

APPLYING *GLADUE* PRINCIPLES REQUIRES MEANINGFUL INCORPORATION OF
INDIGENOUS LAWS AND PERSPECTIVES, INCLUDING CONSIDERATION OF
COMMUNITY-BASED ALTERNATIVES TO INCARCERATION

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By

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ABSTRACT

This thesis considers Canadian criminal sentencing laws and the implications of such upon Indigenous people.¹ In particular, this thesis advocates for the immersion of Indigenous means of justice, including community-based solutions, into mainstream justice. Indigenous communities and people carry their own laws and legal systems to deal with criminal behaviour, including sanctions to manage behaviour. If Canada is serious about creating a justice system that works for Indigenous people in this country, Canadian laws ought to incorporate Indigenous laws.

The Supreme Court of Canada decision, *R v Gladue*,² interprets the Canadian *Criminal Code* sentencing provision, s 718.2(e), which requires sentencing judges to consider all available sanctions, other than imprisonment, for all offenders, with particular attention to the circumstances of Aboriginal offenders.³ *Gladue* provided a two prong consideration for sentencing judges to follow when coming to their ultimate decision:

- A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal 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 aboriginal heritage or connection.⁴

Gladue does not create an Indigenous legal system within Canadian law however *Gladue* creates a passage way for Indigenous understanding to be incorporated into mainstream criminal law. Indigenous ways of justice ought to be considered during the application of *Gladue*. This thesis focuses on the means available to properly consider the second prong of *Gladue*, including community alternatives to incarceration. As is examined in this thesis, if sentencing judges fail to meaningfully consider the second prong of *Gladue* an error of law

¹ Please note throughout this thesis the term Indigenous will be used to describe the first peoples within the land mass known as Canada. Aboriginal is the term often used in Canadian law. For the purposes of this thesis, the reader should consider Indigenous and Aboriginal as interchangeable terms. Please, also note that “Canada” is a colonized title. The descriptor of Turtle Island may be used to describe the land mass known commonly as Canada.

² *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 (SCC). [*Gladue*]

³ *Criminal Code*, RSC 1985, c C-46, s 718.2(e). [*Criminal Code*] (emphasis added)

Please note throughout this thesis when referring to section 718.2(e) of the *Criminal Code* the short form, s 718.2(e), will be used.

⁴ *Gladue*, *supra* note 2 at para 66.

has occurred, as s 718.2(e) of the *Criminal Code* has not been properly applied. To avoid such error, *Gladue* reports and therapeutic courts assist sentencing judges, encouraging proper application of *Gladue*.

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DEDICATION

To my family, in particular my mother Janice and my father Todd,

Your encouragement and love brought me here. Thank you.

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CHAPTER ONE: INTRODUCTION

Indigenous people carry their own laws and justice systems, yet Indigenous people continue to be subjected to colonial legal systems. Indigenous people in Canada are highly over represented in prisons and jails. Institutionalization is separating these people from their families, deteriorating employment opportunities and encouraging an ongoing cycle of state oppression against Indigenous peoples. Over incarceration is also an issue for Indigenous people of New Zealand as well. Both countries are Commonwealth countries, colonized by British law.

As it stands, Indigenous people do not exist within their own autonomous criminal justice systems. If they did Canadian criminal law would not apply to them. This thesis does not explore how a separate Indigenous legal system would function, because unfortunately that is not a current reality. Although this thesis is optimistic that the current Canadian legal system can be improved to more meaningfully reflect Indigenous ways of knowing, this thesis recognizes that such confidence in the current system may be fallacious. This thesis is my attempt to advocate for improvements within the current system to better serve Indigenous people, specifically ways in which the sentencing of Indigenous people can meaningfully incorporate Indigenous ways of justice. In addition to the Canadian context, this thesis explores ways in which the New Zealand criminal justice system implements Indigenous Maori language and law into the mainstream system.

Chapter two is a three-part chapter. Part one provides an overview of Indigenous laws and legal systems. The purpose of this section is to educate the reader of the laws and legal systems of Turtle Island prior to European settlement. Part two provides a short history of the Canadian criminal justice system, looking at the origins of the Canadian *Criminal Code*, which is of a British model. Part three of this chapter provides an overview of the Canadian government policies which have been greatly detrimental to Indigenous people and communities.

Chapter three considers theoretical perspectives regarding Indigenous people in the criminal justice system. The theories drawn upon in this thesis support the need for autonomous

Indigenous legal systems; the writer of this thesis is an advocate and supporter of such systems. However, the writer of this thesis is also cognizant that Indigenous people in what we know to be Canada continue to be subjected to Canadian criminal law. *Gladue* does not change the somber fact that Indigenous people continue to be restricted to a system that is foreign. As is provided in detail in chapter two of this thesis, the mainstream system was never intended to be a system for Indigenous people, rather it was and arguably still is a means to eliminate and silence Indigenous people. Indigenous people are grossly overrepresented in a system with which they do not necessarily identify. *Gladue* is an avenue in which Indigenous ways of knowing can be and ought to be implemented into the colonial system.

Chapter four provides an overview of the current Canadian sentencing provisions applicable to Indigenous people during sentencing. Section 718.2(e) of the *Criminal Code* provides that courts must order sentences which consider “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”⁵ The two seminal Supreme Court of Canada decisions, which define the purpose of this section and provide direction to the courts to implement this section, are *R v Gladue*⁶ and *R v Ipeelee*⁷. The purpose of Canadian law requiring a consideration of circumstances uniquely affecting Indigenous people is to implement sentences that are more appropriate for Indigenous people with the goal of lowering incarceration rates of Indigenous people. What is deemed “appropriate” for Indigenous people ought to be a system that incorporates and values Indigenous perspectives. This thesis does not suggest that *Gladue* and s 718.2(e) of the *Criminal Code* are the ultimate solution, rather *Gladue* is a temporary band-aid fix for deep-seated social issues affecting Indigenous people including addictions, ongoing colonization, poverty and unequal education funding.

Chapters five, six and seven consider the importance of implementing *Gladue* and present examples in which *Gladue* can be meaningfully realized through the integration of Indigenous laws and perspectives.

⁵ *Criminal Code*, *supra* note 3 s 718.2(e). (emphasis added)

⁶ *Gladue*, *supra* note 2.

⁷ *R v Ipeelee*, 2012 SCC 13. [*Ipeelee*]

Chapter five considers the similar over-incarceration rates of Indigenous people in Canada and New Zealand and the dominance of colonial law onto Indigenous people. New Zealand's use of therapeutic courts including an alcohol and drug treatment court is discussed and compared to Canadian drug treatment courts. Chapter five advocates for the implementation of therapeutic courts as a means of appropriately applying *Gladue* principles by incorporating Indigenous heritage and community connection.

Chapter six reviews *Gladue* reports. In short, a *Gladue* report provides information regarding the Indigenous person's identity, their community and ways in which they can be rehabilitated.⁸ This chapter explains how these reports are essential in providing the judge accurate and appropriate information necessary to apply *Gladue* principles, encouraging a fit and correct sentence to be ordered. As is discussed in this chapter, the second prong of *Gladue* requires a sentencing judge to consider sentencing procedures and sanctions, other than imprisonment, that are appropriate for the Indigenous person because of their heritage or community connection.⁹ This thesis argues that such consideration cannot be actualized without the detailed information of a *Gladue* report.

Chapter seven discusses the application of *Gladue* within Canadian courts, emphasizing the failure to meaningfully integrate the second-prong of *Gladue* into sentencing, and arguing for a more meaningful application of *Gladue*. The first part of this chapter analyzes two appellate level courts. The second part of this chapter explores five Saskatchewan cases in which *Gladue* was considered however the depth of analysis is sparse. Commentary is provided regarding how these decisions could have been improved. The third part of this chapter looks at one case from the Nunavut Court of Justice, *R v Itturiligaq*. *Itturiligaq* provides a ray of hope towards the future application of *Gladue* as an unprecedented decision considering Inuit laws during application of the second prong of *Gladue* which ultimately affected the sentence ordered. Analyzing these cases serves as a learning exercise showcasing how the application of *Gladue* can be improved. When ordering a sentence, judges must consider the Indigenous person's heritage and community connection which is required under the second prong of *Gladue*.

⁸ John Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:22 SCLR 689. [Rudin, Aboriginal Over-representation and *R v Gladue*]

⁹ *Gladue*, *supra* note 2 at para 66.

CHAPTER TWO: RELATIONSHIP BETWEEN COLONIAL CANADIAN LAW AND INDIGENOUS LAWS

2.1: Indigenous laws and perspectives

Due to colonialism and Eurocentric settler mentality, Indigenous legal traditions and ways of justice are largely disregarded in the Canadian law context. This section provides a brief overview of the history of Indigenous laws and legal systems. Policies of assimilation and colonialisms hindered Indigenous ways of life, although Indigenous legal traditions continue to exist today and ought to be recognized as legitimate legal systems.

The land mass known by many as Canada was occupied with its own laws prior to European settlement. Indigenous people carry their own practices, which includes systems of justice and order. Larry Chartrand and Kanatase Horn explain:

According to Indigenous legal scholars, prior to the imposition of Western law on Indigenous people, Indigenous legal traditions were important organizing forces that shaped behaviour, guided relationships, and addressed conflict in Indigenous societies.¹⁰

In addition to Indigenous laws existing prior to European contact, Canadian law also recognizes that Aboriginal people exercise their own legal traditions. The Supreme Court of Canada in *R v Mitchell* recognizes that Aboriginal legal traditions pre-date European contact and continue to exist:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty....¹¹

¹⁰ Department of Justice Canada, A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada, by Larry Chartrand and Kanatase Horn (Ottawa, Ontario: Department of Justice Canada, October 2016), citing John Borrows, Val Napoleon and Hadley Friedland. [Chartrand and Horn, Restorative Justice and Indigenous Legal Traditions in Canada]

¹¹ *R v Mitchell*, 2001 SCC 33 at para 10. [*Mitchell*]

In the original paragraph of this decision Aboriginal is not capitalized.

In the decision of *Haida Nation v BC (Minister of Forests)*, The Right Honourable Beverley McLachlin, Chief Justice of Canada¹² for the Supreme Court of Canada affirms, "...Canada's Aboriginal peoples were here when Europeans came, and were never conquered."¹³ Section 35(1) of the *Constitution Act 1982* provides that existing Aboriginal and treaty rights are recognized and affirmed.¹⁴

The Truth and Reconciliation Commission's Calls to Action and the United Nations Declaration on the Rights of Indigenous Peoples¹⁵ recognize Indigenous legal systems and advocate for the recognition and revitalization of Indigenous legal traditions.¹⁶ UNDRIP recognizes Indigenous legal systems and provides a framework for states to look to strengthen the relationship with Indigenous people.¹⁷

The TRC calls upon various levels of government in Canada to act towards decolonization and reconciliation, in light of the residential school experience suffered by many Indigenous children, among other injustices inflicted upon Indigenous people in Canada.¹⁸ The TRC calls to governments to revive and implement Indigenous justice systems that are reconcilable with Aboriginal and treaty rights.¹⁹

In order to apply such Indigenous systems within the Canadian legal system, Indigenous laws and teachings must be understood. Unlike Westernized law, Indigenous laws are not separated into compartmentalized types of laws, such as criminal or corporate law, because one's

¹² As she was. Chief Justice McLachlin retired from the Supreme Court of Canada in 2017.

¹³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25.

¹⁴ *The Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. [*The Constitution Act*].

¹⁵ Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg, Manitoba: Truth and Reconciliation Commission of Canada 2012). [TRC, *Calls to Action*]; United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, (United Nations General Assembly, 2007). [UNDRIP]

¹⁶ Chartrand and Horn, *Restorative Justice and Indigenous Legal Traditions in Canada*, *supra* note 10 at page 10.

¹⁷ UNDRIP, *supra* note 15; Canada endorsed the declaration as a full supporter in 2016, see Indigenous and Northern Affairs Canada, *United Nations Declaration on the Rights of Indigenous Peoples*, (Ottawa, Ontario: Government of Canada, modified 03 August 2017); see also Chartrand and Horn, *Restorative Justice and Indigenous Legal Traditions in Canada*, *supra* note 10 at page 10 referencing articles 3, 5 and 34.

¹⁸ TRC, *Calls to Action*, *supra* note 15.

¹⁹ *Ibid*; see also Chartrand and Horn, *Restorative Justice and Indigenous Legal Traditions in Canada*, *supra* note 10 at pages 10 and 11, referencing articles 27, 28, 42, 45 and 50.

responsibilities are not divided into different areas, rather the obligations are interconnected.²⁰ Indigenous laws are guided by connections. A person has obligations to their family, their community and their environment; thus, the laws are directed by one's kinship. Chartrand and Horn provide that "kinship can be described as legally requiring individuals to act and carry themselves in a way that ensures good relations, rather than prohibiting certain actions."²¹

Colonialism has been very destructive to Indigenous kinship practices. As for actual Indigenous legal systems, despite the weakening of kinship, knowledge of the content of Indigenous legal traditions continues to exist in stories, oral traditions, books, scholarship, and most importantly, in the minds and memories of community Elders and leaders.²²

In the criminal context, maintaining good kinship relations focuses on healing within the community. A form of repairing kinship ties may include practices of community monitored sanctions, reflecting the wants and needs of the community.

There are many Indigenous nations within the landmass known as Canada and as such there is a great deal of diversity within Indigenous legal systems.²³ John Borrows provides examples of Indigenous law from a diverse range of Indigenous nations.²⁴ Borrows provides the following regarding Cree traditions:

Wahkohtowin is viewed as the over-arching law governing all relations. This law is said to flow from the Creator who placed all life on earth. Humans are a part of this order and are organized into families. Since humans exist within the overarching natural law, they are counseled to observe other living things for guidance in practicing this law. A body of stories describes what people have learned from observing the natural world; the stories are used to facilitate order in Cree law. The sun, moon, winds, clouds, rocks, fish, insects, and animals all provide illustrations of *wahkohtowin*, which the Cree interpret into law.²⁵

²⁰ Chartrand and Horn, Restorative Justice and Indigenous Legal Traditions in Canada, *ibid* at pages 6 and 7.

²¹ *Ibid* at page 8.

²² *Ibid* at page 12.

²³ John Borrows, *Canada's Indigenous Constitution*, (Toronto, Ontario: University of Toronto Press, 2010) at pages 59-61. [Borrows, *Canada's Indigenous Constitution*]

²⁴ *Ibid* at pages 61-104. Borrows provides examples of Indigenous legal traditions from the following nations: Mi'kmaq, Haudenosaunee, Anishinabek, Cree, Métis, Carrier, Nisga'a and Inuit.

²⁵ *Ibid* at page 84.

Indigenous societies exercised laws and systems to manage criminal-type actions, such as sexual assault and criminal negligence causing death.²⁶ Intervention centered on healing, though means of deterrence and denunciation were exercised.²⁷ Chartrand and Horn provide the following regarding responding to anti-social behaviour and violence:

Sanctions were therefore multifaceted and tried to achieve multiple goals, although the harshness of potential sanctions, especially those sanctions that attempted to demonstrate deterrence and denunciation, were held in check by important qualifications. Considering that historically, Indigenous communities generally did not have police, sanctions were usually enforced by family members, extended family members, or members of the same clan. This meant healing, reconciliation, and reintegration were priorities, if not the first response. As Val Napoleon and Hadley Friedland point out, even if the person had committed a serious offence, the first response was not to inflict pain or seek vengeance, since the offender was also a family and community member, and someone that was loved.²⁸

Lisa Monchalin explains that when Europeans arrived in Canada at first contact, Indigenous people held their own unique histories and cultures, their own narratives and world views, which continue to exist,²⁹ and they exercised their own legal structures and methods to deal with crime.³⁰ Because the Indigenous systems were not compatible with European legal systems (for example Indigenous people did not have a formal police force), European settlers assumed Indigenous people did not have laws.³¹

Indigenous communities have exercised their own laws and practices to deal with criminal behaviour. However, due to paternalistic and racist government policies Indigenous kinship relationships and laws have suffered greatly. Borrows suggests that the relationship between civil law and common law should be looked at when considering the implementation of two separate systems within one greater state.³² The relationship between civil and common law systems may not always be harmonious, however Borrows offers that the dialogue between the two legal

²⁶ Chartrand and Horn, Restorative Justice and Indigenous Legal Traditions in Canada, *supra* note 10 at pages 13 and 14.

²⁷ *Ibid* at page 9. “In Anishinabek society, the Wetiko, or Wendigo, was thought to be a cannibalistic spirit that could inhabit human beings and make a person do things they normally wouldn’t, like murder and/or eat members of their family/community.”

²⁸ *Ibid* at page 8. (emphasis added)

²⁹ Lisa Monchalin, *The colonial problem: an Indigenous perspective on crime and injustice in Canada*, (Toronto, Ontario: University of Toronto Press, 2016) at page 73. [Monchalin, *The colonial problem*]

³⁰ *Ibid* at pages 52-53.

³¹ *Ibid*.

³² Borrows, *Canada’s Indigenous Constitution*, *supra* note 23 at pages 114-117.

traditions has proven beneficial, referencing several Supreme Court of Canada decisions in which Canada's highest court implemented civil law in common law decisions.³³ This thesis argues that Indigenous laws ought to be implemented within the mainstream criminal justice system of Canada. In order for the criminal justice system to truly serve Indigenous people in this country, the laws of the first people in this land ought to be meaningfully considered.

2.2: The criminal justice system in Canada

In Canada the criminal justice system is based on a British model, as the Canadian *Criminal Code* originates from the British system. In 1892 Canada adopted a *Criminal Code* that had been drafted in England.³⁴ Eric Colvin and Sanjeev Anand³⁵ provide the following regarding the source of Canadian criminal law:

The *Code* drew heavily upon a draft code prepared by Royal Commissioners in England in 1979 but never implemented in that country. The draft code is commonly known as "the Stephen Code," following the name of its principal author Sir James Stephen. The same draft became the basis for the *New Zealand Criminal Code Act* in 1893, and the criminal law of the two countries is still substantially the same.³⁶

As such, Canadian law descends from a European colonial model. Under Canadian law, Indigenous laws are not considered during the sentencing of an Indigenous person. Indigenous people are subjected to a foreign system which does not incorporate their morals and values. The Canadian legal system convicts and sentences Indigenous people without a proper means to consider who these people are. Indigenous people in New Zealand are subject to similar colonial issues, with regards to criminal law and sentencing. Statistics of Indigenous over-incarceration and sentencing of Indigenous peoples in New Zealand is discussed in Chapter five. The comparison between Canada and New Zealand is helpful as both countries are colonized states and imprison Indigenous people at an alarming rate.

³³ *Ibid* at pages 114-115.

³⁴ Eric Colvin and Sanjeev Anand, *Principles of Criminal Law*, 3rd ed (Toronto, Ontario: Thompson Carswell, 2007) at page 8. [Colvin and Anand, *Principles of Criminal Law*]

³⁵ As he was. The Honourable Judge Anand of the Provincial Court for Saskatchewan was appointed in 2014.

³⁶ Colvin and Anand, *Principles of Criminal Law*, *supra* note 34 at page 8.

One of the earliest cases depicting the imposition of colonial law on Indigenous people are the trials of *R v Sinnisiak* and *R v Uluksuk* in the year of 1917.³⁷ In 1912 two priests from the Roman Catholic Church went to the Northwest Territories on a missionary trip.³⁸ They departed from the Northwest Territories to Nunavut but never made their arrival and were never seen after descending from the Northwest Territories.³⁹ Sinnisiak and Uluksuk were accused of murder for the death of the priests. Two separate jury trials commenced. Sinnisiak was found not guilty of the murder of the first priest. During the second jury trial they were both tried and found guilty to the murder of the second priest.⁴⁰ They were spared the death penalty. However after they completed their sentence, the conditions of their release were to return to their home community and educate their people that they are “governed by Canadian law.”⁴¹ The Crown prosecutor during the first jury trial provided the following regarding application of British law to Indigenous people:

These savages, really cannibals, the Eskimo of the Arctic regions have to be taught to recognize the authority of the British Crown, and the authority of the Crown and the Dominion of Canada, of which these countries are a part, extends to the farther most limits of the frozen North. It is necessary that they should understand that they are under the Law, just in the same way as it was necessary to teach Indians of the Indian territories and of the North West Territories that they are under the law...

This is one of the outstanding ideas of the Government, and the great importance of this trial lies in this: that for the first time in history these people, these Arctic people, pre-historic people, people who are nearly as possibly living to-day in the Stone Age, will be brought in contact with and will be taught what is the white man’s justice.⁴²

The history of Canadian law and the application of such to Indigenous people is direct evidence that a purposeful objective of Canadian law is to control Indigenous people and their legal systems. The origins of Canadian law are Eurocentric in nature, with the purposes of expanding British dominance and controlling at the forefront. The history of Canadian law cannot be ignored when discussing current application of Canadian law to Indigenous people.

³⁷ Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner’s Handbook*, (Toronto, Ontario: Emond Publishing, 2018) at pages 66 and 67. [Rudin, *Indigenous People and the Criminal Justice System*]

³⁸ *Ibid* at page 67.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at page 71.

⁴² *Ibid* at page 68. (emphasis added)

Indigenous people are subject to the colonial Canadian criminal justice system and its laws. There are two key reasons the colonial Canadian criminal justice system does not work for Indigenous people. First, the forced nature in which colonial law was introduced and second, Indigenous thoughts and values are not incorporated into Canadian law. Considering the racist policies of Canadian law, it is unsurprising that Indigenous people fail in the current justice system as that was never the goal of Canadian law. The Canadian system is not failing its original purpose, it is carrying it out.

2.3: Canadian government policies inflicted upon Indigenous communities

To appreciate what is meant by “the circumstances of Aboriginal offenders” cited in s 718.2(e) of the *Criminal Code*⁴³ and the language used in the *Gladue* two-step framework applying s 718.2(e),⁴⁴ the history of Indigenous people must be properly understood and explained.⁴⁵

Monchalin provides that there are many different Indigenous nations in Canada which all share a different history in terms of their relations with Europeans, although what they all have in common is the history of colonialism.⁴⁶ Monchalin provides that European settlers made a conscious choice to enter paternalistic relations with the Indigenous population of Turtle Island.⁴⁷ Settlers could have entered into alliance agreements with Indigenous people, honouring the autonomy of each nation. Instead, as Monchalin explains, treaties were formed which created “new hierarches, governments, and legal systems that believed in the absolute superiority of Europeans over the colonized, the masculine over the feminine, the adult over the child, the historical over the ahistorical, and the modern or “progressive” over the traditional or savage.”⁴⁸ Indigenous people have suffered greatly because these paternalistic relations were codified into Canadian law. In present day, the law of this land continues an ongoing dependency between Indigenous people and what is now known as the Canadian government.

⁴³ *Criminal Code*, *supra* note 3 s 718.2(e).

⁴⁴ *Gladue*, *supra* note 2 at para 66.

⁴⁵ This section does not profess to be a comprehensive account of the means used by the Canadian government to suppress Indigenous people, rather it is meant to provide an overview.

⁴⁶ Monchalin, *The colonial problem*, *supra* note 29 at pages 68-69.

⁴⁷ *Ibid* at pages 69-70 and 72.

⁴⁸ *Ibid* at page 72.

The Indian Act

In 1876 the *Indian Act* was unilaterally introduced by the Canadian government.⁴⁹ The *Indian Act* controls how First Nations communities are to govern themselves. It affects many different ways of life including governance,⁵⁰ ceremonial practices,⁵¹ and land governance.⁵² Many have criticized the *Indian Act* as being paternalistic,⁵³ racist,⁵⁴ and sexist.⁵⁵ However, the *Indian Act* recognizes the relationship between the Crown and the First Nation people.⁵⁶ Reflecting upon current impacts of the *Indian Act*, the *Act* creates a dependency relationship between the federal government and Indigenous people, specifically First Nations people. This paternalistic relationship impedes the progress of Indigenous people from asserting autonomy. More specifically, it hinders Indigenous people from collectively establishing their own governance structures.

⁴⁹ *Indian Act*, RSC 1985, c I-5. [*Indian Act*]

⁵⁰ Ken Coates, *The Indian Act and the future of Aboriginal governance in Canada* (West Vancouver, British Columbia: National Centre for First Nations Governance, May 2008) at page 1.

“For decades, this controversial and intrusive piece of federal legislation governed almost all aspects of Aboriginal life, from the nature of band governance and land tenure systems to restrictions on Aboriginal cultural practices.”

⁵¹ Erin Hanson, “The Indian Act: The “Potlatch Law” & Section 141” (First Nations Studies Program, First Nations & Indigenous Studies, The University of British Columbia: 2009). [Hanson, “Potlatch Law” & Section 141]

“In 1884, the federal government banned potlatches under the *Indian Act*, with other ceremonies, such as the sun dance, to follow in the coming years. The potlatch was one of the most important ceremonies for coastal First Nations in the west, and marked important occasions as well as served a crucial role in distribution of wealth.”

⁵² *Ibid.*

⁵³ Dale Smith, “Indian Act ‘paternalistic’ on will-making,” *Law Times: Thomson Reuters* (23 October 2017).

⁵⁴ Government of Canada: Library of Parliament, *Indian status and band membership issues*, by Megan Furi and Jill Wherrett, Catalogue No YM32-2/410-2003-02E-PDF (Ottawa: Parliamentary Research Branch, February 1996, revised February 2003). Second-generation cut-off rule that resulted in the loss of Indian status after two successive generations of parenting by non-Indians.

