"Saskatchewan's Incarceration Epidemic"
Lindsay Hjorth
August 18, 2017

INTRODUCTION

When I first began my research into the Supreme Court of Canada's decision ("SCC"), *R. v. Gladue*[1] ("*Gladue*"), it was suggested that I read Mr. James T.D. Scott's paper: Reforming Saskatchewan's Biased Sentencing Regime as a starting point. Mr. Scott's paper discussed the overrepresentation of Aboriginal peoples in Saskatchewan prisons, and argued that it occurred because of systemic biases in the criminal justice system. To demonstrate the systemic bias against incarcerated Aboriginals, Mr. Scott reviewed all of the criminal sentencing decisions for Saskatchewan as found on CanLII from 1996 through June 2014. His research concluded, "Aboriginals are vastly overrepresented in dangerous offender applications and that this overrepresentation accounts for a shocking discrepancy between the lengths of custodial sentences for Aboriginals compared to non-Aboriginals".[2] As a Metis law student with family that has been subjected to the systemic bias of the Saskatchewan Courts, I felt compelled to continue his research. I was interested to see what, if any, changes had been made to the sentences of Aboriginal offenders in Saskatchewan.

Mr. Scott was not the only person to criticize Saskatchewan Courts for overrepresentation of Aboriginals and disproportionate sentences caused by system biases in our criminal justice system. A former judge from British Columbia, Judge Cunliffe Barnett, publically stated, "Saskatchewan Courts were ignoring *Gladue* principles when sentencing aboriginal offenders. He stated, there is a colonial history in Saskatchewan … I am confident that I am on solid ground when I say that this tragic history is not yet well

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[1] *R v Gladue,* 1999 SCC 679, 1 SCR 688 [*Gladue*].
[2] James T. D. Scott, (2014) "Reforming Saskatchewan's Biased Sentencing Regime" Working Paper at 1 para 3 [James Scott].

understood by more than perhaps very few Saskatchewan judges". [3] Mr. Barnett has observed how judges across Canada have implemented or supported the Supreme Court of Canada's *Gladue* decision. Further, Mr. Barnett noted, "he was struck with how poorly Saskatchewan's judges followed the high court's guidelines".[4]

Overrepresentation of Aboriginal peoples in the Canadian justice system is certainly not a new problem; it has been an ongoing issue ever since "incarceration rates in the prairies began to climb in the 1950s."[5] Furthermore, while Saskatchewan continues to admit and sentence more Aboriginal offenders to prison than any other province in Canada, Saskatchewan is not the only contributor to the epidemic of vastly overrepresented Aboriginals.[6] Overrepresentation of Aboriginal peoples across Canada has been an upward trend over the last twenty years. Records from Statistics Canada indicate that Aboriginal peoples constituted 16% of the total sentenced offenders admitted to prisons in 1995/1996[7] despite representing only 2% of the total Canadian adult population[8].

BACKGROUND

In 1995, Parliament amended the sentencing principles of the *Criminal Code.* In an attempt to address Aboriginal overrepresentation, the amendment included the requirement for sentencing Judges to consider special circumstances when imposing a

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[3] Kenneth Jackson, "Calls for Public Inquiry into Saskatchewan's Over Incarceration of Aboriginal People", *Aboriginal Peoples Television Network* (28 May 2015), online <http://aptnnews.ca/2015/05/28/calls-public-inquiry-saskatchewans-incarceration-aboriginal-people/> at 75 [Call for Inquiry].
[4] *Ibid* at 69.
[5] *Supra* Call for Inquiry at para 45.
[6] Statistics Canada, *Admissions to adult correctional services, by characteristic of persons admitted, type of supervision and jurisdiction, 2015/2016,* Table 5, online <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14700/tbl/tbl05-eng.htm> [2015/2016 Table 5].
[7] Statistics Canada, *Adult Correctional Services in Canada, 1995-1996,* by Micheline Reed and Peter Morrison, Catalogue no. 85-002-XPE Vol. 17 no.4, at 1 at para 6 [Reed and Morrison].
[8] Statistics Canada, *Adult Correctional Services in Canada, 1990-00,* by Charlene Lonmo, Catalogie no. 85-002-XIE Vol. 21 no. 5, at 8 para 2 [Lonmo].

sentence on an Aboriginal person. Section 718.2(e) reads, "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular to the circumstances of aboriginal offenders".[9] The intention of s. 718.2(e) was to create a shift in the way judges sentenced Aboriginal offenders, with a focus toward restorative justice.

Despite these changes, Aboriginal incarceration rates continued to increase. In 1999/2000 although Aboriginal peoples again only constituted 2% of the total population in Canada, they constituted approximately 17% of total admissions to provincial and federal sentenced custody and over half of sentenced admissions in Saskatchewan.[10]

In 1999 the SCC delivered the *Gladue* decision as a guide to the courts on how to appropriately apply s. 718.2(e). The SCC applied s.718.2(e) to Ms. Gladue's case because she was an Aboriginal offender whose life was significantly impacted by "the systemic or background factors which may have influenced the appellant [her] to engage in criminal conduct".[11]

Additionally, *Gladue* provided further guidance -- a framework now commonly referred to as *Gladue* factors, in order to guide sentencing judges when sentencing an Aboriginal offender. The *Gladue* factors reinforce parliament's goal of using s. 718.2(e) to address overrepresentation of Aboriginal offenders in Canada, by outlining specific circumstances under which it is appropriate to undertake a restorative approach in sentencing Aboriginal offenders. The intent of the *Gladue* factors was to assist and "encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force".[12]

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[9] *Criminal Code,* RSC 1985, c C-46, s 718.2(e) [Code].
[10] *Supra* Lonmo at 8 para 2.
[11] *Supra Gladue* at para 94.
[12] *Ibid* at para 93.

Given its bold objective and far-reaching impact, I would argue that *Gladue* is one of the most important and ambitious decisions released by the SCC in the last twenty years. However, it is also a decision full of nuance, and one which leaves great discretion with the sentencing judge. As such, improper interpretation, or even worse, completely ignoring the *Gladue* principles by sentencing judges, can render Gladue powerless to stem the overrepresentation of Aboriginal peoples in prisons in Saskatchewan; rather the inverse will happen, and our province will further contribute to the burgeoning Aboriginal incarceration rate.

In order to emphasize the importance and nuance of *Gladue,* I feel a brief overview of Canada's colonial history, and the ongoing impacts of colonialism, is necessary. As you read this overview, I ask that you be cognitive of the plain language definition of *colonization* from the Oxford dictionary, "the action or process of settling among and establishing control over the indigenous people of an area"[13].

