Abstract

While Indigenous peoples account for a small portion of the Canadian population, they are overrepresented in the Canadian Criminal Justice System. Research and case law suggest culture should always be considered in violence risk assessments (VRAs), but it is unknown whether this recommendation is followed. The present study examined the role of Indigenous versus non-Indigenous culture in judicial opinions regarding evaluators’ VRA and expert witness testimony in Dangerous Offender and Long-Term Offender (DO/LTO) hearings under Canadian Law. 214 DO/LTO hearings from 2009-2016 where judges commented on VRAs submitted to the court were systematically identified via the Canadian Legal Information Institute database. Judicial comments were analyzed in cases with Indigenous and non-Indigenous defendants for discussions of culture and the prevalence of comments regarding qualities of the evaluator(s), qualities of the VRA(s) completed, and qualities of the evaluators’ expert testimony about the VRA. Judges considered culture meaningfully in 64% of Indigenous offenders’ cases. Discussion of VRA tools’ content was significantly more frequent in non-Indigenous cases; otherwise, frequency of non-cultural themes did not vary between case groups. Given the importance of considering culture in VRA, it is concerning that culture was considered in just over half of cases; improving this deficit is discussed.

**Keywords:** indigenous culture, aboriginal,violence risk assessment, expert evidence, sentencing

The Consideration of Indigenous Peoples in High Stakes Evaluations of Risk

**Introduction**

Violence risk assessment (VRA) is a practice that involves professionals forming opinions about the risk posed by an individual for future violence (Douglas et al., 1999). Due to increased attention on clinical, ethical, and legal applications of VRA, an area of primary concern in the current literature is the use of VRA tools with populations upon which they were not developed or normed. With growing recognition of the potential limitations of the research and validation of these tools on such populations, there is an increasing responsibility for professionals to conduct VRAs in line with clinical, legal, and ethical standards. These standards state that assessments should be conducted with consideration of the evaluees’ background and specifically, their culture (see Cook & Hart, 2017). In their recent review, Cook and Hart (2017) called for a new line of comparative legal research to examine what aspects of VRA courts find helpful and where there may be potential national and cultural bias in the assessment process. To contribute to this area, this study focuses on the consideration of VRA expert evidence in cases with Indigenous[[1]](#footnote-2) and non-Indigenous offenders in Canada, with a specific focus on assessments conducted in the context of Dangerous Offender (DO) and Long-Term Offender (LTO) Hearings.

**Dangerous and Long-Term Offender Designations**

A Dangerous Offender (DO) designation can be made when an offender presents a significant threat of future violence and has committed a “serious personal injury offence” (Criminal Code, 1985). If proven, the designation usually results in a long-term supervision order or indeterminate imprisonment (Public Safety Canada, 2019). A Long-Term Offender (LTO) designation is possible when an offender is convicted of a “serious personal injury offence” and is deemed likely to reoffend, but there is a reasonable possibility the offender could be managed in the community after their sentence. The LTO designation allows for a maximum of ten years’ supervision after the offender’s release (Gutierrez et al., 2016). A formal assessment, which includes assessment of risk and manageability, completed by either individual professionals (most often a psychiatrist or psychologist) or multidisciplinary teams is required in a DO or LTO hearing. The assessment is completed at the request of the court, not the prosecution or defense, but the prosecution and defense can call experts to conduct additional assessments and/or testify at the hearing. These assessments are critical in determinations of the offenders’ risk and manageability (*R v Pike*, 2010). For more information on DO/LTO designations, please see The Investigation, Prosecution, and Correctional Management of High-Risk Offenders: A National Guide (Public Safety Canada, 2018).

We focus on DO/LTO designations as these designations are the most severe possible in the Canadian Criminal Justice System in terms of having the greatest restrictions on the defendant’s liberty (e.g., indeterminate imprisonment). Given the impact of decisions in these cases, the highest rigor from judges and expert evaluators is expected, and DO/LTO cases must include assessments of risk and manageability (i.e., VRAs).

**Justice System Involvement of Indigenous People in Canada**

According to the Corrections and Conditional Release Statistical Overview (2019), 24.0% of offenders in the Criminal Justice system are of Indigenous heritage, compared to 4.9% of all Canadian citizens (Statistics Canada, 2017). Further, the most recent data suggest 23% of all DOs and 17% of all LTOs are of Indigenous heritage (Trevethan et al., 2002). Attempts to mitigate this disparity have been made, such as the implementation of the Gladue sentencing principle in 1999. The Gladue principle, per *R v Gladue* (1999), mandates that Canadian judges consider the unique historical and ongoing adversities Indigenous peoples face within Canadian society when administering sentences to Indigenous peoples. The principle further directs judges to consider all alternatives to incarceration when sentencing offenders of Indigenous heritage with an acknowledged goal of decreasing Indigenous peoples’ overrepresentation in the criminal justice system.

There has been much discussion as to why overrepresentation of Indigenous peoples in the justice system exists. Causes of this include the decades of systemic victimization Indigenous peoples faced at the hands of the Canadian government (Canada Privy Council Office, 2019; Monchalin, 2010), high levels of racism experienced by Indigenous peoples (Bailey, 2016), and risk factors for offending prevalent in Indigenous communities caused by this victimization (e.g., family violence, substance abuse; Monchalin, 2010). In specific reference to the overrepresentation of Indigenous offenders in the DO population, Jackson (2015) argues that Gladue factors are not considered or are considered differently in legal analyses of high-risk cases with an Indigenous defendant due to paragraph 79 in *R v Gladue.* This paragraphstates that the most serious and violent offences may be sentenced similarly across ethnicities due to broader sentencing goals of deterrence, denunciation, and separation. Jackson further states that this paragraph has led some judges to hesitate to apply Gladue principals in DO cases, since there may be an *inflation of* perception of risk (e.g., risk is deemed higher than necessary) and *deflation of* possibility for management of Indigenous peoples in the community, impacting DO sentencing.

A catalyst for the discussion of VRA and culture and how these factors interact for Indigenous peoples in Canada is the recent *Ewert v Canada* (2015, 2018) case. Mr. Ewert, who identified as Métis, made a legal claim against the Correctional Services Canada (CSC) for using VRA tools in his case. Mr. Ewert argued that these tools do not estimate risk in the same way for Indigenous peoples as they do for Caucasians because the tools were developed and normed on primarily Caucasian samples. He therefore claimed that the use of these tools violated his rights to life, liberty and security[[2]](#footnote-3) and to be equal before the law without discrimination[[3]](#footnote-4), as guaranteed to him by the *Charter of Rights and Freedoms* (1982). He also put forth that the CSC’s reliance on these tools for Indigenous offenders violated section 24 (1) of the *Corrections and Conditional Release Act* (1992)[[4]](#footnote-5) (CCRA). Further, he claimed that due to the potential of the VRA tools used in his case to assess his risk for violence incorrectly, his initial trial and sentencing outcome may not have been fair (*Ewert v Canada,* 2015, 2018). To capture the key arguments in the case, professionals who gave expert testimony provided commentary on their involvement and the status of the field of legal psychology in a special issue of the *Journal of Threat Assessment and Management* (Haag, 2016). Haag et al. (2016) highlighted that the Ewert case was significant in bringing to light the need for assessment tools used for specific cultural groups to have norms relevant for those populations to ensure equal treatment before the law. One of the experts from the case, Hart (2016), commented that there is a notable lack of empirically sound research and evidence that can support or disprove the validity of using VRA tools with Indigenous peoples and due to this, confusion on how to apply tools to Indigenous evaluees (Haag, 2016).