⁵⁵ “Indian Act and Women’s Status Discrimination via Bill C31 and Bill C3” (09 July 2012), online (blog): *Indigenous Corporate Training Inc.: Working Effectively with Indigenous People*. Bill C31 was put forward to remove discrimination against women and to be consistent with section 15 of the *Charter*.

⁵⁶ John Borrows & Leonard Rotman, *Aboriginal Legal Issues*, 4th ed (Markham, Ontario: LexisNexis, 2012) at 50 and 51.

“As demonstrated by the Penner Commission and other historical events, First Nations want to govern themselves. They want to get rid of the *Indian Act*. However, they do not want to abolish the Act if it is a step towards assimilation. When the Trudeau government proposed the *Indian Act*’s elimination in a 1969 White Paper, First Nations opposed that initiative because it was part of a package designed to eliminate their rights.”

A specific historical example of such paternalistic legal policy is the restriction upon First Nations people to obtain legal representation. First Nations people historically could not either hire lawyers or be lawyers.⁵⁷ Erin Hanson provides the following comment regarding the *Indian Act* restriction to hire lawyers:

Section 141 outlawed the hiring of lawyers and legal counsel by Indians, effectively barring Aboriginal peoples from fighting for their rights through the legal system. Eventually, these laws expanded to such a point that virtually any gathering was strictly prohibited and would result in a jail term.⁵⁸

Section 141 of the *Indian Act* is an example of the explicit discrimination Indigenous people face from the Canadian government. Excluding First Nations people from practicing Canadian law or hiring lawyers was a clear message from the Canadian government that they did not want First Nations people advocating for themselves. In the following section the devastating eras of residential schools is discussed to highlight the racist attitudes towards Indigenous people, their culture, language and ways of knowing.

Residential Schools

Indigenous knowledge systems are often taught in the form of circles to teach the importance of relations and maintaining kinship laws.⁵⁹ In the circle of an Indigenous family or community, children are at the center. Children represent the future for their people and provide parents and Elders with a means to share their knowledge. However, those relations were greatly disturbed by the implementation of residential schools.

Residential schools were state-operated church-run mandatory institutions where children were taken against their parents' wishes. Several horrific atrocities were perpetrated against the children at these schools.⁶⁰ Residential schools are a key contributor to Indigenous people being

⁵⁷ Hanson, "Potlatch Law" & Section 141, *supra* note 51.

⁵⁸ *Ibid.*

⁵⁹ Maria Campbell, *Indigenous Legal Practices and Processes: Circle Teachings Seminar*, (College of Law, University of Saskatchewan, 2017).

⁶⁰ The Canadian Encyclopedia, *Residential Schools in Canada*, by J.r. Miller, updated by Tabitha Marshall (Historica Canada: 14 December 2018, modified 14 June 2018). [Miller and Marshall, *Residential Schools in Canada*]

over-represented in areas of negative social standing, including prison and unemployment, and under-represented in positive areas of social standing including education.⁶¹

The government and the church understood the importance of children to Indigenous communities. Similar to an act of war, the government removed the most precious resource, being the children, to destroy the population it wanted to assimilate. During the expansion of residential schools, the slogan or phrase, “kill the Indian, save the man,”⁶² was used to market the purpose of residential school. The goal of residential schools was to strip the children of their Indigenous connections, languages and ways of knowing in order to reintegrate them back into society as if they were white- English or French speaking Canadians.

Between the years of 1831 and 1996, 150,000 Indigenous children were forcibly removed and separated from their families and communities and were compelled to attend residential schools. There were 139 residential schools that operated in Canada.⁶³ While most of the 139 residential schools ceased to operate by the mid-1970s, the last federally-run school, located in Saskatchewan, closed in 1996.⁶⁴ Senator Murray Sinclair speaks to the horrors the young children were exposed to while at residential school, estimating that half of the students who attended, report having suffered serious physical or sexual abuse.⁶⁵ The residential schools era expands beyond the implementation of residential schools. The Truth and Reconciliation Committee⁶⁶ acknowledges that day schools operated across the country and had the same purpose as residential schools, but the children did not board at the schools.⁶⁷ Murray Sinclair provides that public-school systems in small towns across Canada used similar tactics as residential schools, shaming and

⁶¹ The Final Report of the Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy*, Vol 5 (McGill-Queen's University Press, published for Truth and Reconciliation Commission of Canada, 2015) at pages 3-9.

⁶² “About the Commission: Indian Residential Schools Truth and Reconciliation Commission” (accessed 16 December 2018), online: *Truth and Reconciliation Commission of Canada*.

⁶³ Indigenous and Northern Affairs Canada, *Indian Residential Schools*, (Ottawa, Ontario: Government of Canada, modified 11 June 2018).

⁶⁴ *Ibid.*

⁶⁵ Robin Sears, “Murray Sinclair, Policy-Maker of the Year: The Path to Reconciliation,” *Macdonald-Laurier Institute (MLI)*, (15 December 2015). [Sears, Sinclair: The Path to Reconciliation]

⁶⁶ Truth and Reconciliation Committee [TRC]

⁶⁷ The Final Report of the Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History Part 2 1939 to 2000*, Vol 1 (McGill-Queen's University Press, published for the Truth and Reconciliation Commission of Canada, 2015). [TRC, *The History, Part 2*]

dehumanizing Aboriginal children, teaching the students that Aboriginal people were heathens, savages, uncivilized, weak and inferior.⁶⁸

Unfortunately, the aim of residential schools was largely realized. The children were barred from speaking their native language and practicing their culture.⁶⁹ The children who attended residential schools were conditioned to feel shame about their ancestry. It is unsurprising that even after residential schools closed the connection between the students and their native culture was in many cases severed. The act alone of separating children from their families is devastating enough, but to add insult to injury Indigenous children also faced emotional, physical and sexual abuse and others died while attending these schools.⁷⁰ Residential schools continue to negatively impact Indigenous people, whether it be the 80,000 residential school survivors or their children and grandchildren.⁷¹ Residential schools have an ongoing impact on the quality of life of Indigenous people. The impact of intergenerational trauma continues to show symptoms of damage, including the ongoing over-incarceration of Indigenous people.

This section does not profess to offer a complete record of the legal injustices inflicted upon Indigenous people, but this brief background encourages perspective when analyzing Canadian criminal law and over-incarceration of Indigenous people. Prison statistics of Indigenous people or any population for that matter, cannot be examined on its own, it must be considered in reflection of the historical events and experiences of that group.

To summarize, this chapter has provided an overview of Indigenous laws and legal system, described the origins of colonial Canadian law and detailed a number of Canadian policies which have been detrimental to Indigenous people.

The next chapter will reflect upon the theoretical perspectives concerning Indigenous involvement and thought in mainstream legal systems. Indigenous legal systems exist and thrive in Indigenous communities. In order to remedy over-incarceration of Indigenous people, Indigenous laws ought to be implemented into mainstream Canadian law. *Gladue* is one small opening for such process to commence.

⁶⁸ Sears, Sinclair: *The Path to Reconciliation*, *supra* note 65.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

CHAPTER THREE: THEORETICAL PERSPECTIVES

I draw upon the work of Indigenous female scholars including, the late Patricia Monture-Angus and Professor Tracey Lindberg, for the majority of the theoretical discussion. Both scholars acknowledge the need to implement systems that are based on Indigenous ways of knowing. The insight articulated in these theories ought to be reflected when applying *Gladue* in the Canadian criminal justice system. In order for the successful integration of Indigenous culture into sentencing law, as prong two of *Gladue* requires, Indigenous ideologies must be the criteria which guides such process. The theory of epistemic injustice is also discussed because it explains the hurdles associated with integrating Indigenous understanding into the mainstream system.

Patricia Monture-Angus analyzes and reflects upon equality rights of Mohawk women versus protections provided by the Canadian *Charter*.⁷² As she admits herself, the comparisons between her own experience as a Mohawk woman against the stringent analysis of the *Charter* is awkward and lacks congruency.⁷³ This is due to no fault of her writing style, but rather the two systems were not intended to merge or even function together. It reads as if two languages are being spoken and compared against each other at the same time.⁷⁴ At the end of the chapter Monture-Angus explains that the reason the *Charter* and Canadian legal understanding of equality do not work for Indigenous people is because the *Charter* and the law have eliminated the responsibility component.⁷⁵ The feelings one has and the deeper understanding of the purpose and function of the laws is not present in the Canadian legal system. This thesis submits the lack of connection Monture-Angus speaks of were never intended to be included in Canadian law because colonial law does not concern itself with the values of Mohawk people. Monture-Angus does not

⁷² Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks*, (Halifax, Nova Scotia: Fernwood Publishing, 1995) at pages 131 and 134. [Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks*]

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at page 148.

see herself or Mohawk people reflected within the Canadian legal system because Canada's laws are not meant to meaningfully include Indigenous people. Reiterating earlier discussions in this thesis, Canadian laws and policies, including the *Indian Act*, were designed to reflect Eurocentric views that are not compatible with Indigenous interests.

While discussing the history of residential schools and education in consideration of the *Indian Act*, Monture-Angus provides the following regarding the lack of worth associated with Indigenous culture in the Canadian education system: "It is clear that this was an intentional and deliberate invasion of Aboriginal culture based on the belief that European culture was far more advanced. This philosophy is one that should be easily recognized today as racist."⁷⁶ Indigenous culture and legal systems are not afforded the same weight as Canadian laws. This thesis argues this is based on a systemically racist system of laws and structures that have favoured British law over the original law of this land. Indigenous ways of knowing have been degraded to a point that it is acceptable to question and dismiss Indigenous systems, whereas Canadian laws and policies are not met with the same amount of scrutiny. This general degradation of Indigenous ways of knowing is reflected in law school culture.

Monture-Angus speaks of her experience as a common law student. She recounts the many times she was faced with racism and non-inclusion from her peers, including one of the students accusing Monture-Angus of stealing his friend's place in law school because Monture-Angus filled up an equity seat, which was not true, but nonetheless hostility was directed to her.⁷⁷ Monture-Angus's book *Thunder in my Soul: A Mohawk Woman Speaks* was published in 1995, yet as an Indigenous student in law school between the years of 2014-2017 the writer of this thesis still encountered the same resistance Monture-Angus met.

As an Indigenous person having completed a Juris Doctor program at a common law school,⁷⁸ it was abundantly clear that select students did not approve of the college's mission to increase its Indigenous student population. Students spoke against the Native Law Centre summer program and other supports reserved for Indigenous students. I witnessed non-Indigenous students speaking against opportunities presented to Indigenous students to pursue a legal education, in light of the fact that less than a 100 years ago the *Indian Act* restricted "Indian" people from hiring

⁷⁶ *Ibid* at page 92.

⁷⁷ *Ibid* at page 102.

⁷⁸ I graduated from the University of Saskatchewan, College of Law, in 2017.

lawyers or become lawyers.⁷⁹ Indigenous people are grossly over-incarcerated in prison, especially in Saskatchewan, yet select students grumble when the college alleviates barriers for Indigenous students to contributing and be positively represented in the Canadian legal system. As an example, a classmate of mine overheard a non-Indigenous student whisper that they suspected all the first-year Indigenous students would fail out after December exams.

It is necessary to speak on this topic of non-inclusion in law school because it provides a backdrop to the general resistance in Canadian law regarding Indigenous people, their circumstances and the history of racism directed towards Indigenous people. When Indigenous people contribute to the legal system and utilize their Indigenous backgrounds and practices, colonial ways of thinking are challenged and issues such as over-incarceration rates of Indigenous people are exposed. Many people benefit from such colonial practices; Canada as an institution benefits from colonial law. It is not surprising that some people want to maintain colonialism. The more Indigenous people present in the legal system the more the status quo will be challenged, and the legality of the system questioned.

Tracey Lindberg ponders the daunting question: what if Canadian law is wrong?⁸⁰ Lindberg considers her knowledge of Canadian or colonial law as a tool in her kit towards Indigenous people in Canada practicing their own laws and customs and having their legal systems recognized as legitimate within Canada. Lindberg is direct about her motivation to complete law school to learn and understand Canadian law in order to eventually disprove it.⁸¹

...it was no longer a given that Canadian law was right or powerful, it had to prove to me why it was right or powerful. I had to learn to learn Canadian law in order to unlearn it. I thought of it like a vaccine: I needed part of the disease in order to make myself immune to it.⁸²

Lindberg refers to the process of deconstructing colonial structures and laws while accepting and fostering Indigenous systems and laws as legitimate as critical Indigenous consciousness.⁸³

⁷⁹ Hanson, "Potlatch Law" & Section 141, *supra* note 51. The *Indian Act* was amended in 1951, removing s 141 and other discriminatory sections which prevented practice of customs and culture.

⁸⁰ Tracey Lindberg, "Critical Indigenous Legal Theory part 1: The Dialogue Within" (2015) 27:2 CJWL 224. [Lindberg, "Critical Indigenous Legal Theory"]

⁸¹ *Ibid* at pages 226-227 and 233.

⁸² *Ibid* at page 236.

⁸³ *Ibid* at page 230. Lindberg provides the following:

"In the context that I am writing, when I use the term "critical Indigenous consciousness," I am referring to the process and product of analytical assessment that allows Indigenous peoples to observe and

Lindberg explains that it is necessary for Indigenous people as a collective to come together with a common interest in order to uniformly resist colonial law.⁸⁴ Fighting against the oppressor is onerous, even more so when one side is established and stabilized while the other is fragmented and divided.⁸⁵ The recognized federal Canadian government maintains the benefit of a clear and uniform establishment while Indigenous groups are vast and may be separated by opposing ideologies and values. Lindberg urges Indigenous people to come together as a unit toward the singular goal of achieving proper recognition of Indigenous systems.⁸⁶ This consciousness is reflected upon throughout this thesis. Although the legal system in this land is still a colonial system the ability to meaningfully implement Indigenous customs, laws and values appear to be available through *Gladue*, just as Lindberg recognizes that studying and practicing common law can be used as a means to elevate Indigenous legal systems.

The final theory discussed in this thesis considers the theory of Epistemic Injustice. Epistemic injustice argues that component language does not exist to articulate certain injustices.⁸⁷ In application to Indigenous people in the criminal justice system, epistemic injustice would argue that Indigenous people are not provided the language and tools to articulate their injustices to the court; therefore, the circumstances and history affecting Indigenous people are not communicated.

Franziska Dubgen provides the following definition for epistemic injustice: it “gives a name to experiences that we struggle to articulate due to the injuries of hegemonic speech.”⁸⁸ Dubgen continues that as a society we do not provide a proper vocabulary to articulate the experiences of marginalized people, or at least not in any intelligible form, which is a means of silencing the oppressed by the powerful.⁸⁹ This type of oppression is quiet and hidden, but the effects are real.⁹⁰ Silencing the widespread experiences of Indigenous people is an example of

deconstruct the colonizing apparatuses that impact and oppress Indigenous knowledge (in this case, Indigenous laws and legal orders). Indigenous critical consciousness requires not only the deconstruction/dismantling of harmful apparatuses but also the renewal and resurgence of Indigenous ways of knowing and the renewal and reconstruction of our collective understanding of our identities and existences as Indigenous peoples.”

⁸⁴ *Ibid* at pages 230-231.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* at page 234.

⁸⁷ Franziska Dubgen, “Epistemic Injustice in Practice” (2016) Vol 15 *Wagadu* 1 at page 1. [Dubgen, “Epistemic Injustice in Practice”]

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at pages 1 and 8.

⁹⁰ *Ibid* at page 5.

epistemic injustice. The Alberta Appellate Court decision of *R v Laboucane* showcases an example of epistemic injustice in the courts. In *Laboucane* the sentencing judge found that *Gladue* factors did not need to be considered because there were no intergenerational, systemic or background factors that bore upon the offender or his criminal conduct.⁹¹ Therefore *Gladue* considerations were not applied to Mr. Laboucane. The Alberta Court of Appeal upheld the sentence and agreed with the lower courts' application of *Gladue*.⁹²

The Court did not deem Mr. Laboucane as the type of Indigenous person to which *Gladue* applies.⁹³ The Court drew its own conclusions about intergenerational effects and historical oppression imposed onto Aboriginal people. By doing so, the Court concluded that some Indigenous people are not as affected by such oppression. The Court in *Laboucane* is committing epistemic injustice by classifying, based on their own ideals, who they deem Indigenous.

Additionally, Dubgen argues epistemic injustice shapes development and theories of knowledge, putting a value on certain types of knowledge and degrading others.⁹⁴ Dubgen offers a solution in the form of a process termed *decolonizing knowledge*. Decolonizing knowledge uses a method of “analyzing the power nexus that shapes knowledge formation and identifying how far the research apparatus that we inhabit... is complicit in re-enacting a.... divide within scientific systems of knowledge production.”⁹⁵ Dubgen argues decolonizing knowledge is important to include in the discourse of epistemic injustice because epistemic injustice is entangled in a complex web of power and domination, intertwined with other forms of subjection.⁹⁶ In the lower court decision of *R v Kreko* the Judge concludes that the Aboriginal offender is not connected to their paternal heritage and therefore considerations of *Gladue* and *Ipeelee* are not relevant to the accused's criminal activity.⁹⁷ Why was the Judge inclined to diminish the offenders' Aboriginal ancestry? Does little tangible evidence regarding *Gladue* factors equate to no Aboriginal heritage? Is this reasoning based on a Western way of thinking? It is incredibly paternalist for a judge to tell an Aboriginal person whether or not they are Aboriginal. It is also paternalist to request the input

⁹¹ *R v Laboucane*, 2016 ABCA 176 at para 21. [*Laboucane*]

⁹² *Ibid.*

⁹³ *Laboucane*, *supra* note 91; see *Gladue*, *supra* note 2.

⁹⁴ Dubgen, “Epistemic Injustice in Practice,” *supra* note 87 at page 4.

⁹⁵ *Ibid.* This method is considered in the context of international development cooperation in the global South-North divide.

⁹⁶ *Ibid.*, citing James Bohman, “Domination, Epistemic Injustice of Colonialism” (2012) 26:2 Social Epistemology 175.

⁹⁷ *R v Kreko*, 2016 ONCA 367 at para 15 [*Kreko*], see also paras 16 and 33-34.

of Indigenous communities only to disregard their recommendations upon sentencing, as is reflecting in the next case discussed, *R v Pauchay*.

Jonathan Rudin discusses the use of sentencing circles and the input of Indigenous communities and Elders, while reflecting upon the Provincial Court of Saskatchewan decision, *R v Pauchay*.⁹⁸ In this case Mr. Pauchay is found guilty of criminal negligence causing death after two of his children froze to death after he took his children out with him from his home that evening and lost them on his way to his destination. Prior to ordering the sentencing circle Judge Morgan indicated that a penitentiary sentence may be ordered despite the findings of the sentencing circle. A sentencing circle was held and the community, including a number of Elders, were very supportive of Mr. Pauchay's rehabilitation and healing in the community.⁹⁹ Ultimately, The Honourable Judge Morgan of the Provincial Court of Saskatchewan found that despite the community's input and desire to have Mr. Pauchay in the community, a penitentiary sentence of three years was most appropriate.¹⁰⁰ Rudin is critical of Judge Morgan's decision; despite the Indigenous communities' request to have Mr. Pauchay participate in a community sentence incorporating Indigenous values and laws, Judge Morgan essentially came to the same decision he would have if a sentencing circle was not held.¹⁰¹ Professor David Milward commenting on *Pauchay* provides the following:

This case, leaving aside for the moment the merits of what Christopher Pauchay may or may not have deserved as a negligent father, demonstrates how Canadian attitudes towards crime and justice can manifest hostility towards Aboriginal restorative approaches. The legal and political realities are such that Canadian law is applied as a matter of course so as to trump approaches that Aboriginal communities may want to address crime.¹⁰²

As Dr. Milward provides, *Pauchay* exposes the paternalistic attitudes of the Canadian government towards Indigenous people and Indigenous legal systems. *Pauchay* is a reminder that Canadian courts fail to recognize Indigenous communities as autonomous entities, equipped with their own

⁹⁸ Rudin, *Indigenous People and the Criminal Justice System*, *supra* note 37, citing *R v Pauchay*, 2009 SKPC 4.

⁹⁹ *R v Pauchay*, 2009 SKPC 4 at paras 15-16, 27-28 and 53. Please note this decision is to grant the sentencing circle.

¹⁰⁰ *R v Pauchay* 2009 SKPC 35 at para 69. [*Pauchay*] Please note this is the sentencing decision.

¹⁰¹ Rudin, *Indigenous People and the Criminal Justice System*, *supra* note 37 at page 224.

¹⁰² *Ibid*, citing David Milward, "Aboriginal Justice and the Charter: Realizing a culturally Sensitive Interpretation of Legal Rights" (2012) UBC Press at 47.

governance structures and justice systems. If the Court in *Pauchay* did value the suggestions of the Indigenous community a sentence involving Mr. Pauchay serving the elders in his community as put forward would have been ordered.

In order for judges to understand the importance of *Gladue* they must first appreciate the value of Aboriginal perspectives and knowledge. In particular, judges must be knowledgeable of the historical background of Aboriginal peoples in Canada and the current social issues affecting Aboriginal people.

Failure to accept Aboriginal peoples' declaration of ancestry and life circumstances is an example of the "power nexus" of which Dubgen warns.¹⁰³ In order for *Gladue* to be meaningfully implemented judges must consider Aboriginal ways of presenting evidence as equal to that of the traditional trial process of calling expert evidence. In 2001, the Supreme Court of Canada in *Mitchell v Canada* held that the "the rules of evidence must be adapted to accommodate oral histories... Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge."¹⁰⁴ Additionally, *Ipeelee* requires that the unique factors affecting Aboriginal people be judicially noticed.¹⁰⁵ Therefore, the process of determining admissibility of an expert witnesses detailed in *R v Mohan* is not necessary when adducing evidence of *Gladue* factors.¹⁰⁶ As such, while reviewing *Gladue* reports and oral evidence provided by defense or the *Gladue* report writer, judges shall regard details about the Aboriginal offender and the history of the offender's home community as factual evidence. Defense counsel and Crown counsel ought to accept evidence regarding *Gladue* principles within *Gladue* reports, sentencing submissions and oral statements in court. Additionally, both counsel must speak against any apprehension to accept such evidence.

Moving forward in this thesis, the contextual background of Indigenous people in the law provided by Patricia Monture-Angus, the theory of critical Indigenous consciousness coined by Tracey Lindberg and the theory of epistemic injustice articulated by Dubgen will be drawn upon and referenced throughout the remainder of this thesis, which focuses on analysing Canadian sentencing law.

¹⁰³ Dubgen, "Epistemic Injustice in Practice," *supra* note 87 at page 4.

¹⁰⁴ *Mitchell*, *supra* note 11 at para 31, reaffirming *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 (SCC).

¹⁰⁵ *Ipeelee*, *supra* note 7 at para 62.

¹⁰⁶ *R v Mohan*, [1994] 2 SCR 9, at paras 16 and 17, 114 DLR (4th) 419 (SCC). [*Mohan*]

To reiterate, Indigenous people continue to be subject to the colonial system. The laws applicable to Indigenous people in Canadian criminal law and the statistics regarding incarceration of Indigenous people is discussed in the following chapter. This thesis argues that when an Indigenous person is sentenced by Canadian law the laws of that Indigenous person and their community ought to be applied as well.

CHAPTER FOUR: CRIMINAL SENTENCING AND INDIGENOUS PEOPLE IN CANADA

Indigenous people living in Canada are grossly over-represented in the prison system. This chapter provides brief but pointed statistics outlining the current reality of Indigenous people and their subjection to the Canadian criminal justice system. This chapter also explores the current laws, regarding criminal sentencing of Indigenous people in Canada.

4.1: Brief statistics and incarceration rates of Indigenous people in Canada

In 2016/2017, Aboriginal adults accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population.¹⁰⁷ In comparison to 2006/2007, the proportion of admissions of Aboriginal peoples to correctional services was 21% for provincial and territorial correctional services and 19% for federal correctional services.¹⁰⁸

The proportion of Indigenous people living in Saskatchewan is significant. In Saskatchewan in 2011, 157,740 people identified as Aboriginal comprising 16% of the overall Saskatchewan population.¹⁰⁹ In the same year, the total Saskatchewan population comprised 3.1% of the Canadian population,¹¹⁰ yet 11.3% of the overall Aboriginal population resided in

¹⁰⁷ Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 85-022-X (Ottawa: Statistics Canada, 19 June 2018). [Stats Can, *Correctional Stats in Canada*]

¹⁰⁸ *Ibid.*

¹⁰⁹ Statistics Canada, *Aboriginal Peoples: Fact Sheet for Saskatchewan*, by Karen Kelly-Scott, Catalogue No 89-656-X (Ottawa: Statistics Canada, 14 March 2016). [Stats Can, *Aboriginal Fact Sheet*]; see also Stats Can, *Correctional Stats in Canada*, *supra* note 107 cites the Saskatchewan Indigenous population as 14%.

¹¹⁰ Statistics Canada, *Focus on Geography Series, 2011 Census*, Catalogue No 98-310-XWE2011004 (Ottawa: Statistics Canada, modified 24 October 2012). [Stats Can, *Focus on Geography Series, 2011 Census*], 2011 statistics: 33,476,688 (Canadian population)/ 1,033,381 (Saskatchewan population)=3.1%

Saskatchewan.¹¹¹ In 2016/2017 Indigenous people account for 76% of the Saskatchewan provincial prison population.¹¹² Saskatchewan is a stark example of Indigenous over-representation.

