Sentencing Indigenous Offenders in Saskatchewan:
Taking Judicial Notice of the History of Colonization, Displacement and Residential Schools

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Introduction

The following is based on the information obtained while conducting a report on Legal Aid Saskatchewan's (LAS) Gladue report pilot project[2] (the "Pilot Project") and subsequent research into Indigenous custodial overrepresentation.

A sentencing decision ought be based on the best evidence and the maximum amount of information that is practically available. In the case of an Indigenous offender, the best evidence and maximum amount of information is often only provided to the Court when

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[2] The report involved reviewing 27 Gladue reports from LAS's Gladue report pilot project. I based this report on my conversations with 9 Gladue report writers and student/assistants, 23 defence counsel, 5 of the Gladue reports' subjects, 47 of the people listed in the Gladue reports as sources of information, and from my communications with a senior Crown prosecutor who generously provided me with the views of the majority of the Crown prosecutors involved. I also spoke to one Crown prosecutor from whom the senior Crown prosecutor did not acquire information. I attempted to contact all of the 486 people associated with the Gladue reports.

a Gladue report is prepared. Gladue reports provide superior information regarding an Indigenous person's circumstances when compared to the information provided in a presentence report (PSR).[3] Most Defence Counsel involved in the Pilot Project stated that the Gladue reports from the Pilot Project provided the information they were seeking for their clients. However, a significant number reported that there was room for improvement. An evaluation of the Pilot Project reveals that there are economical ways to improve the effectiveness of Gladue reports. The key to an effective Gladue report is the quantity and quality of the information. A "gold-standard" Gladue report ought to include the following:

- The general history of colonization, residential schools, displacement and a particular history of the offender's community[4];
- Authorities establishing the impact of colonization, residential schools, displacement, historic and intergenerational trauma on individuals;
- Authorities that show how such trauma is related to the individual's offending behavior. Such authorities might include the dominant sociological and criminological theories regarding the features of social involvement which lead to criminal behavior;
- The offender's circumstances including their family and personal history;
- Authorities on the effectiveness of the various forms of sentencing such as the types of treatment and the programs available. Such authorities should include peer-reviewed research on the effectiveness of incarceration;[5] and
- A list of treatments and programs available to the offender and the time frame when they will be available.

The problem with a "gold-standard" Gladue report is that they are time consuming, expensive, and require more knowledge and skill than any one Gladue report writer is capable of providing.

There are two methods to substantially reduce a Gladue reporter writer's need for lengthy preparation time and wide-ranging expert knowledge. These methods will also improve and economize the research and preparation of a Gladue report. These methods are as follows:

1) Obtain the history of an Indigenous offender's community from a reliable, peer-reviewed online source. We are now able to use such a historical database containing the histories of all Indigenous communities in Saskatchewan (the "Indigenous Communities Database"). The LAS, the Law Foundation and a

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[3] See the Appendix for a discussion comparing Gladue Reports to PSRs.

[4] In *R. v. Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 (CanLII) at paragraph 60 Mr. Justice LeBel stated, "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."

[5] For an example of an authority of the effectiveness of such sentences see James Bonta and D. A. Andrews; The Psychology of Criminal Conduct, (Routledge; 6th edition , Nov. 2, 2016); Chapter 13, pages 277-304.

group of history students from the University of Saskatchewan led by Dr. Keith Carlson, have completed (after 3 years) a database containing the written and oral histories of Indigenous communities. This will save the time and expense related to researching the Indigenous offender's community;

2) The Courts take judicial notice of an agreed upon authority or an agreed statement of facts containing a macro-history of colonization, displacement and residential schools as well as a summary of peer-reviewed studies on how criminal behavior is related to this history including the most effective treatments for traumatized offenders. The factual content of this authority will be fully discussed below.

Access to an offender's community's history online in conjunction with an accepted authority or agreed statement of facts showing how historic trauma can cause criminal behaviour will free a Gladue report writer from the need to research these areas for each report. The writer would then only need to research an offender's family background, personal background and the resources available for treatment.

To truly abide by the principles of sentencing with respect to Indigenous offenders and fashion an effective sentence, there must be an understanding of how the above mentioned history relates to the offending behaviour. An overarching objective of sentencing is to arrive at a proportional sentence that fosters community safety[6]. The Court needs reliable information in order to accomplish this goal.

It will be shown below that a complete picture of an Indigenous offender's circumstances has the added benefit of revealing the limitations of the criminal justice system. Much can be done within the criminal justice system to combat the systemic sentencing discrimination working against Indigenous peoples but Judges and Counsel cannot combat this discrimination on their own. Sentencing Judges need to have this information so they can not only state, but fully understand, the challenges to rehabilitation and reintegration and fashion an effective sentence.

The Relationship Between the History of Colonization, Displacement, Residential Schools and Indigenous Custodial Overrepresentation

A plain reading of the sentencing provisions of the *Criminal Code* indicates that Parliament requires the court to take a closer look at the circumstances of Indigenous offenders when applying the principles of sentencing. The Supreme Court of Canada tells us in *R. v. Gladue* that this provision is remedial to address Indigenous custodial overrepresentation. It is useful at this point to ask why Parliament concluded that paying particular attention to an Indigenous person's circumstances would be remedial for Indigenous overrepresentation in custody.

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[6] *R. v. Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 (CanLII) at paragraphs 36 - 39. 66 72, **74** and 120 and *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 at paragraphs 33, 34, 43, 44, 45, 47, 48 and 93,

Mr. Justice LeBel must have been referring to the harm done to Indigenous peoples by "the history of colonization, displacement and residential schools" when he stated in *R. v. Ipeelee* that the courts must take judicial notice of that history.[7] However, a plain reading of the principles of sentencing does not suggest that courts ought to refrain from intervention or impose a lighter sentence because of an Aristotelian notion of equilibrium[8] – that the Indigenous offender has "suffered enough" or should be pitied because she is "more sinned against than sinning". Such notions are of no use when assessing moral culpability or rehabilitation. It should be assumed that Parliament had a sound theoretical basis for including s. 718.2(e) in the 1996 sentencing amendments to the *Criminal Code*. A plausible theoretical basis for s. 718.2(e) will be examined below.

If Parliament relied on a theoretical basis for paying particular attention to the circumstances of Indigenous offenders, then Trauma Theory and General Strain Theory (GST) are good candidates for such a theory. Both Trauma Theory and GST provide a framework for understanding why a person's circumstances are relevant to both moral culpability and rehabilitation.

