

# **EVALUATION OF THE ABORIGINAL YOUTH COURT, TORONTO**

**Report prepared by  
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## Executive Summary

The Aboriginal Youth Court was first convened in June, 2012 at the 311 Jarvis Street courthouse in Toronto. The Court was established to ensure the application of certain sections of the *Youth Criminal Justice Act* and to respond to significant social and justice-related issues facing Aboriginal people, specifically Aboriginal youth.

The Aboriginal Youth Court aims to achieve the following:

- Directly address relevant requirements in the *Youth Criminal Justice Act*, specifically paragraphs 3 (1)(c), 38 (2)(d) and 50 (1);
- Encourage effective alternatives to incarceration for Aboriginal youth, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal youth in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal youth.

The research for the evaluation of the Aboriginal Youth Court (AYC) took place between June, 2012 and June, 2015. The purposes of the evaluation are:

- to assess the extent to which the objectives of the Aboriginal Youth Court at 311 Jarvis Street are being achieved;
- to assess the extent to which relevant sections of the *Youth Criminal Justice Act* are being realized;
- to identify and explain any unintended consequences resulting from Court processes and related programs;
- to identify possible modifications to Court processes and associated programs in order to increase objectives achievement, if warranted.

Evaluation methods include interviews with court officials and others involved with the Aboriginal youth justice process at the Aboriginal Youth Court (AYC) and at Aboriginal Legal Services (ALS), interviews with Aboriginal and non-Aboriginal youth and their family members, file reviews at the AYC and ALS, and court observation.

The Aboriginal Youth Court takes a case management approach. A youth (Aboriginal or non-Aboriginal) enters the system on the basis of one or more charges laid by police. She appears at 311 Jarvis on a promise to appear or is held for a bail hearing before a justice of the peace. If the youth is granted bail with conditions, she is given an appearance date and released. If bail is not granted (a rare occurrence), she is held in remand. As early in the process as possible the

attempt is made to determine if a youth is Aboriginal. Various professionals are responsible for inquiring as to a youth's Aboriginal identity, including the presiding justice of the peace, duty counsel, counsel, and the Aboriginal courtworker assigned to the AYC. If it is determined a youth is Aboriginal, the courtworker explains the AYC as an option to the youth and, if possible, to her parents or guardian. If the youth chooses to have her case heard in the AYC, she engages with the courtworker, ALS youth workers, her counsel and others to develop a plan of pre-diversion/resolution programs and activities. At subsequent AYC hearings, the Crown attorney can recommend withdrawal or staying of charges and diversion or other resolution. The timing of diversion depends on how well the youth is doing in her pre-diversion program. The AYC is a diversion court but also a plea and resolution court. Ultimately, a case is resolved either by diversion or some other form of resolution.

Ontario Court of Justice statistics for the two-year period March 2013 to April 2015 show 2,648 cases were received at 311 Jarvis courthouse (non-Aboriginal and Aboriginal). Based on available data, 98 Aboriginal youth cases or 3.7 percent of the total were received during the same period. Between June, 2012 and June, 2015 (the period of the evaluation), 146 Aboriginal youth cases were received and known to be Aboriginal youth at 311 Jarvis. Ninety-three Aboriginal youth appeared in the AYC during that time: 71 males and 22 females. Most youth appearing before the AYC had more than one charge. The average number of charges per Aboriginal youth during the three-year evaluation period was 4.2.

The AYC is effective in identifying Aboriginal youth, a prerequisite for attendance at the AYC. Aboriginal youth themselves are increasingly spreading the word about the court. Court officials, including defence counsel, are also aware of the AYC, although more education is warranted to ensure counsel throughout the GTA have an understanding of Gladue principles, the intent of the *YCJA* regarding Aboriginal youth, and the role of the AYC.

The proportions of cases received varied by offence category between 311 Jarvis and the AYC. During the period March 2013 to April 2015, 311 Jarvis as a whole ranked cases received as follows: crimes against the person, federal statute, property, administration of justice. Aboriginal youth cases received ranked this way: crimes against the person, administration of justice, property, federal statute. These comparisons suggest that Aboriginal youth are breaching bail or probation conditions or are failing to appear in court at a higher rate than youth at 311 Jarvis generally. The problem is addressed in two ways. First, justices of the peace attempt to design conditions that will meet the situation and the needs of individual youth. In the pre-diversionary period of involvement with the AYC, bail conditions are frequently amended to better suit the individual youth and to encourage positive efforts in rehabilitation. Second, the Aboriginal courtworker and youth workers communicate frequently

with individual youth to help ensure youth show up for court and other meetings (e.g., at CAMH). The reasons for the relatively high rate of administration of justice offences among Aboriginal youth are complex and might be explained by different patterns of offending and by the alienation of Aboriginal youth from the justice system resulting from a legacy of colonialism and marginalization.

Diversion to the Community Council at ALS is an effective, culturally appropriate approach to rehabilitating youth. It appears to have the effect of engaging youth with their culture and decreasing re-offending. Diversion and the withdrawal of charges also remove the stigma and life problems associated with having a criminal record. During the evaluation period, only one youth appearing at the AYC was sentenced to custody (and probation). The number of diversions to the Community Council at ALS has decreased since 2012. In part this could be explained by the general drop in youth cases in Ontario and Toronto during that period. It is also likely, however, that the Crown attorney is increasingly withdrawing charges without a concomitant diversion. This speaks to the high quality of pre-diversion activities planned by the courtworker and youth workers as part of the case management process.

Case processing times are slightly longer in the AYC than in regular Ontario youth courts. All parties, including youth, agree that the extra time serves to ensure progress in the pre-diversionary period, thus increasing the likelihood of diversion or withdrawal of charges without diversion.

Court configuration – a modified “circle” – is universally considered to be respectful of Aboriginal culture and less traumatizing for youth attending court. The opportunity for input from the youth and any person associated with the youth (e.g., family members, probation officers, social workers, the courtworker and youth workers) is welcomed by those individuals and by the Crown attorney and defence counsel.

The *YCJA* requires youth courts to “respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.” (Aboriginal youth differ from other youth to varying degrees with respect to ethnicity, culture and language but they also have special requirements at a relatively high rate, including problems associated with mental health, cognitive impairment, addiction, and family dysfunction.) The Act also requires that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.”

The Aboriginal Youth Court has achieved a significant degree of success in addressing the requirements of the *YCJA* with respect to Aboriginal youth. It is clear that the Aboriginal Youth Court is dependent on the existence and good work of Aboriginal Legal Services with respect to the efforts of the Aboriginal courtworkers, youth workers and the Community Council. Similarly, the restorative programs offered by ALS and other agencies (primarily Aboriginal) in the GTA are essential to the success of the AYC. This has been demonstrated in several ways and confirmed with reference to various information sources, including Aboriginal youth themselves.

In the view of the evaluator, the Aboriginal Youth Court is clearly meeting its four objectives. While some challenges and potential problems remain, the court has maintained flexibility and has adapted since its beginning. The AYC, together with the Community Council at Aboriginal Legal Services, is providing a critically important service to Aboriginal youth, their families and the larger Aboriginal community and should be seen as a model for the development of similar initiatives in Ontario and throughout Canada.

Recommendations are made with respect to several questions, none of them urgent:

- The AYC has the structure and the capacity to manage more Aboriginal youth cases and cases should be traversed more frequently from GTA courts to the AYC. Personnel, particularly lawyers, appearing in other courts require further education to make them aware of the AYC and its benefits for Aboriginal clients.
- The Ontario Court of Justice should consider establishing a central (and larger) Aboriginal youth court with a concomitant mandate to process all Aboriginal youth cases in the GTA.
- Consistency among court personnel and assurances that personnel have a solid understanding of Aboriginal issues, including Gladue principles, are essential for the effective operation of the AYC.
- Counsel should make every effort to ensure their Aboriginal clients are heard in the AYC. This can be a challenge if an Aboriginal youth is co-accused with a non-Aboriginal youth.
- Crown attorneys and Aboriginal Legal Services should discuss the kinds of cases that are likely to be divertible and a clear policy set out. This can be done informally in meetings of the Aboriginal Youth Court Committee.
- The fact that the AYC tends to lead to diversion presumes guilt. The question becomes: will a young person choose to admit guilt when not guilty in order to benefit from the AYC approach to the withdrawal of charges and restorative diversion? This question is worthy of ongoing discussion by the AYC Committee.
- It is possible to initiate sentencing circles in the AYC, although an appropriate case has not yet arisen. There are potential benefits and challenges to the use of circles and the

question requires additional research and discussion. However, if it seems appropriate and if all parties (including the victim) consent, a circle should be arranged. The use of sentencing circles should be assessed and modified as appropriate.



## Introduction

The Aboriginal Youth Court was first convened in June, 2012 at the 311 Jarvis Street courthouse in Toronto.<sup>1</sup> The Court was established to ensure the application of the *Youth Criminal Justice Act* with a particular focus on the sections of the Act concerning Aboriginal youth. In that regard the Court was cognizant of the Supreme Court rulings in *Gladue*<sup>2</sup> and *Ipeelee*<sup>3</sup> that acknowledged the significant social and justice-related issues facing Aboriginal people, and that directed courts to adhere to the 1996 amendments to the *Criminal Code* regarding the sentencing of Aboriginal individuals. Justice Marion Cohen, who initiated the Aboriginal Youth Court, also believed the justice system – in this case, the youth justice system – could play a role in the broader process of addressing the legacy and continuing reality of colonialism as it affects Aboriginal people. In this regard the Court anticipated the final report of the Truth and Reconciliation Commission and its calls for reconciliation between Canada and Aboriginal peoples.

The Aboriginal Youth Court (AYC) adheres to the statutory requirements of the *Youth Criminal Justice Act* through diversions, pleas and resolutions. Trials are held in regular Youth Court. At the Aboriginal Youth Court's inception the plan was to work with Aboriginal Legal Services of Toronto (ALST)<sup>4</sup> to link Aboriginal youth to culturally relevant services suited to their circumstances and needs. A case management approach was envisioned which, with the help of ALST and other agencies, would enable individual youth to prepare for the possibility of diversion or other resolution. The preparatory steps and the actual diversion process would connect the youth to the Aboriginal community in Toronto or elsewhere, as appropriate.

The components of the Aboriginal Youth Court process, including diversion, are addressed later in this report. However, a thumbnail description, as depicted in Figure 1, is warranted here. As noted, the AYC takes a case management approach. A youth (Aboriginal or non-Aboriginal) enters the system on the basis of one or more charges laid by police. She appears at 311 Jarvis on a promise to appear or is held for a bail hearing before a justice of the peace. If the youth is granted bail with conditions, she is given an appearance date and released. If bail is not granted (a rare occurrence), she is held in remand. As early in the process as possible the attempt is made to determine if a youth is Aboriginal; as indicated by the blue lines in Figure 1. Various professionals are responsible for inquiring as to a youth's Aboriginal identity, including

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<sup>1</sup> The court is formally known as the Section 38: Aboriginal Youth Court.

<sup>2</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>3</sup> *R. v. Ipeelee*, [2012] S.C.J. No. 13.

<sup>4</sup> Now known as Aboriginal Legal Services (ALS).

the presiding justice of the peace, duty counsel, counsel, and the Aboriginal courtworker assigned to the AYC. If it is determined a youth is Aboriginal, the courtworker explains the AYC as an option to the youth and, if possible, to her parents or guardian. If the youth chooses to have her case heard in the AYC, she engages with the courtworker, ALS youth workers, her counsel and others such as Native Child and Family Services to develop a plan of pre-diversion/resolution programs and activities. At subsequent AYC hearings, the Crown can specify the withdrawal or staying of charges and diversion or other resolution. The timing of diversion depends on how well the youth is doing in her pre-diversion program. The AYC is a diversion court but also a plea and resolution court. Ultimately, a case is resolved either by diversion or some other form of resolution.

