Remarks by the Right Honourable Richard Wagner, P.C.
Chief Justice of Canada

on the occasion of the 37th Canadian Congress on Criminal Justice

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INTRODUCTION

[1] Thank you for that kind introduction. It gives me enormous pleasure to be here at this joint conference of the Canadian Criminal Justice Association and la Société de Criminologie du Québec. You have had an incredible line-up of panels, workshops and discussions so far, and there are even more to come tomorrow. Thank you for being here and for doing this hard but necessary work of leading the discussion on criminal justice reform.

[2] In particular, I would like to extend my warmest congratulations to the Canadian Criminal Justice Association as we celebrate its 100th anniversary. For 100 years, the Association has played a central role in modernizing corrections and criminal justice policy in Canada to make criminal law more just and equitable. From its origins as a prisoner's aid association to the present day, the Association has always put the humanity and dignity of persons who interact with the system at the centre of its work.

[3] Je tiens également à féliciter chaleureusement la Société de criminologie du Québec qui, depuis presque soixante ans, rassemble les divers intéressés afin d'améliorer et de moderniser le système de justice québécois. La Société est toujours restée fidèle à sa mission première, à savoir humaniser la façon dont la société répond et intervient lorsque des citoyens contreviennent à la loi. D'ailleurs, je me dois de souligner que l'un des premiers vice-président de la société était mon père Claude au début des années 60 – Que le monde est petit.

[4] Comme l'illustrent bien la mission originale ainsi que les travaux et activités de l'Association et de la Société, le meilleur indicateur de la santé du système de justice pénale est la

manière dont il traite les personnes qui se heurtent aux obstacles les plus importants à l'accès à la justice. Indeed, the best indicator of the health of the criminal justice system is how it treats those who face the greatest barriers to accessing justice. While our justice system is meant to treat everyone equally, in practice the privileged often breeze through while the disadvantaged get stuck due to the barriers and pre-existing disadvantages that they face. All of you in this room have first-hand experience with individuals and groups who face these barriers and have contributed in your own ways to finding solutions that humanize the process for those who face the greatest disadvantages.

[5] While there are many disadvantaged individuals and groups who interact with the criminal justice system, I will focus my remarks on the relationship between the criminal justice system and Indigenous peoples. The theme of this conference is "100 years of criminal justice: learning from the past, building the future." Since 1989, 16 commissions and inquiries have studied how the criminal justice system has failed Indigenous people over the past 100 years and have made more than 700 recommendations for a better future. We need to learn from the ways in which the criminal justice system has failed Indigenous peoples in order to engage in the process of reconciliation and build a better future together with Indigenous peoples.

[6] In this spirit, before getting into the heart of the subject, I would like to express my gratitude and my appreciation to the many Indigenous peoples who, since time immemorial, have been living and working on the land where we are gathered together today.

[7] In the time that I have with you today, I would like to trace how the criminal process has failed and continues to fail both Indigenous accused persons and Indigenous victims of crime.

I would also like to offer some proposals on how both individuals and institutions can learn from these failures and build a better future together with Indigenous peoples.

PART I – INDIGENOUS PEOPLES AND CRIMINAL JUSTICE

[8] Les échecs du système de justice pénale à l'endroit des peuples autochtones sont malheureusement considérables. Il y a vingt ans, dans l'arrêt *Sa Majesté la Reine c. Gladue*, la Cour suprême du Canada a conclu que les relations entre les peuples autochtones et le système de justice reflètent une « crise dans le système canadien de justice pénale ». Les juges Cory et Iacobucci ont déploré la surreprésentation des Autochtones dans le système de justice pénale, soulignant avec inquiétude le sentiment d'aliénation qu'éprouvent ces derniers à l'égard de ce système[i]. Il y a sept ans, dans l'affaire *Sa Majesté la Reine c. Ipeelee*, la Cour a reconnu que cette aliénation et cette surreprésentation n'avaient fait qu'augmenter[ii]. Ces échecs visent tout autant les Autochtones victimes de crimes. En effet, en 2014, les Autochtones couraient deux fois plus de risques que les non-Autochtones d'être victimes de crimes violents. Les femmes autochtones, pour leur part, étaient presque trois fois plus susceptibles que les femmes non autochtones de déclarer avoir été victimes de violence[iii].

