Canada's prisons are the 'new residential schools'

A months-long investigation reveals that at every step, Canada's justice system is set against Indigenous people

Canada's crime rate just hit a 45-year low. It's been dropping for years—down by half since peaking in 1991. Bizarrely, the country recently cleared another benchmark, when the number of people incarcerated hit an all-time high. Dig a little further into the data, and an even more disquieting picture emerges.

While admissions of white adults to Canadian prisons declined through the last decade, Indigenous incarceration rates were surging: Up 112 per cent for women. Already, 36 per cent of the women and 25 per cent of men sentenced to provincial and territorial custody in Canada are Indigenous—a group that makes up just four per cent of the national population. Add in federal prisons, and Indigenous inmates account for 22.8 per cent of the total incarcerated population.

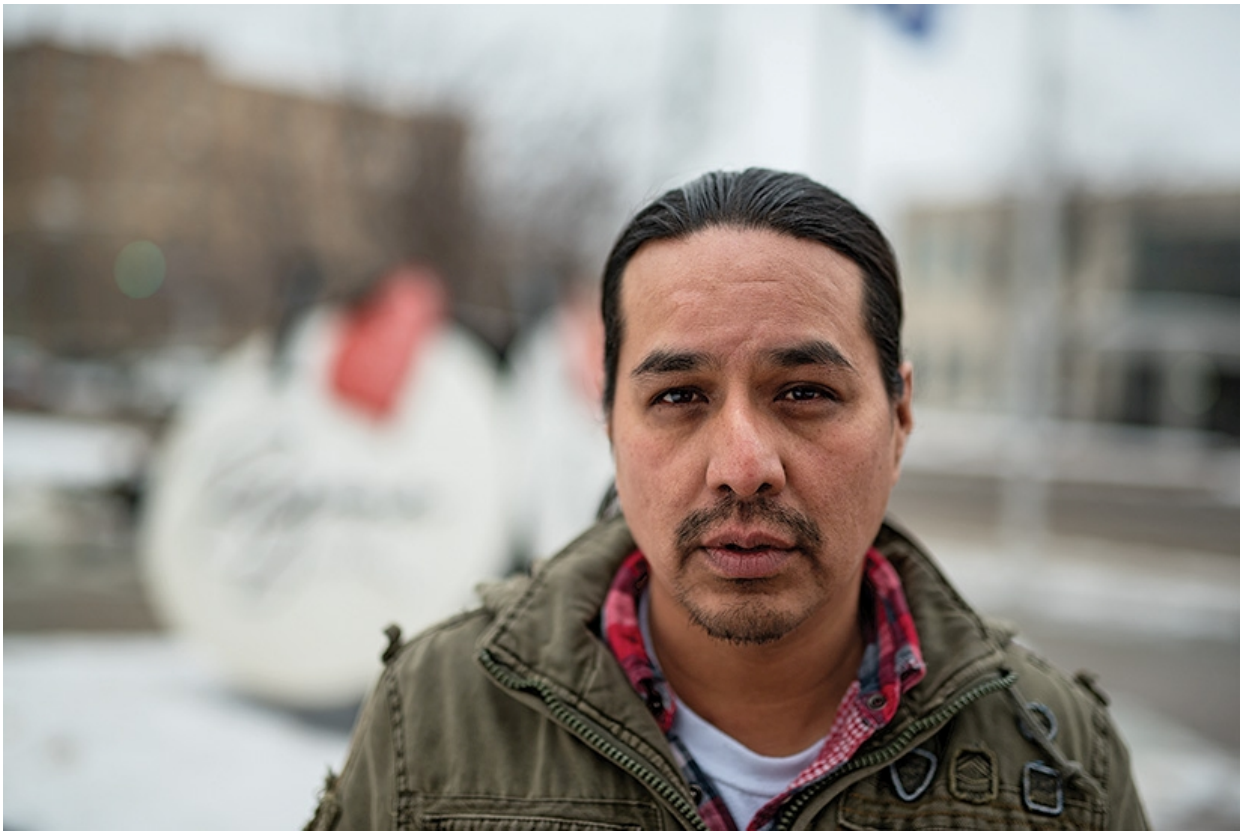
In the U.S., the go-to example for the asymmetric jailing of minority populations, black men are six times more likely to be imprisoned than white men. In Canada, the Indigenous incarceration rate is 10 times higher than the non-Indigenous population—higher even than South Africa at the height of apartheid. In Saskatchewan, if you're Indigenous, you're 33 times more likely to be incarcerated, according to a 1999 report, the most recent available.

This helps explain why prison guard is among the fastest-growing public sector occupations on the Prairies. And why criminologists have begun quietly referring to Canada's prisons and jails as the country's "new residential schools."

In some Prairie courtrooms, Indigenous defendants now make up 85 per cent of criminal caseloads, defence lawyers say. At Manitoba's Women's Correctional Centre in Headingley, as many as nine in 10 women were Indigenous, according to one recent count. At nearby Stony Mountain Institution, Indigenous men make up 65 per cent of the inmate population. Often, they're there because they failed to comply with a curfew or condition of bail. Or they're a low-level drug offender, caught up in Canada's harsh new mandatory-minimum sentences.