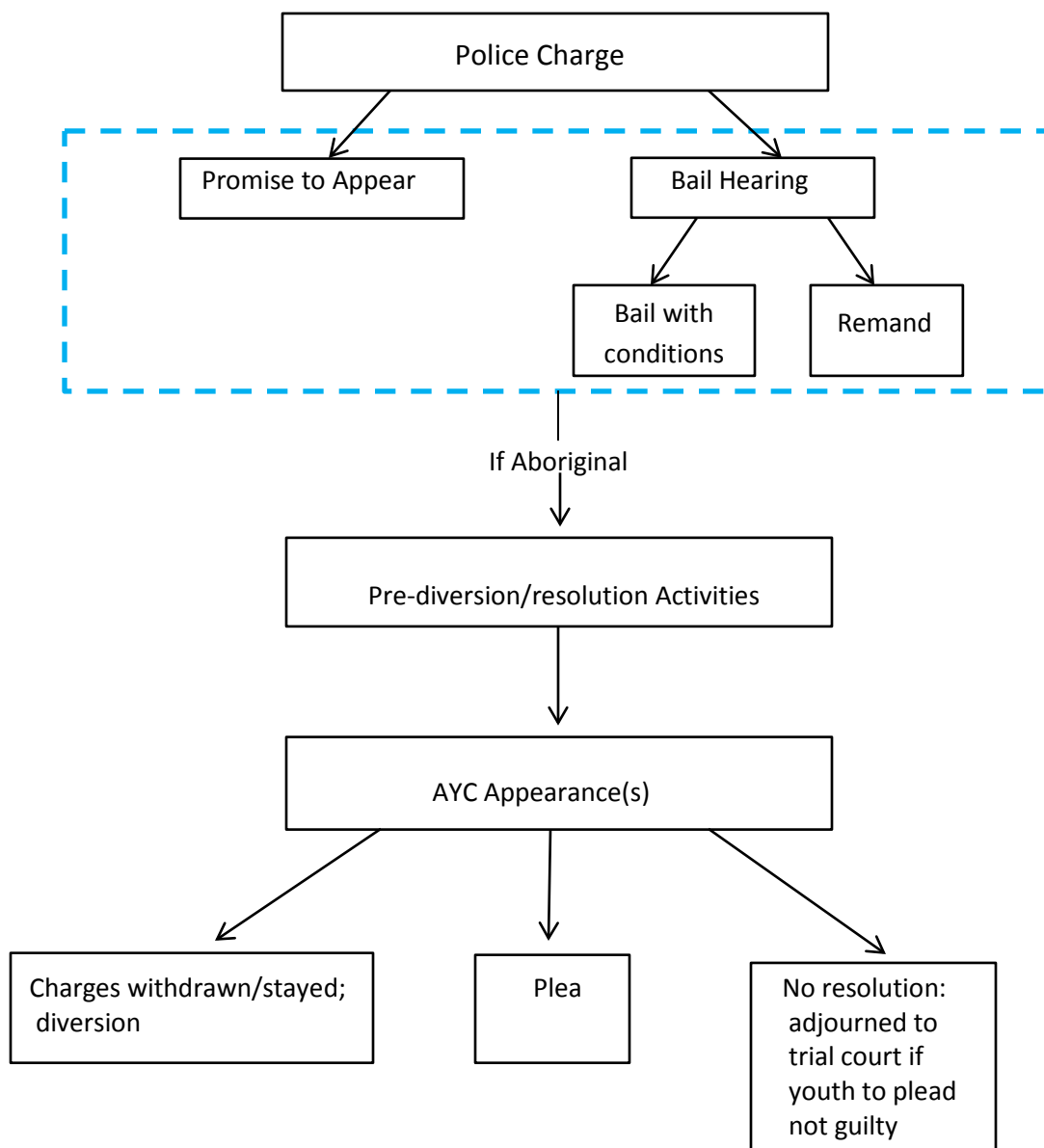


Figure 1: Aboriginal Youth Court Case Management Process

The Aboriginal Youth Court aims to re-model the traditional court process by incorporating Aboriginal understandings of justice and human relations. While care must be taken not to assume a “pan-Aboriginal” view of the world, it is fair to say that Aboriginal cultures in Canada are more oriented to addressing non-normative behaviour through reconciliation and positive transformation than is the mainstream system which continues to be based primarily on adversarial processes, punishment and deterrence. The Aboriginal Youth Court is an attempt to revise the formal youth criminal court by incorporating Aboriginal values and approaches. Proulx (2005) refers to shifts in the formal system as a process of interlegality, in this case not changing Aboriginal approaches to justice but, rather, Euro-Canadian approaches.

### Purpose of the Evaluation

The research for the evaluation of the Aboriginal Youth Court took place between June, 2012 and June, 2015. The evaluation combines analyses of both processes and outcomes associated with the court. It examines the processes by which the AYC objectives are being addressed and the outcomes of the court’s work, mainly with reference to the achievement of objectives and unintended results. The research findings should assist court officials in planning and carrying out AYC operations, and will provide information of use to agencies affiliated with the AYC. This refers primarily to Aboriginal Legal Services (ALS) and that agency’s provision of Courtworker services, Gladue Reports, restorative counselling and rehabilitative programming.

The purposes of the evaluation are:

- to assess the extent to which the objectives of the Aboriginal Youth Court at 311 Jarvis Street are being achieved;
- to assess the extent to which relevant sections of the *Youth Criminal Justice Act* are being realized;
- to identify and explain any unintended consequences resulting from Court processes and related programs;
- to identify possible modifications to Court processes and associated programs in order to increase objectives achievement, if warranted.

This evaluation falls, to a certain extent, within the category of “realist evaluation,” a relatively new approach that examines client outcomes beyond simple numbers reflective of systemic processes. What does the experience of the court process mean for individual young persons, their families, their lives? This approach also considers the effects of the AYC process on individuals and agencies who are involved as part of the system: judges, lawyers, courtworkers, caseworkers, support groups and others. Most importantly, it gives voice to those who have had little opportunity to express their views before. Colonialism is not a legacy; it continues. As

the Truth and Reconciliation Commission and other commissions of inquiry have told us repeatedly,<sup>5</sup> the negative social, economic, psychological and cultural impacts of colonialism affect all Indigenous people in Canada. Indigenous youth are especially vulnerable and without agency. While this is just one study of one court, it aims to give the voiceless a voice. In that spirit, the report contains numerous quotes from Indigenous youth who have passed through the courts and were interviewed as part of the project.

## Rationale for the Aboriginal Youth Court

The *Youth Criminal Justice Act (YCJA)* contains three sections especially relevant to the Aboriginal Youth Court: Sections 3 (1)(c), 38 (2)(d) and 50 (1):<sup>6</sup>

- Section 3 (1) The following principles apply in the Act:
  - (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
    - (iv) respect gender, ethnic, cultural and linguist differences **and respond to the needs of aboriginal young persons** and of young persons with special requirements
- Section 38 (2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
  - (d) **all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons**
- Section 50 (1) Subject to section 74 (application of *Criminal Code* to adult sentences), **Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(e) (sentencing principle for aboriginal offenders)...**

These sections relate to the importance of addressing the unique realities and needs of Aboriginal youth throughout the youth justice system, particularly with respect to sentencing. Section 38 (2)(d) is closely comparable to Section 718.2(e) of the *Criminal Code*, referring to the sentencing of adult Aboriginal offenders: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” The importance of Section 718.2(e)

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<sup>5</sup> For example, the Aboriginal Justice Inquiry of Manitoba, the Royal Commission on Aboriginal Peoples, the Commission on First Nations and Métis Peoples and Justice Reform, the First Nations Representation on Ontario Juries Inquiry, and the Ipperwash Inquiry.

<sup>6</sup> Emphasis added. See Appendix 1 for the complete sections.

was confirmed in Supreme Court of Canada rulings, including *R. v. Gladue*<sup>7</sup> and *R. v. Ipeelee*<sup>8</sup> and by the Ontario Superior Court in *R. v. Bain*.<sup>9</sup> The significance of Section 718.2(e) of the *Criminal Code* is recognized in Section 50 (1) of the *YCJA*.

The Aboriginal Youth Court was established to adhere to the principles and directions regarding Aboriginal youth contained in the *YCJA*. However, the intent was not simply for court officials to bear in mind the Act's provisions during the court process; rather – and significantly – the aim of the Court has been to actively engage the relevant provisions of the *YCJA*. This level of engagement has made the Aboriginal Youth Court unique in Canada.

The Aboriginal Youth Court attempts to address the unique circumstances faced by many Aboriginal youth as the result of historical and ongoing colonial policies that contribute to discrimination and marginalization. These conditions have resulted in the overrepresentation of Aboriginal people in all aspects of the criminal justice system. This is most obviously seen in incarceration rates, including rates for Aboriginal youth, which are significantly higher than for non-Aboriginal individuals.

Aboriginal adults comprise almost 25 percent of the inmate population in federal, provincial and territorial correctional facilities while representing less than 4 percent of Canada's total population. Aboriginal women are especially overrepresented at over 35 percent of the female inmates in federal penitentiaries, but again represent less than 4 percent of Canada's adult female population.

The picture is even more striking for Aboriginal youth (12 to 17 years old). Aboriginal youth represent approximately 7 percent of Canada's youth population. However, in 2014-15 they accounted for approximately 33 percent of young people admitted to the Canadian corrections system (Statistics Canada, 2016). The overrepresentation of Aboriginal youth was even more disproportionate among girls. In 2011-2012, for example, Aboriginal girls accounted for 49 percent of female youth admitted to the corrections system, compared to 36 percent for Aboriginal male youth. As Table 1 shows, in 2008-2009 Aboriginal youth represented 36 percent of the sentenced admissions to custody (34 percent of males, 44 percent of females), 25 percent of admissions to probation (22 percent of males, 31 percent of females), and 33 percent of admissions to remand (29 percent of males, 46 percent of females) (Bell, 2015: 341; Calverley, Cotter and Halla, 2010: 19, 23, 26).<sup>10</sup>

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<sup>7</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>8</sup> *R. v. Ipeelee*, [2012] S.C.J. No. 13.

<sup>9</sup> *R. v. Bain*, Ontario Superior Court of Justice, February 18, 2004, unreported.

<sup>10</sup> Statistical data should be viewed with caution. It is difficult to ensure the accuracy of census counts of Aboriginal people, and even more difficult in terms of crime related data. Statistics Canada (2005) has acknowledged the

The comparative rates increased significantly, as indicated in Table 1, between 2008-2009 and 2013-2014. Bearing in mind that Aboriginal youth represent approximately seven percent of the total youth population of Canada, in 2013-14 Aboriginal male youth comprised 45 percent of all male youth admitted to sentenced custody, 33 percent of male youth given probation, and 43 percent of male youth in pre-trial detention. The comparative percentages for Aboriginal female youth were even higher. In 2013-14, Aboriginal female youth represented 53 percent of all female youth admitted to sentenced custody, 41 percent of female youth given probation, and 62 percent of female youth in pre-trial detention. To the best of our understanding, these rates and the disparities between Aboriginal youth and non-Aboriginal youth are continuing to increase.

<b>Table 1</b>						
<b>Aboriginal Youth Involvement in Corrections, 2008-09 and 2013-14 (as a percentage of all youth in each category)</b>						
<b>Year</b>	<b>Sentenced Custody</b>		<b>Probation</b>		<b>Pre-trial Detention</b>	
	Aboriginal Male	Aboriginal Female	Aboriginal Male	Aboriginal Female	Aboriginal Male	Aboriginal Female
2008-09	34%	44%	22%	31%	29%	46%
2013-14	45%	53%	33%	41%	43%	62%

Sources: Bell, 2015: 341; Calverley, Cotter and Halla, 2010: 19, 23, 26; Statistics Canada, 2014, *Table 251-0012 - Youth custody and community services (YCCS), admissions to correctional services, by sex and aboriginal identity, annual (persons unless otherwise noted)*, CANSIM (database).

The Supreme Court of Canada in *R. v. Gladue* noted that overrepresentation data are both startling and an effective indication that relations between Aboriginal people and the justice system are seriously flawed. The Court stated, “[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system,”<sup>11</sup> a statement that was meant to resonate throughout governments and the justice system itself.

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challenges and Rudin has described the problem in detail (2007: 10-11). Additional problems include failure to report by provinces and territories, as noted above. That said, Statistics Canada provides the most comprehensive data for purposes of this report.

<sup>11</sup> *R. v. Gladue*, footnote 1, at para. 64.

## Government and Judicial Responses to Date

The Government of Canada has attempted in the past to address the problem of overrepresentation in various ways, including amendments to the *Criminal Code* in 1996 (section 718.2(e)) and the subsequent inclusion of certain sections in the *Youth Criminal Justice Act* (paragraphs 3, 38 and 50). These laws address the ways in which Aboriginal offenders, both adult and youth, are to be considered by the courts in the sentencing process. As Rudin notes with respect to the *Criminal Code* amendments, the purpose “was not necessarily to reduce rates of offending in Canada, but rather to lessen the country’s reliance on incarceration as a response to such behaviour” (Rudin, 2009: 448). The legislation regarding the amendments to the *Criminal Code* and the *YCJA* essentially directs judges to consider all aspects of an Aboriginal offender’s background and to hand down a sentence that does not involve jail time if possible and reasonable.