General Strain Theory

GST has its origins in criminological theories and research. Criminologist Robert Agnew described GST as follows:

> General strain theory (GST) argues that strains or stressors increase the likelihood of negative emotions like anger and frustration. These emotions create pressure for corrective action, and crime is one possible response (Agnew 1992). Crime may be a method for reducing strain (e.g., stealing the money you desire), seeking revenge, or alleviating negative emotions (e.g., through illicit drug use). GST builds on previous strain theories in several ways: most notably, by pointing to several new categories of strain, including the loss of positive stimuli (e.g., loss of a romantic partner, death of a friend), the presentation of negative stimuli (e.g., physical assaults and verbal insults), and new categories of goal blockage (e.g., the failure to achieve justice goals). Recent research demonstrates that many of the specific strains falling under these categories are related to crime and delinquency (see Agnew 2001a for a summary; Aseltine, Gore, and Gordon 2000; Mazerolle et al. 2000; Piquero and Sealock 2000). The specification of these new categories of strain is GST's greatest strength.[9]

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[7] *Ipeelee*, s*upra* at paragraph 60

[8] Aristotle stated, "Justice is the political good. It involves equality, or the distribution of equal amounts to equal persons", Aristotle, The Politics of Aristotle, trans. E. Barker, (Oxford: At the Clarendon Press, 1946) vol. III, xii,, 1282 b at 129

[9] Robert Agnew, *Building on the Foundation of General Strain Theory: Specifying the Types of Strain Most Likely to Lead to Crime and Delinquency*, Journal of Research in Crime and Delinquency, Vol. 38 No. 4, November 2001 319-361 © 2001 Sage Publications.

Trauma Theory

The principles of Trauma Theory are similar to GST but arise from a blend of psychology and the humanities. I will concentrate on Trauma Theory because it has been the main explanation adopted by the researchers who examine the high rates of Indigenous crime and victimization.[10] Department of Justice research officer Katie Scrim describes Trauma Theory as follows:

> The theory posits that the relatively recent victimization of Aboriginal peoples has occurred not only to Aboriginal people as individuals but to Aboriginal people as a society, as a result of the colonization process which saw communities losing control over family and culture. It is the preferred theory in many studies examining family violence in Aboriginal communities, but it can easily be applied to a broader theory of Aboriginal victimization (Ursel 2001). Its effects are often explained as the root causes of social disorder in Aboriginal societies where alcohol, suicide, abuse, and victims of violence are symptoms of this underlying traumatization.[11]

The history of colonization, displacement and residential schools reveals that too many Indigenous adults and children have had traumatic experiences. Anyone who practices criminal law in Saskatchewan cannot help but see the correlation between their client's childhood trauma and their criminal behavior. Traumatic events for Indigenous children include physical and sexual abuse, neglect, domestic violence, suicide threats, death of a loved one and other extraordinary events. It seems to me that nearly all of my hundreds of Indigenous clients suffered from some form of childhood trauma.

A correlation between factors is interesting but should not be relied upon too heavily when making important decisions such as sentencing. A correlation between one factor and another does not necessarily mean one of the factors causes the other. For example, there is an established correlation between a country's domestic chocolate consumption and its number of Nobel Prize winners - but there is no evidence that a nation's chocolate consumption causes Noble Prize winners. There is a correlation between Indigenous people and criminal behavior - but there is no evidence to suggest that being an Indigenous person causes that person to commit crimes. Similarly, there is a correlation between criminal behavior and such factors as poverty, or being raised by a single parent, or transience, or a lack of education, but there is no evidence that such factors cause criminal behavior.

The correlation between childhood trauma and criminal behavior is fundamentally different from other so-called "risk factors". There is evidence that traumatic experiences in childhood and adolescence, are not only correlated to criminal behavior[12], but there is

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[10] Katie Scrim, *Aboriginal Victimization in Canada: A Summary of the Literature*, Victims of Crime Research Digest No3, Department of Justice, http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html

[11] *Supra*

[12] Vittoria Ardino, *Offending Behavior: The Role of Trauma and PTSD* - Eur J Psychotraumatol. 2012; 3: 10.3402/ejpt.v3i0.18968. Also Lorraine E. Cuadra, Anna E. Jaffe Renu, Thomas David DiLillo, "Child

also an established **causal link** between such trauma and a traumatized person's involvement in crime, substance use, health-risking sex behaviours, and internalizing problems during early adulthood.[13] Researchers conducted a longitudinal study of 1,575 children all with some underlying propensity to be exposed to maltreatment and compared those who actually experienced maltreatment with those who where not maltreated. The researchers found that being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent.[14]

Not everyone who has suffered childhood trauma or adverse childhood experience behaves in a criminal manner and it has been noted that the mechanism which links trauma to criminal behaviour is complex.[15] Psychologists Lorraine E. Cuadra, Anna E. Jaffe Renu, and Thomas David DiLillo have examined Trauma Theory in conjunction with Social Learning Theory and state the following in "Child Maltreatment and Adult Criminal Behavior: Does Criminal Thinking Explain the Association?":

> Although criminality is certainly not an inevitable outcome of child maltreatment, in a recent review of child maltreatment and delinquency, McGrath et al. (2011) highlight a social learning perspective to explain the frequent occurrence of criminal outcomes in adult victims of child maltreatment. These theories propose that individuals who are exposed directly or indirectly to violent or abusive experiences (e.g., sexual and physical abuse, witnessing domestic violence) early in development may be more likely to adopt corresponding attitudes and beliefs

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Maltreatment and Adult Criminal Behavior: Does criminal thinking explain the association?" (2014). Faculty Publications, Department of Psychology. 652. https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1652&context=psychfacpub

There is also a correlation between adult trauma and criminal behaviour. See Eric B. Elbogen, Sally C. Johnson, Virginia M. Newton, Kristy Straits-Troster, Jennifer J. Vasterling, H. Ryan Wagner, and Jean C. Beckham, "Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans" https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3514623/ ;
James A Reavis, Jan Looman, Kristina A Franco. Briana Rojas, "Adverse Childhood Experiences and Adult Criminality: How Long Must We Live before We Possess Our Own Lives?" https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3662280/

13 T.P. Thornberry, K.L. Henry, T.O. Ireland, C.A. Smith, *The Causal Impact of Childhood-Limited Maltreatment and Adolescent Maltreatment on Early Adult Adjustment* - J Adolesc Health. 2010 Apr; 46(4): 359–365. – the authors state that "childhood-limited maltreatment is significantly related to drug use, problem drug use, depressive symptoms, and suicidal thoughts. Maltreatment during adolescence has a significant effect on a broader range of outcomes: official arrest/incarceration, self-reported criminal offending, violent crime, alcohol use, problem alcohol use, drug use, problem drug use, risky sex behaviours, self-reported STD diagnosis, and suicidal thoughts."