HISTORICAL CONTEXT

In 1870[14], shortly after Confederation, Canadian federal authorities and religious denominations implemented a national system of schools for Canadian Aboriginal children. The Indian Residential School System they created[15] resulted in over 130 residential schools operating across the country. They remained opens for over a century, with the last residential school closing its doors in 1996[16]. The objective of the Indian residential school was "to remove and isolate children from the influence of their homes,

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[13] *The Oxford English Dictionary, sub verbo* "colonization" online: <https://en.oxforddictionaries.com/definition/colonization>.
[14] Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada,* 2015 at 1 para 4 online: <http://www.trc.ca/websites/trcinstitution/index> [TRC].
[15] Marianne O. Nielsen & Linda Robyn, *"Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada New Zealand and the United States of America"* (2003) 4:1 Indigenous Nations Studies Journal at 37 at para 3 online: <https://kuscholarworks.ku.edu/bitstream/handle/1808/5791/ins.v04.n1.29-45.pdf;sequence=1 > [Colonialism Study].
[16] Truth and Reconciliation Commission of Canada, online: <http://www.trc.ca/websites/trcinstitution/index.php?p=4> [TRC website].

families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal."[17] To identify the insidious purpose of residential schools and the goals of the Canadian federal government, one need look no further than Duncan Campbell Scott's perspective on Aboriginal peoples, as the Head of Indian Affairs in 1920,

> I want to get rid of the Indian problem. Our object is to continue until there is not a single Indian in Canada that has not been absorbed. They are a weird and waning race…ready to break out at any moment in savage dances[18];

And,

> It is readily acknowledged that Indian children lose their natural resistance to illness by habituating so closely in the residential schools and that they die at a much higher rate than in their villages. But this does not justify a change in the policy of this Department which is geared towards a final solution of our Indian Problem.[19]

The Aboriginal communities in Canada, more specifically Saskatchewan continue to be marginalized and it is argued that "marginalization is a direct result of colonialism" [20], which I agree with. "The abuses that have been inflicted on Aboriginals from colonization and residential schools have spread and continue to spread from victim to victim like an infectious decease".[21] Try and picture the impact of being removed from your home and your family at five. Imagine being institutionalized and no longer having an identity or your given name rather you were given a number. Picture not being able to speak English without being punished when English is the only language you know. Or as a parent, can you imagine the relationship you would have with your child(ren) after

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[17] Erin Hanson, "The Residential School Systsem", online: (2009) First Nations & Indigenous Studies The University of British Columbia <http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/> [Hanson].
[18] Aaron Mercredi, "To Kill the Indian in the Child: Canada's Geoncidal Residential Schools and the Dilemma of an Apology", posted on Fire This Time, at para 3 online: <http://www.firethistime.net/fttV5N3_residential.html> [Mercredi].
[19] *Ibid* at para 4.
[20] *Supra* Colonialism Study at 33 para 3.
[21] *Supra* James Scott at 22 para 6.

they had been removed from you without your consent, and if you did not consent you faced imprisonment.

The relationship between marginalization and criminal justice involvement is clearly established. For example, the Royal Commission on Aboriginal Peoples stated, "economic and social deprivation is a major underlying cause of the proportionately high rates of criminality among Aboriginal people."[22] Furthermore, Correctional Service of Canada stated "poverty, inadequate educational opportunities, unemployment, poor living conditions, alcohol abuse and domestic violence, all contribute to Aboriginal people coming into conflict with the law."[23] Aboriginal peoples are not inherently delinquent people. A primary reason that Aboriginal peoples frequently come into conflict with the law is due to the unresolved impacts of colonialism; impacts that the Crown itself has caused in a deliberate manner against its duty of care.

GLADUE & IPEELEE

Given the history and ongoing impact of colonialism, displacement and residential schools, the history of an Aboriginal offender cannot be equitably compared with non-Aboriginal offenders. Factors that contribute to intergenerational trauma often include: effects of the residential school system; experiences in the child welfare or adoption system; family violence; sexual abuse; community history; substance abuse; victimization; the loss of, or struggle with, cultural or spiritual identities; levels of, or lack of formal education; lack of employment opportunities; poverty and poor living conditions; high rates of suicide; and, the exposure to and or membership in Aboriginal street gangs.[24] Aboriginal offenders face unique circumstances, and as such, should be sentenced in a different manner than non-Aboriginal offenders. These differences are at the heart of s.718.2(e) and *Gladue*. The SCC ruled that lower courts must consider these unique circumstances and assess the circumstances of each Aboriginal offender

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[22] *Supra* Colonialism Study *at* 32 para 1.
[23] *Ibid* at 31 para 1.
[24] Government of Canada, Office of the Correctional Investigator, *BACKGROUNDER Aboriginal Offenders – A Critical Situation,* 2013*,* online <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx> [Critical Situation].

individually. When the *Gladue* factors have considerably impacted the accused's life, the sentencing judge's analysis must consider restorative justice alternatives rather than imprisonment as a fit sentence. As such, a judge is to consider all options other than imprisonment for a sentence.

Subsequent to *Gladue,* SCC decided *R. v. Ipeelee* ("*Ipeelee*"). *Ipeelee* further clarified s. 718.2(e) and *Gladue,* the Court decided that it is not necessary for an offender to establish a "causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge".[25] Further these factors are not meant to simply reduce the length of an Aboriginal offender's sentence, rather its objective is to address the overrepresentation of Aboriginal peoples in Canadian prisons through alternative sentencing measures and restorative approaches. These approaches consider the unique circumstances of an Aboriginal offender to find a truely appropriate sentence. Examples of restorative justice include participation in a program that would help an offender address the issue(s) that got them into trouble with the law in the first place. Such as participation in drug or alcohol rehabilitation, anger management, or counselling, and in an appropriate circumstance a community sentence may be an alternative to time in jail.[26]

I find it is noteworthy to state that participating in restorative justice programming as noted above or serving a community sentence is not an easy way out for Aboriginal offenders. The objective of restorative justice is for the offender to take responsibility for his or her actions. Alternative measures such as a community sentence often means that an offender will have to work on addressing the root issue(s) that put them in the criminal justice system allowing an offender to genuinely take responsibility for their actions. Alternative measures can be difficult and a lot of hard work.[27]

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[25] *R v Ipeelee,* 2012 SCC 13, 1 SCR 433 at para 81 [*Ipeelee*].
[26]British Columbia, Legal Services Society, *Gladue Primer,* March 2012 update, at 4 at para 2, online: <http://www.lss.bc.ca/resources/pdfs/pubs/Gladue-Primer-eng.pdf> [*Gladue* Primer].
[27] *Ibid* at 4 at para 3.

This is why *Gladue* is incredibly important, and why Aboriginal offenders must be sentenced and considered uniquely. A sentencing judge must receive information which is unique to the offender before them to better understand how systemic factors relate to the particular offender[28]. Section 718.2 (e), *Gladue*, and *Ipeelee* are more than guidelines for sentencing judges to follow, these are rights that Aboriginal offenders have. An Aboriginal offender's social history must be appropriately assessed when their liberty interests are at stake. While assessing the uniqueness of each case and offender, a sentencing must also "always take judicial notice of the broad systemic or background factors that contribute to the overrepresentation of Aboriginal people in the criminal justice system"[29].

GLADUE IN SASKATCHEWAN: JAMES SCOTT'S RESEARCH

Mr. Scott, a well-respected criminal defence lawyer in Saskatchewan, has seen first hand the biased sentencing regimes, which have affected his clients. During a dangerous offender application, the treatment of his client inspired him to write his paper about sentencing biases in Saskatchewan. To determine whether changes have been implemented in Saskatchewan Courts since the release of his paper in 2014, I will first revisit and review his research.

Throughout the course of his research, Mr. Scott analyzed all of the written criminal sentencing decisions published on the CanLII website from 1996 to June of 2014, a total of 484 decisions. What he found was that not only are Aboriginal offenders in Saskatchewan overrepresented in prisons, they are greatly overrepresented in dangerous offender applications, and receive substantially longer custodial sentences compared to non-Aboriginal offenders. Furthermore, Mr. Scott noted that Saskatchewan also held the

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[28] *Supra Gladue* at paras 83 & 93.

[29] Christine Goodwin & Benjamin Ralston, "R. v. Drysdale: A Gold Standard for the Implementation of R. v. Gladue", (2017) 114 Criminal Reports at para 7 [*Drysdale*].

highest dangerous offender rate of all the provinces, and admitted aboriginals into custody at the highest rate of any of the provinces. [30]

Of the 484 decisions Mr. Scott analyzed, 214 of those written sentencing decisions indicated the accused was an Aboriginal offender, while 270 of written sentencing decisions had no indication whether the accused is Aboriginal. If the decision did not indicate that accused was an Aboriginal person he referred to this person as non-Aboriginal (hereinafter "NIA"). It is noteworthy there are likely some Aboriginal offenders included in the NIA category because of this.