Three principles identified by the federal government and confirmed by the Supreme Court in *Gladue* in 1999 underlie these sentencing provisions. The first is that Aboriginal people have long been marginalized and continue to be marginalized through the legacy of colonialism. Marginalization in the form of endemic poverty, poor health care, unacceptably low housing standards, fewer educational opportunities, fewer employment opportunities, and widespread experiences with control and assimilation (residential schools, for example) has been acknowledged by our federal law makers as contributing to higher rates of crime, especially violent crime, among Aboriginal people in many Aboriginal communities and cities. The second principle on which the legislation is based is the recognition that Aboriginal people suffer systemic discrimination within the criminal justice system itself, including by police and courts. Third, the legislation implicitly acknowledges that culturally relevant alternatives to incarceration in the form of rehabilitative programs in restorative justice models are generally more effective than incarceration for the individual offender, the community, and public safety. It was with these realities in mind that the *YCJA* was revised (paragraphs 3, 38 and 50).

Relatively early in the life of the *YCJA* and again eight years later, Barnhorst (2004; 2012), one of the authors of the legislation, addressed the legislation’s potential value and challenges to its implementation. On the positive side, Barnhorst argues the legislation provided a new approach to sentencing, whereby sentences must be proportionate to the seriousness of the offence and, where reasonable according to principles of proportionality, should stress the rehabilitation of youth offenders. Barnhorst also addressed potential difficulties in implementing the *YCJA*. While he did not explicitly state it, other authors suggest those difficulties might be magnified for Aboriginal youth (Latimer and Foss, 2005; Sprott and Doob, 2008). Barnhorst stated that implementation issues could include “appropriate use of available

funding, net-widening,<sup>12</sup> the adequacy of provincial policies and guidelines for police and attorneys, conditions of release, and the interpretation of provisions related to proportionality, rehabilitation, and restrictions on custody” (2004: 231). One could add the provision of culturally meaningful alternative sentencing, especially for Aboriginal youth, as a significant challenge.

It was in recognition of the need to apply the principles laid out by the Supreme Court in *Gladue* and other related cases, the need to act on the amendments to the *YCJA* as they pertained to Aboriginal youth, and the need to avoid at least some of the challenges raised by Barnhorst that the Aboriginal Youth Court was established at 311 Jarvis Street in Toronto.

## Objectives of the Aboriginal Youth Court

The Aboriginal Youth Court aims to achieve the following:

- Directly address relevant requirements in the *Youth Criminal Justice Act*, specifically paragraphs 3 (1)(c), 38 (2)(d) and 50 (1);
- Encourage effective alternatives to incarceration for Aboriginal youth, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal youth in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal youth.

## Indicators of Objectives Achievement

Achievement of the court’s four objectives is assessed on the basis of specific indicators. The indicators identified for assessing objectives achievement vary in terms of the extent to which they are quantifiable or are qualitative/descriptive in nature. In either case, they are useful in understanding the processes and outcomes of the AYC. Discussion of the objectives and their concomitant indicators follows:

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<sup>12</sup> Net-widening might involve a decision maker, such as a judge, a justice of the peace or a police officer imposing an extra judicial measure as an alternative to incarceration when neither an extra judicial measure nor incarceration would have been applied under earlier legislation and the youth would have been “let go” (Bell, 2015: 282-283).



*Objective: Directly address relevant requirements in the Youth Criminal Justice Act, specifically sections 3 (1)(c), 38 (2)(d) and 50 (1).*

The provisions in the *Youth Criminal Justice Act* are general in scope. For example, Section 3 (1)(c) says that measures taken by the court should “respond to the needs of aboriginal young persons.” This is open to interpretation. For example, how does a court define the scope of needs of Aboriginal youth? Do needs cover matters such as housing, therapeutic programs, cultural engagement, health, education, etc.; or is need defined simply in terms of recognition of an individual youth’s Aboriginal identity? Are the needs of Aboriginal youth to be considered in general terms or at the level of the individual? How does the court acquire the information required to assess needs?<sup>13</sup> Who makes the assessment and what is the process?

Similarly, Section 38 (2)(d) identifies the requirement for non-custodial sanctions “with particular attention to the circumstances of aboriginal young persons.” How does a court define the circumstances of Aboriginal youth? What is the scope of the investigation of a youth’s circumstances? How is relevant information acquired? And what is the process for determining the significant circumstances of individual youth?

Section 50 (1) is not as challenging with respect to interpretation as it essentially makes the link between the sentencing principles regarding Aboriginal youth in the *YCJA* and Aboriginal adults in the *Criminal Code*.

Keeping in mind the broad scope of the *YCJA* provisions and the questions of interpretation noted above, several indicators were identified for the purpose of assessing the level of achievement of the first objective. This was done after initial discussions with professionals working in the youth justice system, as well as a review of relevant court rulings and academic literature. The indicators for the Court’s first objective are as follows:

- Opportunities for individual youth to register their Aboriginal heritage with the court.
- Awareness by judges, justices of the peace and counsel of Gladue principles and the significance of young clients registering their Aboriginal heritage with the court.
- The frequency with which individual youth connect with an Aboriginal courtworker prior to first appearance.

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<sup>13</sup> Rudin raises the same question with respect to *Gladue*. As he points out, the Supreme Court in *Gladue* said that “judges needed more information about the particular Aboriginal offenders before the court and the sentencing options that existed for that offender. But what was not at all clear was how this information was going to be provided to the court” (2009: 454). In some Toronto and other Ontario courts, Aboriginal Legal Services provides detailed Gladue Reports to the court in adult cases; however, similar reports have not yet been requested in the AYC. It should be noted that there might be a capacity issue at Aboriginal Legal Services which currently has only two Gladue Report writers.

- The extent to which the Aboriginal courtworker is able to identify the circumstances and needs of an Aboriginal youth prior to first hearing.
- The opportunities for the Aboriginal courtworker and youth workers to inform the court regarding a youth's situation with regard to program involvement and progress in other positive activities prior to a decision about diversion.

*Objective: Encourage effective alternatives to incarceration for Aboriginal youth, developed through a culturally and individually appropriate process.*

a) Pre-diversion

- The availability of resources upon which the courtworker and youth workers draw to design an appropriate program for the youth, including agencies serving youth and family members.<sup>14</sup>
- The extent to which the Aboriginal courtworker and youth workers are able to design individualized programs appropriate to the needs and circumstances of individual youth.
- The extent to which the Aboriginal courtworker and youth workers are able to engage a youth in programs which connect the youth with his/her Indigenous culture.
- The extent to which the Crown considers pre-diversion efforts of Indigenous youth in making a decision regarding diversion.
- The extent to which youth are diverted.

b) Diversion

- The availability of resources upon which the Community Council (ALST) and youth workers draw to design an appropriate program for the youth, including agencies serving youth and family members.
- The extent to which the Community Council and youth workers are able to identify individualized programs appropriate to the needs and circumstances of individual youth.
- The extent to which Indigenous youth complete the programs set out by the Community Council.

*Objective: Encourage the development of resolution plans which will engage Aboriginal youth in their own rehabilitation.*

- The extent to which the Aboriginal courtworker and youth workers are able to identify individualized programs appropriate to the needs and circumstances of individual youth.

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<sup>14</sup> Potential resources include Aboriginal Legal Services (ALS), Native Child and Family Services (NCFS), the Centre for Addictions and Mental Health (CAMH), schools, agencies presenting housing alternatives, and others. The list is expanded later in this report.

- The extent of engagement of individual youth in their plans, both pre-diversion and post-diversion.
- The rate of completion of program plans by youth, pre-diversion and post-diversion.

*Objective: Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal youth.*

- The number of Aboriginal community agencies involved in providing pre-diversion and post-diversion programming for youth.
- The extent to which the Court considers pre-diversion program efforts of Indigenous youth in making a decision regarding diversion.

Information linked to the indicators listed above contributed to findings and conclusions regarding the Court's achievement of its objectives. This is the "outcomes" component of the evaluation. The "process" component examines the methods by which the Court attempts to achieve its objectives. The process component will also contain observations on related factors, including case processing time.

## Methodology

The evaluation research included several approaches to collecting relevant information, analyzing that information, and drawing conclusions. Data collection methods included the following:

- collection and analysis of specific data from Youth Court administrative (case) files at 311 Jarvis Street;
- collection and analysis of specific data from ALS case files;
- collection of statistics from the Ontario Court of Justice and the Canadian Centre for Justice Statistics (Statistics Canada);
- interviews with justice professionals associated with AYC:
  - members of the judiciary
  - Crown attorneys (provincial and federal)
  - defence counsel
- interviews with ALST:
  - Program Director
  - Members of the Community Council
  - Courtworkers
  - Youth workers

- interviews with Aboriginal youth whose cases were heard at the AYC and who were diverted to ALST Community Council;
- interviews with the parents or guardians of Aboriginal youth whose cases were heard at the AYC and who were diverted to ALST Community Council;
- interviews with Aboriginal youth whose cases were heard at 2201 Finch and Scarborough courts and who were diverted to ALST Community Council;
- interviews with non-Aboriginal youth whose cases were heard at Brampton and 2201 Finch courts and who were diverted;
- court observation at the AYC, 311 Jarvis Street from June, 2012 to May, 2015 (AYC convenes every two weeks with occasional three-week resumption.) Court dockets were cross referenced with court and ALS files.

The interviews with Aboriginal and non-Aboriginal youth processed at other courts in the GTA, as noted above, provided comparative information on the perceptions of youth regarding court processes and alternative programming.

A snowball sampling technique was used to identify and contact youth who might be willing to be interviewed. Sampling Aboriginal youth depended largely on the assistance of ALS personnel who often made the initial connection between the interviewer and a youth. Sampling non-Aboriginal youth was done with the assistance of Associated Youth Services of Peel Region.<sup>15</sup> The sample was not random as youth were often difficult to contact or perhaps unwilling to participate in the study. Respondent bias was possible; however, the fact that not all youth respondents were entirely positive about their experience suggests a reasonably accurate picture was obtained. Some Aboriginal youth had suggestions for improvement (typically not major) which, in themselves, should be of value to the AYC and ALS.

All interviews were semi-structured and open-ended. This allowed coverage of the information essential to answering the evaluation questions and provided respondents the opportunity to expand on their answers and observations. All youth respondents were requested to read and sign a consent form prior to being interviewed. Each respondent was assured that s/he was under no obligation to participate and that information derived from the interview would be held in confidence by the researchers.

In total, interviews with youth in the courthouses noted above broke down as follows:

- 311 Jarvis
  - 14 Aboriginal youth who received Aboriginal diversion (12 male, 2 female)

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<sup>15</sup> The Associated Youth Services of Peel Region arranges and monitors extra judicial sanctions for youth.

- 2201 Finch and Scarborough
  - 10 Aboriginal youth who received Aboriginal diversion (9 male, 1 female)
- Brampton
  - 10 non-Aboriginal youth (one processed at 2201 Finch) who received diversion (8 male, 2 female).

Court files were identified for all Aboriginal youth appearing in the AYC during the evaluation period. ALS files for the Aboriginal youth who had appeared at the AYC, 2201 Finch or Scarborough and had been diverted to the Community Council were examined for the evaluation period. (See limitations regarding files, below.)

### ***Limitations to the Research***

It was challenging to find youth – both Aboriginal and non-Aboriginal – who were willing to be interviewed. Aboriginal youth who had completed their diversion to the Community Council and who had completed subsequent programs were difficult to locate. In three cases, however, youth who had completed their ALS programs returned to the ALS office to visit and we interviewed them then. Other Aboriginal youth who were interviewed were in the process of attending ALS programs after diversion. Similarly, it was difficult to contact non-Aboriginal youth who had completed their extrajudicial sanction programs. As a result, the non-Aboriginal youth interviewed were still engaged in their programs.

A second limitation concerned the availability and completeness of files. This was a problem particularly at the 311 Jarvis courthouse. Court files are not stored electronically and are occasionally missing; nor are they always consistent (or even legible). The researchers did their best to extract information.

## **The Bigger Picture: Youth Crime in Ontario, Toronto and Specific Toronto Courts**

Table 2 indicates the number and percentages of youth criminal cases received by offence group in Ontario and Toronto<sup>16</sup> for the two-year period April 2013 to March 2015. The most prevalent category involved crimes against the person at 31.7 percent of all youth cases in

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<sup>16</sup> Ontario Court of Justice statistics included in Table 2 for Toronto do not include Brampton. Table 3 does include Brampton as part of the Greater Toronto Area (GTA) and as one of the four youth court sites included in the evaluation. Slight discrepancies in the total number of cases received in both tables derive from variations in Ontario Court of Justice statistics accessed online. (The OCJ statistics are based on data provided by the Canadian Centre for Justice Statistics.)

