Access to Justice for Indigenous Adult Victims of Sexual Assault

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1. Executive summary

The purpose of this report is to critically engage with diverse approaches to access to justice for Indigenous adult survivors of sexual assault in the context of ongoing colonization and Indigenous-led efforts to end violence. The report seeks to bring grassroots community voices, and others outside the formal justice system, into conversation with existing literature on Indigenous peoples' experiences of sexual assault to foster connections and inform future directions. Additionally, the report seeks to provide a framework of analysis for understanding access to justice for Indigenous adult survivors of sexual assault using a de-colonial trauma-informed framework, in order to redefine 'justice' and 'sexual assault' to reflect the diverse realities of all Indigenous people, including those who are marginalized or absent in the formal literature (ie. Two-Spirit[1] people). The objective of this report is to create a foundation for the development of approaches to improving access to justice with the ultimate aim of reducing the harms experienced by Indigenous people and communities. In addition to an introduction, the report contains 7 main sections which are discussed briefly in this executive summary: 1) historic and social context of colonization and its relationship to access to justice and sexual violence; 2) case law review and analysis; 3) barriers to justice; 4) an intersectional analysis of the needs of survivors; 5) defining access to justice within and beyond the justice system; 6) promising practices and innovative models, and; 7) gaps and areas for future research.

Historic and social context of colonization

In order to understand the relationship between sexual violence and access to justice in the lives of Indigenous peoples, this report provides a contextual account of the historic and ongoing role of sexual violence and law in settler colonialism. Historic processes of colonization are active in shaping Indigenous peoples' lives today. The imposition of patriarchy and racism through the *Indian Act* and residential schools was key to colonization in Canada. The *Indian Act* legislated Indigenous rights through a gender binary which replaced culturally-distinct understandings of gender, erasing gender diversity from legal and policy frameworks while imposing a hierarchy which devalues women and girls. The ongoing marginalization of Indigenous women resulting from governmentally legislated patriarchal models of leadership is a key factor in shaping access to justice and sexual violence today, Further, widespread abuse and family and cultural breakdown resulting from the residential school system continue to be widely understood as a root cause of sexual violence among Indigenous people today. These impacts are evident in state-run child welfare regimes into the present day.

Sexual violence is understood to be part of a continuum of colonial violence. Sexual assault is often treated as expected in the lives of Indigenous people, particularly women and girls, through stereotypes which blame survivors themselves for the violence. Due to

[1] In this report, 'Two-Spirit' is intended to include diversely-identified Indigenous gay, lesbian, bisexual, transgender, transsexual, and queer people, as well as those who identify with culturally specific roles for a range of non-binary genders and sexualities.

its proliferation and naturalization, naming sexual violence *as violence* has been a key site of mobilization for Indigenous women. The ubiquity of this continuum of violence, together with the role of law in processes of colonization, necessitate a decolonial approach and an understanding of intergenerational trauma within justice systems and processes. Just as colonization is understood to be *the* key health determinant for Indigenous peoples today (Greenwood et al 2015), we understand colonization to be *the* key factor shaping justice today, including access to justice for Indigenous survivors of sexual violence. Possibilities of achieving justice for Indigenous survivors is and will continue to be constrained by colonial violence which is structural in nature.

Case law review and analysis

A review and analysis of Canadian case law was conducted in order to attempt to determine what, if any, strategies and approaches are being utilized in legal cases prosecuting those charged with sexual offences against Indigenous adults. As most sexual assaults of Indigenous adults are against women, an analysis of Canadian courts deal with Indigenous women was instructive in assessing the ongoing needs of Indigenous women, and, to the extent it is possible, trans and Two-Spirit, survivors of sexual assault and violence when these matters come before the courts.

In most cases, where courts considered the specific circumstances of Indigenous adult victims of sexual assault, it was revealed that ongoing and pervasive attitudes and beliefs informed by systemic colonialism, racism, and sexism negatively impact the way that Indigenous adult survivors of sexual assault are treated within the Canadian justice system. Where courts have noted the complex lived realities of Indigenous people in Canada, these observations rarely include the ways that colonization naturalizes violence against Indigenous people, families and communities. The distinct history of legal violence enacted through the imposition of Canadian law is ignored.

Canadian courts are not successfully addressing the concerns and needs of Indigenous adult survivors of sexual assault. Rather, court decisions seem to reaffirm the racist, sexist, and colonial narratives that create persistent access to justice issues for Indigenous peoples within the court system. The unfortunate reality for Indigenous adult survivors of sexual assault is that justice is very rarely accessed through the formal Canadian justice system.

Barriers to justice

While barriers to accessing justice are significant and multiple for Indigenous peoples in Canada, this report highlights the following four pervasive issues that form substantial barriers for justice for Indigenous adult survivors of sexual assault: 1) the colonial culture of the Canadian justice system; 2) racism; 3) fear and mistrust; and 4) individualized approaches to violent crime.

Our analysis of barriers to access to justice for Indigenous sexual assault survivors is informed by a critical assessment of what *justice* means in this context. As the case law

review and analysis indicates, the formal justice system does not appear to be the place that provides the most meaningful access to justice for adult Indigenous survivors. Rather, this report determines that barriers to justice faced by Indigenous people stem from the long history and legacy of colonialism and the ongoing impacts of settler-colonial violence enshrined in Canada's justice system. In fact, formal court systems appear to do more harm than good in perpetuating racist, sexist, and colonial stereotypes about how and why Indigenous peoples come to experience violence.

Our analysis identifies connections between the failure of the justice system to provide a meaningful space for accessing justice and the historical and ongoing failure of the Canadian government to address how settler colonial injustice directly impact the rates at which Indigenous peoples experience sexualized violence. Institutional racism within the Canadian justice system is interrelated with that of other state institutions, including the child welfare system, criminal and family justice systems, health and medical systems that shape Indigenous people's lives.

Given their various encounters across a spectrum of life experiences with state institutions and actors, whose approach is informed by such inherent racism, Indigenous peoples develop fear and mistrust based on the ongoing discrimination they face. These individual negative experiences add to a collective historical record of everyday colonial violence experienced by Indigenous peoples, families, and communities. Even when brought to light, the lack of accountability within Canadian institutions buttresses systems that maintain the status quo. This ongoing unwillingness to address underlying racism reifies practices and policies that are racist, as well as sexist, and informs Indigenous peoples' inability to trust state actors or institutions.

With respect to access to justice for adult Indigenous survivors of sexual assault, there cannot be justice without state accountability for the colonial violence of the past and present. This can only occur through recognition of the impact of settler colonial violence as a root cause of sexualized violence against Indigenous peoples. However, at present the Canadian justice system focuses on the individual crimes of individual offenders and treats the circumstances brought forward by every individual complainant as separate. This is not to suggest that individual accused, crimes, or complainants should not be considered as unique as per the evidence or facts of each case, but rather that the fundamental underlying root causes of over representation of Indigenous peoples in the justice system, whether as victims or offenders, must be acknowledged.

An intersectional analysis of the needs of survivors

North American literature on sexual violence tends to frame the issue through a feminist lens which understands sexual violence as the gendered phenomenon of male violence against women. This lens is often replicated in literature on Indigenous women's experiences of sexual violence, with colonialism and race seen as additional factors which put Indigenous women at greater risk or result in magnified impacts. In such frameworks, Indigenous women are often portrayed solely through their increased vulnerability to victimization. Without consideration of the foundational role of settler

colonialism and systemic violence, vulnerability is naturalized as inherent to being an Indigenous woman or girl. However, Indigenous scholars and anti-violence advocates have argued for intersectional approaches which view the structural intersections in Indigenous peoples lives as a form and source of violence that cannot be separated out from individual incidents of rape, sexual assault, sexual harassment and childhood sexual abuse.

Rather than separating out sexual violence from other aspects of Indigenous peoples lives –as is often the case when prevalence of violence is documented solely through statistics of individual incidents of victimization—this report argues that sexual violence must be viewed as interrelated with other forms of violence, including interpersonal and systemic marginalization. The individual needs of survivors are, consequently, understood as inseparable from community, systemic, and historic factors.

An Indigenous intersectional approach to access to justice for Indigenous sexual assault survivors is advanced through five principles: 1) respecting sovereignty and self-determination; 2) local and global land-based knowledge; 3) holistic health within a framework that recognizes the diversity of Indigenous health; 4) agency and resistance, and; 5) approaches that are rooted within specific Indigenous nations relationships, language, land and ceremony.

Indigenous survivors face particular barriers to naming their experience and being validated due to the silencing and normalizing of sexual violence in many Indigenous communities as well as societal discrimination which delegitimizes Indigenous peoples' experiences as valid. Shame and secrecy is also experienced by Indigenous people who are sexually assaulted during adulthood, due to shame, embarrassment, a fear of not being believed or of suffering targeted backlash for disclosing their abuse. Within these complex conditions of silencing, Indigenous survivors need approaches in which they can tell their stories on their own terms. Telling one's story of sexual victimization and being heard and believed is understood to be key to taking back power whether within or outside of the justice system. The role of storytelling within Indigenous cultural practices of justice and resurgence is key to an intersectional approach to access to justice, attuned to the specific needs of marginalized Indigenous people such as sex workers, people with addictions and Two-Spirit and trans people.

It has been argued that Indigenous people are represented *either* through their victimization *or* their criminalization in most Indigenous justice paradigms. These approaches close off possibilities for recognizing the fullness of survivors' knowledge and experience and the fullness of their political subjectivity within frameworks of Indigenous self-determination. Moving beyond criminal-victim paradigms in which Indigenous people are *either* criminals *or* victims requires ideological and systemic shifts toward paradigms rooted in Indigenous self-determination. This section further discusses the importance of moving beyond state apologies to fostering accountability for systemic harms of colonization, including police abuses of power. Additionally, the report argues the necessity of an Indigenous gender analysis that considers both the gendered nature of sexual offences, which are predominantly targeted at women, and the reality that

Indigenous people of all genders experience sexual violence. An Indigenous intersectional approach utilizes Indigenous gender analyses which account for the specificity of gender within Indigenous peoples' diverse lived experiences, cultural practices and teachings. Further themes include localized approaches, health and harm reduction, and moving beyond colonially-defined justice approaches in order to imagine a world without sexual violence.

Defining access to justice within and beyond the justice system

An Indigenous intersectional analysis of access to justice for Indigenous survivors of sexual violence reveals that systemic violence has been, and continues to be, a key barrier to justice for Indigenous people and communities. Within the settler colonial context of Canada, the process of redefining justice for Indigenous survivors must be understood as always delimited by the structural factors which continue to deny Indigenous peoples' self-determination at individual and collective scales. While critics both within and outside the justice system recognize systemic gaps and failures in addressing sexual violence towards Indigenous peoples, many continue to advocate for a blended model in which justice institutions work alongside Indigenous communities. Others are rightfully wary of Canadian legal systems, defining justice as necessarily obtained beyond the judicial system, particularly when sexual violence occurs within Indigenous families. Many efforts to define access to justice for Indigenous survivors have sought to contend with the impossibility of true justice for Indigenous people whose lives are always bound up in colonial systems and ideologies. Rather, access to justice has been defined through the lens of avoiding the perpetuation of trauma through actively centering Indigenous knowledge, perspectives and voice. The report further discusses efforts to define access to justice for Indigenous adult survivors of sexual violence within these systemic and historic tensions.

Promising practices and innovative models

This report identifies some promising practices and innovative models within and outside of the justice system that may provide some guidance for furthering access to justice for Indigenous adult survivors of sexual assault. Three areas of interest are identified: 1) community and grassroots justice and healing; 2) supportive police practices; and 3) alternative and restorative justice models.

Community and grassroots justice and healing provide significant involvement in justice processes where this is desirable or the empowered choice to not engage in or disengage from such processes as a survivor/victim wishes. With proper support and resources, grassroots initiatives that are informal justice models at this time, could be built up into formal community-led, community-specific, and culturally appropriate justice processes that have capacity to respond directly to the needs of Indigenous adult survivors. Such models, various and community-specific as they are, must also account for sexism, homophobia and transphobia if they are to be successful.

Because justice is relational, any agenda to create supportive police practices must go beyond policy to implementation. Indigenous communities' suggestions about steps to move such implementation forward have been outlined in various reports and research. Consultations with Indigenous peoples lays out three important focuses for police forces in Canada in building supportive police practices: 1) police accountability; 2) relationship-building; and 3) Indigenous led community policing initiatives. It is of fundamental importance that all of these initiatives be informed by decolonial anti-racism education and cultural competency training for police that leads to the implementation of trauma-informed approaches and culturally safe practices.

Restorative Justice (RJ) processes have the following broad goals: 1) making offenders accountable to both victims and the community; 2) increasing the role of victims and community in ensuring that accountability; and 3) repairing the harm and restoring relationships that have been damaged as a result of crime. The same colonial, sexist, and racist attitudes that underlie the Canadian justice system broadly do and will continue to interfere with the appropriate use of RJ mechanisms in sexual assault cases. Unless the fundamental issues of colonial, sexist, and racist attitudes that inform formal justice processes in Canada are directly addressed the use of RJ will in most cases be unlikely to accomplish its main goals. Further, RJ processes must provide for an increased and meaningful role of survivors, families, and communities in ensuring accountability of the offender or repairing the harm and restoring relationships that have been damaged as a result of a sexual assault. In many cases this may not be possible.

First Nations Courts (FNC), Gladue courts, and Indigenous courts are usually referred to as forms of problem-solving or specialized courts. These formal alternative courts operate within the Canadian justice system and only deal with sentencing Indigenous offenders who have pleaded guilty. In addition, alternative sentencing processes, such as sentencing circles, operate by way of the common law powers of judges to alter the format of the court. The use of sentencing circles in cases of domestic abuse and intimate partner violence has been researched to some extent; however, there is a lack of data on the degree to which Indigenous adult survivors of sexual assault, or their families, may find these models useful for their healing and to hold perpetrators accountable. Even if these courts or sentencing circles deal with sexual assault, a further limitation of such alternative sentencing processes is that participation may not be in the best interests of complainants, especially if the crime is particularly violent or is a sexual assault. The options available to survivors of sexual assaults to participate in the justice process can be limited not only by the lack of formal supports in place for them, but also by community response or pressures. Although Elders or community members may participate to some degree in these processes, there is an absence of Indigenous concepts of justice or Indigenous law in these models as they are still constituted through the formal Canadian justice system.