For the purpose of measuring custodial time throughout his research, he measured custodial time in months. To determine the custodial time, he calculated the total sentence by: the months received during sentencing plus any credited time adjusted by the Court on remand. And what he found was "Aboriginals in Saskatchewan have been sentenced to well over twice the amount of jail time as non-Aboriginals".[31] His research produced alarming discrepancies in a quantitative manner showing that Aboriginal people in Saskatchewan Courts "have been sentenced to a total of 18, 698.2 months of custody"[32] and NIA people "have been sentenced to a total of 10,622 months in custody".[33] Further, his research shows on average an Aboriginal offender in Saskatchewan was sentenced to 87.4[34] months of custody per person compared to a NIA average sentence of 39.3[35] months of custody per person.

As a backdrop to Mr. Scott's 2014 analysis on sentencing bias in Saskatchewan, his paper also referenced statistics that highlighted troubling trends in the outcomes for Aboriginal offenders at federal and provincial levels. He points out that, while Canadian crime rates

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[30] *Supra* James Scott at 7 & 8.
[31] *Supra* James Scott at 2 at para4.
[32] *Ibid* at 3 at para 1.
[33] *Ibid* at 3 at para 1.
[34] *Ibid* at 3 at footnote 6.
[35] *Ibid* at 3 at footnote 7.

were dropping, "the custodial rate for Aboriginals continues to rise unabated."[36] further escalating an already dire problem of overrepresentation.

As of 2008, Aboriginal offenders had accounted for 22% of new admissions to adult provincial/territorial sentenced custody in Canada, while accounting for only 3% of the adult population at large. Saskatchewan had the worst rate of overrepresentation, with Aboriginal offenders accounting for 81% of new admissions despite Aboriginals comprising 11% of the provincial adult population. By 2013, the Prairie Region of the Correctional Service of Canada (Saskatchewan, Manitoba and Alberta) was accounting for 39.1% of all new federal inmates, with the majority of that growth coming from Aboriginal offenders who by then accounted for 46.4% of the Prairie Region inmate population.[37]

G*LADUE* IN SASKATCHEWAN: JULY 2014 TO PRESENT

In 2014 Mr. Scott concluded "Saskatchewan is Canada's undisputed Provincial leader for placing Aboriginal peoples in concrete cells".[38] Unfortunately it appears that there has not been much cause for optimism in this regard since Mr. Scott concluded his research. According to Statistics Canada, in 2015/2016, Aboriginal adults were still grossly overrepresented in admissions to provincial and territorial correctional services, as they accounted for 26% of admissions while representing about 3% of the Canadian adult population[39], meaning that admission rates have actually gotten worse. During this time period, Saskatchewan continued to be amongst the highest provinces admitting Aboriginal offenders with 76% of admissions to adult correctional services being Aboriginal offenders. [40]

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[36] *Ibid* at 8 at para 3.
[37] *Supra* James Scott at 8 & 9.
[38] *Ibid* at 9 at para 6.
[39] Statistics Canada, *Adult correctional services in Canada, 2015/2016,*at para 34, online: <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14700-eng.htm > [2015/2016 Statistics].
[40] *Supra* 2015/2016 Table 5.

Admissions to adult correctional services, by characteristic of persons admitted for 2015/2016
This table displays the results of Admissions to adult correctional services. The information is grouped by Jurisdiction (appearing as row headers)

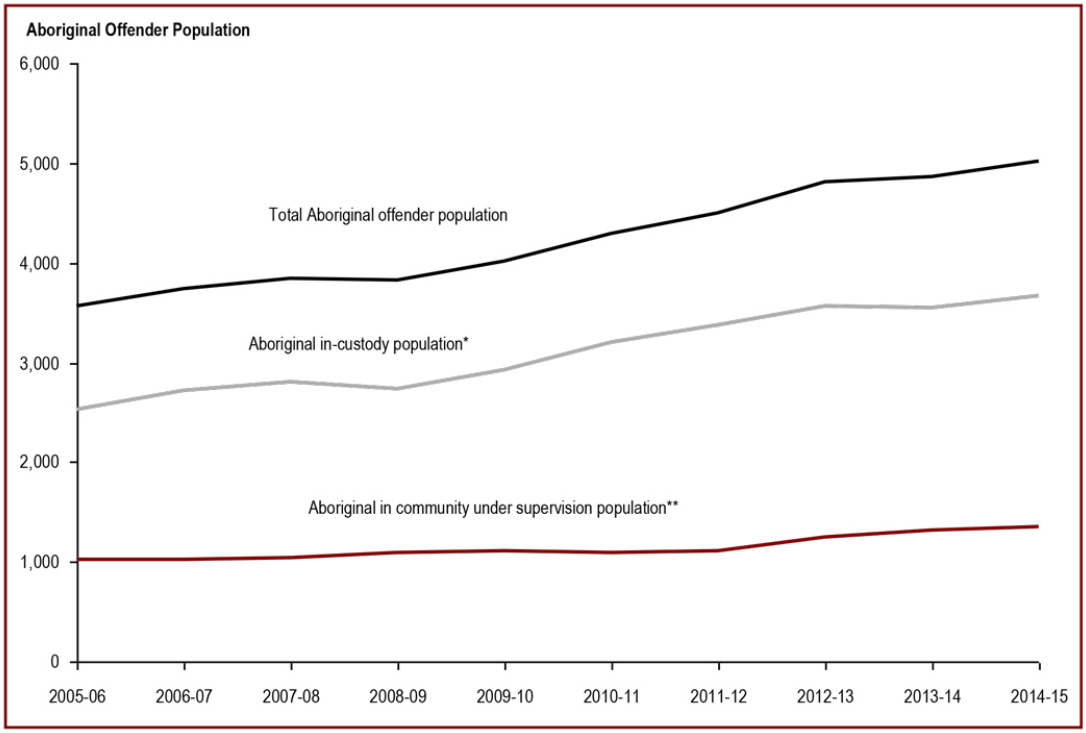
Jurisdiction	Custody	Community		Total correctional supervision	
	Female	Aboriginal	Female	Aboriginal	Female	Aboriginal
	percent					
Newfoundland and Labrador	12	26	24	25	18	25
Prince Edward Island	16	6	22	6	20	6
Nova Scotia	13	10	24	6	18	8
New Brunswick	13	11	22	10	16	10
Quebec	11	5	17	6	13	6
Ontario	13	13	19	11	15	12
Manitoba	19	73	26	57	21	68
Saskatchewan	16	76	23	73	19	75
British Columbia	11	31	19	27	15	29
Yukon	12	70	20	58	17	62
Northwest Territories	5	86	17	86	9	86
Nunavut	4	100	17	100	9	100
Provincial and territorial—total	**13**	**27**	**20**	**24**	**16**	**26**
Federal	**7**	**28**	**7**	**26**	**7**	**27**
						[41]

Further, the Corrections and Conditional Release Statistical Overview for 2015 indicated, "the proportion of offenders in custody [rather than under community supervision] was about 10.5% greater for Aboriginal offenders (73.0%) than for non-Aboriginal offenders (62.5%).