4.2: The law of sentencing in Canada with regards to Indigenous people

Section 718.2(e) of the *Criminal Code*

In order to consider ways in which Indigenous laws can be implemented into the mainstream system we must first understand what laws regarding sentencing currently apply to Indigenous people. This chapter focuses on the *Criminal Code* sentencing principle of s 718.2(e), relating to sentencing of Indigenous people and the seminal Supreme Court of Canada cases interpreting s 718.2(e), being *R v Gladue* and *R v Ipeelee*.

In 1996 section 718.2(e) was added to the “purposes and principles of sentencing” section of the Canadian *Criminal Code*, under “other sentencing principles” directing courts to impose sentences that consider all available sanctions other than imprisonment for all offenders with particular attention to the circumstances of Aboriginal offenders.¹¹³

The interpretation of s 718.2(e) is discussed at length in both *Gladue* and *Ipeelee*. The cases are described below. To summarize, *Gladue* provides that the purpose of s 718.2(e) is to remedy over-incarceration rates of Aboriginal people: “...A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada’s Aboriginal peoples, provide additional insight into the purpose and proper application of this provision.”¹¹⁴ The Supreme Court of Canada in *Gladue* recognizes that Canadian law is not working for Indigenous people.

Ipeelee additionally offers the following principles regarding the practical implementation of s 718.2(e). Section 718.2(e) was not designed to be a discount on sentencing. Rather, it is

¹¹¹ Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Metis and Inuit*, by Annie Turner, Catalogue No 99-011-X (Ottawa: Statistics Canada, modified 25 July 2018). [Stats Can, *Aboriginal Peoples in Canada*]

¹¹² Stats Can, *Correctional Stats in Canada*, *supra* note 107.

¹¹³ *Criminal Code*, *supra* note 3, s 718.2(e) (emphasis added)

“(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” (emphasis added)

¹¹⁴ *Gladue*, *supra* note 2.

intended as a means for judges to order a sentence that properly considers the needs of the offender before them:

[t]he provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, the sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavor to achieve a truly fit and proper sentence in any particular case.¹¹⁵

Parliament is attempting to remedy years of colonialism and oppression through one crucial provision in the *Criminal Code*.¹¹⁶ The Supreme Court of Canada recognizes the law is only one avenue of repairing the widespread issues.¹¹⁷ However, within sentencing judges' limited role they must do what they can to remedy the over-incarceration of Aboriginal people.¹¹⁸ Not only has the Supreme Court of Canada taken on the task of defining the purpose of s 718.2(e), but by defining the provision as such the Supreme Court of Canada has created a legal commitment and promise to apply s 718.2(e) with a vision to repair the epidemic of Aboriginal over-incarceration. In *Gladue* the Supreme Court of Canada stresses the critical nature of Indigenous over incarceration, not just legally, but rather as a pervasive problem, affecting Aboriginal people in many areas of life.¹¹⁹ The critical purpose of s 718.2(e) subsequently creates a great deal of responsibility upon all legal actors to ensure it is implemented and realized to its full potential.

R v Gladue 1999 Supreme Court of Canada

Ms. Gladue pled guilty to manslaughter in the stabbing death of her common law husband.¹²⁰ The Supreme Court of British Columbia sentenced Ms. Gladue to three years imprisonment.¹²¹ Mitigating factors included: Ms. Gladue was a young mother and, apart from a single conviction of driving under the influence, she had no criminal record.¹²² Ms. Gladue was an alcoholic who had been attending counseling, she was provoked during the incident and, because

¹¹⁵ *Ipeelee*, *supra* note 7 at para 75.

¹¹⁶ *Gladue*, *supra* note 2 at para 65.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at para 7.

¹²¹ *Ibid* at paras 13 and 18. The trial decision of *Gladue* did not consider systemic and background factors specifically relevant to Aboriginal people pursuant to s 718.2(e).

¹²² *Ibid* at para 15.

she was pregnant had suffered from a hyperthyroid condition that caused her to overact to emotional situations.¹²³

The issue before the Supreme Court of Canada in *Gladue* was the proper interpretation and application of s 718.2(e).¹²⁴ The Supreme Court of Canada dismissed the appeal and upheld the three-year sentence.¹²⁵ However, the Supreme Court of Canada provided instructions to lower courts regarding how to apply s 718.2(e). The Court articulated the purpose behind the wording of s 718.2(e):

... that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders, which may specifically make imprisonment a less appropriate or less useful sanction.¹²⁶

The Supreme Court of Canada provided sentencing judges with two considerations, which are referred to as prong 1 and prong 2 in this thesis, to be applied when sentencing an Aboriginal person. These dual considerations continue to be applicable today and remain a significant contribution from the *Gladue* decision.

The background considerations regarding the distinct situation of Aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

- a) The unique systemic or background factors which may have played part in bringing the particular Aboriginal offender before the court and;
- b) The types of sentencing procedures and sanctions, other than imprisonment that may be appropriate in the circumstances for the offender because of his/her particular Aboriginal heritage or community connection.¹²⁷

Thus, *Gladue* provides that s 718.2(e) does not direct judges to provide Aboriginal offenders with a more lenient sentence by virtue of being an Aboriginal person, but rather it is

¹²³ *Ibid*, referencing the lower court, the Supreme Court of British Columbia, decision of *Gladue*.

¹²⁴ *Ibid* at para 24.

Gladue was a unanimous decision of a seven-judge panel. Justice Cory and Justice Iacobucci provided written reasons with the following Justices concurring, Lamer CJC., L'Heureux-Dubé, Gonthier, Bastarache and Binnie.

¹²⁵ *Ibid* at para 98.

“[i]n these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant’s circumstances as an Aboriginal offender.”

¹²⁶ *Ibid* at para 37. (emphasis added)

¹²⁷ *Ibid* at para 66. (emphasis added)

meant to address the systemic factors affecting Aboriginal people, particularly with respect to the issue of over-incarceration. Paragraph 60 of *Ipeelee* provides specific examples of the systemic factors or circumstances uniquely affecting Indigenous people:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.¹²⁸

Section 718.2(e) mandates the sentencing judge to seek alternative sentencing to fit the moral culpability of the offender and consider alternatives to prison. In some cases, a fit sentence may include less incarceration time or alternatively a sentence that is served in the community with conditions. This is required because of the unique circumstances of the Aboriginal offender.¹²⁹

The colonial Canadian government inflicted foreign systems upon Indigenous people of Turtle Island. The second prong of *Gladue* creates an opportunity for Indigenous communities to exercise their own means of justice in their community. Kinship values and reparation within the community can also be realized through the second prong of *Gladue*. Implementing Indigenous laws into the Canadian legal system should not be viewed as an alternative to autonomous Indigenous legal systems advocated for by Lindberg, rather it is a means to exercise Indigenous laws into the Canadian system to which Indigenous people are currently subjected.

R v Ipeelee 2012 Supreme Court of Canada

Subsequent to *Gladue*, in 2012, the Supreme Court of Canada heard the appeal of *R v Ipeelee*.¹³⁰ In *Ipeelee* the Supreme Court of Canada decided on two appeals, both concerning Aboriginal offenders with extensive criminal records.¹³¹ These appeals discuss the principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders.¹³² Mr. Ipeelee was sentenced to six years' imprisonment for sexual assault, followed by a 10-year

¹²⁸ *Ipeelee*, *supra* note 7 at para 60. (emphasis added)

¹²⁹ *Ibid* at para 81.

¹³⁰ *Ibid* at para 1.

¹³¹ *Ibid*.

¹³² *Ibid*. Long- term supervision orders [LTSO].

LTSO.¹³³ Mr. Ladue was sentenced to three years' imprisonment and a seven-year LTSO.¹³⁴ In 2012 Mr. Ladue was charged with breaching his LTSO and pled guilty to that offence.¹³⁵

The Supreme Court of Canada employed the *Ipeelee* appeal as an opportunity to revisit and reaffirm the judgment of this Court in *Gladue*.¹³⁶ The Honourable Justice LeBel for the Supreme Court of Canada, answering whether judges must consider Aboriginal circumstances when sentencing, provides the following: “Failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”¹³⁷ Therefore *Ipeelee* reaffirms what *Gladue* already established: it is an error of law for judges to fail to consider Aboriginal factors when sentencing an Aboriginal person.¹³⁸ Additionally, *Ipeelee* requires sentencing judges to take judicial notice of systemic and background factors affecting Aboriginal people.¹³⁹ Additionally *Ipeelee* provides further clarification regarding the purpose of s 718.2(e)¹⁴⁰ and the two prong considerations established in *Gladue*.¹⁴¹ *Ipeelee* provides sentencing judges with two methods they can employ to fulfil the purpose of s 718.2(e), including: sentencing judges can endeavor to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality

¹³³ *Ibid* at para 10.

¹³⁴ *Ibid* at paras 24- 25.

¹³⁵ *Ibid* at para 27.

¹³⁶ *Ibid* at para 1.

Ipeelee is a 6:1 decision with Justice LeBel providing the reasons for the majority, the following Justices concurring, McLachlin CJC., Binnie, LeBel, Deschamps, Fish and Abella. Justice Rothstein provided a dissent decision.

¹³⁷ *Ibid* at para 73. (emphasis added)

¹³⁸ *Ibid* at para 75.

¹³⁹ *Ibid* at para 60.

¹⁴⁰ *Ibid* at paras 66-67.

¹⁴¹ *Ibid* at paras 72-80, further clarification of *Gladue* two-prong considerations:

Para 73, referring to the first prong of *Gladue*: “Systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness... Canadian law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.” (emphasis added)

Para 74, referring to the second prong of *Gladue*: “the types of sanctions which may be appropriate- bears not on the degree of the culpability of the offender, but on the effectiveness of the sentence itself.”

and rehabilitate offenders,¹⁴² and judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing.¹⁴³

Ipeelee resolved any ambiguity as to whether Aboriginal offenders must show a causal link between their offending and their Aboriginal circumstances. *Ipeelee* clearly denounced a need to prove a causal link for two reasons. First, s 718.2(e) does not burden the Aboriginal offender with the need to prove a link and second, it would be extremely difficult for the Aboriginal person to prove a link as the “interconnections are too complex.”¹⁴⁴ *Ipeelee* addressed the irregular and uncertain application of *Gladue* principles relating to serious or violence offences.¹⁴⁵ The Supreme Court of Canada is adamant that s 718.2(e) must be applied in every criminal sentencing involving an Aboriginal person; additionally, the provision applies to offenders who carry extensive criminal records or have committed serious or violence offences.¹⁴⁶

Implementation of *Gladue* principles is a small opening into the mainstream system which facilitates Indigenous thoughts and values. *Gladue* does not replace the mainstream system nor does it create an Indigenous justice system, but it is one means in which Indigenous values can be realized in criminal law in this country. The remaining sections of this thesis advocate for *Gladue* as a means of realizing Indigenous consciousness and contribution to the legal system of Canada. The following three chapters discuss the importance of applying *Gladue*, the scope in which *Gladue* can be applied and different ways in which *Gladue* can be realized in the courts. In the next chapter New Zealand’s approach to over-incarceration of Indigenous people is examined. In particular, New Zealand exercises therapeutic courts which facilitate Maori culture and laws into the sentencing process.

¹⁴² *Ibid* at para 66.

¹⁴³ *Ibid* at para 67.

¹⁴⁴ *Ibid* at paras 82-83.

¹⁴⁵ *Ibid* at para 84.

¹⁴⁶ *Ibid* at para 87.

CHAPTER FIVE: NEW ZEALAND'S APPROACH TO IMPRISONMENT AND SENTENCING OF MAORI PEOPLE

New Zealand's and Canada's criminal codes originate from the same English criminal code.¹⁴⁷ Both countries face similar issues of high incarceration rates of Indigenous people. New Zealand exercises a number of therapeutic courts including an Alcohol and Other Drugs Treatment Court¹⁴⁸ which serves as both an addictions and cultural court. Canada also uses a Drug Treatment Court,¹⁴⁹ although the cultural aspect of Canada's court could be further integrated. This chapter advocates for the implementation of therapeutic courts as a means of appropriately applying *Gladue* principles by incorporating Indigenous heritage and community connection. Therapeutic courts create an opportunity for Indigenous philosophies to contribute to the sentencing process. New Zealand's AODT Court is largely an Indigenous culture court as well. New Zealand implements Indigenous laws and legal system in the mainstream New Zealand justice system. Canada can learn from New Zealand as a model to incorporate Indigenous laws into the mainstream Canadian justice system.

5.1: Comparing incarceration rates of Indigenous people

When comparing Canadian statistics to New Zealand figures it is important to be mindful of a number of key differences. New Zealand is a central government and therefore does not concern itself with division of powers, including provinces or states.¹⁵⁰ According to Canadian law, Canada is a federal state, including both federal powers and provincial and territorial

¹⁴⁷ Colvin and Anand, *Principles of Criminal Law*, *supra* note 34 at page 8.

¹⁴⁸ Alcohol and Other Drugs Treatment Court [AODTC]; also referred to as AODT Court

¹⁴⁹ Drug Treatment Court [DTC]

¹⁵⁰ Ministry of Business, Innovation and Employment, *Central Government* (New Zealand Government, accessed 16 December 2018).

powers.¹⁵¹ This thesis recognizes that Indigenous governments ought to be considered as sovereign states within the land mass of Turtle Island; however, for the purpose of analyzing colonial law in this thesis, New Zealand and Canadian colonial criminal justice systems are analyzed. When comparing the laws between Canada and New Zealand it is necessary to note that the processes and impacts of law will vary to some degree, because of the different forms of government.

The actual population of each country is much different. New Zealand has an overall country population of 4.9 million people¹⁵² whereas Canada has a population of 35.1 million people.¹⁵³ The Canadian province of Saskatchewan accounts for just over 1 million people.¹⁵⁴ Of comparison, the Canadian province of British Columbia population size is quite similar to that of New Zealand, at approximately 4.6 million people.¹⁵⁵ It is important to be aware of these vastly different population sizes, although many of the statistics provided in this thesis will be presented in percentage format.

In Canada there are three constitutionally recognized groups of Indigenous people, including First Nations, Metis and Inuit.¹⁵⁶ Within the three designations of Indigenous people there are many different Indigenous bands, communities, nations and settlements.¹⁵⁷ However, there is only one group of people Indigenous to New Zealand: the Maori. New Zealand's Indigenous people are not subjected to the reserve system, nor are they divided into subsection groups or defined by way of legislation such as the *Indian Act*, in the way that Canadian Indigenous people were and still are. New Zealand carries its own distinct history of colonization. As will be discussed the Treaty of Waitangi defines the relationship between Maori people and the New Zealand government. The actual meaning of the Treaty is contentious.

¹⁵¹ Parliament of Canada, *How Canadians Govern Themselves*, by Senator Eugene Forsey (Ottawa: Library of Parliament, revised February 2016).

¹⁵² Stats NZ, *Population Clock*, (New Zealand Government, accessed 17 December 2018). [Stats NZ, *Population Clock*]

New Zealand population, 4,927,777, as of Monday, 17 December 2018 at 12:40:22pm (NZST).

¹⁵³ Statistics Canada, *Canada at a Glance 2017 Population*, Catalogue No 12-581-x (Ottawa: Statistics Canada, modified 31 March 2017). [Stats Can, *Canada at a Glance 2017*]

Canadian population in 2016: 35,151,728.

¹⁵⁴ *Ibid.* Saskatchewan population in 2016, 1,098,352.

¹⁵⁵ *Ibid.* British Columbia population in 2016, 4,648,055.

¹⁵⁶ Crown-Indigenous Relations and Northern Affairs Canada, *Indigenous peoples and communities*, (Ottawa: Government of Canada, modified 04 December 2017); Stats Can, *Aboriginal Peoples in Canada*, *supra* note 111. The Aboriginal population in Canada is comprised of 60.8% First Nations, 32.3% Metis and 4.3% Inuit.

¹⁵⁷ *Ibid* Stats Can, *Aboriginal Peoples in Canada*.

There are also other Indigenous people that reside in New Zealand who identify themselves as Indigenous people, however do not necessarily identify as Indigenous to New Zealand, including Pacific Island people.¹⁵⁸ When discussing statistics of Indigenous people in New Zealand, statistics of the Pacific Island people will also be provided. As will be further provided in subsequent sections, the Pacific Island people have a similar experience to that of Maori people and therefore it is useful to also consider the prison rates of Pacific Island people as well.

This thesis provides Saskatchewan statistics of Indigenous over-representation because the percentages of Indigenous people in Saskatchewan and New Zealand are similar. Indigenous people in Saskatchewan make up 16% of the overall Saskatchewan population,¹⁵⁹ yet 76% of the provincial prison population in Saskatchewan.¹⁶⁰ Indigenous people in New Zealand account for 15.8% of the overall New Zealand population;¹⁶¹ however 51% of the New Zealand prison population is Maori.¹⁶² When including Pacific people to the Indigenous incarceration population of New Zealand the percentage of Indigenous people in prison increases, although the rate of disproportionately actually decreases. Pacific people account for approximately 10% of the New Zealand population and 12% of the prison population.¹⁶³ Therefore, combining the Maori and Pacific population totals 25.8% of the overall population, yet these two groups together account for 63% of the total prison population.

To summarize these figures, the Indigenous population in Canada is over-represented in prison at a rate of 6.7 times its population size.¹⁶⁴ In Saskatchewan Indigenous people are

¹⁵⁸ Ministry of Pacific Peoples, *Pacific People in NZ*, (New Zealand Government, accessed 16 December 2018).

“By 2026 it is projected that the Pacific people will comprise 10% of the population, compared to 7.4% in 2013; Samoa remains the largest Pacific people ethnic group in 2013 with 48.7% of the Pacific people’s population being Samoan (144,138). Cook Islands Maori 20.9% (61,839 people); Tongan 20.4% (60,333 people); Niuean 8.1% (23,883 people).”

¹⁵⁹ Stats Can, *Aboriginal Fact Sheet*, *supra* note 109.

¹⁶⁰ Stats Can, *Correctional Stats in Canada*, *supra* note 107.

¹⁶¹ Department of Corrections, *Annual Report: 1 July 2016 - 30 June 2017 Creating Lasting Change by Breaking the Cycle of Re-offending* (Wellington, New Zealand, New Zealand Government, 2016-2017). [NZ, Department of Corrections, *Annual Report*]

¹⁶² *Ibid.*

¹⁶³ Stats NZ, *New Zealand’s prison population*, (Department of Corrections and Statistics New Zealand, 2012, accessed 17 December 2018).

¹⁶⁴ Stats Can, *Correctional Stats in Canada*, *supra* note 107.

The Indigenous population in Canada makes up 4.1% of the national population, yet account for 28% of the national provincial/territorial prison population and 27% of federal correctional services.

$(28 + 27)/2 = 27.5$

$27.5\%/4.1\% = 6.70$

incarcerated at a rate of 4.75 times of their population size.¹⁶⁵ In New Zealand Maori people are incarcerated at a rate of 3.2 times of their population size¹⁶⁶ and when including Pacific people the prison rate is 2.4 times their population size.¹⁶⁷

I was fortunate to have the opportunity in New Zealand to observe and interview a number of judges.¹⁶⁸ While interviewing Justice Williams of the New Zealand Court of Appeal, he brought to my attention the high rates of incarceration in New Zealand in general, portrayed through the figure of people incarcerated per 100,000 people in New Zealand. In New Zealand, the prison population rate per 100,000 of the national population is 214/100,000.¹⁶⁹ Figures show a sizable difference when considering Canada's prison population. In Canada, the prison population per 100,000 people is 114/100,000, almost half of New Zealand's 214.¹⁷⁰ It is clear that New Zealand imprisons its overall population at much higher rates. Canada's population size is over 7 times larger than New Zealand's however New Zealand imprisons approximately one quarter or 26% of the total prison population of Canada.¹⁷¹

¹⁶⁵ Stats Can, *Aboriginal Fact Sheet*, *supra* note 109; Stats Can, *Correctional Stats in Canada*, *supra* note 107.

Indigenous people in Saskatchewan account for 16% of the population yet represent 76% of the provincial prison population in Saskatchewan.

$76\%/16\% = 4.75$

¹⁶⁶ NZ, Department of Corrections, *Annual Report*, *supra* note 161.

Maori people account for 15.8% of the national population and 51% of the prison population in New Zealand.

$51\%/15.8\% = 3.23$

¹⁶⁷ *Ibid.*

Maori and Pacific Island people together account for 25.8% of the national population and 63% of the prison population.

$63\%/25.8\% = 2.44$

¹⁶⁸ Justice France, New Zealand Supreme Court; Justice Williams, New Zealand Court of Appeal; Judge Taumaunu, Auckland District Court, Rangatahi (Youth) Court; Judge Aitken, Auckland District Court, Alcohol and Other Drugs Treatment Court; Judge Tremewan, Waitākere District Court, Alcohol and Other Drugs Treatment Court.

¹⁶⁹ "World Prison Brief data: New Zealand" (accessed 17 December 2018), online: *World Prison Brief*. [World Prison Brief, New Zealand]

214/100,000. This figure is based on an estimated national population of 4.88 million in June 2018.

¹⁷⁰ "World Prison Brief data: Canada" (accessed 17 December 2018), online: *World Prison Brief*. [World Prison Brief, Canada]

114/ 100,000. This figure is based on an estimated national population of 35.94 million on September 30, 2015.

¹⁷¹ *Ibid.*; World Prison Brief, New Zealand, *supra* note 169.

$10,435$ (New Zealand's total prison population)/ $41,145$ (Canada's total prison population) = 25.36%

Both Canada and New Zealand are running above prison capacity. The total number of people in prison in New Zealand is 10, 425.¹⁷² The official capacity of the prison system is 8,393.¹⁷³ The total prison population in Canada is 41, 145.¹⁷⁴ The official capacity of Canada's prison system is 38, 771.¹⁷⁵

The high rates of New Zealand's incarceration per capita paired with its large Indigenous population suggests, simply put, New Zealand may be imprisoning more of its population because a large portion of its population is Indigenous. This is a strong statement, but it is logical and compelling. This thesis submits that when a state is highly populated by Indigenous people the notion of "tough on crime" or a punitive approach to prison in general is accepted and encouraged.

When considering the Canadian prairie provinces' rates of imprisonment per 100,000 the numbers become increasingly similar to New Zealand's rates of imprisonment per 100,000. According to Statistics Canada during 2016/2017, Manitoba recorded the highest adult incarceration rate at 240 per 100,000.¹⁷⁶ It is important to note that Manitoba is also home to the highest percentage of Aboriginal people of any Canadian province at 16.7% of the Manitoba population being Aboriginal.¹⁷⁷ Saskatchewan is second to Manitoba's Aboriginal population at 15.6% of the Saskatchewan population being Aboriginal.¹⁷⁸ In 2016/2017, Saskatchewan imprisoned 214 people per 100,000.¹⁷⁹ Manitoba and Saskatchewan's Aboriginal population size is similar to that of New Zealand's and each province's rates of imprisonment per 100,000 is similar to New Zealand's rate of imprisonment per 100,000.

This analysis on its own does not provide definitive evidence that if a country or province is home to more Indigenous people that the state will likely imprison more people on a grand level,

¹⁷² *Ibid* World Prison Brief, New Zealand.

This total includes pre-trial detainees and remand prisoners.

¹⁷³ *Ibid*.

¹⁷⁴ World Prison Brief, Canada, *supra* note 170.

This total includes pre-trial detainees and remand prisoners.

¹⁷⁵ *Ibid*.

¹⁷⁶ Stats Can, *Correctional Stats in Canada*, *supra* note 107 at table 1.

The territories have higher incarceration rates per 100,000 adult population:

Yukon: 23.1% 279/100,000

Northwest territories: 51.9% 552/100,000

Nunavut: 86.3% 577/ 100,000

¹⁷⁷ Stats Can, *Aboriginal Peoples in Canada*, *supra* note 111 at table 2.

¹⁷⁸ *Ibid*.

¹⁷⁹ Stats Can, *Correctional Stats in Canada*, *supra* note 107 at table 1.

but it does expose a worrisome trend that should be noted. It is useful to consider the rates of Indigenous incarceration in other developed countries.

For the purpose of this thesis, Canada and New Zealand are compared, but what are the rates of imprisonment for Indigenous people in other developed countries? Such as Australia and the United States? The United Nations concludes, “even in developed countries [referring to Australia, Canada, New Zealand and the United States] Indigenous peoples consistently lag behind the non- Indigenous population.”¹⁸⁰ Statistics show that Australia and the United States both incarcerate Indigenous people at greater rates than non-Indigenous populations.

In 2001 Indigenous Australians were 9.6 times more likely than non-Indigenous Australians to be imprisoned.¹⁸¹ “In the United States, in the state of Alaska, Native Alaskans are incarcerated at a rate 3.2 times higher than that of white Alaskans, and Native Alaskan juveniles are 1.8 times as likely to be adjudicated delinquent as white juveniles.”¹⁸²

Similar to Canada, Australia’s Indigenous population comprises 2.8% of the overall population.¹⁸³ Indigenous people in the United States comprise 2% of the population.¹⁸⁴

¹⁸⁰ United Nations, *State of the World’s Indigenous Peoples*, Vol 1 (New York City, New York: United Nations publication, 2009) at page 22.

Indigenous people live shorter lives, have poorer health care and education and endure higher unemployment rates.

¹⁸¹ *Ibid* at page 206.

¹⁸² *Ibid* at page 206.