Suggestions for moving forward

This report identifies opportunities for innovation in the areas of education, community justice and government supported and funded research:

1. Education
Additional education for crown, defence, judges and other legal actors about the history and ongoing impacts of settler colonial violence would be valuable.

Education for crown, defence, judges and other legal actors about the history and ongoing realities of local Indigenous peoples including on the ground consultation with community which allow for the integration of their suggestions in the design and implementation of justice practices moving forward is necessary.

2. Community justice models
It would be good to have additional funding to create and support Indigenous legal clinics that are embedded in community, offering pathways to justice that are rooted in individualized, trauma-informed, culturally safe practices and that work to reduce harm to survivors of sexual violence and their families as they engage with justice processes.

Given the failures of the justice system to adequately address ubiquitous sexual violence against Indigenous people, many communities have developed informal support systems for survivors, in which local people work both individually and collectively to provide culturally safe support and/or justice services. This is particularly evident in communities with few or inadequate formal justice resources. Support should be provided to train these individuals and pay them to act in a liaison role and/or to provide culturally and personally appropriate support should the survivor not wish to pursue formal options for reporting sexual violence.

3. Government supported and funded research
Support is needed for culturally appropriate research on the specific access to justice needs of Two-Spirit and trans survivors, sex workers, men, elders and other under-researched groups by trusted researchers who are trained in trauma-informed approaches and rooted in diverse community and justice contexts.

Further commitments to long-term investment in studies that track success of integrated and innovative approaches to access to justice for Indigenous survivors of sexual violence, and provide ongoing support for capacity building for necessary adaptations and changes to program models would be effective.

Given shared jurisdictional responsibility for Indigenous people in Canada, a federally implemented mechanism across jurisdictions in Canada for recording incidents of sexual violence experienced by Indigenous people regardless of action taken by police, crown and other justice representatives, including recording of non-action or inappropriate or harmful action by justice representatives and service providers in providing access to justice for survivors is essential.

The report includes additional recommendations for addressing specific research gaps.

2. Introduction

Sexual assault is part of a continuum of violence disproportionately experienced by Indigenous people in Canada (Monture 1995). While the 2014 General Social Survey on Victimization indicates that Indigenous people are more than twice as likely to experience violent victimization (Boyce 2016), and more than three times as likely to experience sexual assault (Boyce 2016), we know that these figures only partially reflect the extent of sexual violence due to underreporting related to stigmatization and shame, and a lack of trust in reporting systems. Sexual violence is widely recognized as a key feature of colonization, having been used extensively at residential schools throughout Canada (RCAP 1996) as well as targeted at Indigenous women as a tool of colonial conquest (Million 2013, Smith 2005). Due to the intergenerational nature of sexual violence in Indigenous communities today, the normalization of abuse, fear and silencing continues to prevent survivors from speaking out and from seeking support in many communities (Proulx and Perrault 2000). Sexual assault impacts Indigenous people differently across their lifetime, with diverse needs and barriers for adult victims of sexual assault, adult survivors of historic abuse and survivors of sexual assault in their elder years. Sexual violence is deeply related to a broad range of other social and systemic factors impacting Indigenous communities today, including poverty, housing, community governance, and health, with each community facing unique barriers as well as holding culturally-specific solutions.

The purpose of this report is to critically engage with diverse approaches to access to justice for Indigenous adult survivors of sexual assault in the context of ongoing colonization and Indigenous-led efforts to end violence. Further, the report seeks to bring grassroots community voices, and others outside the formal justice system, into conversation with existing literature on Indigenous peoples' experiences of sexual assault to foster connections and inform future directions. Additionally, the report seeks to provide a framework of analysis for understanding access to justice for Indigenous adult survivors of sexual assault using a decolonial trauma-informed framework, in order to redefine 'justice' and 'sexual assault' to reflect the diverse realities of all Indigenous people, including those who are marginalized or absent in the formal literature (i.e. Two-Spirit[2] people). The objective of this report is to create a foundation for the development of approaches to improving access to justice with the ultimate aim of reducing the harms experienced by Indigenous people and communities.

a. Methodologies for the writing of this report

In this report, 'Two-Spirit' is intended to include diversely-identified Indigenous gay, lesbian, bisexual, transgender, transsexual, and queer people, as well as those who identify with culturally specific roles for a range of non-binary genders and sexualities.[3] A limit of the case law review for this report is that we did not find relevant reported cases from every province and territory. Indeed, the case law review was also limited in the number of cases that could be found where judges' reasons addressed the specific issues relevant to this report and where there were adequate details about complaints' perspectives as survivors of sexual assault, including to what degree any of the complaints may have identified as trans or Two-Spirit.

In this report, access to justice for Indigenous adult survivors of sexual assault is approached through a combination of practical expertise both within and outside of the formal justice system, as well as drawing on best practice research, policy and training materials from Canadian justice and Indigenous community settings. Building on this foundational knowledge, we use a historic analysis of colonization to understand sexual assault and barriers to justice faced by Indigenous people, seeking solutions across a range of systems as well as the practices of individual actors in those systems. Going beyond a literature review or summary of best practices, this report uses a critical decolonial and Indigenous gender-based analysis to outline societal and systemic considerations for improving the conditions for Indigenous adult survivors of sexual violence.

b. Guiding principles: cultural safety and a trauma-informed approach

Cultural safety and an Indigenous trauma-informed approach are used as guiding principles throughout this report. These principles provide the foundation for both the style and content of the report. For example, the authors do not include graphic depictions of sexual violence in order to avoid retraumatizing readers, some of whom may themselves be survivors of sexual violence. These principles echo approaches being advanced in Indigenous anti-violence movements, seeking to align with efforts to decolonize and Indigenize the treatment of sexual violence within systems of law and medicine.

Indigenous feminist analyses of colonial violence understand trauma to be both individually and collectively experienced, fostered within racist, sexist, colonial systems and ideologies which naturalize violence against Indigenous people, families and communities. This understanding of trauma is distinct from bio-medical models in which Indigenous people are pathologized as injured or ill individuals in need of intervention, support and saving (Clark 2016). Further, trauma is not only fostered through individual acts of violence but through disconnection from land, the disruption of traditional kinship systems and networks of care, and the genocide enacted through the residential school system. Systems of justice, health and child welfare are also often sites of retraumatization for Indigenous people, even as trauma itself is used as a reason for child apprehension, institutionalization or other state interventions into Indigenous lives (Million 2015, Clark 2012 & 2016). Thus, as stated by Metis scholar and practitioner Natalie Clark, Indigenous trauma-informed approaches call for the development of "models for addressing violence that are aligned with Indigenous values, Indigenous paradigms and epistemologies and that are based in strengths, resistance and survival. I suggest that we should move beyond decolonizing Western models of trauma, and instead attend to the centering of 'wise practices' and specific Indigenous Nations approaches…within a network of relational accountability" (Clark 2016, 11).

Cultural safety is a set of relational practices that have been explored and adopted in the Canadian context by practitioners and researchers in the fields of nursing and medicine in their work with Indigenous peoples and communities (Douglas 2013). Cultural safety is one of three models of intercultural care, along with cultural awareness and cultural

competency, that were developed by Maori anthropologist, educator, and nurse Irihapeti Ramsden in New Zealand in the 1980s as a result of her direct work with Maori peoples in their encounters with the health care system (Douglas 2013). In this context, cultural safety was meant to ensure that practitioners engaged in an ongoing assessment of their awareness of their patients' responses in relation to the treatment being received and how an individual's cultural context impacts their responses. As a practice, cultural safety moves beyond the notion of just being culturally aware and developing cultural competence over time. It demands ongoing accountability and responsibility on the part of someone working to communicate Indigenous experiences and knowledges to actively transfer and transmit those experiences and knowledges, as much as is possible, in context to the specific cultural modes and ways of being and knowing in which they are based (Brascoupé and Waters 2009). Ultimately, culturally safe approaches hope to follow a community-focused model that supports capacity building within Indigenous communities and on-the-ground community-led initiatives that specifically address particular communities' needs (Brascoupé and Waters 2009).

For the purposes of this report, we are framing our analysis through a responsive cultural safety practice that attempts to engage with various Indigenous epistemological and ontological approaches and perspectives. In doing so, we acknowledge that grounding our methodology in Indigenous cultural contexts in this way means we are relationally responsible to those whose views and lived realities we are attempting to discuss. This is a responsibility we take seriously; thus, we endeavor to extend a practice of intercultural care that is grounded in a cultural safety approach by ensuring this report reflects the lived experiences and ways of being and knowing of Indigenous peoples, families, and communities not just in theory, but as based on their own accounts as experts on their own lives.

3. Historic and social context for understanding access to justice & sexual violence

We understand sexual violence and access to justice to be two interrelated facets of contemporary Indigenous life in Canada arising within conditions of settler colonialism, as "marginalization and discrimination put communities at risk of violence and the same factors deny victims protection of the welfare and justice system" (Andersson and Nahwagahbow 2010, 5). In order to understand each of these issues and their relationship to one another, a contextual account of the historic and ongoing role of sexual violence and law in colonization is needed. While we do not have room to provide a full historic and societal account, this section provides a discussion of key aspects of these issues which we feel are essential for framing the remainder of this report.

a. Colonization

Canada is a settler colonial nation and, as such, the historic processes and mechanisms of colonization are active in shaping Indigenous peoples' lives today. It has been argued that colonization is driven by a logic of elimination (Wolfe 2006, Tuck and Yang 2012), working across multiple scales to eliminate Indigenous peoples, their ways of life and their claims to land. Moreover, colonization involves the imposition of colonial

worldviews and systems through mechanisms which prevent the passing on of Indigenous knowledge while advancing the goal of assimilating Indigenous people into Canadian society. Central to this project is the disruption of Indigenous peoples' relationships in all facets of life (Simpson 2014) – relationships with the land and waters, with plants and animals, with their own bodies and emotions, within families and among communities. Further, colonialism involves the disruption and dismantling of relational worldviews embedded in Indigenous cultures, languages, laws and knowledge systems which provide cultural lenses through which to understand this set of relationships. Understanding the violent nature of colonially imposed paradigm shifts is key to framings of both justice and sexual violence.

The imposition of heteropatriarchy and racism through the *Indian Act* was and is integral to colonization, understood through an Indigenous feminist lens to be an instance of the co-constitutive relationship of sovereignty and gender (Barker 2008). Heteropatriachal aspects of the *Act* systematized and legislated Indigenous rights through a gender binary lens which replaced culturally-distinct understandings of gender, erasing Two-Spirit and transgender people from legal and policy frameworks while imposing a gendered hierarchy which devalues women and girls (Hunt 2015). The ongoing political marginalization of Indigenous women resulting from governmentally legislated patriarchal models of leadership is a key factor in shaping access to justice and sexual violence today (Snyder, Napoleon and Borrows 2015).

Fueled by Christian teachings of morality, along with concepts of race and gender, colonization categorized Indigenous people according to stereotypes, many of which focused on portrayals of Indigenous peoples' bodies and sexualities. Stereotypes which portrayed Indigenous women as hypersexualized played a pivotal role in colonial justifications for control and surveillance of Indigenous people and their families (Barker 2008). At the same time, these stereotypes made Indigenous women targets of sexual violence as their sexual availability was assumed (Hunt 2010).

Colonial stereotypes about Indigenous people, including those which portray Indigenous women as hypersexual, have served to naturalize sexual violence against Indigenous people such that it is not treated as a crime in the same way as it is for non-Indigenous victims. Indeed, understandings of sexual violence as a crime should themselves be understood as constructed through colonial paradigms. Socio-legal scholars have argued that "crime" is not a stable category (Comack 2012) but is, rather, produced over time and space through the social construction of race, gender, and other axes of power.

b. Residential schools, sixties scoop and child welfare

Since the Royal Commission on Aboriginal Peoples in the 1990s, residential schools have been recognized as a significant cause of intergenerational violence, including sexual violence, among Indigenous communities and families (RCAP 1996; Bopp et al. 2003). Widespread abuse and family and cultural breakdown resulting from the residential school system continues to be widely understood as a root cause of sexual violence among Indigenous people today (Truth and Reconciliation Commission 2015). Recognizing the legacy of sexual, physical and emotional abuse experienced in

residential schools has been key to understanding and seeking to change patterns of intergenerational sexual violence within Indigenous families and communities (Dion Stout 1996, Truth and Reconciliation Commission 2015).

Less recognized, however, are the ways in which systematized violence and familial dislocation have been continued in state-run child welfare regimes (Pearce et al 2015). Beginning in the 1960s, thousands of Indigenous children were apprehended from their birth families and adopted or fostered out to non-Indigenous families (Sinclair 2007) in what is now called the Sixties Scoop. Today, Indigenous children continue to be overrepresented in child welfare systems, and continue to experience disproportionately higher rates of sexual violence while in these systems. For example, between 2011 and 2014 the Representative for Children and Youth in British Columbia reported 145 incidents of sexualized violence against youth in care, 61% of whom were Indigenous girls (Representative for Children and Youth 2016). Arguably, the ongoing role of child welfare systems in the perpetration of sexual violence against Indigenous young people comprises a key gap in Indigenous survivors' ability to access justice as few mechanisms exist for holding government actors accountable, including social workers and foster parents funded by the state.

c. Indigenous peoples and sexual violence

We understand sexual violence to be part of a continuum of colonial violence experienced by Indigenous people (Monture 1995). It has been argued that sexual violence is a key mechanism of the evisceration of Indigenous nations (Million 2013), comprising a threat to health and security of entire communities (Koshan 2010). Sexualized stereotypes about Indigenous peoples, described above, continue to be used to naturalize violence both socially and legally such that sexual violence against Indigenous people, particularly women, is not taken seriously. Instead, victims of sexual violence are often themselves blamed for their victimization through the mobilization of sexualized and racialized stereotypes (Clark 2016) and, indeed, Indigenous survivors themselves may have internalized these logics such that they feel they are partly to blame for the violence against them (VSCPD 2007)

Sexual violence continues to be weaponized against Indigenous people, particularly women and Two-Spirit people, in efforts to counter movements for self-determination. This was evident during the Idle No More demonstrations in 2012 – a time when public support for Indigenous rights was being expressed in large-scale actions across Canada. In December 2012, at the height of public mobilization for Indigenous rights, a young woman known as 'Angela Smith' was sexually assaulted in Thunder Bay, *explicitly as backlash* to her involvement in local Idle No More actions. Indigenous youth advocates called her attack "a weapon of colonialism and a way to undermine the strength of our leadership" (NYSHN 2014, 411). Immediate action was taken to educate Idle No More organizers to anticipate and intervene in sexual violence, as advocates said that "gender-based violence, rape, and sexual assault are not 'social issues' that can be dealt with after the fact, they are real and happening NOW" (NYSHN 2014, 412). Indeed, Indigenous feminists have long argued "it is a prolific sexual violence (rape, murder, sex trafficking, etc.) against Indigenous women and children that exemplifies early twenty-first-century

experience" (Million 2013, 23) and, thus, sexual violence is centrally an issue of self-determination and Indigenous sovereignty.

