]](#footnote-52)

Furthermore, Indigenous persons in Canada have a higher unemployment rate and lower levels of educational attainment than non-Indigenous persons. Indigenous peoples also have disproportionately inadequate housing and poorer health outcomes. These conditions, as well as poverty, limit the opportunities and life chances for Indigenous individuals, forming the basis for the vulnerability of some and increasing their likelihood of involvement with the criminal justice system.[[53]](#footnote-53)

The Canadian criminal justice system is based on Western values of justice and often excludes Indigenous values. These systems **differ in the perceptions of wrongdoing or harm and the approaches to justice**. In addition to different worldviews, Western justice system officials can misinterpret the normative behaviours that are part of Indigenous cultures. The implementation of culturally relevant community-based justice programs helps to address the impact of cultural differences within the criminal justice system.[[54]](#footnote-54) Also, the development of justice-related programs and services by Indigenous communities based on local needs and tailored to local cultures and traditions has had positive results.[[55]](#footnote-55)

For example, the Indigenous Courtwork Program (ICW) helps address the challenges faced by Indigenous peoples, when implicated with the criminal justice system, through a network of over 190 full-time and part-time Courtworkers. The ICW program supports the provision of culturally relevant services to Indigenous persons (clients) involved with the criminal justice system (whether as accused, victims, witnesses, family members, others). This program has been in operation since 1978 and is managed by the Department of Justice Canada, which makes financial contributions to provincial and territorial governments to support the program.

More specifically, Courtworkers provide information on charges, court procedures, rights and responsibilities, bail, diversion, restorative justice and Indigenous community justice alternatives; offer support in accessing legal resources, as well as appropriate community programming including wellness, trauma, housing, family and employment services; and facilitate communication with court officials, accused persons, family members and communities to ensure understanding and collaboration. As “Friends of the Court”, they also provide critical background and contextual information on the accused, make the court aware of alternative measures and options available in the Indigenous community, and ensure that the accused comprehends the court process.[[56]](#footnote-56)

1. Legal aid services (Question 11)

The Legal Aid Program is a cost-shared program that provides federal contribution funding to the provinces and territories for the delivery of legal aid services for economically disadvantaged persons. This federal/provincial/territorial collaboration is based on the shared responsibility for criminal justice by the federal government, under its constitutional authority for criminal law-making and procedure, and by the provincial/territorial governments, under their constitutional authority for the administration of justice, including legal aid. The federal government is not responsible for the delivery of legal aid, which is provided by the provinces and territories through their legal aid plans.

The Department of Justice Canada manages the program and ensures that the contributed funds are remitted to provinces and territories. In return, the provinces and territories ensure access to justice by the delivery of criminal legal aid to economically disadvantaged persons accused of serious and/or complex criminal offences, who are facing the likelihood of incarceration, and to youth (aged 12-18) accused under the *Youth Criminal Justice Act*.[[57]](#footnote-57) Legal aid services are not normally provided to victims or witnesses of crime.

In Budget 2016, the Government of Canada increased its allocation to criminal legal aid by $88M a year over five years. Starting in 2021-22, the Government of Canada will allocate an additional $30M a year to legal aid (over previous reference levels). The total federal contribution to criminal legal aid in 2019-20 is over $127M. This contribution is divided among the provinces and territories according to a formula that takes into account, amongst other factors, Indigenous populations in each jurisdiction in recognition of the overrepresentation of Indigenous people in the criminal justice system.

Legal aid plans across Canada provide various services to accused persons regardless of Indigenous status. These include legal information, advice and representation, duty counsel services and *Brydges* duty counsel (telephone legal advice to persons arrested or detained by police)*.*[[58]](#footnote-58) Some legal aid plans provide services such as *Brydges* duty counsel in Indigenous languages, through interpretation services.

