

Problem-Solving or Problem-Starting?: Addressing the Under-Representation of Indigenous Peoples in the Therapeutic Court System

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BACKGROUND

Introduction

Therapeutic courts offer an alternative to the revolving door of crime. However, despite Indigenous people being over-represented in the criminal process, Indigenous people are under-represented in therapeutic courts across Canada. Not only this, Indigenous people are also less likely to be successful compared to other participants when accepted into therapeutic programming. This underrepresentation demonstrates barriers preventing Indigenous People from accessing these courts.

Indigenous Peoples' Representation in the Criminal Justice System

Indigenous people are over-represented in both the criminal process and in incarceration. Studies have recognized several contributing factors to this overrepresentation, including discriminatory policies, aggressive over-policing, and harsher sentencing. The trauma from Indian Residential Schools and loss of cultural identity has also been recognized as a factor contributing to Indigenous overrepresentation in the criminal system. This collective trauma from colonial intervention has re-appeared in many Indigenous communities in the form of addictions, mental health, and violence. These issues are often an underlying factor in criminal behaviour.

The Therapeutic Court System

Also known as problem-solving or specialized courts, therapeutic courts work to address the personal social issues underlying an individual's criminal activity, such as addictions, mental illness, or anger issues. Therapeutic courts are intended to be effective in preventing recidivism, as most offenders have underlying addictions issues, trauma, or mental health issues.

Therapeutic courts have demonstrated success in addressing underlying issues in criminal behaviour, preventing recidivism, and improving participants' quality of life. Based on this form of programming, it is anticipated that therapeutic courts would be successful in addressing issues inflicted by colonialism and preventing Indigenous recidivism.