**Validity of VRA with Indigenous Peoples**

The preliminary foray into examining the validity of VRA tools when used to evaluate Indigenous peoples has produced varied results. Some research has demonstrated that all VRA tools examined display lower predictive validity when used with Indigenous offenders, no matter the type of recidivism being predicted (Gutierrez et al., 2016). Other research shows that some VRA tools perform quite similarly when assessing Indigenous and non-Indigenous offenders (e.g., the PCL-R; Olver, Neumann, Sewall, et al., 2018; the VRS-SO; Olver, Sowden, Kingston, et al., 2018). Many tools remain untested (e.g., the SVR-20 and HCR-20V3; Olver, 2016). Further, where predictive validity is known for Indigenous offenders, it is often lower than research standards say is acceptable (Gutierrez et al., 2016). For example, when the predictive validity of the Level of Service Inventory (LSI) was investigated for Indigenous offenders in a recent meta-analysis, it was found to be generally predictive of recidivism, yet five of eight subscales performed less accurately for Indigenous peoples, especially those assessed as lower risk (Wilson & Gutierrez, 2014). It is not known what causes the different performance of the tool across culture, yet its lower accuracy is a critical consideration in whether VRA tools like the LSI should be applied to the Indigenous population (Hart, 2016; Shepherd, 2016; Shepherd & Anthony, 2018; Shepherd & Lewis-Fernandez, 2018). In sum, the inconclusive research is concerning given the known use of VRA tools with Indigenous offenders (Gutierrez et al., 2016). This aptly demonstrates the gap in knowledge that Hart (2016) called attention to and shows the need to examine how frequently VRA tools are used to assess Indigenous defendants.

The Canadian government has publicly stated that it is unknown if many of the VRA tools used on Indigenous offenders accurately predict re-offending (Gutierrez et al., 2016). Despite this, the consideration of culture is conspicuously absent from Public Safety Canada (2018) recommendations on issues to address in a full DO/LTO assessment report. Public Safety Canada (2018) directs that it is preferable to conduct DO/LTO VRAs with actuarial assessment tools. Actuarial tools are a non-discretionary method of VRA, comprised of mostly static (unchangeable) and quantifiable risk factors (Nicholls et al., 2016). Actuarial measures take the sum of scores received on each item and use an algorithm based on the tool’s sample population to provide a total risk score (Heilbrun, 2009), with no use of clinical discretion or consideration of culture- or case-specific factors. In contrast, the structured professional judgment (SPJ) method of risk assessment is discretionary. Evaluators using this method can consider case-specific information, including any culture-specific risk factors, while systematically considering the presence and relevance of risk factors to determine risk level (Douglas & Belfrage, 2015; Nicholls et al., 2016). Given the varied and inclusive research on the application of VRA tools to Indigenous peoples and the fact that actuarial tools do not allow for clinical consideration of cultural factors impacting risk, it is curious that Public Safety Canada recommends the use of actuarial tools in all cases.

**The Consideration of VRAs by the Court**

Although inquiries into how VRAs used to evaluate Indigenous peoples are considered by the courts are novel, there has been some research examining how courts weigh VRAs in all cases (Blais, 2015; Cook & Hart, 2017; Kwartner et al., 2006; Storey et al., 2013). At present, only two studies have examined the consideration of VRAs in DO/LTO hearings. The first, conducted by Storey and colleagues (2013), investigated judicial comments regarding VRAs in Canadian Courts for general offender populations and included a subset of DO/LTO cases. Storey et al. (2013) found that several factors were important to judicial decisions including the type of information used by evaluators to reach an opinion, the extent that information was relied upon in reaching an opinion, evaluators’ understanding of VRA instruments, and evaluators’ ability to explain the VRA process to the court. However, no inquiry such as this has been conducted with a specific focus on Indigenous peoples. It is equally important to determine whether judicial consideration of the broad qualities of VRA in high-stakes cases and the expert testimony that pertains to it significantly differs between cases with an Indigenous and non-Indigenous defendant. This is vital given the overrepresentation of Indigenous peoples in the criminal justice system (Statistics Canada, 2017) and particularly in high-stakes cases (Trevethan et al., 2002). The second study conducted by Blais (2015) examined whether judges consider expert evidence on VRA in DO/LTO hearings. Blais found that judicial decisions were largely consistent with expert assessment of risk, treatability, and risk management, but similarly to Storey et al. (2013), did not separate Indigenous cases.

**Present Study**

Judges are the trier of fact in Canadian DO/LTO hearings. As such, judges are the main consumers of the VRA results presented by forensic evaluators. Judges use VRAs to inform their judgments and often give considerable deference to the opinions of forensic experts (Blais, 2015; Hicks, 2004). Judicial decision-making regarding violence risk as it pertains to culture has not been examined in the empirical literature. Therefore, the present study examines what judges consider in violence risk decision-making related to culture by comparing judicial discussions of violence risk in DO/LTO cases with Indigenous and non-Indigenous evaluees. Specifically, this study examines judicial comments regarding: (1) the qualities of the evaluators who conducted the VRA, (2) the qualities of the VRA(s) completed, and (3) the qualities of the evaluators’ expert witness testimony about the VRA.

**Method**

**Overview**

Judicial decisions that discussed VRAs in DO/LTO hearings were coded for demographic information, case information, and themes. Comparisons were then made using frequency analysis to identify any differences in the presence of the coded variables based on the ethnic background of the offender, as identified by the judge (i.e., Indigenous or non-Indigenous). Unfortunately, the pursuit of this research is challenging when examining published Canadian legal decisions as culture, when formally defined (i.e., “the ideas, customs, or social behaviour of a particular people or society”, culture, n.d.), is often not made explicit or discussed in a way in which researchers can examine the concept within a legal context. Therefore, it was chosen to use the imperfect method of using the identification of ethnicity, which is the state of presenting as or belonging to a certain ethnic group, as a proxy for culture. It is recognized this method is imperfect as ethnicity does not necessarily capture the nuances of how ones belonging to a certain ethnic group impacts their own experience of the ideas, customs, or social behaviours of a particular culture, or the degree of acculturation to different cultures when ones belongs to or identifies with one or more culture.