Ontario and 43.1 percent of all youth cases in Toronto. This category was followed by property crimes and administration of justice offences, respectively. The number of cases was lower in the 2014-15 period compared to 2013-14. Across the province, total youth cases received in 2013-14 (April to March) and 2014-15 (April to March) decreased from 20,524 to 18,782 or 8.5 percent. Total youth cases in Toronto for the same period decreased from 3,605 to 3,175 or 12 percent.

Offence Group	Cases Received		% of all cases received	
	Ontario	Toronto	Ontario	Toronto
Crimes Against the Person	12,463	2,917	31.7	43.1
Property	10,252	1,597	26.1	23.5
Administration of Justice	7,960	1,183	20.2	17.3
Other Criminal Code	1,635	320	4.2	4.7
Criminal Code Traffic	290	16	0.7	0.2
Federal Statute	6,706	747	17.0	10.9
Total Cases	39,306	6,780	100%	100%

Case: refers to all charges on an information for each single accused.

Cases received: all cases received by a court location, adjusted for transfers to or from another court location.

Source: Ontario Court of Justice, *Offence Based Statistics*

<http://www.ontariocourts.ca/ocj/files/stats/crim/2014/2014-Q1-Offence-Based-Youth.pdf>

<http://www.ontariocourts.ca/ocj/files/stats/crim/2015/2015-Q1-Offence-Based-Youth.pdf>

Table 3 indicates number and percentages of youth criminal cases received by offence group for the period April 2013 to March 2015 for four Greater Toronto Area (GTA) courthouses receiving the bulk of youth criminal cases: 311 Jarvis, Street, 1911 Eglinton Avenue East (Scarborough), 2201 Finch Avenue West, and Brampton. The most prevalent category in all four courts involved crimes against the person, followed by property crimes and administration of justice offences, respectively. Numbers of cases were generally lower in the 2014-15 period compared to 2013-14. Across the four courts, total youth cases received in 2013-14 (April to March) and 2014-15 (April to March) decreased from 5,520 to 4,985 or 9.6 percent. One exception was Scarborough Court where property crime cases increased slightly in the same period.

<b>Table 3</b>				
<b>Youth Criminal Cases, Four GTA Youth Courts by Offence Group</b>				
<b>April 2013 to March 2015</b>				
<b>Offence Group</b>	<b>Cases Received: number (and percentage of 4 courts)</b>			
	<b>311 Jarvis</b>	<b>Scarborough</b>	<b>2201 Finch</b>	<b>Brampton</b>
Crimes Against the Person	987 (23%)	925 (22%)	977 (23%)	1,364 (32%)
Property	526 (20%)	401 (15%)	667 (25%)	1,039 (39%)
Administration of Justice	444 (25%)	359 (20%)	367 (21%)	615 (34%)
Other Criminal Code	136 (24%)	88 (15%)	93 (16%)	255 (45%)
Criminal Code Traffic	6 (13%)	4 (9%)	6 (13%)	31 (66%)
Federal Statute	549 (45%)	64 (5%)	126 (10%)	476 (39%)
<b>Total Cases</b>	<b>2,648 (26%)</b>	<b>1,841 (18%)</b>	<b>2,110 (20%)</b>	<b>3,780 (36%)</b>

Case: refers to all charges on an information for each single accused.

Cases received: all cases received by a court location, adjusted for transfers to or from another court location.

Source: Ontario Court of Justice, *Offence Based Statistics*

<http://www.ontariocourts.ca/ocj/files/stats/crim/2014/2014-Q1-Offence-Based-Youth.pdf>

<http://www.ontariocourts.ca/ocj/files/stats/crim/2015/2015-Q1-Offence-Based-Youth.pdf>

At 311 Jarvis, total youth cases received in 2013-14 (April to March) and 2014-15 (April to March) decreased from 1,426 to 1,222 or 14.3 percent. The decrease at 311 Jarvis was greater than the decreases across the province (at 8.5 percent), Toronto (at 12 percent) and the four GTA courts identified above, including 311 Jarvis (at 9.6 percent). This may be significant in terms of the number of Aboriginal youth diversions from the AYC, discussed later in the report.

### ***Caseload in the Aboriginal Youth Court***

It is difficult to say what proportion of youth appearing in the four courts were Aboriginal. There are several reasons for this, as discussed later in the report. In short, however, we can say not all Aboriginal youth in Toronto courts identify or are identified as Aboriginal. At 311 Jarvis the situation is different because of the existence of the AYC, although it is still possible Aboriginal youth cases are being heard in regular court at 311 Jarvis. In the period April 2013 to March 2015 (the period specified in Tables 2 and 3 based on Ontario Court of Justice statistics) a total of 2,648 youth cases<sup>17</sup> (Aboriginal and non-Aboriginal) were received at 311 Jarvis.<sup>18</sup> We are aware of 98 Aboriginal youth cases received at 311 Jarvis in the same period.

<sup>17</sup> Case refers to all charges on an information for each single accused.

<sup>18</sup> Ontario Court of Justice statistics are available for the period April, 2013 to March, 2015. The evaluation period ran from June, 2012 to June, 2015.

Between June, 2012 and June, 2015 (the period of the evaluation), 146 Aboriginal youth cases (390 individual charges) were received and known to be Aboriginal youth at 311 Jarvis. Ninety-three Aboriginal youth appeared in the AYC during that time: 71 males and 22 females. Most youth appearing before the AYC had more than one charge. The average number of charges per youth during the three-year evaluation period was 4.2. In some cases, new charges were incurred while an original charge or set of charges was being processed. Of the 93 Aboriginal youth whose cases were addressed during the evaluation period, 27 youth had a single charge while the remaining 66 youth had multiple charges. At the extreme, two youth had 38 charges each and one youth had 26 charges.

## **Aboriginal Youth Court: Process and Outcomes**

### ***Aboriginal Identity and Related Information***

Aboriginal identity is a basic requirement for a case to be heard in the AYC. Youth are provided the opportunity to identify as Aboriginal in various ways. Duty counsel or the youth's own lawyer normally poses the question at the first meeting prior to appearing at the AYC. Justices of the peace at 311 Jarvis are also aware of the need to recognize Aboriginal identity. If the youth identifies as Aboriginal, counsel normally refers the youth to the Aboriginal courtworker.<sup>19</sup> Service providers familiar with a youth will also alert a court official or the Aboriginal courtworker to the fact a particular youth is Aboriginal. The courtworker explains to the youth the option to appear in the AYC and the potential benefits for an Aboriginal person. In most cases youth choose the AYC option and are then directed to the AYC to be heard.<sup>20</sup> It is important for counsel to be aware of both the existence of the AYC and the responsibility of counsel to identify Aboriginal youth at the beginning of the process.

The Aboriginal courtworker plays an important role in the identification of youth as Aboriginal. As well as referrals from counsel, as noted above, the courtworker poses the question of Aboriginal identity as soon as possible. This can happen when the courtworker is doing intake with a youth in custody (a rare occurrence). More commonly, the courtworker meets with individual youth prior to their first appearance. These meetings are often scheduled and may take place in the courtworker's office. They also occur frequently in the hallway outside the dedicated courtroom either prior to the court being called into session or when the court is already in session.

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<sup>19</sup> Two Aboriginal courtworkers cover three youth courts: one at 311 Jarvis and another at 2201 Finch and Scarborough. Both are employees of Aboriginal Legal Services.

<sup>20</sup> The absence of dedicated Aboriginal youth courts at 2201 Finch and Scarborough means that cases are heard in regular youth court at those locations, although an Aboriginal courtworker is involved.



In some cases, the Aboriginal identity of a youth is raised by parents or guardians who notify ALS or the courtworker directly that an Aboriginal youth will be appearing at the courthouse. This can be especially important if a youth has not been identified as Aboriginal and whose hearing has been scheduled for regular youth court. Similarly, it is important for the courtworker and duty counsel to be aware of Aboriginal youth appearing for a bail hearing. The courtworker also checks the docket for regular court each morning in case it includes any youth who might be Aboriginal.

If a youth identifies as Aboriginal, the courtworker seeks further information regarding the following factors: the personal background of the youth; his/her current living arrangements; whether s/he is status Indian, non-status, Métis or Inuit; the Band, reserve or community with which s/he is affiliated; who in the youth's family is Aboriginal; school attendance; and other relevant information.<sup>21</sup> The intake questions are important because they provide the courtworker with an understanding of the circumstances and needs of the youth, thus enabling the courtworker to advise the court, and to make appropriate referrals to agencies and programs.

A youth might choose not to appear in the AYC. This occurs very infrequently but has happened when a youth is co-accused with a non-Aboriginal youth and chooses to appear in regular court with the other accused. This choice is typically made on the recommendation of counsel. In other cases, a youth may not be aware that s/he is, in fact, Aboriginal. Again, this occurs infrequently but happens typically when only one parent is Aboriginal or partly Aboriginal and the youth has had no exposure to his/her community or culture. In very rare instances, a youth might choose not to identify as Aboriginal simply on the basis of a personal identity choice.

It is also possible that counsel who are unfamiliar with the AYC or the provisions of the *YCJA* regarding Aboriginal youth might not make appropriate inquiries of a youth. This appears to have happened infrequently as almost all private bar counsel appearing at AYC do so regularly and are familiar with the importance of the identity question.<sup>22</sup> That said, providing the opportunity for youth to identify as Aboriginal is largely dependent on court professionals. It is therefore essential that court professionals – justices of the peace, duty counsel and private bar counsel – are knowledgeable regarding the relevant sections of the *YCJA* and build the identity question into their initial interactions with youth.

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<sup>21</sup> Many youth appearing in the AYC do not have a band or reserve affiliation either because they are non-status, Métis or Inuit, or because they have lived all their lives in a city, in this case usually the GTA.

<sup>22</sup> Private bar counsel representing youth in the AYC were without exception acting with a legal aid certificate.

On the basis of interviews and court observation, it is fair to say officials associated with the AYC, including judges, justices of the peace, Crowns and counsel who appear regularly, are knowledgeable about Gladue principles, the Aboriginal provisions in the *YCJA*, and the historical and current realities facing Aboriginal youth. While there is not an official training opportunity for lawyers, it is clear there is commitment to understanding the circumstances and meeting the needs of Aboriginal youth. In that light, and with the involvement of the Aboriginal courtworker, Aboriginal youth are consistently provided the opportunity to identify as Aboriginal early in the court process at 311 Jarvis. The opportunity to identify is not as clear at other courts. The courtworker at 2201 Finch and Scarborough is helpful in this regard but, because she covers two courthouses, is not always present when an Aboriginal youth is present for his/her first hearing. Duty counsel and justices of the peace appear to be less aware of the need to raise the identity question at 2201 Finch and Scarborough than at 311 Jarvis. This omission is even more pronounced in other courts, such as Brampton, according to the experiences of Aboriginal youth who had appeared in those courts on previous occasions.

The importance and the potential infrequency of Aboriginal recognition are demonstrated in the quote below from a youth who had appeared at Scarborough court.

*Question: Do you think it's important that the people at court knew you were Aboriginal?*

*Answer: Just because I look Native, that is why they asked. But there are so many kids who get in trouble that don't know about Native. They don't look Native. They honestly have to...I know a couple kids that went and they didn't know nothing about Native. They didn't look Native either. No one asked them and they didn't tell anyone. I told them, "you gotta tell someone, maybe you might get something." I know there was a couple times where they didn't look Native, and they never got asked. I don't know if it's mandatory, but I know that I always got asked. That should be a mandatory question. They should ask everyone. Even if you are a quarter Native or a half, I'm pretty sure you still get accepted into Native diversion. – 17 year-old boy*

From the youth perspective, there is a concern about a lack of awareness of the AYC. This is not a problem at 311 Jarvis where the Aboriginal courtworker and other court officials try to ensure that youth are provided the opportunity to identify as Aboriginal. At 2201 Finch and Scarborough courts the courtworker is also cognizant of the presence of Aboriginal youth as far as she is able; however, if youth are not also aware of the option to self-identify, they can fall

through the cracks. Beyond those three courts, little, if anything, is done to make youth and others aware of the opportunity or to encourage self-identification.