Due to its proliferation and naturalization, naming sexual violence *as violence* has been a key site of mobilization for Indigenous women. Since the 1970s, Indigenous women have publicly articulated sexual violence, including violence within families, as a key social and political issue (Holmes and Hunt 2017). Yet, sexual violence against Indigenous boys and men remains under-examined as, indeed, sexual violence continues to be associated with shame and silence in many communities as will be discussed in later sections of this report. Significantly, Two-Spirit people's experiences remain invisible in analyses of sexual violence, as gendered lenses used to analyze this violence generally rely on, and perpetuate, a binary understanding of gender (Hunt 2015).

d. Intergenerational trauma

Moving beyond individual notions of trauma formed within a framework of pathology, colonization is understood as having manifest as "intergenerational trauma" (Andersson & Nahwagahbow 2010) or "collective trauma" (Bopp et al. 2003) which impacts Indigenous people collectively. Intergenerational trauma is understood as "collective emotional and psychological injury over the life span and across generations" (Yellow Horse Brave Heart as quoted in Pearce et al 2015, 315) originating within residential schools as well as resulting from ongoing dispossession from Indigenous peoples' territories and broader conditions of colonization.

Yet Indigenous feminist scholars have argued that trauma theory and practices often function to replicate colonial power relations among Indigenous survivors of violence, "that is, they simultaneously erase the naming of the structural acts of violence, while creating and exacerbating the psychological symptoms, through a form of colonial recognition or misrecognition" (Clark 2016, 6). As Athabascan scholar Dian Million argues, trauma is now articulated within national and global understandings of Indigenous governance and rights, with representations of Indigenous suffering through sexual violence being key to constructions of power: "In addition to its gross physical and material effect, sexual violence arouses powerful affective resonance to words such as *victim, trauma, healing* and *self determination.* They came into juxtaposition with each other only in a very recent 'past.' They occur in the paradigm shift in international relations wherein trauma becomes an ethos" (Million 2013, 23). Thus, Indigenous peoples' relationship to sexual violence – both the sexual violence itself and how that violence is understood within public and scholarly discourse – is key to social understandings of Indigenous peoples as political subjects. More than only an issue of individual justice or healing, then, the issue of sexual violence is connected to Indigenous politics and self-determination more broadly.

d. Indigenous peoples and the justice system

Indigenous legal scholars have stated that legal systems and legal actors play a central role in colonial processes, including the creation of legal mechanisms which govern the lives of Indigenous peoples today: "All the oppression of Aboriginal Peoples in Canada

has operated with the assistance and the formal sanction of the law" (Patricia Monture-Angus 1995, 250). Acting with governmentally delineated powers, legal actors, such as police, serve to reproduce societal norms which are colonial in nature, as "the order that the police are reproducing is racialized order that privileges certain groups over others" (Comack 2012, 223) and, we would add, a gendered order as well. The treatment of sexual violence against Indigenous peoples within the Canadian legal system has been a key contributor to the widespread nature of sexual violence which is, in turn, a key mechanism of colonial conquest. Thus, many Indigenous scholars, activists and community members understand colonization and colonial systems and ideologies *as violence*. Just as colonization is understood to be *the* key health determinant for Indigenous peoples today (Greenwood et al 2015), we understand colonization to be *the* key factor shaping justice today, including access to justice for Indigenous survivors of sexual violence. Possibilities of achieving justice for Indigenous survivors is and will continue to be constrained by colonial violence which is structural in nature.

4. Case Law review: discussion and analysis of relevant cases

This case law review has been used to determine what strategies and approaches are being utilized in legal cases prosecuting those charged with sexual offences against Indigenous adults, most of which involve assaults of Indigenous women, and to illuminate how Indigenous peoples are represented in Canadian legal contexts in order to identify the needs of Indigenous adult men and women (and, to the extent it is possible, trans and Two-Spirit) survivors of sexual assault and violence when these matters come before the courts. As much as possible, we have included representation from across Canada, looking at specific examples from different regional representations.[3]

Canadian case law dealing with criminal charges and/or family legal issues that involve sexual assault of Indigenous adults is largely unhelpful in providing guidance about improving access to justice for Indigenous adult survivors of sexual assault. In most cases, because the onus is on the complainant, whether through the Crown's case as a witness or directly as their own witness in family court, to establish the burden of proof, whether beyond a reasonable doubt or on a balance of probabilities, the notion of survivors accessing justice through the court process is a dubious one at best. The unfortunate reality for most survivors of sexual assault is that justice is very rarely accessed through the justice system (Chartrand and MacKay 2006, Comack 2012, Balfour and Comack 2014). While some promising innovative court or justice processes, discussed in a later section of this report, may offer alternatives moving forward, the current reality is that Canadian courts are not successfully addressing the concerns and needs of survivors of sexual assault (Gotell 2006). When one focuses in more closely on

[3] A limit of the case law review for this report is that we did not find relevant reported cases from every province and territory. Indeed, the case law review was also limited in the number of cases that could be found where judges' reasons addressed the specific issues relevant to this report and where there were adequate details about complaints' perspectives as survivors of sexual assault, including to what degree any of the complaints may have identified as trans or Two-Spirit.

the experiences of Indigenous adult survivors of sexual assault the reality is even grimmer (Balfour 2008).

An analysis of the relevant case law as it sheds light on the legal framings and outcomes of cases that deal with sexual assault and violence against Indigenous adults must draw attention to how Indigenous women in particular are characterized. Unfortunately, it seems clear that criminal courts in Canada are not responding to the realities of Indigenous peoples' lives in Canada or changes in law with respect to the treatment of sexual assault survivors (Gotell 2006).

In the case of Cindy Gladue, an Indigenous woman who lost her life as a result of a violent sexual assault, the Alberta Court of Appeal found the charge to the jury wholly insufficient to equip the jurors with the appropriate instruction about ensuring they were not buying into myths or stereotypes about sexual assault, women, Indigenous peoples, and sex trade work (*R.* v. *Barton*, 2017 A.B.C.A. 216, para 1).

Indeed, as the Factum of the Joint Interveners on Appeal, the Women's Legal Education and Action Fund Inc. and the Institute for the Advancement of Aboriginal Women, sets out, the Supreme Court of Canada (SCC) indicated clearly in *R.* v. *Ewanchuk*, "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy" (*R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330, para 28 in *R.* v. *Barton*, A.B.C.A. (March 18, 2015), Factum of the Joint Interveners, para 1). Indeed, 25 years ago Parliament enshrined protections for survivors of sexual assault into the *Criminal Code* post-*Seaboyer*, in order to ensure that a complaint's previous sexual history could not be used against her to the advance the defence of an accused (*R.* v. *Seaboyer*, *R.* v. *Gayme*, [1991] 2 S.C.R. 577).

The trial judge in *Barton* ignored these protections. In fact, *Barton* serves as a significant example of the manner that the Canadian criminal justice system deals with Indigenous women who have experienced sexual assault. According to the Factum of the Joint Interveners in *Barton*, the changes to the *Criminal Code* in 1992 through Bill C-49 were meant to address the ongoing stigma and blame applied to women at trial in the cases when they have reported sexual assault and criminal charges have proceeded:

> Section 276 addresses the "twin myths" that a sexual assault complainant who has consented to sexual activity in the past is more likely to have consented to the sexual activity at issue (s. 276(1)(a)), and that a woman may be less worthy of belief because of her sexual history (s. 276(1Xb)). The provision seeks to counter the risk that evidence of a woman's sexual history will be used to encourage "inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes" (*R.* v. *Osolin*, [1993] SCJ no 135 at para l68 (TAB a)). As shall be explained in section IV (B), consent must be addressed relative to the specific sexual activity at issue in the trial. Permitting sexual history evidence to enter the trial without the careful analysis required by s. 276(2), and anticipated in *Seaboyer*, undermines Parliament's clear objective in enacting s. 276: that is, to address the prevalence of sexual violence against women

> in Canada, while promoting and protecting the rights guaranteed under ss. 7 and 15 of the *Charter* (preamble to *An Act to Amend the Criminal Code (Sexual Assault)* (Bill C-49) SC 1992,c 38 (TAB 5). (*R.* v. *Barton,* A.B.C.A. (March 18, 2015), Factum of the Joint Interveners, para 14).

Despite the fact that there is no defence of implied consent to sexual assault in Canadian law (*R.* v. *Ewanchuk,* [1999] 1 S.C.R. 330), the Factum of the Joint Interveners on Appeal pointed to the trial judge's perpetuation of settler colonial violence in the characterization of Ms. Gladue and Indigenous women generally as being sexually available at all times and accepting of any manner of sexual interaction:

> Other information supplied to the jury about Ms. Gladue engaged racist and sexist myths and stereotypes about Indigenous women, particularly Indigenous women who engage in sexual activity for payment. The trial Court's uncritical admission of irrelevant and prejudicial information, coupled with the inadequacy of its jury charge regarding the Canadian law of consent to sexual activity, constituted efforts in law (*R.* v. *Barton,* A.B.C.A. (March 18, 2015), Factum of the Joint Interveners, para 2).

Such characterization can be seen as a trend in the Canadian legal systems treatment of Indigenous peoples broadly, but has particularly negative impacts when addressing the concerns and needs of Indigenous adult survivors of sexual assault, most of whom are women (FAFIA, 2016). *Barton* provides evidence that a court can fail completely in applying the law not simply because the victim of a violent sexual assault is an Indigenous woman, but precisely because she is an Indigenous woman.

Moreover, in cases where courts have noted the complex lived realities of Indigenous people in Canada, including the ongoing framework of colonial violence that informs Indigenous peoples' lives, these observations rarely, if ever, note the ways that colonial violence foster the racist, sexist, colonial systems and ideologies which naturalize violence against Indigenous people, families and communities. It is this lack of understanding that perpetuates the pathologization of Indigenous people as unfortunate and injured or ill individuals in need of intervention, support, and saving (Clark, 2016). The distinct history of legal violence enacted through the imposition of Canadian law is ignored.

Another aspect of accessing justice that must be considered in criminal cases where the survivor of sexual assault is an Indigenous woman, or is trans or Two-Spirit, and the offender is also an Indigenous person, is the application of s. 718.2(e) and specific *Gladue* factors at sentencing. This may result in a perceived tension between the protection of survivors and the application of *Gladue* factors to the extent that the Supreme Court of Canada (SCC) has made it clear that *Gladue* considerations must be considered in all cases, including the most heinous and/or violent crimes, which captures all manners of sexual assaults (*R.* v. *Gladue,* 1999; *R.* v. *Ipeelee,* 2012; *R.* v. *Wells,* 2000). The SCC stated in *R.* v. *Wells*, 2000 S.C.C. 10,

> The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender. In some cases, it may be that these circumstances include evidence of the community's decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offences in question (*R.* v. *Wells*, 2000 para 50).

However, the court in *Wells* went on to note:

> As Lamer C.J. noted in *M. (C.A.)*, *supra*, at para. 92, sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well:
>
> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. [Emphasis added.] (*R.* v. *Wells*, 2000 para 51).

Although a court is required to consider the systemic and specific circumstances of an Indigenous offender, this is not to result in an uneven application of an assessment of what will be "just and appropriate" for the victim and community as well. In some cases a Victim Impact Statement may assist the court in this assessment (For example: *R.* v. *MacIntyre-Syrette*, 2016 O.N.S.C. 6496). Moreover, the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2, was enacted to uphold the rights of victims, and their representatives or families, to information about and/or involvement in justice processes that impact them. There are not yet studies that indicate whether the *Victims Bill of Rights* has created space for survivors' voices in court proceedings. Likewise, the impact, if any, of the *Bill* on the perceptions of Indigenous peoples in sexual assault cases is as yet unknown.

In cases where the perpetrator of a sexual assault is Indigenous, a *Gladue* report or *Gladue* submissions by defence counsel may describe factual details of sexual assaults experienced by the offender at some point in their life. It is not uncommon to find a varied history of sexual assault across an age spectrum for many Indigenous people (Boyce 2016, Mohony et al. 2017). Nor is it uncommon to find an Indigenous person who has experienced sexual assault at some point in their life before the courts because of involvement in a violent incident as an adult.

There may be a link back to that history of trauma, whether experienced as a child, youth, or adult, that has been triggered somehow and results in violence that leads to criminal charges and incarceration.[4] The link here is not insignificant. While Indigenous men do not report experiencing sexual assault at the much higher rates that Indigenous women do, there is a correlation that may be drawn between the ongoing impact of sexual assault experienced at some point in an Indigenous person's lifetime and their chances of becoming criminally involved and/or incarcerated. We see this as an important inference about the impact of sexual assault on adult Indigenous people that may then also relate to the violence experienced primarily by Indigenous women, or trans or Two-Spirit persons.

It is also important to note that while courts may recognize the individual experiences and specific circumstances of Indigenous offenders through acknowledgment of *Gladue* factors the collective impact of historical and ongoing violence is largely ignored. Judges may note the effects of systemic and institutionalized colonial violence, but these acts of violence are not connected to the collective trauma of disconnection from land, the disruption of traditional kinship systems and networks of care, and the genocide enacted through the residential school system. In fact, as the SCC in *R.* v. *Ipeelee* noted, judges often make the error of ignoring all but the single historic and intergenerational impact of residential schools on an Indigenous person (*R.* v. *Ipeelee*, 2012).

The most common mistake judges make is in failing to recognize the ways that colonial violence has resulted in partial or complete disconnection to land and community for many Indigenous peoples and how that particular trauma can have terrible repercussions through a person's life. And while it may be more common for judges to call attention to the negative impact of the child welfare system in Canada, and certain experiences of violence for Indigenous individuals within that system, they do not generally recognize the very act of removal, or the constant fear of same, as a site of trauma itself. Furthermore, courts and actors in the justice system fail to see how the fear of child apprehension, real and prescient as it is, means that many Indigenous survivors of sexual assault do not report for fear of inviting the Canadian state into their lives and what that may mean. In many cases, rather than being offered support to assist them in addressing the impacts of violence they have experienced, Indigenous peoples are blamed, directly or tacitly, for these experiences, which then may also have ripple effects such as state child welfare intervention and the apprehension of their children.