[14] C.S. Widom and M.G. Maxwell, *An Update on the Cycle of Violence* – U.S. Department of Justice, National Institue of Justicehttps://www.ncjrs.gov/pdffiles1/nij/184894.pdf
Also see Nicolas M. Perez, *The Path to Violent Behavior: The Harmful Aftermath of Childhood Trauma*, Graduate Thesis. http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=7325&context=etd

[15] Lorraine E. Cuadra, Anna E. Jaffe Renu, Thomas David DiLillo, "Child Maltreatment and Adult Criminal Behavior: Does Criminal Thinking Explain the Association?" (2014). Faculty Publications, Department of Psychology. 652.
https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1652&context=psychfacpub

emphasizing the reinforcing qualities of violence and engage in offensive or abusive behaviors later in life. A key element of this *cycle of violence* (Widom, 1989b; Widom, 2000) is that victims internalize maladaptive, violence-supportive beliefs and attitudes, including that physical aggression is an acceptable and useful way to accomplish personal and interpersonal goals such as managing stress or resolving conflicts, and thus, model abusive behaviours in relating with others (Widom, 2000).

A significant body of research supports the existence of this cycle of violence. Using a longitudinal design and matched groups of maltreated and non-maltreated individuals in the general population, Widom (1989b) found that, relative to non-maltreated individuals, those with a history of maltreatment engaged in substantially more criminal behaviours as adults and were more likely to have a criminal record of violent offenses. The Rochester Youth Development Study, which also used a longitudinal design, similarly revealed that maltreatment in childhood and adolescence are associated with increased risk for subsequent delinquent and criminal behaviours in adolescence and young adulthood (Smith and Thornberry, 1995; Smith et al., 2005; Thornberry et al., 2001). Similarly, studies among correctional samples of male offenders show that those who experienced child abuse or witnessed violence growing up are more likely than non-maltreated inmates to engage in violent or aggressive acts as adults (Felson and Lane, 2009; Hill and Nathan, 2008; Komarovskaya, 2009; Neller et al., 2006). Moreover, some studies suggest that the type of criminal behaviors that victims partake in may depend on the type of maltreatment they endured. For example, sexual victimization in childhood, especially over extended periods of time, has been associated with commission of more sex crimes (e.g., rape, sexual contact with children) relative to nonsexual offenses (Felson and Lane, 2009; Romano and De Luca, 1997; Simons et al., 2002), while engagement in violent nonsexual offenses (e.g., assault, attempted murder) in adulthood has been linked to a history of physical abuse in childhood (Dutton and Hart, 1992; Felson and Lane, 2009; Haapasalo and Moilanen, 2004; Lansford et al., 2007; Teague et al., 2008) and physical neglect (Grogan-Kaylor and Otis, 2003; Weeks and Widom, 1998; Widom, 1989b). At the same time, investigators (e.g., Widom, 1995) have observed that, compared to those who were sexually abused, adults who were physically abused as children are more likely to commit sexual offenses that are also violent. This finding suggests a diffusion of long-term outcomes associated with different forms of maltreatment and is consistent with a cycle of violence framework in which violent acts of abuse regardless of the type of abuse experience (i.e., sexual, physical, psychological) in childhood may be related to more violent criminal offending (physical or sexual) later in life (Widom, 1995).[16]

There is also evidence that trauma can be passed from one generation to another and that such intergenerational trauma occurs among Indigenous peoples. In the year 2000, Indigenous social worker Maria Yellow Horse Brave Heart examined the studies of the descendants of the survivors of the Jewish Holocaust and applied those methods when

[16] Lorraine E. Cuadra, Anna E. Jaffe Renu, Thomas David DiLillo, *supra*

studying the descendants of the Lakota people. She was able to establish a link between the Lakota people's historic trauma and their legacy of physical, psychological and economic disparities.[17] Numerous other studies have since confirmed the link between Indigenous historic/intergenerational trauma and the physical, psychological and economic disparities experienced by Indigenous people.[18]

Although most Indigenous people in Saskatchewan show remarkable resiliency,[19] too many have not flourished to the same extent as non-Indigenous people. For example: 1) Indigenous people are disproportionally incarcerated[20], 2) Indigenous people are three times more likely to be the victims of crime,[21] 3) the children of Indigenous people are disproportionally taken from their parents and made wards of the Crown[22], 4) Indigenous peoples are disproportionally poor in a socio-economic sense[23], 5) Indigenous peoples are significantly underrepresented in educational attainment[24], and 6) Indigenous peoples are disproportionally mentally and physically unhealthy compared to non-Indigenous peoples[25]. We now realize that the social problems that are attributed to Indigenous peoples in Saskatchewan have been consistently linked to the historic and

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[17] Maria Yellow Horse Brave Heart, *Wakiksuyapi: Carrying the Historical Trauma of the Lakota*, Tulane University, School of Social Work, 2000, page 245 - http://discoveringourstory.wisdomoftheelders.org/ht_and_grief/Wakiksuyapi-HT.pdf

[18] William Aguiar and Regine Halseth, *Aboriginal Peoples and Historic Trauma: The Process of Intergenerational Transmission* – National Collaborating Center for Aboriginal Health. https://www.ccnsa-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf

[19] Isobel M. Findlay and Warren Weir, Aboriginal Justice in Saskatchewan, 2002-2021: The Benefits of Change (2004 present to The Commission on First Nations and Métis People and Justice Reform - Online).