While some services, such as legal information through a phone line or duty counsel, are often freely available without an application process, legal aid plans require an application to be completed online or in person for full services (i.e. advice from, and representation by a lawyer throughout the course of a criminal trial). Full services are only available to persons who meet strict financial eligibility criteria and whose matters are considered sufficiently serious.

Legal aid plans across Canada provide specialized, culturally-appropriate services to Indigenous persons. These include, among others, providing legal representation in First Nations courts, developing outreach services to Indigenous communities, and creating specific Indigenous legal information outreach worker positions. Legal aid plans also train their staff in providing culturally-appropriate services to Indigenous clients. Currently, the Department of Justice Canada is conducting research on Indigenous-specific services provided by legal aid plans across Canada. As a result, more detailed information will be available regarding these services in the coming months.

1. The right to interpretation provided to victims, witnesses and accused (Question 11)

Section 14 of the *Canadian Charter of Rights and Freedoms* (Charter) provides for the right to an interpreter in any proceedings to a witness or party who does not understand or speak the language in which the proceedings are conducted.*[[59]](#footnote-59)*

In the criminal context, section 14 has a close relationship with section 7 (fundamental justice) and section 11(d) (fair trial) of the Charter. More generally, sections 15 (equality rights), 25 (aboriginal rights) and 27 (multicultural heritage) of the Charter also speak to the importance of the right to interpreter assistance. Section 27, which mandates that the Charter be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, is particularly relevant. As far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system.[[60]](#footnote-60)

The right to interpreter assistance should not be denied unless there is cogent and compelling evidence that an accused's request is not made in good faith. Thus, while the right is not automatic or absolute, courts should be generous and open-minded when assessing an accused's need for an interpreter.[[61]](#footnote-61) Interpretation, particularly in a criminal context, should be objective and unbiased.

Provinces and territories also play a role with respect to Indigenous peoples in the justice system. For example, in 2014, Ontario created a new Aboriginal Justice Division within its Ministry of the Attorney General and this division has led the development of new programs and services to support Indigenous people in the justice system. British Columbia’s Legal Services Society updated their web presence for anyone who self-identifies as Indigenous. The website outlines rights held by Indigenous people as well as benefits and services that are available to them. In addition, Indigenous Community Legal Workers continue to be available to provide direct service in the form of information and advice. Legal Aid Manitoba contracts with an interpretation service that provides real time interpretation of over 110 languages and dialects including all of the Indigenous languages spoken in Manitoba as well as Arabic and several African languages. This service is available 24/7.

1. Taking into account Indigenous peoples’ economic, social, and cultural characteristics (Question 13)

In Canada, constitutional responsibility for the enactment of criminal law rests with the federal government, while the provinces and territories are responsible for the administration of justice. The *Criminal Code* (CC) applies uniformly across Canada and to all equally.[[62]](#footnote-62) Canadian criminal law does take into account the economic, social, and cultural characteristics of Indigenous persons as offenders.

The sentencing provisions of the CC include a legislated statement of the purpose, objectives and principles of sentencing and includes the requirement that backgrounds and unique circumstances of Indigenous offenders be considered in respect of sentencing (paragraph 718.2(e)).[[63]](#footnote-63) The sentencing provisions also place a clear emphasis on restraint in the use of incarceration and encouragement of restorative justice approaches (principle of restraint in paragraph 718.2(d)).[[64]](#footnote-64)

The Government of Canada has been working to increase the use of restorative justice approaches to address the overrepresentation of Indigenous persons in the criminal justice system. Restorative justice processes are voluntary and provide opportunities for victims, offenders, and communities affected by a crime to communicate about the causes, circumstances, and impact of the crime. The underlying principles of a restorative justice response are often considered to be very appropriate, in combination with Indigenous Justice approaches, as a way of holding offenders accountable and providing more meaningful outcomes for victims and the community.

