

Book Review

Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women. By Elspeth Kaiser-Derrick. University of Manitoba Press, 2019. 416 pages.

Reviewed by Ellen Bolger*

In 1999, the Supreme Court of Canada decried the overrepresentation of Indigenous peoples in the criminal justice system, particularly in prisons, in a case called *R v Gladue*.¹ *Gladue* and section 718.2(e) of the *Criminal Code* require sentencing judges to take into account the systemic factors faced by an Indigenous offender that lessen their moral blameworthiness, and to consider all alternatives to incarceration.² Unfortunately, the application of *Gladue* did not lessen the rates of Indigenous overrepresentation in prison, which are “most extreme in the prairie provinces and the northern territories,”³ and in 2012 the Supreme Court of Canada again called for sentencing judges to properly consider systemic factors faced by Indigenous offenders and to craft sentences appropriate to the individual offenders before the courts.⁴

Implicating the System is based on research from Elspeth Kaiser-Derrick’s Master of Laws thesis. In her work, she examines the text from decisions sentencing 177 Indigenous women during the time period between 1999 and 2015. Kaiser-Derrick applies the “victimization-criminalization continuum” theory, which suggests that women’s criminality should be “understood as connected to their experiences of victimization, and that women’s responses to victimization can lead to criminalization” (9). She defines the term “victim” broadly, including experiences of violence, but also “other personal, accumulated, collective, intergenerational, and systemic, state-based traumas” (13).

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Kaiser-Derrick argues that sentencing judges should use the victimization-criminalization continuum together with a *Gladue* analysis in order to enhance the overall analysis when sentencing female Indigenous offenders. Indigenous women are particularly vulnerable to victimization and subsequent criminalization. According to Kaiser-Derrick, when sentencing women for offences, it is important to consider systemic factors, such as the fact that women are more likely to plead guilty and are likely to be the primary caregiver for their children (109). In the cases she examined, approximately 80% of the women sentenced were mothers.

Implicating the System discusses the problem of uneven access to adequate *Gladue* reports for Indigenous women (124). In the Yukon and the Northwest Territories, judges have expressed concerns about access to *Gladue* reports and information.⁵ In 2018, the Government of Yukon and the Council of Yukon First Nations launched a three-year pilot project to provide funding for reports and training for *Gladue* report writers.⁶ As there is no explicit legal authority in the *Criminal Code* for judges to order *Gladue* reports, it is even more fundamental that reports are properly funded and that report writers are trained in order for the relevant information to be before the court (129).

Kaiser-Derrick and others have criticized the practice of including *Gladue* content in Pre-Sentence Reports (“PSRs”) that are prepared primarily by probation officers in the Northwest Territories, in that this results in having “an agent of the colonizer prepare a report on the effects of colonialism” (129–130). This practice has also been criticized on the basis that PSRs and *Gladue* reports often have fundamentally different framing, and what may be considered a *Gladue* factor in a *Gladue* report can be considered a risk factor in a PSR. Kaiser-Derrick brings to light the trend of risk-based decision making in sentencing and how that can become problematic for sentencing Indigenous women in the victimization-criminalization continuum. She approvingly cites (211) an example of a sentencing decision by Yukon Territorial Court Judge Michael Cozens where he is “sensitive to the pitfalls of using risk-based decision making”.⁷

An issue raised in the book that has particular application to the North is the impact of a perceived lack of resources in the community by the judiciary (224). For example, in *R v Smith*, Ms. Smith was given a federal sentence rather than a territorial sentence in part due to resources in the federal system, which are not available in the Yukon (226–227).

Kaiser-Derrick relies on sources such as the Office of the Correctional Investigator (an ombudsman for federal offenders) to counter the idea that prison can be an inherently healing place (202). She also uses the Nunavut Court of Justice case *R v Ussak* as evidence that prison conditions can be harmful to inmates (235). In *Ussak*, Justice Cooper described Ms. Ussak’s experience in remand at the

Baffin Correctional Centre. She was under lock-up for twenty-three hours per day, with authorities having serious concerns about her health after she lost thirty pounds in the forty days she was in custody (235).

It is important to mention that in 2018, the Yukon government commissioned an inspection of the Whitehorse Correctional Centre, which resulted in a report with forty recommendations. The Loukidelis Report recommendations included the immediate removal of the prison's designation as a hospital and to "redouble its efforts to offer culturally-appropriate programs and services."⁸ Several recommendations were also aimed at the mental health of people incarcerated at the prison, such as setting limits and regulations on the use of "separate confinement" (which is confinement for more than eighteen hours per day). The *Act to Amend the Corrections Act, 2009*, an attempt to correct some of the longstanding problems with separate confinement, was assented to by the Yukon Legislative Assembly in November 2019.⁹

Due in part to the author's exhaustive research, *Implicating the System* can be a challenging read. However, dealing appropriately with the complexities inherent in the subject matter requires the refined, sensitive analysis provided by Kaiser-Derrick. The work complements the analysis in *Ipeelee and the Duty to Resist* by Marie-Eve Sylvestre and Marie-Andrée, as both works critique how *Gladue* has been applied, and call for innovation in sentencing.¹⁰

One of the most noteworthy critiques from Kaiser-Derrick is the unavailability of conditional sentence orders for many offences due to 2007 and 2012 amendments to the *Criminal Code*, and how this constrains appropriate sentencing for Indigenous women (12, 305). She is also wary of the use of section 718.2(a)(ii) of the *Criminal Code*, which provides that a victim who is also a spouse or common law partner of an offender is a mandatory aggravating factor in sentencing in the context of domestic violence (167).

Kaiser-Derrick brings elusive systemic issues into focus. Above all, her work affirms the dignity and humanity of Indigenous women, the recognition of which can be lacking in the machinery of the criminal justice system. *Implicating the System* is a must-read for professionals working in the justice system in the North, especially for members of the judiciary. As Justice LaBel stated in *Ipeelee*, "Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination."¹¹

Notes

1. *R v Gladue*, [1999] 1 SCR 688.
2. *Ibid*; *Criminal Code*, RSC 1985, c C-46.
3. *R v Ipeelee*, 2012 SCC 13, 1 SCR 433.

4. Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (University of Manitoba Press, 2019) at 5. Subsequent references to page numbers included in text.
5. *R v Samson*, 2014 YKTC 33 at para 67; *R v Dickson*, 2013 YKTC 27 at para 7; *R v Kanayok*, 2014 NWTSC 75 at para 15.
6. Government of Yukon, “Government of Yukon Funds Gladue Pilot Project” (February 20, 2018), online: <<https://yukon.ca/en/news/government-yukon-funds-gladue-pilot-project>>.
7. *R v Rodrigue*, 2015 YKTC 5.
8. David Loukidelis, “Whitehorse Correctional Centre Inspection Report” (May 2018) at 11 and 14, online: <<http://www.justice.gov.yk.ca/pdf/wcc-inspection-report-david-loukidelis.pdf>>.
9. *Ibid* at 11; Bill 6, Act to Amend the Corrections Act, 2009, 3rd Sess, 34th Leg, Yukon, 2019 (assented to November 27, 2019).
10. Marie-Eve Sylvestre & Marie-Andrée Denis-Boileau, “Ipeelee and the Duty to Resist” (August 24, 2018) 51(2) UBC Law Review 548, online: <<https://ssrn.com/abstract=3237898>>.
11. *R v Ipeelee*, *supra* note 3 at para 67.

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