THE PRAIRIE PROVINCE EPIDEMIC: A CRY FOR THE MEANINGFUL INCLUSION OF THE INDIGENOUS PERSPECTIVE INTO THE SENTENCING OF INDIGENOUS PEOPLE AND *GLADUE*

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ABSTRACT

Indigenous people have been grossly over-represented in the Canadian criminal justice system. In response, Parliament enacted section 718.2(e) of the *Criminal Code.*[1] The decision of *R v Gladue* mapped the parameters of section 718.2(e) and the two prongs that are to be considered whenever an Indigenous person is before the court:

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.[2]

Despite numerous attempts to call attention to this section, Canadian courts still struggle with its implementation, especially when it comes to prong two. This thesis asserts that in order for there to be a meaningful implementation of *Gladue* and the sentencing of an Indigenous person, there must be a meaningful incorporation of the Indigenous perspective.

This thesis also explores tables and figures on the percentage of Indigenous admissions into the criminal justice system for all provinces and territories. The purpose of this exploration is to determine how the population of Indigenous people of any given province or territory compare to that of the Indigenous youths and adults that are being admitted into the criminal justice system. Leading decisions on the issue of *Gladue* in the Provinces of Alberta, Saskatchewan and Manitoba were also explored, demonstrating that prong two of *Gladue* is still largely being ignored. However, a transition is seen in Saskatchewan with the decision of *R v J.P.*, 2020 SKCA 52.[3] The final chapter of this thesis recognizes the need for reform within the Prairie Provinces. As such, four Indigenous courts were looked at and evaluated, including the Gladue Court of Ontario, the Cknucwentn First Nations Court in Kamloops, British Columbia, the Tsuu T'ina Court of Alberta, and the Cree Court of Saskatchewan.

[1] *Criminal Code, RSC 1985, c C-46* [*Code*].
[2] *R v Gladue,* [1999] 1 SCR 688 at 690, 171 DLR (4th) 385 (SCC) [*Gladue*].
[3] *R v J.P.*, 2020 SKCA 52 (CanLII) [*J.P.*].

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CHAPTER ONE: INTRODUCTION

There has been an unfortunate reality that has continued to persist in Canada, and that is that its Indigenous people have been disproportionality overrepresented in its prison systems. This reality is described as a "National Epidemic" facing Indigenous people. Among the many responses to this issue was the enactment of section 718.2 (e) of the *Criminal Code*.[4] Section 718.2 (e) states that "all available sanctions other than imprisonment" must be looked at "with particular attention to the circumstances of Aboriginal offenders."[5] Some of the leading case law in the interpretation and application of section 718.2 (e) are *R v Gladue*[6], *R v Wells*[7], and *R v Ipeelee.*[8] What came of these decisions are two defining principles/prongs, or otherwise known as the *Gladue* analysis/principles that must be discussed every time an Indigenous person is before the court:

1. The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
2. 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.[9]

Among these two aspects, the second prong of the *Gladue* analysis will be examined more thoroughly throughout this thesis. One could argue that in order to come to a meaningful sentence for Indigenous people that there must be a meaningful implementation of restorative justice principles and/or Indigenous legal traditions. *Gladue* and in particular prong two can be viewed as existing and potential avenues for the meaningful inclusion of Indigenous legal traditions into the experience of Indigenous people in the current criminal justice system. It is important to be reminded that long before the imposition of British law, Indigenous people had their own forms of governance, justice and legal traditions. This thesis explores the many ways in which these two legal systems have and can work together to come to a fit sentence for an Indigenous person if properly considered and implemented. This exploration not only recognizes colonial requirements for a fit sentence, but explores instances that rationalize why it is

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[4] *Code*, *supra* note 1.
[5] *Ibid*.
[6] *Gladue*, *supra* note 2 at 690.
[7] *R v Wells*, [2000] 1 SCR 207 at 208, 182 DLR (4th) 257 [*Wells*].
[8] *R v Ipeelee,* 2012 SCC 13 at 435, [2012] 1 SCR 433 [*Ipeelee]*.
[9] *Gladue*, *supra* note 2 at 690.

imperative to also consult with Indigenous people on issues that directly impact the accused and the community. As a result, there are two major questions to be answered in this thesis: 1) whether *Gladue* is being appropriately applied throughout Canada; and 2) whether *Gladue* is meeting its potential in effectively integrating Indigenous legal traditions in the sentencing of Indigenous people. The following chapters are challenged with these questions.

Chapter two is split into two- parts. The purpose of this chapter is to acquaint the readers with section 718.2(e) and the decision of *Gladue.* The first part of this chapter explores the history of sentencing law in Canada, in order to explain why Parliament enacted section 718.2(e) in the first place. The second part of this chapter explores the Supreme Court of Canada's response and initial interpretations of section 718.2(e). These preliminary discussions are used to provide a context for the reader for the remainder of this thesis.

Chapter three provides the definitions of restorative justice and the meaningful aspects of prong two of *Gladue.*[10] The second part of this chapter is best understood as the theory section that will be used for the theme throughout this thesis. The theory is that Indigenous perspectives and laws must be "meaningfully" incorporated into the sentencing of Indigenous people. This paper draws upon existing Supreme Court of Canada case law surrounding the definition of restorative justice and its relationship to the sentencing of an Indigenous person. The difference between restorative justice and Indigenous justice is also briefly outlined. This paper emphasizes that while restorative justice is often linked to Indigenous communities, it is the process itself that truly defines whether it is Indigenous justice. The term "meaningfully" is also carefully defined and discussed throughout this chapter. You will come to know that the term meaningfully varies and can be associated with both working outside the current criminal justice system and also working within the mainstream justice system under section 718.2(e) and *Gladue.*

Chapter four uses a quantitative approach to represent the percentages of Canada's Indigenous people in the criminal justice system. Various tables are reproduced in this chapter using pre-existing data from Statistics Canada. The purpose of this chapter is to capture provincial/territorial trends of Indigenous adult and youth admission percentages in the criminal justice system. The data collected from each of the tables are then combined to compare

[10] *Ibid.*

provincial/territorial Aboriginal populations to provincial/territorial Aboriginal adult and youth Admission percentages. The purpose of these calculations is to determine the percentage of Indigenous people in each Canadian province/territory being admitted to the criminal justice system. This percentage is then compared with the proportion of Indigenous people in each provincial/ territorial population. The findings in this Chapter concludes that what once was considered to be a "National" over-incarceration epidemic is actually best understood as a "prairie province" over-incarceration epidemic, with Alberta, Saskatchewan and Manitoba at the forefront.

To understand further the crisis that exists within the prairie Provinces of Alberta, Saskatchewan and Manitoba, chapter five looks at leading case law in these respective Provinces on the sentencing of Indigenous people. What flows naturally from the discussion of sentencing and Indigenous people is the decision of *R v Gladue*.[11] As such, it is this decision that is used as a foundation for what should be expected whenever the sentencing of an Indigenous person is being conducted. In each of the Provinces of Alberta, Saskatchewan and Manitoba, the cases that will be looked at come from the Court of Appeal level. The first cases that are discussed are *R v Arcand*[12] and *R v Okimaw*[13] from the Province of Alberta. Following this discussion are three Saskatchewan Court of Appeal decisions, beginning with the leading case of *R v Chanalquay*[14], followed by *R v Lemaigre*[15] *and R v J.P.*[16] An examination of two Manitoba Court of Appeal decisions, *R v Peters*[17] and *R v McIvor*[18] is also conducted. The purpose of this exercise is to determine whether each or either of these Provinces are appropriately applying the principles that flow from *Gladue.* In order for *Gladue* to be adequately applied, both prong one and prong two must be meaningfully considered whenever the sentencing of an Indigenous person is at play

The final substantive chapter recognizes the importance of meaningfully incorporating Indigenous communities, their values, traditions and legal systems into the application of *R v Gladue* and more appropriately the Canadian criminal justice system. This chapter provides

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[11] *Ibid.*
[12] *R v Arcand*, 2010 ABCA 363 (CanLII), [2011] 7 WWR 209 [*Arcand]*.
[13] *R v Okimaw*, 2016 ABCA 246 (CanLII), 31 CR (7th) 377 [*Okimaw*].
[14] *R v Chanalquay*, 2015 SKCA 141 (CanLII), [2016] 4 WWR 242 [*Chanalquay*].
[15] *R v Lemaigre*, 2018 SKCA 47 (CanLII) [*Lemaigre*].
[16] *J.P*. *supra* note 3.
[17] *R v Peters*, 2015 MBCA 119 (CanLII), 323 Man R (2d) 237 (CA) [*Peters*].
[18] *R v McIvor*, 2019 MBCA 34 (CanLII) [*McIvor*].

examples of appropriate avenues in which this implementation can be done. The purpose of this chapter is to compare what the Provinces of Ontario and British Columbia are doing to what the Provinces of Alberta and Saskatchewan are doing. The reason for this comparison is to theorize whether the statistics presented in Chapter four may have a connection to the programming that exists within these Provinces. This chapter explores the use of Indigenous courts as potential avenues for appropriately applying the calls made out in *R v Gladue.* These courts are examined using a qualitative approach.

Chapter six, in particular, explores the leading Provinces of Ontario and British Columbia and their approach to appropriately implementing Indigenous legal systems into the mainstream justice system. Together, the Provinces of Ontario and British Columbia are leading the way in Canada with a total of nineteen Indigenous courts in their areas, thirteen of which are in the Province of Ontario and six in British Columbia. Only one of these courts from each Province have been chosen for exploration. It is important to recognize though that while only two courts in total will be discussed, programs that exist within these courts can often be viewed as Province wide, therefore resulting in a more exhaustive discussion than what was originally sought out. However, the two Indigenous courts in these areas that will be looked at are: The Gladue Court of Ontario and the Cknucwentn First Nations Court in Kamloops, British Columbia. Chapter six also looks to these Indigenous courts as a comparison to the Indigenous courts in the Provinces of Alberta and Saskatchewan. The two Indigenous courts that are researched are the Tsuu T'ina Court of Alberta and the Cree Court of Saskatchewan. Following these discussions are recommendations made to the prairie Provinces of Alberta, Saskatchewan and Manitoba for future approaches to incorporating Indigenous legal traditions into the court system to effectively meet the needs of Indigenous people.

CHAPTER TWO: SENTENCING AND INDIGENOUS PEOPLE

2.1 The history of sentencing laws in Canada

Years before the introduction of the 1996 reform in Bill C-41, scholars expressed the need to amend sentencing provisions within the Canadian *Criminal Code.*[19] As noted by the Department of Justice Canada in their report "A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code", some of the major influencers for Bill C-41 were the authors of the *Quimet Report,*[20] the Law Reform Commission of Canada, the federal government, and Bill C-19 and Bill C-90.[21] Following were many other reports including the report on *Sentencing Reform: A Canadian Approach,*[22] the Daubney Report[23] and others.[24] In each of these reports the cry for sentencing reform was evident. As mentioned by the Department of Justice, there were a number of shortcomings that were listed for sentencing reform, including the "absence of any clearly articulated sentencing policy or purposes, over-use of imprisonment as a sanction, and widespread unwarranted disparity in sentences imposed by judges."[25]
In the hope to address some of these shortcomings, Parliament enacted section 718 of the *Criminal Code.*[26] We will find out shortly though, there still exists a major deficiency with regards to the sentencing of Indigenous people.

Section 718 of the *Criminal Code* defines the purpose and the necessary principles that should be incorporated into the sentencing process, a recommendation made by many of the

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[19] Canada, Department of Justice, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code*, by Gerry Ferguson, Catalogue No J22-32/2017E (Canada: 10 August 2016) at 6, online: < https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/RSD_2016-eng.pdf> [*Depart Just G. Ferguson*].
[20] Canada, Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Justice and Corrections*, (Ottawa: 31 March 1969), online: < http://johnhoward.ca/wp-content/uploads/2016/12/1969-HV-8395-A6-C33-1969-Ouimet.pdf> [*Quimet Report]*.
[21] *Depart Just G. Ferguson*, *supra* note 19.
[22] Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Catalogue No J2-67/1986E (Ottawa: 1987), online: < http://publications.gc.ca/site/eng/471728/publication.html> [*Sentencing Reform*].
[23] Canada: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility*, (Ottawa: 16-17 August 1988), online: < http://johnhoward.ca/wp-content/uploads/2016/12/1988-KE-9434-A22-S9-1988-Daubney-E.pdf> [*Taking Responsibility*].
[24] *Depart Just G. Ferguson*, *supra* note 19.
[25] *Ibid* at 6.
[26] *Code*, *supra* note 1.

already mentioned scholars. Section 718 in particular, defines the fundamental purpose of sentencing, which is "…to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions…"[27]

Flowing from the fundamental purpose of sentencing are six major objectives: "denunciation, deterrence, separation, rehabilitation, reparation, and promotion of responsibility and acknowledgement of harm done to victim."[28] Following these objectives are fundamental and additional sentencing principles. According to section 718.1 the fundamental principle of sentencing is that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[29] In addition to section 718.1, section 718.2 state that courts must consider "aggravating or mitigating factors, the principles of parity, totality, the least restrictive appropriate sanction, and the principle of restraint in the use of imprisonment, with particular attention to the circumstances of Aboriginal offenders."[30]

This is the first-time Parliament went beyond just the principle of restraint and specifically mentioned Aboriginal offenders.[31] In order to design a fit and appropriate sentence, particularly with regards to Indigenous offenders, there must be a real consideration, and implementation of section 718.2(e) alongside the other provisions of section 718.1 and 718.2. Alan Rock, then Justice Minister answers best the question of why section 718.2(e) was incorporated into the *Criminal Code*. He states that:

> The reason we referred there specifically to aboriginal persons is that they are sadly over-represented in the prison populations in Canada. I think it was the Manitoba justice inquiry that found that although Aboriginal people make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada's populations, but they represent 10.6% of persons in prison. Obviously there's a problem here…what we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage the courts to look at alternatives where it's

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[27] *Ibid.*
[28] *Ibid,* at *s. 718(1).*
[29] *Ibid.*
[30] *Ibid.; Depart Just G. Ferguson, supra* note 19 at 8.
[31] *Depart Just G. Ferguson, supra* note 19 at 8.*;* Philip Stenning & Julian V Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask L Rev 137 (HeinOnline) [*Stenning & Roberts*].

> consistent with the protection of the public-alternatives to jail-and not simply resort to the easy answer in every case.[32]

This statement was made between the years 1994 and 1996, this is 3-5 years before the decision of *R v Gladue,* which was the first case to interpret the meaning of section 718.2 (e).[33] It is clear from this statement that our legal figures are completely aware that the Indigenous people of Canada are facing an over incarceration epidemic on a national scale. This statement is also clear that Parliaments intention was to create a pathway for courts to look to Indigenous communities and their programming as an alternative to what is typically called for in a mainstream sentencing process. This statement specifically isolates the punishment of jail and encourages courts to look at other Indigenous community based alternatives and where it is appropriate avoid the sentence of incarceration. However, in order to properly implement an Indigenous community based alternative, the courts and our legal system must not only be aware of these existing and available resources, but they must also recognize their validity.

The Law Reform Commissions, as mentioned in the Royal Commission of Aboriginal People in 1996, also expressed similar concern, and stressed a need for reform to our traditional criminal justice process.[34] Michael Jackson, a researcher on behalf of the Law Reform Commission stated that:

> Over the past 20 years in Canada a growing understanding has developed regarding the limitation on the traditional criminal justice process and its reliance on imprisonment to further retributive and deterrent objectives. Furthermore, a consensus is emerging on the need to develop community based sanctions and non-adversary processes which balance the interests of the victim, the offender and the community. There is also a significant and growing body of opinion that restorative justice principles should play a far more important role in criminal justice policy and practice.[35]

The first sentence in this statement speaks to the over reliance of the use of imprisonment as a sanction to further the objectives of retribution & deterrence. It speaks to how over the past

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[32] House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, no 62 (November 17, 1994), at 62 cited in Jonathan Rudin, "Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 Osgoode Hall LJ 689 at 690 [*Rudin WWW]*.
[33] *Gladue, supra* note 2.
[34] Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada,* Catalogue No ZI-1991/1-41-8F (Ottawa: Communication Group, 4 March 1996) at 75 [*RCAP, Bridging*].
[35] *Ibid*.

20 years, there is growing awareness of the limitations of Canada's current criminal justice system. One could argue though that these limitations were recognized by Indigenous people long before the discussions were raised by the Law Reform Commission in 1996.[36] One of the limitations in particular that raises concern is the over use of imprisonment as a sanction. It begs the questions then of whether Indigenous people would even tolerate the use of imprisonment in its current form or at all and whether restorative justice principles would even include jail as a punishment to begin with.[37] There is a clear tension here between the application of colonial laws and the inclusion of the Indigenous perspective. For example, currently, our sentencing principles as set out in the *Criminal Code* presents restorative justice as secondary. If the growing opinion is to have restorative justice play a far more significant role in the sentencing process as mentioned in the above statement, this can only be achieved by designating restorative justice as a primary principle of sentencing. The other issue here though is that our current sentencing process appears to leave no other option in the colonial context other than to imprison people after a certain point in their criminal offending. There seems to be a sliding scale that exists that considers not only the offence itself, but the individuals criminal record if any, and their personal circumstances when determining a fit sentence. One could argue though that a person's criminal record plays a far greater role in the determination of the accused's sentencing position than one would anticipate. In particular, it would seem that a person's criminal record would essentially provide a foundation for the courts to consider what sentence is appropriate. For instance, if an individual has been convicted in the past on similar offences or to a sentence of jail, one could imagine that this would aggravate the circumstances which could possibly result in another jail sentence. It would be interesting to identify what sort of "sentences" would be available other than imprisonment through an Indigenous lens and whether the application of the Indigenous perspective could even effectively form part of the discussions of section 718.2(e).

The decision of *R v Gladue* expands and interprets further Parliament's intention behind the implementation of section 718.2(e). This decision also reiterates the need for change in our traditional justice system process by looking to Indigenous community based justice initiatives as

[36] *Ibid.*
[37] Robert Nichols, "The Colonialism of Incarceration" (2014) 17:2 Radic Philos Rev [*Nichols*].

alternatives. This decision highlights the need for restorative approaches to sentencing and the need for the Indigenous perspective. In particular, the decision of *Gladue* states that the main objectives behind section 718.2 (e) were to: "1) address the serious problem of overrepresentation of aboriginal people in prison and 2) to encourage sentencing judges to have recourse to a restorative approach to sentencing."[38] This thesis argues that in order to truly meet these objectives requested by Parliament there must be a serious and meaningful incorporation of the Indigenous perspective in the current criminal justice system.

2.2: The Supreme Court of Canada's interpretation of s.718.2(e)

The pioneer cases of *R v Gladue*[39] and *R v Wells*[40] are some of the first decisions that attempted to map the boundaries of section 718.2(e) in the late 1990s and early 2000s. Then 13 years later, the Supreme Court of Canada in *R v Ipeelee*[41] continued to define section 718.2(e). The *Ipeelee* decision once again reiterated the same principles that were stated in the early decisions of *Gladue*[42] and *Wells*[43] that seemed to fall silent in the sentencing of Indigenous people. Each of these decisions and their addition to the interpretation of section 718.2(e) will be examined.

2.2(i): R v Gladue

The first analysis of section 718.2 (e) was made in 1999 in the decision *R v Gladue*.[44] The accused, an Indigenous woman named Ms. Jamie Tanis Gladue, was found to have killed her common law partner. Ms. Gladue pled guilty to manslaughter and "was sentenced to three years' imprisonment."[45] During the incident, Ms. Gladue suspected that her older sister and her common law partner were engaged in sexual activity and had been having an affair. Once Ms. Gladue and the victim proceeded home that night, she confronted him and they began to argue. The victim attempted to leave their residence and Ms. Gladue ran after him with a knife. Evidence suggest that Ms. Gladue stabbed the victim twice, once in the chest and once in the arm. The sentencing judge, while taking into consideration other principles of sentencing, held

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[38] *Gladue, supra* note 2 at 690.
[39] *Ibid.*
[40] *Wells*, *supra* note 7.
[41] *Ipeelee, supra* note 8.
[42] *Gladue, supra* note 2.
[43] *Wells*, *supra* note 7.
[44] *Gladue, supra* note 2.
[45] *Ibid* at 688.

that since Ms. Gladue was an Indigenous woman living off of reserve in an urban setting, section 718.2 (e) was not applicable and that no "special circumstances arose from her aboriginal status."[46] With the British Columbia Court of Appeal's dismissal, an appeal by the accused was made to the Supreme Court of Canada. The Supreme Court of Canada held that section 718.2 (e) applied to all Indigenous people whether on or off reserve, or whether they are living in or away from their Aboriginal community.[47]

When delving deeper into *Gladue,* it's easy to see the significance of its analysis to all cases involving Indigenous people and section 718.2(e). In particular, *Gladue* lays down for the first time the appropriate analysis that must be made when sentencing an Indigenous person. *Gladue* expresses that while "sentencing is an individual process," judges are mandated by section 718.2(e) to do something different when coming to an appropriate and fit sentence for an Indigenous offender, "because the circumstances of aboriginal people are unique."[48] As such, when the sentencing of an Indigenous person is taking place, judges must consider the following two principles:

1. The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
2. 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. [49]

When taking these two principles into account, *Gladue* states that "judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing."[50] Particularly, for prong one of the *Gladue* analysis, case-specific information would likely come "from counsel, and a pre-sentence report."[51] When taking into account the appropriate sanction to be used, *Gladue* suggests that prong two of the test "may come from representations of the relevant aboriginal community."[52] *Gladue* also states that even if the Aboriginal community may not have the resources or the alternative sentencing programs available for their community members, this

[46] *Ibid* at 689.
[47] *Ibid* at 691.
[48] *Ibid* at 690.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*

does not preclude sentencing judges from still utilizing "principles of restorative justice."[53] Even if the individual is being sentenced to imprisonment, *Gladue* argues that the length of incarceration must be looked at carefully.[54] On the one end, it appears as though *Gladue* is essentially creating space for Indigenous legal traditions to be used when sentencing Indigenous offenders. On the other end, what is problematic about the wording used in *Gladue* is that it is suggestive. Words like "must consider" and "may" tend to be more permissive, holding less weight. This leaves a lot of discretion to sentencing judges and whether they wish to include Indigenous communities in the sentencing process at all. The latter continues be a major issue when implementing the two prongs of *Gladue.*

Regardless of the wording used in *Gladue* the discussions that flow from this decision are still valuable and require implementation. *Gladue* informs us that the current criminal justice system is not working for Indigenous people and a change is required in the sentencing process that specifically addresses the needs of Indigenous people. *Gladue* recognizes that a possible solution is through Indigenous community based initiatives. Unfortunately, there still appears to be a lot of criticism and/or stereotypes with respect to the implementation of Indigenous community based initiatives or the Indigenous perspective. One of these stereotypes is that Indigenous communities do not believe in being punitive. However, it would be superficial to think that when deterrence, denunciation and separation are the sentencing goal, that Indigenous communities would not believe in a similar process. It would be superficial to think that in traditional Indigenous communities all crimes would have resulted in the same consequences for offenders. It is likely that serious offences would result in different consequences than less serious offences. It is clear that the Supreme Court of Canada recognizes the validity of the implementation of the Indigenous perspective through the *Gladue* process, but it must also be remembered that Indigenous justice systems pre-date the decision of *Gladue.*

2.2(ii): R v Wells

The next major decision to continue shaping the principles of section 718.2(e) was *R v Wells.*[55] The facts of this decision are as follows. The accused, an Indigenous man, named Mr. James Warren Wells, committed sexual assault and was sentenced to 20 months'

[53] *Ibid* at 691.
[54] *Ibid.*
[55] *Wells*, *supra* note 7.

imprisonment.[56] On the night of the incident, Mr. Wells was attending a house party where the victim and her friends resided. The evidence proved that the victim was sexually assaulted by Mr. Wells while she was asleep. The incident occurred in the victim's house and in her bedroom.[57] The sentencing judge stated since Mr. Wells was Aboriginal, 'he was obliged to bear in mind' s.718.2(e).[58] An appeal was made by Mr. Wells to the Court of Appeal, which was dismissed, then another appeal was made to the Supreme Court of Canada. The Supreme Court of Canada found the trial judge's assessment was reasonable under the circumstances as it was deemed to be a serious case. The Supreme Court of Canada showed deference to the sentencing judge and stated that it was open to them to have high consideration for "the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one."[59]

Wells was foundational in stressing the purpose of section 718.2(e) and the sentencing of Indigenous people. Not only did *Wells* suggest that Parliament's purpose in enacting section 718.2(e) was 1) "to reduce the use of prison as a sanction and 2) expand the use of restorative justice principles in sentencing", but also 3) in both of these instances *Wells* suggests that this should be done "with sensitivity to Indigenous community justice initiatives."[60] What one could gather from this statement is that *Wells* requests deference to be given to Indigenous communities when the sentencing of Indigenous people is at play and the principle of restorative justice is engaged. This assumption is only further justified in the fact that *Wells* specifically states that:

> In particular, given that most traditional aboriginal approaches place a primary emphasis on the goal of restorative justice, the alternative of community-based sanctions must be explored…therefore, the role of the sentencing judge is to conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community.[61]

This statement states that, since one of the traditional approaches to Aboriginal justice includes restorative justice, it would only make sense to include the Indigenous perspective as

[56] *Ibid* at 208.
[57] *Ibid* at 207.
[58] *Ibid* at 208.
[59] *Ibid* at 209.
[60] *Ibid* at 212.
[61] *Ibid* at 227-228.

part of the sentencing process of section 718.2(e). It is clear that the Supreme Court of Canada is aware that an Indigenous approach to sentencing would likely include restorative justice as a primary principle of sentencing. In a way, *Wells* appears to recognize that Indigenous people and their communities are likely the most appropriate figures to advise the courts on the issue of restorative justice. However, it is important to note that courts are not obligated to give the principle of restorative justice the greatest weight in the sentencing of Indigenous people, as this would conflict with the fact that each case should be looked at individually in order to come to a fit and appropriate sentence.[62]

The frustrating part about this case though is that while the Judges appear to want to give deference to Indigenous communities when the principle of restorative justice is engaged, they take one step back by using words like "with sensitivity" and "taking into account" the perspective of Indigenous communities. While in law there are tools of interpretation presented to legal figures, it is important to remember that even with those tools, "sentences" can be interpreted very different from one culture to the next. What does it even mean to "take into account" the perspective of Indigenous communities or use words like "with sensitivity"? It is likely that these interpretations could read quite differently from a colonial to an Indigenous perspective.

At first, these words can both be used as an advantage and a disadvantage to Indigenous communities that wish to engage in the sentencing process. For one, it seems like the advantage is that the decision does not obligate Indigenous communities to take part in the sentencing of one of their community members, but it gives the Indigenous community the option to partake. This leaves available to Indigenous communities the option to not partake in a colonial system that would detract from their assertion that they are still sovereign nations that follow their own justice systems. On the other hand, it seems like the courts are still struggling with whether to open the courts up to Indigenous community involvement, which may nevertheless result in including Indigenous justice. Perhaps, there is fear that our mainstream justice system is not as successful in finding justice for Indigenous people as initially planned, and having another legal system come in and demonstrate more success could be threatening. Nonetheless, one cannot ignore that *Wells* is still providing some recognition that the Canadian court system cannot solve

[62] *Ibid* at 228.

the issue of the over-incarceration of Indigenous people on its own. The Supreme Court of Canada is moving in the right direction to include Indigenous communities, but the challenge now is how to do that in a meaningful way.

2.2(iii): R v Ipeelee

Section 718.2(e) was refined further by the decision *R v Ipeelee* in 2012.[63] This particular decision involved two Indigenous offenders, Mr. Manasie Ipeelee and Mr. Frank Ralph Ladue. The two offenders were deemed "long-term offenders and had long-term supervision orders ("LTSOs") imposed."[64] The incidents with Mr. Ipeelee will be discussed first. Mr. Ipeelee suffered from alcohol addiction, which often coincided with the violent offences that he committed. Mr. Ipeelee "was sentenced to six years' imprisonment followed by an LTSO after being designated a long-term offender."[65] Once Mr. Ipeelee was released, he breached his conditions as set out in his LTSO by committing an offence under the influence of alcohol.[66] During this incident, Mr. Ipeelee was sentenced to "three years' imprisonment, less 6 months' of pre-sentence custody at a 1:1 credit rate."[67] Mr. Ipeelee appealed to the Court of Appeal and it was dismissed. An Appeal was then made to the Supreme Court of Canada. The Supreme Court of Canada held that the lower courts made a variety of errors, which resulted in less consideration towards Mr. Ipeelee's "circumstances as an Indigenous offender."[68] The Supreme Court of Canada substituted a sentence of 1 year imprisonment for Mr. Ipeelee.

Mr. Ladue on the other hand was an offender who suffered from alcohol and drug addiction, and offences of sexual assault typically occurred while he was under the influence. Upon sentencing, Mr. Ladue was sentenced to "three years' imprisonment followed by an LTSO after being designated a long-term offender."[69] After the completion of his sentence and once released, Mr. Ladue breached his condition as outlined in his LTSO, and "failed a urinalysis test."[70] From this breach, Mr. Ladue was sentenced to "three years' imprisonment, less five

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[63] *Ipeelee, supra* note 8.
[64] *Ibid* at 434.
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid* at 437.
[69] *Ibid* at 434.
[70] *Ibid.*

months of pre-sentence custody at a 1.5:1 rate."[71] The appeal made by Mr. Ladue to the Court of Appeal was allowed, and he was given a reduction in his sentence to "one year imprisonment."[72] An Appeal to the Supreme Court of Canada was also made. The Supreme Court of Canada held that the Court of Appeal's decision was "well founded" and affirmed its findings.[73]

The majority in *Ipeelee* are even clearer in their direction to use a different method of analysis for Indigenous offenders. *Ipeelee* states that "to the extent that current sentencing practices do not further the objectives of deterring criminality and rehabilitating offenders, those practices must change as to meet the needs of Aboriginal offenders and their communities."[74] The Supreme Court of Canada in this statement recognizes and validates that current sentencing practices are failing Indigenous people and that those sentencing practices must change to meet their needs. What is most striking about this statement is the language being used: "those practices must change." This type of wording holds a lot of weight when legal representatives are attempting to interpret a specific provision in the *Criminal Code*. Take the *Interpretation Act of Saskatchewan* as an example. It states that: "'must' shall be interpreted as imperative," while "'may' shall be interpreted as permissive and empowering."[75] The *Interpretation Act* is one avenue in which legal professionals can look to when they are having difficulty understanding the weight to be given to a certain term. When reading *Gladue, Wells,* and *Ipeelee*[76] the word "must" is glaring when the sentencing of Aboriginal offenders is at play. All of these decisions state, in one way or another, that judges "must" consider the two principles outlined in *Gladue,* yet another cry had to be made in *Ipeelee*[77] several years later. It would seem that the calls to carefully consider the unique circumstances of Indigenous offenders have still gone largely unanswered, especially with regards to the lack of implementation of the Indigenous perspective.

The *Ipeelee* decision is also insightful in that it effectively argues that we must understand that Indigenous people come from different worldviews. *Ipeelee* states:

> 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

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[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid* at 437.
[74] *Ibid* at 435.
[75] *The Interpretation Act,*1995 SS 1995, c I-11.2 [*Act*].
[76] *Gladue, supra* note 2.; *Wells, supra* note 7.; *Ipeelee, supra* note 8.
[77] *Gladue, supra* note 2.; *Ipeelee, supra* note 8.

> recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.[78]

The Supreme Court of Canada recognizes that Indigenous people do have different needs that are defined by each Indigenous group across the country. The Supreme Court of Canada highlights that Indigenous people may have different values or perspectives when it comes to the sentencing of their people. This Court also understands that the values or the principles applied by each Indigenous group to the sentencing of their Indigenous people will likely look quite different than what is observed in the current sentencing process. This statement strengthens the individual process in sentencing and specifically reminds the courts that Indigenous values and worldviews are fundamentally different. Arguably, when it comes to the sentencing of Indigenous offenders, the only logical connection to be made with regards to abandoning this presumption the courts speak of is to look to Indigenous communities for assistance or deference. While this sentence still appears to be suggestive, it does recognize that other approaches to sentencing may be more effective than our current sentencing process. *Ipeelee* further states that:

> *Gladue*…recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples.[79]

While the idea of 'meaningful' will likely vary across Canada for Indigenous people, simply looking to the Indigenous community for support would be a great way to start finding the true meaning of the term. Indigenous communities in this regard would know what is best for their community members and should be given deference. It is important though that when courts follow through with this process that they do not commit pan-Indigeneity and force Indigenous offenders to take part in a sentencing process that is not familiar to them or their Indigenous legal traditions. This could easily be avoided by first talking to the Indigenous person or their Indigenous community. In the cases where the Indigenous person is not familiar with their community or unsure of where they are from, it is important to get consent from that individual to take part in another Indigenous community process. One could argue that the

[78] *Ipeelee, supra* note 8 at 436.
[79] *Ibid.*

Gladue analysis is one avenue in which Indigenous communities and people can find a way to integrate their own laws, knowledge and traditional healing methods into the Canadian sentencing context.

2.3: Conclusion

In response to some of the concerns regarding sentencing disparity across Canada, Parliament enacted section 718 of the *Criminal Code*. Flowing from this section were a number of sentencing principles, including section 718.2(e) which specifically addressed Indigenous people. It became clear throughout this Chapter that Parliaments intention behind section 718.2(e) was not only to address the issues of over-incarceration, but also to encourage courts to look to Indigenous community based alternatives where appropriate. These concerns continued to translate and expand in the emerging case law on section 718.2(e), which included the decisions of *R v Gladue, R v Wells,* and *R v Ipeelee.* As you saw, the Supreme Court of Canada attempts to shape and explore the principles that flow from section 718.2 (e) throughout these decisions. Some of the principles that were explored were around restorative justice, Indigenous community based alternatives, and taking into account the perspective of Indigenous communities when sentencing an Indigenous offender. It is clear the Supreme Court of Canada is looking to change its focus when it comes to sentencing Indigenous people and include the perspective of Indigenous communities. However, what remains missing throughout all of these decisions is not only the instructions on how to implement the Indigenous perspective, but most of all the Indigenous perspective itself is not included at all.