That's one reason for the upsurge. In the past decade, Stephen Harper's government passed more than 30 new crime laws, hiking punishment for a wide range of crimes, limiting parole opportunities and also broadening the grounds used to send young offenders to jail.

But the problem isn't just new laws. Although police "carding" in Toronto has put street checks, which disproportionately target minority populations, under the microscope, neither is racial profiling alone to blame. At every step, discriminatory practices and a biased system work against an Indigenous accused, from the moment a person is first identified by police, to their appearance before a judge, to their hearing before a parole board. The evidence is unambiguous: If you happen to be Indigenous, justice in Canada is not blind.



Chapter 1 – The street check

On Dec. 10, 2014, Simon Ash-Moccasin, a Regina teacher, actor and playwright, was walking to a holiday party for *Briarpatch* magazine, where he sits as a board member. He says officers began tailing him as he approached Casino Regina in the city's downtown core. Ash-Moccasin "fit a description," he was told after asking why he was being stopped. "I know which one that is," the Cree-Saulteaux 41-year-old later told *Maclean's*. "There's only one."

Ash-Moccasin has a good understanding of arrest protocol thanks to an acting gig with the Saskatchewan Police College, teaching trainee officers how not to collar a suspect. He plays the bad guy.

In real life, Ash-Moccasin initially refused to give his name. An officer threw him against a wall, he says. One attempted to cuff him without reading him his rights. He says he was shoved, headfirst, into the backseat. He was briefly detained until his record check came back clean. Before being released, officers told Ash-Moccasin, who was wearing a distinctive green camouflage jacket, that they were looking for an Indigenous man dressed all in black, with no front teeth, trying to hawk a TV.

Ash-Moccasin is among several Indigenous men and women in Prairie cities who allege they are being unfairly, and illegally, singled out. In June 2015, *Maclean's* (working with Vancouver's Discourse Media) attempted to figure out whether their experiences are indicative of a larger issue. Eight Freedom of Information (FOI) requests were filed with major Western Canadian police agencies, looking for race-specific data on discretionary police stops for jaywalking and arrests for drug possession. In the end,

they didn't supply any data. The Edmonton Police Service estimated that producing one set of data—for instance, race-specific data on arrests for drug possession—would cost*Maclean's* $7,693. In Saskatchewan, municipal police are exempted from Freedom of Information laws, and the Regina Police Service instructed their legal counsel to refuse the request.

To approach the issue from a different perspective,*Maclean's* and Discourse Media (with the support of Canadian Journalists for Free Expression) surveyed more than 850 post-secondary students in Regina, Saskatoon and Winnipeg, to see whether there was any difference in the likelihood of being stopped for Indigenous and non-Indigenous students.

Survey results show the odds of an Indigenous student from the sampled population being stopped by police were 1.6 times higher than a non-Indigenous student, holding all other explanatory variables (like gender and age) fixed. Indigenous students will be stopped more frequently, the study indicates; whether or not they were engaged in or close to an illegal activity when stopped by police had little influence in explaining the results. This suggests staying out of trouble does not shield Indigenous student from unwanted police attention.

The survey produced other unsettling data. Indigenous students were more likely to "disagree" or "strongly disagree" that their racial group is viewed positively by police. An Indigenous student had a 69 to 84 per cent chance of "disagreeing" or "strongly disagreeing," depending on their age; a non-Indigenous student had a 10 to 21 per cent chance of responding the same way. Students were also asked to share three words that they feel describe police officers. The most common words non-Indigenous students associate with police—"helpful," "authority"—differed dramatically from those chosen by Indigenous students: "racist," "scary."

In September, three reporters from*Maclean's* and Discourse Media spent two days in downtown and North Central Regina—at the Cornwall Centre mall, at Victoria Park, in churches, and in residents' homes—speaking with dozens of Indigenous residents about police interactions. Half spoke of unwanted contact with police. Of them, a majority felt they were stopped because of the colour of their skin. Two people alleged they were detained when it was determined they had unpaid fines relating to animal bylaw infractions. Others said they were found to be in breach of a condition of bail or a release program during a random stop.

Criminals, meanwhile, have learned to exploit biases. In Saskatchewan, non-Indigenous men and women are recruited to carry drugs and weapons for Indigenous gangs, says Robert Henry, a Saskatoon academic whose Ph.D. research focused on Indigenous street gangs. "They use their whiteness to move around police stop checks."

With frustration rising, some Indigenous citizens have begun filming what they believe are incidents of racial profiling. In a video recently uploaded to Facebook, Andre Bear, a clean-cut, 20-year-old aspiring teacher, is stopped by police in Saskatoon while returning from baseball practice with his 18-year-old friend. When Bear asks why they were pulled over, an officer tells him: "Shut up, passenger." "We have a reason," another says: "Licence and registration." Eventually, they're allowed to go. No reason is given for the stop.