**Procedure**

Data were derived from published court decisions available from CanLII, the Canadian Legal Information Institute (www.canlii.org). CanLII is a publicly available legal database of judicial decisions from all levels of the Canadian court system.

CanLII was searched on January 25, 2017 using the following Boolean search terms: [*dangerous offender, long-term offender, violence risk assessment AND risk assessment*]*.* Inclusion criteria were court decisions where: 1) the legal judgment occurred between January 1, 2009 and December 31, 2016[[5]](#footnote-6); 2) a DO/LTO application was before the court; 3) there was expert evidence on VRA discussed by the judge (although VRAs are required for DO/LTO hearings, judges may or may not have discussed the VRA evidence in their reasons for judgment); 4) the case was not an appeal case; and 5) the decision was published in English[[6]](#footnote-7). The initial search resulted in 693 cases. Duplicate cases were removed (*n* = 143). Of the remaining 550 cases, 336 were removed as they did not meet one or more of the inclusion criteria (e.g., 91 did not include a DO or LTO assessment, 76 were Appeal cases). A total of 214 cases remained for analysis.

Decisions were coded by one of two coders (M.E. or E.D.) using a 24-item coding sheet that included items related to demographic information about the case and three a priori categories of judicial comments derived from previous research (Storey et al., 2013). Regarding demographics, offenders were considered Indigenous when they were identified as First Nations, Métis, or Inuit (*n* = 56; 26.2% of all cases), which is consistent with the Government of Canada definition of Indigenous peoples, or in the absence of identification of ethnic origins when a Gladue report was included in the decision (*n* = 28; 13.1% of all cases), as Gladue reports are only requested for offenders of Indigenous descent (*R v Gladue*, 1999). Using this methodology, it is reasonably certain that all Indigenous offenders were identified. It is therefore assumed that no Indigenous offenders remained in the unknown ethic origin group, with the exception of those with Indigenous descent that do not identify as Indigenous, for which the number is unknown.

Within the sample of cases with an Indigenous defendant, judicial comments on culture were separated into two categories: superficial and meaningful. A comment was considered superficial if the judge only acknowledged that the offender was of Indigenous decent and provided no further elaboration or discussion. This happened in three circumstances across cases: (1) the judge referred to the defendant as “Indigenous” but did not elaborate, (2) a Gladue report was referred to but not discussed further, and (3) the judge mentioned Indigenous-specific programming but only mentioned the program name and did not elaborate further. A comment was considered meaningful if the judge discussed the offender’s Indigenous background in more depth, such as commenting on cultural risk factors that lead to a higher likelihood of incarceration for Indigenous peoples, discussing the presence of the Indigenous defendant’s interest in their culture, or mentioning the benefits of Indigenous support systems for the defendant.

The three a priori categories from Storey et al. (2013) included judicial comments regarding: (1) the qualities of the evaluators who conducted the VRA, (2) the qualities of the VRA(s) completed, and (3) the qualities of the evaluators’ expert witness testimony about the VRA. Within these three a priori categories, Storey et al. (2013) found specific subthemes; the same a priori subthemes were used herein to guide this study’s qualitative coding. Additionally, in all cases where culture was discussed, the nature of that discussion as it related to a priori categories was coded to gather details from judicial comments specific to culture. Prior to coding the data, four practice cases were coded to ensure coder agreement on the criteria and any disagreements were discussed and clarified. Next, interrater agreement was established by comparing the coding of the two coders on 44 randomly selected cases (20.6% of sample). Interrater reliability was only assessed on variables that relied on human judgment (e.g., determination if a theme was present) where discrepancies were most likely to occur. Comparisons were made using intraclass correlation coefficients (ICC1; all ICC1 values were calculated using single measures with two-way mixed effects models and absolute agreement) to determine whether raters had identified the same number of judicial comments across each of the three categories examined. ICCs for the three categories separately ranged from good to moderate where ICC > .75 = excellent; ICC from .60 to .75 = good; ICC from .40 to .60 = moderate; ICC < 40 = poor (Fleiss, 1986). Judicial comments regarding evaluators’ qualities was .74 (good), judicial comments regarding VRA qualities was .70 (good), and judicial comments regarding evaluators’ testimony was .50 (moderate).

**Sample Characteristics**

Only 113 (52.8%) of the 214 cases explicitly identified the ethnic or cultural origins of the offender in the judicial decision. These 113 cases were the sole cases analyzed when examining themes of ethnicity, while all 214 cases (split into those that did and did not identify an offender of a minority ethnicity) were utilized to compare the prevalence of themes unrelated to ethnicity (see “Broad Non-Cultural Themes…”). Of the cases where ethnic origins were identified, most offenders were identified as having First Nations origins (*n =* 50; 44.2%). The remainder were identified as White (*n =* 20; 17.7%), Métis (*n =* 5; 4.4%), Latin, Central, or South American (*n =* 3; 2.7%), African (*n =* 2; 1.8%), Asian (*n =* 2; 1.8%), Caribbean (*n =* 2; 1.8%), and Inuit (*n =* 1; <1%). Using our procedure of identifying Indigenous offenders (i.e., offenders were identified as First Nations, Métis, or Inuit [*n* = 56; 26.2% of all cases] or when a Gladue report was included in the decision [*n* = 28; 13.1% of all cases]), it was determined that 84 (39.3%) of the 214 cases involved an Indigenous offender. The remaining cases were non-Indigenous White (*n =* 20; 9.3%), non-Indigenous ethnic minorities (*n* = 9; 4.2%), and unknown ethnic origin (*n* = 101, 47.2%). See Table 1 for a detailed breakdown of sample characteristics for cases with Indigenous and Non-Indigenous defendants.

Of the 214 cases, 69.6% (*n =* 149) were hearings for DO applications, 20.1% (*n =* 43) were hearings where joint DO/LTO applications were submitted, and 10.3% (*n =* 22) were hearings for LTO applications. Sexual violence was the index offence in 55.1% (*n =* 118) of cases and the remaining index offences were violent non-sexual offences (44.9%, *n =* 96). Regarding the outcome of the case, in 27.1% (*n =* 58) of the cases the offender was designated an LTO, in 69.2% (*n =* 148) the offender was designated a DO, and in 3.7% (*n =* 8) the offender was given a regular sentence with no DO or LTO designation.

In most cases (72.0%, *n =* 154), the evaluators opined that the offender was a high risk to reoffend. In 12.6% (*n =* 27), evaluators opined that the offender was a moderate to high risk, in 6.1% (*n =* 13) offenders were deemed to be moderate risk, and in < 1% (*n =* 1) they were identified as low risk. Half (50.5%, *n* = 108) of the cases had more than one evaluator, and in 9.3% (*n =* 20) of these cases evaluators disagreed on whether the offender was a low, medium, or high risk to reoffend.