5. Barriers to justice for Indigenous adult victims of sexual assault

a. The colonial culture of the Canadian justice system

[4] See for example: *R.* v. *Nikal*, 1999 B.C.C.A. 738; *R. v. Brertton*, 2013 BCSC 1029; *R.* v. *Touchie*, 2015 B.C.S.C. 1833; *R.* v. *Callihoo*, 2017 ABPC 40; and *R.* v. *Cardinal*, 2013 Y.K.T.C. 30. In *R.* v. *Callihoo*, 2017 ABPC 40 the offender is an Indigenous woman, not a man. The offender, Destiny Lauren Fields, in *R. v. Brertton*, 2013 BCSC 1029, identifies as a trans woman.

An analysis of barriers to access to justice for adult Indigenous survivors of sexual assault must begin with a critical assessment of what *justice* means in this context. As an overview of some of the jurisprudence emerging from Canadian courts suggests, the formal justice system may not be the place that can provide the most meaningful access to justice for adult Indigenous survivors of sexual assault. In fact, formal court systems can often do more harm than good in perpetuating racist and sexist stereotypes about how and why Indigenous peoples come to experience harms.

As Lee Maracle (2012) reminds us, "All of us have the same beginning. We began first with the relationship to the earth, and then the relationship the sky world, and then a relationship to the plant world and then a relationship to the animal world and then the relationship to each other". Maracle reminds us that *justice* is relational because we all exist in relation to one another and the world around us. Accessing justice then becomes a process of thinking about the relationships between peoples and the rights and responsibilities that come with these relationships. Canada has not upheld its commitments or promises in its treaty relationships with Indigenous nations (RCAP 1996, TRC 2015). Nor has Canada begun to address the truth of its colonial history and what will need to be addressed in order for a new relationship to be built with Indigenous peoples where their concepts and ideas about justice are equally valued (TRC 2015).

This means acknowledging that the barriers to justice faced by Indigenous people stem from the long relational history and legacy of colonialism and the ongoing impacts of settler-colonial violence enshrined in Canada's justice system. As a result of the overrepresentation of Indigenous children in the child welfare system across Canada, and the under-funding of this system as specific to First Nations children living on reserve, Indigenous children and youth face high rates of abuse, stigmatization, and sexualized violence (BC Representative for Children and Youth 2016). These factors directly impact Indigenous youths' encounters with the criminal justice system in substantial ways, as they are criminalized and pathologized for their responses in coping with the trauma they experience (Clark 2016).

Although this report focuses on adults, we indicate the aforementioned because it relates in two particular ways. First, it explains the connections between the issues Indigenous children and youth face in the child welfare system in Canada that directly links to the barriers Indigenous adults encounter through their lives in the justice system. Second, it elucidates the reasons that adult Indigenous women may not seek police intervention when they are experiencing sexual assault or violence – the fear of state intervention that may lead to the apprehension of their children often acts as an immediate barrier to justice.

Persistent criminalization and encounters with colonial police forces, court processes, and corrections systems has led to the gross over-representation of Indigenous peoples in the criminal justice system – Indigenous offenders are represented in Canadian prisons at a rate that is ten times higher than non-Indigenous offenders (Rudin 2005). Indigenous women are incarcerated at even higher rates than men; in many cases serious charges

against Indigenous women are the result of or connected to their experiences of sexualized violence (Parkes and Cunliffe 2015).

Despite the rulings of the SCC in both *R.* v. *Gladue* and *R.* v. *Ipeelee*, Indigenous peoples are still unlikely in most cases to have access to appropriate *Gladue* reports for their bail or sentencing hearings. Overall, the lack of cultural knowledge and cultural safety within the Canadian justice system combines with and exacerbates the broad range of other social and systemic factors impacting Indigenous communities today as referenced above, including poverty, housing, community governance, and health, to create a formal justice system that does not meet the needs of Indigenous peoples and, in fact, results in their criminalization and over incarceration (Parkes and Milward 2014).

For these reasons, and as outlined in more detail previously in this report, given the context of historic and ongoing colonialism and patriarchy Indigenous women are 2.7 times more likely to report experiencing violence than non-Indigenous women (Mohony et al. 2017). In 2015, Indigenous women were reported as being 24% more likely than non-Indigenous women to be the victims of homicide, despite a steady decline in the number of homicides of non-Indigenous women. Indigenous women represented 10% of the people accused of homicide between 2011-2015. Indigenous men were accused of homicide at a rate 3.7 higher than that of Indigenous women.

The rate of sexual assault amongst Indigenous peoples is three times higher than for non-Indigenous peoples (Boyce 2016, Mohony et al. 2017). Indigenous women account for the highest proportion of sexual assault survivors in Canada (Boyce 2016, Mohony et al. 2017), as they are 3.5 times more likely to experience sexual assault (FAFIA 2016). Further, Indigenous women are grossly overrepresented in the justice system representing "less than 5% of the total female population in Canada in 2015, while they accounted for over one-third of female admissions to federal (39%) and provincial/territorial (38%) custody in 2014/2015" (Mohony et al. 2017).

These figures demonstrate the results of a justice system grounded in the violence of settler colonialism. As Nahanni Fontaine (2014) states, laws

> did and do not develop divorced from the settler colonial context in Canada. Contrary to what most may believe, colonialism is not something that occurred in the past. The colonial experiment in Canada has never ended—European settlers did not de-colonize and go "back home." We are still under the rule of the colonizer, with all of its Western Euro-Canadian ethnocentric ideologies and institutions.

b. Racism

The Committee on the Elimination of Discrimination against Women, Report of the Inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women released on 30 March 2015

outlined the following factors that specifically impact the safety of Indigenous women in Canada and constitute "grave violations" of their human rights (FAFIA 2016):

- the protracted failure of the State party to take effective measures to protect Indigenous women;
- the failure of the established legislative and institutional legal framework to provide effective protections and remedies;
- the failure to take adequate steps to address the stereotyping of Indigenous women and girls, including the stereotyping of them as prostitutes, transient or runaways and having high-risk lifestyles, and an indifferent attitude towards reports of missing Indigenous women;
- the failure to take into account the increased vulnerability of Indigenous women because of discrimination based on both sex and race;
- the failure to take into account the particular problems of Indigenous women living in remote communities;
- the failure to provide sufficient coordination between the different jurisdictions and institutions of the State; and
- the failure to ensure the realization of economic, social, political and cultural rights of Indigenous women – this includes education, housing, transportation options, support to families and children and adequate living conditions on and off reserve – necessary to permit women to escape violence.

The failure of the Canadian government to address historical and ongoing settler colonial injustice informs the on the ground circumstances that directly impact the rates at which Indigenous peoples experience violence, including sexualized violence (Mohony et al. 2017). At its heart, this failure results from institutionalized, systemic racism perpetuated through state institutions, including the child welfare system, criminal and family justice systems, health and medical systems, and Canada's refusal to acknowledge the inherent racism build into these systems or implement changes.

c. Fear and mistrust

Indigenous people are far less likely to report their experiences of sexualized violence due to fear and mistrust of the Canadian justice system. This fear and mistrust lies in the justice system's clear discrimination, evidenced in the historical and ongoing rates of over incarceration of Indigenous peoples. Further, even when they do they report, they are less likely to be believed because of racist attitudes held by police and Crown prosecutors (Chartrand and MacKay 2006, Comack 2012, Balfour and Comack 2014). Indigenous women in particular regularly indicate that their dealings with justice system representatives, such as victims' services workers and lawyers, including Crown counsel, are more likely to be negative and involve blatant racism, including racist and sexist slurs, as well as implied or direct victim blaming (Chartrand and MacKay 2006, Comack 2012, Balfour and Comack 2014). Worse yet, incidents of Indigenous women who call 911 being charged with assaulting their male partners, even though they were defending

themselves, are not uncommon (Balfour 2008, Comack 2012, Human Rights Watch 2013, Balfour and Comack 2014).

Nor can incidents of physical and sexual assault of Indigenous girls and women by police be ignored as a root cause of fear and mistrust (Human Rights Watch 2013, Balfour and Comack 2014). A person who has been physically and/or sexually assaulted by the police cannot be expected to trust that they would be able to rely on police for assistance in the future.

The criminal justice system is only one site of potential harms. Indigenous peoples are not just criminalized, they are also pathologized and stigmatized through interactions with social workers and health and medical professionals. The deeply rooted racism in the child welfare system in Canada is well-documented and results in the ongoing removal of Indigenous children from their families and communities into often unsafe circumstances that ensures the continuation of violent state intervention and impact on Indigenous peoples' lives (Clark 2016).

Therefore, we need proper decolonial anti-racism education and training for police, for Crown prosecutors, for defence counsel, and for the judiciary in order to change the ways Indigenous peoples are treated within the Canadian justice system.

d. Individualized approaches to violent crime

A fundamental issue with the Canadian justice system's ability to address and deal with institutionalized, systemic racism and sexism lies in the individualized nature of the justice process (Balfour 2008). Despite evidence gathered through years of consultation, from the Royal Commission on Aboriginal Peoples (RCAP) to recent scholarly articles and reports, which point to the entrenched institutional and systemic violence of settler colonialism, the approach to solving violent crime remains both an offender-by-offender and victim-centered one. Rather than recognize the historical and ongoing impact of settler colonial violence as a root cause of sexualized violence against Indigenous peoples, the Canadian justice system focuses on every individual criminal charge and every individual complainant as separate.

This is not to suggest that individual accused, crimes, or complainants should not be considered as unique as per the evidence or facts of each case, but rather that the fundamental underlying root causes of over representation of Indigenous peoples in the justice system, whether as victims or offenders, must be acknowledged. With respect to access to justice for adult Indigenous survivors of sexual assault, there cannot be justice without state accountability for the colonial violence of the past and present that has direct repercussions in the lived experiences of Indigenous peoples in Canada.

Although s. 718.2(e) of the *Criminal Code* can be seen as a tacit acknowledgment of the over incarceration of Indigenous peoples, and the SCC has recognized the root causes of this in *R.* v. *Gladue*, and again more recently in *R.* v. *Ipeelee*, the end result still focuses attention back on the individual circumstances of each accused person, and then only at

sentencing. There is no provision allowing for the Canadian justice system to concede the collective and cumulative effect of over 150 years of systemic oppression through settler colonial violence.

Addressing sexualized violence as an individualized experience, in the case of abusers and survivors, and unlinking it from the root causes and effects that rest in settler colonial violence does not allow for building *just* relationships. Ultimately, individualized approaches retraumatize and pathologize Indigenous survivors of sexual assault by denying the collective reasons they experience this violence and its underlying causes.

6. Needs of Indigenous survivors: an intersectional analysis

North American literature on sexual violence tends to frame the issue through a feminist lens which understands sexual violence as the gendered phenomenon of male violence against women. This lens is often replicated in literature on Indigenous women's experiences of sexual violence, with colonialism and race seen as additional factors which put Indigenous women at greater risk or result in magnified impacts, as was evident in the recently released federal strategy against gender-based violence (Status of Women Canada 2017). In such frameworks, Indigenous women are often portrayed solely through their increased vulnerability to victimization. Without consideration of the foundational role of colonization and systemic violence, vulnerability is naturalized as inherent to being an Indigenous woman or girl. However, Indigenous scholars and anti-violence advocates have argued for "an Indigenous wholistic [sic] and intersectional-based framework of violence" (Clark 2016, 7) which views the structural intersections in Indigenous peoples lives as a form and source of violence that cannot be separated out from individual incidents of rape, sexual assault, sexual harassment and childhood sexual abuse. As advanced by Metis scholar and critical trauma theorist Natalie Clark, an Indigenous intersectional approach to violence "attends to the many intersecting factors including gender, sexuality and a commitment to activism and Indigenous sovereignty" (ibid). An Indigenous intersectional analysis of violence centers colonialism as a source of risk (Holmes and Hunt 2017), rather than locating risk as inherent to being Indigenous or being a woman.

Rather than separating out sexual violence from other aspects of Indigenous peoples lives –as is often the case when prevalence of violence is documented solely through statistics of individual incidents of victimization—we assert that sexual violence must be viewed as interrelated with other forms of violence, including interpersonal and systemic marginalization. The individual needs of survivors are, consequently, understood as inseparable from community, systemic, and historic factors. In this section, we avoid listing off individualized needs of survivors—in which considerations of Indigenous culture are often simply added to existing models—and instead focus on the structural and societal needs of Indigenous survivors of sexual violence.

Clark's Red intersectionality (2016), or what we here call an Indigenous intersectional approach, includes five principles, which inform our analysis in the sections below in our discussion of the needs of Indigenous adult survivors of sexual violence: 1) respecting

sovereignty and self-determination; 2) local and global land-based knowledge; 3) holistic health within a framework that recognizes the diversity of Indigenous health; 4) agency and resistance, and; 5) approaches that are rooted within specific Indigenous nations relationships, language, land and ceremony.

a. Naming violence: truthtelling in conditions of silence

There is consensus among literature on gendered and sexualized violence that "victim-sensitive justice" (Koss and Achilles 2008, 2) for sexual violence survivors necessarily allows victims to tell their own stories about their experience, obtain answers to their questions, and experience validation, among other aspects of seeking justice (ibid). Yet Indigenous survivors face particular barriers to naming their experience and being validated due to the silencing and normalizing of sexual violence in many Indigenous communities (Hunt 2007) as well as societal discrimination which delegitimizes Indigenous peoples' experiences as valid (Dylan, Regehr and Alaggia 2008).

Silence around sexual violence is prevalent in Indigenous communities in Canada and internationally. Silence is especially pervasive for adult survivors of childhood sexual abuse, as individuals or, in some cases, numerous survivors of a single or network of offenders within a community, have been shamed or threatened into keeping their abuse secret for a long time (Bopp and Bopp 1997). Further, adult survivors of sexual violence in residential school or foster homes may still carry the shame taught to them during childhood, resulting in an inability to talk about their abuse. In Metis filmmaker Christine Welsh's film *Kuper Island: Return to the Healing Circle*, two brothers talk on camera for the first time about their childhood sexual abuse at the Kuper Island residential school. Carrying their experiences within them for their entire lives, it took the invitation of a filmmaker to allow them to open up about their experiences, revealing the impact of living alongside one another for so long with a secret they both shared. Although the Truth and Reconciliation Commission (2015) opened up avenues for many residential school survivors to break the silence about their childhood sexual abuse, the opportunity was not extended to many who went to day schools, were part of the 60s scoop, or were abused in other institutions. Many adult survivors continue to carry their stories of childhood sexual abuse in silence.