¹⁸³ Australia Bureau of Statistics, *Census: Aboriginal and Torres Strait Islander population*, media release (Australian Government, 27 June 2017). [Australia Bureau of Statistics, *Census: Aboriginal and Torres Strait Islander population*]

¹⁸⁴ United States Census Bureau, *Facts for Features: American Indian and Alaska Native Heritage Month: November 2015*, Release No CB15-FF.22 (Washington, District of Columbia: United States Census Bureau, 02 November 2015). [United States Census Bureau, *American Indian and Alaska Native Heritage Month*]

Country	Indigenous population percentage ¹⁸⁵	Incarceration rate per 100,000 ¹⁸⁶
Australia	2.8%	172
Canada	4.1%	114
Manitoba	16.7%	240
New Zealand	15.8%	214
Saskatchewan	15.6%	214
United States	2%	655

The United States figure is much higher than New Zealand. The United States incarcerates the most people in the world per population rate¹⁸⁷ and per population size.¹⁸⁸ In the United States, the number of American Indians and Alaska Natives held in local jails increased nearly 90% from 1999 to 2014.¹⁸⁹ The United States has a serious issue of incarcerating people of racialized backgrounds, including African Americans and Hispanic people.¹⁹⁰ Together African Americans (13.4%) and Hispanics (18.1%) make up 31.5% of the American population, although in 2015 they compromised 56% of all people incarcerated in the States.¹⁹¹ High rates of incarceration per 100,000 people paired with over representation of Indigenous or racialized people may suggest

¹⁸⁵ The figures in this table are cited throughout this thesis. Please acknowledge the years the figures were collected varies:

Australia 2016: Australia Bureau of Statistics, *Census: Aboriginal and Torres Strait Islander population*, *supra* note 183.

Canada 2016/2017: Stats Can, *Correctional Stats in Canada*, *supra* note 107.

Manitoba 2011: Stats Can, *Aboriginal Peoples in Canada*, *supra* note 111.

New Zealand 2016/2017: NZ, Department of Corrections, *Annual Report*, *supra* note 161.

Saskatchewan 2011: Stats Can, *Aboriginal Peoples in Canada*, *supra* note 111.

United States 2016: United States Census Bureau, *American Indian and Alaska Native Heritage Month*, *supra* note 184.

¹⁸⁶ Prison population rates for Australia, Canada, New Zealand and the United States were collected from “World Prison Brief” (accessed 17 December 2018), online: *World Prison Brief* [World Prison Brief]; statistics collected for Saskatchewan and Manitoba were sourced from Stats Can, *Correctional Stats in Canada*, *supra* note 107.

¹⁸⁷ *Ibid* World Prison Brief.

¹⁸⁸ *Ibid*.

¹⁸⁹ Bureau of Justice Statistics, *American Indian and Alaska Natives in Local Jails, 1999-2014*, by Todd Minton, NCJ 250652, (US Department of Justice, September 2017).

Compared to state prisons (up 61%) and Indian country jails (up 47%).

¹⁹⁰ “Criminal Justice Fact Sheet” (2018), online: *National Association for the Advancement of Colored People*.

¹⁹¹ United States Census Bureau, *Quick Facts: United States* (US Department of Commerce: 2017).

that something more deep-rooted is taking place. Perhaps criminal justice systems themselves are designed, through years of systemic racism and discriminatory practices, to fear and oppress racialized people. The United States has a dramatic and devastating history of slavery and racism; some argue, including Courtney McGinn, LLM student at the University of Texas at Austin School of Law that the United States prison system is a modern day form of slavery.¹⁹² Although slavery has been abolished in the United States a new form of oppression continues in the form of grossly high incarceration rates for African American people. The high rates of incarceration may generally be accepted among society because of a “tough on crime” approach. People are made to feel that they are safe when more people are incarcerated. However, this approach does not consider the historical context that has led to greater incarceration rates.

The criminal justice system was created to serve and protect the colonizers. The theories of Monture-Angus and Lindberg are continually relevant when discussing over-incarceration rates: the justice system was created to oppress racialized people, not to accommodate or protect them. Alternatives to conventional ways of punishment are incredibly important because they allow for Indigenous systems to exist in the colonial system and question the mainstream way of thinking. In the following second half of this chapter the use of therapeutic courts to reintroduce Indigenous ways of knowing into the court system are discussed.

5.2: Therapeutic courts and Indigenous sentencing principles

Throughout this thesis the lack of inclusion of Indigenous culture and laws in mainstream legal systems has been emphasized. High rates of Indigenous people incarcerated in Canadian prisons is evidence of the mainstream Canadian system not working for Indigenous people. In New Zealand there are no uniform Indigenous sentencing principles as there are in Canada. However, New Zealand’s mainstream legal system acknowledges the importance of integrating Indigenous culture and ways of knowing into the court system.¹⁹³ In this chapter, New Zealand’s alcohol and

¹⁹² Courtney McGinn, “Legalized Slavery in the United States Implemented Through the “Justice” System,” *The Bernard and Audre Rapoport Center for Human Rights and Justice* (The University of Texas at Austin, School of Law, 26 April 2017).

¹⁹³ *Sentencing Act 2002* No 9 (NZ).

The New Zealand *Sentencing Act* includes provisions in which Maori upbringing and family connections must be considered:

S 8: principles of sentencing

drug treatment court is introduced. The purpose of highlighting this court is to provide an example in which Indigenous laws have been meaningfully incorporated into the criminal justice system sentencing process. Canada offers a similar drug treatment court, but the immersion of culture and Indigenous ways of knowing do not appear to be as integrated as New Zealand's therapeutic courts, including the Alcohol and Drug Treatment Court.

One of the motivators to include New Zealand's AODTC in this thesis is solution based. Addressing alcoholism in any country or province should lower the rates of crime and incarceration. *Gladue* and *Ipeelee* both involved sentencing decisions of Indigenous people who suffered from alcoholism and whom consumed alcohol when they committed the crimes which they were being sentenced for.¹⁹⁴ A vast number of crimes in Canada are committed while people are intoxicated on alcohol or other drugs. In 2002 The Canadian Centre on Substance Abuse¹⁹⁵ gathered extensive research with a number of stakeholders to provide data on the association between abuse of alcohol and drugs and the commission of criminal acts.¹⁹⁶ The CCSA details the following regarding the correlation between substances and criminal activity:

... the proportion of crimes committed by federal and provincial inmates that are attributed to the use of alcohol and/or illicit drugs in Canada was estimated as being between 40% and 50%. Between 10% and 15% are attributed to illicit drugs only, between 15% and 20% are attributed to alcohol only, and 10% to 20% are attributed to both alcohol and illicit drugs.¹⁹⁷

In 2014 the CCSA published further up to date data regarding the correlation between alcohol and drugs and crime rates:

43% of partially attributable crimes (i.e., excluding impaired driving and crimes defined under the CDSA) would not have occurred if the perpetrator had not been under the influence of or seeking alcohol or other drugs.

S 26: presentencing reports

S 27: offender may request court to hear personal, family, whanau, community, and cultural background of offender

S 51: programmes

¹⁹⁴ *Gladue*, *supra* note 2 at paras 6 and 10; *Ipeelee*, *supra* note 7 at paras 2, 10, 11 and 13.

¹⁹⁵ Canadian Centre on Substance Abuse [CCSA]

¹⁹⁶ Kai Pernanen Ph.D et al, *Proportions Of Crimes Associated With Alcohol And Other Drugs In Canada*, (Canadian Centre on Substance Abuse, April 2002) at page 5.

¹⁹⁷ *Ibid* at page 9.

Almost 20% of all violent crime would not have occurred if the perpetrator was not under the influence of or seeking alcohol.¹⁹⁸

Unfortunately, addictions issues among Indigenous communities and people is a well-known reality in Canada. The CCSA provides that of the First Nations that participated in their survey between 2008-2019, 82.6% reported that alcohol and drug abuse was the number one challenge for community wellness faced by on-reserve communities.¹⁹⁹ It is a well-documented fact that Indigenous communities and people are plagued by substance issues due to ongoing traumas and inequalities, directly created by Canadian government laws and policies; this is supported by the Supreme Court of Canada in both *Gladue*²⁰⁰ and *Ipeelee*.²⁰¹ As articulated earlier in this thesis during discussion of the history between the Canadian government and Indigenous people, paternalistic government policies continue to negatively affect Indigenous people; examples including the ongoing authority of the *Indian Act* and the residual impacts of residential schools.

Therapeutic sentencing courts in the form of addictions courts are one way in which criminal justice systems can remedy historical oppression of Indigenous people while incorporating Indigenous culture and laws into the mainstream legal system.

New Zealand Therapeutic Courts

During completion of my LL.M. course requirements I travelled to New Zealand to research how Indigenous people are treated and sentenced within the New Zealand court system. I spent a large portion of my six-week stay observing AODTC.²⁰² The New Zealand Ministry of Justice provides the following description of the AODT Court:

The AODT Court is an abstinence-based model aimed at defendants whose offending is driven by AOD dependency. It provides selected defendants, who are facing a term

¹⁹⁸ Canadian Centre on Substance Use and Addiction, *Canadian Substance Use Cost and Harms 2007-2014 Report in Short*, (Ottawa, Ontario: Canadian Centre on Substance Use and Addiction, 2018) at page 3.

¹⁹⁹ “First Nations, Inuit and Metis” (accessed 17 December 2018), online: *Canadian Centre on Substance Use and Addiction*.

As a result of a history of colonization, isolation, poverty and language barriers, substance abuse, especially alcohol and solvents, is more common in northern and remote communities. These communities are also more vulnerable to suicide, violence and poor performance in schools.

²⁰⁰ *Gladue*, *supra* note 2 at paras 65, 67 and 80.

²⁰¹ *Ipeelee*, *supra* note 7 at para 60.

²⁰² “Courts” (accessed 17 December 2018), online: *Ministry of Justice, New Zealand Government*. New Zealand also offers other integrative courts including, Family Court and Youth [Rantangi] Court.

of imprisonment of up to three years, with an opportunity to participate in an AOD treatment programme before sentencing. Where AODT Court is not offered, standard District Court process is followed.²⁰³

The AODT Court began operating in November 2012. The intended outcomes of the court are to: reduce reoffending, AOD consumption and dependency, the use of imprisonment; positively impact on health and wellbeing; be cost-effective.²⁰⁴

Participants are making an informed decision when entering the court and are moving through the three phases as expected. While the length of time participants are taking to progress through the court (18 months on average) is at the upper end of what was expected, it aligns with international drug court training.²⁰⁵

AODTC is an example of a criminal justice system integrating culture into the traditional criminal justice system to better reflect the needs of Indigenous people. Although New Zealand does not have a formal sentencing process specifically for Indigenous people, New Zealand uses therapeutic courts to ensure the cultural needs and understanding of Indigenous histories are reflected. Monture-Angus and Lindberg both speak to the disconnect that exists between Indigenous people and the criminal justice system, because the system does not reflect Indigenous culture and ways of knowing.²⁰⁶ The New Zealand AODT Court understands the importance of fusing Indigenous culture and understanding into the court process to ensure the needs of Indigenous people are met.

To be considered for the AODTC a sentencing judge of the mainstream court will refer the offender.²⁰⁷ Offenses committed that involve serious violence or are of a sexual nature will generally be denied into the AODTC.²⁰⁸ The treatment received in AODTC is considered the sentence for the participants, who have either been found guilty of a criminal offense or have pled

²⁰³ Ministry of Justice, *Process Evaluation for the Alcohol and other Drug Treatment Court: Te Whare Whakapiki Wairua, Interim Report*, (Wellington, New Zealand: Litmus, 18 August 2015) at page 20.

²⁰⁴ Ministry of Justice, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court: Te Whare Whakapiki Wairua*, (Wellington, New Zealand: Litmus 17 August 2016) at page 7.

²⁰⁵ *Ibid* at page 4.

²⁰⁶ Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks*, *supra* note 72 at page 148; Lindberg, “Critical Indigenous Legal Theory,” *supra* note 80 at page 234.

²⁰⁷ Ministry of Justice, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court*, *supra* note 204 at page 7. “A District Court judge decides on referrals to the AODT Court based on a full AOD assessment by the Community Alcohol and Drug Services (CADS) and other criteria in the eligibility check list such as RoC*RoI score [Risk of re-conviction and Risk of re-imprisonment, provided by Community Probation], previous and current offences, willingness to participate, likely plea and sentence.”

²⁰⁸ *Ibid* at page 31.

guilty to a criminal offense. Therefore, the participants' willingness to engage in the Court and open up are at the core of this Court. Participants recognize the need to be honest, open and transparent in order to reap the benefits of the Court.²⁰⁹ Many participants have told stakeholders and fellow participants that cheating would jeopardise the existence of the AODT Court.²¹⁰ The Court's goal is long-term sobriety and wellness, not a quick fix. As such the court appreciates that healing takes time and requires compassion and patience through the process.

The focus of the AODTC is the treatment plan, which includes participation in recovery meetings, programs and activities, all of which are based on Maori culture and understanding.²¹¹ Forty- five percent of the participants in the AODT Court identify as Maori.²¹²

You're going to see a level of cultural competence that is unparalleled ... because of the judges who are involved starting the session with Māori cultural...procedures, for the lack of a better word. All sets the tone that I think really affects the way everybody acts...trying to do the best job they can. *Stakeholder*²¹³

Participants proceed through three stages of recovery, each with separate goals and requirements.²¹⁴ Once the participant has met all stages and spent the duration of their sentence in AODTC the participant graduates from the Court.²¹⁵ All participants are regularly drug tested. In order to graduate, participants must be willingly providing tests and be honest about their progress.²¹⁶ Upon graduating, the usual sentence will be intensive supervision and judicial monitoring.²¹⁷ From the inception of the Court in November 2012 until April 2016, 79 participants have graduated from the court.²¹⁸

²⁰⁹ *Ibid* at page 58.

²¹⁰ *Ibid* at page 89.

²¹¹ *Ibid* at pages 61-64.

²¹² *Ibid* at page 46.

²¹³ *Ibid* at page 64.

²¹⁴ *Ibid* at pages 49, 50, 51

Phase one focuses on treatment and adhering to Court requirements; Phase two continues the treatment plan but expands into rebuilding the participant's life, for example pursuing education and employment; Phase three is a transition towards graduation. Participants are expected to gain employment or start education.

²¹⁵ *Ibid* at page 48.

²¹⁶ *Ibid* at page 92. This does not mean that participants are required to provide perfect-negative testings, rather it is crucial that the participants are honest, open and transparent.

²¹⁷ *Ibid* at page 101.

²¹⁸ *Ibid* at page 48. 28% (79 participants) have graduated from the Court.

AODT Court is offered in two locations, Auckland and Waitakere. The Court is in session for a full day once per week.²¹⁹ Participants are expected to always be present in Court, unless otherwise told. Those being sentenced within the AODTC are referred to as participants of the Court, rather than offenders. The goal of AODTC is to recover the participant from addiction issues and reduce reoffending.²²⁰ Central to the philosophy of the AODT Court is that addictions are viewed as primarily a health problem²²¹ and therefore the person before the court requires aid and healing, as opposed to punishment and deterrence. AODT Court is not an adversary court, nor does it concern itself as comprehensively with such principles of denunciation and retribution, as do traditional courts. In order to meet the goal of AODTC the Court focuses on the cultural needs of the participants.

Stakeholders believe that tikanga Māori practices in the AODT Court play a significant role in supporting the cultural needs of Māori and non-Māori participants in their recovery. Māori and non Māori participants and their Whanau are overwhelmingly supportive of tikanga Māori in the AODT Court. The use of tikanga Māori demonstrates to participants and Whanau the therapeutic nature of the court by creating a sense of welcome, inclusion, caring and being non-judgemental.²²²

Two important conclusions can be reasonably drawn from this mission: first, the AODTC respects the legal interpretations of Maori customs and therefore integrates such into the sentencing process of this Court. Second, the AODTC is clear that it values Maori culture as an element of recovery for the participants.

Based on my observations, a key benefit and difference of the AODT Court from drug treatment court in Canada is the integration of Indigenous-Maori culture. AODT Court takes place in a traditional court room, but the set-up of the room is modified; the legal actors are situated in a circle. Other members also present in the Court include a police prosecutor, case managers, court coordinators, cultural advisors referred to as Te Pou Oranga, peer support workers who are living in recovery and probation officers.²²³ The Court is intended to be a support system for the participants of the Court and therefore the legal players and services are working towards the same goal, to recover the participants to a life of sobriety, good health and free from criminal activity.

²¹⁹ *Ibid* at pages 45-46.

²²⁰ *Ibid* at page 7.

²²¹ *Ibid* at pages 3, 7, 16, 22.

²²² *Ibid* at page 61. From a Māori perspective when tikanga has been acknowledged and embedded, the practice of tikanga is now considered as kawa/protocol. Tikanga is the practice of that knowledge.

²²³ *Ibid* at pages 3-4.

As is customary in mainstream courtrooms, a crest above the judge’s bench is present in AODT Court, symbolizing the Queen and her involvement in the court process; however, a Taonga Artwork piece representing the three images from the “serenity prayer” is also included on the courtroom wall.²²⁴ The three panels symbolize the three stages of recovery: serenity, courage and wisdom.²²⁵ The Taonga was created by a Maori artist and professor, Steve Gibb, and is present at both AODT Court locations.²²⁶ While I observed AODT Court, the Maori Elder Mataw would regularly refer to the serenity prayer, explaining its significance to the participants of the Court, usually in Maori language. This is an example of the AODT Court committing to its mission of integrating both mainstream and Indigenous practices to meet the needs of the participants.



²²⁴ Katey Thom & Stella Black with contributions from Michele Yeoman, *Nga Whenu Raranga: Weaving Strands #1, The therapeutic framework of Te Whare Whakapiki Wairua/ The Alcohol and Other Drug Treatment Court*, (Auckland, New Zealand: University of Auckland, 13 April 2017) at pages 12-13. [Thom & Black, *Nga Whenu Raranga: Weaving Strands #1*]

²²⁵ *Ibid* at page 12.

²²⁶ *Ibid* at pages 12-13.

Each time I observed AODTC the judge of the court was a Pakeha person,²²⁷ yet they opened the court by speaking Maori. Both judges I observed were also females. During discussion of family and connection the term whanau is used which is the Maori word for family or belonging. The Maori Elder is called upon throughout submissions to provide their feedback and understanding of the individual being considered or sentenced. At the heart and focus on the AODTC is the connection to the individuals' Maori culture and community. The importance of culture and the Maori ways of life are not debated or questioned. Maori culture is respected and regarded highly.

In terms of the success of the AODTC, the New Zealand Ministry of Justice has stated that the goal is not restricted to the number of graduates or decreased rates of recidivism.²²⁸ Rather, success is more holistic and based on recovery and an ongoing pathway towards good health and sobriety. Exited participants of the AODT Court provide the following testimony regarding the success of the Court:

Even though I didn't graduate I got a lot from it. I've done treatment and I lived in a halfway house... I'm a member of narcotics anonymous and I've got a sponsor. I'm in jail now because I relapsed for about three or four days. I made the wrong choice and exited myself from the drug court, which I regret now. I'm still in recovery and I'll be continuing my recovery when I get out. *Exited Participant*²²⁹

In my heart I wanted to change but it's hard because of my addiction, and people that came around me that had the same addiction weren't really supportive or trying to change. Kind of led me off track... But it's a good programme, I like it. I was thinking of trying to get back into [treatment] when I get out, go there myself. *Exited Participant*²³⁰

Participants of the Court are encouraged to bring their family/whanau to Court with them. If their family members suffer from addictions, they are encouraged to seek the treatment services offered by the Court as well.²³¹ This policy is a testament to the AODTC putting into practice their focal goal, to recover participants in a meaningful and long-term way. The AODTC recognizes that in order for an addicted person involved in criminal activity to become sober and live a pro-

²²⁷ Pakeha is Maori for white New- Zealand person.

²²⁸ Ministry of Justice, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court*, *supra* note 204 at pages 98-99.

²²⁹ *Ibid* at page 98.

²³⁰ *Ibid* at page 99.

²³¹ *Ibid* at pages 67-68.

social life it is greatly beneficial to them for their whanau to be healthy as well. A family member of one of the participants provides the following comment about their experience and involvement with the AODT Court:

The best thing ... for me it was the fact that I was able to participate. In the normal criminal system you're sitting in the court but you can't say anything you just watch the process. So for me the biggest and best thing of the drug court was that we could talk and participate and be involved in the process. *Whānau member*²³²

The AODTC does not implement a policy that once you relapse you are ejected from the Court, rather the Court team members and the judge recognize that addictions are a life long journey, which may include both setbacks and successes. Patience is afforded to the participants, but honesty from the participant is necessary and crucial to the success of the Court. New Zealand also offers youth court as a form of therapeutic and cultural court as well.

I also observed youth court while researching in New Zealand. Youth court in New Zealand is often referred to as Rangatahi Court or the Te Kōti Rangatahi.²³³

Rangatahi Courts are a judicially-led initiative primarily established to provide a more culturally responsive and appropriate process. The overall vision was to promote better engagement with, confidence in, and respect for the youth justice process. Rangatahi Courts provide an opportunity to draw upon the resources of local marae communities and, in this way, operate consistently with the objects and principles of the CYPR Act.²³⁴

The focus of Rangatahi Court is to provide culturally appropriate processes, encourage the youth to gain respect for the rule of the law and foster respect for the youth and their whanau, promoting more positive engagement with the Court.²³⁵ The Rangatahi Court takes place at a traditional

²³² *Ibid* at page 67.

²³³ Te Koti Rangatahi: The Rangatahi Court, *He kōrero whakamārama i te kaupapa me ngā tikanga: Background and Operating Protocol* (Napier Library, reproduced with the permission of Judge Heemi Taumaunu, 01 July 2015) at page 3. [Te Koti Rangatahi: The Rangatahi Court, *Background and Operating Protocol*]

²³⁴ *Ibid* at page 4.

Children, Young Persons and Their Families Act 1989 (CYPF Act)

²³⁵ *Ibid* at page 4.

The specific goals of the Rangatahi Court are to:

- a. Honour and apply the objects and principles in the CYPF Act;
- b. Hold the young person accountable and ensure victim interests are addressed;
- c. Address the underlying causes of the offending behaviour;
- d. Use te reo Māori, tikanga and kawa (Māori language, culture and protocols) as part of the Court process;
- e. Increase the involvement of whānau, hapū and iwi in the Court process;

Maori venue, a Marae.²³⁶ Maori language, rituals and protocols are used through every process of the Court.²³⁷ A key focus of the Rangatahi Court is to reintroduce the youth to their traditional Maori history and encourage the youth to seek out information about their whanau.²³⁸ I was fortunate to have witnessed this process first hand when I attended Rangatahi Court in Auckland, New Zealand. Judge Taumaunu engaged with the youth. He spoke to the youth before him in Maori and asked them about their family roots. If the youth forgot something or were unsure Judge Taumaunu would remind the youth and explain the significance of lineage. While Judge Taumaunu spoke to the youth, the youth's whanau were behind them also listening to the information. The youth's whanau benefit from being present in Court because they also learn about their Maori culture and family history.

A key feature of both the AODT Court and the Rangatahi Court is that culture and family understanding are at the core of each. Maori language is used throughout both courts, protocols are followed and respected and the court actors and members of the court are engaged in the Maori teachings. This emphasis on the respect for culture is a major benefit of therapeutic courts in New Zealand. Although Canada is exercising therapeutic courts, including Cree- Circuit Court,²³⁹

f. To assist young Māori offenders to learn about their Māoritanga (cultural identity), and to develop a sense of identity and belonging as a member of a whānau, hapū and iwi, through the provision of tikanga wānanga

²³⁶ *Ibid* page 4; “Marae- Maori Meeting Grounds” (accessed 16 December 2018), online: *New Zealand Tourism: 100% Pure New Zealand*.

A marae is a fenced-in complex of carved buildings and grounds that belongs to a particular iwi (tribe), hapū (sub tribe) or whānau (family). Māori people see their marae as tūrangawaewae - their place to stand and belong. Marae are used for meetings, celebrations, funerals, educational workshops and other important tribal events.

²³⁷ Te Koti Rangatahi: The Rangatahi Court, *Background and Operating Protocol*, *supra* note 233 at pages 4-5.

²³⁸ *Ibid* at page 5; see also Ministry of Justice, *Youth Court of New Zealand: Rangatahi Courts & Pasifika Courts* (New Zealand Government, accessed 16 December 2018). Youth in Rangatahi Court are expected to learn their pepeha, which is their traditional tribal identity greeting based on their Maori background.

²³⁹ “Cree Court” (2012), online: *Saskatchewan Law Courts*.

The Cree Court is a circuit court that conducts hearings entirely or partially in Cree. The Court handles criminal matters and child protection hearings. It is a unique initiative of the Saskatchewan Provincial Court and is the first court of its kind in Canada.

The Honourable Judge Morin (retired-2019) is an Indigenous person from Cumberland House Saskatchewan and a fluent Cree speaker. Judge Morin established the Cree Court in 2001 and participated immensely in the Court as a judge until his retirement.

Domestic Violence court,²⁴⁰ Drug Treatment Court, Gladue Court²⁴¹ Indigenous Peoples Court²⁴² and Mental Health Court,²⁴³ based on my experience Canadian courts do not promote Indigenous language, culture and support to the same extent as New Zealand. Cree-Circuit Court offers language services and culture components; however, it is not a sentencing court providing supports as the AODT Court offers. AODTC offers a structured cultural court, which provides consistent and ongoing culture supports to the participants.