[20] See *R. v. Ipeelee* [2012] 1 SCR 433, 2012 SCC 13 (CanLII); Also see, Public Safety Canada - Table E3 of their Corrections and Conditional Release Overview for 2013; M. Jackson, *Locking Up Natives in Canada*, *Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 215; Jonathan Rudin, *Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going*, Supreme Court Law Review (2008), 40 S.C.L.R. (2d); and Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 217 (online)

[21] Katie Scrim, Aboriginal Victimization in Canada: A Summary of the Literature. Victims of Crime Research Digest No.3, Ottawa: Department of Justice Canada, Research and Statistics Division, 2015. Online at: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html.

[22] Moniruzzaman, A., Pearce, M.E., Patel, S.H., Chavoshi, N., Teegee, M., Adam, W., et al. (2009). The Cedar Project: Correlates of attempted suicide among young Aboriginal people who use injection and non-injection drugs in two Canadian cities. International Journal of Circumpolar Health, 68, page 2186. Also see Sinclair, R. & Grekul, J. (2012). Aboriginal youth gangs in Canada: (de)constructing the epidemic. First Peoples Child & Family Review, 7(1), page 10.

[23] Sinclair, R. & Grekul, J. (2012). *Aboriginal youth gangs in Canada*: (de)constructing the epidemic. First Peoples Child & Family Review, 7(1), 8-28.

[24] Katie Scrim, Aboriginal Victimization in Canada: A Summary of the Literature. Victims of Crime Research Digest No.3, Ottawa: Department of Justice Canada, Research and Statistics Division, 2015. Online at: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html.

[25] Jillian Boyce, Cristine Rotenberg and Maisie Karam, *Mental health and Contact with Police in Canada*, (Statistics Canada 2012 online); Also see Dr. Billie Allan and Dr. Janet Smylie, *First Peoples, Second Class Treatment* – *The Role of Racism in Health and Well Being of Indigenous Peoples of Canada* (The Wellsley Institute – online at www.wellesleyinstitute.com); Also see Jennifer S. Middlebrooks and Natalie C. Audage *The Effects of Childhood Stress on Health Across the Lifespan* National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention.

intergenerational trauma experienced by other colonized Indigenous peoples worldwide.[26]

Residential schools were a major source of Indigenous trauma. Many residential school survivors experience depression, emotional pain and constant anxiety.[27] One study found that 64% of residential school survivors that had experienced abuse were diagnosed as suffering from Post Traumatic Stress Disorder ("PTSD").[28] PTSD symptoms included experiencing fear, helplessness, horror, anger and shame.[29] Half of residential school survivors diagnosed with PTSD also had other comorbid mental illnesses such as substance abuse disorder, major depression and dysthymic disorder.[30] Many survivors develop addictions as a means of coping.[31] The suicide rate is higher amongst residential school survivors.[32] Survivors can lash out in stressful or threatening circumstances and the path from residential schools to prison tends to be a short one for many survivors.[33]

The historical trauma experienced by Indigenous people can be passed down to subsequent generations[34] through the following means:

1. Survivors of residential schools tend to retain the lessons and values they learned from their adverse childhood experiences and pass those lessons on to their children – many of those lessons and values are harmful;[35]

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[26] Katie Scrim, Aboriginal Victimization in Canada: A Summary of the Literature. Victims of Crime Research Digest No.3, Ottawa: Department of Justice Canada, Research and Statistics Division, 2015. Online at: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html. Also see Amy Bombay, Kim Matheson, Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes Among First Nations People in Canada", *Journal of Aboriginal Health*, 2009:6-47.

[27] Bombay, A., Matheson, K. & Anisman, H. (2011). The impact of stressors on second generation Indian Residential School Survivors. Transcultural Psychiatry, 48, 367-391. Also see Amy Bombay, Kim Matheson, Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes Among First Nations People in Canada", *Journal of Aboriginal Health*, 2009:6-47.

[28] Also see Bombay et al, Intergenerational Trauma *supra*, at pages 15-16.

[29] Bombay et al, Intergenerational Trauma *supra*, at page 10.

[30] Bombay et al, Intergenerational Trauma *supra*, at page 10. Also see Moniruzzaman, A., Pearce, M.E., Patel, S.H., Chavoshi, N., Teegee, M., Adam, W., et al. (2009). The Cedar Project: Correlates of attempted suicide among young Aboriginal people who use injection and non-injection drugs in two Canadian cities. International Journal of Circumpolar Health, 68, page 2187-2189.

[31] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 184 (online)

[32] Moniruzzaman, A., Pearce, M.E., Patel, S.H., Chavoshi, N., Teegee, M., Adam, W., et al. (2009). The Cedar Project: Correlates of attempted suicide among young Aboriginal people who use injection and non-injection drugs in two Canadian cities. International Journal of Circumpolar Health, 68, page 2191.

[33] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 184 (online)

[34] Bombay et al, Intergenerational Trauma *supra*, at page 15; Also see Jillian Boyce, Cristine Rotenberg and Maisie Karam, *Mental Health and Contact with Police in Canada*, (Statistics Canada 2012 online) and Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 184 (online)

[35] Smith, D., Varcoe, C. & Edwards, N. (2005). Turning around the intergenerational impact of residential schools on Aboriginal people: Implications for health policy and practice. Canadian Journal of Nursing Research, 37(4), page 47; Bombay et al, Intergenerational Trauma *supra*, at page 18.

2. Too many survivors of residential schools do not know how to parent or how to cope and they can do harm to the children and others around them[36] – especially when such a survivor is self-medicating with alcohol[37]; and
3. Survivors of residential schools are prone to depression, personality disorders, addictions, and various other forms of mental illness that may adversely harm their child's development and mental health.[38]

Indigenous peoples endure a disproportionately high dosage of adverse childhood experiences. Indigenous children are particularly liable to be placed under stress in their home and community.[39] Indigenous people may not only experience individual and family-level responses to traumatic events but may also live in the context of a traumatized community[40]. A significant number of Indigenous people in Saskatchewan have been beaten and have watched others being beaten.[41] Adverse early life events (including neglect and poor parenting) have been shown to increase a person's vulnerability to later stressor-provoked anxiety and depression, PTSD and an elevated risk of suicide.[42]

These types of adverse experiences can cause people to suffer lasting damage. Studies on children and adolescents have revealed that those who reported a traumatic event, including community violence, sexual abuse and maltreatment, were more apt to use emotion-focused coping strategies, particularly avoidant coping.[43] Children exposed to chronic parental conflict were more likely to use coping methods characterized by the release of frustration, risk-taking and confrontation.[44] Such children tend to be placed in jail and in 2004 Indigenous youth in Saskatchewan were 30 times more likely to be

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[36] Bombay, A., Matheson, K. & Anisman, H. (2011). The impact of stressors on second generation Indian Residential School Survivors. Transcultural Psychiatry, 48, pages 369-381. Also see Bombay et al, Intergenerational Trauma *supra*, at page 10; Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 184 (online)

[37] Evans-Campbell, T. (2008). Historical trauma in American Indian/Native Alaska communities: A multi-level framework for exploring impacts on individuals, families and communities. Journal of Interpersonal Violence, 23, 331.