Police say complaints of racial profiling are without substance. The Saskatchewan Public Complaints Commission, which investigates complaints against municipal police, says not a single allegation of racism by a civilian against an officer with any municipal police force in the province has ever been substantiated. Police say random street checks are necessary, acting as deterrents, helping solve crime and keeping the public safe.

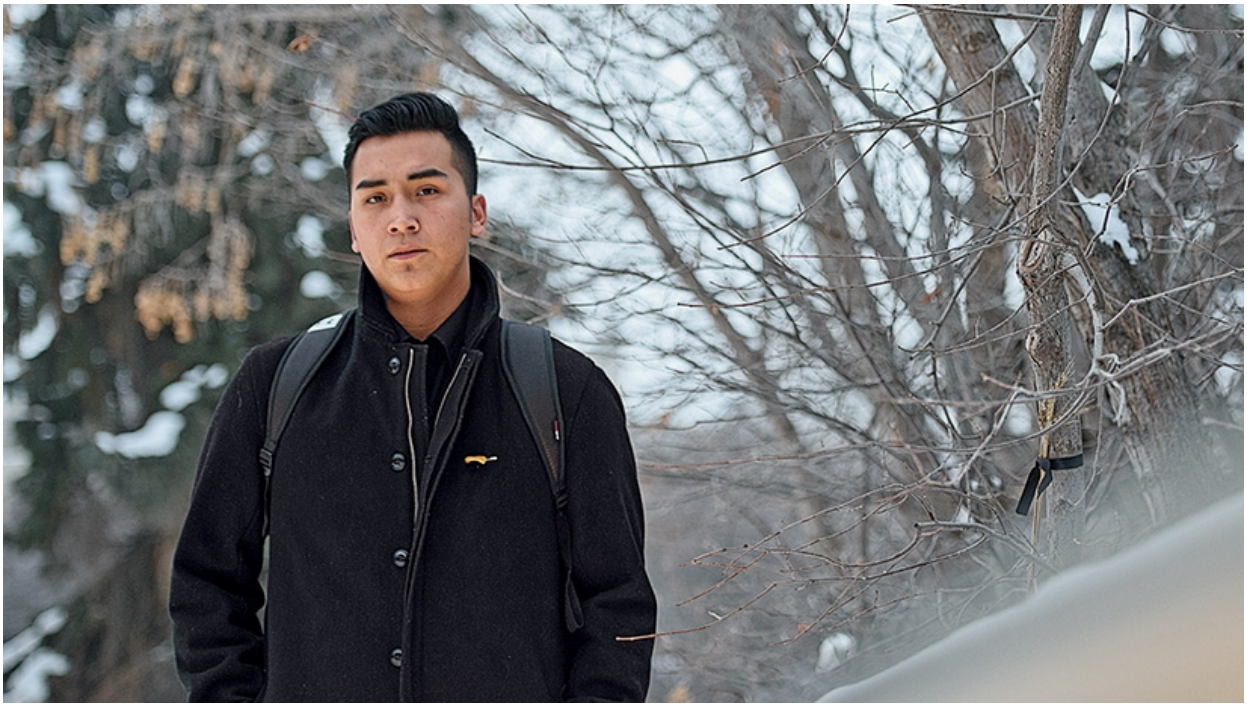
One Indigenous officer in Western Canada, who spoke on condition that his name not be used, told *Maclean's* he was stopped "again and again" growing up; but he argued that proactive policing, focusing on hot spots, helped bring down violent crime across the West—by fully 61 per cent in Winnipeg in the last five years. Indigenous people, who are three times more likely to be victimized, are primary beneficiaries, he added.

There are signs tactics may be changing. The Winnipeg Police Service, under Chief Devon Clunis, who was raised in the city's troubled North End, is testing a new approach to policing in that neighbourhood. Dubbed the "Block-by-Block" program, it zeroes attention on a 21-block area, and brings families concentrated help from social service and health agencies, community groups and schools to try to tackle problems—like substance abuse or domestic violence—before police need to be called. "From day one, I said, 'We are going to dramatically change the way we police in this city,' " Clunis told *Maclean's*. He calls it "crime prevention through social development." Results are due in spring.

But for those repeatedly targeted by police attention, the impact can be profound. "It makes you feel like you're less human, like your life is worth less," says Bear, who was nine the first time he was first stopped, walking home from school in downtown Saskatoon. He's stopped every few months, he says: "When I was younger it made me ashamed—of having brown skin, of growing up where I did."

Peter Daniels, a soft-spoken Cree father of two from Regina, began crying when voicing fears his young sons might soon become targets of police attention, the way he once was. Like him, both boys wear their long, brown hair in braids. His eldest, now 10, was relentlessly teased in school last year because of it, and told his father he'd thought of harming himself. "You wish that police, that people, could look beyond the stereotype, and see you for who you are."

In Regina last month, the SPCC conceded that video and audio recordings did not "contradict" Simon Ash-Moccasin's account of his unlawful detention; and the ministry of justice determined there was "no lawful justification for the use of force." But the SPCC refused to say Ash-Moccasin was racially profiled. He was "by unfortunate coincidence," the "only person observed in the immediate vicinity," SPCC chair Brent Cotter found. No police will be disciplined.