In 45.8% (*n =* 98) of cases, the method of conducting the VRA involved the use of both actuarial tools and structured professional judgment tools, in 27.1% (*n =* 58) only actuarial tools were used, in 17.3% (*n =* 37) the method of VRA was not indicated, and in 9.8% (*n =* 21) only structured professional judgment was used. Cases were heard across a range of provinces and territories in Canada but the frequency of cases in each area was comparable to the density of the populations in those areas except for Quebec where a small number of cases were included. It is likely the lower number in Quebec is a result of cases in French not being included due to researcher constraints as French is more commonly used in Quebec than the other proviences.6 Ontario was the setting for 36.4% (*n =* 78) of cases, 21.9% (*n =* 47) of cases were judged in Saskatchewan, 17.3% (*n =* 37) in British Columbia, 8.9% (*n* = 19) in Alberta, 6.5% (*n =* 14) in Manitoba, 4.2% (*n =* 9) in Nova Scotia, 2.3% (*n =* 5) in the Yukon Territories, 1.4% (*n =* 3) in Quebec, and < 1% (*n =* 2) in the Northwest Territories.

A total of 110 experts provided evidence. About half of the experts (*n* = 53, 48.2%) provided evidence multiple times, completing an average of seven VRAs (*SD* = 6.50, range: 2-29). Most experts completing multiple VRAs did so in two (*n* = 19, 36%) or three cases (*n* = 12, 23%), with the remainder providing evidence in 4 to 29 cases. Evidence was provided on 356 occasions. Evidence was mostly provided by psychiatrists (*n* = 212, 60%) or psychologists (*n* = 105, 29%); the professional was unspecified in the remaining cases (*n* = 39, 11%).

A total of 175 judges provided judgments in the cases examined; most (*n* = 144; 67.3%) only provided a judicial opinion in one case. When more than one judgment in the sample was completed by the same judge, the average number of opinions provided was 2.32 (*SD* = 0.54; mode = 2), with a range of 2 to 4 opinions (22 judges provided 2 opinions, 8 judges provided 3 opinions, and 1 judge provided 4 opinions).

**Data Analysis**

Analyses were completed using SPSS Version 24. First, the number of times judges commented on culture or ethnicity in Indigenous cases was analyzed and comments were separated into the superficial and meaningful categories. Next, qualitative analyses were conducted using conventional content analysis to examine themes among the judicial comments that referenced culture. Conventional content analysis is a qualitative method of analytics used where no prior research has been conducted (Hsieh & Shannon, 2005). This is in contrast with directed content analysis which is applied when there has been research conducted on a phenomenon, and therefore the researcher is informed regarding what themes they should be searching for among their data or summative content analysis where one identifies certain predetermined words or ideas to understand their contextual usage (Hsieh & Shannon, 2005). In contrast, directed content analysis was used, given the previous research conducted by Storey et al. (2013), to count pre-established subthemes within the a priori categories described above of judicial comments regarding: (1) the qualities of the evaluators who conducted the VRA, (2) the qualities of the VRA(s) completed, and (3) the qualities of the evaluators’ expert witness testimony about the VRA.

Last, the frequency of the previously identified three categories of judicial comments and their sub-categories were compared to determine if factors unrelated to culture occurred with comparable frequency for Indigenous and non-Indigenous offenders. The frequency of themes for these three categories was also compared using a test of two proportions. Additionally, the overall number of VRA tools used with Indigenous and non-Indigenous defendants was compared using an independent samples t-test and the frequency of use of each tool within the same samples was analyzed with a test of two proportions.

**Results**

As depicted in Figure 1, themes relating to culture were identified in 93 (43.5%) judicial decisions. Most of the 93 cases involved offenders ethnically identified as Indigenous (*n* = 84, 90.3% of cases where ethnicity was identified) and no cases with culture identified involved a White defendant. While ethnicity or Gladue factors were mentioned in all 84 cases with an Indigenous defendant, in 30 (35.7%) of those cases, the judge commented on the defendant’s culture in a superficial manner (e.g., merely stating the defendant was Indigenous or that Gladue factors should be attended to). In the remaining 54 (64.3%) of the 84 cases, the judge commented on culture in a meaningful way by discussing (1) risk factors appearing more prevalently in Indigenous culture either generally, where the judge merely acknowledged the impact of risk factors, or specifically, where they explained what the risk factors were; (2) the applicability of DO/LTO sentencing or VRA generally to Indigenous peoples, or (3) the impact of racism on the defendant’s life. When superficial or meaningful mentions of culture were discussed in Indigenous cases, these cases were equally as likely to result in a DO, LTO, or regular sentence finding (χ² = 5.28, *p* > .05). However, Indigenous defendants were significantly more likely to be deemed high risk of reoffending by experts than non-Indigenous defendants (χ² = 14.95, *p* < .001). Indigenous defendants with culture considered superficially were not more likely to be designated high risk than defendants with culture considered meaningfully (χ² = .50, *p* > .05). All discussions of culture in the non-Indigenous cases with defendants of other ethnicities were superficial.

**Cultural Themes in Indigenous Cases**

In the 84 cases with an Indigenous defendant, 255 comments about culture were identified. A total of 7 themes related to culture were identified from the conventional content analysis of those comments (see Table 2). The most common theme across cases was *ethnicity* (72.6%, *n =* 61), where the judge referred to the defendant as Indigenous (e.g., “[the defendant] was born to Aboriginal parents in Manitoba”). *Gladue factors* was the second most frequent theme (69.0%, *n =* 58), where the judge mentioned the necessity of considering Gladue factors in sentencing, but did not elaborate further (e.g., “[because the defendant is] considered an aboriginal offender, a Gladue Report was prepared pursuant to s.718.2 (e) of the Criminal Code”). Of note, in two of these 58 cases, the judge rejected the consideration of Gladue factors. The third most common theme was the judge’s discussion of *past or potential Indigenous specific programming* that the defendant has or should participate in (55.9%, *n =* 47). Fourth was a discussion of *culturally-relevant risk factors* (47.6%, *n =* 40). For 25 of the 40 culturally relevant risk factors (62.5%), judges only made a general reference (e.g., “there is an explicit causal relationship between the offender’s Aboriginal status and the major problems subsequently developed”). In the other 15 (37.5%) instances, the judged referred to specific risk factors (e.g., “[the Gladue report filed] found that the substance abuse, family violence, and family dislocation documented by the Royal Commission on Aboriginal Peoples appear to have led to a multitude of negative impacts in [the defendant’s] life”). The most frequently referenced specific risk factors were as follows: substance abuse (27.5% of the 40, *n =* 11), poverty (20.0%, *n =* 8), the influence of residential schools (15.0%, *n =* 6), high unemployment rates (15.0%, *n =* 6), and high suicide rates (10.0%, *n =* 4).