The Supreme Court of Canada (SCC) considered the principle of restraint with respect to Indigenous offenders in *R v Gladue.*[[65]](#footnote-65) The Court noted that the goal of the sentencing principle in paragraph 718.2(e) is that “all available sanctions other than imprisonment that are reasonable in the circumstances and consistent to the harm done to victims or the community should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders” (known as the Gladue principle).  The Gladue principle was intended to respond to Canada’s high rates of Indigenous incarceration to the extent that the sentencing process could do so. The SCC directed that, in sentencing an Indigenous offender, the judge must consider:

* the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and
* the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection.

In 2012, the SCC in *R v Ipeelee[[66]](#footnote-66)* held that the Gladue principle in paragraph 718.2(e) applies to all Indigenous sentencing decisions, including those involving serious offences. The SCC noted that understanding the circumstances of Indigenous offenders is an essential component of the individualized nature of sentencing and the crafting of a sentence that is proportionate to the degree of responsibility of the offender and the seriousness of the offence.  Following the *Gladue* and *Ipeelee* decisions, lower and appellate courts have extended the SCC rulings to apply to other decision points in the criminal justice system where liberty interests may be at stake, including to bail hearings and applications for peace bonds.

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,*[[67]](#footnote-67) which is currently before the Senate of Canada, proposes to provide that the circumstances of the accused, in particular Indigenous accused and accused persons from vulnerable populations who are overrepresented in the criminal justice system, must be considered by police and judges at all stages of the bail process. In particular, Bill C-75 proposes to:

* enact a “principle of restraint” in the bail regime to ensure that, where there are no concerns about the accused coming to court, or posing a risk to public safety, police officers and justices release detained accused at the earliest reasonable opportunity;
* require that conditions imposed by police be reasonable in the circumstances and necessary to ensure the accused’s attendance in court or the safety and security of the victims/witnesses; and,
* provide that the circumstances of the accused, in particular Indigenous accused and accused persons from vulnerable populations, are considered at bail, and in determining how to address a breach of conditions.

*Gladue Reports*

In rendering the *Gladue* and *Ipeelee* decisions, the SCC stressed the obligation for the judiciary to make special efforts to find reasonable alternatives to imprisonment for Indigenous offenders and to take into account the background and systemic factors that bring Indigenous peoples into contact with the justice system. The SCC also underlined as important that, when sentencing an Indigenous offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools; and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and consequently higher rates of incarceration. The Court explained that the method of analysis for determining a fit sentence for Indigenous peoples is different but does not necessarily translate into a lower sentence. Judges must still consider other sentencing objectives and provisions included in the *Criminal Code*, such as protecting society and the gravity of the offence.

In fulfilling their obligations, as per the SCC sentencing directions, judges across Canada are requesting *Gladue* reports. A *Gladue* report provides in-depth background information about social factors and historical circumstances that contributed to an Indigenous person coming into contact with the criminal justice system. These reports not only provide information about the individual, but they also suggest sentencing options (including alternative measures) and healing plans. In an ideal situation, information on available community support networks and service provider protocols would be included as evidence that the appropriate alternative measures/restorative justice process are in place to provide a structure to follow through on *Gladue* report recommendations. *Gladue* reports are comprehensive and also gather information about a person’s community, schooling, relationships and other particular circumstances. The method involves interviewing various community and family members. Through this comprehensive interview process, it brings the voices of the community into the courtroom. *Gladue* reports can and are being used at other stages of the justice continuum, including bail, correctional decision-making (e.g. security classification, penitentiary placement and segregation), correctional rehabilitation programming, parole, and community reintegration.

*Community-Based Actors that Provide Information to the Courts* (Question 12)

As mentioned above, Indigenous Courtworkers play a role in providing information to Crown prosecutors and judges on the history and circumstances of the accused before the courts as well as community-based options and alternatives. As well, Indigenous Justice Program workers often attend court to speak to Crown and judges about the programming they offer and will confirm whether or not an individual could be accepted into their program (which provides non-custodial options).