Canadian Therapeutic Courts

Drug Treatment Court is offered in a number of different provinces in Canada,²⁴⁴ one of which is the Regina DTC located in Regina, Saskatchewan. The DTC is similar to the New Zealand AODTC in a number of ways. The DTC does not accept offenders who have been convicted of certain offenses.²⁴⁵ Like AODTC's court team the DTC has an extensive court team and program centre team.²⁴⁶ DTC operates on a three-step program referred to as tracks, as does AODTC.²⁴⁷

²⁴⁰ "Domestic Violence Court" (2012), online: *Saskatchewan Law Courts*.

²⁴¹ Scott Clark Ph.D, *Evaluation of the Gladue Court Old City Hall, Toronto*, (Toronto, Ontario: Aboriginal Legal Services, 2016).

Gladue Court first convened in October 2001 at the Old City Hall courthouse in Toronto. The court was established to ensure the application of s 718.2(e) and to respond to significant social and justice related issues facing Aboriginal people.

²⁴² Rudin, *Indigenous People and the Criminal Justice System*, *supra* note 37 at pages 240-249.

Indigenous Peoples Courts currently exist in the following provinces: Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Saskatchewan.

²⁴³ "Regina Mental Health Disposition Court" (2012), online: *Saskatchewan Law Courts*.

²⁴⁴ Department of Justice, *Drug Treatment Court Funding Program*, (Ottawa, Ontario: Programs Branch, Department of Justice Canada, modified 12 October 2016)

The Vancouver Drug Treatment Court opened in December 2001; Winnipeg Drug Treatment Court (January 2005); Edmonton Drug Treatment and Community Restoration Court (December 2005); the Ottawa Drug Treatment Court (March 2006); and the Regina Drug Treatment Court (October 2006); see also "Moose Jaw Drug Treatment Court" (accessed 4 April 2019), online: *Saskatchewan Law Courts*. Moose Jaw Drug Treatment Court has been operating since 2009.

²⁴⁵ Regina Drug Treatment Court, *Current Regina Drug Treatment Court Information Book* (March 2018) [unpublished, received by Judie Birns 3 July 2018] at page 1. [Regina Drug Treatment Court, *Information Book*] See also "Regina Drug Treatment Court" (accessed 4 April 2019), online: *Saskatchewan Law Courts*. Offences with serious violence; sexual assaults; family violence cases; offences involving or relating to children/youth; profit-motivated commercial drug trafficking; where there is a mandatory jail term. This is to ensure that participants do not pose a risk to public safety.

²⁴⁶ *Ibid* at page 1.

Court team consists of: judges; Crown prosecutors and defense counsel

Program Centre Team consists of: manager, probation officer; income assistance; nurse; senior counselor and two counselors.

²⁴⁷ *Ibid* at page 2.

DTC program activities include self-help meetings, therapy and cultural activities. In the AODTC system participants must be sober for six months before graduating from the Court. Participants of the DTC are drug tested often; however, they only need to display sobriety for half of the time of AODTC participants, at three months. Although, DTC additionally requires participants to be free of substantive criminal charges for six months, whereas AODTC does not have a strict criterion in this area.²⁴⁸

Referrals at the AODTC are ultimately decided by District Court judges²⁴⁹, although an offender's lawyer may suggest to the court that their client be considered for the AODTC. The DTC requires the Crown prosecutor to screen and recommend individuals but the ultimate decision to admit or not is at the DTC judge's discretion.²⁵⁰ Both AODTC and DTC are appreciative that addictions issues require a significant amount of time and patience to conquer; therefore, a reasonable amount of leeway is afforded to the participants in terms of relapses.²⁵¹ As such, honesty is at the forefront of both of these addictions courts and without such transparency these courts cannot function properly.²⁵²

As reflected throughout this thesis, cultural understanding and Indigenization of the courts is necessary to meaningfully reflect Indigenous people in the law. While comparing the two addictions courts I considered whether New Zealand's AODT Court is superior to Canada's DT Court. Initially, I had the notion that if New Zealand's AODT Court was lowering the rates of reoffending in New Zealand, more so than the rate of Canada's DTC, then it is the superior court and as such the cultural component could be attributing to such success. I became frustrated when I was not able to find a specific statistic detailing AODTC's lower rates of recidivism than

Assessment: Minimum of 30-day assessment period where participants can choose to opt out if they don't feel the program is right for them and they will return to the regular court system.

Track I: pleas must be entered to move into track 1.

Self-identify with addiction and criminal lifestyles

Track II: Stabilizing into a sober and crime free lifestyle

Track III: Maintaining and strengthening recovery through relapse prevention and community resource connections to begin aftercare plan; Begin employment or education plan.

The entire program is approximately 15 months in total.

²⁴⁸ *Ibid* at page 4.

²⁴⁹ In New Zealand trial level courts are called District Courts. As highlighted earlier in this thesis New Zealand is a unitary system.

²⁵⁰ Regina Drug Treatment Court, *Information Book*, *supra* note 245 at page 1.

²⁵¹ Ministry of Justice, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court*, *supra* note 204 at page 58; Regina Drug Treatment Court, *Information Book*, *supra* note 245 at page 2.

²⁵² *Ibid*.

mainstream New Zealand courts and I was discouraged again when I could not find research proving that New Zealand's AODTC produces lower rates of recidivism than Canada's DTC.²⁵³ I was stuck on the hypothesis that New Zealand's AODT Court is as much of a cultural reintegration court as it is an addictions healing court and therefore it ought to also be more successful, which ought to be reflected in lower rates of recidivism. Are lower rates of incarceration required for a therapeutic court to be deemed worthy or successful? I came to a realization, regardless of the recidivism statistics of addictions courts, traditional mainstream courts do not work for Indigenous people, which goes back to the heart of the *Gladue* and *Ipeelee* principles.²⁵⁴

This frustration I was feeling concerning success of the court is consistent with the theory of epistemic injustice. It is well known that mainstream prison is not working for Indigenous people. Addictions, poverty and trauma contribute immensely to high incarceration rates of Indigenous people. Since there is no concrete data showing that therapeutic courts will absolutely lower rates of recidivism these courts are challenged and dismissed. This resistance speaks to the underlying issue of who is afforded the ability to be heard in the criminal justice system and who is to be ignored. Indigenous ways of thinking are largely dismissed and degraded; this is systemic racism. Why should the mainstream court systems and its players, including Correctional Services Canada and the Department of Justice, continue to be seen as the only legitimate source of justice. As this thesis reflects, the Canadian justice system does not work for Indigenous people. The Canadian justice system continues to imprison Indigenous people at high rates yet the government cannot show that incarceration is working, in terms of recidivism.²⁵⁵ In 1999 Public Safety Canada

²⁵³ Thom & Black, *Nga Whenu Raranga: Weaving Strands #1*, *supra* note 224 at page 7.

AODT Court started in November 2012 and the research obtained from the Court and its participants spans from November 2012 to April 2016.

New Zealand's AODTC is a fairly new court, which could explain the lack of detailed research regarding recidivism.

²⁵⁴ *Gladue*, *supra* note 2 at para 68.

"...Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."

²⁵⁵ Department of Public Safety and Emergency Preparedness, "The Effect of Prison on Criminal Behaviour: research summary" (1999, updated 31 January 2018) 4:6 Public Safety Canada.

I recognize this research is dated; however, it appears Public Safety Canada has not conducted another similar research project since 1999.

conducted a study to determine the effect of prison on criminal behaviour, including rates or recidivism.²⁵⁶ The study found the following:

The 50 studies involved over 300,000 offenders. None of the analyses found imprisonment to reduce recidivism. The recidivism rate for offenders who were imprisoned as opposed to given a community sanction were similar. In addition, longer prison sentences were not associated with reduced recidivism. In fact, the opposite was found. Longer sentences were associated with a 3% increase in recidivism.²⁵⁷

When measuring the success of therapeutic courts, this thesis suggests that recidivism should not be the gauge of success, but rather the opinion of Indigenous communities and the people the court serves ought to be considered an indicator of success. In New Zealand's AODT Court, one of the indications of success is whether the participants of the court have an improved appreciation and respect for the processes of the court.²⁵⁸ The following testimonials speak to the satisfaction participants experience in the AODT Court:

They [phases] were just rewarding every time. I just felt proud of myself because I achieved something each stage. It would take about three months for each stage, some of them I would stay longer because I had more charges, so I was looking at an exit hearing. I thought I was going to be thrown out, that is when I turned my life again. *Participant.*²⁵⁹

Their [the participants'] relationship with the judge here is fundamentally different, and it is vital to the working of the court. I've seen the way they talk about the judge and their respect and the expectation she has of them, and their response to that, is fundamental to how the court works.... They have so much respect for her, they don't want to disappoint her. *Stakeholder*²⁶⁰

One of the ways the AODT Court fosters respect between the Court and the participants is through creating a court in which Indigenous people see themselves. Maori culture and language are incorporated in the Court to reflect the values of the Maori participants, creating accountability upon the participants and respect for the court system. Indigenous people do not lack accountability; however, the traditional mainstream court system does not reflect the values of Indigenous people. As Monture-Angus articulates, Indigenous people have their own systems of

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* (emphasis added)

²⁵⁸ Ministry of Justice, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court*, *supra* note 204 at page 111.

²⁵⁹ *Ibid* at page 51.

²⁶⁰ *Ibid* at page 40.

accountability and responsibility. When Indigenous people are subjected to the Canadian system the responsibility component they identify with is not present. How can an individual respect a system that they are not a part of? New Zealand's AODT Court bridges this accountability gap by reintegrating Indigenous understandings into traditional courts.

In Canada, courts are exercised which incorporate Indigenous culture in the court process, which assists in having *Gladue* principles considered.²⁶¹ However, New Zealand AODT Court is an example of a mainstream court providing comprehensive Indigenous culture and language in the sentencing process, which better reflects the values of Indigenous people. New Zealand's AODT Court provides an exceptional model which ought to be reflected upon when considering Indigenous cultural integration into Canadian courts. In the following chapter *Gladue* reports are discussed. Implementing *Gladue* reports is another way to introduce Indigenous history and understanding into the court process by providing sentencing judges with detailed information about the person before them, their Indigenous background and the out of custody sentencing options available.

²⁶¹ Rudin, *Indigenous People and the Criminal Justice System*, *supra* note 37 at pages 240-249. Indigenous Peoples Courts currently exist in the following provinces: Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Saskatchewan.

CHAPTER SIX: *GLADUE* REPORTS

In Canadian criminal courts, upon either a finding of guilt after trial or a plea of guilty a sentence is ordered. One of the ways *Gladue* factors can be considered during sentencing is through the use of an individualized *Gladue* report containing information regarding the Indigenous offender. *Gladue* reports create an opportunity for all court actors, including defense counsel, the Crown prosecutor and the judge to learn about the convicted person's particular *Gladue* factors. *Gladue* reports offer Indigenous communities a voice in the sentencing process. Reflecting on chapter three of this thesis, Dubgen asserts that ensuring oppressed people can voice their concerns is crucial in overcoming injustice. Also, Lindberg suggests that Indigenous perspectives are not included in mainstream justice; therefore, a means to incorporate Indigenous input is necessary. A *Gladue* report obligates the judge to consider and more deeply appreciate who the person standing before them is.

Indigenous judges in Saskatchewan are underrepresented in Saskatchewan courts. It is crucial that the judiciary sentencing Indigenous people have a comprehensive understanding of the history of Indigenous people and alternatives to prison offered in the community. Marilyn Poitras is a Metis person, lawyer and professor at the College of Law at the University of Saskatchewan. Poitras is quoted as providing the following regarding Indigenous representation on the bench in Saskatchewan, "having only two Indigenous judges out of 101 judges in a province where 16 per cent of the population is Aboriginal is unacceptable."²⁶² On a positive note, in 2018 three Indigenous women, The Honourable Judge McAuley, The Honourable Judge Crooks and The Honourable Judge Brass were appointed to the Provincial Court of Saskatchewan.²⁶³

²⁶² Naiomi Metallic, "Canada's shortage of non-white judges creates 'an obvious gap'," *CBC News* (19 July 2016).

²⁶³ Drew Wilby, "Provincial Court Judge Appointed in La Ronge," *Government of Saskatchewan* (23 March 2018); Drew Wilby, "Provincial Court Judge Appointed in Saskatoon," *Government of Saskatchewan* (23 March 2018); Drew Wilby, "Provincial Court Judge Appointed in Estevan," *Government of Saskatchewan* (23 November 2018).

How are the circumstances and histories of Indigenous people to be properly considered if the judges making the ultimate decisions are so rarely Indigenous? This lack of representation is a systemic problem. In order to educate non-Indigenous judges about Indigenous circumstances and alternatives to prison proper resources must be provided to the court. *Gladue* reports are a means in which information about a person's Indigenous background can be presented to the court and included in the sentencing process.

Since *Ipeelee* it is required of judges to take judicial notice of a number of factors uniquely affecting Aboriginal people.²⁶⁴ In order for *Gladue* factors to be fully considered, *Gladue* reports must be completed. These reports are not academic pieces of work, but rather they are colloquial reiterations of the Aboriginal offenders' life circumstances that provide insight regarding their involvement with the criminal justice system. *Gladue* reports are completed by a *Gladue* report writer who does not necessarily have a background in law, but is educated, often by personal experience, of the unique history and challenges affecting Aboriginal people in Canada.²⁶⁵ Judges do not have the lived experience of Aboriginal people; therefore, these reports are provided to explain to the judge how the offender has been negatively impacted, by virtue of being an Aboriginal person in Canada, and how that impact has perpetrated their criminal activity.

The Supreme Court of Canada in *Gladue* makes mention to a special type of report which is required when sentencing an Aboriginal person, "clearly the presence of an aboriginal offender will require special attention in presentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and, where practicable, request that witnesses be called who may testify as to reasonable alternatives."²⁶⁶ In *Ipeelee*, the Canadian Supreme Court defines *Gladue* reports as "a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders."²⁶⁷ Rudin comments on the lack of direction provided by the Supreme Court of Canada, "What the Supreme Court of Canada did not make clear was how judges were to obtain the necessary information about the offender or learn about the things of which they could take judicial notice."²⁶⁸ It has been up to *Gladue* writers to establish a process of

²⁶⁴ *Ipeelee*, *supra* note 7 at para 66.

²⁶⁵ Jonathan Rudin, "Need for National Standard", (Gladue Report Writers Symposium Presentation delivered at the Native Law Centre, University of Saskatchewan College of Law), (4-6 November 2016) [unpublished].

²⁶⁶ *Gladue*, *supra* note 2 at para 84.

²⁶⁷ *Ipeelee*, *supra* note 7 at para 60.

²⁶⁸ Rudin, *Indigenous People and the Criminal Justice System*, *supra* note 37 at page 111.

obtaining the necessary information needed for *Gladue* reports. The Gladue Society of British Columbia created a *Gladue* report Guide to assist writers, explaining how to prepare and write *Gladue* reports.²⁶⁹ The Guide recommends allotting 25 hours to finalize reports and allowing at least 8 weeks before the subject's court hearing to write the report.²⁷⁰ To obtain the information needed for the report it is incumbent that the writer contact the subject's community supports and resources. It is recommended in the Guide that the writer contact the subject's lawyer, inquiring about the purpose of the report whether it be for a bail, sentencing or appeal.²⁷¹ The writer should also get a copy of the subject's criminal record from the lawyer.²⁷² The report should discuss the criminal record, making mention to any trends. For example, if the subject is committing crimes predominately in December of each year it is important to ask the subject why that is.²⁷³ The writer will need to meet with the subject, possibly several times. At the first interview with the subject the writer needs to obtain contact information for the subject's community supports, which may include friends, relatives, support workers, Elders or hereditary or band chiefs.²⁷⁴

The Guide recommends contacting a minimum of six people including but not restricted to: the subject's parole or probation officer to learn about the subject's criminal history and community supervision history, such as compliance with conditions;²⁷⁵ the subject's spouse, children, parents, grandparents, aunts, uncles, siblings and cousins;²⁷⁶ at least one person who can speak to the history and current circumstances of the subject's community;²⁷⁷ and an authoritative community member, such as the chief or an Elder who can discuss the intergenerational factors affecting the community.²⁷⁸ The Guide recommends contacting someone who can speak to the intergenerational effects the subject suffers from. For example if the subject attended a residential

²⁶⁹ The Gladue Writers Society of British Columbia, *Gladue Report Guide: How to prepare and write a Gladue Report* (Law Services Society BC, 2018). [*Gladue Report Guide*]

“The Gladue Writers Society of British Columbia ("GWSBC") was established with the mandate to advance Gladue Rights implementation in the province of British Columbia. We promote Best Practices in Gladue Report preparation and Gladue Rights assertion.”

²⁷⁰ *Ibid* at page 22. Note the Guide uses the term “subject” when referring to the Indigenous person the *Gladue* report is written for.

²⁷¹ *Ibid* at page 22.

²⁷² *Ibid*.

²⁷³ *Ibid*.

²⁷⁴ *Ibid* at page 23.

²⁷⁵ *Ibid* at page 24.

²⁷⁶ *Ibid*.

²⁷⁷ *Ibid*.

²⁷⁸ *Ibid*.

school or their family members attended a residential school contact someone else who also went to that school and can speak to their experience.²⁷⁹ Also, the Guide recommends contacting someone who can speak to the proposed treatment centres.²⁸⁰ The Guide showcases the extensive amount of research, which is predominately done in the form of interviews, needed to conduct and complete a *Gladue* report.

Jonathon Rudin, provides the following regarding the content included in a *Gladue* report:

Gladue Reports go into great detail concerning the life circumstances of the offender. All efforts are made to speak with friends, family members and anyone who can shed light on the life of the person. The reports extensively quote interviewees verbatim. The reports also place the individual's life circumstances in the context of the systemic factors that have affected Aboriginal people. The reports also contain concrete plans as to alternatives to incarceration. For example, if the report suggests that the offender take a program for substance abuse, an application to a program will often have been completed and an acceptance date received prior to the report being filed.²⁸¹

Gladue reports do not advocate for the offender, they simply tell the offender's history including, the history of their ancestors and set out alternatives to incarceration. *Gladue* reports are unique and thus are not to be handled in the same fashion as other court submissions. The essence of a *Gladue* report is to provide insight and context to the sentencing judge regarding the individual Aboriginal person before them, thus it is incumbent that the *Gladue* report be formatted in a way that portrays an authentic picture of the Aboriginal person and the community they are from. To reiterate Rudin, "the reports also contain concrete plans as to alternatives to incarceration." If *Gladue* reports are not completed it is incredibly difficult for the sentencing judge to know the extent of alternatives that exist, unless the Indigenous person, their lawyer or Crown counsel is made aware of the community supports. This is information which may not be readily assessible by people outside of the community.

The information provided in a *Gladue* report is a direct response to the requirements of the *Gladue* two-prong background considerations judges must attend to during sentencing.²⁸² As is articulated in the above passage, a significant portion of the *Gladue* report should include information about the community of the Aboriginal person. Canada consists of different types of

²⁷⁹ *Ibid* at page 25.

²⁸⁰ *Ibid*.

²⁸¹ Rudin, Aboriginal Over-representation and *R v Gladue*, *supra* note 8.

²⁸² *Gladue*, *supra* note 2 at para 66.

Aboriginal people and nations, with different backgrounds and histories.²⁸³ As is established in *Gladue* and mentioned above, “the background considerations regarding the *distinct* situation of Aboriginal peoples in Canada encompasses a wide range of *unique* circumstances...”²⁸⁴ Aboriginal people have a complex and different history from that of other Canadians and therefore judges must know the background of the Aboriginal individual to fully appreciate who that person is prior to coming to a decision of sentence. Community supports and alternatives to prison are niche areas in need of precise research. A *Gladue* report writer is able to gain this information through extensive research and present it to the judge.

The perspectives of Indigenous community members including Elders and knowledge keepers are needed to educate courts about Indigenous laws and the justice system exercised within their communities. As discussed in chapter two, Indigenous laws ought to be incorporated into the mainstream justice system. *Gladue* reports create the opportunity for this valuable information to be presented to sentencing judges. For example, in some Indigenous communities the principle of accepting responsibility and the act of pleading guilty carry different meanings. It is important for the judge to appreciate such differences. Sentencing judges will have a more meaningful understanding of the person before them if they understand the laws the person exercises. Additionally, *Gladue* reports explain how to integrate Indigenous laws into sentencing. Kinship and connection to one’s Indigenous community is at the core of Indigenous laws. An Elder may suggest a community-based sentence with a condition to volunteer at community ceremonies such as sweats. The purpose of such a condition would be to repair connections. Sentencing judges ought to be educated on Indigenous laws and be aware of ways to integrate such laws into the sentencing process.

This thesis submits that *Gladue* reports must be available to ensure proper application of *Gladue* and s 718.2(e) of the *Criminal Code*. Critics may argue that it is not feasible to have a *Gladue* report completed for every Indigenous offender; however, as already stated in this thesis, sending Indigenous people to prison as the rate Canada does is also not feasible. If the Canadian government can afford to keep people in custody at a rate of \$288 per day per person or \$105,286 per year for federal offenders and \$213 per day per person or \$77,639 per year for provincial and

²⁸³ Monchalin, *The colonial problem*, *supra* note 29 at pages 68-69.

²⁸⁴ *Gladue*, *supra* note 2 at para 66.

territorial offenders²⁸⁵ then the government can afford to invest in collecting sufficient information regarding the Indigenous person being sentenced, as is required by law.

As the Supreme Court of Canada has made clear *Gladue* circumstances are unique and therefore must be provided to the court in comprehensible ways to facilitate understanding of the Indigenous people being sentenced.²⁸⁶ *Gladue* circumstances ought to be presented to the court in a separate fashion than that of typical pre-sentence reports. Making available *Gladue* reports in every sentencing decision involving an Aboriginal person would assist sentencing judges in applying *Gladue* principles as the Supreme Court of Canada intended. As *Gladue* reports are currently not required, sentencing judges do not have to explicitly state whether a *Gladue* report was completed or not. In the following chapter, this thesis considers common law cases in which it would have been beneficial for the sentencing judges to provide more analysis regarding s 718.2(e) and *Gladue* considerations.

²⁸⁵ Stats Can, *Correctional Stats in Canada*, *supra* note 107.

²⁸⁶ *Gladue*, *supra* note 2 at para 66; *Ipeelee*, *supra* note 7 at paras 66-67.

CHAPTER SEVEN: REVIEW OF CANADA'S COMMON LAW APPLICATION OF *GLADUE* PRINCIPLES

Leading up to this chapter, the legal necessity and importance of applying *Gladue* principles is discussed. Therapeutic courts and *Gladue* reports have been put forward as tools to more meaningfully apply *Gladue*. In this final chapter the resistance to apply *Gladue* principles within the mainstream court system is considered through examples of Canadian common law cases. This chapter also includes a look at a recent Nunavut decision which provides a ray of hope towards integration of Indigenous community's input in the sentencing process. This chapter serves to reinforce the importance of integrating Indigenous laws and community input within the court system. Doing so will assist in proper implementation of *Gladue*. This chapter should not be read as a comprehensive examination of the Canadian common law approach towards *Gladue*, rather these cases should be viewed as examples.

7.1: Appellate level courts' application of *Gladue*

R v Kreko 2016 Court of Appeal for Ontario

In 2016, the decisions of *R v Kreko* and *R v Laboucane* were reported within months of each other. Both decisions are from the provinces' highest courts, Ontario and Alberta respectively. Each case highlights examples, of what this thesis would argue are, misapplications of *Gladue* principles.

Released on May 16, 2016 the Ontario Court of Appeal decision of *Kreko* overturns the trial level decision and reiterates the ruling of *Ipeelee* by affirming that it is an error of law to require a causal link between the accused's Aboriginal heritage and the offences.²⁸⁷ This case

²⁸⁷ *Kreko*, *supra* note 97 at para 20.

serves as an example in which a trial judge displays disregard for both the law and for the effects of historical wrongdoings inflicted upon Aboriginal people.

The Honourable Justice Pardu for the Ontario Court of Appeal provides the following sentiments with regard to the reason of the trial Judge, “[t]he sentencing judge gave no weight to the appellant’s Aboriginal background when he considered the length of the sentence to be imposed”²⁸⁸ It can be inferred that this statement is in reply to the report the trial Judge provided the Court of Appeal. The trial Judge provided a report to the Ontario Court of Appeal which states the following, “Although a direct, causal link is not required, there is no such tie in this case... There is nothing tied to his Aboriginal genetic heritage, let alone considerations in *Gladue* and *Ipeelee*, that led the accused, Mr. Kreko, to the negative side of hip-hop, including its fascination with guns.”²⁸⁹

Justice Pardu disagrees with the sentencing Judge’s application of the law and provides her decision in reflection of the principles of *Gladue* and *Ipeelee*.²⁹⁰ In particular, Justice Pardu reiterates the finding in *Ipeelee* that no causal link is required and requiring such demonstrates “an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples, and also impose(s) an evidentiary burden on the offender that was not intended by *Gladue*.”²⁹¹

Requiring a causal link is an error of law. It is additionally worrisome that the trial Judge came to such a conclusion in light of the facts of this case. At the time of the offence Mr. Kreko was a 22 year-old Aboriginal man. Mr. Kreko was adopted at a young age and was only told about the adoption when he was between the age of 16 and 18 years old.²⁹² His mother was 15 at the time of giving birth to him and was also a Crown ward at the time of his birth.²⁹³ Both of his parents suffered from alcoholism and his maternal mother’s grandfather was raised on a reserve in Ontario, he and his siblings were in the care of Children’s Aid Society because of parental neglect

²⁸⁸ *Ibid* at para 15.

²⁸⁹ *Ibid* at para 15, see also paras 16 and 33-34.