Aboriginal youth typically are not aware of the provisions of the *YCJA* and the existence of the AYC. It is important, therefore, that they know they may benefit from identifying as Aboriginal. This is especially significant in instances when duty counsel or private bar counsel is not proactive on the question or when the courtworker is not in contact with the youth. A frequent comment by Aboriginal youth whose cases had been heard in the AYC was that the experience was positive but that the existence of the AYC and the need to identify as Aboriginal should be better advertised for the benefit of youth who might find themselves before a court, particularly courts other than 311 Jarvis where the opportunity to identify may not be obvious.

*A lot of people don't know about the court, unless they are already involved with it...so maybe pamphlets or stickers or a little thing on facebook or twitter about awareness about the court...there are so many Native people in jail. We are the highest rate of people in jail which is nonsense. The court is a really good idea, it's really helpful, and it gets a lot of people out of what they are dealing with...but if we could implement the court in other regions it would help a lot of people, and the statistics would plummet. So it's a really good thing but awareness is the main thing. I didn't even know about Aboriginal court.*  
– 17 year-old girl

A related question concerns whether youth should be asked about their personal background as an Aboriginal person in court. Knowledge of this type would be consistent with the *YCJA*, as well as Section 718.2(e) of the *Criminal Code*, insofar as judges require knowledge of an individual's background in order to give proper consideration to disposition in the case of an Aboriginal person. While this matter has been debated among professionals at 311 Jarvis, thus far it has been the practice in the AYC not to raise these types of questions in court, primarily in recognition of the fact it could be awkward for the young person. The matter is dealt with in two ways. First, one of the two judges presiding in the AYC reads a prepared statement at the beginning of court, in which she provides an acknowledgement of the unique circumstances of Aboriginal people and the need to respect and address those circumstances through the court process. Second, the courtworker is aware of the circumstances of most Aboriginal youth at AYC and is able to relate relevant background information to the Crown, as appropriate. (Gladue Reports, which are provided to judges on request in the adult Gladue Court, have not yet been part of the process at the AYC.)

*It's important to have an Aboriginal youth court because I think a lot of the time Natives get treated unfairly, especially with cops and stuff. Well I've seen it anyways. I haven't really experienced it, but I've seen it happen and I've heard about it. If you are in Native court, it's important that they know you're Native. Actually I'm pretty sure the lady judge says a little paragraph too about history and stuff at the beginning. I think that's good.*  
 – 16 year-old girl

The question of Aboriginal identity and background is being handled with sensitivity and in ways that provide an opportunity for youth to make a statement. We found that youth who attended the AYC saw value in claiming their Aboriginal identity and would tell their friends to do the same. Benefits in terms of process and restorative opportunities associated with the AYC and ALS made it worth identifying as Aboriginal even if that had not originally been intended.

*I would tell my friends to go through the Aboriginal court than a regular service because there they really help you. – 15 year-old girl*

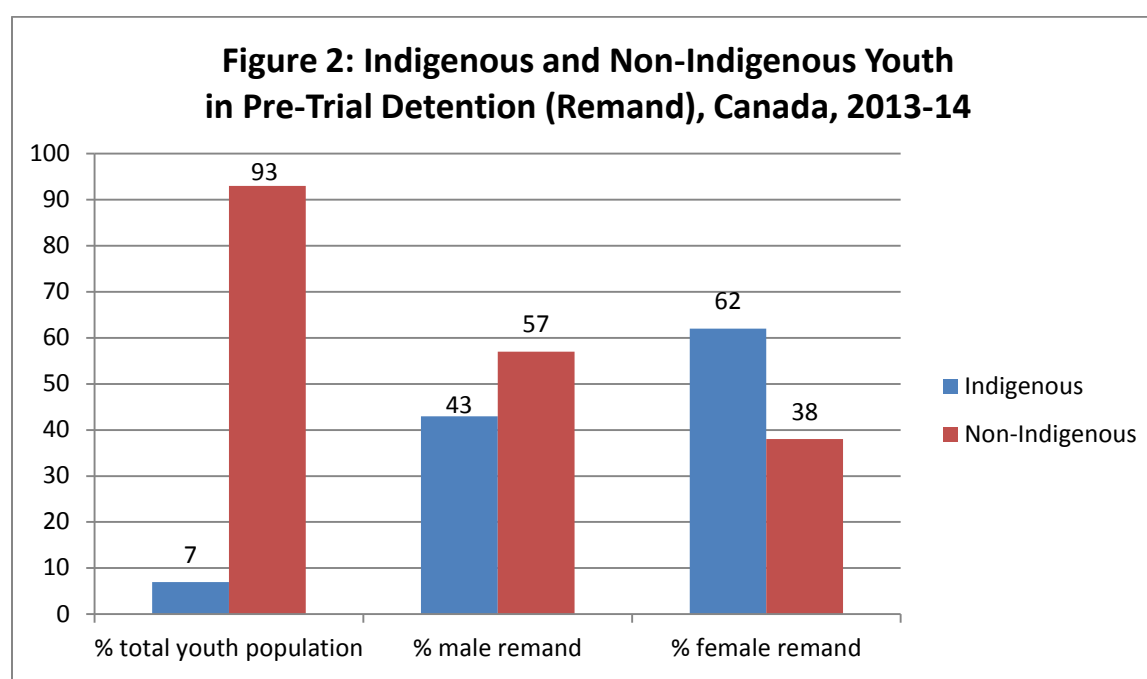
## **Bail**

When the adult Gladue Court was established at Old City Hall in 2001, it was reasoned that Gladue principles should apply to the granting of bail just as it should in sentencing. Remanding Aboriginal individuals without attempting to find reasonable alternatives would contradict the intent of Section 718.2(e) and the Gladue principles handed down by the Supreme Court (Knazan, 2009). The same principles were followed at 311 Jarvis when the AYC was established.

Bail hearings are not held in the AYC but in regular court as the AYC only sits twice per month. However, the vast majority of youth who apply for bail in the AYC have their request granted, normally in a hearing with a justice of the peace presiding. Justices of the peace at 311 Jarvis receive training on Gladue principles and participate in the AYC committee where Gladue principles are discussed regularly.

Of the 93 youth appearing during the evaluation period, five were held in custody prior to their court appearance. We did not collect data on the number of youth who appeared in other

courts and who were in pre-trial detention (remand) during the evaluation period. However, we hypothesize the proportion of AYC youth in pre-trial detention was lower. This is far from typical across Canada. As Figure 2 shows, pre-trial detention is extremely common for Aboriginal youth, particularly Aboriginal female youth, in comparison to non-Aboriginal youth. While Aboriginal youth – male and female – represent approximately seven percent of the total youth population in Canada, they comprise 48 percent of all pre-trial detentions. Among males, Aboriginal youth represent 43 percent of all male youth in remand, while among females, 62 percent of the remand population is Aboriginal. These figures are astounding, especially when one considers again that the Aboriginal youth comprise only seven percent of the total Canadian youth population.



Source: Source: Statistics Canada. *Table 251-0012 - Youth custody and community services (YCCS), admissions to correctional services, by sex and aboriginal identity, annual (persons unless otherwise noted), CANSIM (database)*; Statistics Canada. *Table 051-0001 - Estimates of population, by age group and sex for July 1, Canada, provinces and territories, annual (persons unless otherwise noted), CANSIM (database)*.

Questions concerning bail and pre-trial detention for Aboriginal youth in Canada are clearly serious; however, little research has been done on the reasons for the extremely high rates of bail denial and remand, or on the impacts of these realities. The little work that has been done has shown that denial of bail has negative impacts on the individual and his/her family in terms of psychological stress and loss of opportunity. Further, Justice Brent Knazan at the Old City Hall Gladue Court has indicated adult individuals who are denied bail are more likely to receive jail time at sentencing (Knazan, 2009). The reasons for the inequities are as yet mostly

speculative (and not mutually exclusive). One theory is that police tend to use detention at a relatively high rate for Aboriginal youth (Bell, 2015). Another is that a certain ambiguity continues to exist in the *YCJA* with respect to the use of pre-trial detention in cases involving administration of justice charges, particularly failure to comply with conditions and failure to appear. In light of this ambiguity, judges might be using pre-trial detention in these cases, again especially for Aboriginal youth (Spratt, 2012; Spratt and Myers, 2011). A third theory is that in many parts of the country alternative programming is either not culturally relevant or entirely non-existent, leaving judges with little choice but to remand a youth and, in many cases, impose a custodial sentence when probation or another sentencing option would be more appropriate (Clark and Landau, 2012).

While reasons for high rates of bail denial and remand for Aboriginal youth have not been thoroughly researched, it is reasonable to say that the AYC avoids the problems. We did not examine the role of police in terms of Aboriginal youth detention. But it is clear that justices of the peace and judges associated with the AYC are conscious of the importance of bail and the avoidance of remand in all types of cases, including those involving administration of justice offences. As well, Toronto is more fortunate than many parts of Canada in that culturally relevant programs are readily available for Aboriginal youth and adults. This is thanks to agencies such as Aboriginal Legal Services, Native Child and Family Services, and Council Fire, among others.

Bail for Aboriginal youth at 311 Jarvis typically includes standard provisions such as the orders to reside at a certain address (usually with the surety), to avoid contact with a particular individual or individuals, to avoid certain locations, to avoid illegal drugs, to avoid weapons, to attend school regularly, and to attend a counselling program. Bail conditions are often amended at the request of counsel, often supported by the youth's parent or guardian who is typically the youth's surety. During the evaluation period, requests to alter bail conditions were made 31 times, all of which were accepted by the Crown and the presiding judge. The two most common reasons for amendments were a change in residence location (e.g., moving to the residence of another family member), the need to be present in a previously restricted area for purposes of attendance at school or work, or attendance at school where the victim also attends. Court observation also suggests that the court is sensitive to the efforts of youth who are working not only to meet their bail obligations but also to improve their lives in other ways. For example, if a young person has improved his/her school attendance and grades through hard work, the court appears willing to acknowledge that fact and further encourage the youth by altering bail conditions so they are less restrictive.

The *YCJA* was amended in 2012 to provide for a new stand-alone test for pre-trial detention of youth. Generally speaking, there must be a serious concern about the potential for a youth to commit a serious offence if released (based on the seriousness of the current set of charges and the youth's previous record) or a strong likelihood that a youth will not appear in court when required. Flexibility with regard to the granting of bail is seen by justice professionals as key in adhering to the principles and intent of the *YCJA*. For Aboriginal youth, flexibility is especially important as bail conditions should be suited to the circumstances and needs of the individual youth and be culturally appropriate. Bail hearings at 311 Jarvis for Aboriginal youth take these requirements seriously and Aboriginal youth are often requested to engage in a culturally relevant program while on bail.<sup>23</sup> Ultimately, assuming success in the program, this enhances the youth's likelihood of diversion. Interviews with Aboriginal youth confirm the bail process at the AYC is fair and reasonable. Interviews with lawyers, including Crowns and defence counsel, confirm that culturally relevant bail conditions do, in fact, make diversion an easier decision for the court.

This is not necessarily the case at other courts. An interview question concerning the fairness of bail conditions was asked of youth whose hearings were at the AYC and Aboriginal and non-Aboriginal youth whose hearings were at other courts. The AYC youth responded positively in 13 of 14 interviews conducted, while the Aboriginal youth from other courts responded that their bail was fair in 7 of 10 interviews. The Aboriginal youth at 2201 Finch and Scarborough gave credit to the work of the Aboriginal courtworker but generally felt the court itself was not acting in their best interests with respect to bail. Significantly, the non-Aboriginal youth interviewed from Brampton court (one from Finch) provided the most negative responses, with 5 of 10 youth saying their bail conditions were unfair.

The importance of setting appropriate bail conditions for Aboriginal youth is demonstrated in the following comments by a young person who had appeared at 2201 Finch:

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<sup>23</sup> Peacebuilders International operates a program at 311 Jarvis and some Aboriginal youth attend the program while on bail. A concern with Peacebuilders, however, is that while it is a good program it is not based on Aboriginal culture.

*Question: Do you think the Finch court is Aboriginal youth friendly?*

*Answer: It all depends. The first time I got bail, my Dad came and he told them that I was an alcoholic. They should have known with me being Native and with my background, they shouldn't put me not being allowed to drink on my bail. That's asking for breaches. I'm almost breaching every single day, and they know that. They know certain things and they turn a blind eye to it. They don't do too much about it. They should know. My dad told them I drink every day. Putting on my bail not to drink and to go back to jail for one sip of alcohol, that's asking me to go back. They do try, but they don't put too much research into it. They should know with a Native kid...if they are drinking that much at this age, maybe there is something wrong. Maybe we should send her to counselling, and that should be part of their bail. When I went back I was hung over, and they were like, "don't tell anyone." That's not helping me. Telling me to hide it from the judge, but you are with the court. It's sending me mixed messages, like am I allowed to drink, or not? You're telling me hide it and they are telling me that if I drink, I'm going to jail. –16 year-old girl*

This example raises questions regarding failure to comply with bail conditions. While it is generally believed that bail conditions for Aboriginal youth at 311 Jarvis are fair and reasonable, there appears to be a contradiction in terms of the relatively high rate of administration of justice offences – especially failure to comply and failure to appear – among Aboriginal youth. This question is addressed in the following section of the report.