[9] Quoique les causes de la surreprésentation des Autochtones dans le système de justice pénale soient nombreuses et complexes, l'une des causes principales de cet état de fait est le colonialisme. The scars of colonialism run deep. Canadian governments dispossessed Indigenous people of their lands, suppressed Indigenous culture and traditions, and imposed policies that caused terrible harm to Indigenous children and entire communities. Canadian governments also tried to suppress Indigenous legal orders and replace the legal principles and processes Indigenous

people use to uphold and enforce social norms with the Canadian system of criminal law. These policies did not achieve their objective of hastening the disappearance of Indigenous peoples. Indigenous nations are resilient and vibrant and have kept their legal traditions and peacemaking processes alive. But we must recognize that these policies have caused tremendous harm. And we should not be surprised that these harms have brought Indigenous people disproportionately into contact with the criminal justice system, whether as accused persons or as victims of crime. I will briefly address both.

A. THE CRIMINAL PROCESS FOR INDIGENOUS ACCUSED PERSONS

[10] First, I would like to say a few words about how these failures manifest themselves for Indigenous accused persons. Because the criminal process begins with the laying of charges, we should not be surprised that over-policing is one of the main causes of Indigenous over-incarceration. Over-policing manifests itself in the disproportionate arrest and charging of Indigenous people for petty offences such as drinking violations and the disproportionate subjection of Indigenous people to police street checks. Ultimately, over-policing fosters distrust of the police by Indigenous people.

[11] Les Autochtones contre qui des accusations sont déposées se voient refuser une mise en liberté sous caution de manière disproportionnée par rapport aux autres contrevenants. Comme l'octroi ou le refus d'une mise en liberté provisoire est peut-être la décision la plus importante pour tout accusé dans le système de justice pénale, nous devrions nous inquiéter vivement du fait que les Autochtones subissent de façon disproportionnée les effets des divers problèmes qui affligent le régime de mise en liberté sous caution. En 2014-2015, 25 % des adultes en détention provisoire

étaient des Autochtones. Ce chiffre est huit fois plus élevé que le pourcentage que représentent les Autochtones dans la population générale[iv]. Le fait que des Autochtones se voient refuser une mise en liberté sous caution ou qu'ils soient incarcérés parce qu'ils ont manqué à une condition irréaliste assortissant leur mise en liberté les incite à plaider coupables pour mettre fin à leur détention. Cette situation a pour effet d'entraîner de la surincarcération et, possiblement, d'amener des Autochtones innocents à inscrire un plaidoyer de culpabilité[v].

[12] At the sentencing stage, the lack of resources for Gladue Reports fosters discrimination. In many provinces and territories, there is no formal process that allows for Gladue Reports to be prepared. Even in provinces where there is funding, capacity is often limited.[vi] If judges are deprived of Gladue information, there is a real risk that the sentences they impose will fail to reflect the unique circumstances of the Indigenous person before the court.

[13] The correctional authorities also struggle to provide Indigenous people in custody with pathways to rehabilitation and re-integration into Indigenous communities. Indigenous people in custody are more involved in self-injurious behaviour and are over-represented in involuntary transfers. Placements in segregation have not declined for Indigenous people even though there has been a decline for non-Indigenous people.[vii]

B. THE CRIMINAL PROCESS FOR INDIGENOUS VICTIMS OF CRIME

[14] Unfortunately, the picture is not any better for Indigenous people who are victims of crime. Bon nombre de rapports sur les peuples autochtones et la justice pénale ont indiqué que les services policiers ne traitent pas sérieusement de la violence contre les Autochtones et manifestent souvent des préjugés ou stéréotypes tendant à blâmer les victimes. Cette situation est

particulièrement vraie dans les cas de violence faite aux femmes, aux filles et aux personnes issues de minorités de genre et de minorités sexuelles autochtones. Il n'est donc pas étonnant que les personnes autochtones victimes de crimes soient souvent réticentes à signaler des infractions aux policiers et qu'elles soient moins susceptibles d'avoir confiance en ceux-ci[viii].