Terms of restorative justice and the Indigenous perspective are discussed very broadly by the courts in the decisions. The intention behind these discussions are positive, but the concern here is that by not consulting with Indigenous communities on what alternatives are available or what it means to craft sentences that are meaningful to the Indigenous person or their community, the application of these principles can often lead to the absence of the Indigenous perspective. Two major issues arise as a result of these decisions and the lack of detail by the Supreme Court of Canada on how to include the Indigenous perspective. First, as stated, there is no meaningful application which includes Indigenous community based initiatives and second, there is no real consideration to the inclusion of the Indigenous perspective. Arguably, one of the main reasons courts are falling short on including the Indigenous perspective and Indigenous community base initiatives are because not all courts or legal figures have built a strong

connection or relationship to Indigenous communities or their resources. After reviewing the above noted decisions, it became clear to me that the Supreme Court of Canada is lacking the Indigenous perspective on what it means to craft a sentence that is meaningful to Indigenous people, the very principles that it sought to achieve. Therefore, the purpose of Chapter three is to search for the Indigenous perspective and what it means to include the Indigenous perspective in a meaningful way into the sentencing of an Indigenous person, something that was missing in the decisions of *R v Gladue, R v Wells,* and *R v Ipeelee.*

CHAPTER THREE: INDIGENOUS JUSTICE AND RESTORATIVE JUSTICE

In the previous chapter, we reviewed case law and the Supreme Court of Canada's interpretation of section 718.2(e) and prong two of *Gladue.*[80] Due to the limitations mentioned in chapter two on the limited use of the Indigenous perspective, this chapter is dedicated to exploring the theory that Indigenous perspectives and laws must be "meaningfully" incorporated into the sentencing of Indigenous people in order to effectively meet the needs of Indigenous people and the calls made by *Gladue.* This chapter begins by discussing and defining the terms of restorative and Indigenous justice, as well as what is meant by the term "meaningfully." In an attempt to define the complexity of the term meaningfully, our research draws upon the knowledge of Indigenous legal scholars, such as Ovide Mecredi, Val Napoleon, Anisa White, and Larry Chartrand. Each of these scholars provide examples and unique perspectives on the term "meaningfully." Some scholars argue that in order to meaningfully incorporate Indigenous perspectives into the current legal system, a completely different system of Indigenous justice must co-exist. Others argue that section 718.2 (e) and *Gladue* are effective avenues to incorporate Indigenous legal traditions, while working within the current criminal justice system.

3.1: Defining Restorative Justice

This chapter will begin by first discussing the term restorative justice. Restorative justice has the potential to be defined in both general and specific terms. Elements of restorative of justice often include, but are not limited to, healing, communication, and empowering victims.[81] It speaks to "relationship repair and sustainable healing" for all, the offender, the victim, and the community.[82] In 1999, the Law Commission of Canada in their discussion paper entitled "From Restorative Justice to Transformative Justice" notes that most restorative justice programs found their process on three principles:

1) Crime is a violation of a relationship among victims, offenders and the community.
2) Responses to crime should encourage the active involvement of victim, offender and community.

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[80] *Gladue, supra* note 2.
[81] Jane Dickson-Gilmore, "Whither Restorativeness-Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities" (2014) 56 Canadian J Criminology &Crim Just 417 at 418 (HeinOnline) [*Dickson-Gilmore*].
[82] *Ibid.*

3) A consensus approach to justice is the most effective response to crime.[83]

Some of the various applications viewed as having elements of restorative justice are "victim offender mediation, family conferences"[84] and Indigenous forms of justice, which includes healing circles.[85] There is a major emphasis on relationships and consensus building in all of these programs. In the mainstream court process, there is a heavy focus on the offender and the crime that they have committed, with little discussions on how the crime has impacted the victim and the community. Victims are likely to get more out of the restorative justice process than they would in mainstream courtrooms. The victims are more involved and have more agency over the crime that has impacted them. When victims are created through crime, a sense of security is taken away from them and fear becomes prevalent. One could imagine that by giving victims and communities the chance to see their perpetrator and speak to them can be healing. Victims are given a voice and a chance to speak about how the crime has impacted them. The offender in turn gets to hear the impact the crime has had on the victim firsthand. A lot can be resolved through talking and that's what happens in these types of programs.

Restorative justice was mentioned throughout the decision of *Gladue* and in particular it describes restorative justice as:"…an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist."[86] To explain further, Indigenous worldviews often observe every person, community, and nature etc., as interrelationships and how each of these are interconnected and how they can impact one another. As described by the authors of "Bridging the Cultural Divide:" "…the philosophy of interrelationship informs people's understanding of who they are and their responsibilities to each other, their ancestors and the

[83] Law Commission of Canada, From Restorative Justice to Transformative Justice: Discussion Paper (Ottawa: Law Commission of Canada, 1999), online: < https://dalspace.library.dal.ca/bitstream/handle/10222/10289/Participatory%20Justice%20Discussion%20Paper%20EN.pdf?sequence=1> *[Transformative Just.]*.
[84] Kent Roach, eds, Conditional Sentences, Restorative Justice, Net-widening and Aboriginal Offenders: The Changing Face of Conditional Sentencing Symposium Proceedings, Ottawa, 2000 (Ottawa: Research and Statistics Division with Department of Justice, 2000), online:< https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_3-po00_3/op00_3.pdf> [*CSO Roach*].
[85] *Dickson-Gilmore, supra* note 81. A healing circle is a space in which "affected individuals, elders, the offender, and often the victim(s)" share to understand how the crime has impacted everyone.
[86] *Gladue, supra* note 2 at 726.

generations yet to come."[87] For instance, my family believes that decisions that our elders and adults make now with respect to our Indigenous identity and the earth itself will have impact on the next seven generations to come. As such, one of my values is to ensure that we are making good decisions that will not negatively impact future generations. One can see how this interrelationship philosophy can easily be demonstrated through community involvement and how the community shares part of the responsibility in restoring balance alongside the accused.[88] It is important to note that these discussions on restorative justice are very subsurface and defining the principles of restorative justice could easily be translated to a thesis itself.

3.2: Defining Indigenous Justice

It should be noted that the term 'restorative justice' is commonly associated with Indigenous people and their healing methods, but that does not necessarily mean that they are always uniquely Indigenous. The definition of Indigenous justice likely varies from person, to community, and likely across the country. Indigenous people often do anchor their justice systems on restorative justice principles, but it is the process itself that makes it Indigenous. One way to reconcile this concern is that you can often view restorative justice as one strand or principle that flows from Indigenous laws. Like Canadian law, there are many aspects of Indigenous justice. Anisa White, a Gladue Report Writer, carefully defines Indigenous justice/law in her interview.[89] She states that:

> Indigenous laws to me are a coherent body of laws that address all aspect of human life, human interaction. [It] also speaks to the protocols and obligation that we have one to another, people to people as well as to people to land and to animals and to resources. It also addresses the possibility of conflicts and really safeguarding relationships between families and nation to nation as well.[90]

Within this definition alone, you can see how complex and well-defined Indigenous laws are. You see a concern for human interaction, which likely speaks to respect and how to treat one another. One can also infer from this definition that Indigenous laws also concern themselves

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[87] *RCAP, Bridging, supra* note 34 at 69.
[88] *Ibid*.
[89] UVic Indigenous Law Research Unit ILRU, "Full Interview-Anisa White" (13 September 2015) online: YouTube https://www.youtube.com/watch?v=TNLwoSQzWDI at 00h:01m:13s. [*Anisa White*]. Gladue Reports: "…type of presentence report that really goes much further in creating restorative justice plan and healing principles for that offender when in front of a judge…when pled guilty…"
[90] *Ibid* at 00h:00m:33s.

with relationships and how to resolve conflicts that may result. This definition also speaks about nation building, as well as the protection of resources and the environment. What can be captured in this definition is the intricate obligations that arise from Indigenous justice, which include the protocols and obligations "we have one to another, people to people as well as to people to land and to animals and to resources." Arguably, it appears that Indigenous laws provide even more obligations than what would be expected by Canadian Law. This comparison is especially important when understanding how different Indigenous worldviews are to western worldviews. One can also infer that this definition recognizes the uniqueness of each Indigenous nation. This is important because what may be a principle of Indigenous or restorative justice in one community may not be to the next. It is also significant to mention that even views on how to reconcile issues of justice can also differ among Indigenous communities. What may seem like a common restorative justice principle in one Indigenous community, may be completely foreign and unfamiliar to the next.[91]

3.3: What is meant by "meaningfully?"

The main question posed in this chapter of the thesis is what is meant by the term "meaningfully." It is important that we premise this section on Indigenous worldviews of what is meant by "meaningfully incorporating Indigenous perspectives and laws into the sentencing of Indigenous people." This is important because the current criminal justice system does not immediately premise their views of how to resolve issues of justice using principles of restorative and Indigenous justice. This challenge is best described by the Authors of "Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" in their explanation of what section 718.2 would likely look like if it was headed by Indigenous people.[92] The current *Criminal Code* states under section 718 that: "The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenances of a just, peaceful and safe society by imposing just sanctions…."[93] And from this point on section 718.2(e) is set out, however it appears secondary to all of the other principles of sentencing from section 718.1(a)-(f).[94] The authors of this report argue that "an Aboriginal

[91] *RCAP, Bridging, supra* note 34 at 241.
[92] *Ibid* at 240.
[93] *Code, supra* note 1.
[94] *Ibid.*

statement of purposes and principles would likely read quite differently," finding "that healing and restitution would be at the centre."[95] You can see on this basis alone, that it is important that when we are discussing what is meant by the term "meaningfully" that it is led by an Indigenous perspective.

Larry Chartrand in his article "Indigenous Peoples: Caught in a Perpetual Human Rights Prison," also inherently discusses how different Indigenous worldviews are compared to non-Indigenous worldviews.[96] Have you ever heard the phrase "you can't fit a square peg in a round hole?" This old adage is relevant as it provides a good summary of what happens when trying to explain Indigenous ways of understanding using westernized ideologies. When doing so there are many consequences that arise. One of these consequences is the making of assumptions. Chartrand in particular, criticizes the Habermasian theory on the grounds that it assumes that the Indigenous peoples of Canada chose to become Canadian citizens after colonization.[97] This Habermasian theory is based on democratic legitimacy.[98] However, Chartrand argues that, given the terrible effects of European colonization, Canada's Indigenous people would likely have not wanted to be assimilated into a culture that oppressed them from the beginning.[99] Chartrand also raises the point that the Harbermasian theory assumed that Indigenous people had no laws of their own and therefore European law could be used to govern them.[100]

You can see the challenges that exist when trying to enforce a Eurocentric model or belief system onto Indigenous people. Take the example of the Two-Row Wampum belt that was supposed to signify the relationship between the Mohawk and the European cultures.[101] The two rows in the belt represented the parallel path travelled by European ships and the Mohawk canoes, meaning that the two peoples could co-exist peacefully, but did not try to steer the boat of the other.[102] This example is profound because we know that Canada has not fulfilled its treaty obligations with the Mohawk people and have not taken seriously Mohawk laws. This same

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[95] *RCAP, Bridging, supra* note 34 at 240-241.
[96] Larry Chartrand, "Indigenous Peoples: Caught in a Perpetual Human Rights Prison" (2016) 67 UNBLJ 167 (HeinOnline) [*Chartrand*].
[97] *Ibid.*
[98] *Ibid* at 177.
[99] *Ibid.*
[100] *Ibid* at 179.
[101] *Ibid* at 180.
[102] *Ibid* at 179-181.

criticism can extend itself to all Indigenous people of Canada. The Habermasian theory on the other hand is in stark contrast to the Mohawk laws and understanding of the Two-Row Wampum belt. The Habermasian theory asserts that all people are "in the same boat," which arguably means that everyone begins from the same space.[103] You can see how the Mohawk views on this matter would be quite different, given the description of what the Two-Row Wampum belt meant to them. A co-existence that allowed for both peoples to be in their own boat or canoe.

You can imagine then how important it is that when we are mapping the definition of "meaningfully," that we are in fact meaningfully including Indigenous people. We must not forget about the unique circumstances of the Métis people, who capture both an Indigenous and to some extent, a European perspective. Therefore, what might be regarded as "meaningfully including the Indigenous perspective" by one person or Indigenous group, may not be the same for the next. There may be concern that the implementation of restorative justice is inappropriate and is still founded on the idea that our current criminal justice system works and that restorative justice is one way to mend the loose ends.[104] There may also be concerns that restorative justice itself likely undermines Indigenous justice and laws.[105]

Indigenous Scholars and legal professionals like Ovide Mecredi and Val Napoleon might argue that we must move away from the Canadian criminal justice system entirely and move towards a system that successfully incorporates Indigenous justice systems. Ovide Mecredi stated that "as long as we stay in the criminal justice system, the judges do not have options outside of the *Criminal Code.* Even with special rules [as outlined in *Gladue*], the jails are filling up."[106] Val Napoleon states that restorative justice "'practices' delegitimize Indigenous legal traditions and law."[107] One can imagine that the systems that these two scholars are talking about is an Indigenous justice system, a process that is not within the current criminal justice system.

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[103] Jurgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" (2001) 29:6 Political Theory 766 at 775 cited in *Ibid* at 180.
[104] Meagan Berlin, "Restorative Justice Practices For Aboriginal Offenders: Developing An Expectation-Led Definition For Reform" (2016) 21 Appeal:Rev Current L & L Reform 3 at 4 (HeinOnline) [*Berlin*].
[105] *Ibid.*
[106] Ovide Mecredi, "Aboriginal Treaty Rights" (Lecture delivered at the Faculty of Law, Queen's University, 31 March 2015) [unpublished] cited in *Ibid*.
[107] Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 10 cited in *Berlin, supra* note 104 at 4.

Arguably it is these types of initiatives that may be described as meeting the required term "meaningfully" that was initially set out to answer.

Anisa White, however, would likely view section 718.2 (e) and this aspect of the Canadian criminal justice system process, as an avenue in which Indigenous legal traditions can be used within the existing framework.[108] Ms. White combines Indigenous legal traditions into the restorative justice aspect of *Gladue*. She looks to elders, knowledge keepers, and/or hereditary chiefs from all different nations (First Nation, Métis or Inuit) to guide her with "their existing body of knowledge of legal principles" to help create a plan within Gladue Reports.[109] This process is quite unique in that Ms. White looks to each Indigenous community for guidance in defining what their legal principles are. This approach is impressive as it allows each Indigenous community to self-define and have agency over their matter. It also openly reiterates and reinforces the fact that prior to colonization each Indigenous community had already established laws and structures that they existed within. You will notice that in all aspects of gathering this information, Ms. White is careful and looks to the Elders or Knowledge Keepers for guidance. This is significant because much of the knowledge that is being delivered to Ms. White is likely very sacred. As legal professionals, we must be aware of the honour of possessing this type of information and be respectful of the way we handle it. This is especially important when it comes to delivering and explaining this information to a judge. This information must be delivered clearly and must be appropriately translated to avoid disrespecting or inappropriately applying Indigenous laws. Ms. White explains the process she uses in the following statement:

> We have to take into consideration that the fact there has been harm done, there needs to be a bit of a plan to restore that person's loss, that property loss, and there needs to be some continuous demonstration that that person learned their lesson and is also becoming a better person from it… Difference from Canadian system which is purely punitive creating more of a healing based strategy to addressing crime… restoring those relationships.[110]

This statement seems to capture a lot of the sentencing principles that are used within a mainstream context. This statement alone suggests that this process is not only restorative, but rehabilitative, denouncing, deterring, it promotes responsibility and acknowledges that harm is done, and it is punitive, all the while addressing the healing aspect of the incident. Some of the

[108] *Anisa White*, *supra* note 89 at 00h: 12m:59s.
[109] *Ibid* at 00h: 02m:28s.
[110] *Ibid* at 00h: 04m:23s.

examples Ms. White offered that capture some, if not all of these principles, are explained below. One of the examples given to Ms. White by an Elder was to provide a sentence where the individual had to cut wood for Elders for two years during the winter.[111] Drawing from this example, it must be recognized that a two-year sentence is not light. From my own experience, this is a lot of work and preparation that occurs year-round and not only in the winter when cutting wood. The process involves selecting and cutting trees from the forest, removing branches from the trees, chopping the trees into smaller pieces, moving these pieces from the forest to the Elders home and piling the wood and drying it before it is chopped. Once it is dry, which often takes several months, if done properly, the wood is then split into smaller pieces to be used as kindling for a fire. If this individual was required to check in on the Elders to see if their indoor supply of wood was low, they would then have to chop more kindling and bring it indoors on a regular basis, especially during the winter. In exceptionally cold winters or if the original supply ran out, then the individual would need to return to the forest and begin the process over again. Speaking from experience, it is not easy to walk in the snow, in the forest, during the winter, let alone carrying wood and felling trees. This is a heavy work load for a single household, but keep in mind this would be done for multiple Elders in multiple households, increasing the work load by a large margin.

Another example given to Ms. White was to deliver a sentence where the individual had to fish for those most in need.[112] While this process is not as strenuous as supplying wood for the winter, there is a lot that goes on in this process as well. It takes time to fish and the results can vary from day to day. Sometimes you may catch four fish and sometimes none. You also have to consider the desired species: maybe you are fishing for someone who does not like jackfish and only likes trout. One must also emphasize that fishing privileges vary from Indigenous groups. In Saskatchewan, some Métis people have hunting and fishing rights within a specific zone, whereas most of the Métis people from the southern half of the Province are still struggling to prove these rights. Some of these rights include fishing with a net and others don't. If one were to fish with a net, it would be easier to catch a large number of fish at the same time, however, the amount of preparation and work required would still be substantial. These are but a few examples of restoring relationships within the community and for the offender to realize the

[111] *Ibid* at 00h: 04m:53s.
[112] *Ibid* at 00h: 04m:55s.

harm that was done within the community. As explained, these are not light sentences and in fact require a lot of dedication from the offender. One can also imagine that these sentences are not the only requirement that is demanded of the individual and there are likely other conditions that need to be met.

It must be emphasized that Indigenous laws are not frozen in time. It would be unreasonable to think that Indigenous people would not have changed, evolved, or adapted their laws even without colonization. There may be instances that require a "thinking outside the box" mentality. Ms. White provides the example of a food bank, where one individual was charged with clam digging out of season because she needed to feed her family.[113] She stated that an Aboriginal Court Worker requested a sentence that allowed for this individual to volunteer at a food bank, which would inevitably expose her to a place where she could access food.[114] At the same time she would have to package food for others.[115] In this example, you can understand how poverty has played a significant role in this person's life. It is a matter of the court identifying these types of issues and meeting the person where they are at. There are also instances where sentences could include "rituals like sweat lodges…bathing… dips and the cleansing rituals that occur."[116] So it is important that when Indigenous communities are re-building or building upon their traditional laws that we are not critical, but remain open. This is also mentioned in light of the unique circumstances that even Métis communities have, being the embodiment of both Indigenous and non-Indigenous people and their cultures.

3.4: Conclusion

Indigenous laws and restorative justices are ways in which Indigenous people all across Canada and around the world have lived their lives. Indigenous laws have often been viewed as ancient, inferior and obsolete. The purpose of this chapter's discussion was to present a theory that would premise the conversation for the rest of this thesis. However, at first, I found it very difficult to discuss theory and Indigenous laws together, because it felt like I was minimalizing and perpetuating the same stereotype that Indigenous laws are ancient, inferior and obsolete. There was something about this process that just seemed overwhelming and did not do justice in

[113] *Ibid* at 00h: 08m:17s.
[114] *Ibid* at 00h: 08m:46s.
[115] *Ibid* at 00h: 08m:54s.
[116] *Ibid* at 00h: 10m:29s.

representing the potential that exists and results from the use of Indigenous laws. What I discovered throughout this comparison is that I am not overwhelmed about equating theory with Indigenous laws, but I am overwhelmed with trying to make Indigenous laws fit into the box shaped by western laws and ideologies. These are two different discussions and worldviews that often do not match up. You see this same concern presented by Scholars Ovide Mecredi, Val Napoleon, Larry Chartrand and Anisa White.

Throughout this chapter, two particular methods of how to "meaningfully incorporate Indigenous perspectives and laws" were identified. The first method mentioned was to move away from the Canadian criminal justice system entirely and exist within two separate systems of justice. The second method mentioned was to work within the avenue that currently exists in the mainstream justice system under section 718.2(e) and *Gladue*. The purpose of this demonstration was not to choose which method is better, but rather to present the different perspectives that exist on this issue. What can be gathered from these discussions though, is the crafting of unique sentences that can potentially exist if we are to think outside the box as a legal system. It is these types of discussions that will be rooted in the following chapters to come. Moving forward, the thesis will draw on statistics regarding the over-incarceration of Canada's Indigenous people. The patterns of Indigenous over-incarceration are looked at more fully in the next chapter. By gaining a better understanding of the realities that exist for Indigenous peoples across Canada, we attempt to identify in subsequent chapters ways in which incorporating the Indigenous perspective can alleviate the over-incarceration problem.

CHAPTER FOUR: A PRAIRIE PROVINCE EPIDEMIC: THE OVER-INCARCERATION/ADMISSION OF THE INDIGENOUS PEOPLE OF THE PRAIRIES

The overrepresentation of Canada's Indigenous people in the correctional system has been highly documented over the years, with rates continuously rising both provincially and nationally.[117] Statistics Canada, scholars, and court decisions have continued to document these realities. To provide a brief overview, between the years 2006/2007 and 2016/2017, the Indigenous adult population within Canada's provincial and territorial prisons increased from 21 percent to 28 percent respectively.[118] Between those same years, the Indigenous adult population within the federal prison system increased from 19 percent to 27 percent.[119] The number of Indigenous youth in Canada's correctional system is even more overwhelming. With a representation of only 8 percent of Canada's entire youth population, Indigenous youth still make up 46 percent of correctional service admissions according to 2016/2017 statistics.[120] The overrepresentation of Indigenous youth in both "custody and community supervisions" are at 50 percent and 42 percent respectively.[121]

A similar discussion regarding the overrepresentation of Indigenous people was looked at by Jonathan Rudin in "Aboriginal Peoples and the Criminal Justice System."[122] Rudin explored this issue by calculating the overrepresentation rates for each province/ territory. One of Rudin's main concerns was to address the issue of whether Canada was or was not facing a national crisis of the overrepresentation of Indigenous people.[123] Rudin calculated the rate of overrepresentation by dividing the percentage of Aboriginal people of the general population in each province/ territory by the percentage of Aboriginal people in each provinces/ territories corrections population. In his findings, Rudin determined that the overrepresentation rate of Indigenous

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[117] Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, June 2018 update [Ottawa: Statistics Canada, June 2018] online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm [*Adult and Youth, June 2018*].
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2005) Toronto: Ipperwash Inquiry, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf [*Rudin, 2005*].
[123] *Ibid* at 8.

people in the correctional system was profound not only in the prairie Provinces of Alberta, Saskatchewan and Manitoba, but also in British Columbia and Ontario for the years 1995 and 2001.[124] While Rudin's findings are striking and demonstrate a need for reform at the national level with regards to the overrepresentation of Indigenous people, I am most shocked by the proportion of Indigenous people being admitted into corrections for each province/territory, particularly in the prairie provinces. I believe these findings require closer examination in order to paint a bigger picture of the over-incarceration epidemic that exists across Canada.

As such, the purpose of this chapter is to observe provincial/territorial trends of Indigenous adult and youth admission in the criminal justice system. In order to encapsulate these findings and statistical realities further, five tables are reproduced in this chapter using data from Statistics Canada. The first table reflects the proportion of Indigenous people in the populations of Canadian provinces and territories. The following tables outline Indigenous adult and youth admissions into the criminal justice system. The data from these earlier tables are then combined for the purpose of comparing provincial/territorial Aboriginal populations to provincial/territorial Aboriginal adult and youth admissions. Then, the data from Tables 4.4 and 4.5 are visually represented in Figures 4.1 and 4.2, respectively. My focus is primarily on the Indigenous people as they are the population that is experiencing the over-incarceration epidemic. As such, I avoid making many comparisons to the non-Indigenous population as I want the statistics to home in on the statistical realities that the Indigenous people of each province/territory are facing. In my opinion, there are already far too many comparisons being made between Indigenous and non-Indigenous people.

Therefore, the objective of this chapter is to explore the proportion of Indigenous people being admitted into corrections for each province/territory. What you will come to learn from these statistics is that the previous notion of a national epidemic of over-incarceration of Indigenous people might be better understood as a "prairie province" epidemic. The provinces of Saskatchewan, Manitoba and Alberta appear to be the most affected and their Indigenous people make up the highest admission percentages provincially.

[124] *Ibid* at 13-14.

4.1: A statistical analysis of Canada's Indigenous admissions

There are two commonly used methods to conduct research. These are appropriately identified as quantitative and qualitative approaches.[125] Each of these methods play significant roles in research and both exhibit strengths and weaknesses.[126] Quantitative research can often be expressed through statistics and numbers. Quantitative research gathers information relating to the mean, median, and standard deviation of a particular research topic.[127] It is these numbers and collection of data that allows for a researcher to derive significant information relating to research trends.[128] The strength of the quantitative method is that researchers are able to capture trends and snapshots of particular research found. For example, if the task is to see what age group is using a particular product the most, this method could capture this trend and could likely identify age groups that are using that particular product. This method tends to fall short though in explaining and interpreting the meaning behind the data found.[129] This chapter represents the quantitative research portion of this thesis. Due to the very nature of quantitative research, questions arise regarding the meaning and interpretation behind the statistics presented, a shortcoming that is addressed in chapter six.

When reflecting on these numbers and the following statistics, we must keep in mind that there are gaps that exist, particularly within the sentencing forum. When thinking of admission percentages, the sentencing context itself naturally flows from this discussion. In order to properly evaluate how the criminal justice system is working, sentencing is the best place to look to. According to Anthony Doob, while there is great political attention towards sentencing, there is still a serious neglect in the actual sentencing forum and argues that there is no information available on what judges are doing when a sentencing is taking place.[130] For example, if one wanted to look up specific information about a sentence relating to a particular offence, like

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[125] Demetrius Madrigal & Bryan McClain, "Strengths and Weaknesses of Quantitative and Qualitative Research" (2012) User Research, online:< https://www.uxmatters.com/mt/archives/2012/09/strengths-and-weaknesses-of-quantitative-and-qualitative-research.php> [*Madrigal*].
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*
[130] Anthony N Doob, "The Unfinished Work of the Canadian Sentencing Commission" (2011) 51 Canadian J Criminology & Crim Just 279 at 279 [*Doob*].

assault, or robbery, this information is limited. While we might know what kind of sentences are handed down for offences like robbery or assault in an appeal, this information is generally not collected at the lower court.[131] Take the Provincial Court of Saskatchewan as an example, when a sentencing is taking place most of it is done orally and not reproduced to the public unless there is an appeal or a written or oral transcript is ordered. It is actually quite difficult to know exactly what is happening during the sentencing process, and to observe what type of sentence a Judge is giving to who, and to observe any simple trends that may arise. Therefore, it's difficult to say with great accuracy what is going on during sentencing prior to the data Statistics Canada's provides on admissions. This information is also valuable in understanding these over-incarceration statistics of Indigenous people and may in fact be quite easy to gather by Judges. Keeping in mind this lack of information, the following sections of this chapter compare Indigenous populations across provinces, territories, and Canada as a whole and captures the stark reality of these correctional percentages.[132]

Before delving into the statistics, an overview of the tables presented below is necessary. For clarity, each table is presented separately as each table builds upon the previous data. Table 4.1 in particular, compares the Indigenous population of each province and territory to their own respective total population. The purpose of this table is to demonstrate the proportion of Indigenous populations across Canada. Table 4.2 specifically depicts overall adult admissions for all provinces and territories as well as Indigenous adult admissions. The purpose of this table is to express Indigenous adult admissions as a percentage of the total population being admitted. Table 4.3 is similar to Table 4.2, but the data is for youth admissions. Tables 4.4 and 4.5 build upon the data presented in the previous tables in that they use the Aboriginal population given in Table 4.1 and the Aboriginal adult and youth admissions from Tables 4.2 and 4.3, respectively. While each table will present the values of all provinces and territories, for efficiency, minimum and maximum values will be the focus.

[131] *Ibid* at 281.

[132] I acknowledge that there may be some concerns about the accuracy of these statistics due to the uncertainty of how this data was collected by Statistics Canada.

4.2: Proportion of Indigenous People in the populations of Canadian provinces and territories

As you will see in Table 4.1, Indigenous people only make up approximately 4.9% of Canada's total population with a large proportion of Indigenous people living in the prairie provinces and territories. Of all the provinces and territories, Nunavut's population holds the highest percentage of Indigenous people at 85.9% of its total. Prince Edward Island is on the other end of the spectrum with only 2.0% of its population being Indigenous. Of all the Provinces, Saskatchewan and Manitoba have the highest percentage of Indigenous people making up their total population at 16.3% and 18.0% respectively. The proportion of Indigenous people in the remaining Provinces and territories, including, British Columbia, Alberta, Ontario, Quebec, Nova Scotia, Newfoundland, New Brunswick, Yukon and Northwest Territories as noted in Table 4.1, range from 2.3% to 50.7%. This data will be referenced and understood more clearly when we compare the Indigenous population across Canada to the Indigenous population within the prison system in Tables 4.4 and 4.5. For future reference, values under "Aboriginal Population" will be used in subsequent tables.

Table 4.1: Proportion of Indigenous/Non-Indigenous People in the populations of Canadian provinces and territories[133]

Province/Territory	Total Population	Aboriginal Population	Non-Aboriginal Population	Aboriginal Population (% of Total)	Non-Aboriginal Population (% of Total)
British Columbia	4,560,240	270,585	4,289,655	5.9	94.1
Alberta	3,978,145	258,640	3,719,505	6.5	93.5
Saskatchewan	1,070,555	175,020	895,535	16.3	83.7
Manitoba	1,240,700	223,310	1,017,390	18.0	82.0
Ontario	13,242,160	374,395	12,867,765	2.8	97.2
Quebec	7,965,450	182,885	7,782,565	2.3	97.7
Nova Scotia	908,340	51,495	856,845	5.7	94.3
Newfoundland	512,255	45,730	466,525	8.9	91.1
New Brunswick	730,710	29,385	701,325	4.0	96.0

[133] All statistics in Table 4.1 come from Statistics Canada, *Census Profile, 2016 Census*, May 2018 update [Ottawa: Statistics Canada, February 2017] online: < https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> [*Stats Can-Census Profile*].

Prince Edward Island	139,685	2,735	136,950	2.0	98.0
Yukon	35,115	8,195	26,920	23.3	76.7
Northwest Territories	41,135	20,860	20,275	50.7	49.3
Nunavut	35,580	30,555	5,025	85.9	14.1
Canada	**34,460,065**	**1,673,785**	**32,786,280**	**4.9**	**95.1**

It is important to note that these statistics include all ages. When correlating 2016 Census statistics with prison admissions, there may be some discrepancies as we are only dealing with the adult prison population, that is age 18 and over. In the process of calculating the number of Indigenous people in Canada, then in the province, and then in the prison population, there may be either an overestimation or an under estimation. In an attempt to offset and alleviate this, both youth and adult Indigenous prison populations will be looked at. To ensure consistency in our statistics, all the following tables will contain data from 2016.

4.3: Adult admissions

After considering the proportion of Indigenous people in each province and territory, we will now focus on the number of Indigenous adults being admitted into a correctional facility. The purpose of this next section is to compare total admissions to Aboriginal admissions for each Canadian province and territory. This comparison is then presented under “Aboriginal Adult Admissions” in percentage form. This percentage was calculated by dividing the values under “Aboriginal Admissions” by the values under “Total Admissions” then multiplying by 100. According to Table 4.2, out of all the territorial admissions, Nunavut has the highest proportion of Indigenous admissions at 100%. Following is the Northwest Territories at approximately 88.1% of total admissions. It is important to remember, looking back to Table 4.1, that Nunavut and the Northwest Territories have proportionately larger Indigenous populations at 85.9% and 50.7%, respectively.

Table 4.2: Adult admissions[134]

Province/ Territory	Total Admissions 2016/2017	Aboriginal Admissions 2016/2017	Aboriginal Adult Admissions (% of Total)
British Columbia	27,666	8,829	**31.9**
Alberta	47,828	19,861	**41.5**
Saskatchewan*+	12,957	9,867	**76.2**
Manitoba*	28,872	21,284	**73.7**
Ontario	74,664	9,098	**12.2**
Quebec	43,665	2,285	5.2
Nova Scotia*+	4,247	454	10.7
Newfoundland & Labrador*+	2,044	519	25.4
New Brunswick+	5,247	521	9.9
Prince Edward Island+	662	21	3.2
Yukon	504	322	63.9
Northwest Territories+	1,023	901	88.1
Nunavut+	861	861	100.0
Canada*+	**250,240**	**74,823**	**29.9**

*The provinces whose total admissions population had "Sex unknown" were subtracted from the data.
+ The provinces and territories whose total admissions population had "Aboriginal identity unknown" were subtracted from the data.
Even with the exclusion of this data, it should remain accurate as the percentage of Indigenous people in the total population should not artificially increase as those identified in the category "Aboriginal identity unknown" are most likely a mix of Indigenous and non-Indigenous individuals. You will notice that there is no specific category identified in this table for both male and female and instead we reference the combination of the two categories. The reason for this transition is to eliminate any confusion further on as not all Statistics Canada sources represent their data in this format.