Andre Couillonneur poses for a portrait near the Education Building on the University of Saskatchewan Campus in Saskatoon, SK on January 23rd, 2016.

Chapter 2 – Bail denied

On a recent day, some 70 per cent of defendants who parade past a judge via video link from the Winnipeg Remand Centre are Indigenous, many dressed in jail-issue, baggy, grey sweatsuits. It is a grim cattle call: The Indigenous 18-year-old female accused of stealing meat from a Superstore, the 19-year-old man from Shamattawa, Man., given 25 days for missing a parole check-in. He's been homeless since aging out of foster care, where he was abused and repeatedly left out in the cold. When they pleaded out, their cases often wrapped up in under five minutes, sentencing included. This is bail court, and it is here, at this early stage ahead of trial—with its rigorous standards of due process and proof—that a criminal defendant is most vulnerable. For a majority of Indigenous accused, their case ends here, multiple front-line lawyers told *Maclean's*.

Maclean's spent two days observing the scene. Duty counsel lawyers in Toronto and Winnipeg admit they rarely spend more than 10 minutes with a defendant. Sometimes, it's as little as five. In Winnipeg, some met them in court: In hushed, hurried phone calls—their hands over their mouths to muffle their words—these lawyers rushed through the deal on offer from the Crown. It was unclear whether some of the accused, with intellectual disabilities and fetal alcohol spectrum disorder were equipped to understand proceedings. Repeated interruptions hammered home the point: "Miss, when can I go home?" a 53-year-old Cree man, who pleaded guilty to public intoxication, asked the judge immediately after his sentence was read out.

No province except P.E.I. denies bail more frequently than Manitoba: Just three of 10 inmates in the province's overcrowded jails have been sentenced to a crime; the rest are in remand custody, awaiting trial.

Though Canada's bail laws were reformed four decades ago, grounded in the notion that someone accused of a crime should be released on bail to await trial unless they are a threat, spooked judges are making it increasingly hard to obtain bail, especially for Indigenous defendants, criminal lawyers say. The number of Indigenous people denied bail jumped 92 per cent in the 15 years leading up to 2009, according to federal data.

In Winnipeg, many were appearing at bail court because they'd missed a court appearance or curfew. Some were homeless, and told the court they'd missed a summons as a result. Some had trouble remembering the many conditions of their release, which can now number as many as 34.

Charges for violating conditions like these are soaring. In B.C., fully 40 per cent of criminal court matters are now "administration of justice" offences, which include breaching conditions of bail or probation, according to a recent study. Alberta found that 52 per cent of Indigenous prisoners had been incarcerated for a breach, almost twice the rate for non-Indigenous prisoners, according to a 2011 report by the province's justice branch.

Two years ago, 19-year-old Jonathan Champagne (his name was changed because he was a minor at the time of his arrest) was granted bail after an arrest on a charge of sexual assault. He claims it never happened. A few months later, while walking down Portage Avenue in a favourite red T-shirt, police stopped him on suspicion he was wearing gang colours. Champagne has never been in a gang. He doesn't use drugs. Police searched him, finding a paring knife in his shorts pocket. He was arrested for carrying a concealed weapon. This time, the judge refused to let him out on bail. The 17-year-old, who was shuttled between 10 homes in four cities growing up, was devastated: A few months earlier, he'd been placed in a tough, but loving home with a corrections officer. He's come to trust the family, a first. But the nine-month wait to trial meant losing that placement.

His lawyer, Billy Marks, appealed the judge's decision. His foster parents were so convinced of Champagne's innocence they agreed to foot the $500 monthly cost of an ankle monitoring system to strengthen his case. But the judge refused to budge.

Behind bars, Champagne was vilified and targeted. After admitting to wanting to end his life, he was placed in segregation. He spent 23 hours a day in a tiny cell, fed through the door and released to "the cage," a tiny, enclosed exercise yard for an hour. He'd walk in circles until his time was up. "It got to the point where I didn't want to be alive anymore," he says.

These were his options: Spend nine months in jail and fight the charges, or plead out. The Crown had approached Marks to say they would agree to jointly recommend time served if his client pleaded guilty to sexual assault. The guilty plea broke Marks's heart. "But at the same time, I could see what was happening to him."

He is hardly alone. Many plead out, even when they're innocent, because they can't make bail, putting them at risk of losing jobs, housing, and custody of their children, defence lawyers told*Maclean's*. The simple act of having an Indigenous lawyer, meanwhile, can almost double the number of "not guilty" pleas at first appearance to 49 per cent, according to one federal study.

Eddy Cobiness, a 49-year-old member of the Buffalo Point First Nation in Manitoba, told*Maclean's* he pleads guilty every time he's charged, even when he didn't commit the crime he is accused of: "I just say: 'Okay, yeah'—just to get out. Every day away from your kids is another day of making memories you lose."