[41] *Ibid.*

The number of Aboriginal offenders has increased

Figure C16



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As indicated above, from 2005/2006 to 2014/2015, "the in-custody Aboriginal offender population increased by 44.8%, while the total Aboriginal offender population increased 41.1% over the same time period". [43]

In addition, from 2005/2006 to 2014/2015, "the number of Aboriginal offenders on community supervision increased 32.2%, from 1,026 to 1,356. The Aboriginal community population accounted for 16.8% of the total community population in 2014/2015".[44]

Furthermore the Corrections and Conditional Release Statistical Overview for 2015

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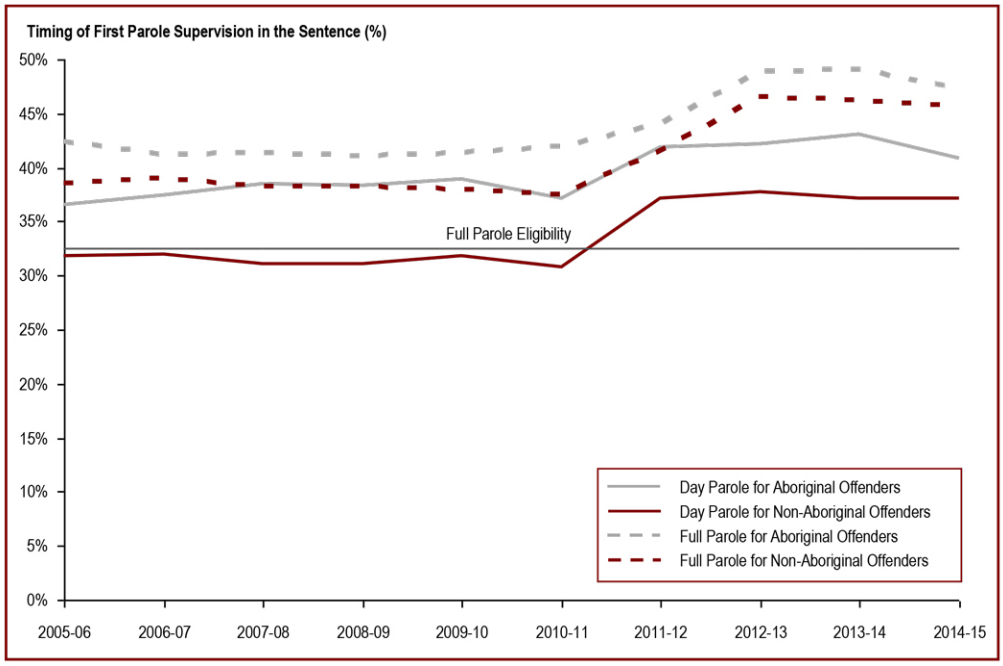
[42] Public Safety Canada, *2015 Corrections and Conditional Release Statistical Overview,* online < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2015/index-en.aspx#c16> [Corrections 2015].
[43] *Ibid.*
[44] *Ibid.*

revealed that Aboriginal offender serve more of their sentence before being released on parole than NIA.

Aboriginal offenders serve a higher proportion of their sentences before being released on parole

Figure D7



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[45] *Ibid.*

G*LADUE* IN SASKATCHEWAN: LINDSAY HJORTH'S RESEARCH

As previous indicated, I have continued Mr. Scott's research into Saskatchewan incarceration rates. For consistency I have examined all of the Provincial Court and Court of Queen's Bench criminal sentencing decisions issued on CanLII from July 2014 until July 2017. Mr. Scott calculated the average sentence-months-per-person in certain offence categories so I applied the same calculations, with my results shown below.

	No Indication if Aboriginal					**Aboriginal Offender**					
	Average Sentence (months)		**# of Decisions (July 2014-July 2017)**			**Average Sentence (months)**		**# of Decisions (July 2014- July 2017)**			**Gladue Reports**
	1996 - June 2014	**July 2014 - July 2017**	**Total**	**DO**	**LTO**	**1996 - June 2014**	**July 2014 - July 2017**	**Total**	**DO**	**LTO**	
Cases of Fraud	19.1	**45.0**	9			17.0	**N/A**				
Drug charges*	13.6	**11.2**	11			13.8	**9.0**	2			
Hazardous driving**	9.8	**18.7**	15			30.0	**22.2**	9	1	1	
Sex Crimes	59.8	**20.4**	10			84.5	**58.3**	16	3		
Home Invasions	125.6	**11.0**	6			172.4	**122.4**	5			
Robberies & Theft	29.2	**11.6**	7			78.0	**87.2**	14	6	1	
Attempted Murder	264.0	**N/A**				139.0	**96.0**	1			
Manslaughter	101.3	**N/A**				97.3	**115.0**	6			
Aggravated Assault	42.0	**70.7**	3	1	1	142.4	**90.9**	7	2		
Assault with a weapon	12.0	**N/A**				122.8	**43.0**	6	1	1	
Assault causing bodily harm	2.5	**6.0**	5			34.3	**63.0**	10	2		
Common assault	3.6	**7.7**	3			19.0	**4.4**	5			
Utter Threats		**5.0**	3				**17**	2			
Weapon charges***		**19.0**	4				**29.8**	8			
Child pornography		**81.75**	8		2	N/A	**14.0**	3			
Total	**39.3**	**31.9**	**69**	**1**	**3**	**87.4**	**96.7**	**69**	**14^**	**3**	**9**

* Drug charges include trafficking and possession
** Hazardous driving includes dangerous and impaired driving, and driving which causes death and injury
*** Weapon charges include possession, possession while prohibited, possession of ammunition
^ One Dangerous Offender faced two predicate offenses; Robbery and Aggravated Assault

	1996 - June 2014 (per James Scott)			July 2014 - July 2017 (per Lindsay Hjorth)		
	Average Sentence (months)		Bias Factor (Aborig/NIA)	Average Sentence (months)		Bias Factor (Aborig/NIA)
	NIA	Aborig		NIA	Aborig	
Cases of Fraud	19.1	17.0	**0.9x**	45.0	N/A	
Drug charges*	13.6	13.8	**1.0x**	11.2	9.0	**0.8x**
Hazardous driving**	9.8	30.0	**3.1x**	18.7	22.2	**1.2x**
Sex Crimes	59.8	84.5	**1.4x**	20.4	58.3	**2.9x**
Home Invasions	125.6	172.4	**1.4x**	11.0	122.4	**11.1x**
Robberies & Theft	29.2	78.0	**2.7x**	11.6	87.2	**7.5x**
Attempted Murder	264.0	139.0	**0.5x**	N/A	96.0	
Manslaughter	101.3	97.3	**1.0x**	N/A	115.0	
Aggravated Assault	42.0	142.4	**3.4x**	70.7	90.9	**1.3x**
Assault with a weapon	12.0	122.8	**10.2x**	N/A	43.0	
Assault causing bodily harm	2.5	34.3	**13.7x**	6.0	63.0	**10.5x**
Common assault	3.6	19.0	**5.3x**	7.7	4.4	**0.6x**
Uttering Threats				5.0	17.0	**3.4x**
Weapon charges***				19.0	29.8	**1.6x**
Child pornography		N/A		81.7	14.0	**0.2x**
Total	**39.3**	**87.4**	**2.2x**	**31.9**	**96.7**	**3.0x**

With Aboriginal offenders receiving average sentences 3.0x longer than NIA offenders from July 2014 through July 2017, it is clear that there is bias within the Saskatchewan justice system against Aboriginal offenders. Furthermore, given that this bias factor has increased from 2.2x to 3.0x between the two time periods studies, we can only conclude that the situation is worsening and that the system will not achieve equity without determined intervention. While sentencing judges appear justified in each individual sentencing decision, the nature of bias means that it can remain invisible in the context of a single decision. In Saskatchewan, it has clearly remained so. In a sense, you cannot see the forest of sentencing bias for the trees of individual decisions. It is only when we

take a step back that we realize that a system that produces such unfair outcomes for an entire ethnic group cannot possibly be treating individual offenders fairly.