The *applicability of VRA to Indigenous offenders* was the fifth theme identified (14.3%, *n =* 12). Judges supported the use of VRA tools with Indigenous offenders in three (25.0%) of the 12 cases that discussed this theme, criticized their use in three cases (25.0%) and discussed the issue but did not take a stance in the remaining six cases (50.0%). One example of a criticism was: “the conclusion from [the evaluator’s] expert report is that the actuarial tests are not sufficiently predictably reliable for Aboriginals because of the cultural variance or bias of the tests.” One judge who did not take a stance commented: “[the evaluator did agree that] the HCR-20 has not been subjected to a specific evaluation as to whether the results are good, better, or worse in Aboriginals than in non-Aboriginals.” Other themes arising in judicial discussion of culture in the 84 Indigenous cases included *the offender’s experience of culture* (21.4%, *n =* 18) (e.g. “[the defendant] has made some positive steps to become more involved in his aboriginal culture and heritage”) and*the application of DO/LTO sentencing to Indigenous peoples* (11.9%, *n =* 10) (e.g., “because of the serious nature of the offences which bring about a dangerous offender application, incarceration will generally be the result for both aboriginal and non-aboriginal offenders alike”). While not frequent enough to be considered themes, it is of note that discussion of the defendant experiencing racism was present in four cases and discussion of the benefit of Indigenous family and friend supports was present in one case.

**Comparison of Broad Non-Cultural Themes in Indigenous and Non-Indigenous Cases**

 **Theme 1: Qualities of the evaluators who conducted the VRA.** The five sub-themes previously identified by Storey et al. (2013) were also present within the broad theme of judicial comments on the qualities of the evaluators for Indigenous (*n* = 84) and non-Indigenous (*n* = 130) cases. The most common theme was the *evaluators’ work experience* (Indigenous 39.3%, *n =* 33; Non-Indigenous 42.3%, *n =* 55), followed by the *academic/professional qualifications of the evaluators* (Indigenous 48.8%, *n =* 41; Non-Indigenous 36.9%, *n =* 48), and the *evaluators’ previous experience with DO/LTO evaluations* (Indigenous 22.6%, *n =* 19; Non-Indigenous 13.1%, *n =* 17). The least frequent qualities of the evaluators discussed were the *evaluators’ previous experience as an expert**witness* (Indigenous 8.3%, *n* = 7; Non-Indigenous 3.1%, *n* = 4) and the *evaluators’ reputation in their field* (Indigenous 2.4% *n* = 2; Non-Indigenous 1.5%, *n* = 2). Frequencies for sub-themes were compared for cases with and without an Indigenous offender using tests of two proportions, with no significant differences found (*p* > .07).

**Theme 2: Qualities of the VRA(s) completed.** The eight sub-themes from Storey et al. (2013) were present in the judicial comments on the qualities of the VRA tools used in Indigenous cases (*n* = 84) and non-Indigenous cases (*n* = 130). The first sub-theme was the *overall quality of the VRA* (e.g., “the VRA used was deemed comprehensive yet practical”; Indigenous 7.1%, *n =* 6; Non-Indigenous 6.2%, *n =* 8), followed by *judicial preference for certain VRA tools*(e.g., “the HCR-20 is the leading violence risk assessment tool [in the field]”) (Indigenous 5.9%, *n =* 5; Non-Indigenous 6.9%, *n =* 9), and *criticism of the VRA tool used* (e.g., where the judge found that the tool was not validated by sufficient research or that the evaluator mishandled its use; Indigenous 4.8%, *n =* 4; Non-Indigenous 6.9%, *n =* 9). The remaining sub-themes were: *materials used in the VRA* (e.g., interview with the defendant, case files) (Indigenous 3.5% *n =* 3; Non-Indigenous 8.5%, *n =* 11), *comparison between two VRA tools*(Indigenous 3.6%, *n =* 3; Non-Indigenous 5.4%, *n =* 7; e.g., “The latter two experts were much more clear about what they had reviewed [than the first expert]”), *the applicability of VRA with Indigenous defendants*(Indigenous 3.6% *n =* 3; Non-Indigenous *n* = 0; e.g., “[the issue of whether] the CSC's reliance on actuarial risk assessment tools for aboriginal offenders constitutes a breach of its obligations under the CCRA and s. 7 and/or 15 of the Charter”), *the outcome of the VRA tool*(Indigenous 2.4%, *n =* 2; Non-Indigenous 7.7%, *n =* 10; e.g., “[the risk assessment total] scores were lower than those obtained by [the evaluator] on the same measures (two points lower on the Static-99R and six points lower on the PCL-R)”), and *the content of the VRA tool*(Indigenous 1.2%, *n =* 1; Non-Indigenous 5.4%, *n =* 7).

When comparing the statistical significance of the proportions of Indigenous and Non-Indigenous sub-themes regarding the qualities of the VRA, only one theme showed a significant difference, *content of the VRA* (*p* = .03). An example of this theme is: “some concerns with respect to [the evaluator’s] report. His risk assessment testing seems to be limited in that apart from the psychological type testing he did, his report reflects that the only ‘risk instrument’ he used as the PCL-R-2.” A discussion of the content of the VRA was more common in non-Indigenous cases (*n* = 7) than in Indigenous cases (*n* = 1). No other subthemes were significantly different in Indigenous and non-Indigenous cases (*p* > .10).

The frequency with which VRA tools were used in Indigenous and non-Indigenous cases was also examined (see Table 3).The Non-Indigenous defendants (*M* = 3.90, *SD* = 2.68) compared to the Indigenous defendants (*M* = 3.07, *SD* = 1.75) were assessed using a significantly higher number of VRA tools, *t*(167) = -2.43, *p* = .02. When comparisons were broken down by tool, three tools were used more frequently to assess Indigenous defendants than Non-Indigenous defendants: the RSVP (*p* = .01), the HCR-20 (*p* = .01), and the SARA (*p* = .04). Three tools were employed to assess Non-Indigenous defendants more often: the PCL-R (*p* < .01), the SORAG (*p* = .03), and the VRAG (*p* = .03).

**Theme 3: Qualities of the evaluators’ expert witness testimony about the VRA.** The four sub-themes first found by Storey et al. (2013) also were apparent throughout the judicial comments on the evaluators’ testimony in Indigenous cases (*n* = 84) and Non-Indigenous cases (*n* = 130). The first sub-theme was the judge’s *overall impression of the evaluators’ testimony* (Indigenous 28.5%, *n =* 37; Non-Indigenous 28.6%, *n =* 24; e.g., “[the expert] displayed a professional demeanor throughout”). The second subtheme was *judicial agreement with the evaluators’ testimony* (Indigenous 16.7%, *n =* 14; Non-Indigenous 21.5%, *n =* 28). The third was *judicial criticism of the testimony* (Indigenous 18.5%, *n =* 24; Non-Indigenous 20.2%, *n =* 17) and *judicial disagreement with the testimony* (Indigenous 7.1%, *n =* 6; Non-Indigenous 12.3%, *n =* 16) was the fourth. No significant differences were found within tests of two proportions for frequency of themes in cases with an Indigenous and non-Indigenous defendant (*p* > .22). There were no references to culture in the comments on the testimony of the evaluators in any case with an Indigenous defendant.