1. Places of detention respect cultural and religious practices and culturally adequate health services (Question 15)

Correctional Service Canada (CSC) is the federal government agency responsible for administering sentences of a term of two years or more. While CSC does not control the imposition of federal sentences (this discretion belongs to sentencing judges) it can influence the time offenders spend incarcerated and their likelihood to re-offend by providing timely access to effective rehabilitation and by fostering successful reintegration.

As such, CSC continues to enhance its capabilities to address the needs of its Indigenous offender population through correctional interventions, specific cultural and spiritual programs and services, and through a sustained collaboration with Indigenous communities.

CSC uses a unique approach to Indigenous corrections, called the **Aboriginal Continuum of Care**, to ensure culturally-relevant restorative services, programs and interventions are available to Indigenous offenders.[[68]](#footnote-68) Across all federal institutions, Elders and spiritual advisors provide spiritual, ceremonial and counselling support to Indigenous offenders wishing to engage in the Aboriginal Continuum of Care. Through traditional cultural and spiritual interventions, Elders assist offenders to reflect on the factors stemming from their social history, which have brought them in conflict with the law. Services include assisting offenders to follow a healing path that supports their correctional plan and advising institutional staff on ceremonies, ceremonial objects, traditional practices and protocols.

In addition, there are nine Healing Lodges across Canada, which are funded or managed by CSC. Healing Lodges are either managed solely by CSC, or funded by CSC and managed by the community. Healing Lodges offer services and programs to Indigenous offenders in a culturally responsive environment that incorporates Indigenous peoples’ traditions, beliefs, and practices. CSC is committed to expanding the number of Healing Lodges and fostering nation-to-nation partnerships with Indigenous peoples.

Finally, CSC is committed to promoting the use of release processes. The *Corrections and Conditional Release Act[[69]](#footnote-69)* provides the legal framework for CSC to engage with Indigenous communities in the release planning process for offenders who express an interest in returning to their identified community. In preparation for the release of Indigenous offenders to the community, CSC establishes contact with Indigenous communities to discuss the offender’s interest in developing a release plan to their community. Early engagement with a community is key for successful release planning. It allows the community to become actively involved in the offender’s case. If the community is not supportive or does not wish to engage in the process with the offender, the offender can still seek to establish an alternative release plan.

**Conclusion**

The information and examples provided throughout this questionnaire response are intended to assist the Special Rapporteur in elaborating a thematic report on the topic of Indigenous justice systems. While not exhaustive, this response describes the broad range of approaches and initiatives in Canada relevant to the proposed study. Links have also been provided, where relevant, to a variety of materials and information that will provide further detail on many of the items discussed.

Canada has many examples of promising initiatives in the area of Indigenous justice systems. The Government of Canada recognizes, however, that there is more work to do, in partnership with Indigenous peoples, and looks forward to the results of the Special Rapporteur’s thematic report, as it will provide an interesting resource to inform such work going forward.