While I will not restate the data shown in the above charts, I will briefly revisit Mr. Scott's findings to compare and contrast Dangerous Offender and Long Term Offender applications between his research and my own.

AGGRAVATED ASSAULT

Mr. Scott found that Part XXIV of the *Criminal Code*'s dangerous offender provisions disproportionately affected Aboriginals. First consider his research regarding aggravated assaults. From 1996 to June 2014 he found 16 dangerous offender applications wherein the predicate offence was aggravated assault. Of those 16 applications, 11 application involved Aboriginal offenders. Out of those 11 dangerous offender applications, six Aboriginal offenders were declared as dangerous offenders, and the other five Aboriginal offenders were designated as long-term offenders. This is in stark contrast to NIA, wherein he found only one NIA being declared a dangerous offender with this predicate offence, and only one NIA being designated as a long-term offender. [46]

Further, Mr. Scott calculated the average months of custody a person was sentenced to for aggravated assault for Aboriginal offenders and NIAs. As indicated above, the average sentence for an Aboriginal offender was 142.4 months per person. In contrast to the NIA offenders, which he found the average sentence was 42 months per person, as indicated above.[47]

My findings were quite similar to Mr. Scott's findings for July 2014 to July 2017. During this time period there were four dangerous offender applications with aggravated assault as the predicate offence. Three of dangerous offender applications involved Aboriginal offenders, and all three offenders were declared dangerous offenders. In contrast to one danger offender application with a NIA offender; and, the NIA was also declared to be a dangerous offender.

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[46] *Supra* James Scott at 5 para 1.
[47] *Ibid* at 5 at para 1.

As reported above, Aboriginal offenders sentences have decreased in my findings for aggravated assault since Mr. Scott's research; however, Aboriginal offenders are still being sentenced longer than NIA. I found the average sentence for an Aboriginal offender to be 90.9 months of custody per person, compared to 70.7 months of custody per person for NIA offenders, which means that Aboriginal offenders are still being sentenced approximately 20% longer than NIAs for aggravated assault.

ASSAULT WITH A WEAPON

Next consider the offense assault with a weapon. Mr. Scott's research regarding assault with a weapon found four of five sentencing decisions with the predicate offence assault with a weapon were dangerous offender applications. The five dangerous offender applications resulted in three Aboriginals offenders being designated as dangerous offenders, and one Aboriginal designated as long term offenders. In comparison to NIAs, which none of the NIA assault with weapon offenders were submitted to dangerous offender applications.[48]

Furthermore, he calculated the average months of custody per person for Aboriginal offenders and NIA offenders for assault with a weapon. And much like his findings for aggravated assault he found that Aboriginal offenders convicted of assault with a weapon were being sentenced much longer than NIA offenders. The average NIA sentence was 12 months per person compared to the average sentence for an Aboriginal offender, which was 122.8 months per person, which is 10 times more than NIA offenders.[49]

Again, my findings were comparable to Mr. Scott's. From July 2014 to July 2017 I found two dangerous offender applications with assault with a weapon as the predicate offence. Both dangerous offender applications involved Aboriginal offenders, and one offender resulted in the offender being declared a dangerous offender, and the other offender was declared a long-term offender. There were not any cases available on CanLII for sentences involving NIA convicted with assault with a weapon, nor were

[48] *Ibid* at 5 at para 2.
[49] *Ibid* at 5 at para 2.

dangerous offender applications involving NIA offenders for assault with a weapon as the predicate offence. I did however calculate the average months of custody per person for Aboriginal offenders and the average sentence during this time period was 43 months per person.

ASSAULT CAUSING BODILY HARM

The next offense to consider is assault causing bodily harm. Mr. Scott the average Aboriginal offender was sentenced to 34.3 months per person compared to a NIA offender at 2.5 months per person. Furthermore he found nine of the sentencing decisions which involved Aboriginal offenders were dangerous offender applications with assault causing bodily harm as the predicate offence. Of the nine applications, five Aboriginal offenders were declared dangerous offender applications, and four Aboriginal offenders were being designated as long term offenders. In contrast, none of the six NIA assault causing bodily harm offenders were submitted to dangerous offender applications. Furthermore he noted that five of those NIA offenders were sentenced to a non-custodial sentence.[50]

When Mr. Scott calculated the average sentence in months for assault causing bodily harm for NIA and Aboriginal offenders, he found that NIA were sentenced to an average sentence of only 2.5 months per person. Aboriginal offenders were sentenced to an average of 34.3 months per person, which is 14 times more than for NIA offenders.[51]

Compared to Mr. Scott's research, I found one dangerous offender applications with the predicate offence as assault causing bodily harm, and the offender is Aboriginal was declared to be a dangerous offender. There were no NIA applications for dangerous offenders with assault causing bodily harm as a predicate offence. In fact, my research found that three NIA offenders received non-custodial sentences for assault causing bodily harm. Compared to the Aboriginal offenders whom received on 63.3 months per

[50] *Ibid* at 5 at para 3.
[51] *Ibid* at 5 at para 3.

person, with none receiving non-custodial sentences. Which means, on average an Aboriginal offender receives sentence 6.67 times longer than that of a NIA offender.

DANGEROUS OFFENDER APPLICATIONS

From 1996 until June 2014, Mr. Scott found 34 Aboriginals had been designated as dangerous offenders in Saskatchewan. He calculated the total length of all the dangerous offender sentences, which was 8,174 months, with an average of 240.4 months per person. Further, over that period he found 30 Aboriginals had been designated as long term offenders in Saskatchewan, and calculated the total length of the offender sentences at a total of 2,818 months or 93.9 months per person.[52]

In comparison to NIA offenders during that period, Mr. Scott found only ten NIA offenders in Saskatchewan were designated as dangerous offenders. Again he calculated the total length of all the dangerous offender sentences, which totalled 4,260 months, with an average of 426 months per person. He also noted that over the same period, only nine NIA offenders had been designated as long-term offenders in Saskatchewan. Again he calculated the total length of all the long-term offender sentences, which was 925 months, with an average of 10.3 months per person.[53]

While Aboriginal dangerous offenders receive shorter average sentences according to Mr. Scott's analysis, it should be noted that he factored life expectancy and offender age into his calculations to evaluate the expected length of indeterminate and life sentences. Mr. Scott noted that NIA offenders are expected to live 180 months longer than an Aboriginal offenders, who would then be expected to serve that much less time in custody compared to NIA offenders serving life sentences.

Over the course of my research, I recognized a significant discrepancy between the treatment of Aboriginal and NIA offenders facing charges for Robbery, and subsequently dangerous offender applications. Of 21 sentences for Robbery or Theft, 14 offenders were Aboriginal and 7 were NIA. From the 21 sentences, I found that seven dangerous

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[52] *Ibid* at 6 at para 2.
[53] *Ibid* at 6 at para 3.

offender applications were made with robbery as a predicate offence. Of those seven applications, six Aboriginal offenders were declared dangerous offenders, and one Aboriginal offender was declared a long-term offender. During this time period there were no dangerous offender applications with robbery as a predicate offence for NIA offenders.