[38] Bombay et al, Intergenerational Trauma *supra*, at page 18.

[39] Bombay et al, Intergenerational Trauma *supra*, at page 21

[40] Evans-Campbell, T. (2008). Historical trauma in American Indian/Native Alaska communities: A multi-level framework for exploring impacts on individuals, families and communities. Journal of Interpersonal Violence, 23, page 322.

[41] "According to the 2004 General Social Survey (GSS) 19, 20, 21, 22, 23, approximately 40% of Aboriginal people aged 15 years and over reported having been victimized at least once in the 12 months preceding the survey." "Aboriginal people were also nearly twice as likely as their non-Aboriginal counterparts to be repeat victims of crime." See Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, Victimization and offending among the Aboriginal population in Canada, Statistics Canada – Catalogue no. 85-002, Vol. 26, no. 3 at page 4; Also see Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 217-218 (online)

[42] Bombay, A., Matheson, K. & Anisman, H. (2011). The impact of stressors on second generation Indian Residential School Survivors. Transcultural Psychiatry, 48, 367-391, Page 12; Bombay et al, Intergenerational Trauma *supra*, at page 19.

[43] Bombay et al, Intergenerational Trauma *supra*, at page 18.

[44] Bombay et al, Intergenerational Trauma *supra*, at page 18.

incarcerated compared to non-Indigenous youth.[45] Unfortunately, the incarceration of Indigenous youth exacerbates their trauma because placing a person in jail tends to lower their self-esteem and increase their anti-social behaviour.[46]

Indigenous people are four times more likely to have encountered severe trauma compared to non-Indigenous people and report particularly high incidents of various types of trauma.[47] Indigenous children are more likely to:

1. Experience childhood abuse and neglect;
2. Be raised in single-parent households;
3. Be raised by parents who abused alcohol;
4. Be raised by parents who had a history of criminal activity; and
5. Be raised by parents who had suffered mental health problems.[48]

Racial bias is another source of trauma. Experiencing racism can be a pathological stress which causes PTSD-like symptoms[49] and in turn causes the spread of further trauma within an Indigenous community, amplifying community-based racism in a snowballing feedback loop. Dr. Peter Menzies argues that racism and discrimination compound the impact of trauma by fostering the oppression of Indigenous people and creating an "insidious trauma".[50] Menzies states that this trauma is insidious because many Indigenous people tend not to realize how social conditions continue to oppress them.[51] Rather than focusing on a singular event that makes the individual feel unsafe, this insidious trauma leads to a view that the world is an unsafe place for the whole group. This "insidious trauma" adds to the other traumas experienced by individuals in the group.[52] Isobel M. Findlay and Warren Weir have stated that the criminal justice system and policing policies and practices are contributing to ongoing trauma in Indigenous communities.[53] The authors of the Truth and Reconciliation Commission's final report stated that Canadian law must drastically change if it is going to have any legitimacy

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[45] See "A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II – February, 2004" found at the Department of Justice Canada web site www.justice.gc.ca/en/ps/rs/rep/2004/snap2/3.html,
[46] Valerie Wright, "Deterrence In Criminal Justice - Evaluating Certainty Versus Severity Of Punishment"; November 2010. Also see Daniel S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-first Century". Chicago Journals, Crime and Justice, Vol. 23, 1998.
[47] Bombay et al, Intergenerational Trauma *supra*, at page 15.
[48] Bombay et al, Intergenerational Trauma *supra*, at page 15.
[49] Currie, C. L., Wild, T. C., Schopflocher, D. P., Laing, L., Veugelers, P. & Parlee, B. (2012b). Racial discrimination, post-traumatic stress, and gambling problems among urban Aboriginal adults in Canada. Journal of Gambling Studies, 29, 393-415.
[50] Menzies, P. (2008). *Developing an Aboriginal healing model for intergenerational trauma. International Journal of Health Promotion and Education*, 46(2), page 43. Also see Bombay et al, Intergenerational Trauma *supra*, at page 15.
[51] Menzies, *supra*, page 43. Also see Bombay et al, Intergenerational Trauma *supra*, at page 15.
[52] Menzies, *supra*, page 43.
[53] See Isobel M. Findlay and Warren Weir, *Aboriginal Justice in Saskatchewan, 2002-2021: The Benefits of Change* (2004 present to The Commission on First Nations and Métis People and Justice Reform - Online); *Final Report of the Honorable Jean-Jacques Croteau, Retired Judge of the Superior Court Regarding the Allegations Concerning the Slaughter of Inuit Sled Dogs in Nunavik(1950-1970)*, March 3, 2010 p.119;

within First Nations and Métis communities.[54] The Commission on First Nations and Métis Communities reported that there is a concern within First Nations and Métis communities that they are being policed by racist police officers.[55] In summary, racism causes stress to Indigenous people and the accumulative stress caused by racism can be traumatic.

Criminological Theories that Support Trauma Theory

There is a general theme in criminology that people who become stigmatized and rejected by the community tend to seek support from subcultures and these subcultures are prone to fostering criminal activity.[56] Criminologist John Braithwaite states that societies that denounce and shame a person's criminal act, without imposing any lasting stigma, and reintegrate such a person through a formal ceremony or some informal means, have fewer anti-social subcultures and the lowest rates of crime.[57]
As stated above, some traumatized children under-perform in school and act out in disruptive ways – they do not fit in. "Subculture Theory" suggests that such outcasts commonly band together and create deviant subcultures that provide social support for the people exhibiting deviant behaviour.[58] The some of the values of these subcultures can be the inverse of the particular values used by the pro-social group to reject them - although the rejection or retention of values depends upon circumstances and there are no consistent patterns among groups.[59] A rejected person's low self-esteem can be eased by that person rejecting many of the values that caused their rejection.[60] Such a person can experience a measure of success by conforming to the values of their new subculture.[61] Studies show that attachment to delinquent-associates in a subculture precedes increased delinquent behaviour.[62] I have observed such sub-cultures in urban and rural Indigenous communities. I have spoken with Indigenous community leaders who would like to provide healing for their traumatized members but lack the necessary resources. Often, members of the main group see such traumatized people as troublemakers and would rather not have to interact with them.