²⁹⁰ *Ibid* at paras 19-20 and 23.

Justice Pardu highlights the remedial nature of *Gladue* and lists the instances in which the trial Judge erred in application of such. In paragraph 23, Justice Pardu highlights, “the court in *Ipeelee* also made it clear that s. 718.2(e) applies to serious offences.”

²⁹¹ *Ibid* at para 21.

²⁹² *Ibid* at paras 9 and 28.

²⁹³ *Ibid* at paras 4-5.

and alcoholism.²⁹⁴ When Mr. Kreko was a young person, his adoptive mother left her family, including Mr. Kreko.²⁹⁵

With regard to Mr. Kreko's *Gladue* circumstances, Justice Pardu came to following conclusions:

In the present case, the appellant's dislocation and loss of identity can be traced to systemic disadvantage and impoverishment extending back to his great-grandparents. This was relevant to his moral blameworthiness for the offences. The intervener has referred to some studies suggesting that adoptions of Aboriginal children by non-Aboriginal parents have a significantly higher failure rate than other adoptions. The appellant's Aboriginal heritage was unquestionably part of the context underlying the offences. The sentencing judge erred by failing to consider the intergenerational, systemic factors that were part of the appellant's background, and which bore on his moral blameworthiness, and by seeking instead to establish a causal link between his Aboriginal heritage and the offences.²⁹⁶

In this case, Justice Pardu denounces the lower court sentencing Judge's conclusion that the appellant's Aboriginal heritage is irrelevant to his sentence.²⁹⁷ The Canadian Supreme Court in its decision of *Ipeelee* provides clear language regarding how *Gladue* principles ought to be considered, including that a causal link is not required. It is troublesome that the trial Judge made such an egregious error, especially considering that most cases are not heard by an appellate court. What about other trial level decisions that do not reach the appellate level? Are other cases being misapplied like the *Kreko* trial decision? *Kreko* is a 2016 decision, 17 years after *Gladue* and 4 years following *Ipeelee*, yet section 718.2(e) sentencing considerations continue to be misapplied.

R v Laboucane 2016 Court of Appeal for Alberta

Like *Kreko*, *Laboucane* is a 2016 case, released less than a month after *Kreko*. However, the Alberta Court of Appeal in *Laboucane* diverges from the Ontario Court of Appeal in *Kreko* in terms of application and meaning of *Gladue*, *Ipeelee* and s 718.2(e). In fact, the Court in *Laboucane* proclaims, "to the extent that *Kreko* may be inconsistent with this view, *Kreko* is not the law of Alberta."²⁹⁸

²⁹⁴ *Ibid* at paras 5-6.

²⁹⁵ *Ibid* at para 7.

²⁹⁶ *Ibid* at para 24. (emphasis added)

²⁹⁷ *Ibid* at para 1.

²⁹⁸ *Laboucane*, *supra* note 91 at para 73.

In *Laboucane* the Court of Appeal for Alberta finds that the offender's *Gladue* circumstances are not applicable to his ultimate sentence.²⁹⁹ This case serves as an example of the colonial influence within the judicial system. As will be suggested in discussion below, *Laboucane* commits an error of law in failing to properly apply all sentencing considerations, including s 718.2(e).

The trial sentencing Judge in *Laboucane* found: "there was no meaningful *Gladue* factors to be considered in sentencing. Mr. [Laboucane] has an Aboriginal heritage and however there, in my view, are no significant *Gladue* factors for the purpose of sentencing."³⁰⁰ ... "no intergenerational, systemic or background factors that bore upon this particular offender or his particular criminal conduct."³⁰¹ Ultimately, the Alberta Court of Appeal agreed with the application of the law and the sentence of the trial Judge.³⁰² The Alberta Appellate Court in *Laboucane* attempts to remedy its conflicting application of the law from that of the Ontario Court of Appeal, "*Kreko* is readily distinguishable because there the Court found a measurable connection between the dislocation and loss of identity of the Aboriginal offender and the systemic disadvantage and impoverishment extending back to his great-grandparents."³⁰³ The Court in *Laboucane* argues no such connection was made between the offender's *Gladue* factors and the crimes which he committed.³⁰⁴ Rather, the Court in *Laboucane* argues that in order to apply *Gladue* it is necessary to identify "relevant factors" to provide "the necessary context" for judges to consider the appropriate sentence.³⁰⁵

The accused in *Laboucane* pled guilty to assault on a cabdriver, possession of a stolen taxicab and refusal to provide a breath sample.³⁰⁶ Mr. Laboucane was found guilty after trial of break and enter and commit assault, assault, and uttering threats.³⁰⁷ He was sentenced to two years imprisonment.³⁰⁸ The appellant raised three grounds of appeal, one being that "the sentencing

²⁹⁹ *Ibid* at para 76.

³⁰⁰ *Ibid* at para 18.

³⁰¹ *Ibid* at para 21, the ABCA reiterating the findings of the sentencing Judge.

³⁰² *Ibid* at para 79.

³⁰³ *Ibid* at para 66.

³⁰⁴ *Ibid* at paras 66 and 76-79.

³⁰⁵ *Ibid* at paras 61 and 68-69.

³⁰⁶ *Ibid* at para 8.

³⁰⁷ *Ibid*.

³⁰⁸ *Ibid* at para 9.

judge erred in not giving proper consideration to the appellant's *Gladue* report."³⁰⁹ In the *Gladue* report the following is included:

"Witnessed domestic violence and drug and alcohol abuse in his older [half]-sister's relationship. Experienced domestic violence in his own intimate relationships. Drug and alcohol abuse from a young age. Lack of employment success due to relationship issues. Lack of educational success."³¹⁰

To reiterate, Mr. Laboucane's *Gladue* report showcases issues of violence and substance abuse. The offenses he committed are violent, which he committed while intoxicated.³¹¹ *Ipeelee* requires *Gladue* factors of the offender to bear on their culpability for the offense before the Court.³¹² Based on the information provided in Mr. Laboucane's *Gladue* report it seems obvious that his *Gladue* factors are connected to the culpability of the offenses committed.

During consideration of the principle of parity the Court in *Laboucane* relies on *Ipeelee*, Section 718.2(e) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances that are rationally related to the sentencing process.³¹³

Ipeelee reflects upon the criticisms of *Gladue* and s 718.2(e). One such critique is that it creates inherently unfair and unjustified distinctions which violates the sentencing principle of parity. The Supreme Court provides the following:

This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, p. 309). As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's"³¹⁴

For the reasons provided above there is a connection between Mr. Laboucane's *Gladue* factors and the offenses committed. The collective experience of Aboriginal people and the legacy of colonialism has contributed to Mr. Laboucane coming before the Court. *Ipeelee* denounces courts

³⁰⁹ *Ibid* at para 14.

³¹⁰ *Ibid* at para 45.

³¹¹ *Ibid* at paras 42, 47 and 91.

³¹² *Ibid* at para 21, citing *Ipeelee*, *supra* note 7 at para 83.

³¹³ *Ibid* at para 62, citing *Ipeelee*, *supra* note 7 at paras 79.

³¹⁴ *Ipeelee*, *supra* note 7 at para 77. (emphasis added)

for placing a burden upon offenders to prove a causal link, deeming such a requirement as an “inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples.”³¹⁵ The horrific history of Indigenous people in Canada affects all Indigenous people in Canada and thus should not be analyzed in fragments. It is required of judges across Canada to address systemic barriers and harm inflicted upon *all* Aboriginal people in Canada, not just the Aboriginal people that the Court deems worthy.

Mr. Laboucane’s degree of responsibility is discussed.³¹⁶ The Court highlights the dysfunctional domestic relationship between Mr. Laboucane and Ms. K. It also reiterates a principle from *Arcand* that “the greater the harm intended or the greater the degree of recklessness or willful blindness, the greater the moral culpability.”³¹⁷ In the paragraph prior to this section the Court reinforces that the gravity of the offences are extremely serious.³¹⁸ This thesis submits that the Court in *Laboucane* articulates the seriousness of the offences to justify a finding of high moral culpability of the offender, but that does not make s 718.2(e) any less applicable. Throughout the decision it is repetitively referenced that Mr. Laboucane committed a violent offence of a serious nature.

The Supreme Court of Canada in *Ipeelee* makes clear a “serious crime,”³¹⁹ is subject to s 718.2(e) sentencing considerations and as such *Gladue* principles and factors ought to be applied.³²⁰ *Laboucane* goes to great lengths to reiterate the principles of *Gladue* and *Ipeelee*;³²¹ however, the Alberta Appellate Court fails to analyze the Supreme Court’s most recent position of serious crimes relating to applicability of *Gladue* principles.

³¹⁵ *Ipeelee*, *supra* note 7 at para 82.

³¹⁶ *Laboucane*, *supra* note 91 at paras 33-38.

³¹⁷ *Ibid* at para 33.

³¹⁸ *Ibid* at para 32.

³¹⁹ *Criminal Code*, *supra* note 3 at section 2. Section 2 of the *Criminal Code* provides: “‘serious offence’ has the same meaning as in subsection 467.1(1)”; “s 467.1(1) ‘serious offence’ means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation. (“*infraction grave*”)

³²⁰ *Ipeelee*, *supra* note 7 at paras 84-87.

Para 86: “First, what offences are to be considered ‘serious’ for this purpose? As Ms. Pelletier points out: “Statutorily speaking, there is no such thing as a ‘serious’ offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered ‘serious’”, citing Renee Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prison” (2001) 39:2-3 Osgoode Hall LJ 469 at 479.

³²¹ *Laboucane*, *supra* note 91 at paras 50-64.

The Court in *Laboucane* provides the following interpretation of *Gladue* regarding serious offenses:

Numerous courts have wrongly concluded that *Gladue* principles do not apply to serious offences. This is due to their erroneous interpretation of the "generalization" (so-called by the Supreme Court of Canada) in *Gladue* which says: "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing": *Ipeelee* at para 84; *Gladue* at para 79; *Wells* at paras 42-44. *Gladue* principles apply to all offences, regardless of relative seriousness.³²²

This interpretation of the law does not properly reflect the views of the Supreme Court of Canada as it does not include the whole paragraph from the *Gladue* decision which reads, "Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender."³²³ This portion of the paragraph from *Gladue* should not have been omitted from the analysis in *Laboucane*. The Supreme Court of Canada's current perspective regarding *Gladue*'s application to serious offenses is more accurately articulated in *Ipeelee*.³²⁴

Based on the language used in the decision it is important for the Court to emphasize that this is a serious offence; however, the Court did not directly cite seriousness of the offences as a reason for resisting to apply *Gladue*, because doing so is invalid in law. To conclude, the application of *Gladue* factors was provided in the following paragraphs:

It is obvious that the sentencing judge did not accept that Laboucane was an Aboriginal offender who was in a situation of social and economic deprivation with a lack of opportunities and limited options for positive development and, further, did not find that Laboucane was exposed to the reality of constrained circumstances that may have diminished his moral culpability, or may have called for a sanction that ought to take into account these circumstances of deprivation and limited opportunities, rather than a sanction aimed at punishment.

³²² *Ibid* at para 63.

³²³ *Gladue*, *supra* note 2 at para 79. The entire paragraph reads:

"Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."

³²⁴ *Ipeelee*, *supra* note 7 at paras 84-87.

In Canadian society, violent offences against persons, especially when coupled with unlawful entry into a victim's dwelling-house, constitute a pressing and substantial concern. The sentencing judge was correct in determining that the appellant's level of moral blameworthiness was high, the offences were grave and that the paramount sentencing objectives ought to be general and specific, denunciation and deterrence. We are of the view that the sentencing judge might have been more felicitous in expression, but given the hectic pace of trial courtroom decision-making, perfection is not demanded. We discern no error in principle, no failure to consider a relevant factor, or an overemphasis of the appropriate factors, and the sentence imposed is not demonstrably unfit. Therefore, appellate intervention is not warranted.³²⁵

It is not applicable to the issue at hand, being the application of *Gladue*, to finish this section with a reiteration of the violent nature of the crime. The violent nature of the crime is irrelevant to the legally required and proper application of *Gladue* principles. The decision of *Gladue* considered the sentence for manslaughter in the stabbing death of a domestic partner, clearly a serious and violent offense.³²⁶ *Ipeelee* considered the application of *Gladue* to breaches of long-term supervision orders with a predicate offense of sexual assault.³²⁷ The spirit and intent of *Gladue* is to reduce the rates of Indigenous people incarcerated³²⁸ and to remedy the devastating effects of colonialism upon Indigenous people as a collective.³²⁹ Regardless of the charge before the court *Gladue* ought to be meaningfully applied and considered.

The fundamental problem with this case is that *Gladue* factors were not applied. Regardless of the effect on sentencing, if such factors are not considered an error of law has been committed.³³⁰

The Court in *Laboucane* provides:

The sentencing judge determined that in the case of these offences and this Aboriginal offender, the identified Gladue factors did not bear on his culpability for the offences or indicate which sentencing objectives can and should be actualized. As such, the identified Gladue factors did "not influence the ultimate sentence": *Ipeelee* at paras 73, 83. We discern no error in the sentencing judge's determination because we do not see how the appellant's predominantly stable and supportive upbringing and background, and his opportunities for positive development, mitigate his culpability for the violent offences he committed.³³¹

³²⁵ *Laboucane*, *supra* note 91 at paras 77-78. (emphasis added)

³²⁶ *Gladue*, *supra* note 2 at paras 5-7.

³²⁷ *Ipeelee*, *supra* note 7 at paras 1, 9 and 22.

³²⁸ *Ibid* at para 87.

³²⁹ *Ipeelee*, *supra* note 7 at para 77.

³³⁰ *Ipeelee*, *supra* note 7 at para 75.

³³¹ *Laboucane*, *supra* note 91 at para 76, citing *Ipeelee*, *supra* note 7 at paras 73 and 83.

It is irrelevant whether *Gladue* factors would have influenced the ultimate sentence, the issue is that *Gladue* factors were not considered or applied during sentencing; that is the error. It does not matter whether or not the *Gladue* factors would have affected the ultimate sentence, they must be considered during sentencing. The judge does not get to decide whether *Gladue* factors are reconcilable with the other factors in the offender's life such as "a good and normal childhood," "his family followed 'mainstream practices,'" "good parents," and "he never witnessed domestic violence or alcoholism in his childhood home."³³² The offender presenting positive factors that are associated with mainstream, white Canadians does not eliminate the need to consider the historical wrongdoings inflicted onto all Aboriginal people.

The Court in *Laboucane* does not view the appellant as the type of Aboriginal person to which *Gladue* applies.³³³ The Court in *Laboucane* does not provide any substantial justification for coming to such an opinion about Mr. Laboucane's *Gladue* circumstances. Although the Court does provide the following two statements: "Section 718.2(e) does not create a race-based discount on sentencing"³³⁴ and "[o]ur core conclusion is that where *Gladue* factors are identified, these factors will not dictate an automatic reduction in the sentence to be served by an Aboriginal offender."³³⁵ The appellant is asking the Court to consider the relevant *Gladue* factors provided in the *Gladue* report and consider such factors while sentencing. There is no indication that the appellant in *Laboucane* made arguments relating to a discount on sentencing or an automatic reduction in sentence, nor is this thesis making such assertions.

Growing up Mr. Laboucane would visit his paternal relatives at the Loon Lake Metis settlement; however, the Court points out that his cultural involvement is limited to his time while incarcerated.³³⁶ This statement is irrelevant. The accused does not need to prove a connection between his Aboriginal heritage and the criminal activity.³³⁷ It should also be noted that displacement is a *Gladue* factor.³³⁸ Within the application section of *Gladue* principles, the sentencing Judge goes on about the support of the offender's family including Mr. Laboucane's parents showing up to trial. The Judge went on to say that "Mr. Laboucane Senior is a Metis man,

³³² *Ibid* at para 40.

³³³ *Laboucane*, *supra* note 91 at paras 39-45.

³³⁴ *Ibid* at paras 51, 60 and 71.

³³⁵ *Ibid* at para 2.

³³⁶ *Ibid* at paras 44 and 75.

³³⁷ *Ipeelee*, *supra* note 7 at para 83.

³³⁸ *Ibid* at para 60.

but with no current affiliations to any First Nation...his mother and father... attended... some or all of the trial and are present from Arizona at the sentencing this morning”³³⁹ Metis people are a distinct people and therefore it would be expected that Mr. Laboucane and Mr. Laboucane Senior would not have a current affiliation to any First Nation.³⁴⁰ Second, why is this piece about Arizona necessary? To show that his parents are committed and loving parents, unlike Aboriginal parents? To show that they are the type of people that can afford to go to Arizona, unlike Aboriginal parents? It is concerning that these statements are included in a written legal decision.

The phrase “necessary context” was used in *Ipeelee* to articulate the importance of analyzing matters uniquely affecting Aboriginal people, which provide the necessary context to consider an Aboriginal offender.³⁴¹ The necessary context does not mean the judge decides if the offender is Aboriginal, that would be a misapplication. *Laboucane* showcases numerous examples of the Court diminishing Mr. Laboucane’s Aboriginal heritage.³⁴² The Court in *Laboucane* makes clear that they interpret s 718.2(e) as not intended to be “race-based”³⁴³ or based on “pure ethnicity,”³⁴⁴ yet it is evident throughout the decision that the Court is comfortable designating Mr. Laboucane as a non-Aboriginal person.

The lower court decision of *Kreko* and the Appellate court of *Laboucane* provide two examples in which the intended nature of s 718.2(e) and the principles of *Gladue* and *Ipeelee* were not properly applied. The Supreme Court of Canada has not placed restrictions upon proof of

³³⁹ *Laboucane*, *supra* note 91 at para 75.

³⁴⁰ *R v Blais*, 2003 SCC 44, at paras 9 and 25.

Para 9: "Métis" does not designate all individuals with mixed heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.

Para 25: "...we take note of the clear distinction made between Indians and "half-breeds.""

³⁴¹ *Ipeelee*, *supra* note 7 at para 60.

³⁴² *Laboucane*, *supra* note 91 at paras 40 and 44 and 75.

In reference to the *Gladue* report completed at the trial level the following is included:

Para 40: The report reveals that he experienced a “good and normal” childhood.” His family followed “mainstream practices.” Laboucane and his family did not participate in Indigenous culture. None of this offender’s relatives attended residential schools.

Para 44: Growing up, he visited paternal relatives at the Loon Lake Metis Settlement, but his cultural involvement is limited to his time while incarcerated.

Para 75: Mr. Laboucane Senior is a Metis Man, but with no current affiliations to any First Nation, although he was born in Loon Lake, Saskatchewan.

³⁴³ *Ibid* at para 60.

³⁴⁴ *Ibid* at para 67.

Aboriginal ancestry or connection with regards to *Gladue* application and thus it is inappropriate for courts to make such determinations.

To reiterate earlier sentiments made in this chapter, *Kreko* and *Laboucane* serve as examples of s 718.2(e) being applied inconsistently, leading to errors in sentencing. These examples serve as reminders that measures must be taken to ensure Indigenous understanding is incorporated into the sentencing process. Sentencing judges ought to be thoroughly educated regarding the unique circumstances of Indigenous people and how those circumstance transcend into social issues, including involvement in the criminal justice system. Understanding Indigenous people requires judges to understand Indigenous laws and perspectives towards kinship, justice and healing. In the following section, application of *Gladue* in Saskatchewan is discussed.

7.2: Saskatchewan courts' application of *Gladue*

As already examined in this thesis, the rate of incarceration of Indigenous people in Saskatchewan is alarmingly high.³⁴⁵ Additionally, Saskatchewan imprisons its citizens at a higher rate than the national average.³⁴⁶ In this section five Saskatchewan cases are analyzed. Four of the cases are decisions of the Queen's Bench for Saskatchewan, *R v Whitstone* is a Queen's Bench summary conviction sentence appeal. *R v Pauchay* is a decision from the Provincial Court of Saskatchewan. As already discussed in this chapter, *Kreko* and *Laboucane* are both appellate courts and therefore the application from that level of court has been discussed. Furthermore, the choice of a trier of fact to gain further information about *Gladue* circumstances is the decision of a trial judge. The standard of review provided in *R v Arcand* provides that absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court should not interfere with a sentence unless it is demonstrably unfit.³⁴⁷ Failure to

³⁴⁵ Stats Can, *Correctional Stats in Canada*, *supra* note 107.

Indigenous people in Saskatchewan account for 16% of the population yet represent 76% of the provincial prison population in Saskatchewan.

³⁴⁶ *Ibid* at table 1. The prison rate in Saskatchewan is 214 per 100,000 and the total for all Canadian provinces and territories is 87 per 100,000.

³⁴⁷ *R v Arcand*, 2013 SKCA 75 at para 26, citing *R v M(CA)*, [1996] 1 SCR 500, at para 90, 105 CCC (3d) 327 (SCC); see *Gladue*, *supra* note 2 at para 85, see also paras 82-84. "where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing."

consider factors unique to the Aboriginal person being sentenced is a failure to consider the sentencing principle of s 718.2(e). The motivation to focus on mainly trial level decisions in this section is to allow for greater focus on the process trial judges take when ascertaining information about *Gladue*.

R v Bignell 2016 Court of Queen’s Bench for Saskatchewan

In 2016, the Saskatchewan Court of Queen’s Bench released the sentencing decision *R v Bignell*.³⁴⁸ The accused in *Bignell* is a First Nations status person from Opaskwayak Cree Nation in Manitoba.³⁴⁹ This case involves a serious offence of breaking and entering and committing an indictable offence of aggravated assault; Mr. Bignell pled guilty and was sentenced to six years.³⁵⁰ A short paragraph indicates that *Gladue* must be considered but suggests that insufficient information was provided. The Honourable Justice Schwann for the Court of Queen’s Bench for Saskatchewan³⁵¹ writes, “unfortunately, no formal *Gladue* report was provided and only a brief amount of information was presented in the pre-sentence report.”³⁵² Based on Justice Schwann’s comments she is dissatisfied that a *Gladue* report was not completed and would have found it beneficial to have such information before her.

The pre-sentence report included the short summary regarding *Gladue* principles: “William experienced family breakdown, abandonment, alcohol abuse and violence during his childhood. He understands that his experiences have contributed to his anger and his use of alcohol as a coping mechanism. He understands that he needs help to break this cycle of alcohol abuses and violence.”³⁵³ Justice Schwann applied the relevant *Gladue* principles, despite being provided with a pre- sentence report that “was not overly detailed”³⁵⁴ and thus concluded Mr. Bignell’s upbringing “had an impact on his ability to appropriately interpret and react to conflict.”³⁵⁵ Had a *Gladue* report been provided it would have assisted Justice Schwann in coming to her decision. In this case, *Gladue* factors were considered and it was properly concluded that the accused’s

³⁴⁸ *R v Bignell*, 2016 SKQB 285. [*Bignell*]

³⁴⁹ *Ibid* at para 26.

³⁵⁰ *Ibid* at paras 1 and 70.

³⁵¹ As she was. Justice Schwann was appointed to the Saskatchewan Court of Appeal in 2017.

³⁵² *Bignell*, *supra* note 348 at para 26.

³⁵³ *Ibid* at para 30.

³⁵⁴ *Ibid* at para 63.

³⁵⁵ *Ibid*.

upbringing affected his moral culpability. However, this analysis could have gone further. A *Gladue* report speaks to the relevant information required in *Gladue* and *Ipeelee*, including a consideration of the Aboriginal person's community supports and alternatives to sentence. Jonathon Rudin provides the following regarding the impact of *Gladue* reports and the key components of a *Gladue* report:

Evaluations of the program³⁵⁶ have shown that Gladue Reports have an impact on the sentences that are handed down to Aboriginal offenders. Campbell Research Associates found that judges, Crown counsel and defence counsel all agreed that Gladue Reports enable the courts to better meet the requirements of the *Criminal Code* and the *Youth Criminal Justice Act* regarding the sentencing of Aboriginal offenders. Crown attorneys often changed their position on sentence after receiving a Gladue Report. All the judges interviewed in the evaluation agreed that the reports formed a sound basis for a sentence.³⁵⁷

Gladue reports are a source of information regarding the individual Aboriginal person but also, of equal importance, they educate the judge regarding the community the person comes from and alternatives to sentencing.³⁵⁸ Thus, even if the sentencing judge is cognizant of the circumstances affecting Aboriginal people, including Canada's history of colonial laws and systemic racism, it remains virtually impossible for a judge to fully acknowledge the person before them without the full details provided in a *Gladue* report. Alternatives to sentencing included in a *Gladue* report provide the judge with further options beyond that of traditional incarceration in which the judge may not have considered or even been privy to. Even an educated and well-intended judge is not expected to make such findings without a *Gladue* report. This concern is apparent in the sombre 2012 Saskatchewan Court of Queen's Bench long-term dangerous offender decision of *R v Bunn*.³⁵⁹

R v Bunn 2012 Court of Queen's Bench for Saskatchewan

Mr. Bunn was convicted of sexual assault, on top of his prior 93 criminal convictions.³⁶⁰ The Saskatchewan Queen's Bench decision details Mr. Bunn's life as an ongoing spiral in and out

³⁵⁶ Referring to the Aboriginal Legal Services of Toronto (ALST) *Gladue* Casework Program. (emphasis added)

³⁵⁷ Rudin, Aboriginal Over-representation and *R v Gladue*, *supra* note 8 at page 706. (emphasis added)

³⁵⁸ *Ipeelee*, *supra* note 7 at para 60; Rudin, Aboriginal Over-representation and *R v Gladue*, *supra* note 8 at pages 704-706. (emphasis added)

³⁵⁹ *R v Bunn*, 2012 SKQB 397. [*Bunn*]

³⁶⁰ *Ibid* at para 24.

of custody, fuelled by violent and physical attacks following the consumption of alcohol.³⁶¹ Mr. Bunn had committed a wide range of violent attacks against a variety of people.³⁶² A significant portion of the *Bunn* decision is spent listing Mr. Bunn's prior convictions and grappling whether Mr. Bunn should be designated a dangerous offender, which the Court ultimately answers in the affirmative.³⁶³ There is no indication that a *Gladue* report was completed in this case. The extent to which *Gladue* principles were considered is as follows:

... prior to making a final determination as to whether or not to designate Bunn a dangerous offender or whether the long-term offender provisions would suffice, the court must consider the *Gladue* factors, [1999] 1 S.C.R. 688, as recently reaffirmed by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

Gladue factors are present in this case.³⁶⁴

The entirety of paragraph 63 reads, "*Gladue* factors are present." What follows is a short three paragraphs outlining the circumstances of Mr. Bunn's life, including Mr. Bunn's attendance at residential schools starting at the age of eight. Mr. Bunn reports that he was sexually abused as a child by at least five different family members and many times in the residential school. Mr. Bunn left residential school at the age of 15 however his academic level was that of a student in grade three. Additionally, Mr. Bunn indicated that he was physically abused at residential school including strappings with a ruler and deprived of food if he spoke his native Sioux language.³⁶⁵ Mr. Bunn suffered greatly in the government run residential schools. It is important that Mr. Bunn's experience in residential schools be raised to the court; however, the history of Mr. Bunn's family, his community and most importantly the potential for alternative programming should have been made known to the sentencing judge, especially considering the sentence imposed:

The *Gladue* factors are the only mitigating circumstances in this case. Having considered all of the evidence and the unwavering opinion of Dr. Holden which is substantiated by prior psychological reports on Bunn, I find that there is no possibility of eventual control of his behaviour in the community. The most appropriate sentence is an indeterminate period of incarceration. I do order an indeterminate period of incarceration of Bunn designated as a dangerous offender.³⁶⁶

³⁶¹ *Ibid* at paras 25-26.