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91(27) and 92(14). [↑](#footnote-ref-1)
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35. For additional context, see Canada’s Core Document, HRI/CORE/CAN/2019, available online at: <<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2fCORE%2fCAN%2f2019&Lang=en>>. [↑](#footnote-ref-2)
3. The full set of Calls to Action is available online at: National Centre for Truth and Reconciliation, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: <http://nctr.ca/assets/reports/Calls\_to\_Action\_English2.pdf>. [↑](#footnote-ref-3)
4. For example, the Province of Manitoba held a Public Inquiry into the Administration of Justice and Aboriginal People between 1988-1991. The Report of the Aboriginal Justice Inquiry of Manitoba, released in 1991, and the work of the resulting Aboriginal Justice Implementation Commission continue to provide a useful resource for efforts in this area. Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg, Aboriginal Justice Implementation Commission, 1999), online: <http://www.ajic.mb.ca/volume.html>. [↑](#footnote-ref-4)
5. Specific examples of the various approaches described in section A) are outlined in the following section B). [↑](#footnote-ref-5)
6. Canada, Crown-Indigenous Relations and Northern Affairs Canada, “The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government”, online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>. [↑](#footnote-ref-6)
7. Section 35 of the *Constitution Act, 1982*, *supra*, defines the Aboriginal peoples of Canada as including Indian (First Nations), Inuit and Métis peoples. [↑](#footnote-ref-7)
8. See, for example: Lake Babine First Nation (Canada, Crown-Indigenous Relations and Northern Affairs Canada, “Canada, Lake Babine Nation and British Columbia Join Together on Road to Long-Term Reconciliation” (14 December 2018), online: <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2018/12/canada-lake-babine-nation-and-british-columbia-join-together-on-road-to-long-term-reconciliation.html>); Tsilhqot’in Nation (Canada, Crown-Indigenous Relations and Northern Affairs Canada, “Letter of Understanding Between the Tsilhqot'in Nation and Canada” (27 January 2017), online: <https://www.rcaanc-cirnac.gc.ca/eng/1493905807283/1529500971080>). [↑](#footnote-ref-8)
9. See announcement: Canada, Department of Justice Canada, “Canada and Red Earth Cree Nation Sign Memorandum of Understanding to Advance Discussions on Administration of Justice” (5 April 2019), online: <https://www.canada.ca/en/department-justice/news/2019/04/canada-and-red-earth-cree-nation-sign-memorandum-of-understanding-to-advance-discussions-on-administration-of-justice.html>. [↑](#footnote-ref-9)
10. See Nunavut Tunngavik Incorporated, “Nunavut Agreement”, online: <https://nlca.tunngavik.com/>. [↑](#footnote-ref-10)
11. Similar provisions regarding establishment of an Inuit Court and the hiring of a representative workforce can also be found in the Labrador Inuit Land Claims Agreement. More information about this agreement can be found online at: <<https://www.nunatsiavut.com/labrador-inuit-land-claims-agreement-3/>>. [↑](#footnote-ref-11)
12. Grand Council of the Crees (Eeyou Istchee) / Cree Nation, “Main Agreements of the Cree Nation Government”, online: <https://www.cngov.ca/governance-structure/legislation/agreements/>. [↑](#footnote-ref-12)
13. In a recent sentencing decision, the Court of Quebec considered the 2007 Agreement and the JBNQA as part of sentencing two Indigenous offenders. *R v. Isherhoff and Coon Come*, 2019 QCCQ 2339, available online through CanLii at: <<https://www.canlii.org/en/qc/qccq/doc/2019/2019qccq2339/2019qccq2339.pdf>>. [↑](#footnote-ref-13)
14. Teslin Tlingit Council, “Administration of Justice Agreement”, online: <http://www.ttc-teslin.com/administration-of-justice-agreement.html>. [↑](#footnote-ref-14)
15. More information about the Tribunal can be found on its website at: <<http://www.msat.gov.ab.ca/appeals/>>. [↑](#footnote-ref-15)