INACCESSIBILITY

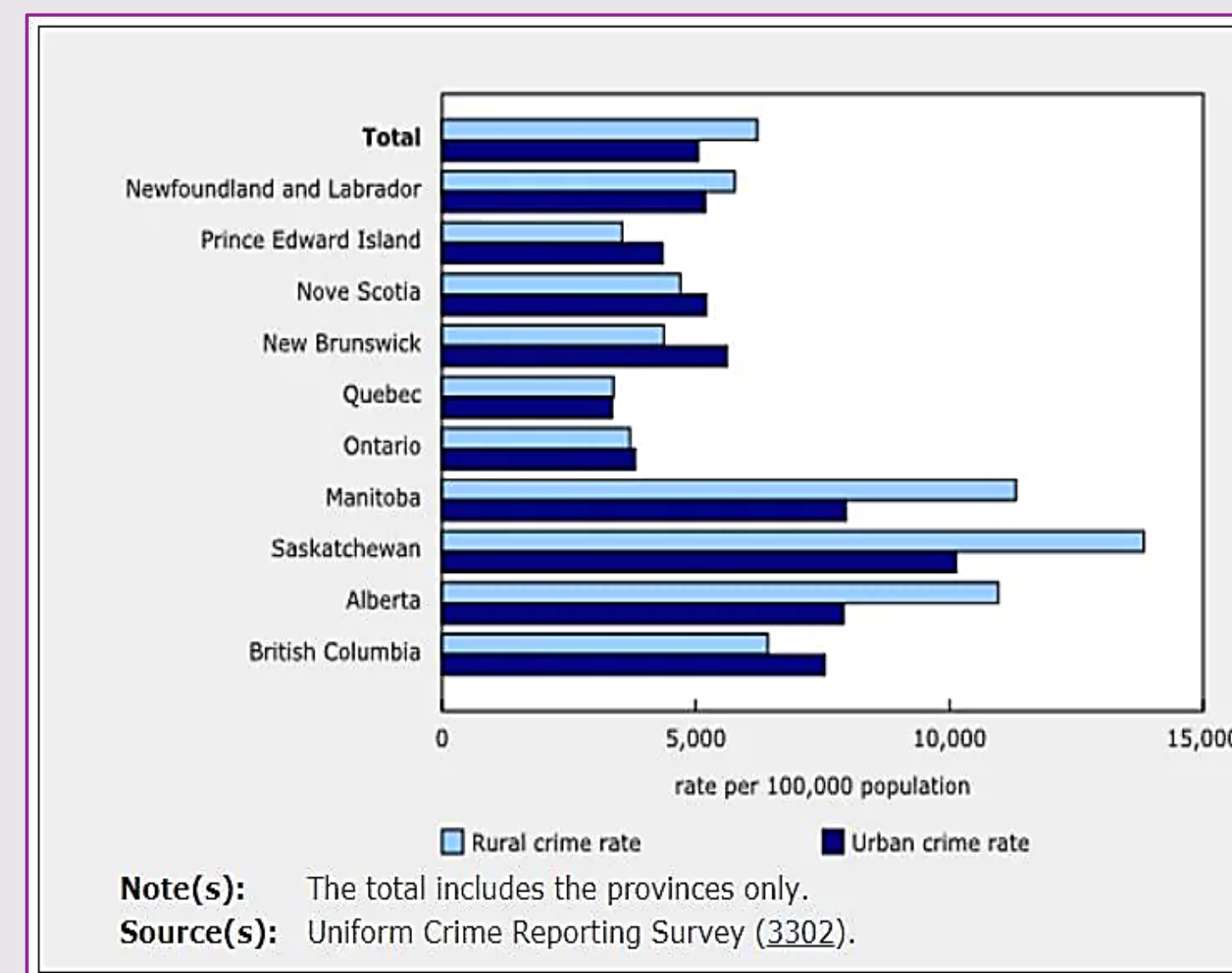
Social Issues

Indigenous offenders experience a higher rate of poverty and other social barriers, causing increased difficulty in attending therapeutic programming. These social issue barriers may include:

- An inability to sacrifice employment to attend full-day programming (programming is often 1-1.5 years in length);
- An inability to afford childcare to attend full-day;
- Unstable housing preventing program admission;
- Addictions issues, resulting in relapses that prevent program admission/success.

Rural Accessibility

Nearly half of First Nations people with registered Indian status live on reserves, and nearly half of all Indigenous Canadians live in rural settings. Police-reported crime rates in rural areas are 23% higher compared to urban crime, with this rate being nearly double in Saskatchewan. Crime rates on reserves are also twice as high compared to urban centres. Due solely to location, Indigenous offenders residing rurally or in reserve communities are unable to access therapeutic courts, further contributing to cycles of recidivism and higher rural crime rates.



Eligibility Criteria

For acceptance into a therapeutic court program, offenders must also enter into a guilty plea. Those who go through the traditional trial process and are found guilty are unable to access therapeutic programming.

Therapeutic courts should be accessible to accused who plead not-guilty. Those found guilty through the standard trial process due to an underlying issue, and take responsibility upon sentencing, deserve the same therapeutic treatment available to those who enter not-guilty pleas. The trial process would also provide more time to identify if other underlying issues were the cause of the offence, ultimately improving the amount of those treated.

To participate in therapeutic courts, offenders cannot have previous or concurrent charges relating violent criminal convictions or domestic violence convictions violence. However, Indigenous people are more likely to receive violent convictions due to racial bias, disqualifying them from participating in therapeutic courts.

RACIAL BIAS

Research supports that there are several race-based perceptions that could be colouring the risk assessment for Indigenous offenders and preventing their inclusion in therapeutic courts.

In order to participate in therapeutic courts, a risk assessment must be completed. If an offender is deemed to be too high of risk to the community or the other therapeutic court participants, incarceration or other sanctions are preferred. Without even committing an offence, Indigenous individuals are more likely to be perceived as inherently deviant, criminal, and dangerous. Indigenous offenders face additional discrimination as their criminal activities are viewed as more severe and dangerous compared to offenders of other races. Consequently, these biases impact the eligibility stage in Indigenous offenders qualifying for acceptance into therapeutic courts.

Indigenous people are also more likely to receive harsher punishments, disqualifying them from participating in therapeutic courts.

INCREASING ACCESSIBILITY

In order to address these barriers, therapeutic courts must expand their accessibility, and focus on reducing barriers that are more likely to impact Indigenous offenders. Indigenous representation could be achieved by several reform initiatives:

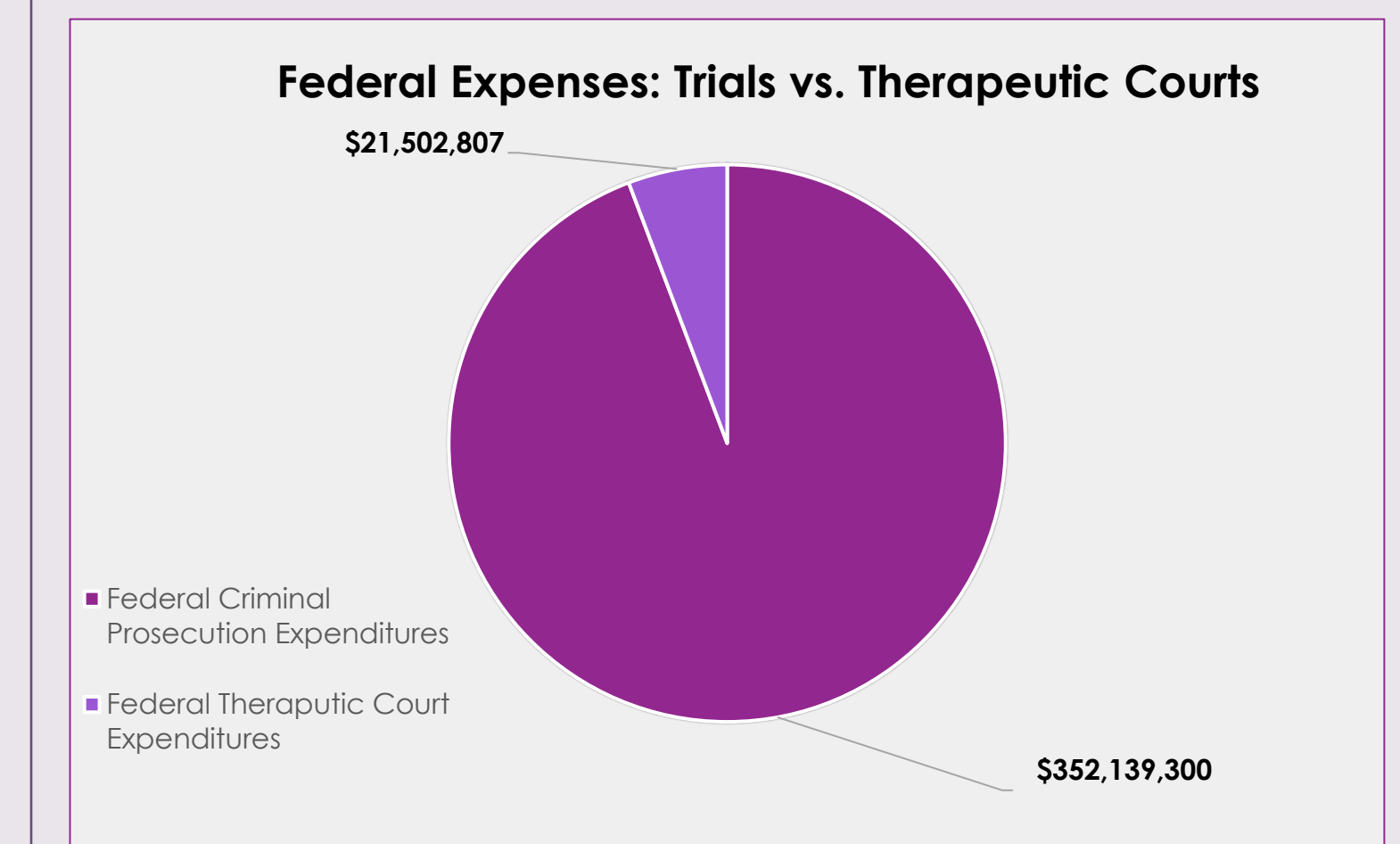
- Expansion to rural communities to meet the needs of offenders residing on reserves and in other rural communities;
- Creating an integrated housing program, or special funding towards participates obtaining stable housing;
- Implementation and reform of more flexible programming for employees – such as weekend/evenings;
- Funding towards childcare;
- Abandoning abstinence-based programming to manage addictions; instead, more focus on medical support, harm reduction, and positive behaviour therapy;
- Eligibility criteria should extend to those who plead not-guilty;
- Abandoning automatic denial based on previous violent offences; instead, a case-by-case review should be implemented, with special consideration given to Indigenous offenders; and
- Amend s. 718.2 of the *Criminal Code* to specify and encourage the referral of Indigenous People to therapeutic courts.



ISSUES WITH REFORM

Cost

Cost is an unsurprising issue when recommending most forms of legal reform. Expanding therapeutic courts to more locations would not only result in further infrastructure costs, but also increased program costs. Funding towards stable housing, child care, and addictions management pose additional financial burden. However, by providing more access to therapeutic programming, the occurrence of recidivism reduces—saving trial expenses.



Not a Conclusive Fix

Even with increased accessibility, therapeutic courts will not prevent the other variables that contribute to Indigenous people being over-represented in the criminal system. As mentioned, factors such as discriminatory policies, aggressive over-policing, harsher sentencing, and ongoing systemic racism, will continue to contribute to Indigenous people's over-representation.

CONCLUSION

Therapeutic courts offer an alternative to the revolving door of crime. Unfortunately, this alternative remains inaccessible for Indigenous Peoples. Addressing the barriers that result in Indigenous Peoples' under-representation would reduce recidivism, lessen Indigenous People's presence in the criminal system, and provide equal access to rehabilitation resources.

REFERENCES

Please visit the following link to view references:
<https://docs.google.com/document/d/1sshe0omf3xoywrnxDRDz3MJu68Z6M1Z06tXgUf2rjqQ/edit?usp=sharing>.

QUESTIONS?

Please feel welcome to contact Wendy Corden with questions at wac266@usask.ca.