Denied bail and faced with the prospect of a lengthy stay in an overcrowded jail, more and more are pushed into perverse choices in this era of mandatory minimums. "What would you do?" says Winnipeg criminal lawyer Greg Brodsky. "Do you want to lose your kids? Your job? Or do you [take the plea, and] just go home?" Increasingly, he says, justice resembles a "rush to resolve cases by the best bargain you can make."

Kinew and Kim

Chapter 3 – Sentencing

Two years ago, Jim Scott, a soft-spoken Saskatoon defence lawyer, grew so troubled by the harsh sentences he was seeing handed out to Indigenous offenders that he set out to study all publicly available, online criminal decisions in Saskatchewan, starting in 1996; there, 81 per cent of adults sentenced to provincial custody are Indigenous, more than anywhere else in the country. 1996 was the year the Criminal Code was amended to push judges to consider conditional and restorative sentences,

particularly when sentencing Indigenous offenders. Three years later, in *R. v. Gladue*, the Supreme Court was even more explicit: Sentencing judges must recognize an Indigenous offender's history of dislocation, disadvantage, addiction and abuse.

Still, Scott felt that judges in the province mostly "tuned out" whenever he presented a *Gladue* submission. This wasn't just frustrating; the resulting sentences were "unlawful" in his mind: "The Supreme Court wasn't making a suggestion, the law requires it."

So he analyzed sentences for all crimes in Saskatchewan; *Gladue* reforms, his data showed, have failed miserably. Indigenous offenders were sentenced to more than twice as much jail time as those where there was no indication the offender was Indigenous. It was three times higher for hazardous driving and 10 times higher for assault with a weapon. The problem is, on the Prairies, where *Gladue* is most "desperately needed," it's been "virtually ignored," says Jonathan Rudin, with Aboriginal Legal Services of Toronto.

The Saskatchewan Court of Appeal (SKCA) has been called out by legal scholars, including the University of Toronto's Kent Roach, who in 2010 wrote that the SKCA has made clear "in a number of cases," that *Gladue* will "make little, if any, difference in the sentencing of Aboriginal offenders in serious cases." In 2012, the Supreme Court was forced to reiterate its stance in *R. v. Ipeelee*, calling out lower courts by noting that *Gladue* applies in all contexts, and that failing to apply the principle is sufficient grounds on its own for appeal.

Like Scott, retired B.C. judge Cunliffe Barnett was perturbed by rulings he saw emerging from the Saskatchewan Court of Appeal. Two years ago, he reviewed all the court's publicly available criminal cases involving Indigenous offenders in Saskatchewan, from 1999 on. His data showed an eight per cent application rate for *Gladue* in cases with an Indigenous defendant. In some cases, Barnett felt the Conservative-appointed appeals court was "actively avoiding stating the person was Indigenous at all."

"Too many judges will say: 'I understand Aboriginal people,' but they don't have a clue," says Barnett, who sat on the bench for 38 years, first in B.C.'s Interior, then in the territorial courts in the Yukon and Northwest Territories. "They've made judgments on Aboriginal people for years. But they've never set foot on a reserve. They've never talked with ordinary, Indigenous people."

Scorching judicial criticism like this is almost unprecedented. The SKCA, bound by principles of judicial restraint, could not issue a response; but one came via retired SKCA Justice W.J. Vancise, who vigorously disputed Barnett's findings. The SKCA has "written extensively on this subject," he wrote in the Saskatoon *StarPhoenix*.

One of the most troubling examples of disparity in the courts—and a reason for the sentencing imbalances Scott found in Saskatchewan—is the country's increasing use of the dangerous offender designation. It was designed for irredeemable monsters like serial rapist and murderer Paul Bernardo. More than 80 per cent have convictions for sex offences. Some call it Canada's death penalty. Just 3.7 per cent of "DOs" ever leave prison, according to the latest corrections' data.

But a growing number of Indigenous offenders are being jailed for life this way. The number of annual dangerous-offender designations has doubled in the last decade, to an average of 40 per year. The proportion of Indigenous designations recently hit 29 per cent, up from 23 per cent in 2007. In Saskatchewan, which has the highest number of dangerous offenders per capita in the country, 80 per cent are Indigenous, according to Scott's data. Some are there for "really ludicrous offences," says a doctor who acts across Canada as a witness in such cases. "There is a good reason they call Saskatchewan 'Alabama north,' " the doctor adds. Scott's data shows the provincial Crown's office logging a 98 per cent success rate in these cases. Only two of the 98 dangerous and long-term offender applications Scott reviewed were dismissed.

In one 2014 dismissal, a judge ruled against the Crown's application for a mentally ill Indigenous woman who had spent the previous five years tied to a bed and could no longer stand or walk.

In 2005, Andy Peekeekoot, a 25-year-old man from central Saskatchewan's Ahtahkakoop Cree Nation, was charged for his role in a bar fight with two Caucasian men in Shell Lake, Sask. No one was seriously hurt; one of the men involved ordered another beer when the 90-second fight ended. But Peekeekoot waved a knife with a four-inch blade he said he'd found at a nearby lake. That incident would lead to his dangerous-offender designation, even though he'd never even served serious time—a penitentiary term of two years or more.