Out of all the Provinces, Saskatchewan and Manitoba hold the highest Aboriginal admissions at 76.2% and 73.7% respectively, when considering the total number of admissions per province. Alberta follows with 41.5%. These numbers are alarming because they indicate that these three prairie Provinces are incarcerating their Indigenous people at a much higher

[134] All statistics in Table 4.2 come from Statistics Canada, *Adult custody admissions to correctional services by sex* [Ottawa: Statistics Canada, November 2018] online: < https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001501> [*Stats Can-Adult Admissions by Sex*] and Statistics Canada, *Adult custody admissions to correctional services by aboriginal identity* [Ottawa: November 2018] online < https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.1> [*Stats Can-Adult Admissions by Ab Iden*].

percentage than other provinces. This is especially true for the Provinces of Saskatchewan and Manitoba. When comparing these admission percentages to other Provinces, it becomes disturbingly clear that the prairie Provinces are experiencing what one would call an over-incarceration epidemic of Indigenous people. Saskatchewan in particular is admitting its Indigenous adults at a percentage 24 times higher than Prince Edward Island, 2.4 times more than British Columbia and 6.2 times more than Ontario. Prince Edward Island's Indigenous admission percentage sits at a low 3.2%. British Columbia and Ontario sit at 31.9% and 12.2%, respectively.

Manitoba is also admitting its Indigenous adult population at high percentages. In particular, Manitoba is admitting its Indigenous adult population 23 times more than Prince Edward Island, 2.3 times more than British Columbia and 6 times more than Ontario. Provincially, Alberta is admitting its Indigenous adult population at high percentages as well. Alberta is admitting its Indigenous adult population at a percentage approximately 13 times higher than Prince Edward Island, 1.3 times higher than British Columbia, and 3.4 times higher than Ontario. The reason why we are comparing the prairie Provinces of Saskatchewan, Alberta and Manitoba to Prince Edward Island is because Prince Edward Island has the lowest Indigenous population. The comparison to British Columbia and Ontario is being done because these two Provinces have the highest total number of Indigenous people compared to the other Provinces. These comparisons help paint a picture of the realities that exist for Indigenous people across provinces where there are high Indigenous populations and where there are low Indigenous populations.

What Table 4.1 and Table 4.2 are demonstrating to us is that when comparing Saskatchewan, Manitoba and Alberta's Indigenous population to other Provinces, proportionately they are admitting their adult Indigenous population at much greater percentages. Evidently, even though Ontario and British Columbia have more Indigenous people in total, Saskatchewan and Manitoba are admitting more of their smaller Indigenous populations to corrections. The difference in the Indigenous population percentages for Saskatchewan (16.3%), Alberta (6.5%) and Manitoba (18.0%), compared to Ontario (2.8%) and British Columbia (5.9%), does not account for the fact that the prairie provinces have drastically higher admission percentages. It is interesting to note that British Columbia (270,585), Alberta (258,640) and Manitoba (223,310) have similar Indigenous populations, and yet their Indigenous admission

numbers and percentages differ substantially. While British Columbia admitted 8,829 Indigenous people in 2016/2017, Alberta admitted 19,861 Indigenous people (more than double) and Manitoba admitted 21,284 Indigenous people (almost triple). Saskatchewan has roughly 100,000 less Indigenous people than British Columbia, and yet Saskatchewan admitted 9,867 Indigenous people in 2016/2017 (over 1,000 more). Ontario on the other hand, has an Indigenous population of 374,395 and yet only 9,098 Indigenous people were admitted in 2016/2017, almost 800 less than Saskatchewan. Clearly, there is something happening in the Prairie Provinces that is causing much higher percentages of Indigenous people to be admitted. While these numbers are a serious wake up call, these are only the adult admissions. Therefore, the next objective is to discern whether the over-incarceration of Indigenous people in Saskatchewan and Manitoba are also represented in youth admissions.

4.4: Youth admissions

As mentioned earlier, youth admissions will also be explored to ensure accuracy in our analysis. This will ensure that data is consistent with Table 4.1, which likely includes all ages, when comparing these statistics to adult and youth admissions. When comparing youth admissions to adult admissions, the picture that is painted shows that Saskatchewan and Manitoba still hold the highest admission percentages in comparison to other provinces (Table 4.3).

Table 4.3: Youth admissions[135]

Province/Territory	Total Admissions 2016/2017	Aboriginal Admissions 2016/2017	Aboriginal Youth Admissions (% of Total)
British Columbia*	2,975	1,334	**44.8**
Alberta	---	---	**---**
Saskatchewan*	3,098	2,796	**90.3**
Manitoba	4,333	3,217	**74.2**
Ontario	6,434	645	**10.0**
Quebec	---	---	---
Nova Scotia	---	---	---

[135] Statistics Canada, *Youth admissions to correctional services, by Aboriginal identity and sex,* [Ottawa: Statistics Canada, November 2018] online: < https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510000701&pickMembers%5B0%5D=1.17&pickMembers%5B1%5D=2.1&pickMembers%5B2%5D=4.1> [*Stats Can-Youth Admissions*].

Newfoundland & Labrador*	238	21	8.8
New Brunswick	482	38	7.9
Prince Edward Island*	83	4	4.8
Yukon*	73	63	86.3
Northwest Territories*	78	71	91.0
Nunavut*	73	73	100.0
Canada*	**17,867**	**8,262**	**46.2**

* Excludes data under category "Aboriginal identity unknown".
As noted earlier, this will likely not make much of a difference when comparing non-Indigenous and Indigenous data. It is also important to note that data was not available for Alberta, Quebec, and Nova Scotia in Statistics Canada for the year 2016. It is unfortunate this data was not collected as it would likely create an even clearer picture of the realities that Indigenous people face in corrections, especially in the prairie province of Alberta.

Saskatchewan in particular has an Indigenous youth admission percentage of 90.3% of total youth admissions. This is utterly astonishing because what these percentages are telling us is that 90.3 percent of total admissions for the years 2016/2017 were Indigenous youth. Manitoba also has a high Indigenous youth admission percentage at 74.2 % of total youth admissions. What is happening in these provinces that is causing so many Indigenous youth to be incarcerated compared to the rest of the country? This stark reality points to a larger issue in the prairie provinces regarding the younger demographic, and this issue needs immediate attention to assess the impact of the over-incarceration of Indigenous youth.

To continue the same comparison as discussed in adult admissions, we will also compare Saskatchewan and Manitoba to Ontario, British Columbia and Prince Edward Island. One could imagine that if Indigenous youth admission statistics were available for Alberta, they would likely resemble that of Indigenous adult admissions. The over-incarceration epidemic of Indigenous youth becomes clear when examining the numbers more closely. The following comparisons will demonstrate that on its face Indigenous youth in the prairies are far worse off than Indigenous adults in the prairies within correctional facilities. This is especially true for the Provinces of Saskatchewan and Manitoba.

Saskatchewan is admitting its Indigenous youth 9 times more than Ontario and 2 times more than British Columbia. Ontario's Indigenous youth admissions sits at low 10.0% and British Columbia's Indigenous youth admissions sits at 44.8%. Manitoba is also admitting its Indigenous youth at 7.4 and 1.7 times more than Ontario and British Columbia, respectively.

Both Ontario and British Columbia have high Indigenous populations compared to the rest of the Canadian provinces, and yet both Saskatchewan and Manitoba are admitting their smaller Indigenous youth populations at much higher percentages. When performing the same comparison with Prince Edward Island, Saskatchewan and Manitoba are admitting their Indigenous youth at an alarming 18.8 and 15.4 times more, respectively. Prince Edward Island sits at a low Indigenous youth admission percentage of 4.8%. These percentages were calculated by dividing the value "Aboriginal Youth Admission (% of Total)" for the Provinces of Saskatchewan and Manitoba by the value for the Provinces of Ontario, British Columbia, and Prince Edward Island.

You will also notice that all the territories also hold high admission percentages, ranging from 86.3% to 100.0%. Nunavut in particular is at 100% admissions of its Indigenous people. It is important to recognize though that these locations have a proportionately high Indigenous population as noted in Table 4.1. You will also notice that the number of Indigenous youth being admitted for the territories is between 73 and 75 individuals for each territory. In contrast, Saskatchewan and Manitoba admitted 2,796 and 3,217 Indigenous youth, respectively. One can only infer then that the prairie provinces are far more likely to incarcerate their Indigenous youth than in the territories.

Out of all the statistical comparisons, what is the most overwhelming is the fact that Saskatchewan is admitting its Indigenous youth 10 times more than non-Indigenous youth. Manitoba on the other hand is admitting its Indigenous youth 3 times more than non-Indigenous youth. The other Provinces demonstrate the exact opposite trend, like Ontario, which is admitting its Indigenous youth 9 times less than non-Indigenous youth. Less than half of youth admissions in British Columbia are Indigenous. Newfoundland and Labrador are also admitting their Indigenous youth 10 times less than their non-Indigenous youth.[136] While we cannot say with accuracy the reasons for these trends, one can infer that something needs to change within the prairie Provinces. This again begs the question: what is going on in the prairie Provinces of Saskatchewan and Manitoba that has contributed to the high admission percentages of their Indigenous youth? Perhaps, these other Provinces are moving away from incarceration as a punishment and are using other means of justice that is not readily apparent in these statistics.

[136] These numbers were calculated by simply subtracting the percentage of Indigenous youth admissions from 100%.

This is exactly the disadvantage of quantitative research that has been discussed. Numbers and percentages are significant to an extent, but there always remains further inquiries and questions.

4.5: Comparing Provincial/Territorial Aboriginal populations to Provincial/Territorial Aboriginal adult admissions

Based on the data in the tables presented, it is easy to see the profound overrepresentation of Indigenous adults and youth in the criminal justice system. However, these statistics are even more startling as Canada's Indigenous adult and youth only make up 4.9 percent of the total population.[137] It becomes increasingly apparent that the over-incarceration epidemic is concentrated in the prairie Provinces of Alberta, Saskatchewan, and Manitoba. The following statistics illustrate the number of Aboriginal adults, out of every 100,000, that were admitted into the correctional justice system in the year 2016/2017 (Table 4.4). This number was calculated by dividing "Aboriginal Adult Admissions" by the "Aboriginal Population" for each Province. The results were then multiplied by 100,000, which gives us the "Number of Aboriginal Adult Admissions per 100,000 Aboriginal People." The numbers for the prairie Provinces were then compared to the rest of Canada.

Table 4.4: Comparing Provincial/Territorial Aboriginal Populations to Provincial/Territorial Aboriginal Adult admissions

Province/Territory	Aboriginal Population	Aboriginal Adult Admissions 2016/2017	Number of Aboriginal Adult Admissions per 100,000 Aboriginal People
British Columbia	270,585	8,829	3,263
Alberta	258,640	19,861	7,679
Saskatchewan	175,020	9,867	5,638
Manitoba	223,310	21,284	9,531
Ontario	374,395	9,098	2,430
Quebec	182,885	2,285	1,249
Nova Scotia	51,495	454	882
Newfoundland	45,730	519	1,135
New Brunswick	29,385	521	1,773
Prince Edward Island	2,735	21	768

[137] *Adult and Youth, June 2018*, *supra* note 117.

Yukon	8,195	322	3,929
Northwest Territories	20,860	901	4,319
Nunavut	30,555	861	2,818
Canada	**1,673,785**	**74,823**	**4,470**

In Manitoba, 9,531 out of every 100,000 Aboriginal people were admitted to corrections for the year 2016/2017. In Saskatchewan and Alberta, these numbers were 5,638 and 7,679 for every 100,000, respectively. This is in stark contrast to British Columbia, Ontario and Prince Edward Island, where 3,263, 2,430, and 768 out of every 100,000 Aboriginal people were admitted, respectively. This is visually represented in Figure 4.1 below. To illustrate the data more clearly, the upper limit of the y-axis was set to 30,000.

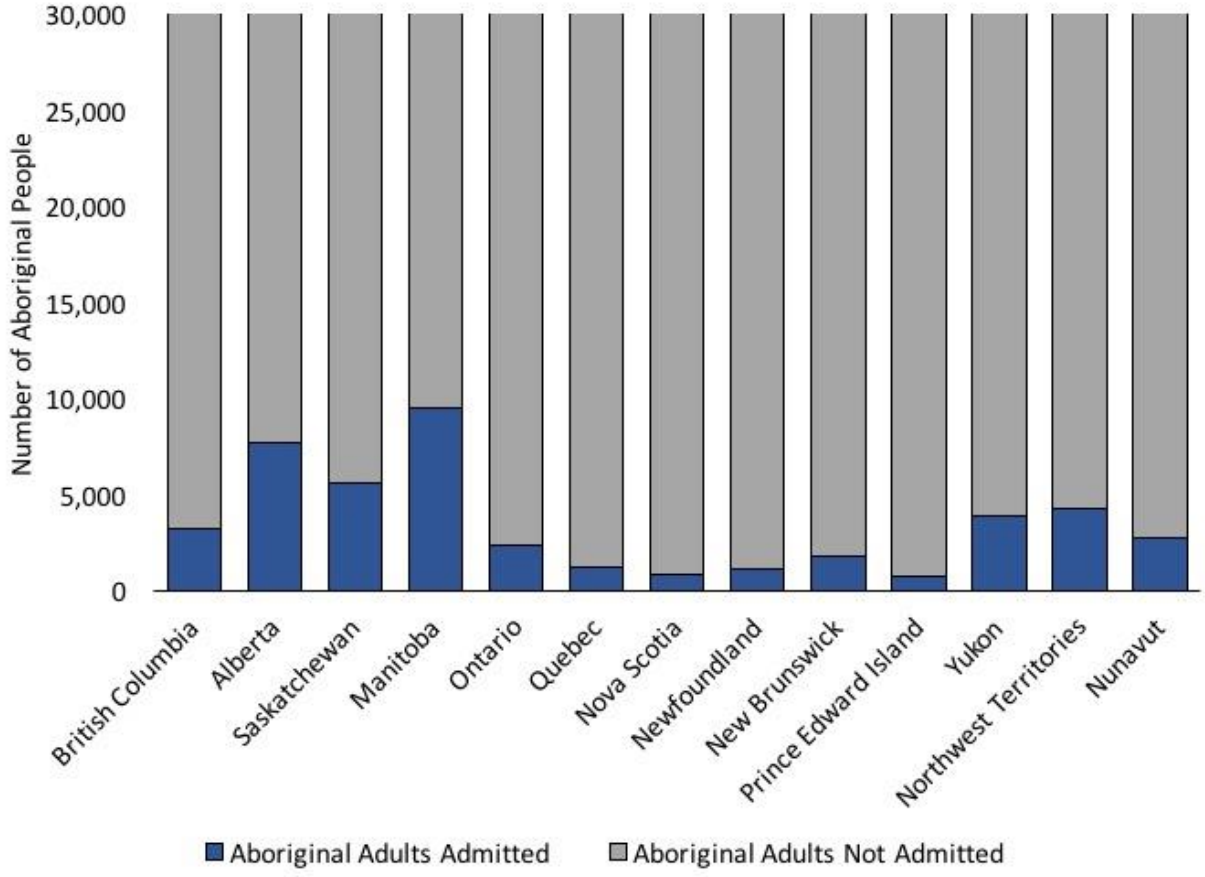

Figure 4.1: Aboriginal adult admissions for every 100,000 Aboriginal people by province/territory.

It is clear from this figure that the prairie Provinces are admitting their Aboriginal adults at much higher numbers than any other Province or territory. Even in the territories, where the

Aboriginal population is proportionately higher, there are still fewer Aboriginal adults being admitted for every 100,000.

The following comparisons were calculated by dividing the "Number of Aboriginal Adult Admissions per 100,000 Aboriginal people" from Table 4.4 for a given prairie Province (i.e. Saskatchewan) by the corresponding value for another Province (i.e. British Columbia).

According to the data, Manitoba is admitting its Aboriginal adult population 2.9, 3.9, and 12.4 times more than British Columbia, Ontario, and Prince Edward Island, respectively. For the remaining Provinces, Manitoba is admitting its Indigenous adults between 5.4 and 10.8 times more. While Manitoba's adult admission is the highest among all Provinces and territories, the neighboring Provinces of Alberta and Saskatchewan are a close second and third, respectively.

For every 100,000 Aboriginal people, the Province of Alberta is admitting its Aboriginal adult population 2.4, 3.2, and approximately 10.0 times more than British Columbia, Ontario, and Prince Edward Island, respectively. Even though Alberta and British Columbia have similar Indigenous population sizes, Alberta is admitting substantially more of its adults from its Indigenous population. For the remaining Provinces, Alberta is admitting its Indigenous adult population between 3.2 and 6.4 times more.

Saskatchewan is also not too far off in admitting its adult population: 1.7, 2.3, and 7.3 times more than British Columbia, Ontario, and Prince Edward Island, respectively, for every 100,000 Aboriginal people. Compared to the remaining Provinces, Saskatchewan is admitting its Indigenous adult population between 4.3 and 8.7 times more. To get a more complete picture of Aboriginal admissions in Canada's prairie Provinces, we must not forget to consider the Aboriginal youth admission statistics.

4.6: Comparing Provincial/Territorial Aboriginal populations to Provincial/Territorial Aboriginal youth admissions

In Table 4.5, the same procedure as Table 4.4 was followed to calculate the number of Aboriginal youth for every 100,000 that were admitted into the criminal justice system. You will notice that figures for Alberta are missing as data for this Province was not available. This contributes a gap to our data set, as the figures demonstrated in Table 4.4 presented high adult admissions in the Province of Alberta. This is concerning because it is likely that the numbers for youth admissions are similar to the adult admissions for this Province. For consistency, we

compared the Provinces of Saskatchewan and Manitoba to British Columbia, Ontario, and Prince Edward Island, with a range for the remaining Provinces.

Table 4.5: Comparing Provincial/Territorial Aboriginal Populations to Provincial/Territorial Aboriginal youth admissions

Province/Territory	**Aboriginal Population**	**Aboriginal Youth Admissions 2016/2017**	**Number of Aboriginal Youth Admissions per 100,000 Aboriginal People**
British Columbia	270,585	1,334	**493**
Alberta	258,640	---	**---**
Saskatchewan	175,020	2,796	**1598**
Manitoba	223,310	3,217	**1441**
Ontario	374,395	645	**172**
Quebec	182,885	---	**---**
Nova Scotia	51,495	---	**---**
Newfoundland	45,730	21	**46**
New Brunswick	29,385	38	**129**
Prince Edward Island	2,735	4	**146**
Yukon	8,195	63	**769**
Northwest Territories	20,860	71	**340**
Nunavut	30,555	73	**239**
Canada	**1,673,785**	**8,262**	**494**

We will first look to Saskatchewan as it is the Province that has the highest Indigenous youth admissions out of all Provinces and territories. For every 100,000 Aboriginal youth, Saskatchewan is admitting them 3.2, 9.3, and 10.9 times more than the Provinces of British Columbia, Ontario, and Prince Edward Island, respectively. For the remaining Provinces that have data, Saskatchewan is admitting its Aboriginal youth between 12.4 and 34.7 times more. Manitoba is also admitting its Aboriginal youth 2.9, 8.4, and 9.9 times more than British Columbia, Ontario, and Prince Edward Island, respectively. For the other Provinces with data, Manitoba is admitting its Aboriginal youth between 11.2 and 31.3 times more.

As with the previous section, the data from Table 4.5 is visually represented in Figure 4.2 below. To illustrate the data more clearly, the upper limit of the y-axis was set to 5,000.

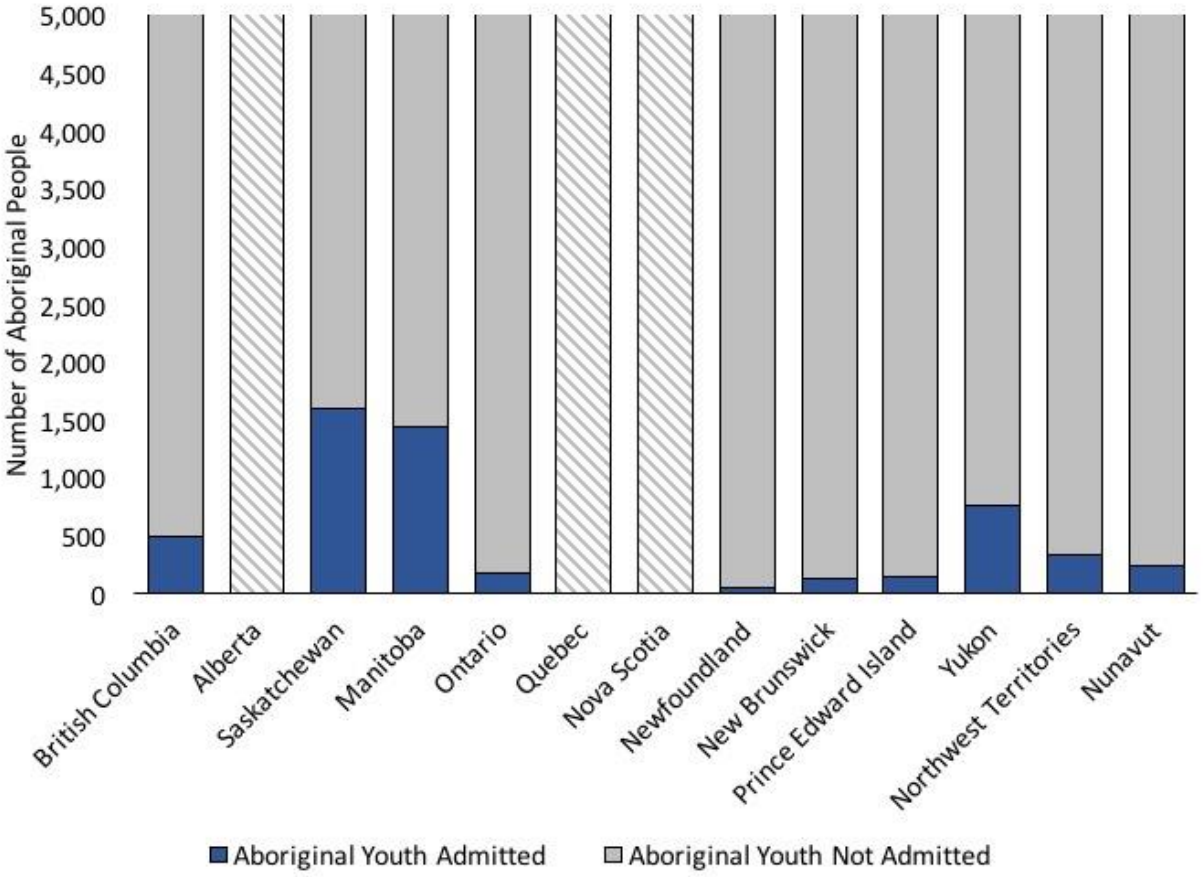

Figure 4.2: Aboriginal youth admissions for every 100,000 Aboriginal people by province/territory. Bars with diagonal lines represent provinces with missing data for Aboriginal youth admissions.

At first, Figure 4.2 as a whole does not appear substantial. However, notice that only Saskatchewan and Manitoba have a discernable number of Aboriginal youth being admitted into corrections, whereas all the other Provinces are nearly non-existent. Even the territories do not come close to the numbers observed in the prairie Provinces of Saskatchewan and Manitoba. One can assume that if data were available for Alberta it would resemble the pattern seen in Saskatchewan and Manitoba.

4.7: Conclusion

It has often been said that Canada has been faced with a national epidemic of over-incarcerating its Indigenous people. While this may be true, something is happening to the

Indigenous people of the prairie provinces that have been highlighted in the statistics presented in this chapter. What these statistics have demonstrated is that we are also undergoing what one could call a "prairie province epidemic" of the over-incarceration of Indigenous people. As presented above, this epidemic is a reality not only for Indigenous adults, but also for Indigenous youth. There appears to be an over-incarceration trend that persists within the prairie provinces of Alberta, Saskatchewan, and Manitoba, that is drastically higher than other parts of Canada. As a legal professional, I have always been aware of the realities that exist for Indigenous people within Saskatchewan and its prison system. As an Indigenous person, these stark realities hit a lot closer to home considering my own personal experiences as a child visiting family members who were incarcerated. A major drawback of statistics is that they appear as numbers in a list which removes the emotional aspect tied those numbers. We can easily forget that those statistics represent people who are fathers, brothers, sisters, mothers etc. It is highly advisable that we treat these statistics seriously going forward. This brings me to the question: what are other provinces doing that is different from or similar to the province of Saskatchewan regarding the over-incarceration of Indigenous people? I am drawn towards the Provinces of Ontario and British Columbia to examine what they are doing that the prairie Provinces are not. More importantly, it begs the question: what can be done to address this critical issue of over-incarceration in the prairie provinces of Saskatchewan, Manitoba and Alberta?

These questions drove me to explore section 718.2(e) of the *Criminal Code* and its varied application across the prairie provinces.[138] The next chapter of this thesis examines how Alberta, Saskatchewan and Manitoba are applying and interpreting section 718.2(e). This is a section of the *Criminal Code* that is specifically designed to address the over-representation of Canada's Indigenous people in the criminal justice system and explores the implementation of the Indigenous perspective.[139] Chapter four has quantitatively informed us about the over-incarceration issue in the prairie provinces and across Canada. Chapter five on the other hand will look to the way the courts have applied section 718.2(e) and whether the application of it could be a contributing factor to the over-incarceration epidemic.

[138] *Code*, *supra* note 1.
[139] *Gladue*, *supra* note 2 at 737.

CHAPTER 5: RESISTANCE IN THE PROVINCES OF ALBERTA, SASKATCHEWAN AND MANITOBA-AN EXAMINATION OF CASE LAW POST-GLADUE

After reviewing chapter four, it is obvious that there is a clear trend of Indigenous over-incarceration concentrated in the prairie Provinces. It is important therefore that we turn our attention to what is happening within the courtrooms of these Provinces and conduct a close examination of the leading case law within Provinces of Alberta, Saskatchewan and Manitoba on the sentencing of Indigenous people. This chapter will do an analysis of two major cases on the issue of *Gladue* from the Provinces of Alberta and Manitoba, and three major cases from the Province of Saskatchewan. While the application of *Gladue* may not be the primary solution to the obvious over-incarceration epidemic within the prairie Provinces, one can view it as a starting point. It begs the question then: Are the prairie courts properly implementing all of the principles of *Gladue*? This chapter draws upon various decisions, including *R v Arcand*[140], *R v Okimaw*[141], two decisions from the Alberta Court of Appeal, as well as three Saskatchewan Court of Appeal decisions, *R v Chanalquay*[142], *R v Lemaigre*[143] *and R v J.P.*[144] Following these reviews is an examination of two Manitoba Court of Appeal decision, *R v Peters*[145] and *R v McIvor*.[146] These decisions were chosen because 1) they were frequently discussed by other case law that followed within each province, 2) they were decisions that were made fairly recently, and 3) I also wanted to compare later cases to earlier cases to see if there was a common trend in the application of *Gladue* between and within the prairie provinces. As such, these seven decisions will be analyzed for their interpretation of the Supreme Court of Canada decision of *Gladue,* and the adequacy and effectiveness of these interpretations will be discussed. The first decision that will be analyzed is *R v Arcand.*[147]

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[140] *Arcand, supra* note 12.
[141] *Okimaw, supra* note 13.
[142] *Chanalquay, supra* note 14.
[143] *Lemaigre, supra* note 15.
[144] *J.P., supra* note 3.
[145] *Peters, supra* note 17.
[146] *McIvor, supra* note 18.
[147] *Arcand, supra* note 12.

5.1: An examination of R v Arcand from the Alberta Court of Appeal in 2010

The Judges overseeing the decision in *R v Arcand* were Fraser CJA, Côté JJA, Hunt JJA, O'Brien JJA, and Watson JJA. The majority in *R v Arcand* were Fraser CJA, Côté and Watson JJA, and the other remaining Judges, Hunt JJA and O'Brien JJA concurred in part. However, for the purposes of this paper, it appears that the Judges overall agreed on the fundamental aspects of the case.

The issue discussed in *R v Arcand* was around fit sentencing. Mr. Arcand was found guilty of sexually assaulting a woman in her sleep, a relative that allowed him to spend the night at her place. The trial Judge sentenced Mr. Arcand, an Aboriginal man, to a "90-day intermittent sentence and 3 years' probation."[148] The Crown appealed and argued that this sentence violated the principle of proportionality and stated that this sentence is inconsistent with "starting point judgements for cases of serious sexual assault," which calls for 3 years imprisonment "for non-consensual vaginal intercourse and other equally serious sexual assaults."[149] In its factum, the Crown requested a sentence ranging from 3 to 4 years imprisonment, while the defense requested 1 year.[150] On appeal, the majority sentenced Mr. Arcand to 2 years less a day imprisonment and 2 years' probation and deemed this to be a fit and appropriate sentence.[151]

As one may be able to infer, this decision focused on the discussion of starting point sentences, particularly with regards to serious sexual assault cases. There is also a huge portion of this decision dedicated to sentencing and the problems revolving around it. In fact, only a small portion of the actual decision focused on the appeal itself. Nevertheless, rooted in many of the concerns relating to sentencing in this decision was the maintenance of public confidence.[152] *Arcand* began with the introduction of the 1996 Sentencing Reform, which brought forth the enactment of what is now section 718 of the *Criminal Code.*[153] Section 718 begins by codifying that:

> …the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe

[148] *Ibid* at 1.
[149] *Ibid* at 1-2.
[150] *Ibid* at 4.
[151] *Ibid* at 60.
[152] *Ibid* at para 1.
[153] *Arcand, supra* note 12 at para 2.; *Code*, *supra* note 1.

> prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society.[154]

One might ask: how is this done? The answer flows from section 718 with the imposition of a just sanction. A just sanction is further defined by encompassing the various objectives set out in section 718.[155]

As a result, the majority in *Arcand* focused on defining what is meant by a just sanction. As recalled by Fraser CJA, and Côté and Watson JJA, a just sanction called for by Parliament in section 718.1 "must be proportionate to two things: the gravity of the offence and the degree of responsibility of the offender. Together, these determine the offender's overall culpability."[156] It is these two elements therefore that determine a "just and appropriate sentence."[157] This is otherwise known as the fundamental principle of sentencing. In addition to this, *Arcand* defines further the scope of the secondary principles flowing from section 718.2. It appears that the procedure to determine what is a just and appropriate sentence under the fundamental principles of sentencing is different than was is used under section 718.2. *Arcand* explains that section 718.2 and other principles of sentencing "are to be considered in determining a just and appropriate sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender."[158]

The relationship between the proportionality principle and the secondary principles of sentencing also comes into question in this decision. What immediately comes to mind is the impact that this distinction can make on future decisions. In particular, this discovery could have a major impact on how future case law interprets the relationship between proportionality and other principles of sentencing like section 718.2(e). According to *Arcand* these secondary principles under section 718.2 are used to reduce or increase sentencing reflecting on "mitigating and aggravating circumstances."[159] These circumstances include both the circumstances of the offence and the circumstances of the offender. *Arcand* explicitly lists all the sections that fall under section 718.2, including section 718.2(e). At that time, section 718.2(e) stated: "all

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[154] *Code, supra* note 1.*; Arcand, supra* note 12 at para 2.
[155] *Arcand, supra* note 12 at para 2.
[156] *Ibid* at 1.
[157] *Ibid* at para 3.
[158] *Ibid.*
[159] *Ibid* at para 34.

available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[160] The majority in *Arcand* then proceeds to argue that "proportionality is based on simple, yet compelling, premise. The severity of sanction for a crime should reflect the overall degree of moral blameworthiness, that is the seriousness, of the criminal conduct."[161] *Arcand* goes on to clarify this section further by stating that "In other words, sanctions should be scaled according to the seriousness of the criminal conduct."[162] *Arcand* seems to completely disregard the existence of section 718.2 and the function that it has in relation to not only mitigating, but aggravating factors. One could argue that the purpose of section 718.2 is to do exactly as *Arcand* calls for "to scale" the accused's offence on this line of consequences. Instead *Arcand* intends to isolate the offence itself and argues that severity of a sanction is to reflect the overall degree of moral blameworthiness. This essentially reinforces the example that all people should be treated the same regardless of their personal circumstances. Take theft as an example, what one can gather from *Arcand's* assertion is that it continues to reinforce this idea that it does not matter whether someone steals food because they are impoverished or when someone steals food for other less serious reasons. Respectfully, section 718.2 serves a much greater purpose during criminal proceedings than is highlighted in this decision, which in fact speaks to the circumstances of the offence and the offender. Arguably, in order to truly meet the intentions of Parliament and to truly come to a fit sentence, section 718.2 must always be considered.

As a legal system, we must move away from this idea that all people must be treated the same. Whatever the case may be, each individual's circumstances that have brought them to committing the offence on that date will almost always be different. One must set their mind to a number of questions in these situations. For example, what happened in the offender's life 3 seconds before the crime was committed? What happened in the offender's life 2 hours before, or even that morning, that year, or 5 years before? How about even going back as far as when they were a child? Or even going back as far as their parent's childhood or adulthood. Sometimes these circumstances have a lot more to do with the criminal conduct than one can expect. From personal experience, the considerations and questions I have posed are things that

[160] *Code*, *supra* note 1.
[161] *Arcand*, *supra* note 12 at para 48.
[162] *Ibid* at para 49.

many of the judges at the provincial court do take into account when sentencing is conducted. It is difficult to know exactly what sort of tone *Arcand* was trying to display in this decision, but one can infer that this idea of "getting tough on crime" was one of them.