**Discussion**

**Consideration of Culture**

This study was the first to examine culture as it relates to expert evidence on VRA within judicial decisions. The first major finding was that culture is not always considered in judicial decisions regarding violence risk. In fact, cultural was only meaningfully considered in a small number of the 214 cases examined (25.2%). Specifically, the results indicated that culture was identified explicitly (i.e., either superficially or meaningfully) by judges in just under half of all cases (43.0%) -- in almost all these instances the case involved an Indigenous defendant (89.4%). Put another way, this meant that in most (74.8%) of the cases examined there was either no discussion of culture or only a superficial discussion. While this was expected to a degree, as most non-Indigenous offenders are White (Public Safety Canada, 2019) and judges would be unlikely to make reference to a majority ethnicity in their decisions, other cultures were represented in the sample (see Sample Characteristics) and when culture was not identified (in 47.2% of the sample) it is likely that a portion of these offenders were non-White, non-Indigenous offenders based on the diversity of the Canadian Federal Correctional population (Caucasian = 56.3%, Indigenous = 24.0%, Black = 7.3%, Asian = 5.5%, Hispanic = 1.1%, Other/unknown = 5.9%; Public Safety Canada, 2019). Despite this likelihood, culture was not considered for these other non-White groups. Given the diversity of this population, the same thoughtful consideration of how culture may affect VRA can and should be extended to individuals from all cultures (American Psychological Association, 2013; Cook & Hart, 2017; Haag, 2016; Knapp & VandeCreek, 2006). As stated by Cook and Hart (2017): “Considering culture in violence risk assessment goes beyond noting that someone is from a specific cultural background. It takes critical and careful evaluation and review of an individual’s history and current functioning in the context of the culture with which they identify and discerning not only if there are unique cultural considerations *present*, but if culture is *relevant* to the evaluee’s violence risk” (p. 139). Culture should always be considered, particularly for individuals from cultures that differ from the cultures in which VRA tools have been developed or validated (Haag, 2016) and certainly other cultural factors can contribute to the nature of violence risk (Shepherd & Anthony, 2018). The nature of our data did not allow us to better understand why culture is not being considered by judges. It is possible, or even likely given the recent findings by Riggs Romaine and colleagues (2018) on the variability in such judicial reporting, that the evaluators were not reporting on race, ethnicity, and/or culture and the relevance of this to risk and manageability and therefore the judges had nothing from the report to discuss.

 The culture of the offender was unknown in over half of the cases in our sample. Other than Indigenous culture (identified in 84 cases), culture was only identified in eight cases where offenders had other cultural origins, specifically Latin American, African, Asian, and Caribbean origins. The lack of identification as well as the narrow range of cultural origins identified is concerning since Canadians represent over 250 ethnic origins or ancestries, with 41.1% of Canadians reporting having multiple ethnic origins (Statistics Canada, 2019). This suggests that non-White, non-Indigenous culture was under-discussed in our sample and points to a clear need for further research as well as a need for the same thoughtful consideration by judges and evaluators regarding how culture may affect VRA for individuals from other cultures (American Psychological Association, 2013; Cook & Hart, 2017; Haag, 2016; Knapp & VandeCreek, 2006).

**Consideration of Indigenous Culture**

The nature of the data allowed us to systematically analyze judicial consideration of Indigenous culture. The results revealed that culture is being considered meaningfully in many (64.3%), but not all, cases with an Indigenous offender (*n* = 84). Although this is positive, it is insufficient according to Canadian case law; *R v Gladue* (1999) stipulates that judges *must always* consider culture. Specifically, *R v Gladue* (1999) stipulates that principles and factors, especially the offenders’ unique circumstances, *must* be taken into consideration when sentencing Indigenous offenders in Canada. The court must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts, and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection (*R v Gladue*, para 93(6)). It is concerning that these requirements, as put forth by Jackson (2015), are not being met or are met too late in the process to be useful and potentially even harmful in Canadian DO cases.

Our results also demonstrated that Indigenous culture was found to be related to risk outcomes. Indigenous defendants were significantly more likely to be considered higher risk for reoffending by experts. Although risk ratings differed, types of sentence did not differ between the two groups. This may suggest cultural factors were not considered in rating overall risk but were considering in determining length of sentence. Or, in line with Jackson’s (2015) suggestion that judges may not be considering Gladue factors in DO cases for Indigenous peoples (hence the higher risk ratings) and given the severity of DO/LTO offences, there is little practical likelihood we would see differences in sentences for Indigenous offenders from non-Indigenous offenders (hence the similar sentences). We were unable to examine the impact of a meaningful cultural discussion on the conditions of sentencing imposed due to data collection limitations. However, we would expect a meaningful discussion to impact conditions imposed given the guidance on culturally appropriate sentencing.

**Cultural Themes and Implications for Practice**

This study identified seven broad themes related to culture (see Table 2). Although there was a theme that captured the superficial mentions of culture (Demographic Ethnicity), there were many themes that provided clarity regarding how judges meaningfully considered culture. Judges articulated how culture was present and relevant to an offenders’ risk and management through the consideration of Gladue sentencing principles, Indigenous Specific Programming and Indigenous risk factors. Relatedly, judges were considering the offender’s experience of Indigenous culture. The presence of these themes indicates that when judges meaningfully consider culture they are doing so in line with what we were expecting (i.e., Cook & Hart, 2017). The judges also discussed how VRAs are applied to Indigenous Offenders and the application of DO/LTO sentencing to Indigenous Peoples, bringing life to many of the considerations outlined in *Ewert v. Canada* (2018) and the Haag (2016) special issue: for example, the status of research on the use of specific VRA tools with Indigenous peoples.