The multinational catering company just hired by the Saskatchewan government to provide meals at eight provincial correctional centres has been the subject of serious complaints about food quality and other issues elsewhere.

As a young man, Peekeekoot racked up a list of offences, many for fighting or spitting at guards in jail; on all but one occasion, lawyers pleaded him out. He was, undeniably, violent. His most serious conviction was for stomping a man in a brawl when he was 22, causing the victim brain damage.

In court, Peekeekoot didn't help himself. During his dangerous-offender hearing, he fired one lawyer; another quit at the most critical phase for the defence, concluding his client had lost confidence in him. The judge ordered Peekeekoot, with a Grade 6 education, to continue. He was barred from making copies of court documents, barred from bringing court documents to his cell to study. In any event, he couldn't "make heads or tails of [them]," as he told Judge Lloyd Deshaye.

He'd been forced to appear in a heavy, anti-suicide smock, after an undisclosed incident, and was naked underneath. His hands were cuffed. He was being held in segregation.

At one point, a concerned Indigenous court worker stood: "Do you know about his childhood?" Eric Ahenakew asked the court. He urged the judge to consider the systems that had failed to protect Peekeekoot as a boy, to consider why he was lashing out, to "get a view of this man as an Aboriginal person." He "wasn't born to be violent," Ahenakew told the court.

Before he turned two, Peekeekoot was made a ward of the state, after being found starving and neglected. Both parents were violent alcoholics and drug users, among many who serially abused him throughout his youth. When he was nine, his mom, who once attempted to stab him, convinced a group of male friends to beat him so badly he was hospitalized. By 10 he was drinking. He was 12 the first time he attempted suicide, after being sexually abused. When he was 13, his father made him watch as he raped a child. He was 14 when he did his first stint in juvenile detention. From then on, he was in and out of jail.

"I can't do this by myself," Peekeekoot kept telling Judge Deshaye. "I've not the means nor the education to do so. There's no way I can continue." The judge concluded Peekeekoot would not be calling any evidence in his defence: "If people cannot or will not work with you I don't have a magic wand that can cure that situation," the judge said.

Barnett, who served 38 years on the bench, believes the judge was "flat-out wrong": He could have appointed counsel. A *Gladue* report to be used in sentencing could have been ordered. "A judge has a duty to make very certain the information Peekeekoot wanted before the court gets there. It is unconscionable that a court in Canada can think it acceptable that a person be declared a dangerous offender and locked up—almost certainly for the rest of his life—when he has not been heard, and his story has not been told," Barnett says. Peekeekoot understood so little that on Jan. 15, 2010, the day Deshaye was delivering his ruling, he thought court had convened so he could begin the process of finding a new lawyer.

He appealed, but Saskatchewan's high court ruled that it was "not clear the sentencing judge failed to consider so-called *Gladue* factors." The judge "didn't even describe Andy as Aboriginal," says Bob Hrycan, Peekeekoot's lawyer on appeal. "There was no meaningful analysis of background factors. And in the end, he had no lawyer. That was enough?"

For Peekeekoot, it was also the end of the line. Last May, the Supreme Court declined his application for leave to appeal (the high court approves roughly five per cent of applications, Barnett notes). Hrycan believes Peekeekoot is a changed man. He's 36 now, married, and hasn't had a charge for violence in nine years. Peekeekoot, who is currently housed in a federal prison in Alberta, says he's been clean of drugs and alcohol for 11 years. As a young man he was almost mute. These days, he'll spend hours on the phone, opening up about the darkest chapters of his life, or the tiny fox he watches out in the prison yard. He's come to see that in the warped environment of youth, the men around him earned respect through anger and hostility. In response, he always tried to be "twice as tough."

None of this, Hrycan says, will do him any good: "He'll never get out. We've put someone in jail for the rest of his life for waving a four-inch knife."

Prisoner Andy Peekeekoot, pictured at Grande Cache Institution in Grande Cashe Alberta, February 16, 2016. In 2007, Peekeekoot was convicted on two counts of assault while threatening to use a weapon in 2005. Peekeekoot was declared a dangerous offender in 2010. The dangerous offender label means he can be kept behind bars indefinitely.

Chapter 4 – Segregation

In prison, Indigenous offenders serve much harder time than anyone else. Indigenous inmates are placed in minimum-security institutions at just half the rate of their non-Indigenous counterparts. They

are more likely to be placed in segregation, accounting for 31 per cent of cases; and, once in isolation, they'll spend 16 per cent more time there. They account for 45 per cent of all self-harm incidents. Nine in 10 are held to the expiry of their sentence, versus two-thirds of the non-Indigenous inmate population. They are more likely to be restrained in prison, to be involved in use-of-force incidents, to receive institutional charges, to die there.

Many of these disparities are known because Howard Sapers, the correctional investigator of Canada, made a point of tracking race-specific corrections data. Two years ago, troubled by the surging growth of the Indigenous inmate population, he issued a special report on it in Parliament, blaming systemic racism and cultural bias. It was one of only two the office has ever issued, to "signal this was a very important matter requiring urgent action." It received "anything but," Sapers says now, bitterly. Last year, the federal government announced he was being replaced (a process interrupted by the election, which left him on the job).