Shame and secrecy is also experienced by Indigenous people who are sexually assaulted during adulthood, due to shame, embarrassment, a fear of not being believed or of suffering targeted backlash for disclosing their abuse (VSCPD 2007). For example, Indigenous people living on reserve may fear losing their job, losing their housing or fear retribution against their extended family in cases where their assailant is in a position of power. These silencing mechanisms are an ongoing legacy of the *Indian Act.* Further, research in Australian Indigenous communities in which survivors and their offenders are from the same community, found that the fear of perpetrators dying in prison or experiencing increased state violence contributes to silencing of Indigenous survivors of sexual violence (Cossins 2003).

Within these complex conditions of silencing, Indigenous survivors need approaches in which they can tell their stories on their own terms. Rather than requiring survivors to use

legal or therapeutic jargon, approaches are needed in which people receiving disclosures are aware of local terminology used to name sexual violence. For example, in previous research (VSCPD 2007, Hunt 2011), we have heard words such as "bother" are used to talk about sexual abuse, with a shared meaning among members of a network of Indigenous communities. Yet if an outside service provider, such as police or counsellor, heard the term, they may not know it was being used to refer to sexual assault. In essence, survivors need to be able to name their experiences in terms that make sense to them and that account for intersecting local, cultural and personal dynamics, including those of collective silencing. Despite increased public discourse about Indigenous women's vulnerability to sexual violence, many Indigenous survivors continue to live in conditions in which violence is not named but is normalized as just a part of life (VSCPD 2007).

b. Telling our stories and being believed

Telling one's story of sexual victimization and being heard and believed is understood to be key to taking back power (Dylan, Regehr and Alaggia 2008), whether within or outside of the justice system. Although it is known that sexual violence is underreported to police and that much violence continues to be normalized, this does not mean that Indigenous survivors aren't seeking out ways to have their stories heard. National statistics indicate that 92% of Indigenous survivors of sexual violence who chose to disclose this violence within statistics-gathering mechanisms spoke about the violence with someone other than police (as opposed to only 66% of non-Indigenous respondents), while only half reported the violence to police (Boyce 2016). This is evidence that Indigenous survivors are seeking out people who already know them, their family, culture and community, and who are perceived as likely to believe them.

As has been discussed, the fear of not being believed is well founded in Canadian society in which it is common for Indigenous survivors to be blamed for their own victimization. For example, Natalie Clark (2012) shares the story of a young woman who disclosed sexual abuse by her stepfather only to be discredited by police and social workers as being a lesbian (and therefore promiscuous), being mentally ill or using drugs – all "raised in the assessment of her credibility, her believability and her motivations" (135-6). Further, research has documented the perpetuation of racist and sexist stereotypes which, in essence, blame the victim, in judge's sentencing of rapists who have been convicted of sexually assaulting Indigenous victims (Craig 2014). Given the deployment of 'blame the victim' discourses within systems of justice, child welfare, education and health, Indigenous survivors need alternative avenues for telling their stories in which they will be believed.

Story telling is part of healing and of building new narratives in which Indigenous people can make sense of, and heal from, violence, including sexual violence. Storytelling often runs counter to Canadian justice processes in which mechanisms for telling one's account of an assault or pattern of sexual violence is limited to allowable forms within state systems. Haida storyteller Roberta Kennedy (Kung Jaadee) writes, "I learned that stories are healing….An elder has taught me my tears are my strength—that tears indicate one's

strength, not one's weaknesses. She also shared that crying is healing. I now share this teaching with everyone when I perform my stories" (Kennedy 2015, 134).

The ability of legal representatives to hear and believe survivors of sexual violence is key to changing the relationship between Indigenous peoples and the law: "Laws not only affect our lands but also our bodies: there is a direct connection between the violence in these two areas. We affirm the right survivors or victims of violence have to be believed and supported unconditionally when they say they have been assaulted regardless of whether they report to police or media. Trust that survivors and victims know what is best for them, and support their decisions about what they would like to happen after an assault" (NYSHN 2014, 412).

Indigenous sex workers, people who are street involved, drug users or who are otherwise marginalized have unique needs as they tell their stories and seek to have their experience affirmed. In particular, people who are criminalized in some aspect of their life such as sex work or drug use are often disbelieved or are themselves blamed when recounting experiences of sexual violence. Social stigma against sex work creates particular needs for sex workers of all genders who have experienced sexual violence, both historic and recent, as a "discourse of disposal" (Comack and Seshia 2010) renders sex workers at greater risk of violence and of having the violence not taken seriously. For example, in a study of 'bad dates' against sex workers in Winnipeg (Comack and Seshia 2010), a city with a population which is 50% Indigenous, 58% of bad dates involved sexual violence, often concurrent with physical, verbal and economic violence. Sexual violence for sex workers in this study "[ranged] from refusing to wear a condom to the forced removal of clothing, unwanted sexual touching, and vaginal and anal rape" (Comack and Seshia 2010, 208). These findings are consistent with an earlier study in Vancouver (Lowman and Fraser 1996) in which the majority of bad date incidents involved sexual and/or physical assault. The prevalence of sexual violence against Indigenous sex workers demands that "we pay attention to the role of public discourse in perpetuating this 'othering' process" (Comack and Seshia 2010) such that Indigenous sex workers can disclose incidents of violence without facing further discrimination.

Grassroots organizations and social service agencies providing health care, housing, child care, food and other basic needs are well positioned to listen to the stories of marginalized Indigenous people who are seeking support for sexual violence because they meet people where they are at and foster an environment which does not judge, criminalize or pathologize. However many of these types of services are not available in smaller, rural and reserve communities or are limited to services operating out of band offices in which there is no anonymity.

c. Beyond the criminal-victim paradigm

It has been argued that Indigenous people are represented *either* through their victimization *or* their criminalization in most Indigenous justice paradigms in what some have called a "victimization-criminalization continuum" (Balfour 2009, 103). Despite reforms in the justice system intended to address overrepresentation of Indigenous

women in Canadian prisons and to take seriously the high rates of violence towards Indigenous women, feminist legal scholars have argued that "Aboriginal women have fallen between the cracks of zero tolerance and restorative justice in that they are likely to be both severely victimized by gendered violence and coercively punished" (Balfour 2009, 102). Moving beyond the victim-criminal paradigm requires the inclusion "of women's narratives of violence and social isolation in the practice of sentencing law" (ibid).

It has been argued that a sole focus on Indigenous peoples' victimization closes off possibilities for recognizing the fullness of their knowledge and experience and the fullness of their political subjectivity within frameworks of Indigenous self-determination. As measures have been taken to unearth the violence experienced in residential schools, concerns have been raised about the way survivors are locked into a victim paradigm: "Survivors are more than just victims of violence. They are also holders of Treaty, constitutional, and human rights" (Truth and Reconciliation Commission 2015, 207). Indigenous feminist scholars have further argued that the institutionalization of reconciliation paradigms subjugates treaty and nation-based participation by "locking our Elders—the ones that suffered the most directly at the hands of the residential school system—into a position of victimhood. Of course, they are anything but victims. They are our strongest visionaries and they inspire us to vision alternative futures" (Leanne Simpson as quoted in Truth and Reconciliation Commission 2015, 208).

Moving beyond criminal-victim paradigms in which Indigenous people are *either* criminals *or* victims requires ideological and systemic shifts toward paradigms rooted in Indigenous self-determination. Within frameworks of Indigenous law, survivors are not simply victims or offenders but are legal actors with the right to individual and collective self-determination. Survivors are community leaders and educators, holding diverse leadership roles within Indigenous communities. Indeed, survivors themselves are the most knowledgeable stakeholders in what it requires to heal and how to prevent violence in the future (Truth and Reconciliation Commission 2015).

d. Beyond apologies: fostering accountability

Apologies for sexual and other forms of violence in residential schools are seen as important societal steps to making amends for past wrongs. It has been argued that social empathy for victims of abuse is important but this alone will not provide similar acts of violence for recurring in new forms (Truth and Reconciliation Commission 2015). Indigenous people seek to move beyond apologies to accountability from state actors and systems, the most pressing of which are systems of child welfare and policing.

Indeed, at the same time as the TRC has raised public recognition of the abuse of Indigenous children in residential schools, we have seen little action to achieve state accountability for the present-day sexual abuse of Indigenous children and youth in care. A 2016 report by the BC Representative for Children and Youth exposed the high rates of sexual violence experienced by youth in government care, the majority of whom are Indigenous girls, yet no mechanisms for accountability were forthcoming. So while, on the one hand, all levels of government are seen to be invested in apologizing for past

wrongs against Indigenous children and families, those same governments remain unaccountable for the perpetuation of sexual violence in state systems today. Survivors of sexual violence need mechanisms for holding government actors accountable, including, in this case, foster parents and group home staff who are paid by the government to 'care for' Indigenous children and youth.

Further, the need for police accountability cannot be overstated. Police have a significant role in mediating Indigenous survivor's encounters with the legal system, and, broadly speaking, studies have shown these encounters to be overwhelmingly marked by feelings of disrespect and dismissal (Dylan, Regehr and Alaggia 2008). Further, Indigenous people have reported misuse of power, including incidents of sexual and physical violence, at the hands of police, with few avenues for accountability.

Despite a lack of official national statistics on the issue, sexual violence against Indigenous women at the hands of police remains a defining issue of access to justice in Canada (Palmater 2016, Human Rights Watch 2013, Balfour and Comack 2014). Although this issue has only recently made it into public discourse, Indigenous women have long talked at a local level about the need for police violence to be taken seriously (Hunt 2006, Human Rights Watch 2013), naming police violence as an abuse of power. As Mi'kmaq legal scholar Pam Palmater (2016) discusses, "the majority of incidents involving allegations of police sexualized violence against Indigenous women and girls (at least those that have been publicized) appear to have been addressed as employee discipline matters rather than being prosecuted as sexual assault crimes" (260). Thus, social and legal mechanisms are needed to adequately support Indigenous survivors of sexual violence at the hands of police and to foster police accountability, particularly in light of recent cases in which formal reports and investigations have not resulted in criminal charges being laid, such as in Val D'or, Quebec and in Northern British Columbia.

e. Indigenous gender based analysis

The pervasive nature of sexual violence among Indigenous adults, including childhood sexual abuse and/or sexual violence experienced in adulthood, requires a gender analysis that considers both the gendered nature of sexual offences which are predominantly targeted at women, and the reality that Indigenous people of all genders experience sexual violence.

Research has shown that Two-Spirit people's experiences of sexual violence are interrelated with transphobia, homophobia and racism, including discrimination within systems of justice, education, and health (Zoccole et al. 2005, Taylor 2009). Two-spirit women face particularly high risk of sexual violence (Hunt 2016). Meeting the social and cultural support needs of Two-Spirit people is viewed as both a preventive and healing measure, as their vulnerability is compounded by isolation from family and community. The integration of Two-Spirit people in designing and leading initiatives to prevent and respond to sexual violence is greatly needed, particularly as national anti-violence and justice initiatives focused on Indigenous women often exclude and erase Two-Spirit perspectives and voices (Hunt 2015, Hunt 2017).

Thus, there is a need to utilize Indigenous gender analyses which account for the specificity of gender within Indigenous cultural practices and teachings, and to account for the intersecting forms of violence experienced by Indigenous people of all genders and specifically targeted at women and Two-Spirit people. However, this must not be conflated with approaches which deploy often-romanticized notions of 'tradition' in defining the roles of men and women as complementary across all Indigenous cultures. Snyder, Napoleon and Borrows (2015) call for approaches which avoid understanding Indigenous peoples and their gender 'traditions' as frozen in history, instead locating gender analyses firmly within a decolonial approach in which decolonization is gendered and gender is decolonized. In other words, we must move beyond dichotomous approaches in developing gender-based analyses which account for the lived realities of all Indigenous peoples experiences of sexual violence today, rooted in Indigenous intersectional and feminist principles which respect gender and cultural diversity as central to Indigenous self-determination.

f. Everyday realities: localized needs

Indigenous survivors of sexual violence often live in cultural and community contexts which are incongruent with systemic approaches to, and understandings of, violence and healing. Across urban and rural contexts, Indigenous survivors often live alongside those who have abused them or live in families and communities in which nearly everyone has experienced some form of sexual violence. This reality creates unique support needs for Indigenous survivors who have been victimized by someone in their own community. Research in BC found that the close-knit dynamics in Indigenous communities can be both a point of strength and fear for Indigenous survivors (VSCPD 2007) where anonymity cannot be assured when accessing services. In many Indigenous communities, the people who respond to sexual violence are from the community and may themselves be survivors of violence (VSCPD 2007). Thus, the support needs of Indigenous people working as service providers and first responders, including those within the justice system, must be considered in policy and program design. In order to fully meet these complex realities, localized culturally-appropriate and community-led models are needed.

g. Health and harm reduction

Indigenous survivors of sexual violence require harm reduction approaches which understand the use of drugs and alcohol as coping mechanisms for past and ongoing violence, including sexual violence. Harm reduction programs for drug or alcohol use largely do not address colonialism, intergenerational trauma or the specific needs of Indigenous clients. As demonstrated in a seven-year study in Vancouver and Prince George, Indigenous women who use drugs experience disproportionate levels of violence, including being singled out by sexual predators, yet are "provided scant protection and indifferent justice" (Pearce et al. 2015, 314). In this study, nearly 28% of Indigenous women participants reported being sexually assaulted over the study period - a rate that jumped to 45% for women who use injection drugs. Yet only 21% of participants who used injection drugs and were sexually assaulted had accessed any counselling or other formal support to deal with the assault. Underreporting of sexual

violence is common for Indigenous women who use illicit drugs, especially injection drugs, and appropriate public health, harm reduction and psychosocial support responses are needed (Pearce et al. 2015).