Trauma Theory and Subculture Theory are also related to "Control Theory". The primary difference between Control Theory and other criminological theories is that Control Theory examines criminality from the perspective of "what prevents someone from committing a crime" rather than "what causes someone to commit a crime".[63] This

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[54] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation
Commission of Canada page 258 (online)
[55] Commission on First Nations and Métis Peoples and Justice Reform, Chapter 5 (Online)
[56] John Braithwaite, "Crime, Shame and Reintegration", 1989 (Cambridge) Cambridge University Press at pages 98-107
[57] *Supra*; Also see Carole LaPrarie Examining Aboriginal Corrections in Canada Aboriginal Corrections, Ministry of the Solicitor General, 1996. at 63-64.
[58] *Supra* at 21 and 67
[59] *Supra* at 23-25
[60] *Supra* at 23
[61] *Supra*
[62] *Supra* at 21
[63] *Supra* at 27

theory examines the interdependency between an individual and their family and group. None of us can survive alone and we are all interdependent within our community. Most of us seek ways to help others and do not even contemplate criminal behavior because such behavior would activate our conscience and weaken our relationship with others whom we depend upon. We understand that others evaluate us through gossip (as we evaluate them) and we want to be thought of as beneficial and effective.[64] We do not want to behave in a manner that could cause us to be ostracized by our community. We are controlled by our understanding and expectations of our community's norms.

Again, people who are traumatized as children tend to get stigmatized, alienated or ostracized.[65] People also become stigmatized through criminal deterrence – a criminal record. This stigmatization is counterproductive when pro-social attachments that might otherwise control criminal behavior are broken.[66] An alienated person needs to find a subculture for support and such subcultures are composed of other rejected people.[67] The subculture's values often allow or promote criminal behavior.[68] Alienation through stigmatization increases the attractiveness of subgroups that provide social support for crime.[69] The people in a subgroup are interdependent and can be controlled by a need to conform to the values of the subculture. Furthermore, Social Learning Theory holds that criminal behavior is learned from others in their subgroup.[70] Criminal lessons include techniques for committing a particular crime, motives, rationalizations and attitudes.[71]

Summary

Although childhood trauma does not cause all people to engage in criminal behavior, most Indigenous criminal behavior in Saskatchewan has been caused by people who have suffered childhood trauma. Indigenous peoples in Saskatchewan have experienced historic trauma, intergenerational trauma and personal trauma on a large scale. Trauma is the link between Indigenous custodial overrepresentation and the history of colonization, displacement and residential schools. A sentencing Court ought to look at the particular circumstances of an Indigenous offender in order to take childhood trauma into account.

A sentencing Court also ought to know how Saskatchewan's history is related to the rising rates of Indigenous custodial overrepresentation. That history will be discussed next.

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[64] *Supra* at 82
[65] *Supra* at 67-68
[66] *Supra* at 81
[67] *Supra*
[68] *Supra*
[69] *Supra*
[70] *Supra* at 35-37
[71] *Supra.* Also see note 16 above - Lorraine E. Cuadra, Anna E. Jaffe Renu, Thomas David DiLillo, "Child Maltreatment and Adult Criminal Behavior: Does Criminal Thinking Explain the Association?" (2014). Faculty Publications, Department of Psychology. 652.
https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1652&context=psychfacpub

A Broad Stroke History of Colonization, Displacement and Residential Schools as it is related to the Criminal Justice System

Most Judges and Counsel in Saskatchewan appear to be scrupulous in striving to improve their knowledge of Indigenous sentencing issues including the history of colonization, displacement and residential schools in Saskatchewan. However, there is no evidence indicating that Judges and Counsel have a meeting of minds regarding this history as it relates to Saskatchewan. Until the participants in the criminal justice system demonstrate that they have a common understanding of this history, it is unrealistic to assume that this history is sufficiently uncontroverted. For this history to be considered generally accepted so as not to be subject to debate there needs to be evidence that there is a meeting of minds including the history of a particular Indigenous offender's community. Legal decisions such as sentencing are based on facts and small discrepancies can cause significant legal consequences. Parity of sentencing is at risk when it is uncertain whether or not all sentencing Judges are relying on the same understanding of the history of colonization. The Indigenous Communities Database will provide an essential micro-history of an offender's community and circumstances if it is accepted. However, a macro understanding of the colonization, displacement and residential schools would exhibit an offender's circumstances within a larger context. There needs to be an acceptance of both of these facets of the Indigenous offender's history to enhance parity in sentencing.

The history of Indigenous peoples in Saskatchewan is best understood by examining the waves of trauma-causing events that crashed over Indigenous peoples and their cultures. These waves of trauma caused increasing victimization among Indigenous peoples and increasing Indigenous involvement in the criminal justice system. The following proposed macro understanding of Indigenous history in Saskatchewan is a brief description of these waves of trauma;

The Colonization of the Plains - the Imposition of Western Legal Systems & the Policy of Aggressive Assimilation

Colonization can be defined as the action or process of settling among and establishing control over the Indigenous people of an area. Most of the harm from colonization in Saskatchewan was caused by an assumption that the Indigenous peoples were incompetent to make decisions concerning their self-interest and that they needed to cease being "Indians" to get along with the settlers. This harm was compounded by the use of coercion and punishment.