An Indigenous offender's problems begin with intake, Sapers says, where their risk level is often consistently over-classified by the Custody Rating Scale; it determines whether they belong in minimum, medium or maximum security (and almost everything else about their time behind bars). For years, the federal government has been ignoring repeated demands to reform these and other assessment tools used on the Indigenous inmate population. The latest, in September, came in a blistering Federal Court ruling. Justice Michael Phelan ordered Correctional Service Canada (CSC) to stop using them on Indigenous offenders, arguing they are "susceptible to cultural bias," and can produce "junk" data.

"This is not an issue the CSC missed inadvertently," Justice Phelan wrote, noting the U.K., Australia and the U.S. have all studied such assessments to ensure they are reliable for cultural minorities. "It has been a live issue since 2000, on the CSC's 'radar screen,' and the subject of past court decisions. It is time for the matter to be resolved." CSC immediately appealed.

Part of the problem is that the marginalization experienced by some Indigenous peoples gets turned into "risk": intergenerational trauma, alcoholism, a history of abuse, a lack of education, employment, a bank account or even hobbies make it more likely an inmate will be housed in maximum, and classed "high risk."

Cruelties are built into the system. The main reason Indigenous women—who account for 78 per cent of all self-harm incidents in prison—are moved to higher security levels is due to self-harm, including suicide attempts, according to a 2008 report by the Ontario Women's Justice Network.

Kinew James, who died months before the end of a 15-year sentence while incarcerated in Saskatchewan, is frequently compared to Ashley Smith, who strangled herself to death at Grand Valley Institution for Women in 2007 as guards watched. Both were incarcerated as teens. They struggled with mental illness and self-harm, were frequently moved, and spent long stretches in segregation in a system that didn't know how to deal with them. But James had a resilient streak. She believed she was stronger: "I'm not Ashley Smith," she said at a Kitchener court appearance in 2011, when a judge noted the likeness. "I have a lot more strength. I got my Grade 12. I want out of jail," she told him. "I know I will get out."

She never did. The 35-year-old Anishinaabe Native, a member of the Roseau River First Nation in Manitoba, died Jan. 20, 2013, while incarcerated at Saskatoon's Regional Psychiatric Centre. All day, she'd been complaining of being unwell. By night, she was moaning and crying, pressing the distress button in her cell. According to one media report, corrections officers responded by muting or shutting it off. Other inmates reportedly began calling for help. When it did come, just before midnight, James was unresponsive.

James was then transferred to hospital where she was declared dead, apparently from heart failure.

She was then a few months shy of being released. She'd been incarcerated at 18, initially sentenced to six years, for manslaughter; but inside, her mental health spiralled downward, she lashed out, and her sentence doubled. She was known to take blame for others, and had been charged with assaulting guards, sometimes when they tried to stop her from harming herself. She cut herself, and self-strangled. Her Ojibwe name, Keshebawnodinnuke Kinew, means "eagle in the whirlwind."

The data on Indigenous female offenders are grim: 91 per cent admit to having been sexually or physically abused; and nine in 10 report using drugs or alcohol the day they offended, according to the Canadian Association of Elizabeth Fry Societies. Many enter the prison system with a host of mental health needs requiring services and programming. Some instead end up in segregation.

Despite a host of severe mental health diagnoses, including borderline personality disorder, paranoid schizophrenia and schizoaffective disorder, manic type, fully six of James's 15 years in prison were spent in isolation. Sometimes she was held in barren cells so small she could touch opposite walls at once. She was there 23 hours a day, "let out for a half-hour in the yard," says her sister, Cheryl Smith, of Winnipeg. At one point she spent almost two years straight in segregation. She was then under "management protocol," a super maximum designation allowing inmates to be held indefinitely in segregation; when it was quietly ended in 2011, 100 per cent of inmates so designated were Indigenous. James was sometimes so starved for human contact she would lie against her cell floor, her face pressed against the crack beneath the door, to hear voices.

After prolonged stays in segregation James would sometimes "see things, hear things," and get lost in fantasies, says Kim Pate, executive director of the Canadian Association of Elizabeth Fry Societies, who knew James well. In 2013, Colorado barred inmates with serious mental health issues from being held in segregation. "There is ample evidence Kinew's death was preventable," says Pate. "It screams out the need for oversight and accountability for corrections."

James was told she'd never reach Grade 4, but managed to earn her high school equivalency certificate behind bars. She was fully shackled and carrying a body chain at her graduation. No one was permitted to attend. These were among privileges James had to earn, to work her way out of segregation and management protocol, says Pate. At times, she was barred from keeping photos of her family, from having crayons. An overheard swear word was evidence of non-conforming behaviour, a higher standard than anything demanded of male inmates, says Pate.

Before she died, she'd begun post-secondary coursework for Athabasca University. She wrote poetry. "Six months later, she would have been home," says Cecil, her brother, a band counsellor at Roseau River. Her death will be the subject of a public inquiry in Saskatchewan in April. Last week, a judge denied a request to seal a report into her death.