One might ask how *Gladue* fits into all of this, as section 718.2(e) is one of the secondary principles that *Arcand* spoke to. With all the discussion around sentencing in *Arcand,* it is in fact this deep analysis that is missing from the decision. For example, how does *Gladue* fit into the discussion of starting point sentences? Is it even possible for starting point sentences and *Gladue* to co-exist? Arguably, starting point sentences tend to dismiss the purpose of *Gladue*, which is to take in account an Indigenous offender's background and express to the court how that background may impact their sentence. This paragraph reminds me of the comments I made about the Two-Row Wampum belt in Chapter 3. In order for true reconciliation to occur, we must acknowledge that not all people have come from the same place and as a result we all must be treated individually in order to be treated equally. Starting point sentences ignore this principle and in effect ignore *Gladue.* Essentially, the only effect *Gladue* would have with starting point sentences is for the accused to argue a sentence that falls within the range of that starting point. However, this seems to ignore the life experiences of offenders that is called for by *Gladue.*

In reviewing the decision of *R v Arcand*, *Gladue* is only mentioned four times and only within the footnotes. It would seem that in such a major decision with hundreds of pages, paragraphs, and footnotes, that the discussion of *Gladue* and section 718.2 (e), as it is an Indigenous person before the court, would be a lengthy discussion. In fact, the discussion of section 718.2 (e) is given very little weight in this Appeal and was left to one of the very last paragraphs.[163] There are a few comments I would like to make with regards to this paragraph. At the outset, I would like to say that I am certainly not disregarding the fact that sexual assault is a serious crime nor am I dismissing the fact that Indigenous women have been exceptionally vulnerable in these circumstances. However, I take issue with the fact that in order for a sentence to be justified for an Indigenous person that it is still being compared to non-Indigenous people and how their sentence would be in those circumstances. Sentencing is an individualized process and it must be treated as such. These comparisons defeat the purpose of *Gladue.* These

[163] *Ibid* at 60.

discussions also give rise to the lack of *Gladue* in the implementation of this decision. Section 718.2 (e) as discussed in *Gladue* gives sentencing Judges some discretion to consider a fit and appropriate sentence for Indigenous offenders. The Judge's discretion does not extend to whether they should or should not apply *Gladue*; rather the discretion is that they are not limited in how they craft a unique sentence for Indigenous people. Judges have always been statutorily mandated to "…take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community" and after the 1996 reform, this statutory obligation includes "the unique circumstances of the offender as an aboriginal person."[164] This includes all the matters as presented by *Ipeelee* with respect to racial discrimination, residential schools, trauma, abuse etc.[165]

To simply state that Mr. Arcand is an Aboriginal man and to provide no context of what that means and why section 718.2(e) is relevant in the first place ignores the statistical realities of the over-incarceration and over-representation of Indigenous people that Parliament intended to remedy. As raised in *Gladue*[166] and as quoted in Jonathan Rudin's article: "It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree."[167] It is difficult not to view the decision of *R v Arcand* as a case of resisting the implementation of *Gladue*. It begs the question of whether there was something more than resistance driving this type of discussion, especially since we know the prairie Provinces of Canada are in need of redress.

5.2: An examination of R v Okimaw from the Alberta Court of Appeal in 2016

One might ask: has much changed since the 2010 decision of *R v Arcand* with respect to the implementation of *Gladue* in the Province of Alberta? Arguably, there appeared to be a positive shift in the Alberta Court of Appeal in the 2016 decision of *R v Okimaw.*[168] The appellate Court in this decision examined very closely the systemic and background factors of

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[164] *Ibid* at 730-731.
[165] *Ipeelee, supra* note 8 at 436.
[166] *Gladue, supra* note 2.
[167] *Arcand, supra* note 12 at 722.*;* Jonathan Rudin, "Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R v Arcand* and Aboriginal Offenders" (2011) 48 Alta L Rev 987 online: < https://heinonline-org.cyber.usask.ca/HOL/Page?public=true&handle=hein.journals/alblr48&div=45&start_page=987&collection=journals&set_as_cursor=0&men_tab=srchresults> at 999 [*Eyes Wide Shut*].
[168] *Okimaw, supra* note 13.

the accused and the impact that these circumstances had on his life, including his criminal offending. These are aspects of the accused's circumstances that the sentencing judge failed to take into account in any meaningful way during the sentencing process. As such, this appeal concerned itself with the sentencing of Indigenous people and continued to build upon a framework for sentencing judges to consider whenever "*Gladue* factors ought to be applied."[169] The Judges that oversaw the decision of *R v Okimaw* were the Honourable Mr. Justice Jack Watson, the Honourable Madam Justice Myra Bielby, and the Honourable Madam Justice Frederica Shutz.[170] This was an appeal from a sentencing decision made by the Honourable Mr. Justice L.R.A Ackerl.[171]

The procedural history of this decision is as follows: after trial on October 14, 2014, Mr. Frank James Okimaw, the accused in these circumstances, was found guilty of "aggravated assault and possession of a weapon" to wit a knife "for a dangerous purpose."[172] Approximately one year later, on November 4, 2015, Mr. Okimaw was sentenced to a term of custody followed by probation. His sentence was 30 months jail less the 7.5 months of pre-sentence custody he received credit for, with 18 months' probation to follow. [173] Ancillary orders were also made, including a mandatory DNA order and a section 109 weapons prohibition.[174] Two major issues were raised in the appeal by Mr. Okimaw:

1. The sentencing judge erred in failing to give weight to specific *Gladue* factors, resulting in a sentence that was demonstrably unfit; and
2. The sentencing judge erred in treating as aggravating that the complainant was previously unknown to the appellant.[175]

Mr. Okimaw took the position that four to six months custody to be "deemed served by pre-sentence custody" followed by "a period of probation" was a fit sentence.[176] It was Mr. Okimaw's position that "the sentence imposed was unfit given his young age, lack of significant record, and the failure to account for his background as an Aboriginal offender."[177] The Crown,

[169] *Ibid* at para 1.
[170] *Ibid* at 1.
[171] *Ibid.*
[172] *Ibid* at para 3.
[173] *Ibid* at para 4.
[174] *Ibid.*
[175] *Ibid* at para 5.
[176] *Ibid* at para 6.
[177] *Ibid.*

on the other hand, was agreeable to the sentence imposed and argued that no errors were made by the sentencing judge to justify appellate intervention. Moreover, the Crown argued that *Gladue* factors were considered through the probation order that was imposed.[178] In order for the appellate Court to determine whether the sentence imposed on Mr. Okimaw was fit, the court analyzed "whether Okimaw's sentence was proportionate to the gravity of the offence and his degree of responsibility."[179]

The following facts were considered in this analysis. Mr. Okimaw had attended a liquor store in the city of Edmonton, Alberta. At some point in time, the staff at the store asked Mr. Okimaw to leave and he did. Shortly after leaving, the complainant and his girlfriend confronted Mr. Okimaw about him bothering the store employees.[180] As a result, the complainant's girlfriend shoved Mr. Okimaw and in response, Mr. Okimaw swore at her and said "…what did you hit me for?"[181] The complainant intervened and as a result a verbal altercation ensued with all three of the parties. The altercation became physical as Mr. Okimaw punched the complainant in the jaw.[182] A fight broke out between the complainant and Mr. Okimaw. During the physical altercation, Mr. Okimaw "pulled out a paring knife that he carried for protection," and subsequently "stabbed the complainant eight times."[183] The complainant's injuries included "one laceration and seven penetrating wounds on his face, arms, spine and back."[184] The complainant's girlfriend attempted to intervene by punching and kicking Mr. Okimaw, but was unsuccessful. Mr. Okimaw eventually fled. At trial, the facts were admitted by Mr. Okimaw, but he stated that he acted in self-defence. It was determined by the sentencing judge that Mr. Okimaw's "…belief in the force or threat of force being used against him was reasonably held," but his response to that threat was "grossly disproportionate" to the events."[185]

Regarding Mr. Okimaw's personal circumstances, the Court learned that Mr. Okimaw was 27 years of age, his previous criminal record contained a total of nine prior convictions, three of which were weapon related offences, but he had no other violent offences on his

[178] *Ibid* at para 7.
[179] *Ibid* at para 13.
[180] *Ibid* at para 15.
[181] *Ibid.*
[182] *Ibid* at para 16.
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid* at para 20.

record.[186] Some other factors that the Court took into account were: 1) that Mr. Okimaw suffered from addiction to both alcohol and drugs; 2) on the offence date in question, Mr. Okimaw "had consumed both alcohol and drugs after becoming depressed about not seeing his children;" 3) he had suffered the loss of his son; 4) there was a breakdown in his relationship with his partner; and 5) he had not slept the night prior to the offence, nor did he take his prescribed medications.[187] In addition, Mr. Okimaw submitted that while he did act on impulse, it was because he had been attacked in a similar prior incident.[188]

The appellate Court took a closer look at Mr. Okimaw's unique background and systemic factors, otherwise known as his *Gladue* factors. The details of Mr. Okimaw's personal circumstances were outlined in both a pre-sentence report and in a *Gladue* report.[189] The appellate Court rightfully concluded that Mr. Okimaw's personal circumstances, also known as his systemic and background factors, did have an impact on the sentence imposed.[190] These circumstances were highlighted throughout paragraphs 27 to 47 of the appeal.[191] It was learned that Mr. Okimaw was an Aboriginal man from Driftpile First Nation, his paternal grandmother (Kokum) attended residential school, and his Kokum's residential school experience was not positive. It was learned that after Mr. Okimaw's Kokum left residential school, she married Julian Okimaw, and they had six children together, including Mr. Okimaw's father. Julian Okimaw eventually passed away in a farming accident in 1965, and Mr. Okimaw's Kokum later met Lionel Lalonde.[192] Mr. Okimaw's parents separated shortly after his birth and he was raised mostly by his Kokum. His father also helped raised him, but to a lesser extent. Mr. Okimaw's mother on the other hand was largely absent from his life. Mr. Okimaw's father suffered from alcoholism and eventually ended up on the streets at the age of 16. Transiency also became an issue for Mr. Okimaw, as he also began living on the streets at the age of 15. Mr. Okimaw's father eventually passed away from cirrhosis of the liver. Mr. Okimaw recalls hunting and fishing in the past with his father on their home reserve.[193] Unfortunately, he stated that

[186] *Ibid* at para 23.
[187] *Ibid* at para 24.
[188] *Ibid.*
[189] *Ibid* at para 25.
[190] *Ibid* at para 26.
[191] *Ibid* at para 27-47.
[192] *Ibid* at para 29.
[193] *Ibid* at para 35.

"whenever he returns to the Driftpile reserve 'something always happens.'"[194] He specifically noted that his cousins were selling drugs and were involved in the gang life. He recalled a time when he was 25 and "three people attacked him and he ended up in hospital with broken teeth and ribs."[195] He also recalled other instances where "gangs from the surrounding areas were retaliating against a gang in Driftpile, and he and his cousins were shot at near the community school."[196]

The Court also learned that Mr. Okimaw witnessed domestic violence and suffered physical abuse in his childhood home.[197] He experienced this abuse with his father. Mr. Okimaw's experience with drugs and alcohol began at the early age of 8 years old. By the time Mr. Okimaw was 16 years old, he had consumed marijuana, cocaine, and crystal methamphetamine.[198] At the age of 14, Mr. Okimaw began associating with a gang, and by the age of 21 he disassociated himself. In the year 2010, Mr. Okimaw was stabbed during an altercation where his friend was being harassed by two men. Mr. Okimaw intervened to help his friend and as a result suffered significant injuries. Following this event, Mr. Okimaw was eventually diagnosed with Post-Traumatic Stress Disorder and anxiety. Mr. Okimaw also lived with ADHD, depression, pain and respiratory problems, and was under the regular care of a physician.[199] There was also some discussion regarding the potential diagnosis of Fetal Alcohol Spectrum Disorder. While Mr. Okimaw denied having any suicidal ideations, an incident from 2014 was discussed where he had "slit his wrists after a domestic dispute following the death of his son."[200] Mr. Okimaw was also exposed to two other incidents where "his common law spouse (mother of their deceased son) had threatened to hang herself," and "where he witnessed a friend cut his own throat."[201] Mr. Okimaw also experienced racism and bullying during his childhood. He did go on to complete high school and pursued higher education as an apprentice chef. However, Mr. Okimaw eventually left school to seek employment to support his young

[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid* at para 36.
[198] *Ibid* at para 37.
[199] *Ibid* at para 39.
[200] *Ibid* at para 42.
[201] *Ibid* at para 43-44.

family. He was eventually deemed unemployable in 2012 by his physician "due to ongoing problems with PTSD, ADD and depression."[202]

It is clear from these background factors that Mr. Okimaw had a traumatic upbringing that had undoubtedly impacted his life and decision-making. The sentencing judge acknowledged the list of *Gladue* factors outlined in both the pre-sentence report and *Gladue* report, but "…found that while the *Gladue* report suggested potential sentencing sanctions, it did not explain 'any impact on Okimaw's moral blameworthiness for the offence committed.'"[203] The sentencing judge further acknowledged that Mr. Okimaw's systemic factors did play a role in bringing him before the court, but "found that the existence of systemic factors were of limited relevance and of 'limited impact in determining sentence quantum' for these offences."[204] The sentencing judge further admitted that Mr. Okimaw's mitigating factors did include his *Gladue* factors, but these circumstances did not have "any bearing on Okimaw's moral blameworthiness for these offences."[205] The Court of Appeal in this case disagreed with the sentencing judge's findings in this regard. The appellate Court also disagreed with the finding that it was aggravating that the complainant in this case was a stranger, and "that Okimaw was armed and 'prepared for potential battle.'"[206]

Essentially, the sentencing judge disregarded the impact of Mr. Okimaw's moral blameworthiness on the offences committed because the *Gladue* report writer did not make this connection in the report. Arguably, it is the role of the judge, not the report writer, to make this connection. The role of the *Gladue* report writer is to gather information about the accused's personal experience and provide that information to the court in the form of a *Gladue* report. This statement also holds true for probation officers who are writing pre-sentence reports. Their role is to simply gather and provide information to the courts so that they are better able to come to a fit sentence.

The sentencing judge also stated that Mr. Okimaw's past experiences, as discussed in the pre-sentence report and *Gladue* report, had no bearing on his moral blameworthiness for the offences. It is difficult to see how Mr. Okimaw's upbringing could not have had an impact on his

[202] *Ibid* at para 45.
[203] *Ibid* at para 50.
[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid* at para 51.

moral blameworthiness. Arguably, it is because of his upbringing, his transiency, and his previous experience on the streets, which included him being stabbed, that resulted in him carrying a knife for protection. This commentary is echoed by the appellate Court in this decision. The appellate Court explained that Mr. Okimaw's physical and mental health ultimately distinguishes him from other individuals who commit similar offences. The sentencing judge failed to account for how Mr. Okimaw's physical and mental health concerns may have impacted his moral blameworthiness.

In addition, the appellate Court argued that Mr. Okimaw's previous experience which included two unknown people confronting Mr. Okimaw and stabbing him, combined with his experience of transiency, "led him to carrying a knife for protection."[207] The appellate Court made clear that they are "not approving of vigilantism," but are rather highlighting the significance of section 718.2(e) and *Gladue.*[208] The Court explained that this section and court decisions relating to *Gladue* have "reminded courts that personal culpability under s 718.1 of the *Code* is related to the circumstances which constituted the offender's upbringing and life experience."[209] The Court stated that:

> It cannot be doubted that a life of abuse, hardship, insecurity, dislocation and rejection will be braided into the thinking processes of any individual from a young age. Any person with such an upbringing may violently react to perceived aggression in a more pre-emptive or excessive manner than would be the case with others whose lives have not been so afflicted since childhood. In devising the appropriate sentencing response, it is important to understand the individual. Armed assaults that are forethought or driven by malice are not the same as those which are reactive.[210]

This statement is by far one of the clearest considerations of *Gladue* that I have come across. It is clear from this statement that a person's upbringing does have an impact on personal culpability. It states that, with a past similar to Mr. Okimaw's, there is no doubt that someone would react in an exacerbated manner compared to someone who was not exposed to Mr. Okimaw's experience and upbringing. The Court of Appeal goes further to state that when the courts are assessing what an appropriate sentence is for a particular offender, they are obligated to analyze their unique background and systemic factors.[211] The Court also emphasized that

[207] *Ibid* at para 55.
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid* at para 56.

Gladue factors can help to understand the context of where the accused is coming from.[212] This understanding, in turn, could assist in the sentencing process.

The analysis provided by the appellate Court with respect to Mr. Okimaw's past experience involving a similar confrontation is a profound example of how courts are to utilize *Gladue* factors in the sentencing process. In this case, the appellate Court used information that was provided to them within the context of a *Gladue* and a pre-sentence report and used that information to understand and evaluate Mr. Okimaw's offending. This connection ultimately explains why Mr. Okimaw was armed in the first place. This connection is helpful, but requires careful consideration by the sentencing judge to understand the context surrounding Mr. Okimaw's criminal offending. In its simplest form, this analysis by a judge is a form of empathy and understanding that requires a deep consideration of an individual's personal circumstances. It requires the consideration of not only the context surrounding the offence, but also a look at Mr. Okimaw's past experiences to understand how these circumstances have impacted his moral culpability in the present offence. This type of consideration is regrettably quite rare, but is a good example of how *Gladue* factors are to be interpreted during the sentencing process.

Because of these misunderstandings, the appellate Court determined that the sentencing judge erred, which resulted in an "overemphasis on denunciation and deterrence and a sentence that did not properly account for Okimaw's reduced level of moral blameworthiness for these offences."[213] In determining an appropriate sentence, the appellate Court turned their attention to two questions: 1) whether *Gladue* factors bear on this offender's culpability, and 2) what types of sentencing sanctions are appropriate in the circumstances for this particular Aboriginal offender.[214] The appellate Court determined that Mr. Okimaw's unique and systemic background factors "are inextricably embedded in Okimaw's own life experiences and clearly bear on his culpability for these offences."[215] In the appellate Court's analysis of the first question, they spoke to Mr. Okimaw's personal experiences growing up and the intergenerational trauma that was afflicted on him and his family.[216] These factors were then used to inform what type of

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[212] *Ibid* at para 57 citing *R v Laboucane*, 2016 ABCA 176, [2016] 12 WWR 34 (CA) at paras 50-64.
[213] *Okimaw*, *supra* note 13 at para 73.
[214] *Ibid* at 16-20
[215] *Ibid* at para 75.
[216] *Ibid* at 75-84.

sentencing sanction was appropriate, which speaks to question two of the appeal.[217] The appellate Court referred to the *Gladue* report that was prepared and listed a number of culturally based programs in terms of rehabilitation for Mr. Okimaw, including alcohol and substance abuse, family violence, and anger management.[218] The Court determined that this type of offence attracted a period of incarceration, but "should in no way prevent Okimaw from receiving the benefit of those programs and treatments."[219] The Court emphasized that the principles of deterrence and denunciation "cannot be allowed to obliterate and render nugatory or impotent other relevant sentencing objectives."[220] This includes *Gladue* factors. The Court determined that, accounting for these factors, "a lesser period of incarceration" was appropriate.[221] The appellate Court determined that in similar circumstances not involving the personal experiences of Mr. Okimaw, an individual would have received a sentence of 30 months.[222] However, given Mr. Okimaw's circumstances, the Court determined that a fit sentence would be 21 months custody. This sentence was "reduced by the 7.5 months credit he originally received for time served pre-sentence."[223] Mr. Okimaw was also "entitled to any statutory remission available for time served post-sentence."[224]

The answer to the initial question of whether much has changed since the introduction of *R v Arcand* is yes with respect to the decision of *R v Okimaw*. *R v Okimaw* conducted a thorough analysis of Mr. Okimaw's systemic and background factors and was a good example of how those factors could be interpreted during the sentencing process. While the appellate Court in this decision should be applauded for appropriately considering Mr. Okimaw's systemic and background factors, and how those factors have played a part in bringing him to court, there remains one significant concern for future decisions in this area. There is a concern that future legal professionals may not be able to make the same connection between an offender's background and their current criminal offending that the appellate Court has made in this decision. This type of analysis often requires an empathetic connection from personal or

[217] *Ibid* at pare 87.
[218] *Ibid* at para 88.
[219] *Ibid* at para 89.
[220] *Ibid* at para 90.
[221] *Ibid.*
[222] *Ibid* at para 93.
[223] *Ibid*
[224] *Ibid* at para 94.

vicarious experience. What I can gather from the decision of *R v Okimaw* is that the Court in this case had likely been exposed, personally or vicariously, to similar experiences as Mr. Okimaw's in order to appropriately make this connection. It is unfortunate that many Indigenous people across Canada have had similar experiences to Mr. Okimaw as a result of colonialism. As an Indigenous person in the legal profession, I have come to know that I read, feel, hear and see things quite differently because of my personal upbringing. The impact of colonialism, intergenerational trauma, poverty, alcoholism, catholic and residential schools, etc. were a far too common reality in my personal upbringing. I can easily understand how Mr. Okimaw's personal experiences as an Indigenous person have contributed to his current situation. There still remains a concern though that other legal professionals may not be able to make the same connection due to their limited exposure. Without at least a rudimentary understanding, it is concerning that the legal profession will continue to inadequately apply *Gladue*.

5.3: An examination of R v Chanalquay from the Saskatchewan Court of Appeal in 2015

The following decisions hit closer to home, as they were decided at the Saskatchewan Court of Appeal. The first case that will be discussed is *R v Chanalquay*.[225] *Chanalquay* was oversaw by Richards CJS, Lane and Whitmore JJA.[226] The issue in *Chanalquay* was whether the cases of *Gladue* and *Ipeelee* "were properly applied in relation to the sentencing" of Mr. Joseph Chanalquay, an Indigenous man from Buffalo River Dene Nation.[227] Mr. Chanalquay was found guilty of sexual assault "for having sexual intercourse with a woman who" was sleeping at a party they were both at.[228] The woman woke up during the incident and ran home.[229] At trial, the sentencing Judge gave a lot of weight to a number of *Gladue* factors that existed in Mr. Chanalquay's life, as well as his personal circumstances. The sentencing Judge ultimately found that these *Gladue* factors spoke directly to Mr. Chanalquay's "moral culpability with respect to the offence."[230] In considering *Gladue*, the sentencing Judge went from the starting point sentence of three years, which is standard for these types of offences, to sentencing Mr.

[225] *Chanalquay*, *supra* note 14.
[226] *Ibid.*
[227] *Ibid* at 1.
[228] *Ibid*.
[229] *Ibid* at 2.
[230] *Ibid* at 1.

Chanalquay to 2 years less a day imprisonment.[231] As a result, the Crown appealed to the Court of Appeal and argued that the sentence imposed by the trial Judge was "demonstrably unfit."[232] The Court of Appeal eventually found that the sentencing Judge did misapply the principles of *Gladue* and *Ipeelee,* but decided to keep the sentence of 2 years less a day imprisonment, but added probation with aims to address the goals of restorative justice.[233]

During Richards CJS analysis, he reiterated the two-prong test from *Gladue*:

1. The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts and
2. 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. [234]

Richards CJS interpreted both of these prongs. In particular, under prong one, the Court clarifies an aspect that was missing in the decision of *R v Arcand*.[235] Specifically, that systemic and background factors "may speak to the culpability of an Aboriginal offender if they reveal something of his or her level of moral blameworthiness."[236] Whereas in *R v Arcand,* the Court argued that the seriousness of the offence goes to the "overall degree of moral blameworthiness," which essentially left no room for *Gladue.*[237] Richards CJS explained that the circumstances of an offender could reasonably influence the imposition of a sentence.[238] In particular, a person's personal circumstances could speak to their moral culpability and could ultimately lead to an entirely different sentence than what would normally be imposed for this type of offence.[239] Richards CJS explains that sentencing judges are mandated to not only explore the personal circumstances or background factors of the offender, but also their community dynamic.[240] He explains that sometimes in order to gather this information, it is necessary for a pre-sentence

[231] *Ibid.*
[232] *Ibid*.
[233] *Ibid.*
[234] *Gladue, supra* note 2 at 690.
[235] *Arcand, supra* note 12.
[236] *Chanalquay, supra* note 14 at 9.
[237] *Arcand, supra* note 12 at 12.
[238] *Chanalquay, supra* note 14 at para 40.
[239] *Ibid.*
[240] *Ibid* at para 43.

report to be completed.[241] *Chanalquay* solidifies that there may be other circumstances that do in fact impact an Indigenous offender's moral culpability, a ruling that fell short in *Arcand.*

In his analysis, Richards CJS also conducts an examination of prong two of *Gladue.*[242] Richards CJS explains that this is arguably the most important factor of the two outlined in *Gladue.*[243] He explains that "…a sentencing judge must carefully consider available alternatives to incarceration," as the whole purpose of section 718.2(e) was to remedy the overrepresentation of Canada's Indigenous people in prisons.[244] He goes on to further state that Indigenous community programming could be "significant in this regards."[245] He also notes that even in the absence of such programming, restorative justice approaches are still to be considered by a judge.[246]

Referring back to Richards CJS ruling in *Chanalquay,* where he sentenced Mr. Chanalquay to 2 years less a day imprisonment and probation, it is important to understand what Richards CJS meant when he said that there would be probation with aims to address the goals of restorative justice. In fact, what does it mean to have "probation aimed at restorative justice goals"?[247] More importantly, what does the court mean when they say, "restorative justice goals?" In discussing the purpose of *Gladue,* Richards CJS concludes that the purpose of Gladue is not to "impose shorter jail terms on Aboriginal offenders," but rather it is linked to goals of restorative justice.[248] Richards CJS explains that:

> …Its approach is very much tied to the concept of restorative justice… the fundamental dynamic underlying s.718.2(e) when a trial judge sentences an Aboriginal offender is not merely one of reflexively giving less jail time. Rather, it involves the subtler idea of attempting to limit or minimize jail time by using restorative justice approaches when and if such approaches are appropriate. In the end, s.718.2(e) means what it says: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered…"[249]

Richards CJS then explains that:

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[241] *Ibid.*
[242] *Ibid* at 41.
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] *Ibid* at para 5.
[248] *Ibid* at 8.
[249] *Ibid.*

> I observe as well that the analysis mandated by s.718.2(e), as explained in *Gladue* and *Ipeelee*, is not a free-standing inquiry that is brought into play to adjust an otherwise fit sentence *after* it has been determined. Instead, the analysis is an integral part of the reasoning which leads to a fit sentence (*Gladue* at para 88). It does not stand outside of that reasoning and judges should not approach the sentencing exercise with a view to giving (or not giving) a specific or express reduction in a sentence because of *Gladue* factors. This is not what *Gladue* and *Ipeelee* provide.

Richards CJS explains that sentencing judges should be asking themselves whether a restorative justice approach to sentencing could be used to "reduce or limit the term of imprisonment imposed."[250] This approach to *Gladue* is attractive, as it eliminates the generalization that Indigenous people receive a discount whenever *Gladue* is applied. Moreover, I believe Richards CJS is on to something here in these last two paragraphs. As I become more immersed into the study of criminal law, I am beginning to realize that restorative justice is not always about the sentence itself, but it is also about how the courts have treated that individual throughout the entire criminal process. What sort of tools are the courts using in order to meet the unique needs of an Indigenous offender? Did the court keep a record of these restorative justice aspects, so that future legal professionals can be made aware of them and apply them? While these restorative justice approaches are a significant leap within the criminal justice system, they are only but a part of the greater whole, the "whole" being restorative justice initiatives led by Indigenous people. It would seem that this latter argument is more in line with what *Gladue* was calling for in 1999. One major downfall of this decision is that there exists an absence with respect to what exactly these restorative justice approaches are. The lack of explanation on these approaches is quite detrimental as it leaves out significant details that could assist and impact future decisions in this area.

It is not enough to simply say that a sentence is restorative by the very fact that the sentence was reduced or the judge implements restorative justice approaches; rather, there must be something truly meaningful or Indigenous about those approaches themselves. Prong two of the test as noted by the Court of Appeal is the most important element of *Gladue,* as it speaks specifically to the sentencing of an Indigenous offender. To simply dismiss meaningful engagement of this prong would disregard a significant aspect of *Gladue.* In fact, the restorative process itself is significant to the sentencing process overall.

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[250] *Ibid* at 54.

What we do know from this decision is the sort of conditions Mr. Chanalquay was placed on when he was sentenced with probation requirements.[251] While these conditions will not be repeated here, it is important to clarify that Mr. Chanalquay was sentenced to a typical probation order. What is missing from these conditions and/or sentencing position is real engagement and sensitivity to Indigenous restorative justice initiatives. *Chanalquay* leaves out whether an appropriate person contacted Mr. Chanalquay's community for support and whether any Indigenous justice or restorative justice initiatives were meaningfully engaged. These conditions seem to be atypical, rather than unique. While the Court of Appeal can be applauded for their discussion on prong one of *Gladue*, I would respectfully argue that they failed to engage meaningfully with regards to prong two of the test. There appears to be a lot of theoretical discussion being done with regards to prong two and restorative justice, but no practical application of it. It is understood that the Court of Appeal does not view *Gladue* as a requirement to change the entire sentencing paradigm for Indigenous offenders, but it is also understood that something different and unique needs to be done. To simply engage in half of the *Gladue* analysis and to dismiss any real Indigenous approaches to it is also, in my respectful opinion, a misapplication of it.

5.4: An examination of R v Lemaigre from the Saskatchewan Court of Appeal in 2018

The next decision that will be considered is *R v Lemaigre* from the Saskatchewan Court of Appeal in 2018.[252] The Justices that oversaw this decision were Jackson, Herauf, and Whitmore JJA.[253] Jackson JA wrote the contents of this decision and they are as follows. In the case of *Lemaigre*, the sentencing judge found Mr. Lemaigre guilty of sexual assault.[254] The complainant/victim L.V. at the time of the assault was 19 years old, pregnant, and living alone with her two children in a remote community. Mr. Lemaigre was L.V.'s ex partner's brother.

The facts of this decision are as follows. The incident occurred between approximately 7:00 am to 8:00 am when Mr. Lemaigre woke L.V. with several phone calls. Mr. Lemaigre was calling because he wanted to go over to her place. She told him not to. Shortly after, Mr. Lemaigre began knocking on her door. She told him to leave and shut the door, but Mr.

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[251] *Ibid* at 59.
[252] *Lemaigre, supra* note 15.
[253] *Ibid.*
[254] *Ibid* at 1.

Lemaigre entered anyway into L.V.'s home, uninvited, as she had forgotten to lock the door. Mr. Lemaigre then made his way to the living room where he got "undressed and got on top of her."[255] Mr. Lemaigre told L.V. that "he wanted to have fun with her."[256] At this point in time, Mr. Lemaigre proceeded to grab L.V.'s "hand and put it down onto his penis."[257] L.V. recalls the smell of alcohol on Mr. Lemaigre. L.V. attempted to push him off and told him that she did "not want to do anything."[258] Mr. Lemaigre's response was that he "would take care of" her "and the kids."[259] He then proceeded to take L.V.'s underwear off, at which point she continued to refuse and "he forced himself on her and put his penis inside of her vagina."[260] The whole time, L.V. pushed him off and Mr. Lemaigre "eventually stopped."[261] Mr. Lemaigre was once again told to leave. A few days had passed when L.V. went to the police. Mr. Lemaigre was charged, but the trial did not take place until approximately 4 years thereafter.[262]

A victim impact statement was taken by L.V. to which she describes being blamed and the impact that the offence has had on her.[263]During trial, Mr. Lemaigre denied the assault, but was found guilty. During his sentencing, the Judge discussed the relevant *Gladue* factors. The judge stated:

> …The offender's experience as a youth was transitory with frequent relocations within Alberta and Saskatchewan with his mother. His father, when drinking, would abuse his mother in the home in front of the children. The offender's mother…then began a relationship…[that] also abused [the mother] and the children. The family experienced poverty and racism. The offender believes the impact of residential schools on members of his family has influenced his use of alcohol.[264]

The Crown argued for a sentence of 3.5 to 4 years and Mr. Lemaigre argued for two years less a day, plus probation. Mr. Lemaigre was sentenced to "two years less a day plus 24 months of probation."[265] The Judge also reduced his sentence by 282 days "from the custodial

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[255] *Ibid* at 2.
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid* at para 7.
[259] *Ibid.*
[260] *Ibid.*
[261] *Ibid.*
[262] *Ibid* at para 8.
[263] *Ibid* at para 10.
[264] *Ibid* at para 13.
[265] *Ibid* at para 16.

sentence in order to give enhanced credit for 188 days spent in pre-sentence custody."[266] The total sentence being reduced to "one year and 82 days."[267] The Crown appealed this sentence. In short, the Court of Appeal found that the trial Judge both erred in principle and held that the sentence was demonstrably unfit.[268]

The Court of Appeal therefore "imposed a sentence of three and one-half years" and took "into account the proper pre-sentence credit of 153 days."[269] During sentencing, the trial Judge looked to a variety of case law, including *Chanalquay,*[270] to come to his findings. The Court of Appeal argues that the trial Judge fell afoul of the issue they anticipated in *Chanalquay*[271] by using section 718.2(e) as "a directive to shorten jail terms imposed on Aboriginal offenders."[272] What really sticks out in this decision is the impact that this incident had on the victim, an aspect the sentencing judge failed to highlight in any detail. The Court of Appeal describes the victim being in a vulnerable situation, it being winter, her children sleeping upstairs, and it was her children's uncle who committed the assault.[273] While I am not certain whether L.V. is Indigenous, I do want to mention that women, and Indigenous women in particular, are far too often the victims in these types of situations. These circumstances need to be acknowledged. The exact same question continues to come to mind when reading many of these types of decisions: how does *Gladue* coexist in situations where the victim is also an Indigenous person? In answering this question in part, the Court of Appeal in *Lemaigre*, drew on the decision of *Chanalquay*[274] and *Ipeelee,*[275] and in particular paragraph 52 of *Chanalquay*:

> …To determine the extent to which *Gladue* factors impact on an offender's moral culpability, a sentencing judge must examine both the nature of the relevant factors and the particulars of the crime in issue…[276]

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[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid* at para 33.
[270] *Chanalquay, supra* note 14.
[271] *Ibid.*
[272] *Lemaigre, supra* note 15 at 4.
[273] *Ibid* at para 18.
[274] *Chanalquay, supra* note 14.
[275] *Ipeelee, supra* note 8.
[276] *Lemaigre, supra* note 15 at para 22, citing *Chanalquay, supra* note 14 at para 52 [emphasis added].

It would seem that the impact that the crime has had on the victim falls directly within the particulars of the crime.