Further, research with Indigenous people who have contracted HIV through injection drug use has found that many Indigenous people who are HIV+ are survivors of sexual violence, which often began in foster care and/or is connected to intergenerational abuse beginning in residential school. As Indigenous health scholar Charlotte Reading (2015) writes, "structural determinants are revealed as the foundation upon which successive trauma, sometimes over generations, leads to coping through drug use and the current epidemic of HIV among Aboriginal peoples" (11). Thus, Indigenous people who use drugs and alcohol require inter-sectoral client-driven strategies which are tailored to "establish trust-based relationships within culturally safe settings" (Pearce et al. 2015, 314), as well as access to safe, low-threshold housing, and low-barrier counselling.

h. Development of just communities: imagining a world without sexual violence

Ultimately, Indigenous people and communities require a movement away from approaches which assume Indigenous victimization toward approaches which foster just communities in which sexual violence is no longer a reality. Some have suggested that community development approaches are well suited to take practical steps toward this goal, as this approach is geared towards enabling communities to overcome poverty and social exclusion, which are root causes of violence: "In contrast to criminal justice strategies that focus on punishment, discipline and control, Aboriginal community development focuses on healing, wellbeing and capacity-building. Honouring Aboriginal traditions, values and cultures becomes an important part of this healing process. So too does reclaiming a sense of self-worth and pride that has been systematically stripped from Aboriginal people by colonial strategies manifested in the residential schools, the reserve system, and the Indian Act, and dominant discourses that Other them as 'welfare recipients' and 'criminals'" (Comack 2012, 222).

Indigenous people have long rejected being defined solely through their victimization, instead nurturing ways to revitalize cultural teachings which foster love and respect. Situating Indigenous peoples' bodies, relationships, and sexuality within Indigenous worldviews works to counter the impacts of colonial violence on Indigenous peoples' self image. Fostering self-love is an important aspiration of movements to change the role sexual violence plays in ongoing colonization, and provides the healing necessary to prevent abuse toward others. "When we love ourselves, we make our world a better place instantly. When we love ourselves, we will see that we automatically love everyone else in our world. We can't help that" (Kennedy 2015, 132). Indeed, in the face of ongoing colonialism, Indigenous women hold love and rage in tension as they envision decolonial futures, as "Indigenous women's love is not a given; it is the result of tremendous desire to survive, to carry our teachings forward so that our ancestors recognize us and so that we become good ancestors" (Flowers 2015, 40). This future-oriented vision fostered by Indigenous survivors is key to moving beyond our current realities to the development of truly just communities.

h. Practical considerations in meeting survivor needs

While we have primarily focused here on the systemic and societal concerns which impact the prevalence of sexual violence facing Indigenous people and communities within the context of colonization, we end by touching on some practical considerations that are especially pressing for Indigenous adult survivors:

- **Mobility of support systems:** Sexual violence against Indigenous people can happen anywhere (Hunt 2006) including in spaces considered public (streets, malls, parks alleys, highways, universities and colleges) or private (homes, vehicles, escort agencies, businesses). Further, sexual violence is prevalent across spatial dichotomies of rural-urban and off-reserve-on-reserve – spaces which are simultaneously understood to be situated within Indigenous territories. Thus, mobility of services across these private-public, rural-urban and on/off reserve spaces must be a key factor in working with adult survivors of sexual violence. Moreover, while Indigenous people are often understood to live *either* on *or* off reserve, the reality is that Indigenous people's mobility is fluid and entails regular movement across reserve boundaries. Survivors of sexual violence need services which are not jurisdictionally bound by reserve, rural or urban delineations but which can account for both their mobility and the prevalence of violence across all jurisdictions.
- **Transparency and availability of information:** Access to information about the range of available services is key to the healing of Indigenous survivors of sexual violence. Studies have shown lack of information about available supports and about the workings of judicial processes is a critical issue that can lead to feelings of powerlessness or lack of control over one's fate, which can have serious implications for victim resolution and recovery (Dylan, Regehr and Alaggia 2008). Keeping in mind the underreporting of sexual violence among Indigenous survivors, information about services for survivors of sexual violence should be made available within the social and cultural spaces of Indigenous communities such that they can access support information outside of formal health, education and justice systems.
- **Healing within Indigenous family systems:** Anti-violence approaches are needed which account for the significance and lived realities of Indigenous kinship systems which extend beyond the nuclear family (Monture-Angus 1995). Keeping children within their communities and extended families is itself a preventive approach to ending cycles of violence when children can be encircled in the values of cultures which are not predicated on violence.

7. Defining access to justice for Indigenous people: within and beyond the justice system

An Indigenous intersectional analysis of access to justice for Indigenous survivors of sexual violence reveals that systemic violence has been, and continues to be, a key barrier to justice for Indigenous people and communities. Within the settler colonial context of Canada, the process of redefining justice for Indigenous survivors must be understood as always delimited by the structural factors which continue to deny Indigenous peoples'

self-determination at individual and collective scales. While critics both within and outside the justice system recognize systemic gaps and failures in addressing sexual violence towards Indigenous peoples, many continue to advocate for a blended model in which justice institutions and actors work alongside Indigenous community knowledge and experience (Bopp et al. 2003). Others are rightfully wary of Canadian legal systems, defining justice as necessarily obtained beyond the judicial system, particularly when sexual violence occurs within Indigenous families and close-knit communities (Holmes and Hunt 2017) as criminalization of offenders has thus far not aided in reducing violence (LaRocque 1997). Thus, many efforts to define access to justice for Indigenous survivors have sought to contend with the impossibility of true justice for Indigenous people whose lives are always bound up in colonial systems and ideologies. Rather, access to justice has been defined through the lens of avoiding the perpetuation of trauma through actively centering Indigenous knowledge, perspectives and voice. In this section, we discuss efforts to define access to justice for Indigenous adult survivors of sexual violence within these systemic and historic tensions.

a. Access to justice: decolonial and Indigenous perspectives

Access to justice, most fundamentally, means that law ceases to be a tool for the dispossession and dismantling of Indigenous peoples (Truth and Reconciliation Commission of Canada 2015). It has been argued that Indigenous peoples' sovereignty should include sovereignty over issues of justice (Koshan 2010), which should include not only shaping justice mechanisms but redefining justice itself in terms that align with Indigenous worldviews and contemporary realities, including realities of sexual violence.

The *United Nations Declaration on the Rights of Indigenous Peoples* provides a framework and mechanism to support and improve access to justice. Article 40 of UNDRIP states:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Thus, access to justice is understood as a collectively held Indigenous right that should be defined by Indigenous people themselves, supported and enacted through Canadian law: "Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force" (Truth and Reconciliation Commission of Canada 2015, 205)

At an individual level, access to justice is also understood to mean the availability of measures which avoid retraumatization or "behavior of justice personnel and institutional culture that exacerbates rather than reduces survivor/victims' distress" (Koss and Achilles 2008, 3). Retraumatization includes both factors which are specific to the realities of adult survivors of sexual violence, such as being forced to face one's assailant in court (Dylan, Regehr and Alaggia 2008), as well as retraumatizing factors that any Indigenous

person might face within a legal process, such as racism, sexism, homophobia and other forms of discrimination. Thus, access to justice requires both an individualized and systematized approach to addressing factors which might cause retraumatization.

Access to justice requires changing the way Indigenous people's legal subjectivity is understood by seeking to make sense of violence through Indigenous socio-legal frameworks. Canadian law treats individual incidents of sexual violence as "individual and isolated phenomenon, and are rarely able to assess them within their historical and contemporary contexts" (Monture-Angus 1995, 52). Yet, "From an Aboriginal point of view, family relations would not be seen as private-law rights. In fact, the public/private law distinction as an organizational principle of social order makes little sense to the Aboriginal mind" (ibid, 59). As we have discussed, sexual violence is not only an individual or private matter but a matter of broader concern to entire communities and families which must be reflected in how sexual violence is treated within conceptualizations of justice. Access to justice is defined as moving beyond criminal justice approaches which isolate the experiences of survivors from their families and communities, and which utilize punitive measures that rarely stop cycles of violence (LaRocque 1997) in order to center Indigenous concepts of family within justice mechanisms.

Indigenous legal theorists differ in their analysis of the role of violence in historic Indigenous societies and, consequently, in existing knowledge about Indigenous law. Mohawk legal scholar Patricia Monture-Angus (1995) wrote "We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. They did not exist because they were not needed. What we can reclaim is the values that created a system where the abuses did not occur. We can recover our own system of law, law that has at its centre the family and our kinship relations" (258). On the other hand, Snyder, Napoleon and Borrows (2015) suggest that it is more useful to look to the gendered violence that *was* present in Indigenous societies historically in order to understand precedent within Indigenous law for dealing with this violence: "These resources can be accessed, *inter alia,* through precedent in the form of Indigenous stories, songs, dances, teachings, practices, customs, and kinship relations. These resources can be used to reason collaboratively within Indigenous communities (and beyond) to discover and create standards and criteria for discussion, debate, and judgment when addressing violence against women" (597).

Thus, the revitalization of Indigenous knowledge, including legal knowledge, is integral to redefining and expanding access to justice for Indigenous survivors. Currently, survivors of sexual violence have little choice but to turn to state systems and actors when violence occurs even though they are well aware of the failures, limitations and harms of that system. In the Canadian context, there has been no sustained constitutional innovation dealing with Indigenous justice issues despite numerous reports recommending greater Indigenous control of justice under section 35(1) of the *Constitution Act, 1982* (Snyder, Napoleon and Borrows 2015). Indeed, legislatures and courts thus far do not regard violence against women to fall within Indigenous peoples'

jurisdiction despite the work of Indigenous legal scholars and practitioners to apply principles of Indigenous law to sexual and gendered violence (Snyder, Napoleon and Borrows 2015).

However, in the United States, the *Violence Against Women Act* allows Native American Nations jurisdiction over any crimes on tribal lands, including sexual violence. Applying Tribal Law to cases of sexual violence has not been an easy task, as colonialism in the United States, like Canada, has institutionalized heteropatriarchy and the devaluation of women and Two-Spirit people: "These codes challenge systemic sexism and the work that nations face in their implementation must address male privilege and sexism as they play out in the legal process itself" (Snyder, Napoleon and Borrows 2015, 624). In discussing the role of Indigenous law in addressing gendered violence (understood to be largely sexual in nature), Snyder, Napoleon and Borrows (2015) caution against essentialist approaches to culture, as "discussions of culture should never be disconnected from concerns about power; culture can be a source for the abuse of power, as much as it can be a force for literation when examined in real world terms" (595). Therefore, questions must be asked about how legal traditions will be deployed, by whom and for what purposes (ibid) informed by an analysis of colonial heteropatriarchy in current formations of sexual violence in Indigenous communities.

Thus, the application of Indigenous law to contemporary issues such as sexual violence requires that Indigenous law is allowed to transform itself such that it may not look the same as Indigenous systems of law did historically (TRC 2015). Indigenous law is seen as operating within the revitalization of all aspects of Indigenous self-determination, interconnected with other social efforts to address sexual violence. Indeed, "we recognize that Indigenous law, like all law, has its limits. Law should never be the only system discussed or applied in dealing with [sexual violence]" (Snyder, Napoleon and Borrows 2015, 597).

There has been a recognition of the need for Indigenous systems of justice to ensure Indigenous women and children are free from discrimination and that people with disabilities have access to Indigenous justice mechanisms (TRC 2015). Yet a gender-based analysis requires more than just ensuring women's freedom from discrimination but ensuring women and Two-Spirit people play an active role in the implementation of justice mechanisms which concern sexual violence. Madeline Dion-Stout's (1998) assessment twenty years ago is equally relevant today: "Regardless of how much research is undertaken into the causes of Aboriginal women's victimization by the justice system, real improvement is unlikely until Aboriginal women possess the political power necessary to force the pace and direction of change" (31).

Key to the creation of mechanisms for addressing sexual violence within Indigenous law and self-governance, then, is the rebuilding of Indigenous gender roles and responsibilities within decision-making bodies. Further, as Mohawk legal scholar Patricia Monture-Angus wrote more than two decades ago, without talking to women, any

conversations about self-determination and justice will fall short: “It was the women who had a fundamental role in making laws in our communities. I cannot stress enough that the answer lies with the women *of the communities*” (Monture-Angus 1995, 263). Localized community-led solutions are needed which take into account the ways in which sexism and heteropatriarchy shape Indigenous community governance and power dynamics today. Further, Dion-Stout’s (1998) call for strategic policy development on “likely impacts of all facets of self-government on all Aboriginal women, including the administration of justice and the transfer or control over health services delivery” (35) remains equally pressing today. Policies governing the administration of justice and the implementation of health services, in addition to housing, child welfare and other social services, remain key access to justice issues for Indigenous survivors of sexual violence at a community level.

Relatedly, as we have argued, an Indigenous gender based analysis of sexual violence must account for the ways in which Two-Spirit people have been erased from legal and policy frameworks for governing Indigenous lives and communities, including national frameworks for addressing gendered and sexual violence (Hunt 2015). Moreover, scholarship on the historical roles and responsibilities of Two-Spirit people understands the revitalization of these roles as integral to the formation of healthy and just societies (Driskill 2011). Without romanticizing all Indigenous cultures as accepting of gender fluidity and diversity, scholarship on Two-Spirit traditions has shown that approximately two-thirds of Indigenous languages in North America include words for people who are neither male nor female. Given that Two-Spirit people historically held roles as spiritual leaders, interpreters, mediators and knowledge keepers (Tafoya 1997), restoring respect for Two-Spirit people is essential for the revitalization of Indigenous systems of law which is, in turn, key to transforming access to justice.

The restoration of respect for Indigenous people of all genders, particularly women and Two-Spirit people, is understood as interconnected with the restoration of Indigenous sovereignty, including what is called body sovereignty (Wilson 2015a and 2015b, Hunt 2015). Indigenous sovereignty is often imagined in relation to territories or nations, but Indigenous feminist and Two-Spirit activists and scholars have reframed sovereignty as extending outward from the body. In this way, the body is the site through which Indigenous people assert sovereignty over all aspects of their lived experience, including their intimate relationships and sexual health. Thus, sexual violence is understood as a tool through which Indigenous sovereignty has been and is denied to Indigenous people and communities. Within this decolonial feminist framework, we are pushed to ask new questions and create new paradigms that disrupt colonial systems of knowledge and power (Smith 1999). Thus, we ask: how can access to justice support Indigenous peoples’ body sovereignty?

Foundationally, there is a need for survivors to define justice and healing on their own terms, rather than only those predetermined through state-delineated justice or healing models. Practitioners working with survivors of sexual violence have sought to focus on culturally-rooted practices and concepts of survival (Clark 2016), defined as “a narrative resistance that creates a sense of presence over absence, nihility and victimry” (Vizenor

1994, 41). We therefore pose an additional question: how might access to justice be redefined through engagements with Indigenous survival that moves beyond victim narratives to narratives of ongoing Indigenous presence rooted in self-determination and decolonization?

b. Innovative practices within the justice system

Access to justice within the justice system necessitates the designation of central roles and responsibilities to Indigenous people themselves. This arises out of a longstanding critique of restorative and alternative justice programs for having a lack of Indigenous people involved in their creation and implementation (Cameron 2006). Thus, access to justice for Indigenous survivors is closely linked to Indigenous law programs and other educational program in Canada which train Indigenous people to work in, administer and design various aspects of the justice system.