16. *Indian Act*, RSC 1985, c I-5. [↑](#footnote-ref-16)
17. National Inquiry into Missing and Murdered Indigenous Women and Girls, “Our Mandate, Our Vision, Our Mission”, online: <http://www.mmiwg-ffada.ca/mandate/>. [↑](#footnote-ref-17)
18. Two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual. [↑](#footnote-ref-18)
19. The Interim Report of the Inquiry is available online at: National Inquiry into Missing and Murdered Indigenous Women and Girls, “Interim Report: Our Women and Girls are Sacred” (Vancouver: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2017), online: <http://www.mmiwg-ffada.ca/publication/interim-report/>. The final report will also be available online following its release in June. [↑](#footnote-ref-19)
20. The full text of all 10 principles can be found at: Canada, Department of Justice Canada, “Principles Respecting the Government of Canada's Relationship with Indigenous Peoples”, online: <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>. [↑](#footnote-ref-20)
21. The full Directive can be found at: Canada, Department of Justice Canada, “The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples”, online: <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>. [↑](#footnote-ref-21)
22. The Committee provides a forum for dialogue, review of litigation practice and rules, and for making recommendations for improvement. Other organizations have also participated from time to time, including members of various Canadian courts, academics, and the National Judicial Institute. In addition, the Committee regularly consults with First Nations Community Elders from across the country. [↑](#footnote-ref-22)
23. The full practice guidelines can be found at: Federal Court ~ Aboriginal Law Bar Liaison Committee, “Practice Guidelines for Aboriginal Law Proceedings” (April 2016), online: <https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf>. [↑](#footnote-ref-23)
24. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See, in particular, sections 7-14. [↑](#footnote-ref-24)
25. Discussed in Part 2, below. [↑](#footnote-ref-25)
26. See, for example, the Accessing Justice and Reconciliation Project launched in 2012 by the University of Victoria’s Indigenous Law Research Unit, the Indigenous Bar Association and the Truth and Reconciliation Commission of Canada: Indigenous Law Research Unit, "Revitalizing Indigenous Laws", online: <https://www.indigenousbar.ca/indigenouslaw/>. [↑](#footnote-ref-26)
27. Available online through the Canadian Legal Information Institute (CanLII): <http://canlii.ca/t/hvmr5>. [↑](#footnote-ref-27)
28. Available online through CanLII: <http://canlii.ca/t/g8nzn>. [↑](#footnote-ref-28)
29. Available online through CanLII: <<http://canlii.ca/t/hwqxg>>. [↑](#footnote-ref-29)
30. Available online through CanLII: <http://canlii.ca/t/hnsmc>. [↑](#footnote-ref-30)
31. Available online through CanLII: <http://canlii.ca/t/hsqfp>. [↑](#footnote-ref-31)
32. Available online through CanLII: <http://canlii.ca/t/gx330>. [↑](#footnote-ref-32)
33. Available online through CanLII: <http://canlii.ca/t/hwvkk>. [↑](#footnote-ref-33)
34. Available online through CanLII: <http://canlii.ca/t/1whct>. [↑](#footnote-ref-34)
35. Available online through CanLII: <http://canlii.ca/t/g7mt9>. [↑](#footnote-ref-35)
36. Available online through CanLII: <http://canlii.ca/t/h5sfb>. [↑](#footnote-ref-36)
37. Available online through CanLII: <http://canlii.ca/t/hst1j>. [↑](#footnote-ref-37)
38. Available online through CanLII: <http://canlii.ca/t/hsn8g>. [↑](#footnote-ref-38)
39. Jamil Malakieh (The Canadian Centre for Justice Statistics), *Adult and Youth Correctional Statistics in Canada, 2016/2017* (Ottawa: Juristat (Statistics Canada), 2018), online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=ousc89ia>. [↑](#footnote-ref-39)
40. *Ibid*. [↑](#footnote-ref-40)