[15] Even when the criminal trial begins, judges and lawyers often fail to treat Indigenous victims and their families with the respect and dignity they deserve. In *Her Majesty the Queen v. Barton*, the Court was recently confronted with such a situation. Witnesses, Crown counsel, and defence counsel repeatedly referred to Ms. Gladue as a "Native girl," "Native woman," or "prostitute." The trial judge did nothing to correct this. As my colleagues Justices Abella and Karakatsanis wrote in that case, these references would have led the jury to believe that Ms. Gladue was more likely to have consented to whatever the accused did and was even less worthy of the law's protection.[ix] Ultimately, as my colleague Justice Moldaver wrote, the criminal justice system let Ms. Gladue down and failed to send the message that "her life mattered."[x] Such insensitive and derogatory language re-traumatizes Indigenous victims and their families and communities and ultimately brings the justice system into disrepute.

PART 2 – WHAT WE CAN DO

[16] So far, the picture I have been painting is bleak. But we must do more than just wallow in self-recrimination. Instead, we must be open to new approaches to ensure that the system does not further victimize or criminalize Indigenous people. As a starting point, I would like to encourage each person and institution that wields authority in the justice system to address the

issues they can control, keep the humanity and dignity of each Indigenous person front of mind, listen to Indigenous peoples, and begin to build respectful relationships with them.

[17] First, I would like to encourage each institution and person to address the aspects of the relationship with Indigenous people that they can control. While the barriers Indigenous people face are systemic and are not the exclusive domain of any single institution, each institution can improve how it relates to Indigenous people in matters that fall within its own domain. As I recently wrote in *Ewert v. Canada*, the fact that many aspects of Indigenous over-incarceration and alienation from the criminal justice system are beyond the control of correctional authorities does not justify the status quo. There are still many matters that correctional authorities do control and can address to mitigate the problems of overrepresentation and discrimination.[xi] I am very pleased to see that many of the workshops and roundtables at this conference are focusing on how justice institutions can better address the challenges and barriers that Indigenous people face.

[18] Je vous invite en outre toutes et tous à faire tout ce qui est en votre pouvoir, individuellement, pour améliorer la façon dont le système de justice interagit avec les Autochtones. Quoique le système puisse sembler vaste et impersonnel, il est en définitive composé de personnes comme vous et moi. Each person in the system makes day-to-day choices that shape how Indigenous people experience the system and these choices can either reinforce mistrust or begin to build trust. Here I can do no better than to adopt the wise words of Mr. Jonathan Rudin, program director of Aboriginal Legal Services:[xii]

> Everyone in the justice system has the opportunity to either ameliorate or worsen the conditions faced by Aboriginal people in the justice system. The system has done enough of the latter; now is the time to work on the former.

[19] Second, I would like to encourage each of you to keep the humanity and dignity of the Indigenous people who interact with the justice system front of mind. It is all too easy for labels such as "serious offender" or "prostitute" to blind us to the humanity of the Indigenous accused person or victim. We need a different mindset. In her decision in *Sauvé v. Canada (Chief Electoral Officer)*, my predecessor referred to incarcerated people as "citizen law-breakers."[xiii] That means treating them not as social outcasts but as fellow citizens. That means centering the humanity, dignity, and rights of every person in the criminal justice system. It means recognizing the unique systemic or background factors that may have played a role in bringing an Indigenous person before the sentencing judge. It also means supporting Indigenous victims and their families and doing our utmost to ensure that the criminal justice system treats them and their loved ones with dignity and respect. In this regard, I am encouraged by the determination of both the Canadian Criminal Justice Association and la Société de criminologie du Québec to make humanizing the criminal justice process so that it respects each person's dignity a priority.