Bopp and Bopp (1997) write that numerous programs to intervene in sexual violence in Indigenous communities in North America have been created which "attempt to form a supportive and productive working partnership between some type of community-based team and the dominant culture's justice and social services departments in order to ensure that legal requirements are met at the same time that a wellness approach, based on restorative justice, be applied to the problem" (14). While innovations may have been attempted, they largely remain inaccessible as a form of justice for adult survivors of sexual violence due to severe underfunding, lack of adequate follow-up and continuity, and the lack of adequate grassroots community involvement (Bopp and Bopp 1997), including the leadership of Indigenous women. Despite calls for Indigenous women to be included in a substantive manner when developing or amending policy to deal with sexual violence, including when funding contracts for service agencies are being negotiated (Amnesty International 2004, Dreaddy 2002, Russell 2002), little is known about the extent to which Indigenous women are actually being substantively included in these decisions.

Arguably access to justice for survivors of sexual violence will continue to be compromised as long as Canadian legal approaches continue to structure options for addressing sexual violence:

> For some time, Indigenous peoples (including Indigenous women) have asserted their sovereignty over matters including interpersonal violence, and reforms to the Canadian criminal justice system in the area of sexual violence and sentencing of Aboriginal offenders can only be seen as partial and temporary responses in light of this political reality. For example, in a number of marital rape cases, sentencing circles were considered and sometimes used as a way of taking cultural issues into account. In other cases, courts have listened to the views of elders about the accused's role and regard in the community. However, these approaches maintain overall jurisdiction in the Canadian state and its institutions, as courts are not obliged to convene circles, to ensure victim participation, to follow the circle's recommendations, or to otherwise take the views of the

community into account. (Koshan 2010, 64)

Given the limited power of Indigenous nations, legal systems and individual survivors in the current treatment of sexual violence against Indigenous women, Koshan (2010) surmises that constitutional challenges may be used to further both Indigenous women's autonomy and security as well as being "relevant to the sovereignty of Indigenous peoples and the decolonization of Canadian law relating to sexual violence in spousal relationships and more broadly" (66).

Further to our previous comments on the significance of police violence, this issue remains a defining element of access to justice for Indigenous survivors, particularly Indigenous women. As Palmater (2016) states, "Indigenous women have literally become the targets of police sexualized violence and racism as the shooting target poster of an Aboriginal woman at the Saskatchewan Police College shooting range showed so clearly" (268). At the present time, Indigenous people not only do not trust police but also normalize an expectation of racism and gendered violence from police without any hope of holding them accountable (ibid). Access to justice must involve fundamental changes in the power police have in the lives of Indigenous people: "For people lacking the social capital and acutely aware of their position of disempowerment relative to the power and public support accorded the police, making a formal complaint is often seen as too risky an endeavor" (Comack 2012, 225). Indeed, in research on responding to violence in Indigenous communities in British Columbia, Hunt (2015) found that Indigenous women would rather deal with a sexual offender themselves than call police because "the offender you know is better than the offender you don't know" (177)– the offender you don't know being the police. Thus, Indigenous women's access to justice is directly related to the widespread fear and mistrust of police, and to ineffective and inadequate measures for dealing with police violence.

c. Collaborative and relational approaches

Across Canadian and Indigenous mechanisms of justice, collaborative approaches are needed to address the complex realities of sexual violence facing Indigenous communities today: "We believe in process pluralism, which encourages many different systems to operate in harmony and in competition with one another to deal with violence against women as long as they are attentive to the issues of power and gender" (Snyder, Napoleon and Borrows 2015, 597). Further, within an intersectional Indigenous lens, gender and power must be understood as interrelated with sexual orientation, ability, geographic location, and other axes of power which shape the everyday lives of adult survivors. In particular, access to justice must be understood through the short- and long-term visions for justice held by individual Indigenous survivors of all genders as well as collectively held visions for justice in which sexual violence ceases to be an urgent reality for Indigenous communities.

Cross-sectoral approaches provide promising models for increasing Indigenous survivors' access to justice, as research has found that fostering partnerships and collaborative relationships between all levels of government and service providers is integral to an effective intervention (Deer et al. 2004, Dion-Stout, Kipling & Stout 2001, National

Crime Prevention Centre 2003). Indigenous survivors of violence have said that "the more integrated the service they received, the greater their satisfaction and sense of empowerment" (Russell 2002). Importantly, violence is recognized as a key social determinant of health for Indigenous people, intersecting in unique ways with other social determinants across diverse community contexts (Holmes and Hunt 2017), thus collaborations between health and justice are paramount. Additional priority areas for collaboration include child welfare, housing and victim services, though efforts to foster cross-sectoral approaches must not move ahead without directly involving Indigenous people in key roles and centering Indigenous knowledge in defining access to justice.

In British Columbia, the Ending Violence Association of BC has undertaken a cross-sectoral anti-violence initiative with Indigenous women in key leadership positions. The Indigenous Communities Safety Project (ICSP) facilitates sharing of knowledge between Indigenous women and Indigenous leadership on issues of criminal justice, family justice, and child protection that have a direct impact on responses to sexual violence, as well as intimate partner violence and child abuse. ICSP is working to strengthen relationships between EVA BC and the Legal Services Society (LSS), as they jointly created community workshop materials in which justice and violence are contextualized within considerations of colonization and healing. Significantly, the program accounts for women in same-sex relationships, and names homophobia and transphobia in discussions of violence. Stakeholders seek to increase Indigenous women's awareness of their rights, risk factors related to interpersonal violence, and, consequently, increased use of support services (including the justice system) if violence does occur. This initiative models a relational approach to building shared understanding among Indigenous women and a diversity of cross-sectoral stakeholders, with the lived realities and concerns of Indigenous women and families at the center. This is one example of an ongoing effort to improve access to justice for Indigenous women survivors, as well as to improve the effectiveness of various systemic responses through developing shared understanding of the role of colonization.

8. Promising practices and innovative models

a. Community and grassroots justice and healing

According to feminists and victim's rights organizations who work on the ground with survivors of sexual assault, there are many years of reports and recommendations in Canada, based on direct consultation with survivors, that address the unequal treatment of victims/survivors of crime related to the criminal justice system (Cameron 2006, Belknap and McDonald 2010). These reports and recommendations have identified a consistent disempowerment of survivors in the processes of the formal justice system and within institutionalized supports, such as victim's services and/or medical and health services (Dylan et al. 2008). Survivors feel that they have no voice in the system and that they receive unequal treatment as compared to the rights, assumed liberties and treatment of offenders (ibid). Many reports have outlined what is needed to respond more effectively to the needs of victims/survivors, especially those harmed by violent, interpersonal

crimes such as sexual assault. Further, the recently enacted *Victims Rights Bill*, which was enacted to assist victims/survivors in obtaining information and/or accessing some agency in cases where they are complainants, has not yet shown to provide significant involvement in the criminal justice process for complainants.

Published reports repeat the same messages over and over, without significant change or results. Given this, it is important to pay attention to community and grassroots justice and healing. Such initiatives must be community-led, community-specific, and culturally appropriate, but they must also account for sexism and other gendered discrimination or homophobia, queerphobia, or transphobia (Hunt 2007, Ristock and Potskin 2011).

Examples of survivor-centred approaches to justice and healing can be found outside of the criminal justice system. For example, the Indian Residential School Settlement Agreement (IRSSA) process Independent Assessment Process (IAP), though fraught with many issues that caused retraumatization and harm to Indian Residential School (IRS) survivors, did allow for survivors to build their own healing plans as part of the IAP process. Survivors were able to articulate the healing plan that would best assist them by listing specific programs, services, and supports, including those that were Indigenous-specific and culturally appropriate, based on their particular needs. The IAP healing plan proposals included a budget that set out the costs of the specific programs, services, and supports a survivor wished to access as part of their healing plan, including potential travel and accommodations for accessing these. Unfortunately, a limit to the IAP healing plan proposals was that the survivor has to be successful in their IAP process overall in order to access the federal funding as a part of the IRSSA.

b. Supportive police practices

As emphasized throughout this report, Indigenous people are far less likely to report their experiences of sexualized violence due to fear and mistrust of the Canadian justice system. And even when they do they report they are less likely to be believed because of racist attitudes held by police and Crown prosecutors (Chartrand and MacKay 2006, Comack 2012, Balfour and Comack 2014).

Indigenous girls and women in particular regularly indicate that their dealings with police are more likely to involve blatant racism, including victim racist and sexist slurs, implied or direct victim blaming, and/or physical and sexual assault (Chartrand and MacKay 2006, Comack 2012, Human Rights Watch 2013, Balfour and Comack 2014). Reports of physical and sexual assault of Indigenous girls and women by police must also be acknowledged and responded to through formal processes that hold officers accountable (Human Rights Watch 2013, Balfour and Comack 2014). Elizabeth Comack's (2012) research, *Racialized policing: Aboriginal People's Encounters With the Police*, in particular cites accounts from Indigenous peoples throughout Canada and the underlying racism and sexism at the heart of policing practices in officer dealings with Indigenous peoples.

A person who has been physically and/or sexually assaulted by the police cannot be expected to trust that they would be able to rely on police for assistance in the future. It is

of note that the Civilian Review and Complaints Commission for the RCMP (CRCC) was created to respond to inappropriate, abusive, and violent RCMP officer conduct, with a special mandate to respond to the reports of police abuse amongst Indigenous communities following Human Rights Watch's 2013 report *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia*. The office is a national body and performs civilian investigations of police reported police misconduct in order to increase accountability.

Because justice is relational, articulating an agenda to create supportive police practices must go beyond policy to implementation. Indigenous communities' suggestions about steps to move such implementation forward have been outlined in various reports and research, including the *Royal Commission on Aboriginal Peoples*, the Truth and Reconciliation Commission of Canada's *Calls to Action,* and Human Rights Watch's 2013 report *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia*. In 2017, the CRCC BC Operations conducted consultations "with 500 individuals from 13 First Nations communities, 17 service providers and 5 educational institutions" for their *2016-2017 Outreach Report: Being Accountable to Community*. Their conclusions and recommendations are markedly similar to those noted in previous reports and research in that Indigenous peoples and communities do not trust RCMP and see the organization as a state agent meant to enforce colonial law and that the onus must lay with the RCMP to build relationships with Indigenous communities and address the racism that informs their practices.

Consultations with Indigenous peoples lays out three important focuses for police forces in Canada in building supportive police practices: police accountability, relationship-building, and Indigenous-led community policing initiatives. It is of fundamental importance that all of these initiatives be informed by decolonial anti-racism education and cultural competency training for police that leads to the implementation of trauma-informed approaches and culturally safe practices.

Police accountability

Accountability by police agencies cannot simply take the form of apologies and/or commitments to further officer training. These are important and must happen, but do not fully address the collective accountability necessary for change. Agencies must be willing to take a community-by-community approach to accountability, including by determining what Indigenous protocols and ceremonies are required for healing. Meaningful accountability also means officers who have conducted abuse or engaged in violence, verbal, physical, or sexual, against Indigenous people must face criminal charges for their actions and behaviours; they must also be removed from policing units and not permitted to work in the policing profession in the future.

Relationship-building

Relationship building efforts must also take a community-by-community approach. Officers who are posted to regions where there are Indigenous nations must be introduced to the local community and engage in meaningful dialogue with the community about what unique barriers to access to justice the community faces. Police agencies and officers need to consider what Indigenous protocols and ceremonies are required for establishing relationships, as well as what responsibilities flow from those relationships. Building relationships will also demand that policing agencies develop culturally safe practices informed by Indigenous concepts of justice.

Community policing initiatives

Building capacity within policing agencies to work with Indigenous communities on relational justice models informed by Indigenous concepts of justice will build further capacity for community policing initiatives. Community policing initiatives that respond to the particular needs of communities on the ground without engaging the formal state justice systems, is distinctly different from traditional policing. Commenting on the commissioners' recommendations from the 1991 *Report of the Aboriginal Justice Inquiry of Manitoba,* Comack observed the commissioners "advocated for a community policing approach" instead of a "traditional crime-fighting model" noting

> Community policing, in contrast, is decentralized and prevention-oriented. It encourages partnership between the police and the community; it is flexible and adaptable to Aboriginal cultural standards and accommodating to wide variation of lifestyles in Aboriginal communities (2012).

Engaging strategies that aim to establish new models of Indigenous-led approaches to policing informed by Indigenous justice principles may result in new relationships built on accountability and trust. Creating such models may in turn allow Indigenous survivors of sexual assault to feel safe and supported in their interactions with police officers and agencies that could increase the likelihood of reporting. Survivors feeling confident that they will be believed and supported could enable access to justice from the initial stages of survivors' involvement with the justice system.

c. Alternative and restorative justice models

Restorative Justice

Restorative Justice (RJ) processes have the following broad goals: (i) making offenders accountable to both victims and the community, (ii) increasing the role of victims and community in ensuring that accountability, and (iii) repairing the harm and restoring relationships that have been damaged as a result of crime (Goundry 1998). The same colonial, sexist, and racist attitudes that underlie the Canadian justice system broadly do and will continue to interfere with the appropriate use of various RJ mechanisms in cases involving Indigenous adult survivors of sexual assault. Unless the fundamental issues of colonial, sexist, and racist attitudes that inform formal justice processes in Canada are directly addressed the use of RJ will in most cases be unlikely to accomplish its main

goals. Specifically, with respect to the possibility of appropriately addressing the needs of victims of violent sexual assaults, the use of formal Canadian court or justice system RJ processes should not be considered as an alternative to other potentially more appropriate community or grassroots responses including models within Indigenous legal orders that will better support Indigenous adult survivors of sexual assault. And indeed, there may well be particular crimes where the survivor, with the support of her community, determines the use of any RJ processes will simply not be appropriate.

One of the criticisms of RJ processes is the potential that they interfere with the court's ability to address at sentencing some key concerns as to an offender's individual circumstances, including any special circumstances, such as whether they are an Indigenous person and S. 718.2(e) of the *Criminal Code* applies or someone who is particularly vulnerable (ie: dealing with addictions or mental health issues, etc.). Even where RJ processes do allow for the potential for avenues that could assist with meaningful accountability, responsibility, and rehabilitation of the offender, the real concern becomes whether RJ processes can provide for an increased and meaningful role of survivors, families, and communities in ensuring accountability of the offender or repairing the harm and restoring relationships that have been damaged as a result of a sexual assault. And in many cases, of course, this simply may not be possible.