Nevertheless, while the sentencing Judge in this decision did correctly provide the systemic and background factors of Mr. Lemaigre, he failed to consider how Mr. Lemaigre's personal circumstances have contributed to his moral culpability.[277] The Court of Appeal compared both the cases of *Chanalquay* and *R v Whitehead* to Mr. Lemaigre's case, and found that since he "has not accepted responsibility for his offence" it made "it difficult to actualize s.718.2(e)."[278] The Court of Appeal noted that: "When an offender does not accept responsibility for the crime that has been committed, and takes no steps to reduce the possibility of engaging in future criminal activity, determining a fit sentence that gives effect to s. 718.2(e) is difficult."[279] The Court found that in Mr. Lemaigre's circumstances, "imposing a restorative justice sentence" would be "contrary to *Ipeelee* and *Chanalquay."*[280]

As you will notice, the Saskatchewan Court of Appeal has shown consistency and has enforced strongly the terms found within *Chanalquay*. One of the major downfalls in these two decisions is that they fail to engage in any adequate implementation of the second prong of *Gladue.* It appears that the decision of *Lemaigre* begins its discussion of restorative justice at the very beginning of paragraph 31, and ends the discussion of restorative justice in that same sentence as well. In both of these Saskatchewan Court of Appeal decisions, limited discussions have been made with respect to the second prong of *Gladue,* and any discussions that were made failed to engage in any meaningful way with the perspective of Indigenous people.

5.5 An examination of R v J.P. from the Saskatchewan Court of Appeal in 2020

We will now turn our attention to the Saskatchewan Court of Appeal decision, *R v J.P.* from 2020 to see if much has changed with respect to the Province's implementation of prong two.[281] The Justices that oversaw this decision were the Honouarble Madam Justice Schwann, Mr. Justice Leurer and Mr. Justice Kalmakoff.[282] The Honourable Mr. Justice Leurer wrote the

[277] *Lemaigre*, *supra* note 15 at 6.
[278] *Ibid* at 7.
[279] *Ibid* at para 31.
[280] *Ibid*.
[281] *J.P., supra* note 3.
[282] *Ibid*.

decision in this appeal.[283] Justice Schwann and Justice Kalmakoff were in concurrence with Justice Leurer.[284] The main issue in this appeal concerns J.P., an accused "who suffers from Fetal Alcohol Spectrum Disorder [FASD]" and his unique personal circumstances of which "call for the application of the principles set out in" the *Gladue* decision.[285] At trial, J.P. was sentenced to 17 years in imprisonment.[286] The trial judge then reduced J.P.'s sentence "to a global sentence of ten years less" remand credit.[287] J.P.'s offences included, among several others, two armed robberies.[288] On appeal, J.P.'s sentence was varied and he was ordered to serve five years concurrently for his two armed robberies. In addition, his global sentence was varied to eight years less remand credit.

The facts of J.P.'s offences are as follows. The first robbery took place on August 22, 2015. J.P entered a convenience store for the purposes of scouting out the premise. He then left. J.P.'s 14 year old nephew then entered the store with a crowbar. J.P.'s nephew "demanded cash and cigarettes."[289] In the process of the robbery, the nephew used the crowbar to damage the cash terminal screen. The second incident took place six days later. J.P.'s nephew went into the store covering his face with a bandana, holding a black folding knife, and a bag. J.P.'s nephew demanded cash and cigarettes holding up the knife. Little did the nephew know was that there was a GPS tracking device in one of the cigarette packages. J.P. and his nephew were subsequently arrested. The other matters included property related offences, a breach of recognizance, a break and enter, and possession of marijuana.

A *Gladue* report was prepared for sentencing.[290] The report outlined J.P.'s personal circumstances, which included a history of family attending residential school, substance and alcohol abuse, domestic violence, sexual abuse, poverty, lack of educational opportunities, and overcrowding.[291] When J.P. was born, his mom was 15 years old and was not aware of her pregnancy until seven months. According to the *Gladue* report, J.P.'s mother drank, did drugs

[283] *Ibid.*
[284] *Ibid.*
[285] *Ibid* at para 1.
[286] *Ibid* at para 2.
[287] *Ibid* at para 2.
[288] *Ibid* at para 1.
[289] *Ibid* at para 5.
[290] *Ibid* at para 10.
[291] *Ibid.*

and inhaled solvents during this time.[292] When J.P. left school in Grade 10, he was exposed to criminal offending by his stepfather, where he was obligated to provide part of the proceeds of the crimes he committed to his stepfather.[293] J.P.'s stepfather also exposed him to drugs and alcohol. J.P.'s criminal offending got worse and he was sentenced to a five year penitentiary sentence at the age of 18. It was also discovered during the course of this report that J.P. suffered from a diagnosis of FASD. Dr. Logan determined that this diagnosis was the "primary cause of J.P.'s difficulties."[294] This diagnosis was accepted by the Crown, to which led to their position of a global sentence of ten to twelve years less remand credit. The Crown was asking for a seven-year consecutive sentence on the two robberies, two to three years for the break and enter, and 12 months concurrent for the other offences.[295] J.P. requested a total sentence of eight years, with part of his sentence to be served in the community. He asked to be sentenced to a concurrent sentence of five years for the two robberies, with concurrent sentences on the others. With the remand credit, it was J.P.'s position that he would only serve 18 months total in custody, followed by three years' probation.[296]

After a review of the case law on the issue of *Gladue,* the judge determined that as a *Gladue* factor, FASD is a "serious consideration in the determination of a fit sentence," which may ultimately "weigh against an Indigenous offender's moral blameworthiness."[297] However, the sentencing judge failed to consider just that- how J.P.'s *Gladue* factors, which included the diagnosis of FASD, may have impacted or weighed on J.P's culpability level. The sentencing judge connected *Gladue* and the diagnosis of FASD on the basis of its prevalence in Indigenous communities. The appellate judge reviewed this connection and concluded that "FASD presents as a *Gladue* factor not simply because of disproportionate FASD rates among Aboriginal communities, but because it is, in his life, an intergenerational consequence of residential school."[298] As a result, the appellate judge concluded that the sentencing judge errored in principle, when he "refused to accept that *Gladue* considerations should operate to mitigate the

[292] *Ibid* at para 11.
[293] *Ibid* at para 13.
[294] *Ibid* at para 15.
[295] *Ibid* at para 16.
[296] *Ibid* at para 17.
[297] *Ibid* at para 19.
[298] *Ibid* at para 45.

appropriate sentence in this case because a penitentiary sentence was required."[299] The appellate judge then quoted the Supreme Court of Canada decision *Gladue,* and the Saskatchewan Court of Appeal decision of *Whitehead,* to which both decisions expressly rejected this type of reasoning. For example, the *Gladue* decision expressly states that "[if] there is no alternative to incarceration then length of the term must be carefully considered."[300] In addition, the decision of *Whitehead* also emphasizes that proportionality can only be met if courts balance the impact of systemic and background factors on a person's moral blameworthiness when considering an appropriate period of incarceration.[301] The appellate judge states that to ignore that a factor of any kind may reduce or increase the moral blameworthiness of the offender, simply ignores the fundamental principle of sentencing that " [a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence *and the degree of responsibility of the offender."*[302] The appellate judge therefore concluded that "any factor that reduces the moral blameworthiness of an offender must be accounted for when determining a proportionate sentence."[303] Therefore, even if the diagnosis of FASD was not connected to the *Gladue* factors that are considered under section 718.2(e), the appellate judge stated that the impact the diagnosis has on an individual must be more than a "recitation of facts," but must be "weighed when fixing a proportionate sentence."[304] The sentencing judge failed to do this.

This decision is fundamental in many respects. First, this decision not only recites J.P.'s personal circumstances, but actually attempts to make sense of how these personal circumstances may have impacted his life and his current circumstances of criminal offending. I have read many decisions on the issue of *Gladue* that simply recite *Gladue* factors without any basis or reasoning for why they are being discussed. In these types of decisions, we often hear the words residential schools, alcohol abuse, lack of education, and poverty, but then that's it. There is no real consideration of how those personal circumstances have impacted the accused's life. What makes this decision truly unique is that the appellate judge in J.P. attempted to understand those

[299] *Ibid* at para 46.
[300] *Ibid* at para 63 citing *Gladue, supra* note 2 at para 93.
[301] *Ibid* at para 63 citing *R v Whitehead,* 2016 SKCA 165 (CanLII), [2017] 5 WWR 222 at para 84 [*Whitehead*].
[302] *J.P., supra* note 3 at para 64.
[303] *Ibid* at para 66.
[304] *Ibid*.

words and what that meant for J.P.'s current life. Notably there is an intergenerational connection to be made here with respect to J.P.'s criminal offending. J.P. was exposed to criminal offending at an early age by his stepfather. His stepfather not only directed him to commit offences, but also encouraged J.P. to provide him with part of the proceeds of those crimes. Then in turn, J.P. involved his nephew in criminal activity. It is clear here how the impact of intergenerational trauma has affected this family.[305]

Secondly, the appellate judge made sense of this meaning of "weighing" individuals like J.P.'s systemic and background factors with other principles of sentencing to come to a fit sentence. It is even more clear now that courts must not ignore section 718.2(e) when it determines that incarceration is a fit sentence, as section 718.2(e) is an element of that consideration. Finally, this decision also brings to light something I have thought about all throughout my research: *Gladue* and section 718.2(2) should not be used to disadvantage Indigenous people. For example, in this case, the Crown and the sentencing judge ignored the personal circumstances of J.P. by finding that the robberies "were clearly not offences for an alternative to imprisonment in a penitentiary", and where the Crown sought to consider *Gladue* on a "lower plane than other factors that affect moral blameworthiness."[306] As explained by the appellate judge this line of argument "would turn s. 718.2(e) from being a tool that is intended to *reduce* the level of incarceration of Indigenous persons into one that is, at best, simply neutered and, at worst, one that disadvantages Indigenous offenders."[307] The significance of section 718.2(e) alongside other principles of sentencing should not be diminished.

In summation, I would say much has changed since the earlier decisions discussed from the Court of Appeal. My biggest criticism of the earlier decisions was that the courts failed to connect prong one of *Gladue* to prong two, and seriously failed to consider the meaningfulness of prong two. The entanglement between the two can be summarized in one question: how do the systemic and background factors outlined in prong one of a *Gladue* analysis impact the sentencing in prong two? The Appellate judge in this case eloquently made these connections

[305] Glen Luther & Hilary Peterson, Case Comment, *R v J.P.*, 2020 SKCA 52 [*Luther & Peterson*].
[306] *J.P., supra* note 3 at para 67.
[307] *Ibid*.

throughout his decision, by weighing in J.P.'s *Gladue* factors including his FASD diagnosis in coming to a fit sentence.

5.6: An examination of R v Peters from the Manitoba Court of Appeal in 2015

The next set of decisions that will be looked at are from the Manitoba Court of Appeal. The first decision is *R v Peters*.[308] The Justices that oversaw this decision are Mr. Justice Michel A. Monnin, Madam Justice Freda M. Steel and Mr. Justice William J. Burnett.[309] Mr. Justice Michel A. Monnin wrote the decision. This appeal dealt specifically with three sentence appeals relating to the "possession of cocaine for the purpose of trafficking."[310] This decision in particular dealt with an appeal of a "suspended sentence along with three years of supervised probation with 200 hours of community service."[311] The main issue in this appeal is the applicability of the *Gladue-Ipeelee* principles.[312]

The facts of this decision are as follows. On March 5, 2013, the accused Mr. Ryan Peters was arrested for selling cocaine to "an undercover police officer."[313] Mr. Peters was in possession of $405.00 during the time of arrest. Mr. Peters' partner was searched, and was found to be "holding 62 one-quarter grams of cocaine in her vagina."[314] At this time, Mr. Peters' partner was pregnant and due shortly. Mr. Peters admitted he was in possession of the cocaine. Sentencing occurred on October 29, 2014. At this time Mr. Peters was 31 years of age, was of Aboriginal ancestry and was supported by his family.[315] Just a few months before on June 9, 2014, Mr. Peters was granted sole custody of three children.[316]

Mr. Peters spent most of his life living in Winnipeg, but after his arrest, he moved to Long Plains First Nation. As for Mr. Peters' criminal record, he had 54 prior convictions, starting from 1998 in his youth, with his most recent offence being from 2004 for possession for the purpose of trafficking. At that time, Mr. Peters received "a sentence of 26 months, plus two

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[308] *Peters, supra* note 17.
[309] *Ibid* at 1.
[310] *Ibid at* para 2.
[311] *Ibid* at para 1.
[312] *Ibid* at para 3.
[313] *Ibid* at para 4.
[314] *Ibid.*
[315] *Ibid* at para 5.
[316] *Ibid.*

years' probation."[317] Mr. Peters' sentence was also informed by a pre-sentence and a *Gladue* report. The pre-sentence report found him at "a very high risk to re-offend."[318] In addition, materials were also filed outlining that Mr. Peters had completed "a 30-day residential treatment program."[319] It included programming in "domestic violence, anger management and parenting."[320] At sentencing, the Crown's position was three years' imprisonment and Mr. Peters' counsel argued for a suspended sentence as a conditional sentence order was no longer available due to the recent changes made to the *Criminal Code.* The sentencing judge went along with Mr. Peters' counsel's submissions.

During his submissions, the sentencing judge placed a lot of weight on *Gladue-Ipeelee* factors, as well as Mr. Peters' ability to change his life. The sentencing judge in particular spoke about Mr. Peters' past history with a gang, his criminal record, and his past dealings with drugs. The sentencing judge drew specifically on his parenting and the fact that Child and Family Services determined that he was a good parent. In his submissions, the sentencing judge was guided by the *Ipeelee* decision and quoted Justice Lebel at paragraph 67:

> …if an innovative sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?[321]

The sentencing judge then went on to explain that a jail sentence would not be appropriate and would not serve to deter Mr. Peters.[322] The sentencing judge concluded that a more restorative approach to sentencing was appropriate and sentenced Mr. Peters to a suspended sentence followed by three years' probation.[323] The failure to comply and the abstinence charges were ordered to run concurrently.[324]

The Crown argued that "the sentencing judge erred in principle," and in the alternative the sentence was demonstrably unfit.[325] The Crown argued that the sentencing judge failed to

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[317] *Ibid* at para 7.
[318] *Ibid.*
[319] *Ibid* at para 8.
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid* at para 12.
[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid* at para 13 and 15.

recognize that cocaine traffickers call for the principles of deterrence and denunciation.[326] The Crown also argued that the sentencing judge overemphasized *Gladue* factors. The Crown stated that Mr. Peters failed to demonstrate the impact that the *Gladue* factors had on him.[327] In particular the Crown stated "…that the accused's background has no effect on the circumstances of this offence and that although of Aboriginal descent, the accused has not demonstrated that he has been impacted by the usual *Gladue* factors."[328]

The Crown also argued that while a suspended sentence is not illegal, "the sentencing judge erred by avoiding Parliament's direction that cocaine traffickers are no longer eligible for community-based sentences."[329] In addition, the Crown argued that the period of probation was not sufficient.

In response, Mr. Peters argued that *Gladue-Ipeelee* are adequate to "override the considerations of deterrence and denunciation or the reliance on the range that has previously been set for this type of offence" even if the sentencing judge did make an error.[330] The Crown then discussed the decision of *R v Voong (DM) et al,* one of the other decisions that was being "heard at the same time."[331] As in this case, the Crown is appealing "the imposition of suspended sentences and probation orders on four" individuals who had pled "guilty to dial-a-dope drug trafficking offences."[332]

The Appellate Court concluded that the sentencing judge did not err in principle nor was the sentence demonstrably unfit.[333] The appellate Court determined that sentencing judge "applied what the Supreme Court of Canada directed judges to do in sentencing Aboriginal offenders."[334] The appellate Court determined that "the sentencing judge crafted a sentence that was appropriate and recognized the very substantial change" that it offered in Mr. Peters' life.[335] The appellate Court then explained that because of Mr. Peters' changes, he would have been an

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[326] *Ibid* at para 13.
[327] *Ibid.*
[328] *Ibid* at para 13.
[329] *Ibid.*; *Controlled Drugs and Substances Act*, SC 1996, c 19, s 7.
[330] *Peters, supra* note 17 at para 17.
[331] *R v Voong (DM) et al* ,2015 BCCA 285, 374 BCAC 166 cited in *Peters, supra* note 17 at para 19.
[332] *Peters, supra* note 17 at para 19.
[333] *Ibid* at para 25 and 27.
[334] *Ibid* at para 25.
[335] *Ibid.*

appropriate candidate for a conditional sentence order, but since this was unavailable, other sentencing options had to be considered. According to the appellate Court, Mr. Peters conduct after arrest called for "a restorative approach to sentencing."[336] The appeal was dismissed.

This decision is a good example of how the legal system continues to struggle and resist the integration of the *Gladue* principles into the sentencing of Indigenous people. Section 718.2(e) is designated as a secondary principle to sentencing, but it is still required by law to be applied to the sentencing of Indigenous people, and to avoid its application is an error of law. One must applaud the sentencing judge, as well as the appellate Court in this decision for understanding the intricate realities of Mr. Peters' life, their skilled ability to see his progression and their detailed inclusion of the *Ipeelee* decision.[337] Unfortunately, not all decisions are this clear, which has resulted in confusion and a lot of misunderstanding following the *Gladue*[338] and *Ipeelee*[339] decisions. One could argue much of the resistance of *Gladue* likely comes from misunderstanding, lack of education, lack of exposure and experience, lack of direction, and the differing perspectives/ interpretations of the *Gladue*[340] and *Ipeelee*[341] decisions. In particular, one must highlight the Crown's perspective in this case. The Crown noted that Mr. Peters failed to demonstrate the impact that the *Gladue* factors had on him and argued that "the accused's background has no effect on the circumstances of this offence."[342] Respectfully, Mr. Peters is not obligated to make this connection that the Crown has proposed. It is the role of the judge to make this connection. This is a heavy burden to be placed on an accused, especially since the courtroom is likely the first place that they have ever divulged the realities of their lives and the traumatic experiences that they have been faced with. On the other end, it is also important to recognized that our experiences often inform our opinions and for those who have been exposed to the historical realities that Indigenous people have been faced with are often better equipped to make these types of connections. To truly apply the principles of *Gladue*, it requires a deeper understanding than what is written, it requires connection, empathy and the ability to relate.

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[336] *Ibid* at para 29.
[337] *Ipeelee, supra* note 8.
[338] *Gladue, supra* note 2.
[339] *Ipeelee, supra* note 8.
[340] *Gladue, supra* note 2.
[341] *Ipeelee, supra* note 8.
[342] *Ibid.*

Armed with a better understanding of the *Gladue* principles, sentencing decisions could be better informed.

5.7: An examination of R v McIvor from the Manitoba Court of Appeal in 2019

The final decision that will be explored from the Manitoba Court of Appeal is *R v McIvor*.[343] The Justices that oversaw this decision were Madam Justice Jennifer A. Pfeutzner, Madam Justice Janice L. leMaistre, and Madam Justice Karen I. Simonsen. Madame Justice leMaistre wrote for the majority in this decision, while Madam Justice Simonsen dissented. The accused Mr. McIvor was the appellant in this decision. Mr. McIvor was being charged with two counts of armed robbery, where he was sentenced to incarceration for 24 months.[344] Mr. McIvor argued that several errors in principle were made by the sentencing judge, and as a result, the sentence was demonstrably unfit.[345] The Crown argued that the sentence was not unfit and that the appeal should be dismissed.

The circumstances surrounding the offence are as follows. Mr. McIvor was charged with two counts of robbery from the same day. During each offence, he wore a hood over his head to conceal his identity. In the last robbery, sunglasses were worn by Mr. McIvor. In the first robbery, Mr. McIvor, while armed with a knife, went to a convenience store and threatened the clerk. The clerk's five-year-old son was also present. Mr. McIvor "demanded cash and cigarettes."[346] Mr. McIvor left the scene with a pack of cigarettes and $160.00. For the second robbery, Mr. McIvor went to a gas station. He was "armed with a metal bar."[347] Once again he demanded cash and cigarettes. Mr. McIvor "removed $189.19 from the cash drawer and fled" the scene.[348] During Mr. McIvor's arrest, a knife was found on him. Mr. McIvor subsequently admitted to the robberies. Mr. McIvor claimed that these offences "were motivated by his drug addiction."[349]

Mr. McIvor at the time of the offence was 34 years old and his record consisted of "assault, drug possession, break and enter, mischief and breaches of court orders."[350] A "pre-

[343] *R v McIvor*, *supra* note 18.
[344] *Ibid* at para 1.
[345] *Ibid* at para 2.
[346] *Ibid* at para 5.
[347] *Ibid* at para 6.
[348] *Ibid.*
[349] *Ibid* at para 8.
[350] *Ibid* at para 9.

sentence/*Gladue* report" was also available for the court, detailing Mr. McIvor's personal experiences.[351] You will note that the Court cites the report as "pre-sentence/*Gladue"* and does not seem to distinguish one from the other. Some scholars have argued that these reports are not one and the same.[352] In this case, the report spoke to Mr. McIvor's parents' issues with substance abuse and the impact it has had on Mr. McIvor. Mr. McIvor graduated high school even with his continued struggles with drugs and alcohol. Eventually, Mr. McIvor fathered two children. After their birth, Mr. McIvor managed to "maintain periods of sobriety" with treatment.[353] Mr. McIvor's life took a downward turn after a series of unfortunate events in 2012. During the offence, Mr. McIvor was taking a variety of drugs. He was assessed as "a high risk to reoffend" by his probation officer.[354] Mr. McIvor and his family have also been impacted by residential schools and colonialism.[355] Upon Mr. McIvor's guilty plea, he "was released on bail to the Behavioural Health Foundation (the BHF)."[356] He stayed there for a period of eight months and completed treatment. His children and wife attended the program with him and Mr. McIvor subsequently got a job.[357]

At first, the Crown's position was three years imprisonment, but once they read the reports from the Behavioural Health Foundation, it was decreased to 30 months.[358] The Crown explained that Mr. McIvor's circumstances "were not exceptional."[359] Counsel for Mr. McIvor on the other hand argued that his "circumstances were exceptional."[360] Counsel for Mr. McIvor argued for non-custody or for credit for pre-sentence custody.[361] The sentencing judge concluded that his criminal activity was linked to his drug addiction. The sentencing judge stated that offences like these call for a starting point of 24-30 months. He explained that the "central crux

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[351] *Ibid* at para 10.
[352] Hilary Peterson, *Applying Gladue Principles Requires Meaningful Incorporation of Indigenous Legal Systems and Values, including Consideration of Community-Baes Alternatives to Incarceration* (LLM Thesis, University of Saskatchewan College of Law, 2019) [unpublished] at 52-57 [*Peterson*].
[353] *R v McIvor*, *supra* note 18 at para 12.
[354] *Ibid* at para 15.
[355] *Ibid* at para 16.
[356] *Ibid.*
[357] *Ibid* at para 17.
[358] *Ibid* at para 18.
[359] *Ibid.*
[360] *Ibid* at para 19.
[361] *Ibid.*

of the exceptional circumstance argument" involves proof of "extreme… rehabilitative efforts," which was not met in this case.[362] For the first offence of robbery, the sentencing judge looked at 24 months incarceration and 42 months for the second. However, he "reduced the sentence on the basis of the accused's 'reduced moral culpability by the combination of the *Gladue* factors and his severe drug addiction as well as his demonstrated pathway toward rehabilitation.'"[363] The sentence was reduced by six months and was further reduced by Mr. McIvor's time in custody. The sentenced imposed was therefore one of 17 months.

Prior to the current appeal and after sentencing, Mr. McIvor's counsel with the consent of the Crown provided to the Court updated information on Mr. McIvor. Mr. McIvor was still attending and living with his family at BHF, and was doing well. His children were in school and he had a new job.

> Mr. McIvor's counsel argued at appeal that the sentencing judge erred in law by: imposing consecutive sentences, applying the principle of totality prior to assessing the accused's moral blameworthiness, making a calculation error, overemphasizing general deterrence, failing to consider alternatives to custody, failing to conclude that the accused's circumstances were exceptional in light of his findings of fact; and imposing a sentence that is harsh and excessive.[364]

They also argued that the sentence was demonstrably unfit. The majority concluded that an error was made when the sentencing judge imposed consecutive sentences, but it "did not impact the sentence in more than just an incidental way."[365] It was determined that an error was not made with respect to the principle of totality and that the sentencing judge simply misspoke when he said a reduction of seven months would be made. When reading the context as a whole, the majority understood that the sentencing judge intended it to be six months. With regards to general deterrence, the majority agreed that the sentencing judge was entitled to find that "general and specific deterrence outweighed rehabilitation."[366]

The next ground for appeal was with respect to alternatives to custody. The accused in this case argued that "while the sentencing judge conducted 'a thorough review of [the

[362] *Ibid* at para 23.
[363] *Ibid* at para 27.
[364] *Ibid* at para 30.
[365] *Ibid* at para 44.
[366] *Ibid* at para 50.

accused's] background,' he failed to consider alternative sentencing sanctions that would permit the accused to remain at the BHF and continue his treatment plan."[367]

During sentencing, the defence counsel spoke to Mr. McIvor's *Gladue* factors, which he argued "mitigated the accused's moral blameworthiness."[368] The defence argued that Mr. McIvor's circumstances were exceptional and "warranted a non-custodial sentence."[369] The defence counsel provided to the Court "a number of options that would allow the accused to continue his treatment plan."[370] The appellate Court determined that *Gladue* was carefully considered at the sentencing stage, and his "moral culpability was reduced as a result of *Gladue* and other factors."[371] BHF and Mr. McIvor's success was also heard by the Court. The appellate Court found the sentencing judge to be responsive with respect to the issues and principles, which included section 718.2(e). It was clear the sentencing judge reasoned that the offences were serious, finding that "alternatives to custody were not reasonable in the circumstances of this case."[372]

Mr. McIvor argued that there were exceptional circumstances in this case and "the sentencing judge's conclusions amounted to" this finding.[373] Some of the factors Mr. McIvor deemed exceptional were: his addictions to drugs, early guilty pleas were entered, significant *Gladue* factors, his last conviction was 10 years prior, he was doing well in BHF, etc.[374] Mr. McIvor argued that a non-custodial sentence was appropriate in these circumstances and the sentencing judge erred as a result. The majority described the high standard with respect to "a finding of exceptional circumstances," and determined that the sentencing judge was aware of its rare role.[375] Great deference was given to the sentencing judge's finding that the standard for exceptional circumstances was not met. The appellate Court ultimately stated that Mr. McIvor's assertions that are deemed to be exceptional are certainly "sympathetic and significantly

[367] *Ibid* at para 52.
[368] *Ibid* at para 53.
[369] *Ibid.*
[370] *Ibid.*
[371] *Ibid* at para 54.
[372] *Ibid* at para 55.
[373] *Ibid* at para 56.
[374] *Ibid.*
[375] *Ibid* at para 59.

mitigating, but not so unusual that they meet a high threshold to be exceptional."[376] The Court called upon the decision of *Peters* for comparison.[377] The Court stated that:

> …while there are similarities regarding the mitigating facts, including the *Gladue* factors and the rehabilitative efforts of both accused, the accused in *Peters* had been living in the community after residential treatment and the sentencing judge concluded that, Child and Family Services has no concerns about [the accused's] abstinence and has no concerns about [the accused's] risk to become a criminal.[378]

By doing this comparison the Court concluded that absent the assistance of BHF, Mr. McIvor has not proven his ability to maintain rehabilitative efforts in the community. The appellate Court found that long-term public protection ruled against non-custody. The appellate Court ultimately determined that the sentencing judge imposed an appropriate sentence and it was not demonstrably unfit.[379] The appeal was ultimately dismissed.

Simonsen JA dissented in this decision. Simonesen JA concluded that the sentencing judge did error in principle. She explained that given Mr. McIvor's *Gladue* factors and rehabilitative progress, an appropriate sentence would have been what defence counsel put forward "seven months' custody, satisfied by the credit for pre-sentence custody, followed by a three-year supervised probation order," concurrent sentences of one day imprisonment were also imposed, which was "satisfied by the accused's appearance in Court."[380] Conditions were to reflect defence counsel's proposal, including the treatment with BHF.[381] Simonsen JA argued that this was a case that called for the lens of *Gladue* more so than one of exceptional circumstances. She found that Mr. McIvor's circumstances, unlike what the majority concluded, were similar to Mr. Peters in the *R v Peters* decision.[382] Mr. McIvor was "assessed as a high risk to re-offend."[383] The dissenting judge explained that this assessment needed to be considered in light of Mr. McIvor's addiction and *Gladue* factors.[384] While Mr. McIvor is not a single parent and had "undergone a Child and Family Services assessment," his program for rehabilitation was

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[376] *Ibid* at para 64.
[377] *Peters, supra* note 17 cited in *McIvor, supra* note 18 at para 67.
[378] *Peters, supra* note 17 cited in *McIvor, supra* note 18 at para 67.
[379] *McIvor, supra* note 18 at para 71.
[380] *Ibid* at para 74 and 114.
[381] *Ibid* at para 114.
[382] *Peters, supra* note 17 cited in *McIvor, supra* note 18 at para 107.
[383] *McIvor, supra* note 18 at para 108.
[384] *Ibid.*

longer, he "is an important role model; provides financial support for his two young children; and has an excellent report from the BHF."[385] Simonsen JA concluded that:

> The sentence imposed must reflect not only the systemic and background factors affecting Aboriginal people, but also the specific impact that background has clearly had on the accused. In the particular circumstances of this case, application of section 718.2(e) and the approach mandated by the Supreme Court of Canada in *Ipeelee* call for imposition of the available alternative to a go-forward jail sentence."[386]

Simonsen JA argued that measures that serve Mr. McIvor's rehabilitation would serve the protection of the public long-term as opposed to sentencing him to incarceration.[387] What can be gathered from this statement is that rehabilitative measures in place now could serve to assist Mr. McIvor's reintegration back in to society. These resources could provide him with the skills needed to be a positive member of society. One can gather from Simonsen JA that incarcerating an individual does not necessarily result in rehabilitation, but could potentially foster pro-criminal attitudes that could lead to increased recidivism.

The dissent in *McIvor* should be applauded for their ability to compare and distinguish between Mr. Peter's case and Mr. McIvor's. While their situations can be observed as similar, there are unique circumstances for both individuals. When sentencing Indigenous people, there is a concern that the Courts will run afoul to considering *Gladue* as a blanket principle, dismissing the fact that colonialism impacted every Indigenous person differently. What may impact one individual in a negative way may not be the same for the next. Some individuals may not even be aware that their background has affected their actions. That is why it is important that when the legal profession is discussing *Gladue*, both an individualistic and a community approach is necessary to gather the full story. As stated numerous times, Parliament's intention when they introduced section 718.2(e) was to reduce the increasing overrepresentation of Canada's Indigenous people in prisons.[388] On a large scale, it is clear there is an epidemic that persists in the lives of Indigenous people and prisons, but *Gladue* more specifically seeks to understand why that is by drawing upon the accused's life, their background, and their systemic factors. This is done by ensuring that each Indigenous person's experiences are seen as unique.

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[385] *Ibid.*
[386] *Ibid* at para 111.
[387] *Ibid.*
[388] *Gladue, supra* note 2.

5.8: Conclusion

During our examination of the noted decisions within the prairie Provinces of Alberta, Saskatchewan and Manitoba, a clear trend of resistance and a lack of understanding was identified with respect to the implementation of the principles of *Gladue.* The decision of *Arcand* in particular was an explicit example of the Court's resistance to consider *Gladue* as a meaningful factor. In fact, *Gladue* was only mentioned in the footnotes. This was a lengthy decision that directly involved an Indigenous person, but the consideration and analysis of *Gladue* was almost non-existent. This decision in particular stated that a person's overall moral blameworthiness should reflect the seriousness of the crime. This statement alone left no room for an analysis of *Gladue.*

A major leap was taken by the Alberta Court of Appeal in the decision of *Okimaw.* The Court thoroughly explored Mr. Okimaw's systemic and background factors and attempted to understand how those circumstances brought him before the court. This decision engaged in a detailed analysis of *Gladue,* a major aspect that was missing from the decision of *Arcand.* While this decision can be applauded for its meaningful engagement of the *Gladue* principles, it is also significant to recognize the lack of understanding of the case law in this area that continues to persist in the courtrooms. For instance, it is the role of the sentencing judge to make the connection between an individual's moral blameworthiness and the offences committed, yet the sentencing judge in this case placed the onus upon the *Gladue* report writer. It is the obligation of the court to make this connection, it is not upon the accused nor is it upon the *Gladue* report writer. One must not forget that one of the main reasons for this decision was because the sentencing judge failed to give weight and consider a meaningful inclusion of *Gladue.* This resulted in the decision being taken to the Court of Appeal, where more resources were dedicated to a single case. With a better understanding of the principles of *Gladue,* courts could allocate these resources elsewhere to improve efficiency.

Turning to the Saskatchewan Court of Appeal, many positive shifts were made with respect to prong one of *Gladue*. Unlike the decision of *Arcand,* the Saskatchewan Court of Appeal decision *Chanalquay* explicitly stated that *Gladue* factors can speak to the culpability of an Indigenous offender. This shows some progress in the Province of Saskatchewan. However, throughout our examination of *Chanalquay,* there was no meaningful interpretation of prong two of *Gladue* and what that should look like in the sentencing of an Indigenous person. The term

restorative justice was often used, but the Court failed to define what a restorative approach to sentencing could be. The same concern arose in the decision of *Lemaigre*. The decision of *Lemaigre* also failed to engage in any meaningful discussions with the Indigenous perspective regarding restorative justice and the sentencing of an Indigenous person. An interesting shift is identified in the decision of *R v J.P.* at the Saskatchewan Court of Appeal with regards to the implementation of the *Gladue* principles. For instance, we see the courts not only exploring J.P.'s systemic and background factors in a meaningful way, which included Gladue and his FASD diagnosis, but we also observe the Court examine how those personal circumstances brought J.P. in front of the courts. While there was a detailed analysis of *Gladue* conducted by the Appellate Court, there still remains a concern that the legal profession overall is still misinterpreting the principles that flow from *Gladue.* In particular, it must be noted that *Gladue* should not be used as a tool to disadvantage Indigenous people.