41. Remand is the detention of a person in custody while awaiting a further court appearance. These persons have not been sentenced and can be held for a number of reasons (e.g. risk that they won't appear for their court date, danger to themselves and/or others, risk to re-offend). Remand is the responsibility of provincial/territorial correctional services. [↑](#footnote-ref-41)
42. Custom calculation, Justice Canada: Table 35-10-0016-01 (formerly CANSIM 251-0022). Adult custody admissions to correctional services by aboriginal identity. [↑](#footnote-ref-42)
43. *Ibid*. [↑](#footnote-ref-43)
44. *Ibid*. [↑](#footnote-ref-44)
45. Pre-trial detention is when a young person is held temporarily in custody while awaiting trial or sentencing. [↑](#footnote-ref-45)
46. Custom calculation, Justice Canada: Table 35-10-0007-01 (formerly CANSIM 251-0012). Youth admissions to correctional services, by Aboriginal identity and sex. The calculation of percentages excludes admissions for which Indigenous identity information is unknown. [↑](#footnote-ref-46)
47. Malakieh, *Adult and Youth Correctional Statistics in Canada, 2016/2017*, *supra.* [↑](#footnote-ref-47)
48. Canada, Statistics Canada, “Aboriginal Peoples in Canada: Key Results from the 2016 Census” (25 October 2017), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>. [↑](#footnote-ref-48)
49. *R v Gladue* [1999] 1 SCR 688. Available online through CanLII: <http://canlii.ca/t/1fqp2>. [↑](#footnote-ref-49)
50. Raised by the Supreme Court of Canada in cases such as *R v Gladue*, *supra; R v Wells,* 2000 SCC 10 (available online through CanLII: <http://canlii.ca/t/527n>); and *R v Ipeelee,* 2012 SCC 13 (available online through CanLII: <http://canlii.ca/t/fqq00>).  [↑](#footnote-ref-50)
51. Some examples: Royal Commission on Aboriginal Peoples (1996), Ipperwash Inquiry (Ontario, 2007) and the upcoming National Inquiry into Missing and Murdered Indigenous Women and Girls (final report expected in June 2019). [↑](#footnote-ref-51)
52. Clark, 2019; Bourgon & Paquin-Marseille, 2019; Malakieh, 2018; Office of the Correctional Investigator, 2012; Rudin, n.d. [↑](#footnote-ref-52)
53. Clark 2019; Statistics Canada 2017; Statistics Canada 2016; Wesley-Esquimaux & Smolewski, 2004; RCAP, 1996; LaPrairie, 1990; Rudin, n.d. [↑](#footnote-ref-53)
54. Clark 2019; Chartrand & Horn, 2016; Ross n.d.; Rudin, n.d. [↑](#footnote-ref-54)
55. Department of Justice Canada, 2016. [↑](#footnote-ref-55)
56. Canada, Department of Justice Canada, “Indigenous Courtworker Program”, online: <<https://www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html>>. [↑](#footnote-ref-56)
57. *Youth Criminal Justice Act*, SC 2002, c 1. [↑](#footnote-ref-57)
58. *R v Brydges*, [1990] 1 SCR 190 (available online through CanLII: <http://canlii.ca/t/1ft0k>) is a leading Supreme Court of Canada decision on the right to retain and instruct counsel under section 10(b) of the Canadian Charter of Rights and Freedoms. The Court held that the right imposed a duty upon the police to provide information and access to a legal aid lawyer if needed. From this case came the term "Brydges Counsel" to refer to legal aid lawyers that assist recently arrested individuals. [↑](#footnote-ref-58)
59. ***Canadian Charter of Rights and Freedoms*, *supra*.** [↑](#footnote-ref-59)
60. R v Tran, [1994] 2 SCR 951, available online through CanLII <http://canlii.ca/t/1frqw>. [↑](#footnote-ref-60)
61. *Ibid*. [↑](#footnote-ref-61)
62. *Criminal Code*, RSC, 1985, c C-46. [↑](#footnote-ref-62)
63. *Ibid*. [↑](#footnote-ref-63)
64. *Ibid*. [↑](#footnote-ref-64)
65. *Gladue*, *supra*. [↑](#footnote-ref-65)
66. *Ipeelee*, *supra*. [↑](#footnote-ref-66)
67. 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*, 1st Sess, 42nd Parl, available online through LEGISinfo: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9745407>>. [↑](#footnote-ref-67)
68. Canada, Correctional Services Canada, “Indigenous Corrections”, online: <https://www.csc-scc.gc.ca/publications/005007-3001-eng.shtml>. [↑](#footnote-ref-68)
69. *Corrections and Conditional Release Act,* SC 1992, c 20, s 84. [↑](#footnote-ref-69)