### ***Administration of Justice Offences***

Failure to comply with conditions and failure to appear in court are serious issues for all youth, including Aboriginal youth. As Table 4 shows, during the period April, 2013 to March, 2015, administration of justice offences as a percentage of cases received at 311 Jarvis was higher among Aboriginal youth appearing in the AYC compared with youth appearing in other courts: 20.2 percent of cases received compared to 16.7 percent of cases received. For Aboriginal youth, administration of justice offences ranked second in terms of volume, preceded by crimes against the person and followed by property offences. Among youth processed in other courtrooms, crimes against the person was also the most prevalent offence category, followed by federal statute offences and property offences. These comparisons indicate the relative significance of administrative offences among Aboriginal youth, most typically involving failure to comply with conditions and failure to appear in court.



<b>Offence Group</b>	<b>Cases received 311 Jarvis</b>	<b>Offence Rank 311 Jarvis</b>	<b>Cases received AYC</b>	<b>Offence Rank AYC</b>
Crimes Against the Person	37.2 %	1	36.5 %	1
Property	19.8 %	3	19.4 %	3
Administration of Justice	16.7 %	4	20.2 %	2
Other Criminal Code	5.1 %	5	4.9 %	5
Criminal Code Traffic	0.2 %	6	0 %	--
Federal Statute	20.7 %	2	19.0 %	4
Total Cases	100 % (n = 2,648)		100 % (n = 98)	

Case: refers to all charges on an information for each single accused.

Cases received: all cases received by a court location, adjusted for transfers to or from another court location.

Sources: 311 Jarvis Youth Court files; Ontario Court of Justice, *Offence Based Statistics*

<http://www.ontariocourts.ca/ocj/files/stats/crim/2014/2014-Q1-Offence-Based-Youth.pdf>

<http://www.ontariocourts.ca/ocj/files/stats/crim/2015/2015-Q1-Offence-Based-Youth.pdf>

While the rates of administrative offences among Aboriginal youth are somewhat higher than among non-Aboriginal youth, judges in the AYC are not applying sanctions in the form of either remand or bail denial or revocation, as might be the case in other jurisdictions.

We observed that judges in the AYC are flexible with regard to youth missing a court date. Bench warrants with discretion are preferred to a regular warrant. It is accepted that youth often face challenges in terms of attending appointments, whether the appointments be at court or an agency such as CAMH. The reasons for non-attendance are many; for example, other commitments such as school, inability to travel to 311 Jarvis, illness, sleep deprivation (sometimes associated with mental health), or simple forgetfulness. That said, the ALS youth workers make sincere efforts to remain in communication with the AYC youth and provide reminders to show up for court. Defence counsel and youth workers appear to be effective in explaining to the court why an individual youth might have missed a court date. Again, judges tend to be understanding and willing to give youth further opportunities to attend.

We found that the Aboriginal Youth Court adheres to the principles set out in the *Youth Criminal Justice Act* with respect to Aboriginal youth by granting bail whenever possible and reasonable, including when cases involve administrative charges. We also found that bail

<sup>24</sup> Again, the period April, 2013 to March, 2015 is shorter than the evaluation timeframe of June, 2012 to June, 2015; however it corresponds to data available on the Ontario Court of Justice website. The comparison period is valid.

conditions are generally appropriate to the circumstances and needs of individual youth and that bail conditions are most often linked to culturally relevant programs. Bail conditions are frequently amended to reflect practical realities or good efforts by a youth. Pre-trial detention is rarely ordered for an AYC youth.

A question raised in the previous section of the report is this: if bail conditions are considered fair and reasonable for Aboriginal youth at 311 Jarvis, why are rates of administration of justice offences higher than among non-Aboriginal youth? This is a complex question that warrants more in-depth research than was undertaken for the evaluation. That said, there are two (perhaps more) possible explanations. First, the ranking of categories of offences might differ between Aboriginal and non-Aboriginal youth simply because non-Aboriginal youth commit crimes against the person at a higher rate than Aboriginal youth. If this is the case, it would contribute to a comparatively higher ranking of that category of offence among non-Aboriginal youth and lower a lower ranking of the same category among Aboriginal youth. Second, it is important to bear in mind that Aboriginal youth are generally more marginalized than non-Aboriginal youth. This view, which is almost universally held by researchers, academics and advocates, is based on the recognition of a continuing legacy of colonialism, socio-economic deprivation and systemic discrimination that negatively affects Aboriginal youth in cities as well as in remote and isolated communities. In turn, these realities are consistent with greater risk of becoming involved with the justice system and, at the same time, a feeling of alienation from the system. The immediate result of this combination of factors is often non-compliance with the dictates of the justice system, regardless of whether bail conditions and court hearings are seen on the surface to be fair and reasonable. This is an important set of questions that should be addressed in an in-depth way by first asking Aboriginal youth themselves.

### ***Case Processing***

Case processing times are slightly longer in the AYC than the provincial average. The average number of days to disposition<sup>25</sup> in Ontario youth courts is 129 with an average of 6.1 appearances. In the AYC during the evaluation period, the average number of days to disposition was 138 and the average number of appearances was 6.2. It was anticipated prior to the research that the difference would be significantly greater due to the time required for pre-diversion programming. However, the relatively small difference can be explained by the fact that AYC cases generally do not proceed to trial.

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<sup>25</sup> Average number of days from when the first court appearance was scheduled to the date of the final court appearance in cases without bench warrants.

As noted earlier, neither court officials, including counsel, nor the youth see the slight difference as a problem. Interview responses indicate all parties understand the importance of “getting it right.” The courtworker and the caseworkers take the time required to understand the circumstances and needs of each youth and to monitor them through the pre-diversion process of improving their situation. Depending on the individual youth and the nature of his/her offence, the process may take longer for some youth than others before the court is prepared to divert.

While the AYC sits only every two weeks, its caseload is low relative to regular court and dockets are well managed on court days. This may explain the fact that the number of days to disposition is reasonably close between the two courts.

The second quote below raises the question of appearance by counsel. Counsel often tells the court s/he is unable to attend the AYC on a particular date as s/he is already committed to

*The best thing I would say [about the AYC] is that they are very helpful and right down to it. They just want to get your case out of there as fast as possible because no one belongs in jail. – 16 year-old girl*

*It was actually alright because it wasn't dragged out too much. They got straight to the point...what they wanted to do and stuff. The only thing is that it got put over a lot because we had problems with our lawyer. But that wasn't really the court's fault, it was more the lawyer's. – 16 year-old boy*

another matter at the suggested time, often in a different courthouse. The travel time between courthouses (e.g., Scarborough and 311 Jarvis) is also seen as a challenge, particularly if counsel is only appearing briefly for one client at the AYC. The result can be a further extension of the adjournment in order to accommodate the lawyer. This is not satisfactory for the court or for the youth whose case is being put over.

This is a difficult issue. Counsel is obliged to make every reasonable attempt to appear at the set hearing time in the interests of the court and, especially, his/her client. Knowing an appearance might be brief or that the commute to 311 Jarvis might be long are not valid reasons to avoid the date. As the AYC convenes only every second week, the absence of counsel could jeopardize the timely resolution of matters. Designations occur frequently but

are not ideal from the court's perspective or, more importantly, from the perspective of the youth who would expect to be represented by his/her own lawyer.

An obvious answer to the problem would be to increase the frequency with which the AYC convenes. If the court sat every week instead of every two weeks, counsel would be more likely to appear at the appointed time and cases would be delayed less often. This would lead to smaller dockets but would shorten adjournments and would give counsel and youth more chances to attend. The number of cases being heard in the AYC would have to increase by traversing cases from other courts in order to warrant greater frequency of court sittings. There may also be problems with this solution with respect to the availability of judges and court staff, as well as the availability of the AYC courtroom. However, it is worth considering.

The question of traversing cases from other courts is relevant. Cases are traversed infrequently and only after a guilty plea has been entered. This is less an issue with respect to 2201 Finch and Scarborough as a courtworker covers those courts. However, there is some merit to the idea as the AYC is set up to deal specifically with Aboriginal youth, unlike most other courts in the GTA. While travel to the AYC might be a challenge for some youth, simple methods such as providing TTC tokens could help. Traversing more Aboriginal youth cases to 311 Jarvis would benefit the youth by placing them in a more culturally appropriate court setting, by having their cases processed by officials understanding of and committed to their particular issues, by increasing the likelihood counsel would attend court on a given day, and by increasing the docket size, thereby warranting a weekly schedule for the AYC.

### ***Courtroom Configuration***

While the AYC convenes in a regular courtroom at 311 Jarvis, it is significantly less formal than other courtrooms in the building. The judge presides (wearing robes or not) at a "circle" comprising four tables arranged in a square. The Crown attorney is always present at the table, as are the Aboriginal courtworker and either counsel or duty counsel. The judge encourages anyone involved with the youth in a supportive capacity to sit at the table. These individuals could include parents, guardians, siblings, case workers, CAS workers, probation officers, shelter supervisors, program facilitators, or close friends. The presiding judge offers everyone at the table the opportunity to speak about the case at hand. As well, the judge may question individuals participating in the circle and may invite others in the gallery, such as ALS youth workers, to provide information and views.

*Since this court is for all Native people, it's for a specific group. It's kind of a personal and more comfortable communication and relationship between everyone. It was pretty good. – 15 year-old boy*

*The Aboriginal part of it was pretty awesome, but the actual courthouse sucked. I liked the Aboriginal part, it was more open, and I liked that we were able to say more about what we were feeling rather than what was expected of us. I was able to voice my own opinions. – 17 year-old boy*

*It (the AYC) was great actually. I liked it. It's easy going, the judge is really nice. The workers there are easy to talk to and stuff. I liked sitting in a circle. Isn't the point of it to make you feel more comfortable? I liked that. – 16 year-old girl*

The Aboriginal Youth Court is unique in that it provides a 'circle of care' within the courtroom itself. From the perspective of Aboriginal youth and their family members, the relative informality and inclusiveness of the AYC are among its most positive attributes. It is fair to say, for all the reasons regarding systemic discrimination noted by various commissions and the Supreme Court, Aboriginal people do not normally feel comfortable with the mainstream justice system. However, the responses provided in this evaluation clearly indicate individuals' original skepticism and, indeed, their fears of the system were allayed by the nature of the AYC and the professionals associated with it. The nature of the court provides youth with a sense of self-worth which, in turn, contributes to their rehabilitation. If the AYC decides to implement sentencing circles, the court configuration and the tone are already set.

### ***Diversion***

During the evaluation period it appears that only one youth whose case was heard at the AYC was sentenced to custody, combined with probation. Table 5 indicates that of a total of 390 charges, 229 charges were withdrawn, 91 charges were stayed, 26 charges resulted in a guilty plea and finding with probation, 24 charges were withdrawn with a peace bond, 19 charges resulted in a guilty plea and finding with a conditional discharge, and one charge resulted in a guilty plea and finding with custody and probation.

During the evaluation period, dispositions for 390 charges broke down as follows:

Withdrawn	Stayed	Plead Guilty/Found Guilty – probation	Withdrawn – peace bond	Plead Guilty/Found Guilty – conditional discharge	Plead Guilty/Found Guilty – custody & probation
229	91	26	24	19	1

Source: 311 Jarvis Court files and ALST files.

Of the 93 youth appearing in the AYC during the evaluation period, 45 were diverted. Diversion is decided by the Crown attorney, most often the provincial Crown in the AYC.<sup>26</sup> The courtworker and youth workers provide important input to the decision. Young persons are given the opportunity to prove themselves while on bail in the hope of improving their chances for diversion. It is “serving their sentence up front in a way.” That process takes additional time, which is one of the factors contributing to longer than average case processing times in the AYC (see below). However, the extra time is considered justified by court officials, by support agency staff (e.g., Aboriginal Legal Services), and generally by the youth themselves.