In reviewing the previous decisions mentioned from Saskatchewan, not much more than the mentioning of the term restorative justice is discussed. A similar, but different approach was taken in Manitoba. For instance, the Court of Appeal in Manitoba in the decision of *Peters* was striking. The decision revealed a good understanding of both prongs of *Gladue.* The Court made good interactions with respect to Mr. Peters' systemic and background factors, as well as the integration of restorative justice when crafting his sentence. Unfortunately, not all decisions are interpreted this well with respect to *Gladue.* This appeared to be the case with the decision *McIvor*. Based on my reading of the case, the dissent appeared to have a better understanding of the realities that existed within Mr. McIvor's life and the efforts he made to better himself. Ultimately, the majority decision is what stood at the end of the day for Mr. McIvor. Based on these two Manitoba decisions it is clear that our courts and the legal profession overall still struggles with how to interact and engage with section 718.2(e) in any meaningful way.

In the examination of these decisions, it is clear that our Prairie courts are failing in their implementation of prong two of *Gladue,* which is an imperative component of sentencing for an Indigenous person. There also continues to remain a concern that the legal profession overall continues to misapply the principles of *Gladue.* It is recommended that in order to adequately integrate the principles of *Gladue* into the sentencing of an Indigenous person, the following is required: greater clarity and understanding around the case law, education regarding the

application of the *Gladue* principles, and the inclusion of the Indigenous perspective through consultation with Indigenous people and their communities.

CHAPTER 6: AN EXPLORATION OF CANADA'S INDIGENOUS COURTS: A COMPARISON BETWEEN BRITISH COLUMBIA AND ONTARIO, AND THE PRAIRIE PROVINCES

The urge to incorporate more Indigenous laws and initiatives into the Canadian criminal justice system has been a long-standing cry across Canada for centuries. This type of reform was mentioned as early as the signing of Treaty 6, right into the latest discussions of the decision of *R v Gladue* in 1999. These calls are even more urgent within the prairie Provinces of Alberta, Saskatchewan and Manitoba, which are undergoing what can be called a prairie province epidemic with the over incarceration of their Indigenous people. The purpose of this chapter is to look at the Provinces of Ontario and British Columbia to determine what they are doing and comparing that to the prairie Provinces. The first part of this chapter begins by exploring Canada's early relations with Indigenous people and the justice system. This chapter then proceeds to discuss and evaluate four Indigenous courts across Canada, including the Gladue Court of Ontario, the Cknucwentn First Nations Court in Kamloops, British Columbia, the Tsuu T'ina Court of Alberta, and the Cree Court of Saskatchewan. This information is then used to make the inference that the more Indigenous courts there are in a given province, the more likely these courts are to effectively meet the needs of Indigenous people. The evaluations of these courts are then used to recommend a possible working model for Saskatchewan and the other prairie provinces.

6.1: Canada's relations with Indigenous People, justice, And Indigenous courts

The first part of Chapter Six will begin by outlining some of Canada's initial gestures to include Indigenous people in upholding the justice system. This is observed in the Saskatchewan Treaties, as well as section 107 of the *Indian Act*.[389] However, as it is known, efforts to uphold justice within Canada was and is not only rooted in colonial practices, but in Indigenous laws. Unfortunately, colonial practices have intentionally overshadowed Indigenous laws. This can be observed in the Treaties of Saskatchewan.

Saskatchewan Treaties

Gladue is not the only call that was made in Canada for a joint effort in the pursuance of justice.[390] One of the earliest recognitions of Indigenous peoples' assistance in addressing the

[389] *Indian Act, RSC* 1985, C I-5, s 107 [*Indian Act*].
[390] *Gladue*, *supra* note 2.

issues of justice was set out in all of the numbered Treaties of Saskatchewan in some variation. These were known as the "peace and order clauses."[391] Treaty 6 in particular states that:

> They [the undersigned Chiefs on their own behalf and on behalf of all other Indians inhabiting the tract within ceded] promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites…and that they will aid and assist the officers of her Majesty in bringing to justice and punishment any Indian offending the stipulations of this treaty, or infringing the laws in force in the country so ceded.[392]

The clause is interesting because at first "Her Majesty" seems to be protecting her interests, ensuring that their laws would be upheld. If one were to only look at this clause from the first half, it could be read as having only regard for "Her Majesty's" laws. As you read further, there is a lot of room left for interpretation. In some ways, that's not a good thing, but in other ways it is. In interpreting this clause of the treaty, one must narrow in on the latter half of this paragraph. It speaks directly to having the Indigenous people of the Treaty 6 territory assist the "officers of her Majesty" in bringing forth justice whenever another Indigenous person within Treaty 6 violates the laws of Canada. Not only does this treaty designate Indigenous people with the authority to bring forth justice in relation to their people on behalf of "Her Majesty," but it also empowers Indigenous people to assist in providing the punishment for the violation that was made. Despite the intentions behind this clause, whether that be to protect "Her Majesty" or to give "Her Majesty" more authority, if this clause were to be interpreted in modern day, there is likely a lot of power in favour of Indigenous leadership.

In a perfect world, this clause would be interpreted to mean that Indigenous people have power over what justice and punishment looks like for their people. This clause even goes as far as to use the word "will" in ensuring that Indigenous people follow through with their assistance. The treaty states that the Indigenous people "will aid and assist." What does that mean? According to the Oxford Dictionary, "aid" means "help, assistance, esp. of a practical nature."[393] To "assist"

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[391] Kent Roach, *Canadian Justice, Indigenous Justice: The Gerald Stanley and Colton Bushie Case* (Montreal &Kingston: McGill-Queen's University Press, 2019) at viii Foreword [*Roach*].
[392] *Copy of Treaty No 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions,* 23 & 28 August 1876 and 9 September 1876, (entered into force 24 February 1877) [*Treaty 6*].
[393] *The Oxford English Dictionary, sub verbo* "aid", online: < http://www.oed.com/view/Entry/4302?rskey=9zs2rH&result=4&isAdvanced=false#eid>.

is defined as "An act of assistance; aid, help."[394] Since both of these words use the word "help," it would also be useful to look at the definition of the word "help." Help is defined as "the action of helping; the supplementing of action or resources by what makes them more efficient."[395] One could argue that in order to provide one's assistances and aid would require their services and their resources. Arguably, this would include Indigenous ways of understanding justice and punishment. It is likely that Indigenous services and resources could include asking Indigenous people to incorporate their Indigenous healing methods and to describe what sort of punishment is acceptable in the circumstances of the offence. This clause, while it describes a joint effort, specifically calls upon Indigenous people to deal with the legal matters of their people not only in relation to the treaty, but also criminal law.

The translation of words from an Indigenous language to English comes with many consequences. The meaningfulness and strength of certain words are lost in translation. It would be interesting and powerful to have viewed this Treaty through the language and perspective of the Indigenous people of that time. One could imagine that much of the meaning behind the Treaty was lost in translation for Indigenous people. The importance of language in the Treaties was also mentioned by John Borrows in the Foreword written in Kent Roach's book "Canadian Justice, Indigenous Justice: The Gerald Stanley and Colten Boushie case," he states:

> I learned that in the Cree language, the Treaties' "peace and order" promise is understood by the word *miyo-wicehtowin. Miyo wichetowin* asks, directs, or requires people to conduct themselves in a manner that creates positive and good relations in all their relationships. Similarly, *pastahowin*, interpreted as "crossing the line," … It means that certain things cannot be done without experiencing bad consequences…*wahkohtowin*…conveys the idea that laws and duties must be followed to have good relationships…[396]

One can see from this statement that one or two words in the Cree language have great meaning, and sometimes a word, sentence or explanation in the English language is still unable to give effect to the true meaning of the word. Arguably, even with the lengthy sentences that attempt

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[394] *The Oxford English Dictionary, sub verbo* "assist", online: < http://www.oed.com/view/Entry/11950?rskey=reSt6S&result=1#eid>.
[395] *The Oxford English Dictionary, sub verbo* "help", online: < http://www.oed.com/view/Entry/85739?rskey=yY7kyA&result=1&isAdvanced=false#eid>.
[396] *Roach, supra* note 391.

to define these words, their true meaning is still lost as it is described in English. This holds true for many, if not all, Indigenous languages.[397]

Section 107 of the *Indian Act*

At the same time treaty 6 was being negotiated and signed, the *Indian Act* became law in 1867.[398] In 1881, a few years after the Treaty 6 negotiation, Section 107 of the *Indian Act* was enacted.[399] This section speaks specifically to the "Appointment of justices" and states:

> The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to
>
> (a) any offence under this Act; and
> (b) any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.[400]

It appears that the *Indian Act* was never intended to invest in the purpose of the Treaty 6 clause relating to the involvement of Indigenous people in the pursuance of justice.[401] The basis of this argument is partly founded on the fact that following the signing of Treaty 6, the *Indian Act* is enacted and the amendments of it are used as oppressive tools to assimilate, segregate and eradicate Indigenous people and their culture. The *Indian Act* in 1927 specifically prohibited Indigenous people from "hiring lawyers to pursue land claims."[402] Unfortunately, what results from section 107 is yet another tool to control Indigenous people. As Jonathan Rudin notes, "section 107…was never intended to allow Indigenous people to exercise control over justice

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[397] It is difficult to say with confidence exactly what this treaty means for the Métis people of the area. It begs the question of whether this Nation is included in its discussion at all. On the other end, this may actually leave a lot of room for the Métis people to discuss what their legal autonomy could look like, as this clause of the treaty does not specifically define the role of the Métis people.

[398] "Appendix B: Indian Act Timeline," online: Pulling Together: Foundations Guide <https://opentextbc.ca/indigenizationfoundations/back-matter/appendix-b-indian-act-timeline/> [*Indian Act Timeline*].; *Indian Act, supra* note 389.

[399] Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practioner's Handbook,* (Toronto: Emond, 2019) at 237 [*Rudin, IPCJS*].; *Indian Act Timeline, supra* note 398.

[400] *Indian Act, supra* note 389.

[401] *Ibid.*

[402] *Indian Act Timeline, supra* note 398.

matters; it was designed to allow non-Indigenous people to maintain control over Aboriginal people."[403]

For the majority of history, it is true that section 107 was used as avenue to give Indian agents the powers of the justice of the peace.[404] However, despite the resistance to include Indigenous people and the initial intentions of this section, in the 1980s, almost 20 years before *Gladue,* this section became a potential avenue for Indigenous people to gain control over their justice matters.[405]

When reviewing section 107, a justice of the peace's power ranges from offences relating to the *Indian Act,* to a broad range of *Criminal Code* offences relating to the "cruelty to animals, common assault, breaking and entering and vagrancy."[406] Since there is no specific description of who can fall within the Justice of the Peace position, even though in the earlier periods, it was the Indian agents, this has left room to argue for Indigenous control over Indigenous community justice. It is important to note though, that this authoritative range seems to only go as far as offences committed by an Indigenous person, which does not extend to when a non-Indigenous person commits an offence to another non-Indigenous person.[407] This is unfortunate as one could assume that even two non-Indigenous people could benefit from an Indigenous justice system process.

One of the first Indigenous groups to exercise the powers of section 107 was the Mohawk of Kahnawake and their establishment of the Kahnawake Court.[408] The powers of this Court have grown to extend beyond what section 107 initially had to offer and has included most if not all summary offences, such as "assault, mischief, theft, and breach of probation and peace bonds."[409] These powers also include cases involving "band by-laws and traffic regulations."[410]

Despite these developments, it is important that the restrictions that exist while working within a colonial system are not forgotten. One must keep in mind the intentions behind the *Indian Act* and the fact that section 107, like many other sections, may not be the right place in which

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[403] *Rudin IPCJS, supra* note 399 at 237.
[404] *Ibid.*
[405] *Ibid.*; *Gladue, supra* note 2.
[406] *Indian Act, supra* note 389.; *Rudin IPCJS, supra* note 399 at 238.
[407] *Rudin IPCJS, supra* note 399 at 238.
[408] *Ibid.*
[409] *Ibid.*
[410] *Ibid.*

Indigenous groups build a long-term justice system. Some have argued that section 107 is only a short-term solution for the foundation of Indigenous justice systems.[411] This concern was raised by the Royal Commission on Aboriginal Peoples in 1996, in *Bridging the Cultural Divide*.[412] It was noted that the special justices of the peace were never intended to be filled by Indigenous people, and these roles were intended to be used as another form of assimilation.[413] This same concern was also noted by the Aboriginal Justice Inquiry of Manitoba:

> The restrictions that exist in the Act are such that it offers little promise for the long-term future and is unlikely to satisfy current demands from First Nations to establish their own justice system. At most, it offers a short-term interim measure and an indication that a separate court system can function readily in Indian reserves without causing grave concerns within the rest of society or the legal community.[414]

Another major restriction in continuing forward with this process and using section 107 as a foundation for Indigenous justice, is that it excludes some Indigenous groups, such as the Métis. One must emphasize that it is not being said that the Métis should now be a part of the *Indian Act*, because the history of the development of this legislation has made many Indigenous groups frustrated with its enactment, and it would likely be difficult to want to be a part of an oppressive policy in the first place. And it is not being said that the Métis have not suffered from these oppressive policies as well, but there are restrictions that exist while working within a colonial system that has divided Indigenous people in a systematic way.

One must agree that section 107 courts are only the beginning to finding a long-term solution to re-incorporating Indigenous justice systems in Canada. Whether Indigenous justice systems are included within section 107 or in other ways, it is important to recognize the momentum and traction that these courts can have in beginning the shift of a whole country's perspective on Indigenous justice. It is these types of discussions and initiatives that will begin the shift in our legal systems. As you will come to know this type of traction continued on across Canada over the years to come, and what becomes known as the transition into Indigenous courts, Indigenous Justice programs and alternative measures.

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411 *RCAP*, *Bridging*, *supra* note 34 at 103-104.
412 *Ibid.*
413 *Ibid.*
414 *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Aboriginal Justice Inquiry of Manitoba, 1991) vol 1 at 305 [*Inquiry of Manitoba*].

Elders and Indigenous courts

While Treaty 6 and the *Indian Act* had the potential for significant advancement with regards to the inclusion of Indigenous healing, one must not forget that Indigenous laws were already long established. The introduction of Indigenous laws and healing were not always rooted in colonial practices, and it is superficial to think that Indigenous people did not have their own Indigenous legal processes before the imposition of colonial legal systems. In fact, "over thousands of years, self-determining Indigenous justice and governance systems were created and refined to address the needs of diverse societies."[415] Even with the many efforts to eradicate Indigenous people and their practices, these systems continued on after colonization and are still being practiced today. Fortunately, these traditions are carried on through Elders and Knowledge Keepers. These leaders were the original source of Indigenous laws and healing for most, if not all Indigenous groups. Whenever one thinks of justice, knowledge keepers of Indigenous laws such as Elders are often the first to come to mind. One cannot discuss the introduction of Indigenous laws without having the discussion of Elders or knowledge keepers, as they go hand in hand. As noted by Shelly Johnson in *Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence,* "Elders are the embodiment of Indigenous law."[416] It is essential that decisions being made about Indigenous people meaningfully include the input from Elders or Knowledge Keepers.[417] Action must be taken for "re-establishing, recreating and reclaiming traditional Indigenous problem solving approaches to conflict resolution and healing."[418]

6.2: The evaluation of Indigenous courts

Methodology used for evaluating the Indigenous courts

The methodology that will be used in this chapter is based on a qualitative approach. A qualitative approach is commonly understood as describing "the qualities or characteristics of something."[419] It cannot be as easily codified into numbers, but it can provide details relating to

[415] Shelly Johnson, "Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence +" (2014) 3:2 Journal of Indigenous Social Development 1 at 1 [*Johnson*].
[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid* at 2.
[419] *Madrigal, supra* note 125.

"human behavior, emotion and personality characteristics" that cannot be done using the quantitative method.[420] More importantly, its data can collect information relating to the needs and feelings of a particular group.[421] This type of data is often collected by observation, "such as ethnography or structured interviews."[422] Once the data is collected, instead of looking at trends through statistics, researchers using the qualitative method look to "statements that are identical across different research participants."[423] It is said that "hearing a statement from just one participant is an anecdote; from two, a coincidence; and hearing it from three makes it a trend."[424] This is the method used for evaluating the Indigenous courts.

This analysis was by no means an exhaustive list or description of each of these Provinces' initiatives, rather they have strategically been chosen according to the earlier work done in Chapter Four. Tables 4.4 and 4.5 of Chapter Four compared Indigenous admissions out of 100,000 Indigenous people. The purpose of that chapter was to see out of 100,000 Indigenous people within a certain province, how many Indigenous people are expected to be admitted into corrections. The prairie Provinces really stuck out in these findings. When comparing the prairie Provinces findings, other Provinces like British Columbia and Ontario were also striking. These Provinces stuck out in two different ways: 1) the prairie Provinces appeared to be incarcerating and admitting its Indigenous population at high percentages and 2) Ontario and British Columbia, even with being the two Provinces with the highest Indigenous population, admit and incarcerate their Indigenous people at lower percentages. What these statistics can tell us is that "something different" is happening in the Provinces of Ontario and British Columbia that seems to be working, and is being reflected in their lower incarceration percentages.

Therefore, once the research for Chapter Four was completed, I decided to look at what sort of initiatives were available in the Provinces of British Columbia and Ontario that might be contributing to those Provinces' success. What was found was that British Columbia and Ontario together hold nineteen Indigenous courts within their Provinces; Ontario has thirteen and British Columbia has six.[425] The prairie Provinces, on the other hand, have three combined, two in Alberta,

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[420] *Ibid.*
[421] *Ibid.*
[422] *Ibid.*
[423] *Ibid.*
[424] *Ibid.*
[425] *Rudin IPCJS, supra* note 399 at 240-251.

one in Saskatchewan and none in Manitoba.[426] It is these Provinces that will be explored and evaluated, with particular attention being paid to their selected Indigenous courts. Each Indigenous court will be described in detail, outlining its initiatives, its process, and if available, information relating to who funds the court will be looked at as well. Once this information is provided, each court will be concluded by an evaluation of its success, using primarily testimonial supports.

Determining success

At first, the main objective of this chapter was to determine whether Indigenous courts have proven to be successful in lowering recidivism and incarceration percentages for Indigenous people. What is quickly realized though is that the measurement of success can be defined in many other ways that does not necessarily require a connection to be made to recidivism and incarceration percentages. The reason for this determination is because even Correctional Service Canada has found it difficult to define success and recidivism rates as they relate to programming. Correctional Service Canada says that "we run into more problems when we try to evaluate the success of particular correctional programs or correctional systems as a whole."[427] They also admit that it is difficult to answer the question of the "overall recidivism rate in Canada."[428] The reason for mentioning Correctional Service Canada's opinions on recidivism and success is not to compare the current justice system to the processes found within Indigenous courts, but rather to have a discussion on expectations. It is simple, if Correctional Service Canada is not expected to measure success using recidivism rates, then Indigenous courts should not be expected to either. One must not delegitimize the success of Indigenous courts because of the absence of recidivism rates.

Another question remains and that is what is incarceration doing that deems it to be an effective tool of measuring success? A study done by the National Crime Prevention Centre on "Incarceration in Canada," discussed three main theories that support incarceration "as an effective means of decreasing crime rate," including individual deterrence, general deterrence, and incapacitation.[429] The first theory, individual deterrence is where "the prisoner may be deterred by

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[426] *Ibid.*

[427] "Forum on Corrections Research," online: So You Want to Know the Recidivism Rate <https://www.csc-scc.gc.ca/research/forum/e053/e053h-eng.shtml>[*Recidivism*].

[428] *Ibid.*

[429] "Incarceration in Canada," online: < http://publications.gc.ca/collections/Collection/J73-6-1997E.pdf> [*Incarceration*].

the experience of incarceration and then returned to life in the community at the end of the sentence."[430] Secondly, general deterrence is where "the threat of punishment, especially imprisonment, will prevent people from committing crimes in the first place."[431] Finally, the theory of incapacitation is where "crimes can be prevented by removing offenders from society and keeping them in prison."[432] The study found that the first theory has proven to be ineffective and community based probations orders were deemed to be just as or more effective in certain cases than individual deterrence.[433] It was also found that general deterrence is "an expensive form of punishment" and alternative forms of punishment are to be looked at, as they are cheaper and can be as effective as incarceration in preventing crime.[434] According to this study, out of the three theories, incapacitation was proven to be the most successful, but the study still indicated that "not all offenders re-offend' so this theory "must be applied selectively" as it can be a major unnecessary expense on the government.[435] While all of these theories suggest that incarceration rates is the standard of measurement to be met, they also suggest something else, that incarceration is not working and there are other effective alternatives available that are just as or more effective at addressing criminal activity.

It is true and the reality is that incarceration is not working for many people that confront the criminal justice system, but it is especially true for Indigenous people, a cry that could not have been clearer than what was made in *Gladue*:

> …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 of internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.[436]

As noted by Hilary Peterson, it becomes clear then that recidivism and incarceration rates are not the required measurements to define success, because we already know "…traditional mainstream courts do not work for Indigenous people…"[437] We have gone far too long defining

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[430] *Ibid.*
[431] *Ibid.*
[432] *Ibid.*
[433] *Ibid* at 3.
[434] *Ibid.*
[435] *Ibid.*
[436] *Gladue, supra* note 2 at 724-725.
[437] *Peterson, supra* note 352 at 55-56.

success based on how it compares to the current criminal justice system, that we must stop legitimizing Indigenous systems only as they stand next to it. Peterson also raises this concern, "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."[438] Peterson goes on to describe a study that was conducted in 1999 by Public Safety Canada, which in short, determined that imprisonment does not reduce recidivism and in fact the opposite trend has been exposed and Indigenous people are suffering as a result.[439]

One might ask, if not recidivism and incarceration rates then how is success defined? In order to effectively define a measurement of success in relation to Indigenous courts, one must first determine their purpose. After some research, one can gather that the purpose of these courts is to heal, not only the individual, but the individual's community. It is about finding a way to healthier people and healthier communities. What will soon be uncovered throughout this research is that the courts that were chosen for evaluation have been proven to be successful in meeting their purposes. Evaluations of the Indigenous courts are primarily founded on testimonials, which will be determined to be legitimate sources of measuring their success.

6.3: Ontario- The Gladue (Aboriginal Person) Court and the Gladue Court Case Worker

The first Province that will be looked at is Ontario. In Canada, Ontario is at the forefront for the highest number of Indigenous courts in the country.[440] In fact, Ontario has more Indigenous courts within its Province alone than there are Indigenous courts all together in the other remaining provinces. According to Jonathan Rudin's work, there are twenty-four Indigenous courts in total spanning across Canada.[441] The Province of Ontario holds thirteen of those twenty-four Indigenous courts. That means that the other Provinces that do have Indigenous courts are sharing the other eleven. It is important to mention though that while Rudin outlines twenty-four Indigenous courts, there are likely a myriad of similar initiatives that are yet to be discovered through other Constitutional arrangements or Treaty processes.

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[438] *Ibid* at 56.
[439] Department of Public Safety and Emergency Preparedness, "The Effect of Prison on Criminal Behvaiour: research summary" (1999, updated 31 January 2018) 4:6 Public Safety Canada [*DPSEP*] cited in *Ibid*.
[440] *Rudin IPCJS, supra* note 399 at 243.
[441] *Ibid* at 240-251.

Nonetheless, within the city of Toronto alone there are five Indigenous courts.[442] Six of the remaining Indigenous courts are located south of Toronto, and the other two are in Thunder Bay and Ottawa.[443] For the purposes of this paper, out of these thirteen Indigenous courts, The Gladue (Aboriginal Persons) Court located "at the Old City Hall" has been chosen for closer examination. This Court has been strategically chosen as it has been the most studied and has ran the longest out of all the Indigenous courts of Ontario.[444]

As a response to the Supreme Court of Canada's call made in *R v* Gladue[445] in 1999, preliminary discussions arose between Judges and Aboriginal Legal Services at the Annual Conference of the Canadian Association of Provincial Court Judges around a specialized court that would appropriately address and apply the principles of *Gladue*.[446] For a year, "a group of judges, academics and community agencies" and an Aboriginal courtworker, including, Justice Patrick Sheppard, Professor Kent Roach and Jonathan Rudin, got together to discuss this matter and how to meaningfully address the *Gladue* decision.[447] What came of these discussions is what is now known as the Gladue (Aboriginal Persons) Court.

In these preliminary discussions, the aim of the Court was "to establish this criminal trial court's response to Gladue and s.718.2(e) of the Criminal Code and the consideration of the unique circumstances of Aboriginal accused and Aboriginal offenders."[448] The goal of the Court was, and still is, to address the unique needs of Indigenous offenders. The Gladue Court is available to all Indigenous people, whether First Nation, Métis, or Inuit, who wish to attend.[449] This does not mean that all Indigenous people are mandated to attend the Gladue Court, as they are still free to choose where they want their matter to be heard.[450] Typically though, once the Indigenous person has

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[442] *Ibid* at 243.
[443] *Ibid*.
[444] *Ibid*
[445] *Gladue*, *supra* note 2.
[446]*Rudin IPCJS, supra* note 399 at 243.; Judge Brent Knazan, "Sentencing Aboriginal Offenders in A Large City- The Toronto Gladue (Aboriginal Persons) Court" (delivered at the National Judicial Institute Aboriginal Law Seminar in Calgary, 23-25 January 2003) [unpublished], online: < https://www.aboriginallegal.ca/assets/gladuesentencingpaper.pdf> [*Knazan*].
[447] Jonathan Rudin, "*Gladue* (Aboriginal Persons) Court Ontario Court of Justice- Old City Hall Fact Sheet", Note, (2001), online: < https://www.aboriginallegal.ca/assets/gladuefactsheet.pdf> [*Fact Sheet*].; *Knazan, supra* note 446 at 3.
[448] *Fact sheet, supra* note 447.
[449] *Ibid.; Knazan, supra* note 446 at 6.
[450] *Fact sheet, supra* note 447.

followed through with the Gladue Court process, the matter is to continue there until it is concluded.[451]

The Gladue Court was initially scheduled to be held twice a week on Tuesday and Friday afternoons, but was later scheduled "for two full days a week."[452] One could assume that the increased schedule was likely due to the Court's high demand. The first cases to be heard at the Gladue Court took place on October 2001.[453] The matters heard within the Court are quite identical to what one would hear in the traditional Court room process at the Old City Hall. However, what distinguishes the Gladue Court is that it offers all of these same matters "in one court: bail hearings and bail variations (with consent of the Crown Attorney), remands, trials and sentencing."[454]

One of the main strategies of the Court is to bring "all Aboriginal offenders into one court where the resources of the Aboriginal community are readily available."[455] What makes this Court truly unique is the resources and experts that are available to the Court. Those who are working for the Gladue Court are experts in understanding the "range of programs and services available to Aboriginal people in Toronto."[456] Having this expertise will ensure that the judges are able to craft a meaningful sentence, because "the information required to develop such responses will be put before the court."[457] One could assume that these discussions are in place in the attempt to meet the restorative justice aspect of sentencing requested by *Gladue.*[458]

The legal figures found in the Gladue Court are very similar to what you will find in a regular provincial courtroom, such as a judge, a Crown prosecutor, duty counsel, and an Aboriginal court worker.[459] But what is unique to this process is the training that took place before the introduction of the Court, where each judge and Duty Counsel was trained by Aboriginal Legal services' staff and an Elder, and the creation of the position of the Gladue Court caseworker.[460] The person in this position "assists in the preparation of sentencing reports to the court," they are

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[451] *Ibid.*
[452] *Rudin IPCJS, supra* note 399 at 243-244.; *Ibid.*
[453] *Rudin IPCJS, supra* note 399 at 244.
[454] *Fact sheet, supra* note 447.
[455] *Knazan, supra* note 446 at 2.
[456] *Fact sheet, supra* note 447.
[457] *Ibid.*
[458] *Gladue, supra* note 2.
[459] *Knazan, supra* note 446 at 3-4.
[460] *Ibid* at 4.

required to find "out about available resources for sentencing" and they are also seen to "complement" the "Aboriginal courtworker who already" works "in the courthouse."[461]

The strong involvement of the Aboriginal courtworker and the Gladue Court caseworker with the accused is unique to the Gladue Court. At the very beginning of the process, the worker, whether that be the Aboriginal courtworker or the Gladue Court caseworker, is made available to the accused, and is able to "approach the Crown, defence, and address the Court."[462] If the accused has family present, the worker can also directly seek their contribution if necessary.[463] With this expertise, the worker is able to transform the sentencing process in a truly meaningful way. This transformation is best understood in the form of a Gladue Report, which is "about the offender's Aboriginal background and the factors in that background that may have contributed to the commission of the offence."[464] The Gladue Court caseworker is specifically trained in rapport building and in questioning, so that they know what kinds of questions need to be asked in order to gather the information needed for the judge to come to a fit sentence. All of this information is gathered to assist the judge "in understanding the particular circumstances of" that Indigenous offender.[465] With their findings, the Gladue Court caseworker then provides recommendations regarding sentencing for the judge.[466]

Funding the Gladue Court

According to a fact sheet on the Gladue Court from October 3, 2001, the only new funding that was required for the development of this Court was for the position of the Gladue Caseworker.[467] At the time this fact sheet was made, the Gladue Court was to be seen as redistributing pre-existing resources.[468] These pre-existing resources include, "a dedicated Crown Attorney, Duty Counsel, Probation and Parole Officer and court clerk," and a rotation of judges."[469] As for the Gladue Caseworker, there are three positons that are being funded. The first two positions are funded by Legal Aid Ontario and the third is being funded by the Ministry

[461] *Fact sheet, supra* note 447.; *Ibid.*
[462] *Knazan, supra* note 446 at 8.
[463] *Ibid.*
[464] *Ibid* at 9.
[465] *Ibid* at 9-10.
[466] *Ibid* at 10.
[467] *Fact Sheet supra* note 447 at 2.
[468] *Ibid.*
[469] *Ibid.*

of the Attorney General.[470] Aboriginal Legal Services of Toronto's contribution to the daily developments and activities of this Court must also be mentioned when discussing funding. Aboriginal Legal Services employs the Aboriginal Court worker and the Aboriginal Court Caseworker, who are both heavily involved in the Gladue Court process.[471]

The Gladue Court process

The first process that is conducted in the Gladue Court is a case management approach, where diversion has become one of the main aspects of its entire process.[472] The process begins with the accused person, whether Indigenous or non-Indigenous, entering the courtroom because of a charge or multiple charges laid by the police.[473] At this point, two things can happen. On one end, if the individual is released on a promise to appear, following the charges that have been laid by the police, this individual "is given a hearing date" and must make their first appearance in "101 court or 103 court," (these are not in the Gladue Courtroom).[474] On the other end, if the individual identifies as an Indigenous person, the individual "will be informed of" their "option to appear in Gladue Court."[475] If this option is chosen, they are then "directed to appear in Gladue Court."[476] At this stage, another process may occur, where the individual is "diverted without a hearing" instead.[477] If this occurs the individual's charges may be stayed or withdrawn as a result of diversion.[478] At this point, the Aboriginal court worker plays a very significant role. The goal of the Aboriginal court worker at this stage is to liason with the Crown "regarding a possible diversion."[479] If the Crown is not satisfied that this matter should be diverted, the individual proceeds with their matter in the Gladue Court, where "one or more hearings take place."[480] Once the individual is directed to the Gladue Court, the matter can be decided "in one

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[470] See "Gladue Program Evaluation," online: < https://www.aboriginallegal.ca/gladue-evaluations.html> [*GPE*].
[471] *Fact Sheet supra* note 447 at 2.
[472] Scott Clark, "Evaluation of the Gladue Court, Old City Hall, Toronto" (Toronto: Aboriginal Legal Services, 2016), online: < https://www.aboriginallegal.ca/assets/gladue-court-evaluation---final.pdf> at 6-7 [*Eval. Old City Hall*].
[473] *Ibid.*
[474] *Ibid.*
[475] *Ibid.*at 7.
[476] *Ibid.*
[477] *Ibid.*
[478] *Ibid.*
[479] *Ibid.*
[480] *Ibid.*

of three ways:" 1) charges are withdrawn or stayed, or 2) the accused enters a guilty plea or 3) if a guilty plea is not entered, the matter is adjourned to trial Court.[481]

Another situation that occurs once the police have laid charges "involves the individual being remanded into custody."[482] The accused is then directed to a first appearance in "101 court or 103 court."[483] If the individual identifies as Indigenous, the Aboriginal court worker is particularly beneficial, as they begin the process of developing "a release plan," otherwise known as "a plan of care" for the individual.[484] At this point in time, three things can happen: 1) the individual is diverted, 2) a bail hearing takes place in the Gladue Court or 3) if the matter is timely, the bail hearing may end up in a "regular bail court."[485] These matters are typically "referred to the Toronto Bail Program, Gladue Supervision which is designed to cover bail..."[486] On one end, if bail is granted with conditions, the individual is released and provided with a court date in the Gladue Court.[487] On the other end if bail is denied, they are remanded."[488] Even at this stage, whether bail is granted or not, "diversion and the withdrawal or staying of charges" still remains a possibility.[489] If the matter takes place in Gladue Court, there still remains three possible outcomes: 1) charges are withdrawn or stayed, 2) the accused enters a guilty plea, or 3) if a guilty plea is not entered, the matter is adjourned to trial Court.[490] In either of these two processes mentioned, if a guilty plea is entered or a finding of guilt is made, Aboriginal Legal Services may prepare a Gladue Report for that individual.[491]

An evaluation of the Gladue (Aboriginal Persons) Court

The reason for evaluating the Gladue Court is to determine whether it has been successful in meeting its purpose. Since the Gladue Court was created in response to the *Gladue* decision, it

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[481] *Ibid.*
[482] *Ibid* at 9.
[483] *Ibid.*
[484] "A release plan is designed to recognize the circumstances of the individual and to meet that person's specific needs; for example, anger management or substance abuse counselling. It could include diversion to the Community Council at Aboriginal Legal Services" defined in *Ibid* at 9.
[485] *Eval. Old City Hall, supra* note 472 at 9.
[486] *Ibid.*
[487] *Ibid.*
[488] *Ibid.*
[489] *Ibid.*
[490] *Ibid* at 7.
[491] See "Aboriginal Legal Services," online: Gladue Court <https://www.aboriginallegal.ca/gladue-court.html> [*ALS*].

makes sense that lowering incarceration rates would in fact be one of its overall purposes.[492] Fortunately though, initial goals in the development of this Court were set out thoroughly in an update on the Toronto Gladue (Aboriginal Persons) Court in 2005.[493] The goals for the Gladue Court included:

- Identifying Aboriginal accused,
- Taking advantage of available resources,
- Expanding the use of bail to keep Aboriginal offenders out of jail, and
- Creating a welcoming atmosphere for Aboriginal persons dealing with criminal justice.[494]

Goal #1: Identifying Aboriginal accused

According to a 2005 update on the Toronto Gladue (Aboriginal Persons) Court, these goals were found to have been fulfilled.[495] For the purposes of this evaluation, each goal will be addressed individually. The first goal "identifying Aboriginal accused" was initially in place, among other reasons, to address the issue of "knowing when an Aboriginal person was before" the Court.[496] The reason for this goal is to ensure that every Indigenous person before the Court is being given the proper defense to which they are entitled, including a proper *Gladue* analysis. The goal here is to also ensure that every Indigenous person is aware of the Gladue Court and its resources. This is especially important because if for some reason the Judge or the Court does not readily identify an Indigenous person, that individual is more likely to advocate for themself if the Gladue Court is publicized. On the other end, one can also infer that the Gladue Court has become quite successful at identifying when an Indigenous person is before the Court. This type of situation can likely be avoided by simply asking the accused the question of, "Whether they are Indigenous?" This issue has been identified and addressed by the update, which emphasizes that "the actual operation of the Court has replaced the original publicity and now it would be difficult for an Aboriginal person to proceed with their case without knowing about the Court.[497] The Court

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[492] Jonathan Rudin, *The Toronto Gladue (Aboriginal Persons) Court An Update, National Judicial Institute, Aboriginal Law Seminar, St John's, Newfoundland and Labrador, April 2005* (St John's, Newfoundland and Labrador, 2005), online:< https://www.aboriginallegal.ca/assets/gladuecourtupdate2005.pdf> [*Rudin Seminar*].
[493] *Ibid.*
[494] *Ibid.*
[495] *Ibid.*
[496] *Fact Sheet, supra* note 447.
[497] *Rudin Seminar, supra* note 492 at 5-6.

has become so busy that each day is full and there have been discussions about expanding the Court "to one more day a week in another courthouse" to reach more Indigenous people farther away from the Centre of Toronto.[498]

Goal #2: Taking advantage of available resources

The second goal, "taking advantage of available resources" has been addressed in a number of ways. As explained in this report, the Gladue Court is sentencing Indigenous offenders differently as directed to sentencing judges by the Supreme Court of Canada.[499] This goal is largely fulfilled by the abundance of resources available to the Court at every stage of its process and the fact that the Court is ready to access these resources when necessary.[500] For one at the very beginning of the process, an Aboriginal court worker is made available at the Court for the purposes of interviewing and screening "each defendant to see if they qualify for diversion."[501] If possible, this screening tool is used as a mechanism to avoid the criminal justice system all together, which can often result in a stay or withdrawal of charge.[502] Diversion can take place both at the case management stage or even after a release plan has been made for a person that is in custody.