³⁶² *Ibid* at para 31.

³⁶³ *Ibid* at paras 33 and 39-61.

³⁶⁴ *Ibid* at paras 62-63.

³⁶⁵ *Ibid* at para 66.

³⁶⁶ *Ibid* at para 67. (emphasis added)

The Honourable Justice Acton for the Court of Queen’s Bench for Saskatchewan made the following remarks regarding Mr. Bunn’s potential for reintegration into the community, “no possibility of eventual control of his behaviour in the community.”³⁶⁷ There is no indication that a *Gladue* report was provided for this determination nor is there any indication that a *Gladue* report had been completed in the past for Mr. Bunn. Considering the indeterminate sentence ordered, it is likely Mr. Bunn will be incarcerated for the remainder of his life. It appears from the decision that alternatives to such a sentence were not discussed. This could be for a number of reasons. Mr. Bunn could have said he did not want a *Gladue* report, although that is not indicated in the decision. Mr. Bunn’s sentence is reflective of a long and serious list of criminal convictions; however, that does mean that *Gladue* considerations become any less important to consider, in fact it increases the importance of applying *Gladue*. A *Gladue* report does not have the authority to transform a sentence of an indeterminate period of incarceration to a community sentence order. That is not what is being suggested, rather *Gladue* reports provide the opportunity for the judge to hear options that work within the range of appropriate sentences. For example, institutional programming could have been recommended. Cultural treatment could have been considered as well.

Based on Mr. Bunn’s criminal conviction record he appears to be a dangerous person coupled with a high risk to reoffend,³⁶⁸ but that does not detract from the legal requirement of *Gladue* principles and s 718.2(e). Judges are not afforded the discretion to choose when to apply *Gladue* in a meaningful way and when to falsely discharge their duty to consider s 718.2(e) by citing the phrase “*Gladue* factors are present in this case.”³⁶⁹ It is an error of law to not consider *Gladue* principles.³⁷⁰ *Ipeelee* further developed the second prong of *Gladue*.³⁷¹ Justice Lebel speaking for the Supreme Court of Canada in *Ipeelee* provides, “the *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid* at para 33.

³⁶⁹ *Gladue*, *supra* note 2 at para 82, see also paras 83-85.

“There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.”

³⁷⁰ *Ipeelee*, *supra* note 7 at para 75.

³⁷¹ *Ibid* at paras 74 and 101.

world views, different or alternatives sanctions may more effectively achieve the objectives of sentencing in a particular community.”³⁷²

Bunn is an example in which an error of law occurred as the Court failed to consider the totality of *Gladue* factors relevant to Mr. Bunn. Had a proper *Gladue* report been prepared and submitted, the Court would have been equipped with the requisite information to provide an appropriate decision. Whether alternatives are available must be explored in every case, especially a case of this magnitude, where an indeterminate period of incarceration is imminent.

The case of *Ipeelee* considered two-appeals by Aboriginal offenders who committed multiple serious offences and were both ordered to long-term supervision orders.³⁷³ The *Bunn* decision ponders a similar issue in the form of a dangerous offender designation. To suggest that *Ipeelee* does not apply because the offense in *Bunn* is a serious offence is a fallacious argument. *Gladue* must be considered in every criminal sentence involving an Aboriginal person, there are no exceptions.³⁷⁴ Proper considerations includes bringing to the judge’s attention alternatives that are appropriate for the Indigenous person before them, which take into account their unique circumstances. If this analysis is not complete, then the sentencing principle of s 718.2(e) is not properly applied. In 2017 the Saskatchewan Court of Queen’s Bench rendered another decision in which *Gladue* factors were arguably not considered to the extent they ought to have been.

R v Moostoos 2017 Court of Queen’s Bench for Saskatchewan

Five years after *Bunn* the Saskatchewan Court of Queen’s Bench released the sentencing decision of *R v Moostoos*. Ms. Moostoos was found guilty of manslaughter and sentenced to a total of seven years.³⁷⁵ The Honourable Justice Barrington-Foote for the Court of Queen’s Bench for Saskatchewan³⁷⁶ provides,

the only evidence tendered at the sentencing hearing was a pre-sentence report [PSR], and an updated criminal record. There was a brief agreed statement of facts (Trial Exhibit P-1), which did not describe the circumstances of the offence...³⁷⁷

³⁷² *Ibid* at para 74.

³⁷³ *Ibid* at para 1.

³⁷⁴ *Ibid* at para 8; *Gladue*, *supra* note 2 at para 82.

³⁷⁵ *R v Moostoos*, 2017 SKQB 12, at paras 1 and 59. [*Moostoos*]

³⁷⁶ As he was. Justice Barrington-Foote was appointed to the Saskatchewan Court of Appeal in 2018.

³⁷⁷ *Moostoos*, *supra* note 375 at para 2.

The story of Candace Moostoos is a tragic one. Ms. Moostoos referred to Mr. Burns, the man she ultimately kills, as “grampa.”³⁷⁸ Mr. Burns sexually abused her at a very young age and continued abusing her up until the night she took his life.³⁷⁹ In terms of *Gladue* circumstances Ms. Moostoos is a member of James Smith Cree Nation,³⁸⁰ her parents abused alcohol, she was verbally abused by her relatives and she was exposed to her father’s physical abuse of her mother.³⁸¹ Both her parents were incarcerated. When she confided in her mother that Mr. Burn’s was sexually abusive her mother told her not to report it to police.³⁸² Ms. Moostoos attended residential school at the age of 10 where she was verbally abused by the dorm supervisor and beaten and raped by other students.³⁸³ At the time of the offence Ms. Moostoos abused alcohol heavily.³⁸⁴

Justice Barrington-Foote reflected on other cases applying *Gladue*, emphasizing that *Gladue* is not an automatic reduction in sentence and the sentence must reflect all other sentencing purposes and principles.³⁸⁵ Justice Barrington-Foote cites the Saskatchewan Court of Appeal decision of *R v Chanalquay* and makes reference to The Honourable Chief Justice Richards’ reiteration of the key points made in *Gladue* and *Ipeelee*. One of those points includes, “If there is no alternative to incarceration available, the length of the jail term imposed on the offender must be carefully considered.” However, the decision of *Moostoos* does not mention nor discuss alternatives to incarceration. It can be inferred that this sentencing consideration was overlooked because a *Gladue* report was not completed and therefore information regarding alternatives to incarceration were not presented nor made known to Justice Barrington-Foote.

Justice Barrington-Foote’s suggests that he was not provided with sufficient evidence;³⁸⁶ however, what is restricting him from ordering a *Gladue* report? The same issue arose in the *Bignell* decision. Justice Schwann in *Bignell* describes the information in the pre-sentencing report

³⁷⁸ *Ibid* at paras 5 and 8. Mr. Burns was Ms. Moostoos’ maternal great-uncle.

³⁷⁹ *Ibid* at paras 8 and 11.

³⁸⁰ *Ibid* at para 14.

³⁸¹ *Ibid*.

³⁸² *Ibid*.

³⁸³ *Ibid* at para 15.

³⁸⁴ *Ibid* at para 19.

³⁸⁵ *Ibid* at paras 38, 40 and 46, citing *R. v Chanalquay*, 2015 SKCA 141; *R v Whitehead*, 2016 SKCA 165.

³⁸⁶ *Ibid Moostoos* at para 2.

“The only evidence tendered at the sentencing hearing was a pre-sentence report [PSR], and an updated criminal record. There was a brief agreed statement of facts, which did not describe the circumstances of the offence.” (emphasis added)

as “brief.”³⁸⁷ Sentencing judges can and should request further information if they do not receive sufficient information needed to apply s 718.2(e), as is provided in *Gladue*:

However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.³⁸⁸

Additionally, if sentencing judges fail to consider such information, on appeal an appellate judge ought to require such information as is articulated in *Gladue*:

Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.³⁸⁹

In the next decision discussed, The Honourable Justice Zuk for the Court of Queen’s Bench for Saskatchewan argues that it is the duty of all court actors, including defense counsel, Crown counsel and the sentencing judge, to ensure that *Gladue* is considered in all cases, as is reflected in the 2018 Saskatchewan Queen’s Bench decision of *R v Whitstone*.

R v Whitstone 2018 Court of Queen’s Bench for Saskatchewan

R v Whitstone is an appeal decision which considers the obligations of court actors, including defense counsel, crown counsel and the judge regarding disclosure of Indigenous ancestry of the accused. In this case neither Crown or defense counsel made the sentencing Judge

³⁸⁷ *Bignell*, *supra* note 350 at para 26.

³⁸⁸ *Gladue*, *supra* note 2 at para 84. (emphasis added)

³⁸⁹ *Ibid* at para 85. (emphasis added)

aware that the offender was of Aboriginal ancestry.³⁹⁰ Justice Zuk provides that based off of the lower court transcript it appears that the sentencing Judge did not inquire into whether the person before them was Indigenous.³⁹¹ There is also no mention in the transcript of any evidence at the show cause hearing that Ms. Whitstone is an Indigenous person.³⁹² However, there was information provided in the transcript that should have called for further inquiry, including that Ms. Whitstone lives on Thunderchild First Nation.³⁹³ This should have triggered to all of the court actors, especially the sentencing Judge, that Ms. Whitstone is Indigenous and therefore s 718.2(e) applies.

Ms. Whitstone entered guilty pleas to two counts. First, to fraudulently personating with the intent to obtain groceries contrary to s 403 of the *Criminal Code* and second, to fraudulently obtaining food contrary to s 364(1) of the *Criminal Code*. Ms. Whitstone was already on a conditional sentence order when she committed these new offenses. Counsel for Ms. Whitstone consented to the Crown application to convert the unexpired portion of her conditional sentence order to be served in jail. Therefore, this sentence was a joint submission agreed upon by Ms. Whitstone's counsel and the Crown. However, it is still required that *Gladue* considerations be made known to the sentencing judge during joint sentencing submissions. If *Gladue* is not addressed then an error of law has been committed.

Ms. Whitstone, who was self-represented at the appeal, stated that she did not know about *Gladue* factors at the time of her sentencing.³⁹⁴ She advised the Court that she is an Aboriginal person and that her parents attended residential schools.³⁹⁵ Crown counsel argued that the sentencing Judge would have been familiar with Ms. Whitstone from presiding over her criminal matters, thus would have known of her personal circumstances and therefore was aware of the need to address *Gladue* issues.³⁹⁶ Justice Zuk did not accept the Crown's position, rather he provides the following in response to the Crown's argument:

³⁹⁰ *R v Whitstone*, 2018 SKQB 83 at para 2. [*Whitstone*]

³⁹¹ *Ibid* at para 42.

³⁹² *Ibid* at para 8.

³⁹³ *Ibid* at para 36.

³⁹⁴ *Ibid* at para 37, see para 11. "s 718.2(e) creates a statutory duty on every sentencing judge to determine the circumstances of an Aboriginal offender unless the offender specifically waives his or her right to have those circumstances ignored." There was no such waiver in this case.

³⁹⁵ *Ibid* at para 11.

³⁹⁶ *Ibid* at para 12.

This argument fails... in the absence of any reference by the sentencing judge at any point in the sentencing process to acknowledging that Ms. Whitstone was an aboriginal offender and that, either directly or by implication, he considered those circumstances in the context of a *Gladue* analysis as mandated in s. 718.2(e), the correctness of the resulting sentencing decision cannot be properly assessed on appeal. The deficiency of adequate reasons and the absence of any reference in the transcript to Ms. Whitstone being acknowledged as an aboriginal offender and that the sentencing judge was aware of the circumstances associated with her being aboriginal precludes an appellate court from properly carrying out its function.³⁹⁷

As such Justice Zuk found that an error of law had occurred and therefore referred the matter back to Provincial Court for sentencing, to properly enable the court to assess Ms. Whitstone's unique *Gladue* circumstances.³⁹⁸

This case differs from the other Queen's Bench decisions discussed in this section because in those cases Indigenous ancestry of the person before the court was raised. However, *Gladue* is a two-prong test and requires not only the sentencing judge to consider the unique circumstances of the Indigenous person but also to consider alternatives to sentencing. In order to properly apply *Gladue*, a sentencing judge must determine whether the person before them is Indigenous and consider the alternatives to sentencing. If either of the two prongs of *Gladue* are ignored then *Gladue* is not properly applied and as such an error of law has occurred. *Whitstone* briefly addresses the need to reflect upon alternatives, "there was no evidence provided at the original sentence hearing with respect to Ms. Whitstone's aboriginal circumstances nor was there any evidence provided with respect to possible sentencing alternatives."³⁹⁹ Sentencing judges ought to consider alternatives to sentencing in every sentencing involving an Indigenous person. If such analysis is not provided, then an error of law has occurred. In the final decision discussed in this section, *R v Pauchay*, a sentencing alternative was put to the Court by the Indigenous community but was rejected.

R v Pauchay, 2009 Provincial Court of Saskatchewan

Pauchay has already been discussed in chapter three, during discussion of the theory of epistemic injustice. The circumstances of the case have been provided during earlier discussion. In *Pauchay* an alternative sanction was put to Judge Morgan at the sentencing circle by the

³⁹⁷ *Ibid* at para 42. (emphasis added)

³⁹⁸ *Ibid* at para 47.

³⁹⁹ *Ibid*. (emphasis added)

Indigenous community Mr. Pauchay belonged to; however, the Court rejected that recommendation. It was proposed that Mr. Pauchay serve the Elders in his community for the rest of his life, which is equivalent to a life sentence:

During the recommendation stage of the circle, it was again made clear that the participants felt that it was time for Mr. Pauchay to begin the healing process. Mr. Francis Nippi, a respected elder of the community, recommended that Mr. Pauchay be required to serve the elders of the community for the rest of his life, as a reminder that the Creator had not left him. That sentiment was echoed by other elders, some of whom queried whether or not the healing journey could start under the present circumstances in which Mr. Pauchay is separated from his partner. Many individuals spoke of the need for Tracey Jimmy and Christopher Pauchay to take counselling together, and the need for them to get reconnected with their youngest daughter, points I addressed earlier as being raised by Dr. Hathiramani.⁴⁰⁰

The Court analyzed the principles and purposes of sentencing and concluded, “The principle of denunciation, and the need to foster respect for the judicial system, mandates a significant response.”⁴⁰¹ Judge Morgan acknowledged the helpful contributions of the community; yet, claimed that even if he wanted to order the community-based recommendations put forward at the sentencing circle he did not have the jurisdiction to do so as the maximum duration of a probation order is three years.⁴⁰² Although in his decision to grant the sentencing circle Judge Morgan acknowledged that a conviction of criminal negligence causing death does not carry a minimum sentence.⁴⁰³ It was within Judge Morgan’s jurisdiction to order a three year probation order which includes conditions to serve the Elders in his community. This proposed sentence is not the life sentence put forward by the Elders. Although it would be a sentence which is compatible with both the principles and purposes of Canadian sentencing law and the Indigenous community’s means of employing reparation and justice.

Section 718.2(e) ought to be applied as Mr. Pauchay is an Indigenous person but there are also other sentencing purposes and principles which are relevant in the circumstances. Judges are required to consider the least restrictive sanctions that are appropriate in the circumstances.⁴⁰⁴ Judge Morgan focuses on the purpose of denunciation but that does not detract from his duty to

⁴⁰⁰ *Pauchay*, *supra* note 100 at para 51. (emphasis added)

⁴⁰¹ *Ibid* at para 69.

⁴⁰² *Ibid* at para 69. See also para 53.

⁴⁰³ *Pauchay*, *supra* note 99 at para 38.

⁴⁰⁴ *Criminal Code*, *supra* note 3 s 718.2(d).

also consider the other purposes including rehabilitation of offenders, to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.⁴⁰⁵

The community affected by Mr. Pauchay's actions which caused the death of his children, including the mother of his children, expressed a desire to have Mr. Pauchay treated in their community. The community acknowledged the serious nature of Mr. Pauchay's actions as they were most affected by it.⁴⁰⁶ The Elders should have been able to treat Mr. Pauchay in a way that their community deemed appropriate and meaningful. Judge Morgan had the jurisdiction to order such a sentence.

R v Itturiligaq is discussed in detail in the final section of this chapter. In this case an alternative sanction which incorporated Indigenous laws allowing the offender to stay in his community was presented to the Court and ordered.

7.3: A look at the Nunavut Court of Justice application of *Gladue*

In October of 2018, the Nunavut Court of Justice released the decision of *R v Itturiligaq*, written by The Honourable Mr. Justice Bychok.⁴⁰⁷ Justice Bychok attained detailed information regarding both the Indigenous person before the Court and the Indigenous community they are from, which ultimately impacted the sentence ordered. Justice Bychok demonstrates a thorough understanding of the Indigenous Inuit community of Nunavut, ranging from the colonial impacts plaguing the Inuit people and the importance of traditional knowledge and practices.

At the time of sentencing, Mr. Itturiligaq was a 24-year-old Inuk who was born and raised in Nunavut.⁴⁰⁸ The Court provides the following regarding the offender's circumstances: "The accused had a traditional upbringing. His Inuit culture and knowledge are said to be "very important to him". He hunts and fishes for country food for sustenance, which he shares with family and community."⁴⁰⁹

⁴⁰⁵ *Ibid* s 718(d), s 718(e) and s 718(f). (emphasis added)

⁴⁰⁶ *Pauchay*, *supra* note 100 at paras 48 and 49.

⁴⁰⁷ *R v Itturiligaq*, 2018 NUCJ 31. [*Itturiligaq*]

⁴⁰⁸ *Ibid* at para 44.

⁴⁰⁹ *Ibid*.

Mr. Itturiligaq pled guilty to s 244.2 of the *Criminal Code*, intentionally discharging a firearm at a house knowing that it was occupied.⁴¹⁰ Section 244.2(3)(b) establishes a four year mandatory minimum for the offense of s 244.2.⁴¹¹ Following an argument with his long-term partner, who is the mother of his daughter,⁴¹² Mr. Itturiligaq fired at the roofline of the house his partner was in.⁴¹³

The Crown asked the Court to impose the four-year mandatory minimum at a southern penitentiary.⁴¹⁴ The defense raised that *Gladue* principles apply.⁴¹⁵ Mr. Itturiligaq's *Gladue* principles were presented to the court in the form of a Pre-Sentence Report.⁴¹⁶ Defense counsel argued that s 244.2(3)(b) violates s 12 of The *Canadian Charter of Rights and Freedoms* as cruel and unusual punishment.⁴¹⁷ The defense requested, "the Court to strike down s 244.2(3)(b) and to impose a two year penitentiary term less credit for remand time followed by probation for 18 months."⁴¹⁸

Defense provided the following regarding the "severe" effect of the mandatory minimum sentence:

For a first-time, youthful offender from a small Inuit community, who has had little exposure to life outside the North, the actual effect of serving a sentence at a federal penitentiary will be extreme. In practical terms, this means that the Applicant will have to serve his sentence thousands of kilometers away from his family. This sentence will have a severe impact on the Applicant who will presumably have no physical access to his young child or other members of his family during the duration of his stay at the penitentiary.⁴¹⁹

⁴¹⁰ *Ibid* at paras 1 and 12.

⁴¹¹ *Ibid* at para 13.

⁴¹² *Ibid* at para 44.

⁴¹³ *Ibid* at para 8.

⁴¹⁴ *Ibid* at para 34.

⁴¹⁵ *Ibid* at para 48.

⁴¹⁶ *Ibid* at para 78. *Gladue* factors including: "His parents went their separate ways when he was six or seven years old and he lived with his mother; He witnessed domestic violence as a child; His mother was a heavy marijuana user while he was growing up; He suffers from a hearing deficit and wears a hearing aid; He experienced the overcrowding so common in the territory, living with his partner and child with his partner's family. They have been on a housing waiting list for "a couple of years"; His education was hampered by his difficulty understanding English because the emphasis was on English language instruction at school; He won't qualify to get his job back and there are very few employment opportunities in Kimmirut; and He has had thoughts about suicide during his relationship with the victim."

⁴¹⁷ *Ibid* at paras 14 and 20, defense applied the s 12 *Charter* analysis from *R v Nur*; see *R v Nur*, 2015 SCC 15 at para 46. See also *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁴¹⁸ *Ibid* at para 41.

⁴¹⁹ *Ibid* at para 47.

Justice Bychok agreed with the defense that a four-year penitentiary sentence would be too harsh of a punishment, violating Mr. Itturiligaq's section 12 *Charter* rights and such a violation cannot be seen as proportionate under section 1 of the *Charter*.⁴²⁰ In Nunavut there is no federal penitentiary, if sentenced to penitentiary time, it would have to be done outside of Nunavut in the southern provinces.⁴²¹ Justice Bychok ultimately sentences Mr. Itturiligaq to two years less a day in jail, giving credit to the 277 days of pre-sentence custody, followed by probation for two years.⁴²² Justice Bychok provides the following regarding the severe effects of a penitentiary sentence for an Nunavut person:

Mr. Itturiligaq had a traditional upbringing. His life is intimately connected to his land—the land of his ancestors. In this Court, we hear frequent submissions from counsel on the impact a loss of liberty has on a traditionally raised Inuk...⁴²³

There is no federal penitentiary in Nunavut. Inuit must serve their federal prison time in the south where they are forced to live in isolation from their culture, family and social networks. In many ways, the federal penal system is a twenty-first century continuation of the philosophy of forced resettlement, Residential Schools and southern tuberculosis sanatoria. Many Nunavummiut cannot understand why we continue to let our offenders be sent south.⁴²⁴

In coming to this decisions Justice Bychok expresses an understanding of the Inuit community in Nunavut and reflects upon the Indigenous Inuit traditional laws. Justice Bychok raises that the history of Nunavut and issues plaguing Nunavut are distinguishable from other areas in Canada.⁴²⁵ In Nunavut 86% of the population is Inuit,⁴²⁶ Nunavut does not suffer from gang violence as larger center like Toronto do, however firearm offenses are prevalent.⁴²⁷ Inuit people in Nunavut have suffered from collective trauma due to the forced separation of children to residential schools.⁴²⁸

The Inuit community in Nunavut, which includes Mr. Itturiligaq, exercise in their daily lives Inuit traditional laws. The Court reflects upon the Inuit societal values, Inuit Qaujimaqatigangit,

⁴²⁰ *Ibid* at paras 125 and 130.

⁴²¹ *Ibid* at para 116.

⁴²² *Ibid* at paras 133-135.

⁴²³ *Ibid* at para 111.

⁴²⁴ *Ibid* at para 116.

⁴²⁵ *Ibid* at paras 57-60.

⁴²⁶ *Ibid* at para 59.

⁴²⁷ *Ibid* at para 58.

⁴²⁸ *Ibid* at para 60.

which are broken when using a rifle to endanger oneself or others.⁴²⁹ The Court provides the following regarding application of Inuit laws in the sentencing process:

This is not to say that Inuit are not subject to the same laws—and sentencing principles—as all other Canadians. Reference to Inuit Qaujimajatuqangit is, however, a meaningful application of the clear *Gladue* direction to judges that Aboriginal persons are to be sentenced "differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case."⁴³⁰

The rationale stated in *Gladue* for this direction touches upon considerations of fundamental justice as it is understood in Nunavut:

A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentence ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in para. (d), (e), and (f) of s. 718 of the Criminal Code apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e).⁴³¹

Justice Bychok acknowledges that Inuit perspectives ought to be considered during application of *Gladue* considerations. As has been reflected throughout this thesis, the experiences of Indigenous people and the values Indigenous people carry are not reconcilable with Canadian law, nor are the *Criminal Code* sentencing purposes and principles reflective of traditional Indigenous sanctions. *Itturiligaq* supports the main argument put forward in this thesis; Indigenous laws need to be considered during application of s 718.2(e) and *Gladue* principles, in particular sanctions supported by Indigenous laws ought to be considered and ordered when appropriate. *Itturiligaq* provides hope that courts will continue to consider Indigenous laws within the mainstream justice system.