In formal court processes judges must consider the appropriateness of RJ for sexual assault cases, which may be in the best interests of an offender, if they are diametrically opposed to the best interest of the survivor – when this is the case the intention of RJ cannot be achieved. Further, the potential meaningfulness of RJ processes that may assist survivors in having a greater role or voice in sentencing must be weighed against how survivors respond to their role in the process. This is especially troubling when considering the impact on Indigenous adult survivors of sexual assault as particularly vulnerable survivors who may be forced to interact with the offender or his family if they are from the same community. This is especially the case when the survivor has experienced sexual assault in the context of a domestic relationship and where there may be children of the domestic partnership.

Increasing opportunities for RJ processes could be considered upon sentence by the judge in one of two ways: either taken into account at sentencing as a part of the individual offender's circumstances if they have engaged in RJ before sentencing, though not specifically as a mitigating factor. Or, alternatively, as a part of the sentence itself, but only if the offender can meaningfully engage in the RJ process and only if the victim is also able and willing to engage in the RJ process, though not as a factor in reducing what would otherwise be an appropriate sentence in the particular case.

Considerations with respect to ensuring greater opportunities for RJ processes when considering the specific needs of adult Indigenous survivors of sexual assault should include:

1. The role of Indigenous victims/survivors: Increased opportunities for RJ processes may help to ensure victims/survivors have a voice in sentencing, if they choose to participate.

Victim/survivor participation must remain voluntary in all cases. Expanding RJ mechanisms in sentencing should be weighed against the severity of the crime in question and that RJ processes may not be appropriate in the case of violent and sexual crimes, such as where the violence involves a domestic abuse, sexual assault, or the victim is a child. It would be necessary to expand support services for victims/survivors who may wish to participate RJ processes and ensure that proper ongoing support is available beyond the court-initiated or mandated RJ process.

2. Indigenous Offenders and Survivors: Increased opportunities for RJ processes must consider the particular and culturally appropriate needs of Indigenous offenders and Indigenous survivors – both of whom are overrepresented in the criminal justice system. Many RJ processes are not culturally appropriate or culturally safe, and do not include meaningful engagement with Indigenous justice or laws. There is another special consideration when attempting to address the concerns of Indigenous women, girls, trans, and Two-Spirit peoples who are the largest Indigenous populations impacted by violence, as is evidenced earlier in this report. As discussed previously, First Nations Sentencing Courts in British Columbia, the *Gladue* Court at Old City Hall in Toronto, various regionally constituted Indigenous courts located throughout Canada, and/or sentencing circles in other jurisdictions may provide examples of RJ processes that could be culturally appropriate and culturally safe, although these may or may not provide examples of the application of specific Indigenous justice or laws – and in some cases Indigenous justice or laws may not correlate with Canadian laws or ideas about justice. Moreover, in the case of community-led initiatives, such as sentencing circles, these may only provide meaningful options for Indigenous women if there is also not a gendered power imbalance in their community. It remains critical that romanticized notions of Indigenous law are not taken up, presented, and utilized as accurate or legitimate representations of Indigenous justice (Cameron 2006).

The potential for retraumatizing survivors must be taken into account in the consideration of RJ, especially in light of increasing opportunities for RJ options in sentencing. Meaningful RJ processes must assist victims in having a greater role or voice in sentencing proceedings with culturally appropriate and culturally safe supports and services in place for survivors and their families. This means that in order to ensure access to justice for Indigenous adult survivors of sexual assault, a holistic and contextual framework informed by Indigenous concepts of justice are necessary (Cameron 2006).

Whether the RJ process is appropriate in the case, including whether the crime involves threats of death or serious interpersonal violence, or in cases where there are vulnerable victims, including survivors of sexual assault and whether such an assault also occurred in the context of a domestic relationship it is essential that survivors' rights are considered as paramount. Because the RJ process should be considered as a separate process from any criminal or civil court proceeding, there is no reason that this cannot be accomplished while also ensuring all the elements of due process for the offender within the criminal or civil justice systems.

Research conducted with survivors by victims' rights and survivors' advocates have concluded the following general guiding principles may assist in ensuring RJ processes promote survivors' rights and support them through RJ processes (Goundry 1998, Cameron 2006):

1. Restorative justice processes are not alternative measures nor an alternative to sentencing; in fact, many forms of RJ may be appropriate as processes separate from the formal justice system in order to ensure due process within the formal criminal or civil justice systems is not impacted.
2. If the RJ processes is within the formal criminal justice system, participation in RJ processes is not a factor in reducing what would otherwise be a proportionate sentence in a particular case.
3. If the RJ processes is within the formal criminal justice system, participation by an offender might be considered upon sentence by the judge in one of two ways:
    a. Either taken into account at sentencing as a part of the individual offender's circumstances if they have engaged in RJ before sentencing, though it should not be considered as a mitigating factor; or
    b. Alternatively, RJ can be included as a part of the sentence itself, but only if the offender can meaningfully engage in the RJ process and only if the victim is also able and willing to engage in the RJ process.
4. If the RJ processes is within the formal criminal justice system, counsel and the courts should canvass and/or set out the following in cases where a RJ process may be used:
    a. Explicit consent of victims, if they are participating in the RJ process;
    b. How victims will be supported pre- / through / and post- RJ process;
    c. Offenders/victims should be able to withdraw at any point in the RJ process; and
    d. That there is foundational training and guidelines for an appropriate RJ processes, including what is culturally appropriate, in a particular case.

The last point is of particular importance when addressing the needs of Indigenous adult survivors of sexual assault. For example, unless the perspectives of Indigenous women and trans and Two-Spirit peoples are considered within the specific Indigenous justice system that may apply in each case, RJ approaches cannot truly be holistic and culturally appropriate (Cameron 2006, Clairmont 2013)

Indigenous Courts and Sentencing Circles

First Nations Courts (FNC), Gladue courts, Indigenous courts, and/or sentencing circles are usually referred to as forms of problem-solving or specialized courts/court processes. The formal FNCs or alternative courts operate within the formal Canadian justice system and only deal with sentencing Indigenous offenders who have pleaded guilty, whereas alternative sentencing processes, such as sentencing circles, operate by way of the common law powers of judges to alter the format of the court. Actors within the formal justice system often describe these kinds of courts or sentencing models as delivering "therapeutic justice" (Challenger 2017, 4). According to BC Provincial Court Judge, Joanne Challenger, this is sometimes described as:

> …engaging the coercive power of the court to achieve rehabilitation. The nature of the proceedings themselves and the sentences imposed attempt to redress the effects of the social and personal dysfunction and breakdown in the communities and lives of Indigenous peoples which are a direct result of the assimilation policies and residential school system. In my view, another important role of the judge and lawyers in FNC is to address reconciliation. (ibid)

The first alternative court of this type was the Gladue Court in Toronto, which sits at Old City Hall, and began operating in October of 2001. The Gladue Court has the unique feature of Gladue Caseworkers, who are trained to prepare Gladue reports and provide supports to Indigenous offenders as they engage with their healing plans post-sentencing (Rudin 2000).

Various regional Indigenous courts also exist throughout the country including: the Healing to Wellness Court in Elsipogtog, New Brunswick; the Akwesasne Community Court, courts located at Alexis, Siksika and Tsuu T'ina First Nations in Alberta; and the Whitehorse Wellness court (Clairmont 2013). Similarly, sentencing circles have been constituted in various jurisdictions (Cameron 2006, Bleknap and McDonald 2010). The use of sentencing circles in cases of domestic abuse and intimate partner violence has been researched to some extent; however, there is a lack of data on the degree to which Indigenous adult survivors of sexual assault, or their families, may find sentencing circles useful for their healing and to hold perpetrators accountable (Cameron 2006, Bleknap and McDonald 2010).

The first FNC in BC began operating at of the New Westminster courthouse in November 2006. There are presently three other FNCs in BC. The North Vancouver court was established in February 2012, the Kamloops Court in March of 2013 and the Duncan court in May of 2013 with more in development throughout the province (Challenger 2017). Although the FNCs and Gladue court in Toronto function similarly, they each deal with different types of offences, for example some will only accept summary offence charges, and each court has developed in its own way and engages in its work with Elders differently as based on "the views of the people and communities who developed them" (Challenger 2017, 5). The FNCs in BC have developed out of collaborative processes between Indigenous communities, the BC Provincial Court, lawyers, corrections, policing agencies, and other stakeholders (Challenger 2017, Dandurand and Vogt 2017). Unfortunately, the FNCs only sit once per month in their various locations and, due to the resource-intensive nature of the courts, the capacity and funding for such innovative court models is limited as well.

Due to the involvement of Elders in FNCs, the process itself can be more informed by Indigenous concepts of justice. Elders may sometimes even invoke Indigenous laws as a suggestion to the court about potential punishment or remedies; however, the courts are not always able to incorporate Indigenous law into sentencing as Indigenous concepts of justice do not always map onto Canadian law (Dandurand and Vogt 2017, 28).

Ultimately, the FNCs are limited in their ability to engage the Elders' use of Indigenous law and justice due to their placement firmly within the Canadian legal system. The limits on what offences a court may allow waived in also places severe limitations on the options for adult Indigenous survivors of sexual assault to utilize the resources of such courts; many of these courts will not deal with violent or sexual offences at all. Given that an offender has to plead guilty in order to access these courts, the power is essentially taken out of the hands of complainants should they wish to access these Indigenous-focused and potentially more culturally-appropriate court processes.

Even if a court will deal with sexual assault, a further limitation of the FNCs is that participation may not be in the best interests of complainants, especially if the crime is particularly violent or is a sexual assault. The options available to survivors of sexual assaults to participate in the justice process can be limited not only by the lack of formal supports in place for them, but also by community response or pressures. The stigma and alienation Indigenous sexual assault survivors sometimes experience within their own communities has been noted and is not uncommon (*R.* v. *Fiddler* 1994, Chartrand and McKay 2006, Cameron 2006, Bleknap and McDonald 2010).[5]

According to a report recently produced for the Provincial Court of BC and Legal Services Society of BC, the theoretical foundations of FNCs "has not yet been fully articulated" (Dandurand and Vogt 2017, 11). However, as the authors of the report indicate,

> it would seem that the model relies on the assumptions that the rehabilitation and successful reintegration of Indigenous offenders can be facilitated by eight separate but interrelated factors:
>
> (1) **deterrence** (by holding the offender accountable for his/her behaviour and imposing a sentence, including follow-up sanctions in response to noncompliance with the original court order);
> (2) **application of healing plans and community-based sentences** (or in some cases, a bail supervision order) that allow offenders to participate in treatment or receive other forms of culturally appropriate support to address underlying criminogenic needs;
> (3) a focus on **reconciliation, restoration and reintegration** of the offender in the community, and sometimes include measures to repair the harm caused by the offence;
> (4) **effective support or treatment** for the offenders;
> (5) **judicial supervision** of the offenders' progress and compliance with the condition of their sentence or bail order;
> (6) **participation of community Elders** and other community members, as appropriate, in the sentencing and judicial supervision processes;

[5] For example, in *R.* v. *Fiddler*, 1994 CanLII 7396 (ON SC) it was noted the youth complainant who came forward with sexual assault allegations against the accused experienced significant stigma and alienation in the First Nations community she lived in as well as in surrounding communities. The court indicated that evidence suggested this was due to the influence of the Fiddler family in the local communities.

> (7) **active participation of the offenders** and sometimes the victims in the sentencing process or the development of a healing plan; and,
> (8) enhanced **perceived legitimacy** of the justice system by the offenders and their community (Dandurand and Vogt 2017, 11).

Unfortunately, such a theoretical model focuses almost exclusively on the offender and does not set out the rights or supports FNCs may be able to offer to victims/survivors, their families, and/or their communities. Likewise, Toronto's Gladue court is focused on offenders and supporting them in engaging with their healing plans and rehabilitation as well.

Ultimately, although there is some information inferring various RJ processes that are victim/survivor-focused and which include Indigenous law may be useful to assist Indigenous adult survivors in accessing justice, there is at this time a lack of research addressing this specific topic. Future studies into the effectiveness of alternative and RJ practices within the formal justice system, such as those discussed here, may point to the need to focus instead on Indigenous-led community and grassroots justice and healing processes outside of the formal Canadian justice system in order to actually address meaningful access to justice for Indigenous adult survivors of sexual assault.

9. Gaps and areas for future research

Clearly, there is a need for more research in all areas of concern in this report. At the same time, it is important to note that Indigenous women have outlined calls for transformative action related to both access to justice and in sexual violence, for several decades. Thus, the need for research must not be seen as a replacement for action – rather the two must go hand in hand.

We wish to recognize, in reference to Section 4: Case Law Review, that this report does not include a comprehensive assessment of the multiple access to justice issues faced by Indigenous adult survivors of sexual assault in the family law or child welfare systems. This report focuses mostly on the access to justice issues that result from the limits of the criminal justice system. To expand the research to include the family law and/or child welfare systems would have been difficult due to substantial research needed in that specific area, i.e. how the sexual assault of an individual does or may impact their particular family law issue or child welfare issue.

Indigenous people with specific health needs related to HIV/AIDS, FAS/FAE and physical and mental disabilities were named in the literature as being particularly impacted by sexual violence, yet their experiences accessing justice for sexual violence remain underexamined. Although it has been noted that specific considerations must be given to Indigenous survivors with FAS/FAE or who have cognitive impairments, as they face higher rates of violence while having specific needs in accessing justice mechanisms resulting from that violence (Hunt 2006), little research has been done on what this means for their access to justice. Further, although Indigenous people with physical disabilities are more likely to experience sexual violence (METRAC 2005), people with

disabilities are infrequently named in the literature and no specific research is available on the access to justice needs of Indigenous survivors with disabilities.

Furthermore, we recognize the following gaps in available research on access to justice for Indigenous adult survivors of sexual violence:

- specific research on the needs and experiences of male survivors
- specific research on the needs and experiences of Two-Spirit survivors, including transgender Indigenous people
- specific research on the needs of elders who are survivors, including elders who experience sexual violence in their later years – something which is rarely acknowledged.
- specific research into the effectiveness of alternative and RJ practices within the formal justice system
- specific research on Indigenous-led community and grassroots justice and healing processes outside of the formal Canadian justice system that addresses what is meaningful access to justice for Indigenous adult survivors of sexual assault.

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