Among the Aboriginal court workers are an "Aboriginal Bail Program supervisor, two Ontario Legal Aid duty counsel, and two Crown Counsel," all of whom assist in the release, defense, and the interests of the Indigenous offender.[503] The Aboriginal Bail Program supervisor 'interviews and screens defendants without sureties for eligibility for release."[504] This Toronto Bail Program ensures that eligible individuals are not in custody longer than they need to be. Both the defense and the Crown who take part in this process have been trained and arguably rehearsed to some extent in the realities of the lives of Indigenous people.[505] This training and exposure to the Gladue Court is extremely important when it comes to determining sentences and whether diversion can be an option.

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[498] *Ibid* at 5.; There are now five Gladue Courts in Toronto.
[499] *Rudin Seminar, supra* note 492 at 5.
[500] *Ibid.*
[501] *Ibid.*
[502] *Ibid.*
[503] *Ibid.*
[504] *Ibid.*
[505] *Ibid.*

Another resource worth mentioning here is the Crown Prosecution Manual of Ontario.[506] This manual has gone as far as to create a section specifically dedicated to Indigenous people.[507] The manual outlines that "prosecutors should be familiar with the history of Indigenous peoples and understand the impact of that history on Indigenous accused, victims and communities. Prosecutors should also be aware of the value of restorative approaches to justice."[508] This manual specifically places an obligation on the prosecutors of Ontario to take in account "the unique circumstances of an Indigenous accused, including their background, community history, and the effects of systemic discrimination at many stages of criminal proceedings, including bail and sentencing."[509] Similar types of circumstances, including the "background and systemic factors that brought an Indigenous accused in contact with the criminal justice system," are also to be taken into account when the Crown prosecutor is deciding on whether diversion is an option for the accused.[510] As discovered in the evaluation, it is evident that these policies already exist in the Gladue Court and one can suspect that it is the Gladue Court and its procedures that have driven this section of the Manual. The manual requests that prosecutors be aware of available programming that is specifically directed at meeting the needs of an Indigenous person. In fact, the manual mentions *Gladue* Courts in particular, and lists many of the other programs that have already existed within the Gladue Court, including "restorative justice diversion programs, Aboriginal Court Workers…Friendship Centres, and Indigenous Legal Services."[511]

Going back to the Gladue Court in particular, there is also a Gladue caseworker found in the midst of this process, "employed by Aboriginal Legal Services, who prepares reports for the judge if a defendant is found guilty."[512] This report is what is known as the Gladue Report. A Gladue Report is intended to address the sentencing of an Indigenous person in two ways: 1) to provide information relating to "the unique systemic or background factors which may have played a part in bringing…the Aboriginal offender before the Courts," and 2) "to provide

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[506] Ontario, Criminal Law Division-Ministry of the Attorney General, *Crown Prosecution Manual*, (Ontario: Ministry of the Attorney General, 1 November 2018) [*Manual*].
[507] *Ibid* at 61-65.
[508] *Ibid* at 61.
[509] *Ibid* at 62.
[510] *Ibid* at 62-63.
[511] *Ibid* at 62.
[512] *Rudin Seminar supra* note 492 at 5-6.

recommendations…about some of the programming that is available."[513] For those matters that involve the Gladue Caseworker, there is also available an employee from Aboriginal Legal Services that is "responsible for post-sentence follow up."[514] This process is unique to the Gladue Court as most provincial courts are not likely to follow up with the accused. There appears to be a commitment and a sense of responsibility left not only on the accused, but also Aboriginal Legal Services to ensure the success of these individuals.

Another figure that assists in the process is the Judge. Judges are also a great resource in the Gladue Court as most of the Judges involved have knowledge of the resources available in the province of Ontario. These resources relate to "housing, counselling, shelter, treatment for drug addiction, treatment for alcohol addiction, employment or training, education, contact with elders, training in Aboriginal tradition or spiritual comfort."[515] One could imagine that in having these Gladue reports and knowledge about Ontario resources that Judges are more equipped in coming to an appropriate sentence the first time the Indigenous person is before the Court for that particular charge.

Arguably, when a judge is aware of the circumstances of the accused, they are also better equipped to provide appropriate probation conditions for the accused. Appropriate conditions could include those that do not incidentally burden the accused because of the very nature of their circumstances. For example, if the accused is homeless and as a result is found soliciting in a coffee shop to stay warm for the winter, the court should concern themselves more with finding a shelter for the accused rather than the solicitation. While, in some circumstances, there may be a condition to ban the accused from the coffee shop, I would still argue in this very circumstance that finding housing and shelter are more significant issues. And in some instances, it may not be wise to put an alcohol condition on the individual, because in some circumstances this may result in a continued breach on the part of the accused. The result being that the accused is before the court again. However, the court should also be aware that in some treatment facilities you cannot be on drugs or alcohol to attend. Therefore, even if a no alcohol clause is avoided, the very fact that treatment for alcohol may be on the condition sheet could impede the individual as well.

Goal #3: Expanding the use of bail to keep Aboriginal offenders out of jail

[513] *Rudin IPCJS, supra* note 399 at 269.
[514] *Rudin Seminar, supra* note 492 at 2.
[515] *Ibid* at 2.

Another objective outlined by the report on the Gladue Court is in relation to "expanding the use of bail to keep Aboriginal offenders out of jail." The *Gladue* decision mentioned that there existed "an institutional bias against granting bail to Aboriginal persons."[516] According to the 2005 report, the Gladue Court has attempted to combat this bias.[517] The prosecutors have become very familiarized with and committed to the decision of *Gladue* and as a result, they "work on a form of bail from first appearance."[518] This commitment is also demonstrated in the fact that the Crown prosecutors have often agreed to a release and a plan in cases where the accused is already on their second or third bail.[519] In some cases, the prosecutors themselves even initiate these plans.

As mentioned briefly earlier, the Gladue Court works with the Toronto Bail Program, "a longstanding program for supervising persons who have no sureties, has adapted its guidelines so that Aboriginal persons, even those with histories of failing to appear in court, can qualify for their supervision."[520] The Aboriginal Bail Program supervisor works alongside other workers within the Gladue Court "to find some appropriate release order so that the issue of alternative reasonable sanctions to imprisonment is not predetermined because of pre-trial custody."[521]

Goal #4: Creating a welcoming atmosphere for Aboriginal persons dealing with criminal justice

The final objective as outlined by the 2005 update was "creating a welcoming atmosphere for Aboriginal person dealing with criminal justice." The Gladue Court has also met this goal. Indigenous legal professionals are always present in the courtroom, whether that be the Crown prosecutor, the clerk, the Duty Counsel, the Aboriginal court staff, and the Aboriginal caseworker or court worker.[522] To demonstrate respect for the Indigenous people and their language, "judges, lawyers and staff are encouraged to properly pronounce Aboriginal names and place names."[523] The Court is also unique in that judges always make time to hear the stories of the individuals before them, these individuals are not rushed and if needed the Court will break or sit late to ensure that the accused is being heard.[524] Elders have also given the Court an eagle feather, which is made

[516] *Ibid* at 4.; *Gladue, supra* note 2.
[517] *Rudin Seminar, supra* note 492 at 4.
[518] *Ibid.*
[519] *Ibid.*
[520] *Ibid.*
[521] *Ibid* at 4-5.
[522] *Knazan, supra* note 446 at 15.
[523] *Ibid.*
[524] *Rudin Seminar, supra* note 492 at 6-7.

available to the accused if requested. Smudging is also available upon request.[525] The resources, expertise and the idea of doing something different are the pillars that have defined the success of the Gladue Court.[526] The 2005 Update explains that "there is evidence, anecdotal only, that some Aboriginal offenders are moving toward wholeness and rehabilitation as a result of either their diversion from the justice system in Aboriginal Court or the treatment they received as part of a sentence in the Court."[527] With so much progress being made, there still remains a goal for the Gladue Court to incorporate the perspectives of Indigenous people.[528] At the time of the 2005 update, "almost all sentences have been some familiar variation of the range of available sentences under the *Criminal Code*."[529] However, in addressing the issue of sentencing Indigenous people differently, and accessing existing and available resources, the Gladue Court is a positive response to the decision of Gladue, Parliament, and section 718.2 (e) of the *Criminal Code.*[530]

6.4: British Columbia- The Cknucwentn First Nations Court, Elders and healing plans

The next Province's Indigenous court that will be examined is in British Columbia. British Columbia is known for its six Indigenous courts.[531] Out of these six courts, five refer to themselves as "First Nations Courts" and the sixth one is known as an "Indigenous Court."[532] All Indigenous people within the location of one of these courts are welcome to attend. These courts are located in the southern part of British Columbia, including: "New Westminster, North Vancouver, Kamloops, Duncan, Merritt, and Prince George."[533]

According to the Provincial Court of British Columbia, the focus of these Indigenous courts are "…holistic, recognizing the unique circumstances of Indigenous offenders within the framework of existing laws."[534] As this is not an exhaustive description of each one of these courts, only one will be explored, the Cknucwentn First Nations Court in Kamloops. "Cknucwentn"

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[525] *Knazan, supra* note 446 at 16.
[526] *Rudin Seminar, supra* note 492 at 7.
[527] *Ibid* at 6-7.
[528] *Ibid* at 7.
[529] *Ibid.*
[530] *Ibid*.; *Gladue supra* note 2.*; Code, supra* note 1.
[531] *Rudin IPCJS, supra* note 399 at 247.
[532]*Ibid.*
[533] *Ibid.*
[534] "About Indigenous Courts," online: Provincial Court of British Columbia http://www.provincialcourt.bc.ca/about-the-court/specialized-courts#IndigenousCourts [*AIC BC*].

translates to mean "where help is given."[535] The Cknucwentn First Nations Court opened in March 2013.[536]

There was a lot of discussion that went on prior to the establishment of this Court. Due to the frustrations by local Judges and lawyer Linda Thomas from the Tk'emlups Indian Band, in "their inability to effectively address the root causes of offending by aboriginal people," changes began to take shape.[537] As a result, a Council was formed, called the Aboriginal Community Justice Council which included "…representatives of area bands, friendship societies, Crown and defence lawyers, youth and adult probation officers, Corrections Centre liaison, police, sexual assault centre, family justice centre, and Elizabeth Fry and John Howard Societies."[538] The Chief Judge also attended these meetings. For the continued discussion and establishment of this Court, another Council called the Aboriginal Justice Council was formed and included "Elders and Knowledge Keepers trained in court procedures and sentencing principles by retired Judge Cunliffe Barnett."[539]

Funding for the Cknucwentn First Nations Court

In the beginning, there were no funds available to establish "a dedicated court room or to provide additional court time with staff and judges…" for the Cknucwentn First Nations Court.[540] While there was no funding available for this change, Thomas was encouraged by local judges to create a plan for a specialized Court.[541] The Chief Judge and the Community Justice Council that was created, all came together to gather resources for the Court. The Chief Judge in particular "obtained support for it from outside agencies" and the Community Council "established the parameters for resources they could bring to the First Nations Court."[542] Due to funding restrictions, it appears that Cknucwentn First Nation Court primarily uses pre-existing resources for its operation. According to a 2011 "Review on the Provincial Justice System in

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[535] Rhaea Bailey "Cknucwentn First Nations Courts: Heartwarming and Effective", *The Factum My Law BC* (20 July 2017), online: < http://factum.mylawbc.com/posts/2017/07/20/cknucwentn-first-nations-court-heartwarming-effective> [*Bailey*].
[536] "Cknucwentn First Nations Court, Kamloops," online: Provincial Court of British Columbia <http://www.provincialcourt.bc.ca/enews/enews-20-10-2015>[*CFNC Kamloops*].
[537] *Ibid.*
[538] *Ibid.*
[539] *Ibid.*
[540] *Ibid.*
[541] *Ibid.*
[542] *Ibid.*

British Columbia," the Ministry of Attorney General (MAG) and the Ministry of Public Safety and Solicitor General (PSSG) jointly administer the justice system in the Province of British Columbia.[543] Together, MAG and PSSG are responsible for "an effective and efficient justice system," which oversees: "police services, prosecutorial services, court services, including family, civil and criminal courts; the funding of the judiciary; and corrections services."[544] Despite the datedness of this review, it would still seem likely that the Cknucwentn First Nations Court is still the responsibility of MAG and PSSG, as they are a court service that likely require the support from the police, prosecutions, the judiciary, and corrections.

The Cknucwentn First Nations Court process

The Cknucwentn First Nations Court is unique in its structure and is different from other courts. The Court makes due with the resources they have, and while a more restorative justice process is preferred, the Court presently makes "do with participants seated in many chairs set around the table where lawyers sit when the room is used for traditional court proceedings."[545] Prior to the commencement of court proceedings, "an Elder smudges the courtroom with sweetgrass or sage" to which anyone in the courtroom is welcome to partake.[546] Once everyone is assembled, the judge comes in and "an Elder performs a prayer, usually in Secwepemc language."[547]

The Cknucwentn First Nation Court is a sentencing court, which means that when the accused's matter is called, like other criminal courts, "a plea is taken."[548] What makes this court structure different is that the accused sits alongside "the prosecutor, defence lawyers, the judge, and a panel of Elders" at a table.[549] The table is not limited to these traditional figures and can also include the victim, other participants like "probation officers, drug and alcohol counsellors,

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[543] British Columbia, Internal Audit & Advisory Services Ministry of Finance, *Review of the Provincial Justice System in British Columbia*, by Chris D Brown (British Columbia: Internal Audit & Advisory Services Ministry of Finance, 2011), at 5 online: <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/internal-corporate-services/internal-audits/provincial-justice-system-review.pdf> [*BC Audit*].
[544] *Ibid.*
[545] *CFNC Kamloops*, *supra* note 536.
[546] *Ibid.*
[547] *Ibid.*
[548] *Ibid.*
[549] *Ibid.*

foster parents…," "representatives of the White Buffalo Aboriginal and Metis Health Society, the Friendship Centre, area bands…," or other people or organizations that the accused may wish to invite for support.[550] These latter participants like the Friendship Centre are particularly useful in that they " offer advice about available resources in order to help craft a rehabilitative and restorative plan."[551]

Once the proceedings begin, the prosecutor starts by discussing the circumstances that arose around the offence and their sentencing position.[552] Following are the submissions of the defence lawyer "on behalf of the accused person."[553] After the lawyers have spoken and outlined their positions, the accused is given a chance to speak, "expressing remorse and trying to identify the reasons for his or her offending."[554] The panel of Elders are also included in this process in which they "ask questions, offer advice and more often than not a stern word or two."[555] Directly after these discussions is the judge's sentencing imposition.[556]

What distinguishes this process from others, is the sentencing imposition itself. Attached to the sentence is a healing plan.[557] In this process, the judge first begins by imposing a traditional sentence, which "may or may not include jail," and then secondly "…a probation order is prepared."[558] The probation order includes not only ordinary terms, but also "the healing plan."[559] The healing plan is "developed by the Court, the Cknucwentn Elders Council" and the accused.[560]

The healing plan is intended "to reduce recidivism and increase willing and active engagement in rehabilitation."[561] The plan can include the following elements:

> …attending the White Buffalo Health Society to be set up with a counsellor, attending a resource to get housing plans underway, making an education plan to pursue a career,

[550] *Ibid.*
[551] *Ibid.*
[552] *Ibid.*
[553] *Ibid.*
[554] *Ibid.*
[555] *Ibid.*
[556] *Ibid.*
[557] *Ibid.*
[558] *Ibid.*
[559] *Ibid.*
[560] *Ibid.*
[561] *Ibid.*

> attending sweats, contacting an Elder, participating in cultural activities, performing community work, and such other rehabilitative tasks.[562]

It is uniquely crafted, to include both "the insights the accused has expressed" and the recommendations made by the Elders.[563]

When a regular probation order is made and complied with, judges often never see the accused person again. This is not the case for the Cknucwentn First Nations Court.[564] The individual under sentence at the Cknucwentn First Nation is required to "return each month to report on his or her progress" and at the same time they will "receive a dressing down if the Elders are not impressed."[565] If the Elders are impressed, "sincere encouragement is given and the recipients respond very well to this."[566]

Upon successful completion of the sentence and conditions made under the probation order, the individual takes part in a ceremony where they are gifted a blanket.[567] These blankets are "…acquired by the White Buffalo Society," which are then sent out "to various artists in the Kamloops area who [apply] a unique design to each blanket."[568] During this ceremony, the participants receiving the blankets give a speech and are congratulated.[569] Now that we have done a brief overview of what goes on within the Cknucwentn First Nations Court, it is important that we take some time to evaluate its success.

An evaluation of the Cknucwentn First Nations Court

As discussed by Rhaea Bailey, one of the main objectives of the Cknucwentn First Nation Court is to incorporate Indigenous culture into the healing process. [570] Bailey, a visitor of the Cknucwentn First Nations Court, witnessed firsthand the strong impact of this Court on Indigenous people.[571] She defined the success of this Court as being "rooted in its cultural approach and the great people involved, as well as the requirement that the accused return each month to report on

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[562] *Ibid.*
[563] *Ibid.*
[564] *Ibid.*
[565] *Ibid.*
[566] *Ibid.*
[567] *Ibid.*
[568] *Ibid.*
[569] *Ibid.*
[570] *Bailey, supra* note 535.
[571] *Ibid.*

their progress."[572] Bailey discusses her experience at the Court during a time where a blanket ceremony took place, where she expressed that:

> In a First Nations Court, people are humanized and given an opportunity to do better. I observed firsthand the effectiveness of the court when I watched a blanket ceremony at the end of the day. Two people had turned their lives around and were acknowledged by the whole court when the judge, lawyers, and Elders surrounded the two in a circle and wrapped a beautiful blanket around them while congratulating them on the successful completion of their sentence and healing plans. The pride and accomplishment that radiated from each person touched me, and, at times, I couldn't hold back my tears.[573]

What can be appreciated about this testimony is the fact that the Court humanizes the individual, a process that sometimes seems distant in the mainstream courtroom. There is so much emotion that is involved in this process. It is partly due to the fact that those involved in the process are truly committed to the success of the individuals involved. This is expressed throughout the entire process, from right as you walk into the courtroom where smudging is available, to the Elders involvement, to the creation of the healing plan, right up until the blanket ceremony. As mentioned by Bailey, the success of this Court is also demonstrated through the fact that they require the individual to "return each month to report on their progress."[574] One can infer that the Cknucwentn First Nation Court has been successful in incorporating components of Indigenous healing into their criminal process. It has also been shown that the strong involvement of the Court and their staff in this process has also been deemed to be significant in the accused's overall healing.

Unfortunately, due to the lack of available resources or information regarding the success of the Cknucwentn First Nation Court, a look into other First Nation courts of British Columbia must be looked at for evaluation. According to the Provincial Court of British Columbia, some of the main objectives of their Indigenous courts are to:

> …provide support and healing to assist in rehabilitation and to reduce recidivism while also acknowledging and repairing the harm done to victims and the community. Several Canadian justice system professionals and academics have shown interest in using BC's Indigenous Courts as a model for courts in their own communities.[575]

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[572] *Ibid.*
[573] *Ibid.*
[574] *Ibid.*
[575] *AIC BC, supra* note 534.

Under this same description, the provincial courts of British Columbia direct our attention to a Globe and Mail article called "Traditional Justice."[576] While this article is about the Duncan First Nation Court, it can be used as an excellent example of the impact of using traditional Indigenous laws and customs within the current criminal justice system to heal, rehabilitate, and in particular repair harm that has been done to a community.

"Traditional Justice" discusses a case about illegal hunting activity involving two Indigenous men, Joseph William Thomas and Christopher John Brown from the urban Esquimalt First Nation.[577] Due to the decline in hunting in their area, they went to the Ditidaht territory to hunt.[578] These trips were deemed illegal, and to make matters worse, they were caught twice "poaching by conservation officers."[579] They were facing 17 charges in total, "that could have resulted in fines between $2,000 and $250,000 and up to three years in prison."[580] Instead, Indigenous leaders saw this case as an opportunity to use their traditional Indigenous laws as a means to resolve Mr. Thomas' and Mr. Brown's legal issues.

The interesting aspect of this case is that it was not only evaluated through a legal sense, but it was also evaluated using the Indigenous perspective, which is often left out of the mainstream courtroom. For example, alongside these individuals' legal battle, there was also the concern that they did not "seek the permission of the Ditidaht to hunt in their territory and they had left meat to rot in one instance."[581] According to the Esquimalt Nation conventions, this brought shame to them and conflict to their community.[582] To make matters worse, the Ditidaht are strongly in "favour of conservation efforts to protect Roosevelt elk" and have worked alongside other Nuu-chah-nulth tribes "in offering a reward for information that leads to the conviction of elk poachers."[583] You can see from this instance alone that even consequences are likely to differ from one worldview to

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[576] Justine Hunter, "Traditional justice", *The Globe and Mail* (8 January 2016, updated 12 November 2017), online: < https://www.theglobeandmail.com/news/british-columbia/nw-bc-aboriginal-hunting-0108/article28093390/?utm_source=Shared+Article+Sent+to+User&utm_medium=E-mail:+Newsletters+/+E-Blasts+/+etc.&utm_campaign=Shared+Web+Article+Links> [*Hunter*].
[577] *Ibid.*
[578] *Ibid.*
[579] *Ibid.*
[580] *Ibid.*
[581] *Ibid.*
[582] *Ibid.*
[583] *Ibid.*

the next. You can also see how exposure to Indigenous legal traditions are extremely important when it comes to evaluating Indigenous people. If we only take into account one perspective and that being the colonial perspective, we dismiss Indigenous legal systems and how certain activities can impact them.

The charges against Mr. Thomas and Mr. Brown were eventually withdrawn, but they are still working to redeem themselves in both their own community and within the Ditidaht Nation.[584] As a result, a settlement was made between the Esquimalt Nation and the Ditidaht Nation that imposed restrictions on Mr. Thomas' and Mr. Brown's hunting for a year, and required them to perform duties.[585] They were both prohibited from hunting for the year and were required to store their guns with the Esquimalt Nation.[586] Part of this settlement also had Mr. Thomas and Mr. Brown carting firewood into Esquimalt reserve's longhouse. Every week, twice a week, for one year, they were required to attend the Esquimalt reserve for cleaning and maintenance purposes.[587] These duties were not to be viewed as punishment, "but an opportunity to model good behavior" in the Indigenous communities.[588] Mr. Thomas and Mr. Brown were also required to attend each home within the community of the Esquimalt Nation and invite them to a ceremony, where an apology and gifts would be given to the Ditidaht Chief and Council.[589] This process is part of a sacred ceremony, which is best described by one of the hereditary Chiefs of Esquimalt Nation, Andy Thomas: "We used our sacred ceremonies, we wrapped [the Ditidaht representatives] in blankets to warm them, to take some of the hurt away. The two hunters presented gifts, to take the shame off our face."[590] The purpose of the ceremony was to "address the wrong committed by" Mr. Thomas and Mr. Brown and restore "his people's standing."[591] What also resulted from this settlement was a legacy where the two Indigenous communities, the Esquimalt and the Ditidaht Nations, began working towards a hunting protocol respecting "the Ditidaht's commitment to elk conservation."[592]

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[584] *Ibid.*
[585] *Ibid.*
[586] *Ibid.*
[587] *Ibid.*
[588] *Ibid.*
[589] *Ibid.*
[590] *Ibid.*
[591] *Ibid.*
[592] *Ibid.*

What is also demonstrated in this case is the difference among Indigenous Nations and their concerns. You see this not only in the conservation of Elk with the Ditidaht, but also through the fact that the sacred ceremony that was done here was actually new to the Nuu-chah-Nulth traditions. The Esquimalt perform Coast Salish ways, which are different from the Nuu-chah-Nulth traditions.[593] This scenario is best described in the following statement:

> The Nuu-chah-nulth traditions are different from the Coast Salish ways of the Esquimalt, and the longhouse ceremony was new to chief councillor Robert Joseph. "It's not my culture, the Salish customs- it was pretty impressive," he said in an interview. Satisfied with the reparation, he now sees this case as an opportunity to show how aboriginal law can be used in a contemporary context. "It's refreshing. The Crown recognized for the first time that we have equal weight to the regular court system." Mr. Joseph said.[594]

As noted by Chief Councillor Robert Joseph, this is a perfect example of how Indigenous laws and traditions can thrive within the current criminal justice system. This case is also a great demonstration of deference being given to Indigenous communities by colonial court systems that has proven to be very successful, a call that was made by *Gladue, Wells, and Ipeelee* not too long ago. The settlement that was crafted between the two nations is unique to those Indigenous communities, these are reparations that would likely not have been thought of in a regular courtroom. What distinguishes Indigenous courts and mainstream courts is that Indigenous courts have available to them an abundance of Indigenous resources, due to the very fact that those who are involved in these courts are aware of those resources, and are prepared to reach out to them when necessary.

What was also unique to this process is the way Mr. Thomas felt. He said that, "He emerged from the ceremony in July not shamed or branded a criminal, but enlightened about how to adhere to the law and to his culture."[595] Mr. Thomas said he felt like he "was standing again."[596] This was not a process that only involved the two individuals who committed a crime, but it was also a process that involved two Nations. Both of these Indigenous communities appeared to be a part of Thomas' and Brown's healing process in its entirety. This process was not in place to shame Mr. Thomas and Mr. Brown, but a depiction of how a community can come together successfully in a time of healing, rehabilitation and reparation. This case is also a great example of Crown

[593] *Ibid.*
[594] *Ibid.*
[595] *Ibid.*
[596] *Ibid.*

discretion being used to facilitate the integration of Indigenous healing methods. As mentioned earlier, the Crown in this case eventually withdrew all charges against Mr. Thomas and Mr. Brown. This is a significant step made by the Crown that demonstrates their commitment and dedication to the Duncan Court process.

6.5: Alberta- The Tsuu T'ina Court and the Peacemaking Circle

The next Indigenous Court that will be looked at is called the Tsuu T'ina Court. The Tsuu T'ina Court is one of the two Indigenous courts found within the Province of Alberta. This Court is connected to the Tsuu T'ina First Nation.[597] It was originally established in 1999 and was located near the Calgary edge on what is called the Tsuu T'ina First Nation.[598] Today, this Court sits within the city of Calgary in the Centre Calgary Court. The Court takes place the "first and third Friday of every month."[599] The Court is made available to all the Indigenous people of the area, but also oversees matters that include non-Indigenous people.[600] The Tsuu T'ina Court "has jurisdiction over criminal justice, youth justice, and First Nation by-law offences."[601]

The first Judge to preside over this Court was Mandamin J, who was part of the First Nations Bar.[602] Madamin J was not the only Indigenous representative of the Court, as most of the staff were also Indigenous. The staff consists of court clerks, a court worker, probation services, "two peacemakers, who were elders," a Peacemaker coordinator, (who was Ellery Starlight between the years 1999-2010)[603] and community members.[604] Ellery Starlight was heavily involved in the development and design of the courtroom.[605]

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[597] *Rudin IPCJS, supra* note 399 at 246.
[598] *Ibid.*
[599] Brent Scout "Inside the Aboriginal Courtroom in the Calgary Courts Centre: Form meets function in this unique space where First Nations restorative justice is designed to flourish in partnership with the Western judicial system" *Avenue Magazine Calgary* (16 January 2017), online: < https://www.avenuecalgary.com/city-life/inside-the-aboriginal-courtroom-in-the-calgary-courts-centre/> [*Scout*].
[600] See "Spotlight on Gladue; Challenges, Experiences, and Possibilities in Canada's Criminal justice System," online: "Tsuu T'ina First Nation Court in Alberta"< https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p4.html> [*Spotlight*].
[601] *Ibid.*
[602] *Rudin, IPCJS, supra* note 399 at 246.
[603] *Scout supra* note 599.
[604] *Johnson, supra* note 415 at 6.
[605] *Scout supra* note 599.