Another notable finding was that there was only judicial consideration of the evaluators’ experience with Indigenous offender assessment in a minority of cases (11.9%). This suggests that cultural competence among evaluators in applying VRA tools to Indigenous evaluees is assumed, rather than challenged and carefully considered in judicial decisions. Although it is expected that Canadian evaluators have developed competence in assessing violence risk among Indigenous evaluees, this should not be assumed. Evaluators are required to consider culture in the evaluation of violence risk and how culture impacts the selection and application of VRA tools across cultures (see Cook & Hart, 2017; Knapp & VandeCreek, 2006; Shepherd & Lewis-Fernandez, 2018). Cultural factors can impact the application of or interpretation of psychological tests and it is essential that this information be integrated into the selection of a particular test, its interpretation, and in the way in which the information is considered in the overall conceptualization of the case. This has been explicitly established in the Specialty Guidelines for Forensic Psychology of the *American Psychological Association* (2013). The specialty guidelines direct professionals to appreciate individual and group differences (i.e., per Guideline 2.08, understanding culture: understanding how culture may affect and be related to an individual contact and involvement in the legal system) and to appreciate individual differences when interpreting assessment results (i.e., per Guideline 10.03: consider how culture might affect the assessors own judgments or reduce the accuracy of their interpretation of their tests). Given this expectation at a practice level, we encourage legal counsel to challenge expert experience on culture and cultural competence to ensure evaluees are being evaluated by professionals with appropriate experience and competence to conduct these assessments. This is in line with the call by Shepherd and Lewis-Fernandez (2018) for evaluators to establish and maintain capacity for cross-cultural assessment. The authors state: “Clinicians must be regularly educated in cultural competency or safety to ensure that risk assessment interviews gather relevant and meaningful information without unintentionally alienating, offending, or demeaning the client. A clinician’s cross-cultural aptitude can shape the risk assessment experience (i.e., patient candor or rapport, symptom interpretation, and risk precision) and should not be undervalued.” (p. 434). This may be taking place and not discussed in the judicial decisions we reviewed, but given the importance it is worth underscoring here. Legal professionals should also obtain and maintain cultural competence. If culture is not being considered thoughtfully in all cases, it may be a function of legal professionals not being adequately aware of the importance of culture on the assessment of violence risk. We are unaware of any current professional guidelines in the legal community relating to the consideration of culture beyond case law (i.e., *R v Gladue*, 1999, *R v Ipeelee*, 2012) and suggestions set out by a legal professional on the matter (i.e., Jackson, 2015).

**General (Non-Cultural) Findings**

The results indicate that there was no difference in the judicial consideration of the broad qualities of VRAs across Indigenous and non-Indigenous cases (i.e., overall quality of the assessment, judicial preference for certain VRA tools, and criticism of the tools used), however there was significantly more consideration of the content of the VRA in non-Indigenous cases. The general lack of significant differences is in contrast to what would be expected given that Indigenous evaluees are required by law to be given additional consideration based on culture. This further highlights the need for increased cultural competency in the context of VRA for legal professionals.

The results also showed that VRA tools were used in most (83.3%) cases where the offender was Indigenous. It is clear that VRA tools are being used with Indigenous offenders, despite the fact that research on the use of VRA tools with Indigenous offenders is not prevalent or conclusive (Gutierrez et al., 2016) and that it is still unknown whether VRA tools categorize Indigenous offenders as high risk in disproportionate numbers (Olver, 2016). This result is however in line with some recommendations, for example, by Gutierrez et al. (2016) who recommend that VRA still be conducted with Indigenous offenders unless and until better researched options with higher predictive validity are presented. Relatedly, Olver (2016) advises that a gap in evidence does not automatically translate to low predictive validity. The finding that VRA tools and actuarial tools specifically are generally being used more frequently for Non-Indigenous defendants is also encouraging, as this likely reflects a decision by evaluators to not use the tests on groups for which they are not validated. Further to this, SPJ tools that allow for clinical consideration of item relevance and case-specific risk factors (i.e., RSVP, HCR-20, and SARA) were being used more frequently with Indigenous offenders, and actuarial tools that have no discretion (i.e., PCL-R, SORAG, and VRAG) were being used less frequently with Indigenous offenders.

Although results showed the utilization of VRA tools, and in particular actuarial tools, was reduced with Indigenous defendants comparatively to Non-Indigenous, tools were still used frequently with Indigenous peoples. As such, the validation of *all* the tools that are currently being used with Indigenous peoples is a priority of future research. Shepherd and Lewis-Fernandez (2018) provide a concise review of the challenges in this area and suggest that efforts be made in examining how culture impacts the development and application of VRA tools, that item-content may need to be modified for cultural specification, and that there is a potential need to develop entirely new tools for certain minority populations. More immediately, evaluators must decide which tools to use with Indigenous offenders based on the currently limited research base. As with any other clinical decision regarding what tool(s) to use for an evaluation, evaluators will want to decide based on the extant evidence, particularly work by Olver, Neumann, Sewall, et al. (2018) and Olver, Sowden, Kingston, et al. (2018). In doing this, evaluators may want to consider factors such as the intended population and context in which the tool is meant to be used, if there are any limitations of using the tool with Indigenous offenders, and if there is any relevant research about the application of the VRA instrument with Indigenous offenders. This is especially true in the highest stakes cases where the outcomes of these tools inform decisions about attaching life-long labels of dangerousness and indefinite sentences to offenders.

**Limitations**

This study has several limitations. First, since the materials utilized were written transcripts of judicial decisions, the data and subsequent conclusions are based on judges’ interpretations of the expert evaluators’ reports. The content that a judge includes in their written decision may also not comprehensively discuss every factor that influenced their decision. Cultural considerations may have been omitted due to social desirability bias (e.g., not wanting to appear racially biased) or for other, unknown reasons. It was not possible to access the original expert reports to confirm whether culture was meaningfully considered by the evaluator, or to identify what was discussed in court. Second, it was only possible to use published judicial decisions. While CanLII attests that the Institute makes every effort to provide users with a comprehensive database, some delays may result due to the courtroom-to-online transcription process leaving an unknown number of cases excluded from our analyses. Third, while we are reasonably confident that we correctly identified the Indigenous cases in the sample, it was impossible to assess the extent to which the defendant identified with Indigenous culture or their level of acculturation into other cultures, such as the dominant Canadian culture. This is important because the relevance of culture may differ depending on an individual’s identification with Indigenous culture and the degree to which, if any, they identify with another culture or cultures. Fourth, the number of the Indigenous and non-Indigenous cases were not equal and could detract power from the statistical analyses conducted. Lastly, we only examined interrater agreement on the number of comments provided by judges, not the content of the comments. We also did not assess for interrater agreement intermittently after the coding began. Optimally, our coding procedures would have reflected these elements and we cannot be certain that the same content of contents was reliably coded or if coding remained reliable over the entire sample.

**Suggestions for Future Research**

This study was the first to examine how judges consider culture in cases with Indigenous defendants. Future studies can build on these initial efforts by addressing some of the limitations of the current methods, specifically (1) investigating expert reports *and* their interpretation by judges, (2) utilizing methods that can examine the impact of level of acculturation into the dominant Canadian culture or other cultures on VRA and judicial decision making on VRA, and (3) examining the cultural competence of evaluators and judges who work on cases with Indigenous offenders. One important avenue will be to gain an increased understanding of the findings of Riggs Romaine and Kavanaugh (2018) to determine if there is variability in reporting on race, ethnicity, and/or culture, and why this may be the case. For example, evaluators may not be reporting on race, ethnicity, and/or culture out of fear they will be perceived as racially biased, or because they lack the requisite training. Further to this, as this study was conducted on Canadian cases involving high-stakes evaluations and specifically examined Indigenous culture, it will also be important to expand the investigation to lower stakes cases, other cultural groups, and other countries. Lastly, we suggest that this topic should also be explored through a comparative law review by our colleagues in the legal profession in other countries, such as that done by Jackson (2015) and Thompson (2016) in Canada.