Prior to Canada acquiring Rupert's Land from the Hudson's Bay Company in 1870, Indigenous peoples relied on their traditional system of law and governance.[72] Parliament

[72] See Connolly v. Woolrich et al. (1867), 17 R.J.R.Q at page 95: "It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally and indiscriminately; it did not abrogate the Indian laws and usages."

wanted to demonstrate that the plains were a secure place for settlers as it intended to populate the newly-acquired North West Territories (NWT) with non-Indigenous settlers. Parliament passed legislation in 1873 that extended most of Canada's criminal law to the NWT.[73] It took another four years for Indigenous peoples on the plains to experience the impact of Canada's criminal justice system because the courts and police did not become operational until 1877.[74]

It is important to note that the Canadian criminal justice system on the plains at that time was not as comprehensive as it is today. Indigenous law still operated in northern Indigenous communities as late as the 1950s.[75] Historians R.C. Macleod and Heather Rollason stated that between 1878 and 1885:

> …the Canadian authorities adopted a cautious and selective approach to introducing criminal sanctions. Native dispute settlement institutions remained viable and individuals were able to choose which system best suited their circumstances.[76]

This cautious and selective approach devolved into neglect by government authorities during the first half of the twentieth century.[77]

Unfortunately, things changed dramatically for Indigenous peoples after the North West Resistance of 1885. The courts at that time served the Canadian government's objective of cowing the Indigenous peoples into submission. Historian Bill Waiser stated that the Canadian government was attempting to attract settlers to the prairies to repay the huge debt incurred from the purchase of Rupert's Land and wanted to demonstrate that these lands were open and secure for settlement.[78] The Crown prosecuted four Chiefs – One Arrow, Poundmaker, Big Bear and Whitecap – for treason. This was done to hold them personally responsible for the acts of their people.[79] It did not matter to the Court that tried them that there was no evidence that One Arrow was involved – he was convicted and sentenced to prison.[80] The evidence at Poundmaker's and Big Bear's trials showed that they did everything in their power to restrain their followers and avoid bloodshed. However, the Courts still convicted them of treason.[81] The Indigenous people of the

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[73] R.C. Macleod and Heather Rollason, Restrain the Lawless Savages: Native Defendants in the Criminal Courts of the North West Territories, 1878–1885, Journal of Historical Sociology Vol. 10 No. 2 June 1997 at page 159; Also see M. Jackson famously stated in "Locking Up Natives in Canada", 23 *U.B.C. L. Rev.* 215 at pp. 242

[74] *Supra*

[75] David M. Quiring, CCF Colonialism in Northern Saskatchewan: Battling Parish Priests, Bootleggers, and Fur Sharks, Vancouver, UBC Press, 2004 – pages 90-92. Also see *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 3.

[76] R.C. Macleod and Heather Rollason *supra* at page 1.

[77] David M. Quiring, *supra*, note 6.

[78] Bill Waiser, A World We Have Lost; Saskatchewan Before 1905, Markham, Ontario, Fifth House Ltd. 2016, pages 560 to 562.

[79] *Supra*

[80] *Supra*

[81] *Supra* at 562

plains were not used to confinement and suffered greatly. Three of the Chiefs died less than a year after their release from prison.[82]

Other Indigenous men at that time were alleged to have committed murder and were punished by the Courts accordingly.[83] Some of the Regina "Indian" trials were described by Waiser as being a "farce".[84] Nine members of Big Bear's band were tried together and assigned numbers because their names were too difficult for the Court to pronounce.[85] This resulted in chaos because lawyers and witnesses were never sure which defendant they were talking about.[86] All nine men were convicted and given custodial sentences.[87]

The same treatment was administered to five different Indigenous defendants the next day with the same results.[88] No allowances were made for the Indigenous defendants' cultural differences regarding notions of justice and guilt.[89] Another sixty Indigenous defendant's were tried and sentenced in Battleford to save expense. Their trials were described by Waiser as a "mockery".[90] The residents of Battleford considered themselves to be victims of the defendants and demanded the severest possible punishment.[91] The trial Judge also considered himself to be a victim of the defendants' actions.[92] The trials were "speedy" with no attempt to determine the circumstances of the alleged crimes.[93] Waiser described the custodial sentences as "ridiculously long" and the death sentences of eight of the Indigenous men were conducted in the form of a mass public hanging that was designed to serve as a spectacle. The hangings ordered were in contravention of an 1868 federal statute prohibiting public executions.[94] It was arranged that a large number of the families were to watch the execution of their loved ones.[95] Prime Minister Macdonald stated that, "The executions… ought to convince the Red Man that the White Man Governs".[96] The bodies were then buried in a mass grave behind the fort.[97]

Law professor Shelly A.M. Gavigan[98] stated that when an Indigenous person was charged with a crime between 1870 and 1905:

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[82] *Supra*
[83] *Supra* at 561
[84] *Supra* at 562
[85] *Supra*
[86] *Supra*
[87] *Supra*
[88] *Supra*
[89] *Supra*
[90] *Supra*
[91] *Supra*
[92] *Supra*
[93] *Supra* 563
[94] *Supra* 563-564
[95] *Supra* 564
[96] *Supra*
[97] *Supra*
[98] Full Professor of Law at Osgoode Hall Law School and member of the Graduate Faculties in Law, Socio-Legal Studies, and Women's Studies at York University.

> …they appeared in Court invariably as a prisoner, without legal counsel, without legal arguments, without grand juries, in proceedings conducted in a foreign language, where they had limited access, if any, to basic linguistic interpretation.
>
> …For most accused persons, it meant remaining in custody at the police barracks until trial, appearing before the magistrate in his office at the barracks, and serving a custodial sentence in the same police barracks. For most, it involved a preliminary hearing or possibly a summary trial before one or two justices of the peace, who probably held that office because they were a Hudson's Bay Company factor, a North-West Mounted Police officer, an Indian Agent, or a medical man or other eminent member of the settler community. For many, then as now, it involved a guilty plea and no trial, and, for almost all, no appeals to a higher court. For the most unfortunate, it meant a prison sentence to be served in the Manitoba Penitentiary, a form of death by incarceration for many.[99]

Any examination of the criminal Courts at that time needs to be viewed with Canadian "Indian" policy in mind. Even before the North West Resistance, the Canadian government used the *Indian Act* to promote a policy of cultural genocide against "Indians"[100] and increased the intensity of that policy over the last two decades of the nineteenth century.[101]

Indigenous people experienced great hardship during this time. The total population of the plains in 1870 was estimated as being between 40,000 to 50,000 people with the First Nations people accounting for approximately 35,000 of those people. By 1885 the Indigenous population had fallen to about 25,000 people (4,848 "Half-Breeds" plus an "Indian" population of 20,170) and the non-Indigenous population had risen to 21,990 people. By 1900, the Indigenous population had fallen to 14,699 people while the total population had risen to 158,940 people.[102]

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[99] Shelley A.M. Gavigan, Hunger, Horses and Government Men – Criminal Law on the Aboriginal Plains, 1870-1905, UBC Press, Vancouver, 2012, pages13 to 14; Also see M. Jackson "Locking Up Natives in Canada", 23 *U.B.C. L. Rev.* 215 at pp. 242-244

[100] See Supreme Court Chief Justice Beverley McLachlin says Canada attempted to commit "cultural genocide" against aboriginal peoples, Toronto Globe and Mail, May 28, 2015 (online); Also see Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (online); and Report of the Royal Commission on Aboriginal Peoples, Part Two: False Assumptions and a Failed Relationship (online);
Genocide is defined in Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide (1948)* as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, Racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] **forcibly transferring children of the group to another group**." This definition is similar to the definition of genocide in *The Convention on the Prevention and Punishment of the Crime of Genocide* (1951). .