Last, throughout my research I found that there were 16 dangerous offender applications published on CanLII. Of the 16 dangerous offender applications, 15 applications were for Aboriginal offenders. Alarmingly 14 out of the 15 dangerous offender applications declared the Aboriginals offenders as dangerous offenders. One Aboriginal offender was declared a long-term offender. During this time period only one NIA offender was declared a dangerous offender. Furthermore, during this time period there were seven offenders were declared to be a long-term offender; four of the offenders were Aboriginals offenders, and three were NIA offenders. It is noteworthy to state that of two of the NIA offenders, which were declared as long-term offenders, the offences were related to child pornography.

GLADUE IN BRITISH COLUMBIA: LOOKING FORWARD FOR SASKATCHEWAN

Saskatchewan Courts must change how we sentence Aboriginal offenders moving forward; what we are currently doing is clearly not working. As British Columbia's Chief Joe Alphonse, the tribal chairman of the T'silhquot National Government, stated about the current approach to incarcerating Aboriginal offenders, "right now, you throw somebody in jail for six months and they just become better and better at their craft because you're enabling them to become educated by real criminals. Things just keep escalating and you want to stop that escalation from happening and that's what this process will enable us to do."[54]

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[54] Sunny Dhillon, "Two more First Nations Courts Proposed in British Columbia", *The Globe and Mail,* (6 March 2017) at para 5 online: <https://www.theglobeandmail.com/news/british-columbia/two-more-first-nations-courts-proposed-in-british-columbia/article29043462/> [Dhillon].

As noted above, Saskatchewan continues to lead the prairies in sentencing Aboriginal offenders to prison, which only further contribute to overrepresentation of Aboriginals in Canadian prisons.[55] Saskatchewan Courts need to begin to focus on rehabilitating Aboriginal offenders and not immediately sentencing an offender to imprisonment.

If the systemic bias in our criminal justice system is not addressed, Aboriginal incarceration will continue to get worse. Statistics Canada projects an increase in the national Aboriginal population of up to 70% by 2036. They also project that Saskatchewan will remain one of the provinces with the highest proportion of Aboriginal people in Canada, with about one in five people from Saskatchewan identifying as Aboriginal.[56]

Records from Statistics Canada for 2010/2011 support Chief Alphonse's comments mentioned above. Statistics Canada noted that many provinces assess conditions of an offender to help determine offenders' treatment and the programming needs of adult offenders entering correctional centres. The assessment generally focuses on "six domains: alcohol or drug abuse (substance abuse); criminal peers and companions (social interactions); community functioning; employment; family or marital issues; and attitude".[57]

In 2010/2011, the Saskatchewan correctional centres indicated adults who entered custody typically had four of the six rehabilitative needs, with 85% of offenders displaying needs with social interaction; the most common need was in the area of substance abuse, which was 92% or approximately 9 in 10 offenders admitted to custody;

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[55] *Supra* 2015/2016 Table 5.
[56] Statistics Canada, *Projections of the Aboriginal population and households in Canada, 2011 to 2036,* at para 4, online: < http://www.statcan.gc.ca/daily-quotidien/150917/dq150917b-eng.htm > [2036 Projections].
[57] Statistics Canada, *Adult correctional statistics in Canada, 2010/2011,* at para 34 online <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm > [2010/2011 Adult corrections].

77% displayed needs with attitude; 70% displayed needs with employment; 69% displayed needs with community functioning; and 50% had family or marital issues. [58]

Since Saskatchewan's Aboriginal incarcerations rates are amongst the highest in the country with no signs of dropping, it will be helpful to look to other provinces with much lower Aboriginal incarceration rates to see if there are alternative approaches our Courts can implement when sentencing Aboriginal offenders. For alternative approaches I will briefly look into British Columbia, another western province, which has a much lower Aboriginal incarceration rate than Saskatchewan, and much different approaches when sentencing Aboriginal offenders. According to Statistics Canada in 2016, Aboriginal people made up 5% of British Columbia's total provincial population, and accounted for approximately 17% of Canada's total Aboriginal population. [59] Despite the overall Aboriginal population being larger in British Columbia than Saskatchewan, in 2015/2016 British Columbia was amongst the lowest provinces for admitting Aboriginal offenders into adult correctional services with only 31% [60] of the custodial admissions identifying as an Aboriginal person. This is likely due to the fact that British Columbia has taken a much different approach to implement section 718.2(e) principles, *Gladue,* and *Ipeelee* factors.

FIRST NATIONS COURT

In 2006, British Columbia implemented a First Nations Court, which is commonly referred to as "*Gladue* Courts". *Gladue* Courts have jurisdiction over bail hearings and sentencing hearings, and they are now facilitated in six[61] communities. If an offender lives in British Columbia, and self identifies as an Aboriginal person then the matter may be heard at a *Gladue* Court. Most importantly, *Gladue* Courts were developed "in consultation with local First Nations, the community at large, police, Community

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[58] *Supra* 2010/2011 Adult corrections at para 35.
[59] Statistics Canada, *Aboriginal Peoples: Fact Sheet for British Columbia,* at para 1 online <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm > [Fact Sheet BC].
[60] *Supra* 2015/2016 Table 5.
[61] New Westminster, Whistler, Squamish, North Shore, Kamloops, and Duncan.

Corrections, Crown counsel, defence lawyers, and other support service groups like the Native Courtworker and Counselling Association of British Columbia".[62] British Columbia's model for *Gladue* Courts has gained attention from "several Canadian justice system professionals and academics"[63] to use this model in their own communities.

Gladue Courts differ from a traditional courtroom settings because it "takes a holistic, restorative, and healing approach to sentencing, with a focus on rehabilitation whenever possible"[64], which recognizes the unique circumstances of Aboriginal peoples. The Court focuses on rehabilitation whenever possible, not only reduce recidivism but to assist with healing and repairing "the harm done to victims and the community".[65] Further, the *Gladue* Courts put a focus on community and makes sure everyone involved in the case has a chance to be heard, "local First Nations communities are encouraged to contribute to the proceedings"[66] , which is an important part to healing. During a sentencing, the judge, the Crown, Aboriginal community members, the victim and the victim's family, the offender and offender's family tend to be present, and sometimes the sentence will include probation officers, social workers, and drug and alcohol counsellors. Unlike the formal courtroom settings, parties sit around a table where everyone gets a chance to speak. And, after each person has spoken, the judge will work collaboratively to come up with a healing plan. The plan may involve referrals to counsellors; culturally appropriate programming, job training, and education; and programs offered by Health Canada. An offender is expected to adhere to the healing plan and must attend future court dates to report their progress. [67]

Dana-Lyn Mackenzie, Associate Director of Indigenous Legal Studies at the University of British Columbia's College of Law, stated that there has not been "statistics on recidivism rates for offenders who go through First Nations court, but said anecdotal

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[62] Provincial Court of British Columbia, "About the Court", at para 7 online: <http://www.provincialcourt.bc.ca/about-the-court/court-innovation/problem-solving-courts#FirstNationsCourt> [BC Provincial Court].
[63] *Ibid* at para 7
[64] *Supra Gladue* Primer at 23 at para 1.
[65] *Supra* BC Provincial Court at para 7.
[66] *Ibid* at para 7.
[67] *Supra Gladue* Primer at 23 para 2.

evidence leads her to believe they make a difference." Further stated, "there is a much higher success rate because it's a more restorative, healing approach to sentencing. … I think it allows the offender to really come to terms with what they did and realize how it impacts their community".[68]

GLADUE RERPORT DISBURSEMENT PILOT PROJECT

In addition to *Gladue* Courts, in 2011 a *Gladue* Report Disbursement Pilot Project began in British Columbia. The pilot project was ran by Legal Services Society ("LSS") , and was largely funded by the Law Foundation of British Columbia.[69] The pilot project ran from June 2011 until March 31, 2013.[70] This pilot project was implemented to address an access to justice issue many Aboriginal offenders face. *Gladue* reports are costly and many Aboriginal offenders cannot afford or obtain a *Gladue* report because of the cost. According to Legal Aid, the preparation of *Gladue* reports was inconsistent with the number of Aboriginal offenders, as many of Legal Aid's clients are Aboriginal, and this pilot project helped address this issue.