The cases discussed in this chapter highlight the importance of gathering proper information about the Indigenous person before the court and providing ways in which such

⁴²⁹ *Ibid* at para 62. "Inuuqatigiitsiarniq (respecting others, relationships and caring for people); Tunnganarniq (fostering good spirit by being open, welcoming and inclusive); Pijitsirniq (serving and providing for family or community or both); Aajiiqatigiinni (decision making through discussion and consensus); Pilimmaksarniq or Pijariuqsarniq (development of skills through practice, effort and action); Piliriqatigiinni or Ikajuqtiigiinni (working together for a common cause); Qanuqtuurniq (being innovative and resourceful); and Avatittinnik Kamatsiarniq (respect and care for the land, animals and the environment)."

⁴³⁰ *Ibid* at para 63.

⁴³¹ *Ibid* at para 64, citing *Gladue*, *supra* note 2 at para 70. (emphasis added)

information can be incorporated into the court process, to facilitate the most appropriate sentence. The highest court in Canada pointedly directs that *Gladue* is necessary in every case involving an Aboriginal person; however, *Gladue* continues to be overlooked. It is difficult to say with any certainty how often *Gladue* fails to be applied to its intended purpose. Trial decisions may be provided orally, and cases heard at the appellate level are the exception, not the rule. Despite these challenges, there is sufficient case law and commentary demonstrating a lack of meaningful implementation of *Gladue* principles, particularly there is a failure to consider alternatives to incarceration. *Whitstone* and *Itturiligaq* are rays of hope. These decisions provide direction to the courts to meaningfully consider alternatives to incarceration required by the second prong of *Gladue*. The second prong encourages integration of Indigenous laws and values into sentencing.

CHAPTER EIGHT: CONCLUSION

Due to a history based on colonial law and racist policies, Canada has created a justice system plagued with over-incarceration of Indigenous people, among a variety of social issues uniquely affecting Indigenous communities. Indigenous communities carry their own knowledge systems and means to seek justice. In order to remedy the inequality suffered by Indigenous people, over incarceration being a by-product of such, Indigenous ways of knowing ought to be relied on. Indigenous people understand the issues of their own communities more than any authority figure or colonial government ever will. As already stated in this thesis, *Gladue* may not be the correct avenue to implement Indigenous laws, in fact separate Indigenous justice systems may be the only way for Indigenous laws to be truly realized. In the meantime, Canadian law ought to implement Indigenous laws.

Courts across Canada appear to be resistant to *Gladue*, especially at the trial level. Canadian law is not structured to adapt to Indigenous laws and legal systems. *Gladue* can be utilized as a bridge between two paradigms in order to properly serve the Indigenous person before the court. Lindberg's theory of critical Indigenous legal theory is a sobering reminder that mainstream colonial systems were not intended to accommodate Indigenous values. The lasting effects of colonialism makes the second prong of *Gladue* crucial. The Indigenous person's heritage and connection ought to be a focal consideration during sentencing. However, this cannot happen if biases towards Indigenous people and their culture exist. Monture-Angus speaks to the racism within the legal system and the negative impact that has on the autonomy of Indigenous people. The recommendations and suggestions put forward in this thesis are moot if courts hold prejudicial ideals about Indigenous people and their communities. Biases and systemic racism needs to be challenged. When peace and friendship treaties were signed between Indigenous nations and the Canadian government both parties did so as autonomous nations. The inherent legitimacy given to Canadian law yet denied to Indigenous laws and communities ought to be challenged.

The motivation to write this thesis was two-fold. First, it was important to write about the history of Canada including the discriminatory practices by the Canadian government inflicted

upon Indigenous people. This history is what has generated the crisis of Indigenous people and over-incarceration in the justice system. Implementation of section 718.2(e) of the *Criminal Code* being a by-product of colonialism; people who are discriminated against and plagued with trauma are more likely to commit crimes. *Gladue* and colonialism cannot be separated because *Gladue* is a reaction to the impact of colonial practices. Second and most importantly this thesis suggests improvements to the sentencing process for Indigenous people and their communities. Chapters five through seven can be classified as a recommendation section.

Gladue reports, which aid in incorporating Indigenous values and understanding ought to be presented to all sentencing judges. If sentencing judges are to apply Indigenous laws within the mainstream system judges need to have a means to learn about Indigenous legal systems. *Gladue* reports provide a means to educate the courts not only about who the Indigenous person is but the reports also educate the judge about the Indigenous laws this person practices and the community they come from. For example, if an Indigenous person wants to participate in a community-based healing program with Elders from their community a *Gladue* report would be of great assistance. Perhaps the report would outline why the program will benefit the Indigenous person's kinship relationships and how the program will instill a sense of responsibility. *Gladue* reports provide a wealth of information and a means to bring that information to the courts' attention.

Therapeutic courts encourage healing and acknowledgement of responsibility and reliance on Indigenous practices and laws. This thesis considered one type of therapeutic court, being addictions courts. There are other forms of therapeutic courts which also incorporate Indigenous values of reconnection and rehabilitation including: *Cree* court, domestic violence court and *Gladue* court. New Zealand's alcohol and drug treatment court is considered a great success because of the connections it fosters to Maori culture and language. Canada and New Zealand share a history of colonialism, which includes assimilative policies that were and continue to be greatly detrimental to traditional practices. Canada ought to recognize its role in repairing the harm it has caused to Indigenous ways of life. Therapeutic courts, especially in centers with high Indigenous populations, ought to be offered throughout Canada. It is human nature to want to be proud and feel good about oneself. Reconnection to culture encourages healing and fosters positive connections to family networks and community.

The spirit and intent of *Gladue* is an acknowledgement of the alarmingly high rates of Indigenous people in the criminal justice system and a need to remedy such. Solutions need to

consider the perspectives of Indigenous communities. Elders and community members understand better than anyone else the issues their people face. It is these same people who are also in the best position to provide recommendations and suggestions to fix these issues. The second prong of *Gladue* demands that these solutions be considered and where appropriate be ordered. This thesis calls for greater implementation of community input. It is not enough for the courts to hear communities. Implementation is needed. Court actors including judges, lawyers and police need to reflect upon the biases and opinions they carry regarding Indigenous based sentences. Elders ought to be treated as legitimate sources of information, ceremonial practices including sweats ought to be classified with the same legitimacy as institutional programming and Indigenous agencies must be afforded autonomy to treat their members. Courts must implement the suggestions put forward so long as they are reasonable and address the circumstances of the Aboriginal person being sentenced.

To conclude, this thesis puts forward two additional recommendations. First, in accordance with the TRC Calls to Action judges, lawyers and law students ought to be educated about Indigenous governance structures and Indigenous legal systems.⁴³² This education must include attention toward policies inflicted by the Canadian government onto Indigenous people, including the *Indian Act* and residential schools. The TRC specifies that this “will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.”⁴³³ Additionally, judges, lawyers and law students should be encouraged to conduct their own research. The University of Saskatchewan created the Gladue Rights Research Database which offers a wealth of information.⁴³⁴ The Database is free and available online to the public. This Database offers a collection of useful information which could be either implemented into *Gladue* reports or be provided to the court on its own. The Database has research on Indigenous events,

⁴³² TRC, *Calls to Action*, *supra* note 15. See also articles 48 and 50.

Article 42: “We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.”

⁴³³ *Ibid* articles 27 and 28.

⁴³⁴ Legal Aid Saskatchewan; The University of Saskatchewan, College of Arts and Science, Department of History, Community-engaged History Collaboratorium; and The University of Saskatchewan Humanities and Fine Arts Digital Research Centre “Settler Colonial History and Indigenous People in Saskatchewan: A Gladue Rights Research Database” (accessed 4 April 2019), online: *Gladue Rights Research Database*.

communities, the histories of residential schools and additional resources. This Database is a valuable tool which should be utilized by all lawyers, especially those who serve Indigenous clients.

The proportion of judges who are Indigenous ought to be proportionate to the population they are situated in. In Saskatchewan 16% of judges ought to be Indigenous as 16% of the Saskatchewan population is Indigenous. Canadian law may be a foreign system to some Indigenous people. It is important that the people subjected to the system feel they are represented by their peers. Representation enforces confidence in the system. Although it may be difficult to prove, racial bias influences court actors. Representation combats systemic racism as it challenges norms of authoritative figures and places Indigenous people in positions of power and influence.

Gladue is not a fix-all solution. *Gladue* will not remove barriers of addictions, trauma and poverty. It will not return the children who were removed from their mother and father's arms in the name of white superiority. *Gladue* does not provide an answer to Indigenous communities when they ask why their children did not return home. *Gladue* does not challenge the misuse of police tactics such as street checks. *Gladue* does not mandate Canadian society to question its racist and ill-informed opinions of Indigenous people. Nor does section 718.2(e) have jurisdiction to lower the rates of Indigenous people who are arrested and brought before the court. What *Gladue* provides is hope. Hope that the Canadian justice system will not only accommodate but encourage and uplift Indigenous people. Hope that Indigenous people will return home.

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APPENDIX



Regina Drug Treatment Court

Eligibility

Persons are not eligible to participate in the DTC if they are charged with certain types of offences.

These include:

- Offences with serious violence,
 - Sexual assaults,
 - Family violence cases,
 - Offences involving or relating to children/youth, and
 - Profit-motivated commercial drug trafficking
- Where there is a mandatory jail term.



Referral process

All referrals are made through the Crown Prosecutor, who screens the file and once satisfied the individual may be a fit for the program, forwards the name to the manager, probation officer and income assistance worker to do pre-screening. Housing, income, health and addiction information is gathered and it is discussed at pre-court meeting. (Tuesday from 9 – 10:15) The Crown will then refer to the program for assessment, or deem them ineligible.

Court Team

Judges - Judge Hinds Alternate – Judge Reis
Crown Prosecutor – Lauren Ellis
Defence Counsel – Norm Bercovich and Maria Pappas

Program Centre Team

Manager	Judie Birns	766-6303	cell 306-529-8128
Probation Officer	Katka	766-6309	

Income Assistance	Barb	766-6308	(Wednesday mornings)
Nurse	Susan	766-6306	
Senior Counselor	James	766-6305	
Counselor	Kristen	766-6304	
Counselor	Darcy	766-6310	

PROGRAM HOURS:

9:00 am to 3:30 pm Monday to Friday with exception of Tuesday as it begins with court at 10:30 pm. Program 1:15 pm to 3:30 pm
 Court room 7 Provincial Court House 1815 Smith Street.

TRACKS OR PARTS OF THE PROGRAM

Assessment Minimum of 30 day assessment period where participants can choose to opt out if they don't feel the program is right for them. They will return to the regular court system.

Track I **Pleas must be entered to move into Track 1.**
 Education to self-identify with addiction and criminal lifestyles

Track II Stabilizing into a sober and crime free lifestyle

Track III Maintaining and strengthening recovery through relapse prevention and community resource connections to begin aftercare plan.
 Begin employment or education.
Program is approximately 15 months in total based on progress.

PROGRAM COMPONENTS

Activities include: group and individual therapy, addictions, criminal thinking (moral reconation therapy), self-help meetings, life skills, education. Each participant may have different requirements based on their situation and progress in Drug Court. There are off site resources

used as well for cultural activities, grief and loss, parenting, anger management, etc. based on participant needs.

Drug use and old street habits don't change overnight, so we try to work as much as possible on these issues, and we treat each person as an individual. Honesty is important.

The treatment plan could include detox, residential addiction treatment, day programs, work readiness programs, education, and other resources that will help them meet their treatment goals.

DRUG TESTING:

Drug testing is done through urine screens. These are random and witnessed to ensure no tampering. Tampering with screens can result in dismissal from the program. Screens are done 7 days per week and are generally witnessed. Creatinine is measured to monitor tampering.

CURFEW:

Participants need written permission to be out after curfew. Curfew is 930 pm to 7 am when they start. As they progress the curfew will be reduced to 10 pm to 7 am.

Regina Police Service does curfew checks and provides information on results to the Manager and Probation officer for follow up if necessary. Breaches are laid at Crown's request.

MEDICATIONS:

All medications must be approved by the Centre. If it is on a controlled drug list, it cannot be taken and alternatives must be explored. If participants are not medically fit enough to allow them to attend, and provide necessary screens, they will be removed from the program.

Rewards and Sanctions

The target group is high risk, high need participants.

Adult drug courts are not designed to treat all drug-involved adult offenders. They were created to fill a specific service gap for drug-dependent offenders who were not responding to existing correctional programs—the ones who were not adhering to standard probation conditions, who were being rearrested for new offenses soon after release from custody, and who were repeatedly returning to court on new charges or technical violations. DRUG COURT PRACTITIONER FACTSHEET TARGETING THE RIGHT PARTICIPANTS FOR ADULT DRUG COURTS PART ONE OF A TWO-PART SERIES by Douglas B. Marlowe, JD, PhD Chief of Science, Law & Policy, National Association of Drug Court Professionals

We find that rewarding positive behavior has significantly more impact than sanctioning negative behavior. Where possible, this is the focus. For two weeks clean and perfect attendance and call ins, with no curfew breaches they draw from the “fishbowl” at court and rewards can include \$10 grocery cards, movie passes, coffee cards, time off, socks, mittens, etc.

They earn points within the program for attendance at meetings, and following through on weekend safety plans, which are designed to look at triggers for both using and committing crime and put in actions to stop them from acting on either.

Non-compliance with screening (refused screens, flushed screens, or tampered screens) continued attendance or behavior issues, failure to comply with inpatient detox or treatment (leaving before completion), etc. will result in sanctions such as extra time at the centre, written assignments, meetings, remand time and/or expulsion from the program depending on severity and number of occurrences.

Participants will be discharged for:

Using, bringing, or dealing drugs at the treatment facility, or possessing paraphernalia there.

Continued criminal activity, especially drug trafficking.

Tampering with urine screens.

Repeated missed treatment sessions and/or court appearances without permission of the treatment provider or the court.

Violent behavior or the threat of violence.

FINAL SENTENCING

Graduates of the program do not receive jail time. They can receive either probation or CSO based on their situation. They continue to report to the court monthly and the centre as deemed necessary based on their performance.

Graduation Criteria:

1. Abstinence of all substances for 3 months verified by urine screens
2. Stable housing.
3. Participation in education/employment.
4. Ongoing Maintenance of Planned Recovery Activities.
5. 6 months with no new substantive criminal charges.

Those who do not complete may serve custodial time. They do not receive time for time while in the program in that case, but will receive some credit.

The Judge makes the final decision and there are different sentences depending on charges and performance.

Some or all - **DRUG TREATMENT COURT CONDITIONS OF UNDERTAKING/RECOGNIZANCE**

1. **S2** Keep the peace and be of good behavior

REPORTING TO BAIL SUPERVISION

2. **R33** Report to the Drug Treatment Court, Courtroom #7, 1815 Smith Street, Regina, SK when required to do so.
3. **R34** Report, in person, to the Bail Supervision Officer and/or designate at 2024b Albert Street (or 2nd floor, 1942 Hamilton Street), Regina, Saskatchewan immediately upon release from court and thereafter, at times and dates specified by the Bail Supervision Officer and/or designate.

ELECTRONIC MONITORING

4. **R34** Report in person to the Bail Supervision Officer and/or designate at 2024b Albert Street (or 2nd floor, 1942 Hamilton Street), Regina, Saskatchewan immediately upon release from court and thereafter, at times and dates specified by the Bail Supervision Officer and/or designate.
5. **R35** Participate in the Electronic Monitoring Program and abide by all the rules and regulations of the program.
6. **R25** You shall be confined to your residence and must not leave that residence without prior written permission to do so from the Probation Officer or his designate. When absent from your residence you must be at a specific place authorized by the probation officer.

RESIDENCE

7. **R36** Live at a residence as approved by the Bail Supervision Officer or at _____ Regina, Saskatchewan. Do not change that address without the prior written approval of the Bail Supervision Officer, Director and/or designate of the Drug Treatment Centre of the Drug Treatment Court.
8. **R36** Live at a residence as approved by the Bail Supervision Officer (or at Kate's Place 2735 5th Avenue, Regina, SK) or (at Waterston Center, 1845 Osler Street, Regina, Sk) and abide by the rules and regulations of the residence, and do not change that address without the prior written approval of the Bail Supervision Officer, Director and/or designate of the Drug Treatment Centre of the Drug Treatment Court.

CURFEW

9. **R44** Not to be outside your residence between the hours of ____ and ____ except with the prior written permission of the Bail Supervision Officer.
10. **R45** Personally present yourself to any Bail Supervision Officer or designate or police officer who attends your residence to monitor the conditions of this order.

DRUG TREATMENT COURT PROGRAM

11. **R37** Report immediately to the Drug Treatment Centre located at 2024b Albert Street, Regina, Saskatchewan and thereafter at such dates and times as directed by the Drug Treatment Centre Director and/or designate and abide by all of the rules and conditions of the Drug Treatment Program.
12. **R38** Actively participate in all assessments and counseling and treatment plans and follow all lawful instructions of the Drug Treatment Centre Director and/or designate. Any Treatment Centre staff of any contact with peace officers or if you receive any new charges.
13. **R49** Immediately advise the Drug Treatment Centre staff of any contact with peace officers of if you receive any new charges.
14. **R50** Shall sign such releases as necessary to allow the Drug Treatment Centre of Drug Treatment Court to access any information it deems necessary related to medical and treatment history
15. **R41** Provide, without warning, a suitable sample of our breath, blood or urine upon demand by any peace officer or staff member of the Drug Treatment Centre, and the signing of this order is your consent to giving the sample.
16. **R39** Not to use, consume or possess any alcohol or illegal drugs
17. **R40** Not to be in any bars or liquor stores or casinos.
18. **R42** Submit to a search, by a peace officer or Drug Treatment Program officer of himself/herself, any residence or place occupied by him/her or any vehicle operate or occupied by him/her on demand and without warrant or reasonable grounds.

WEAPONS

19. **R43** Not to have in your possession any firearms, cross-bow, prohibited or restricted

weapons, ammunition, or explosive substances.

NO CONTACT

20. **R47** Have no contact of any kind in any way, directly or indirectly with _____ except through a member of the Law Society of Saskatchewan.
21. **R48** Not be at the place of residence, education or workplace of _____.

CELL PHONE

22. **R51** Not to possess any cell phones, pagers or police monitoring equipment.

OTHER

23. **R52** Not to purchase or possess any drug use paraphernalia, including needles and pipes. You may carry with you one enclosed Naloxone kit as approved by DTC staff which may contain no more than two sealed syringes, two Naloxone vials, rubber gloves, a facemask and training certification. The syringes may be removed from the packaging for the sole purpose of administering the Naloxone in accordance with your training and instructions.

REGINA DRUG TREATMENT COURT Participant agreement

As a participant of the Regina Drug Treatment Court, I agree to the terms and expectations below:

The participant understands s/he may rescind this agreement at any time; however it will result in unsuccessful termination from the RDTC program.

Program Expectations

Comply with treatment plan developed in consultation with the participant.

Cooperate and complete all referrals for assessment and enter into and complete residential and/or outpatient programs as identified in the treatment plan.

Sign releases of information as necessary to allow for monitoring of attendance, progress, and care plans from external agencies/services.

Participant Monitoring

The RDTC program incorporates ongoing judicial interaction with each participant as an essential component of the program. The program is comprised of tracks, and performance and progress is monitored with weekly reporting to the RDTC Judge.

The structure of the phases may be changed to meet the participants' individual needs. Participants will not advance through tracks based on pre-set timelines. Advancement is based on individual performance in the treatment plan, compliance with requirements and by recommendation of the treatment team and approval of the judge.

Rewards and Sanctions

The goal of the Regina Drug Treatment Court Program is to encourage success and discourage failure. With that objective, the RDTC uses incentives as an important component in making lasting changes in behavior. Incentives demonstrate acknowledgment of the difficult changes a participant is making in his/her life. Positive changes and compliance with Drug Court requirements will be rewarded.

Some of the positive changes and behaviors that may be rewarded include, but are not limited to:

- Attending all treatment sessions
- Attending recovery meetings and getting a sponsor;
- Abstaining from alcohol and drugs, as evidenced by negative test results;
- Engaging in vocational or educational, or employment activities;
- Securing stable housing;
- Advancing in the Drug Court Program tracks; and

- Accomplishing any other milestone identified by the treatment team.

INCENTIVES

The Judge uses incentives on a case-by-case basis. The Judge dispenses incentives as the participant's status and conduct indicate. The Judge determines the type of incentives received based on the participant's performance and compliance with program requirements.

There are many types of incentives available that may include, but are not limited to:

- Encouragement and praise from the Judge;
- Ceremonies and tokens of progress, including advancement in the Drug Court Phases;
- Decreasing court appearances and supervision contacts;
- Increasing or expanding privileges;
- Gift cards for restaurants, movie theaters, recreational activities, or personal care services;
- Graduation from the Drug Court Program.

Incentives may be provided and can be earned through compliance with the Drug Treatment Court Program.

SANCTIONS

Just as it is important to recognize progress, it is also important to respond swiftly to problems and noncompliant behavior. By imposing sanctions, a participant who is not compliant with the requirements of the program will learn that there are consequences for his/her behavior. The objective is not only to reprimand noncompliance, but to re-engage and encourage the participant to continue working through the recovery and treatment process. Sanctions are issued according to the seriousness of a violation. Serious violations could result in termination from the program. Sanctions are used on a case-by-case basis by the Judge when a participant fails to comply with Drug Court Program requirements.

These requirements include, but are not limited to:

- Failure to attend court;
- Failure to provide a drug screen in the allotted time;
- Failure to meet curfew;

- Failure to complete programming as outlined in treatment plan which may include detox and residential or outpatient treatment

- Falsifying or attempting to falsify any required documentation, including self-help recovery meeting attendance;

*Failure to improve troublesome behavior

Graduated sanctions are used to address noncompliant behaviors. Sanctions may include, but are not limited to:

- Warnings and admonishment from the Judge;
- Community service work;
- Individualized sanctions such as writing essays or reading books;
- Being placed on an Electronic Monitor bracelet;
- Increasing frequency of alcohol and drug testing;
- Increasing frequency of court appearances;
- Refusing specific requests, such as permission to travel;
- Denying additional or expanded privileges, or rescinding privileges previously granted;
- Imposition of remand days;
- Termination from the Drug Court Program.

Sanctions are not only used as a form of consequences for inappropriate choices, but also a way to re-evaluate a participant's commitment to sobriety and to completing the Regina Drug Treatment Court Program.

Urine Screening

see drug screen contract

Termination Criteria

The participant understands s/he may be terminated for

- Ongoing non-compliance with treatment or resistance to treatment
- New serious criminal charges
- Selling drugs at the program centre

Signed: _____ Date: _____

Print name: _____

Witness: _____ Date: _____

Print Name: _____

Drug Testing Contract

I AM AWARE THAT:

- Drug and alcohol testing will be performed by a laboratory or program approved by the Regina Drug Treatment Court.
- The Drug Court will rely on the results of an instrumented or laboratory-based test in confirming whether substance use has occurred.
- Drug and alcohol testing will be performed frequently and on a random basis, which could include weekends and holidays.
- I am responsible to check upon arrival at the program centre if screens are required that day and by what time. Days I am not at the centre, I will call in and arrive at the designated testing facility within time specified after being notified that a test has been scheduled. If I fail to provide a screen by the deadline, or fail to attend, it is deemed a refusal and I will be sanctioned.
- Generally, a staff person will directly observe the collection of test specimens.
- I must provide a sufficient volume of fluid for analysis.
- I will be given sufficient time (up to two hours) to deliver a urine specimen.
- I may not drink any fluid excessively before testing and must avoid environmental contaminants, over-the-counter medications, or foods that can reduce the accuracy of the tests.
- I may be subjected to immediate spot testing if the Drug Treatment Court has reason to suspect recent use or during high-risk times such as weekends or holidays.
- Because cannabinoids (a by-product of marijuana) may persist in the body for several days, marijuana users have a grace period. After 30 days positive cannabinoid tests will be presumed to reflect new marijuana use. After I have had 14 days of consecutive cannabinoid-negative urine specimens, the Drug Treatment Court will presume that subsequent positive cannabinoid results reflect new use. Levels may be requested from lab.
- The excuse that I was associating with other people who are engaged in substance use or for exposing me to passive inhalation or second hand smoke will not be accepted.
- I will be sanctioned for providing diluted, adulterated, or substituted test specimens. Urine specimens below 90°F, above 100°F, or that have a creatinine level below cut off; will be presumed to be diluted or fraudulent. I bear the burden of establishing a convincing alternative explanation for such results. Under such circumstances, I may receive sanctions.

- I have been informed that the ingestion of excessive amounts of fluids can result in a diluted urine sample and I understand that my urine sample will be tested to ensure the sample is not dilute.
- Provision of a light sample may result in having to provide an additional sample within 2 hours.
- I understand that substituting or altering my specimen or trying in any way to modify my body fluids for the purposes of changing the drug testing results will be considered as a positive test for drugs/alcohol and will result in sanctioning and may be grounds for immediate termination from drug court.

Signed: _____

Date: _____

Print name: _____

Witness: _____

Date: _____

Print Name: _____