Aboriginal Legal Services records indicate the number of diversions from 311 Jarvis to ALS has not steadily increased as might have been anticipated with the advent of the new court in 2012. Table 6 shows diversions to ALS from all Toronto courts from March, 2010 to December, 2015. The average number of diversions per year from 311 Jarvis for the period 2010 to 2012 was over 24.<sup>27</sup> The average declined for the years 2013 and 2014 to 12 diversions per year.

<sup>26</sup> The federal Crown appears only when drug related charges are involved. During the two-year evaluation period, federal Crowns attended court in approximately 33 cases received (23 percent of cases received).

<sup>27</sup> ALS records on youth diversions are not readily available prior to March, 2010.

<b>Time Period</b>	<b>Total Diversions</b>	<b>311 Jarvis</b>	<b>Scarborough</b>	<b>Other Courts</b>
March – December 2010	37	26	2	9
January – December 2011	36	20	11	5
January – December 2012	45	26	12	7
January – December 2013	49	15	11	23
January – December 2014	23	9	6	8
January – December 2015	31	16	6	9

There are two possible reasons for the decrease in the number of diversions from 311 Jarvis to ALS. First, as noted earlier in the report, the total youth cases decreased across Ontario. The number of youth cases for all of Toronto decreased by 12 percent from 2013-14 to 2014-15. Similarly, the number of cases heard at the four central Toronto courts (311 Jarvis, Scarborough, 2201 Finch and Brampton) declined by 9.6 percent during the same period. Cases received at 311 Jarvis from 2013-14 to 2014-15 decreased by 14.3 percent. While this is a significant decline, it does not entirely explain the over 50 percent decrease in the number of diversions from the AYC to ALS.

The second reason is that there have been more charges withdrawn or stayed without a subsequent diversion since 2013 than in previous years. This can be explained in part by the approach of the Crown appearing in the AYC whereby youth who are doing well in their pre-diversion activities are not then diverted.<sup>28</sup> In turn, this speaks to the importance of the early involvement of the ALS courtworker and youth program workers in providing direction and support to youth with respect to appropriate pre-diversion activities. If this is the primary explanation for the decline in diversions and if re-offending rates are relatively low, as appears to be the case, then it is fair to conclude the AYC-ALS case management process is working well.

It is worth noting there appears to be some uncertainty regarding the types of offences that are potentially divertible. While one court official told the interviewer that ‘anything short of homicide is potentially divertible,’ others indicated that sexual assault and domestic violence charges are not eligible. As well, an ALS employee stated that drinking and driving offences

<sup>28</sup> The timing is consistent with the arrival in January, 2013 of the current Crown appearing in the AYC. It should also be noted that the one disposition involving custody and probation occurred prior to her arrival.

cannot be diverted. The same respondent noted that domestic charges could be diverted from youth court if the incident involved siblings or a child and a parent but not partners. In fact, one youth who was charged with assaulting a sibling in the family home was ultimately diverted and successfully completed his diversion programming.

The protocol between the Toronto Crown Attorney's office and Aboriginal Legal Services is more consistent with the first view – that “anything short of homicide is potentially divertible.”<sup>29</sup> The protocol appears in two versions, both of which contain similar, relevant clauses:

While the nature of the offence committed by the individual will be a factor in the determination of whether or not to divert the case by the Assistant Crown Attorney, no Class I or Class II offences are inherently ineligible for diversion.

No individual, by virtue solely of his or her prior youth record, is ineligible for diversion to the Council.

While the nature of the offence committed by the individual will be a factor in the determination of whether or not to divert the case by the Assistant Crown Attorney, no offences are inherently ineligible for diversion. As well, no individual, by virtue solely of his or her prior youth record, is ineligible for diversion to the Council.

There appears to be some confusion on this point among youth as well. For example, a 16 year-old boy said “If you have serious charges, diversion can't help you. Diversion can only help you on the petty charges. When it comes to the most serious charges that most Natives are involved in, diversion can't deal with you...they would be like 'oh, we don't deal with that'.

A more positive perspective on this question is that the current Crown attorney is exploring possibilities that even cases that would normally be viewed as “indivertible” in other courts could reasonably be considered for diversion from the AYC to the Community Council. The Community Council might be open to this approach. However, it is a question requiring discussion and clarification by ALS, including Community Council members, and the Aboriginal Youth Court Committee, which includes representatives from ALS. It is possible to work together informally toward a clear policy understood by all who are involved in the AYC process.

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<sup>29</sup> The most recent version of the Crown-ALST protocol appears to have been drafted in 2000 prior to the existence of the AYC but relevant to the diversion of Aboriginal youth to ALST's Community Council Project at the time. The protocols (1999 and 2000) are contained in a compendium entitled *Section 38 Aboriginal Youth Court, Program Materials, May 31, 2012*, published by the Ontario Court of Justice.



Of 56 diversions from the AYC during the evaluation period,<sup>30</sup> 45 were to the Community Council at Aboriginal Legal Services, as noted above. The Community Council is a restorative circle of Aboriginal volunteers, including Elders, who talk with the youth about why the offence occurred, not about the offence itself. Unlike the extrajudicial sanctions system run by the Ontario government where program decisions are made by a probation officer, the Council is supportive of the young person and sets a rehabilitative program in collaboration with him/her.<sup>31</sup>

The courtworker at the AYC and the ALS youth workers work closely with the youth and his/her supports to identify the circumstances and needs of the individual youth and to set in motion the restorative process with the Community Council. The Council and the youth reach a “decision” which is a list of tasks to which the youth agrees. This often includes attendance at the ALS anger management program, as well as activities at other agencies, as listed below. The programs suggested by the courtworker and the youth workers are meant to be well suited to the individual youth. But, importantly, it is the youth him/herself who decides on the program direction to follow. This appears to be important for young persons because it gives them agency in their own development and leads to a program direction that is more likely to elicit commitment from the youth and to result in success. Usually there is one meeting between a youth and the Community Council for a set of charges. Occasionally the Council will request a follow-up meeting with a youth, primarily for encouragement, support and assessing progress. As well, an ALS youth worker (there are two currently) supports each youth through their diversionary activities.

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<sup>30</sup> Diversions were also made to Native Child and Family Services, Anishnawbe Health and other agencies, although relatively few compared to diversions to the Community Council.

<sup>31</sup> Craig Proulx provides a thorough description of the Community Council in his book, *Reclaiming Aboriginal Justice, Identity, and Community* (2003), although the book was published before the Council’s direct association with the AYC.

*I guess the best thing [about the AYC and Community Council] is how they listen to your side of the story. They get to find out who you are and what type of person you are. They get to help you more, and they get to know what kind of programs you're into and stuff like that. It gives you a better chance compared to someone not really caring and just giving you what they think you deserve. – 16 year-old boy*

*Ya, my plan was fair because I had an opinion too in what I wanted to do. What I said was actually taken into consideration [by the Community Council]. – 15 year-old girl*

Several agencies provide programs to which Aboriginal youth are directed by the Community Council. Not all the agencies are strictly Aboriginal in their programming; however, Aboriginal youth claim to benefit from engagement in the programs. The prevalence of programs relevant to the needs of Aboriginal youth means that Aboriginal youth in Toronto (and the GTA) are fortunate relative to youth in other parts of Canada. Agencies include the following:

- Aboriginal Legal Services
  - Harm reduction group
  - Housing location
  - Anger management
  - Life skills
  - Substance abuse counselling (recently ended)
- Council Fire
- Outward Bound
- Central Toronto Youth Services
- Native Child and Family Services
- Anishnawbe Health
  - Offers sweat lodges, among other programs
- Miziwe Biik
  - Housing location
  - Education and training
  - Employment assistance
- Operation Springboard
  - Part time employment program
- East Metro Youth Services
  - Respect in Schools Everywhere (RISE) Program.

In addition to engagement in structured programs, the Community Council often suggests other activities relevant to the needs of individual youth. Examples include:

- Explore volunteer activities in the Toronto Aboriginal community
- Request to the Toronto Police Service to have prints and photos sealed
- Get a driver's licence
- Prepare or updating a resume
- Get a social insurance number
- Continue in an educational program already started
- Enrol or continue in a martial arts program.

In the interest of meeting the needs of individual youth, the Community Council may recommend participation in a program outside the GTA. In one case, for example, a young woman was urged to engage with the Edmonton Youth Transitions Program as she was moving to Edmonton.

While youth workers support individual youth during the diversion process, ALS sees it as important not to “police” youth while they are on their restorative path. Youth are told – and it is written into the agreement with the Community Council – that should the youth not complete his/her programming or should s/he be arrested again, s/he will be given another chance to return to the Community Council. If, however, the youth relapses again, s/he would be denied further involvement with the Community Council. Youth attending the Community Council are also urged to contact their worker for support if they have questions or are unsure of their path.

*I liked diversion. I found it useful that when I went to the Community Council that they gave me a list of Aboriginal places to volunteer at. That was nice. I actually felt at home when I went to Toronto Council Fire because I got to integrate with other Aboriginal people and I got to feel more connected with the culture because they do things like drum making there. They incorporate culture into literally everything. – 17 year-old boy*

*I think diversion was a very life changing event for me. Doing the diversion programs was when I really picked up my culture. That was when I really started to smarten up because I used to be a pretty reckless person. – 17 year-old girl*

At least three positive results arise from diversion. First, youth who are diverted and who have charges withdrawn do not acquire a criminal record. The significance of this is obvious when speaking of young people who need to make the most of every opportunity available to them as they proceed in life.

Second, youth diverted to the Community Council and subsequently to culturally and individually appropriate programming often continued to be more engaged with their culture than they had been before their involvement with the AYC and diversion. For example, young people occasionally continued to visit the ALS office simply to maintain their connections with other Indigenous people in a positive setting. We were told on numerous occasions by youth that the process had positive impacts on their lives and on their relationships with others. This was confirmed by several family members.

Third, we found that youth who had been through the AYC-Community Council process were less likely to re-offend than Aboriginal youth in other jurisdictions. In certain parts of Canada, re-offending rates are over 85 percent. During the evaluation period we saw a re-offending rate of approximately 7 percent among youth diverted from the AYC. To the extent we were able to review individual cases, the re-offending rate among youth whose cases had been heard at the AYC but who had had their charges withdrawn without being diverted was slightly higher at 12 percent. Again, however, these rates are comparatively low in the larger context. In several instances, youth who were still in the court process and had not yet been diverted incurred further charges (12 of 93 youth). Based on an analysis of the profiles of all diverted youth (personal history, current living conditions, prior convictions) we saw that youth with a more troubled past and present were more likely to re-offend during or after the diversion process. However, the rate was not very much higher than that for diverted youth who had a less troubled life: 11 percent compared to 7 percent.

*I haven't been in trouble in a long time so I think it's good. Coming here [to ALST] is something to do when I'm sober. It's something positive to do. Every time I come here I learn different stuff. I already finished the programs, but I still come to the substance program. I like it. – 17 year-old boy*

A reduction in re-offending is not a direct objective of the AYC. It is also important to acknowledge that Aboriginal youth are at relatively high risk of being involved with the criminal justice system. Therefore, the assumption of major, long term impacts with regard to re-

offending is not realistic. However, the re-offending rates we saw during the evaluation period can be interpreted as a positive result of the AYC-Community Council diversion approach.

## Conclusions

This section of the report provides conclusions based on the analysis of available information. Recommendations reasonably arising from those conclusions follow. The conclusions address both process questions – how the AYC and related institutions operate to achieve the objectives of the Court – and outcome questions – the success of the Court in achieving its objectives. A series of indicators relating to objectives were identified earlier in the report. Again, the Court’s objectives are as follows:

- Directly address relevant requirements in the *Youth Criminal Justice Act*, specifically sections 3 (1)(c), 38 (2)(d) and 50 (1);
- Encourage effective alternatives to incarceration for Aboriginal youth, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal youth in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal youth.

The Aboriginal Youth Court was conceived and initiated primarily with a view to applying the specific components of the *YCJA* identified in the first objective listed above. The three subsequent objectives, important in their own right, are essentially intended to achieve the primary objective. The following conclusions and recommendations are therefore framed in terms of the first objective – addressing relevant sections of the *YCJA* – while considering the significance of the second, third and fourth objectives in terms of the first.

The *YCJA* requires youth courts to “respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.” Aboriginal youth differ from other youth to varying degrees with respect to ethnicity, culture and language but they also have special requirements at a relatively high rate, including problems associated with mental health, cognitive impairment, addiction, and family dysfunction. The Act also requires that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.”