As indicated the objective of the pilot project was to fund *Gladue* reports and to ensure that Aboriginal people had access to comprehensive *Gladue* reports for sentencing hearings. In addition to providing a Court with a comprehensive account of an Aboriginal offender's background and his or her community, *Gladue* reports also presents options for a sentencing or a bail plan that offers realistic and viable alternatives to prison.[71]

The LSS compiled and analysed data from 30 *Gladue* reports and some findings were: 30% of offenders had a physical or mental disability such as, 10% with Attention-Deficit Hyperactivity Disorder/Attention Deficit Disorders ("ADHD/ADD"); 3% with a brain

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[68] *Supra* Dhillon at para 14 & para 15.
[69] British Columbia, Legal Services Society, "Evaluation of *Gladue* Report Pilot Project", (2013) at 1 at para 1, online: <http://www.lss.bc.ca/assets/aboutUs/reports/aboriginalServices/gladueReportDisbursementEvaluationJune2013.pdf> [LSS Evaluation].
[70] *Ibid* at 5 at para 2.
[71] *Ibid* at 5 at para1.

injury 3%; 13% with concurrent disorder; 6.7% with Post-Traumatic Stress Disorder ("PTSD"); 16% with Fetal Alcohol Spectrum Disorder ("FASD") and another 16% were undiagnosed but suspected of having FASD; and 3% experienced a physical injury and one person had a suspected brain disorder that was undiagnosed.[72]

With respect to an offender's childhood: 53% of offenders were removed from their families in childhood; 10% were adopted into a non-Aboriginal family; 20% went to a non-Aboriginal foster family; and another 10% went to live with other family. It is noteworthy to mention the reality for children in foster care, many children do not stay in one place, they are moved around between foster families, group homes and sometimes other family; 20% of the offenders reported spending their entire childhoods living between families and group homes; and 33.3% were removed or dislocated from the Aboriginal family and community.[73]

With respect to abuse, which abuse characterized many of their lives: 83% of the report offenders had parents with substance abuse issues; 73% had experienced physical violence and neglect as a child; 36% of the offenders were sexually abused by a family member; another 16.7% reported being sexually abused by a member of their community; and 23% stated they suffered emotional abuse from their family.

Of the 30 offender reports analysed 63% had experienced some form of traumatic event or grief in childhood including: 23 % reported multiple deaths of family members or people close to them; 6% had been victimized sexually multiple times; and 30% had witnessed family violence.

For most of the 30 offenders analysed, residential school was a defining feature of their past and subsequently a determining factor in their futures; 66.7% of offenders were directly connected to residential schools including parents and grandparents who had been in residential schools. It is noteworthy to indicate that residential school not only has an impact on an individual, rather residential school have an impact on entire

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[72] *Ibid* at 19 at para 3.
[73] *Ibid* at 19 at para 4.

communities. The residential school legacy manifests itself in the social structure of communities. And from the *Gladue* reports analysed, 40% of offenders came from communities that had been affected by residential school. It is well known and understood that residential schools created legacy of dysfunction in Aboriginal communities, which includes substance abuse, sexual abuse, physical abuse, and poverty.[74]

GLADUE REPORTS VS. PRE-SENTENCE REPORTS

There is debate about whether a presentence report ("PSR") provides the same information that a *Gladue* report provides, and without understanding that a *Gladue* report provides much more than a sentencing report then the confusion is somewhat easy to understand. Especially once the cost of a *Gladue* report is compared to the cost of a PSR. Despite the similarities between the PSR and *Gladue* report, I will attempt to explain the differences.

A PSR is prepared by a probation officer to assist judges with sentencing, and its "purpose is to give the Court a picture of you as an offender and is based on your criminal record"[75] with a focus on criminal behaviour and on risk analysis on (likelihood of an offender to re-offend).[76] Something to consider about the pre-sentence report is the fact that reports are prepared by probation officers which may also limit or impact the amount of information that offenders share, since parole officers are "not independent and [their] role includes investigating and reporting criminal charges against [the offender]."[77]

Section 721 of the *Criminal Code* specifies the inclusion of the following information be included in a PSR: "the offender's age, maturity, character, behaviour, attitude and

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[74] *Ibid* at 20 at para 1.
[75] Public Safety Canada, *Presentence Reports in Canada 2005-03,* at para 5 online < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/prsntnc-rprts-cnd/index-en.aspx> [Presentence Reports].
[76] *Supra Gladue* Primer at 7 at para 4.
[77] *Supra* Drysdale at para 12.

willingness to make amends; the history of previous dispositions under the *Young Offenders Act* and of previous findings of guilt under this Act and any other Act of Parliament; the history of any alternative measures used to deal with the offender, and the offender's response to those measures to be included in the report."[78] On the surface a PSR may seem like it relays the same information as a *Gladue* report because a PSR may include a *Gladue* component, it is important to remember to purpose of a PSR which is to focus on an actuarial, risk-based approach to assessing the offender." [79]

Next consider the *Gladue* report, which I will argue is much more extensive than a PSR, and the information within the *Gladue* report is crucial when sentencing an Aboriginal offender.

An important factor of a *Gladue* report is that the report is usually written by an Aboriginal person or at the very least a person with significant understanding of Aboriginal history and culture, not a probation officer. It is also noteworthy to mention the level of trust that a *Gladue* report writer has with an offender, which is likely because Gladue understand the colonial history and the impacts of colonialism. This is incredibly influential to build trust because an offender must speak candidly and explain deep personal details about themselves, and it seems unlikely an offender will share these details with their probation officers. *Gladue* writers create safe environments to enable offenders to disclosure sensitive and private details of their lives.[80]

It is meaningful to remember the intention of s 718.2(e) and the purpose of *Gladue* and *Ipeelee,* which is to rehabilitate an Aboriginal offender in order to address the overrepresentation of Aboriginals in Canadian prisons. Unlike a PSR a *Gladue* report provides a sentencing judge the information he or she needs to make the best decision possible when sentencing an Aboriginal offender. When sentencing an Aboriginal offender, the sentencing judge must answer two important questions: "Why is this

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[78] Presentence Reports at para 12.
[79] *Supra Drysdale* at para 11.
[80] *Supra* LSS Evaluation at 3 & 4.

particular Aboriginal person before the court?";[81] and ,"What sentencing options other than jail are available that might help to address the reasons why this Aboriginal person is before the court?"[82] To answer these questions, the sentencing judge must know more about the offender, and to properly assess the offender they require as much information as possible about the offender and the offender's background in order to get a full picture of their life. The thoroughness of a *Gladue* report, which canvasses the unique factors faced by an Aboriginal offender, is how *Gladue* reports differ from PSRs. A *Gladue* report is lengthy and is usually 12 to 18 pages long.[83] In order to find that appropriate sentence the sentencing judge requires this background information about an offender's family and an offender's community to determine how or why that person struggles with the law. The judge then must consider how will they help the offender in order to address the issues that got an offender into trouble with the law, and rehabilitate that offender.[84]