[20] Troisièmement, je vous encourage toutes et tous à écouter les Autochtones. Car il est possible que la façon dont les ordres juridiques autochtones abordent certaines questions touchant la justice diffère fondamentalement de l'approche classique du système canadien de justice pénale. En conséquence, pour bien comprendre ce que signifie la justice pour les Autochtones, il faut écouter les « gardiens du savoir » de ces ordres juridiques et apprendre d'eux sur le contenu de ces ordres. Failing to listen can cause justice system actors to hold faulty assumptions about the values

and priorities of Indigenous people. These faulty assumptions yield bad policy. Without listening to and learning from Indigenous peoples, any reform program would suffer from the same colonial flaws that have caused the justice system to fail Indigenous peoples. I commend both the Canadian Criminal Justice Association and la Société de criminologie du Québec for fostering such listening so that the system does not simply repeat its past mistakes.

[21] Fourth, to listen effectively, I would like to encourage each of you to invest in developing relationships with Indigenous peoples. Building respectful relationships requires sustained, proactive outreach. I am heartened that many of you have taken up this challenge. To give just one example, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls detailed how some police forces hold regular meetings with the leaders of Indigenous communities to ensure that policing priorities reflect community priorities. This relationship-focused approach can positively impact the structures, policies, and actions of the police and ensure that they have more helpful encounters with Indigenous women who are at risk of violence or exploitation.[xiv]

CONCLUSION

[22] Let me conclude with this. We cannot change the past. Nor can the justice system alone address the challenges that Indigenous people face and that bring them disproportionately into contact with it. But that is no reason not to do better. Police, prosecutors, defence lawyers, court workers, victim support workers, judges, correctional officers, and parole officers – indeed all of us in this room – everyone influences the treatment of Indigenous people in the justice system. As the Aboriginal Justice Inquiry of Manitoba recognized, “there is much the justice

system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation."[xv]

[23] J'ai beaucoup parlé de la situation des Autochtones, mais je suis conscient que la santé de notre système de justice pénale dépend de la façon dont il traite l'ensemble des justiciables. As I said at the outset, the health of our criminal justice system depends on how it treats everyone. When it comes to the criminal justice system, we must recommit ourselves each day to right the wrongs that we can. While we will never have a perfect system, we must try for something better. The harder we push ourselves, the further we will go. Let us do our part to ensure that every person who interacts with the criminal justice system, whether as an accused person, an incarcerated person, or a victim, is treated with respect and dignity. It is our responsibility to ensure that every person who interacts with the system feels that they are treated as a human being, not a label or a statistic. Let us strive to listen to justice system participants and to build relationships with them so that the operation of the criminal justice system reflects their values and priorities. Only by engaging in this hard work can we ensure that people are not further victimized and alienated by the criminal justice system. Je remercie l'Association canadienne de justice pénale et la Société de criminologie du Québec d'organiser ces importantes conversations sur les leçons que nous pouvons tirer des échecs passés du système de justice pénale afin de bâtir ensemble un avenir meilleur. Thank you to each one of you for the work that you do to ameliorate the conditions that people face in the criminal justice system. Merci pour votre attention et bonne fin de soirée.

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[i] *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 64-65.
[ii] *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433, par. 62.

[iii] Statistique Canada, Centre canadien de la statistique juridique, *La victimisation chez les Autochtones au Canada, 2014* par Jillian Boyce, nº 85-002-X au catalogue (Ottawa: Statistique Canada, 2016) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-fra.htm>.
[iv] Statistique Canada, Centre canadien de la statistique juridique, Programme des services correctionnels, *Tendances de l'utilisation de la détention provisoire au Canada, 2004-2005 à 2014-2015*, nº 85-002-X au catalogue (Ottawa : Statistique Canada, 2017) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14691-fra.htm>.
[v] Voir Amanda Carling, « A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions » (2017) 64 CLQ 415.
[vi] Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019), at pp. 109-111.
[vii] Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: Her Majesty the Queen in Right of Canada, 2018), at p. 62 <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>.
[viii] *La victimisation chez les Autochtones au Canada, 2014*, *supra*.
[ix] *R. v. Barton*, 2019 SCC 33, at para. 231.
[x] *Ibid*, at para. 210.
[xi] *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 61.
[xii] Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019), at p. 48.
[xiii] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 40.
[xiv] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1a (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2018), at p. 709 < https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.
[xv] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991), at p. 111.