From the very beginning, this Court was seen as "a justice continuum that included more restorative justice practices rooted in Indigenous traditions."[606] The courtroom was designed specifically to "reflect the traditions of the Peacemaking Court," and the values of the Tsuu T'ina people.[607] All those in the courtroom sit in a circular format all on the same level. The courtroom's center is specifically crafted to reflect a "teepee's fire in the middle of a circle-patterned carpet."[608] The courtroom has "a ventilation system," which allows for the Court to open with a "traditional smudge ceremony." [609]

Funding for the Tsuu T'ina Court

The Tsuu T'ina Courtroom is a blending of both "the Provincial Court of Alberta and the peacemaker process."[610] The Alberta Government in particular is responsible for most of the services provided within the Alberta courts including: "Alberta Crown Prosecution Service Division, Correctional Services Division, Justice Services Division, Legal Services Division, Public Security Division, and resolution and Court Administration Services."[611] The Department of Justice Canada, on the other hand, appears to be responsible for the funding of the Tsuu T'ina Peacemaker Program.[612]

The Tsuu T'ina Court process

From the beginning, the Peacemakers and Elders are heavily involved in the Court process where they "review the cases diverted from the justice system as well as cases that require dispute

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606 *Rudin IPCJS, supra* note 399 at 246.
607 *Johnson, supra* note 415 at 6.
608 *Scout, supra* note 599.
609 Lynette Parker, "Tsuu T'ina Peacemaking Justice in Canada" in *Justicia Restaurativa en Linea*, 2004 ed by Lynette Parker, online: < http://www.justiciarestaurativa.org/www.restorativejustice.org/editions/2004/August/peacemaking> [*Parker*].
610 *Spotlight supra* note 600 at 42-43.
611 Alberta, Justice and Solicitor General, *Justice and Solicitor General Annual Report 2017-18,* (Alberta: Justice and Solicitor General, 2018) at 6-9, online: < https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/551c4547-3897-470b-bbf7-3729eb154382/download/justice-and-solicitor-general-annual-report-2017-2018.pdf> [*Alberta Annual Report*].
612 See "Location of Aboriginal Justice Strategy Programs in Canada," online: "Tsuu T'ina Peacemaker Program" < https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplace/ab.html> [*Location of AJSP*].; Canada, Department of Justice, *Aboriginal Justice Strategy Annual Activities Report 2002-2005,* (Ottawa: Department of Justice, December 2005*)* at 33-34, online: <.https://www.justice.gc.ca/eng/rp-pr/aj-ja/0205/rep-rap.pdf> [*SAAR, 2005*].

resolution."[613] There is an office specifically dedicated to the Peacemakers, which "operates a peacemaking program that employs culturally appropriate mediation and alternative dispute resolution techniques."[614] Referrals can be made to this office by "schools, police, provincial courts, the Tsuu T'ina Band Administration or by a community member."[615]

The Peacemaker coordinator and the Crown work together to determine which of their matters "could be resolved through" the peacemaking process.[616] Most offences for both adult and youth are eligible for this process, except for the offences of "homicide and sexual assault."[617] In order for an individual's matter to be transferred to peacemaking, "the offender must take responsibility for his actions and the victim must agree to participate."[618] Those matters that are transferred to peacemaking are adjourned, and a peacemaker is assigned by the peacemaker coordinator.[619] The peacemaker is to be viewed as a neutral party that is chosen fairly "to all sides."[620]

Those involved in the peacemaking circle are "the victim, the offender, family members, helpers or resource personnel (e.g., alcohol addiction counselors)… and Elders."[621] Elders are present in this circle to ensure that the process is done well.[622] Those who are not found within the circle are the Judge and Counsel, something that is truly unique to this process.[623] Each person within the circle gets the opportunity to speak and the process itself can last anywhere from "two hours to two days."[624] There are several rounds of the circle. In the first round, the events between the victim and the offender that occurred are addressed.[625] During the second round, those around the circle get the opportunity to speak about how the event impacted them specifically. In the third

[613] *Spotlight supra* note 600 at 43.
[614] *Ibid.*
[615] *Ibid.*
[616] *Parker supra* note 609.
[617] *Ibid.*
[618] *Ibid.*
[619] *Ibid.*
[620] *Ibid.*
[621] *Ibid.*
[622] *Ibid.*
[623] *Rudin IPCJS, supra* note 399 at 246.
[624] *Parker, supra* note 609.
[625] Natasha Bakht, "Problem Solving Courts as Agents of Change" (2005) 50 Crim L Q 224 at 242 (HeinOnline) [*Bakht*].

round, those around the circle get the opportunity to recommend "what should be done."[626] In the fourth round, those around the table speak about what they agree on with regards to the recommendations made around the circle. Upon completion of the circle, all parties come to an agreement that is signed by the offender. This agreement "may require actions such as an apology, restitution, counselling, a session with an elder, and community service."[627] What is also unique about this process is that upon completion of the recommendations found within the circle's agreement, the offender takes part in a "final circle ceremony" in celebration of their success.[628] Once this final ceremony is completed, the matter is sent back to Court.[629]

Once the matter returns to Court, the Peacemaking coordinator explains the circle recommendations and what sort of tasks the accused has completed as a result.[630] The prosecutor holds a lot of discretion in this process and is the one that evaluates the agreement and its recommendations.[631] The prosecutor has the power to drop the charges if they are satisfied by the circle's recommendations or if the prosecutor decides not to drop the charges, the findings made within the circle are still "considered at the sentencing stage."[632] If the offender does not complete the recommendations made by the circle, then the matter is likely to return to Court.[633] Now that a brief overview of the Tsuu T'ina Court has been outlined, an evaluation of the Court's success must be explored.

An evaluation of the Tsuu T'ina Court

An Aboriginal Courtroom was always a part of the initial proposal for the new courthouse in Calgary.[634] One of the main objectives of the Aboriginal courtroom was to create a space "where First Nations advocates and the accused could work with Alberta's court system and negotiate respectful relationships."[635] It was also intended to be a space for cultural interpretation and the integration of restorative justice through a First Nations lens.[636] Another goal for the Court was to

[626] *Ibid.*
[627] *Parker, supra* note 609.
[628] *Rudin IPCJS, supra* note 399 at 247.
[629] *Bakht, supra* note 625.
[630] *Ibid.*
[631] *Parker, supra* note 609.
[632] *Rudin IPCJS, supra* note 399 at 247.
[633] *Parker, supra* note 609.
[634] *Scout supra* note 599.
[635] *Ibid.*
[636] *Ibid.*

address the disproportionate numbers of Indigenous people being incarcerated, by marrying together two approaches to justice- "First Nations and Western."[637]

These goals have arguably been met through the use of the Tsuu T'ina Court and its access to the Peacemaker initiative.[638] The Peacemaker initiative is a good example of Canadian Law and Indigenous laws working together. From the years 1999-2010, Ellery Starlight was the coordinator for the Peacemaker Program as well as the court's administrator.[639] Ellery's position allowed him to ensure that the Tsuu T'ina ways of justice were being met and that the peacemaker initiative was being accessed. It has been noted that to some extent Ellery held "an equal but different role as peacemaker officer" to the Crown prosecutor.[640] Ellery worked alongside the judge and the Crown to decide "if an accused member of his community will be best suited to have justice meted out in a peacemaking talking circle or through the Canadian system with punishments of fines or jail time."[641] If it was decided that the matter would be resolved through the peacemaking initiative, Ellery highlights that "things" were "done the Tsuu T'ina way."[642] Ellery is Tsuu T'ina himself, and has learned the values and laws from his father.[643] It is clear that Ellery and his position as the peacemaker coordinator has been a major resource to the Tsuu T'ina Court in meeting some of its initial objectives.

Working alongside Ellery at the time in bridging the gap between Tsuu T'ina values and Western ideals was Judge Mandamin, the Elders and the Crown prosecutors. Judge Mandamin has a keen insight in the area of restorative justice, not only as an Indigenous person himself, but he "specializes in the area of restorative justice in aboriginal communities."[644] One can imagine that during Judge Mandamin's time at the Court, he had a major impact on the inclusion of restorative justice into this process.

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[637] *Ibid.*
[638] *Ibid.*
[639] *Ibid.*
[640] Norma Large, "Healing Justice: The Tsuu T'ina First Nation's Peacemaker Court throws out punitive justice and restores the ancient traditions of… talking." *Alberta Views The Magazine For Engaged Citizens* (1 May 2001), online: < https://albertaviews.ca/healing-justice/> [*Large*].
[641] *Ibid.*
[642] *Ibid.*
[643] *Ibid.*
[644] *Ibid.;* Judge Mandamin is no longer the judge at this Court.

During the peacemaking process, the Elders involved play a significant role in meeting Tsuu T'ina Justice and ensuring that the circle is carried out correctly.[645] As in many Indigenous communities, "the elders are the ones who hold the knowledge of the past, including traditional justice practices."[646] The Crown prosecutors also play a major role in reaffirming the success of the peacemaker initiative. As noted, the Crown works with the peacemaker coordinator and the Judge in deciding if a matter can be dealt with by way of the peacemaking circle. The fact that the Crown prosecutors are willing to agree to this transfer affirms the success of the peacemaking program and also suggests that the Crown is committed to its process.

The success of the Tsuu T'ina Court and the peacemaking initiative can also be best described through the testimonies of the individuals involved.[647] One story in particular that should be highlighted involved an elderly lady who was charged with driving an uninsured vehicle.[648] The Court agreed that this matter should be resolved through the peacemaking initiative. What came out in the peacemaking initiative was that the elderly woman had experienced a death in the family and was busy trying to make funeral arrangements. She explained that this was the reason why she was out driving without a license. An Elder from her community was brought in as a resource to the circle. The Elder spoke about the unique traditions of their community. One of the traditions that the Elder provided was that of ceremony. The Elder explained that a ceremony is often used some time after the death of a loved one, where family members and friends are able to come to say goodbye and grieve. With this knowledge, the peacemaking circle came to the decision that instead of having to pay for a fine, the woman would have to pay for the ceremony, which is comparable in price.

Another matter that was resolved through the peacemaking circle involved an assault between a younger and older woman.[649] In the circle it was discussed that the two women had been friends prior to the assault. During the circle, each of the women apologized to one another. The younger woman got a chance to explain why she had committed the assault in the first place, where she explained that she was sorry for hitting her, but at the same time explained that she had done

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[645] *Ibid.*
[646] *Ibid.*
[647] Wanda D McCaslin, *Justice As Healing: Indigenous Ways*, 1st ed (Saskatoon: The Native Law Centre at the University of Saskatchewan, 2005) at 349-355 [*McCaslin*].
[648] *Ibid* at 349-350.
[649] *Ibid* at 350.

so because the older woman had hurt her. This discussion resulted in the restoring of the friendship between the two women.

One of the other testimonies involved a group of young people who broke into a school, where they stole money and damaged some property.[650] The loss was assessed at over $1000.00 dollars. This matter was resolved in the peacemaking circle. It was decided in this circle that the "youth had to pay back what they had stolen and compensate the school for the damage caused."[651] The result was that all those involved in the offences obtained employment and paid the entire restitution amount.

Another matter worth discussing involved a woman who was charged with shoplifting pills.[652] During the circle, the woman was asked about the skills she had to offer, "she answered that she had no skills-she had nothing."[653] She explained that the reason she stole the pills was because she was suffering from depression and they helped her cope. The circle was also informed that she had become addicted to these pills. She explained to the circle that she never completed high school, and she said, "her life was going nowhere."[654] The circle spent some more time addressing the issue of skills. What she learned and expressed to the circle was that she did have skills to offer, these included: cooking, keeping house, and making traditional garments.[655] In the circle it was also discovered that the woman had a dream to attend college. From these discussions, the circle agreed that she would attend counselling for her addiction, finish high school, and continue her education into college. A little while later this woman came back to the circle and explained that she had to leave college to help her daughters. The circle was understanding.

These are but only a few testimonies that have been found within the circle at the Tsuu T'ina Court. However, even within these few testimonies, the peacemaking circle understands the circumstances of each individual at a much deeper level. Elders' are brought in as resources on the traditions of the Indigenous communities, which gives the circle a better understanding of what sort of requirements are appropriate to be asked of the individual. The circle is also effective at addressing the root causes of each offence, whether that be due to addiction or loss of self. The

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[650] *Ibid* at 349.
[651] *Ibid.*
[652] *Ibid* at 354-355.
[653] *Ibid.*
[654] *Ibid.*
[655] *Ibid.*

circle is also useful in providing a place for people to open up about why the offence occurred in the first place and a place where both the offender and the victim can discuss how the offence has impacted them. The circle is truly a place of healing.

6.6: Saskatchewan- The Cree Court and Indigenous language

The next Indigenous court that will be looked at is within the Province of Saskatchewan. The Saskatchewan Cree Court is one of the three Indigenous courts in the prairie Provinces.[656] Due to the limited amount of resources available about the Cree Court, the description and evaluation of this Court will be shorter. The Cree Court was established in "the fall of 2001" and was initiated by the Saskatchewan Provincial Court.[657] In that same year on January 26th, 2001, Gerald M Morin was newly appointed to the Provincial Court of Prince Albert.[658] Judge Gerald Morin, a fluent Cree Speaker, became responsible for the developments of the Cree Court.[659] The Saskatchewan Minister of Justice stated at the time that "Judge Morin is a northerner and speaks Cree. I am looking forward to his leadership in establishing the capacity for Cree language services in the Provincial Court of Saskatchewan."[660] Judge Morin's reputable expertise in his experience "in social work, corrections, education, and the practice of law" all "served him well in presiding over the Cree court."[661] It was clear that Judge Morin was well suited for this position. The Cree Court itself is "based out of Prince Albert" Saskatchewan and is what is known as a circuit court.[662] While Prince Albert is located in the central north of the province of Saskatchewan, the Cree Court rotates throughout certain areas of north-eastern Saskatchewan, "including Pelican Narrows, Sandy Bay, Whitefish First Nation, and Ahtahkakoop First Nation."[663] As Judge Morin comes to

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[656] *Rudin IPCJS, supra* note 399 at 244.
[657] *Ibid.*
[658] *McCaslin, supra* note 647 at 347.
[659] *Ibid.*
[660] *Ibid.*
[661] *Ibid.*
[662] *Rudin IPCJS, supra* note 399 at 244.
[663] Alex Macpherson, "'He had the ability to make people feel comfortable': Indigenous judge responsible for Cree court retiring after 17 years on the bench: Judge Gerald M. Morin is known for his contributions to access to justice, particularly in remote northern communities." *Saskatoon StarPhoenix* (6 December 2018), online: < https://thestarphoenix.com/news/local-news/he-had-the-ability-to-make-people-feel-comfortable-indigenous-judge-responsible-for-cree-court-retiring-after-17-years-on-the-bench?fbclid=IwAR2Txonky7d8xlpw_Vk4yK3duU2iSzlPrEcBE3E19Lkuz_Ys0HQOvzbYwJI[*Macpherson*].

retirement, it is the hope that his legacy will be carried on with the newly appointed provincial court judge, Judge McAuley, who is also Cree speaking.[664]

The Cree Court process

The Cree Circuit deals with "criminal matters and child protection hearings."[665] While the Court operates similarly to what one would see in a typical provincial court circuit, the Court is primarily conducted by Cree speakers.[666] This not only includes Judge Gerald Morin, the leading figure of the Cree Court who is fluent in Cree, but also clerks, court workers, and sometimes legal aid lawyers and Crown prosecutors.[667] Even in the circumstances when the lawyers do not speak Cree, the accused in the courtroom is still able to communicate in Cree with Judge Morin.[668] The Cree language is most often incorporated into sentencing "where the judge may provide a detailed explanation of sentencing principles to the accused and to the members of the public who are present."[669] What is unique to the sentencing process is that Judge Morin may also incorporate "traditional Cree values regarding respect for one's family and community."[670]

Funding for the Cree Court

According to an Annual Report for 2017-2018, the Saskatchewan Government is primarily responsible for the Provincial Courts of Saskatchewan, which would include the Cree Court.[671] In particular, the Ministry of Justice and Attorney General states that it "is responsible for prosecutions, civil law services, marketplace regulation and providing support to the court system."[672] The Court and Tribunal Division of the Saskatchewan Government is responsible for

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[664] Bonnie Allen, "Saskatchewan's first Cree-speaking judge reflects on legacy of Cree court as he retires: Saskatchewan appointed 3 Indigenous women to provincial court bench in past year" *CBC News* (24 February 2019), online: < https://www.cbc.ca/news/canada/saskatchewan/cree-judge-gerald-morin-retirement-1.5029792> [*Allen*].
[665] *Macpherson supra* note 663.
[666] *Ibid.*
[667] *Ibid.*
[668] *Ibid.*
[669] "Cree Court," online: Courts of Saskatchewan < https://sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc> [*Cree Court*].
[670] *Ibid.*
[671] Saskatchewan, Ministry of Corrections and Policing & Ministry of Justice and Attorney General, *Annual Report for 2017-18* (Saskatchewan, Government of Saskatchewan,2017-18) at 5, online: < http://publications.gov.sk.ca/documents/15/107653-2017-18CorrectionsandPolicingandJusticeAttorneyGeneralAnnualReport.pdf> [*SK Annual Report*].
[672] *Ibid.*

the Court Services, which "provides for the delivery of all court administration services" for the Provincial Court.[673] One can infer from the 2017-2018 Report, that the Saskatchewan Government is likely the primary funder for the Provincial Courts, which includes the Cree Court.[674]

An evaluation of the Cree Court

At the outset, some of the main goals in the creation of the Cree Court were to address language barriers and access to justice issues.[675] Judge Morin himself noted at a conference in 2005 that "One goal of the Cree Court is effective communication, not rigidity."[676] In these preliminary discussions, Judge Morin explained that "people often see an injustice when they don't fully understand the process and they feel they haven't been fully and fairly dealt with."[677] It was the hope that by introducing the traditional Indigenous languages of the area into the Cree Court that the system would not be so foreign and it would become more accessible to the Indigenous people of the area.[678] After some review, it is clear that these goals are being met.

First and foremost, the rotation of the Cree Court in north-eastern Saskatchewan is specifically designed to address some of the access to justice issues that often result in the north of Provinces.[679] One of these access to justice issues is the language barrier. On November 19th 2001, Judge Morin spoke to the University of Saskatchewan College of Law "of his respect for the law and the need for respect of the language."[680] He explained that this respect is what directed his journey in the creation of the Cree Court.[681] It was explained that "by using the traditional language, the Cree Court provides the accused, who is in conflict with the law, the opportunity to give full answer to the charge."[682] To not fully understand the criminal process and the consequences of it, is an access to justice issue.

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673 *Ibid.*
674 *Ibid.*
675 *McCaslin, supra* note 647 at 616.
676 Paul Chartrand, "Aboriginal People & the Criminal Justice System in Saskatchewan: What Next?" (2005) 68 Sask L Rev 253 at 284 [P *Chartrand*].
677 *Ibid.*
678 *Ibid.*
679 *Macpherson supra* note 663.
680 *Ibid.*
681 *Ibid.*
682 *Ibid.*

Resulting from the successful incorporation of the Cree language were other positive responses. For example, by incorporating the Cree language into this courtroom it has also allowed for young people to "'see their language being legitimized within the major institutions,' providing a sense of pride and belonging."[683] Judge Morin has also expressed that he "believes his understanding of language, culture, and history meant Indigenous people felt heard in his courtroom in a way they'd never been before, and that it changed their perception of the justice system."[684] He explained that "when I talk to people, they open up."[685]

Something much greater is happening at the Cree Court when people open up to Judge Morin. It has become a space founded on trust and security. There is trust in believing that Judge Morin understands the realities of the individuals before him, and is able to make this connection on a much deeper level, because he himself has likely experienced these realities as an Indigenous person. And if he has not experienced them firsthand, he is able to find commonality and empathy. This expertise is best explained by Judge Morin in one of the many experiences he had in the Cree Court:

> Morin recounted a case in which an Indigenous man who had beaten up his son stood before him, and the judge relied on his own family scars from residential school trauma to connect with the offender. "I said, 'I know your dad. My dad knows your dad, because my dad went to residential school with your dad.' Those are things you're not going to hear from a non-Indigenous judge.[686]

Judge Morin's expertise does not only stem from the fact that he is able to make a familiar connection with most of the Indigenous people before his court, but it is about how he can interpret these encounters into the sentencing of the Indigenous person that makes it extremely effective.

Judge Morin's expertise has also been noted by CBC News alongside the newly appointed Cree speaking Judge Mary McAuley. The two Judges "say they have a deeper understanding of Gladue principles and what people in their courtrooms have struggled with in their lives-racism, systemic discrimination, residential school abuse, family violence, poverty, drugs, alcohol" because of their upbringing as Indigenous people.[687] This connection was also mentioned by Ron Piché, "a Saskatoon defence lawyer who attended law school with" Judge Morin, when he

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[683] *Ibid.*
[684] *Allen, supra* note 664.
[685] *Ibid.*
[686] *Ibid.*
[687] *Ibid.*

encountered Judge Morin speaking Cree to his client.[688] Piché stated that: "Just by the body language and the eye contact they had with each other, the accused and Judge Morin, you knew that he was hitting home… He was taking things to another level, and you don't see that often in court, that ability to relate to an accused."[689]

Advantages of the Cree Court that have been identified by the Saskatchewan Provincial Courts include:

- Enabling the Court to communicate with an accused in a manner suited to his or her language and cultural needs;
- Encouraging the participation of community leaders in the criminal justice system and recognizing the community's role in supporting both the victims and the accused;
- Incorporating traditional values into sentences, making them more responsive to the needs of particular communities;
- Affirming the Court's position as a local institution with an interest in building a safe and healthy society in Saskatchewan's North; and
- Acknowledging the value of certain aspects of First Nations' culture and language, and the role they can play in addressing current challenges.[690]

The third bullet point is also identified more clearly by Jonathan Rudin in his book "Indigenous People and the Criminal Justice System."[691] He explains that "Language shapes the way we see relationships between people, and the world around us."[692] Current systems often ignore that Indigenous languages and culture often view those relationships differently from the mainstream English and French. By bringing in the Cree language it is revitalizing and legitimizing those perspectives on relationships. By using the Cree language to conduct these proceedings, Judge Morin is also inherently bringing about Indigenous values.[693]

Judge Morin also explains his heavy reliance on "community workers who engage in mediation" and programs for other effective means that have addressed criminal behavior. [694] He explains that these resources and programs have made his "court particularly effective."[695] This effectiveness is also demonstrated in the fact that Judge Morin's decisions have rarely been

[688] *Macpherson, supra* note 663.
[689] *Ibid.*
[690] *Cree Court, supra* note 669 cited in *Rudin IPCJS, supra* note 399 at 245.
[691] *Rudin IPCJS, supra* note 399.
[692] *Ibid* at 246.
[693] *Ibid.*
[694] *Ibid.*
[695] *Ibid.*

appealed. The limited amount of appeals is also relevant to the Crown's "hands off" approach that has occurred in other Indigenous courts that have been mentioned. It is also indicative of the Crown's commitment to the Cree Court's approach.

6.7: The preferred model for Saskatchewan and other Prairie Provinces

Professor Norman Zlotkin could not have made it clearer for the Province of Saskatchewan in his commentary in the Justice Reform Commission Report on "Policing and Aboriginal People."[696] Professor Zlotkin cites in his comments the Cree Court and explained that this was "a worthwhile improvement in the system and suggested that more courts of this nature should be established."[697] Taking into account the Indigenous courts that have already been discussed in Chapter 6, the question then is what sort of model or processes the prairie Provinces should adopt for future developments. As you can recall most of these Indigenous courts have been funded by the government, which demonstrates that the funding for these types of developments could be made possible.

In this discussion, it is important to clarify that each model will likely vary from province to province as each Indigenous group incorporates their own traditional values and ways to address issues of justice. When looking to Ontario, British Columbia, and Alberta there are aspects of each of these models that are quite intriguing and could serve to benefit the Province of Saskatchewan in particular. Starting with Ontario, there are three major aspects of their process that should be considered. First, the Gladue Court in Ontario has specifically created a model that has built diversion also known as alternative measures, right into its process. This ensures that all those involved in the Gladue Court process are aware that diversion is engrained and must be considered every time an accused person is before the Court. Secondly, there must be a consideration for the creation of the Gladue Court Caseworker position or something that is similar to it. This position ensures that the Gladue aspects of an Indigenous person's sentencing are being appropriately met through the creation of a Gladue Report. Thirdly, a Crown Manual that specifically dedicates a section on Indigenous people should also be something considered. This manual creates certain policies and obligations that the Crown has to consider whenever an Indigenous person is before the Court.

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[696] *P Chartrand, supra* note 676 at 274.
[697] *Ibid.*

With regard to British Columbia, there are two major aspects of this process that must be considered in the prairie Provinces. First, the incorporation of Elders into the Cknucwentn Court process is something that is quite compelling. The Elders are really involved in the healing of the individual and the community, which goes to the second aspect for consideration, the healing plan. The healing plan is a process that is built alongside the probation order, a great example of Indigenous values working alongside Western law. This plan ensures that Indigenous values are being incorporated into the healing of the individual.

In Alberta, there are two main aspects of the Indigenous Court that are quite interesting. First, is the design of the Tsuu T'ina Courtoom. The unique characteristics of this courtroom that emphasizes Tsuu T'ina values is something that could be integrated within Saskatchewan using values and traditions that are unique to the Indigenous people of that area. The design of this courtroom is warm, reflecting a non-hierarchical approach to justice. Second, there is the Peacemaker Coordinator who works directly with the Crown and Judge in determining whether certain matters could be transferred to the peacemaking circle. A position and initiative that is truly unique to the Tsuu T'ina Court, but two aspects that could certainly be introduced in Saskatchewan with its own unique traditions.

Other aspects of these Indigenous courts that are essential in the creation of more Indigenous courts include: 1) the accessibility of fluent speakers of the Indigenous language of the area, and in most cases, this should include the Judge, 2) a large Indigenous representation of legal representatives and staff where possible, 3) the court is advertised and made known to Indigenous people and 4) that all Indigenous people are able to access the court.

After further consideration of these Indigenous courts, two thoughts come to mind. First, it becomes apparent that funding needs to become available to pay the salaries of Elders and Peacemakers. This will ensure that communities do not have to worry about requiring such persons to volunteer. Secondly, it also becomes clear that Indigenous courts like the Cree Court should be located also in bigger cities like Saskatoon, Regina or Winnipeg.

6.8: Conclusion

After reviewing and evaluating these four Indigenous courts from the Provinces of Ontario, British Columbia, Alberta and Saskatchewan, it can be said that their processes are working for Indigenous people. In doing this evaluation, the purpose was to compare what the Provinces of Ontario and British Columbia are doing to what the Provinces of Alberta and Saskatchewan are

doing with respect to Indigenous courts. Following these evaluations were suggestions made about what sort of processes should be incorporated into the prairie Provinces, especially Saskatchewan. A major inference made in this chapter is that while all these courts have made substantial progress in their areas, there is more progress being made in the Provinces of Ontario and British Columbia. This can also be inferred by the fact that Manitoba has not created its own Indigenous court and thus could not be discussed and evaluated. The progress made within the Provinces of Ontario and British Columbia are also an indicator that in all of Canada, there should be more implementation of Indigenous courts and programming that meet the needs of Indigenous people. "All of Canada" is mentioned because while Ontario and British Columbia in comparison to the Provinces of Alberta and Saskatchewan have made more progress, there still exists an over incarceration of Indigenous people across Canada, with an urgent need of change particularly within the prairie Provinces. As identified in this chapter, this change must include a meaningful incorporation of Indigenous courts, initiatives, laws, traditions and values, as they have already proven to be successful for the overall healing of Indigenous people.

CHAPTER 7: CONCLUSION

The Indigenous people of Canada are disproportionality overrepresented in virtually all aspects of the criminal process. Across the country, the reality is Indigenous people are faced with a "National Epidemic," with Canada's criminal justice system. Canada is fully aware of these realities and continues to respond. Section 718.2(e) of the *Criminal Code* was one of those responses.[698] With the push from Parliament, came the foundational decisions of *R v Gladue*[699], *R v Wells*[700], and *R v Ipeelee.*[701] If appropriately implemented, there is arguably potential for section 718.2(e) to be one effective avenue for remedying the over incarceration of Indigenous people. In order to meet the true purpose of this section though, Canada's legal system must take seriously and adequately implement both prongs of the *Gladue* factors:

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.[702]

Prong two is especially important when it comes to the effective implementation of the *Gladue* factors, a factor that is often discussed very little. This thesis initially posed two major questions concerning the implementation of *Gladue*: 1) whether *Gladue* is being appropriately applied throughout Canada; and 2) whether *Gladue* is meeting its potential in effectively integrating Indigenous legal traditions in the sentencing of Indigenous people. The chapters throughout this thesis grappled with these questions.

First, chapter two asserted that in order to meet the objectives of Parliament and its intention with regards to section 718.2(e), there must be a serious and meaningful inclusion of the Indigenous perspective. Chapter two looked to the leading decisions of *R v Gladue*[703], *R v Wells*[704], and *R v Ipeelee*[705] for the courts' interpretations of what is to come from section 718.2(e), as it relates to Indigenous people. The Supreme Court of Canada in these decisions are

[698] *Code, supra* note 1.
[699] *Gladue, supra* note 2.
[700] *Wells, supra* note 7.
[701] *Ipeelee, supra* note 8.
[702] *Gladue, supra* note 2 at 690.
[703] *Gladue, supra* note 2.
[704] *Wells, supra* note 7.
[705] *Ipeelee, supra* note 8.

reminded that Indigenous people come from a completely different worldview. It is with this assertion in mind that this chapter begins the discussion of defining the term meaningful, and what that term means to Indigenous people and sentencing. It is important that when this term is defined, it is done using the perspectives of, and appropriate consultation with, Indigenous people and their communities.

Chapter three looked specifically to the Indigenous perspective in defining the term "meaningfully" and the importance of doing so. This chapter asserts that Indigenous worldviews of justice would likely look quite different than what is currently set out in the *Criminal Code* under section 718.2(e), with a focus on healing.[706] It is important that whenever Indigenous worldviews of justice are being discussed, the inclusion of the Indigenous perspective is paramount. By introducing Indigenous worldviews of justice using a colonial lens, these worldviews are often lost in translation. The distinctiveness of Indigenous worldviews compared to Western Canadian worldviews were examined using the analogy of the Two- Row Wampum belt and the Habermasian theory. These analogies strengthen the argument that two groups of people can have two completely different perspectives regarding the same matter, which may lead to negative outcomes. These differences can also be expressed among Indigenous groups. What may be defined as meaningful to one Indigenous person may not be the same for the next. Some Indigenous scholars have defined the term "meaningfully" as it relates to the sentencing of an Indigenous person as moving away from the current criminal justice system entirely. In particular, some scholars view the term "meaningfully" as to refer to a completely separate Indigenous legal system. Others have viewed avenues such as section 718.2(e) as a potential recourse where the Indigenous perspective can co-exist within the current criminal justice system. The focus of this chapter was not to choose which method is preferred, but rather to bring awareness to the differing perspectives on Indigenous justice.

Chapter four used a quantitative approached and narrowed in on the statistical realities that exist for Indigenous adults and youth across the Provinces and Territories. Tables and figures were used to demonstrate these statistics using visual aids. The ultimate objective of this chapter was to determine the percentage of Indigenous people that were admitted in each province/territory as it relates to the Indigenous population that resides within each of those

[706] *Code, supra* note 1.

particular provinces/territories. What is discovered through the examination of these statistics is that what was once called a "National Epidemic" of the over-incarceration of Indigenous people, may also be understood as a "Prairie Province Epidemic," with Saskatchewan, Manitoba and Alberta leading the way for admitting their Indigenous people at much higher percentages. Indigenous Adult admissions in the Prairie Provinces were 41.5%, 76.2%, and 73.7% for Alberta, Saskatchewan and Manitoba, respectively. Comparatively, the Provinces of British Columbia and Ontario were 31.9% and 12.2%, respectively. These statistical realities were even more alarming for youth admissions, where 90.3% and 74.2% of admitted youth were Indigenous in Saskatchewan and Manitoba, respectively. There were no statistics available for youth admissions for the Province of Alberta, but one could imagine that those statistics would likely resemble the percentages that were found for Indigenous adult admissions. Comparatively, Indigenous youth admissions found in the Provinces of British Columbia and Ontario were 44.8% and 10.0%, respectively. These statistical disparities in the Prairie Provinces led me to question what was happening in the Provinces of British Columbia and Ontario that appears to be missing in the Provinces of Alberta, Saskatchewan and Manitoba as it relates to the over-incarceration of Indigenous people, paving the way for further research on the subject matter.

Chapter five therefore focused on what was happening in the prairie provinces with regards to the sentencing of Indigenous people that may be causing the over-incarceration percentages to stand out. In particular, Court of Appeal decisions from Alberta, Saskatchewan and Manitoba were examined with regards to the sentencing of Indigenous people. What was discovered from the examination of these decisions was that the courts still appear reluctant to providing any meaningful implementation of prong two of *Gladue* into the sentencing of an Indigenous offender. In some cases, the *Gladue* analysis was nearly non-existent as was observed in the decision of *Arcand*.[707] While a transition was seen in the decisions of *Okimaw*[708], *Chanalquay*[709], *J.P.*[710], *Peters*[711] and *McIvor*[712], upon closer review there were shortcomings observed. There continues to be little engagement with prong two of *Gladue* with a failure to

[707] *Arcand*, *supra* note 12.
[708] *Okimaw*, *supra* note 13.
[709] *Chanalquay*, *supra* note 14.
[710] *J.P.*, *supra* note 3.
[711] *R v Peters*, *supra* note 17.
[712] *R v McIvor*, *supra* note 18.

adequately define restorative justice and what that looks like in the sentencing of Indigenous people. The legal profession overall continues to struggle with how to interact and engage in a meaningful discussion with respect to *Gladue* and s. 718.2(e). These struggles partially stem from a lack of understanding and misinterpretation of the principles that are found within the leading case law. More importantly, the case law itself continues to fail to engage in any meaningful discussion with the implementation of the Indigenous perspective. Even when decisions do incorporate both prongs of *Gladue*, these decisions are few and far between. With that being said, minor errors in the application of *Gladue* still exist. Ultimately, this chapter affirms that, overall, *Gladue* is not being adequately applied to the sentencing of Indigenous people in the prairie Provinces.

In the final chapter of this thesis, an evaluation on the Indigenous courts found in Ontario, British Columbia, Alberta and Saskatchewan was conducted. The purpose of this chapter was to compare what appeared to be more successful Provinces on the issue of the over-incarceration of Indigenous people like Ontario and British Columbia to the prairie Provinces of Alberta and Saskatchewan. Unfortunately, an evaluation within the Province of Manitoba could not be conducted, as no established Indigenous courts could be found in that area at the time of writing. The first part of this chapter reminds us that prior to colonization, Indigenous people did, and continue to, practice their own laws, with Elders being at the core of these legal systems. While each of these court systems are working within the mainstream justice system, they all bring to the table a major Indigenous component, something that is likely missing in other courtrooms, from the Indigenous design of the courtrooms, to a Gladue court case worker, to healing plans, to the peacemaking circle, to the Indigenous language itself. Based on the research conducted, all of these courts have proven to be successful in their approaches.

The final chapter is ultimately concluded by recommending a preferred model going forward for the prairie Provinces, or for any province or territory for that matter. The recommendation being premised on the fact that more courts of this nature need to be established within all parts of Canada, with adaptations made that uniquely suit the needs of the Indigenous people of that area. The preferred model takes into account the unique Indigenous components of each of these courts, which have made these types of courts successful in their approach. What is unique about these courts is the very fact that they are founded on the principles of Indigenous

ways of knowing. One of the main principles being to heal, not only the individual, but the community.

Moving forward it is clear that a meaningful incorporation of the Indigenous perspective must be included into the sentencing of every Indigenous person in order to successfully remedy the epidemic that exists within the prairie provinces and across Canada. It is evident that *Gladue* is only the tip of the ice-berg for meaningfully including the Indigenous perspective in the sentencing of an Indigenous person. I would even go one step further and say that the uniqueness of these Indigenous courts is that they include the Indigenous perspective in more than just the sentencing aspect of the court process. In some instances, the courtrooms defer entirely to the Indigenous perspective. It is my hope that one day when the legal profession hears the words *Gladue,* it is envisioned beyond the boundaries that exist within the current criminal justice system. In order to meet this vision, our current legal system must look beyond its walls and open its doors to what *Gladue* could look like through the lens of Indigenous people.

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