"There is a group in Canada that keeps mysteriously dying,'" says University of Toronto sociology professor Sherene Razack. "We have convinced ourselves that we are improving. The reality is systems are in place to keep reproducing this."

Since no data on the race of those dying in prison in Canada exists, Razack undertook a study of in-custody deaths in Saskatchewan; her study found that Indigenous men account for roughly 50 per cent of all male deaths, many from suicide, head-injury or fatal encounters with police. Many of these deaths occur because officials "will not touch, examine, or closely monitor Indigenous people in their care," Razack says. "This indifference kills."

Andy Peekeekoot and his wife.

Chapter 5 — A new start

"Courtroom's open," Judge Marion Buller-Bennett says with a wide smile, ushering everyone waiting in the corridor into the second-floor courtroom at the New Westminster Provincial Courthouse. As the gallery fills, Buller-Bennett, a member of the Mistawasis First Nation in Saskatchewan, leaves the judge's dais, pulls up a plastic chair, and asks everyone to introduce themselves. Several she greets with a few words in their language, thus opening B.C.'s First Nations Courts, which operates unlike any other courtroom in the country.

Legal jargon is barred. Formalities are not observed. There is no prisoner's dock, no microphones. Babies, noisy kids, coffee, laughter—all are welcome. Elsewhere, a judge might threaten sanction after an interruption or outburst. Buller-Bennett encourages them.

During a hearing for a 28-year-old Cree man who pleaded guilty to a drug offence, a recovering crystal meth addict stood up to commend his progress. Someone else suggested he consider Warriors Against Violence, an anger management program geared to Indigenous men. Another piped up with the number of a bus that will take him directly to it. Before he left, the Sandy Lake First Nation man, choking back tears, thanked the judge for acknowledging him—a "first," he said. As he was leaving, someone grabbed him in a bear hug. "You're doing great man," he said. "Stick with it."

Indigenous offenders can only appear before B.C.'s First Nations Court if they are entering guilty pleas (and their charges must be minor, and without a mandatory minimum sentence). They then work with the judge and two courtroom elders to come up with a "healing plan," a 12-month suspended sentence, which generally includes a stay in a residential treatment facility, anger management and parenting classes, addictions and cultural programming.

Most appearing before Buller-Bennett on that day were intergenerational survivors of residential schools. Their stories rarely deviated from a grim narrative: harrowing childhood, substance abuse, incarceration—almost always for crimes fuelled by or to feed their addictions.

"Rather than apply another Band-Aid," Buller-Bennett explained to the court, the point is to "help deal with what's causing the problem, often addiction." To monitor progress, the offender is required to return every two months. A missed appearance triggers a bench warrant, as in regular court.

At the completion of sentences, Buller-Bennett holds "graduation ceremonies." Two elders blanket graduates in red and black fleece, among the highest honours in Coastal First Nations culture. Not one got through it dry-eyed.

Buller-Bennett has said recidivism rates in the eight-year-old court, based on Cree teachings, beliefs and values, are low. Similar courts in Australia have more than halved recidivism rates. As in the Australian courts, elders tend to say things a judge might not. "It's like being publicly scolded by your grandma," Rose Falla, an Indigenous magistrate who helped establish Koori Courts in Australia's Victoria state told *Maclean's*.

But Jonathan Rudin sums up the problem: Where these innovations are most needed—Manitoba, Saskatchewan and Alberta—is exactly where you see the "most intransigence, the fewest innovations."

These same critiques could also be levelled at Ottawa, which, for a decade, has been ignoring calls to reform biased correctional admissions tests, bail and other laws disproportionately impacting Indigenous offenders. Instead, it appears to be incarcerating as many Indigenous people as possible, for as long as legally possible, with far-reaching consequences for Indigenous families. "[Indigenous people] are not there because of a crime spree," says Sapers. "They're there because of the impact of social factors, government policy and mandatory minimum sentences."

This situation does not help increase public safety: incarceration has almost no effect on bringing down crime, and it increases the likelihood of reoffending, as any criminologist will argue. Indigenous communities complain offenders are being returned more hardened, hopeless, violent and angry.

“What we are doing is using our criminal justice system to defend ourselves from the consequence of our own racism,” says Toronto criminal lawyer John Struthers, who cut his legal teeth as a Crown attorney in remote, northern communities. “Rather than treat alcoholism, addiction, trauma, we keep the doors closed.”

“Once you’re in the system, you never get out,” says Dwight Monkman. Three of his four brothers have been incarcerated. The 26-year-old Winnipegger, a member of the Lake Manitoba First Nation, spoke to *Maclean’s* late last summer from the Headingley Correctional Institution, where he was incarcerated for a weapons charge and breaching a condition of his release. Since turning 18, the longest stretch Monkman says he’s spent on the outside was 15 months. “I’m actually scared to get out,” he says, clutching the battered, black phone under his chin. “Because I know I’ll end up right back here.”

Nancy Macdonald
MacLean's
Feb 18, 2016