The results suggest that although some practices in the consideration of violence risk in cases with Indigenous offers are in line with recommendations and Canadian case law, culture is not being routinely or meaningfully considered in all cases. It is therefore important that we continue to critically examine whether and how professionals incorporate cultural in their evaluations of risk and that we continue to increase cultural competence of professionals through education and research.

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Figure 1. *Depth of Consideration given to Culture in Cases Analyzed*

Table 1

*Sample Characteristics for Indigenous and Non-Indigenous Offenders*

|  |  |  |
| --- | --- | --- |
|   | Indigenous % (*n*)(*n* = 84) | Non-Indigenous % (*n*)(*n* = 130) |
| Type of application Dangerous offender DO/LTO combined  Long-term offender | 65.5% (55)19.0% (16)15.5% (13) | 72.3% (94)20.8% (27)6.9% (9) |
| Outcome of case Dangerous offender Long-term offender Regular sentence | 72.6% (61)25.0% (21)2.4% (2) | 68.5% (89)26.2% (34)4.6% (6) |
| Evaluators’ opinion of risk Low risk Moderate risk Moderate to high risk High risk Disagreement | 0% (0)0% (0)8.3% (7)85.7% (72)4.8% (4) | 0% (0)8.5% (11)18.5% (24)62.3% (81)10.8% (14) |
| Number of evaluators | 1.45 | 1.82 |
| Judicial agreement with evaluators Agreed with both Agreed with one Agreed with neither Agreement not mentioned | 70.2% (59)13.1% (11)1.2% (1)15.5% (13) | 70.0% (91)20% (26)0.8% (1)9.2% (12) |
| Method of assessment Actuarial and structured professional judgment  Structured professional judgment Actuarial tool Structured professional judgment and other  Actuarial, structured, and unstructured judgment Unknown | 48.8% (41)16.7% (14)14.3% (12)2.4% (2)1.2% (1)16.7% (14) | 42.3% (55)3.8% (5)35.4% (46)0% (0)0.8% (1)17.7% (23) |
| Location of case  Ontario  Saskatchewan British Columbia Alberta  Manitoba Yukon Northwest Territories Quebec Nova Scotia | 15.5% (13)39.3% (33)13.1% (11)11.9% (10)9.5% (8)6.0% (5)2.4% (2)1.2% (1)1.2% (1) | 50.0% (65)10.8% (14)20.0% (26)6.9% (9)4.6% (6)0% (0)0% (0)1.5% (2)6.2% (8) |

Table 2

*Percent and Frequency of Themes Identified Related to Indigenous Culture*

|  |  |  |
| --- | --- | --- |
| Theme | % | *n* |
| Demographic Ethnicity | 71% | 61 |
| Gladue Sentencing Principles | 69% | 58 |
| Indigenous Specific Programming | 55% | 47 |
| Indigenous Risk Factors | 47% | 40 |
| General Mention | 29% | 25 |
| Specific Mention | 18% | 15 |
| Offender Experience of Indigenous Culture | 21% | 18 |
| VRA Applicability to Indigenous offenders | 14% | 12 |
| DO/LTO Sentencing of Indigenous Peoples | 12% | 10 |

*N* = 84

Table 3

*Frequency of Use of VRA Tools with Indigenous and Non-Indigenous Defendants*

|  |  |  |  |
| --- | --- | --- | --- |
| VRA Tool | Indigenous % (*n*)(*n* = 84) | Non-Indigenous % (*n*)(*n* = 130) | χ2 |
| *Actuarial VRA Tools* |  |  |  |
| Psychopathy Checklist-Revised (PCL-R) | 38.1 (32) | 68.5 (89) |  21.07\*\* |
| Violence Risk Appraisal Guide (VRAG) | 34.5 (29) | 50.0 (65) | 4.85\* |
| Static-99/Static-99R | 34.5 (29) | 46.2 (60) | .14 |
| Sex Offender Risk Appraisal Guide (SORAG) | 21.4 (18) | 35.4 (46) |  4.89\* |
| Violence Risk Scale (VRS) | 5.9 (5) | 2.3 (3) | 2.00 |
| Level of Service/Case Management Inventory (LS/CMI) | 4.8 (4) | 1.5 (2) | 2.09 |
| Level of Service Inventory-Revised (LSI-R) | 2.3 (2) | 2.3 (3) | .00 |
| Stable2007 | 1.2 (1) | 0.0 (0) | 1.61 |
| *Structured Professional Judgment VRA Tools* |  |  |  |
| Historical, Clinical and Risk Management – 20 (V2) (HCR-20) | 42.9 (36) | 27.7 (36) |  6.70\*\* |
| Sexual Violence Risk-20 (SVR-20) | 14.3 (12) | 10.8 (14) | .76 |
| Spousal Assault Risk Assessment Guide (SARA) | 8.3 (7) | 2.3 (3) |  4.38\* |
| Risk for Sexual Violence Protocol (RSVP) | 8.3 (7) | 1.5 (2) |  6.18\* |
| *Unstructured Clinical Judgment* | 2.3 (2) | 1.5 (2) | .23 |

\* *p <* .05

\*\* *p* < .01

1. Throughout this paper, the term “Indigenous peoples” is used. Indigenous is a term that refers to different Aboriginal groups. The Government of Canada recognizes the term Indigenous as a broad term for any people descending from an ethnicity or culture that is indigenous to Canada. Indigenous peoples include First Nations, Inuit, and Métis peoples. The term “Aboriginal” (commonly used in government policies and documents) has also been used to refer to Indigenous peoples, however the term Aboriginal is being replaced in Canada with Indigenous in accordance with the UN Declaration of the Rights of Indigenous Peoples (Trudeau, 2017). [↑](#footnote-ref-2)
2. Section 7 of the Canadian Charter of Rights and Freedoms (1982) [↑](#footnote-ref-3)
3. Section 15 of the Canadian Charter of Rights and Freedoms (1982) [↑](#footnote-ref-4)
4. 24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible. [↑](#footnote-ref-5)
5. These dates were chosen because previous research had already investigated judicial decision making for general offending (which would have included DO/LTO cases) and VRA in Canadian courts between 1998 and 2009 (Storey et al., 2013) and for DO/LTO cases between 2006 and 2008 (Blais, 2015). [↑](#footnote-ref-6)
6. Since Canada’s official languages are English and French decisions can be published in either language. Coders did not have the language skills needed to analyze decisions written in French. [↑](#footnote-ref-7)