In additions to all factors that are discussed in a PSR other relevant background information is also included in a *Gladue* report. Specifics that will often be found in *Gladue* reports and not found in PSRS are: the offender's education level including the offender's reading ability; and whether the offender faced any challenges that would prevent him or her from learning, such as trauma, learning disabilities, or FASD. The offender's past and present employment record and whether the offender has any special training, skills, or talent. Whether the offender is a member of any social, professional, or religious clubs; and what are the offender's interests, goals, and aspirations (educational, professional, or otherwise). The financial situation of the offender is considered and whether the offender has been impacted by poverty. Whether there is a history with social assistance, employment insurance, food banks, or shelters. Whether the offender has mental health issues (mental, emotional, and behavioural status); and whether the offender is in overall good health or whether there are any health or physical problems. Whether the offender struggles with or has struggled with addictions or substance abuse. If so, whether the offender grew up in a home where there was a

[81] *Supra Gladue* Primer at 6 para 1.
[82] *Ibid* at 6 at para 1.
[83] *Ibid* at 7 para 3.
[84] *Ibid* at 6 para 1.

history of addictions or substance abuse. Whether the offender was subjected to domestic violence or abuse as a child. Given the nature of the personal and traumatic information provided to a *Gladue* writer, for privacy and sensitivity reasons, it is important to note that if an offender does not want this information discussed out loud in court, an offender can ask their lawyer to give this information in writing to the judge and the Crown.[85]

Further to the extensive detail about an offender's past and their community, *Gladue* reports provide details and address specific needs of each offender which includes programs, treatment and probation conditions. *Gladue* writers end their report with sentencing recommendations, unique to each offender and a viable plan alternative to a prison sentence. *Gladue* reports "adopt a non-actuarial model and more contextualized approach to situate and frame Aboriginal offenders' risk."[86]

Arguably, the greatest contribution of a *Gladue* reports is the ability to help guide the Court to correlate the intergenerational impacts of colonialism, such as residential schools, community displacement, child apprehensions, and the offender being sentenced. The correlation of colonialism in what is missing in the courtrooms in Saskatchewan when sentencing Aboriginal offenders. A meaningful application of *Gladue* requires this background information, and requires genuine consideration of alternatives to incarceration. And when counsel does not offer this information, it is "incumbent on the Courts to obtain it".[87]

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[85] *Ibid* at 6 para 4.
[86] *Supra Drysdale* at para 11.
[87] *Ibid* at para 22.

CONCLUSION & RECOMMENDATIONS

As Mr. Scott's research indicated in 2014, and my subsequent research from 2017 supports, Canada and more specifically Saskatchewan must work towards rehabilitation of Aboriginal offenders.

The upward trend of Aboriginal incarceration rates since the 1950s has been documented. Saskatchewan is arguably the province that needs *Gladue* the most and yet continues to implement it the least. Over incarceration of Aboriginal peoples is still a considerable problem in Saskatchewan. If you recall statistics indicating for 2015/2016 Saskatchewan continues to have the highest Aboriginal incarceration rate of the prairies, and is amongst this highest admission rates of Aboriginal offenders in the country.

In 1999, in *Gladue* the Court stated,

> "Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents".[88]

I think it is important to restate what the Court had to say about Saskatchewan in 1999. It has almost been 20 years since the *Gladue* decision, and the Court recognized then that Saskatchewan Courts were the new Indian residential schools for Aboriginal offenders sentenced in Saskatchewan. And since *Gladue* what has changed in Saskatchewan?

It is time for Saskatchewan judges to show compassion when sentencing an Aboriginal offender. Consider a decision from an Ontario Court. Justice S. Nakatsuru sentenced Ms. Josephine Shelly Lynn Pelletier in 2016 in Toronto, *R. v. Pelletier*. The reason Ms. Pelletier found herself in front of the Court because she breached a condition to abstain from illegal drugs. The Crown was seeking a 18 month sentence. Justice Nakatsuru recognized that Ms. Pelletier has struggled with addiction her entire life. Justice Nakasturu stated,

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[88] *Supra Gladue* at para 60.

> "I find that rehabilitation is an important principle in my sentence. I find that restraint in imposing jail is important. Obviously it is important for you Ms. Pelletier. But is also important to deal with the problem we have in this country of sending too many indigenous offenders to jail. The courts recognize that problem. I have to address it in my sentencing of you."[89] Further, "I am sending you home. I wish you all the best in your life."[90]

Compassion, empathy, humanity, kindness, mercy and sympathy are required from our Saskatchewan judges, especially when dealing with additions or mental health. For example, if you're afraid you might not be able to abstain from alcohol, ask for a clause that allows you to drink alcohol inside your home only. This may seem counterintuitive, but so does doing the same thing over and over and expecting a different result. Recognizing and understanding what an addict is, it is clear that punishing an offender by incarceration not going to address the root problems. As Mr. Scott aptly stated in his 2014 paper, "the Courts and the officers have to show leadership to stop the epidemic of violence and sexual abuse which has infected Aboriginal communities since the horrors of colonization and residential schools. If we in the criminal justice system do not do so, no one will".[91] I could not agree more with Mr. Scott.

To help address these chronic problems, Saskatchewan judicial actors require a deep understanding of colonial history, and Saskatchewan requires *Gladue* courts. By simply implementing holistic courts in Saskatchewan, and providing intensive education to judicial actors, Saskatchewan Courts could play a leading role in healing Aboriginal offenders, and decreasing our Aboriginal incarceration rates. *Gladue* courts are distinctively designed to ensure that sentences conform to the principles set out in section 718.2(e), and this is the factor we are missing in Saskatchewan when sentencing our Aboriginal people.

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[89] *R v Pelletier* 2016 ONCJ 628 (CANLII) at para 25 [Pelletier].
[90] *Ibid* at para 30
[91] *Supra* James Scott at 29 at para 6.

For insight into the impact of colonization I will close with a poem written by Mr. Jeremy Jerry Mooswa. Mr. Mooswa is an Aboriginal person whose struggles with addictions, gang life, poverty, and the law are directly related to colonization, as he indicates in his touching piece of writing submitted through sentencing submissions at his Dangerous Offender hearing. Justice Allbright took an unconventional step when writing Mr. Mooswa's decision by including his poem. Thank you Justice Allbright for including Mr. Mooswa's raw piece of writing, and allowing us to gain insight into his unique perspective on how and why he ended up where he is today.

Locked up where one cannot see
Lonely I try to get lost in memories
Being institutionalized is a mindset
Which isn't easy to forget
because behind every wall
could mean life or death
Trust no one just me that's all there's left
Remembered by Few Forgotten by many
Any form of communication is as good as any
Day to day anticipation
Judgement day perspiration
Jailed means I failed
Freedom I finally prevailed
a lot of bad choices
which is why I have to voice this
this is how I grew up
a lil cree native picked on now steppin up
all heart & street smart
grew up Fatherless from the start
Moms did the best she could
But I fell thru the cracks drinkin smoking kickin it in the head
This is all I know
But I'm not a Dangerous Offender
Just lost unfocused & surrounded by danger
a life of crime suspense & anger
was the normal & I felt no stranger
the time that I've wasted my biggest regret
rotting in this cell I will never forget
thinkin about all the things that Ive done
crying and laughing the pain and the fun
me and my shame & never ending guilt
behind this wall of emptiness & pain that I've built
I'm getting too old for this young persons game

Acting real tough with no sense of shame
Becoming this person I don't want to be
I've hurt so many people & the ones that are dear to me
I'm trying real hard to not play the part
I'm still holding my dreams deep in my heart
I know I can make it I just have to try
I was headed for death but now I don't want to die.[92]

[92] *R v Mooswa* 2016 SKQB 122 (CANLII) at para 118.

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APPENDIX

Supplementary Data Fie

The accompanying Excel spreadsheet with my research from CanLII.