### *Aboriginal Identity*

We found that Aboriginal youth whose cases arrive at the Aboriginal Youth Court are provided reasonable opportunities to identify as Aboriginal. Justices of the peace and duty counsel at 311 Jarvis are aware of the need to inquire about an individual young person's identity. Defence counsel who regularly appear at 311 Jarvis are cognizant of Gladue principles and the importance of Aboriginal self-identity. Probation officers and care providers, such as workers with Native Child and Family Services, are generally aware of the identity question and often advise youth of the option to appear in the AYC or inform the courtworker about an Aboriginal youth. The courtworker checks the daily youth court docket at 311 Jarvis and is usually present at bail hearings. If an Aboriginal youth is being held in custody, the courtworker speaks with the youth to explain the option to appear in the AYC. She is also the primary contact for youth and their care givers, including parents and other family members who recognize the importance of informing the court of the youth's Aboriginal identity. It is possible but not likely, thanks to the efforts of the courtworker and court officials, that the identity of an Aboriginal youth would be missed at 311 Jarvis. An Aboriginal youth might choose not to appear in the AYC for personal reasons, although this appears to have occurred very rarely. The role of the Aboriginal courtworker is essential with respect to identifying youth as Aboriginal.

### *Awareness of Gladue Principles by Court Officials*

Court officials, including judges, the Crown, duty counsel and counsel appearing in the AYC are well aware of Gladue principles and the importance of youth identifying as Aboriginal. Moreover, they understand how the AYC differs from regular youth court in acknowledging the circumstances and meeting the needs of individual Aboriginal youth. Justice of the peace at 311 Jarvis are aware of the need for Aboriginal youth to identify as Aboriginal and that Gladue principles apply when making bail decisions and setting bail conditions. Justices of the peace have received relevant training.

Court observation suggests that counsel appearing in the AYC do not generally present an argument as to why a youth should be managed in a particular way because of his/her Aboriginal background (the "Gladue argument") unless there is an especially relevant point with reference to the young person's attempts to rehabilitate through engagement with Aboriginal cultural activities. In such cases the courtworker contributes relevant information. We found that AYC officials understand the background circumstances facing Aboriginal youth and that those circumstances do not often require explanation by way of a Gladue argument. Consistency in court personnel is important in this regard. For example, the fact the Crown understands the issues and is familiar with the resources available for Aboriginal youth provides assurance that Gladue principles will be applied and that the resources offered by ALS and other agencies serving Aboriginal people will be drawn upon.

### *Case Management and the Role of the Aboriginal Courtworker*

As noted above, the courtworker plays an essential role at the AYC. She is the bridge between the court and restorative alternatives for each youth. She is key in identifying youth as Aboriginal and explaining the AYC option to them. She provides information regarding the circumstances and needs of individual youth to the court and liaises with family members, care givers and representatives of agencies with the capacity to assist Aboriginal youth. Aboriginal youth whose hearings are at 311 Jarvis almost always connect with the courtworker in a timely manner and with enough information exchange to assist both the youth and the court. Each young person's background, particularly as an Aboriginal youth, is documented by the courtworker and the information shared with the court as appropriate in order for the court to be able to apply Gladue principles in responding to the circumstances and needs of individual youth. The courtworker, together with ALS youth workers and others, develops pre-diversion plans for youth and reports to the court regarding the young person's progress with the plan. This information is significant in the decision to divert by the Crown and the judge. Similarly, the courtworker provides advice to the Community Council with respect to appropriate diversion programs for individual youth. The Aboriginal courtworker plays an essential role with regard to case management and the successful operation of the AYC.

*She [the courtworker at AYC] was very nice and friendly. She remembered me both times. She's a nice person, and she does a lot to help you...she does what she can. She made sure I met all the right people. She made sure I knew all the information, and everything that I had to know. She made sure all my paperwork got done, like even extra paperwork like getting my disclosure...stuff like that. – 17 year-old girl*

### *Alternatives to Incarceration*

The Aboriginal Youth Court consistently finds alternatives to pre-trial detention and sentenced custody. As noted, only one youth who had appeared in the AYC received a custodial sentence during the three-year evaluation period. Moreover, with the involvement of Aboriginal Legal Services and other agencies, youth are provided the opportunity to engage in culturally appropriate alternatives. Youth have agency in determining their diversion plans through their interactions with the Aboriginal courtworker, ALS youth workers and the Community Council.

The relationship between the AYC and ALS cannot be overstressed. The Aboriginal courtworkers, youth workers and the Community Council are essential in assessing the circumstances and meeting the needs of Aboriginal youth in trouble with the law. The

achievements of the Aboriginal Youth Court and the successful diversion of Aboriginal youth to the Community Council depend in large part to the work done by the courtworkers and youth workers. In a three-year evaluation of the ALST caseworker program associated with the adult Gladue Court at Old City Hall (caseworkers write the adult Gladue Reports), Jane Campbell said this of ALS personnel:

... there is a high level of trust among team members that took time to build – the continuity of these team members in their positions has been important to this development of trust; this has influenced how the court operates and enables all parties to provide greatest assistance to Aboriginal offenders; having this network in court facilitates addressing the offender’s needs. (2008: 21)

The same applies to the courtworker, the Community Council members and the youth workers engaged with youth through the AYC. Understanding of the issues facing Aboriginal youth, dedication and continuity are essential and enable the successful transition from the court to restorative programming, whether in pre-diversion or diversion to the Community Council. Similarly, the judges and the Crown are part of the same team and exhibit the same qualities of understanding, dedication and, very importantly, continuity.

*They [Community Council] pushed me to do what I wanted to for diversion. It was what I wanted but it just gave me that extra shove to do it. – 17 year-old boy*

*When I went to ALST and all of us were just sitting around it felt like they were more there for me, instead of just being there type of thing. – 14 year-old boy*

The Aboriginal Youth Court has achieved a significant degree of success in addressing the requirements of the YCJA with respect to Aboriginal youth, specifically sections 3 (1)(c) and 38 (2)(d). It is clearly the case that the AYC is dependent on Aboriginal Legal Services for effective case management and to provide restorative options associated with the court. Similarly, the restorative programs offered by ALS and other agencies (primarily Aboriginal) in the GTA are essential to the success of the AYC. This has been demonstrated in several ways and confirmed with reference to various information sources, including Aboriginal youth themselves.



*Well, ya it is important to have an Aboriginal youth court because with other cultures or religions, they have specific rights and some things that differ from another background or race, so they get different things. If people are being so open to other peoples' religions and backgrounds, then why not ours? We have been here for how long? People need to recognize us...so if we ended up in that situation of being in court or being in jail, then I think it's important. – 16 year-old boy*

In the view of the evaluator, the Aboriginal Youth Court is clearly meeting its four objectives. While some challenges and potential problems remain, the Court has maintained flexibility and has adapted since its beginning. The Aboriginal Youth Court, together with Aboriginal Legal Services/Community Council and other agencies, is providing a critically important service to Aboriginal youth, their families and the larger Aboriginal community and should be seen as a model for the development of similar initiatives in Ontario and throughout Canada.

## Recommendations

1. While there are Aboriginal youth living throughout Toronto and the Greater Toronto Area, their attendance at the Aboriginal Youth Court at 311 Jarvis is restricted in part by the court's downtown location. Youth charged with an offence in the 311 Jarvis catchment area are processed there, but youth charged elsewhere normally attend other courts often a significant distance from 311 Jarvis; e.g., 2201 Finch, Scarborough and Brampton. While a courtworker is present at 2201 Finch and Scarborough courts and facilitates diversions to the Community Council, Aboriginal youth processed in those courts do not benefit from the Aboriginal court experience as do youth at the AYC.

It appears some Aboriginal youth in other Toronto court jurisdictions are not being given the opportunity to identify as Aboriginal and little or no special provision is made for those youth who do identify. Many are "falling through the cracks." The 311 Jarvis AYC has the capacity to process these youth and others; however, they are not being traversed for a variety of reasons. For example, Crowns and defence counsel at other courts still may not be aware of the existence and capacity of the AYC. Defence counsel may be resistant to traverse a client because of the perceived inconvenience of attending AYC downtown. More outreach and education are required.

The Aboriginal Youth Court at 311 Jarvis has the structure and the capacity to expand its mandate to include Aboriginal youth throughout the GTA. Aboriginal youth would benefit

from being traversed to 311 Jarvis from other courts. The Ontario Court of Justice should also consider establishing a central (and larger) Aboriginal youth court with a concomitant mandate to process all Aboriginal youth cases in the GTA.

2. The AYC works well in large part thanks to the justice professionals who work there. It was expressed several times during the evaluation interviews that a change in personnel (e.g., the Crown) could change the dynamic overnight. The federal and provincial governments should ensure consistency among officials working at the AYC. As well, personnel must be carefully screened for their knowledge, experience and commitment to Aboriginal justice issues prior to being assigned to the AYC.
3. When an Aboriginal youth is co-accused with a non-Aboriginal youth, complications can arise with respect to two questions: scheduling hearings and the differential treatment by AYC and regular court. This can lead to counsel choosing to avoid the AYC in favour of having both clients appear in regular court, resulting in a loss for the Aboriginal youth. Ongoing education of lawyers and clear direction for representing Aboriginal clients in the AYC would help to ensure Aboriginal youth are heard in the AYC.
4. There is some lack of clarity among court officials and others as to what kinds of charges are likely to be divertible. This is not a major issue and can be seen as a question for informal discussion among court officials and ALS staff. It can easily be addressed at the Aboriginal Youth Court Committee and a clear policy set out.
5. The AYC is “like a therapeutic court but it is not a therapeutic court.” The fact that the AYC tends to lead to diversion presumes guilt. The question becomes: will a young person choose to admit guilt when not guilty in order to benefit from the AYC approach to the withdrawal of charges and restorative diversion? This is a difficult question that requires a professional approach by lawyers with the help of Aboriginal courtworkers, youth workers and others. It is worthy of ongoing discussion at the AYC Committee.
6. It is possible to initiate sentencing circles in the AYC, although an appropriate case has not yet arisen. There are potential benefits and challenges to the use of circles and the question requires additional research and discussion. However, if it seems appropriate and if all parties (including the victim) consent, a circle should be arranged. The use of sentencing circles should be assessed and modified as appropriate.

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## Appendix

### Youth Criminal Justice Act S.C. 2002, c.1 (relevant sections<sup>32</sup>)

#### DECLARATION OF PRINCIPLE SECTION 3

- 3. (1)** The following principles apply in this Act:
- (a) the youth criminal justice system is intended to protect the public by
    - (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
    - (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
    - (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
  - (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
    - (i) rehabilitation and reintegration,
    - (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
    - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
    - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
    - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;
  - **(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should**
    - (i) reinforce respect for societal values,
    - (ii) encourage the repair of harm done to victims and the community,
    - (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
    - (iv) respect gender, ethnic, cultural and linguistic differences **and respond to the needs of aboriginal young persons** and of young persons with special requirements; and

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<sup>32</sup> Emphasis added.

- (d) special considerations apply in respect of proceedings against young persons and, in particular,
  - (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
  - (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
  - (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
  - (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

*Act to be liberally construed*

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

*2002, c. 1, s. 3;*

*2012, c. 1, s. 168.*

## PART 4 SENTENCING

### Purpose and Principles SECTION 38

Purpose

**38.** (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

*Sentencing principles*

**(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:**

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- **(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;**



- (e) subject to paragraph (c), the sentence must
  - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
  - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
  - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
  - (i) to denounce unlawful conduct, and
  - (ii) to deter the young person from committing offences.

*Factors to be considered*

- (3) In determining a youth sentence, the youth justice court shall take into account
- (a) the degree of participation by the young person in the commission of the offence;
  - (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
  - (c) any reparation made by the young person to the victim or the community;
  - (d) the time spent in detention by the young person as a result of the offence;
  - (e) the previous findings of guilt of the young person; and
  - (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

2002, c. 1, s. 38;

2012, c. 1, s. 172.

**PART 4**  
**SENTENCING**  
**Youth Sentences**

**SECTION 50**

*Application of Part XXIII of Criminal Code*

**50.** (1) Subject to section 74 (application of *Criminal Code* to adult sentences), **Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(e) (sentencing principle for aboriginal offenders)**, sections 722 (victim impact statements), 722.1 (copy of statement) and 722.2 (inquiry by court), subsection 730(2) (court process continues in force) and sections 748 (pardons and remissions), 748.1 (remission by the Governor in Council) and 749 (royal prerogative) of that Act, which provisions apply with any modifications that the circumstances require.

*Section 787 of Criminal Code does not apply*

(2) Section 787 (general penalty) of the *Criminal Code* does not apply in respect of proceedings under this Act.

2002, c. 1, s. 50