[101] Gavigan *supra* at 21

[102] *Supra* at 29 to 31

The One Arrow Reserve near Fort Carlton had a death rate of 141 per 1000 in the winter of 1883-84.[103] By 1889 less than half of the pre-rebellion population of the Battleford reserves remained.[104] The Cree lost nearly all of their leaders.[105]

After the 1885 North West Resistance, the death rate for Indigenous people was staggeringly high. The Cree people at Thunderchild died at a rate of 233.5 per 1000.[106] The Cree people at Sweet Grass died at a rate of 185 per 1000. Deaths at Battleford Agency exceeded births by a 4:1 ratio. The Sharphead Stoney group in central Alberta ceased to exist as a distinct population.[107]

Hunger and material privation was a constant presence in the court records during the last decades of the nineteenth century.[108] Indigenous people experienced poverty and starvation. These circumstances were made worse by the injury, violence and threats and harassment of criminal prosecution.[109] This included a rapid reshaping of existing Indigenous laws. Gavigan states:

> The introduction and imposition of a new legal regime; new notions governing property, marriage and sexual relations and the redefinition of crimes of past practices associated with the hunt, sport, and inter-tribal relations, such as capturing and recapturing horses, represented a historic cultural assault. Added to this was a cavalry of white men mandated to enforce these new laws, many of whom also had the authority to adjudicate, to convict, and to sentence.[110]

Authorities who enforced the *Indian Act* relied on the coercive force of the criminal courts when threats and compulsion failed.[111] For example, Etchease from Muscowpetung Reserve was convicted in a Regina Court for celebrating a dance of which giving away goods was a part, and for encouraging others to dance. He was sentenced to three months in the Regina jail.[112]

More Indigenous people faced criminal charges between 1878 and 1905 than before, but the exact increase during that period is unclear. The Indigenous peoples during this period were vastly underrepresented proportionate to their overall population when compared to the non-Indigenous offenders involved in the criminal justice system. As stated above, the demographics of the NWT changed during that time due to immigration and a rapid decrease in the Indigenous population. The Indigenous population between 1878 and 1885 was on average about equal to the non-Indigenous population. Gavigan

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[103] Daschuk, *supra*, at page 146
[104] Daschuk, *supra*, at page 162.
[105] Daschuk, *supra*, at pages 160-161
[106] Daschuk, *supra*, at page 164.
[107] Daschuk, *supra*, at pages 164.
[108] *Supra* at 134 and 155
[109] *Supra*
[110] *Supra* at 25
[111] *Supra* at 139
[112] *Supra*

concluded that Indigenous people made up less than a third of the accused during that period.[113]

The Courts were not a tool of the Canadian government's "Indian" policy. Although the Courts shared the government's desire to "make better Indians", they showed judicial independence and did not "rubberstamp" the charges brought by Indian agents to punish hungry Indigenous people even further[114] - the Northwest Resistance trials notwithstanding. However, the Government's "Indian" policy was a constant burden and a threat to Indigenous people. For example, an Indigenous person could be charged for being off of their reserve without a pass stipulating that they had leave to be away as well as the purpose and duration of the leave. The Canadian government created the "pass system" to control the movement of Indigenous people. The Head Indian Agent, Edgar Dewdney, and Prime Minister John A. Macdonald knew that this system of apartheid was illegal.[115] In fact, Dewdney wrote Macdonald stating that they should amend the treaties for the pass system to be legal.[116] The treaties were not modified but the *Indian Act* was amended to abolish the pass system in 1951.[117]

Moreover, Indigenous people were prohibited from practicing their rituals and religion.[118] Indigenous people could not take their grievances to Court because the *Indian Act* prohibited them from getting legal advice and prevented lawyers from representing them.[119] They could not complain to their Member of Parliament because they were not considered "persons" and they did not have the vote.[120]

The *Report of the Aboriginal Justice Inquiry of Manitoba* pointed out that:

> The *Criminal Code* in 1892 made it possible to charge with an indictable offence any person "who induces, incites, or stirs up any three or more Indians, non-treaty Indians or half-breeds" to meet together to make demands upon civil servants in a riotous or disorderly manner. This clear violation of the fundamental principle of freedom of association enjoyed by Canadians significantly prevented the development of Aboriginal political organizations and minimalized the pressure on the federal government to honour its obligations. Any efforts by Indian people to pursue justice through Canadian Courts about their grievances were blocked effectively as well by the *Indian Act*, which made it an offence to raise money to

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[113] Shelley A.M. Gavigan, Hunger, Horses and Government Men – Criminal Law on the Aboriginal Plains, 1870-1905, UBC Press, Vancouver, 2012, page 86
[114] *Supra* at 139 and 154
[115] *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 3.
[116] James Daschuk, *Clearing the Plains, Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina, University of Regina Press, 2013) at pages 161-162.
[117] *Report of the Aboriginal Justice Inquiry of Manitoba* , Online.
[118] Honouring the Truth, Reconciling for the Future, *supra*, and Report of the Royal Commission on Aboriginal Peoples, Part Two: False Assumptions and a Failed Relationship Chapter 9 (online).
[119] *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 3. Also see Report of the Royal Commission on Aboriginal Peoples, Part Two: False Assumptions and a Failed Relationship Chapter 9 (online).
[120] Report of the Royal Commission on Aboriginal Peoples, Part Two: False Assumptions and a Failed Relationship (online).

> commence claims against the Crown and made it illegal for a lawyer to receive fees to represent an Indian or band for this purpose without the consent of the Superintendent General from 1927 to 1951. (*An Act to amend the Indian Act*, S.C. 1926–27, c. 32, s. 149A)[121]

Despite the imposition of a foreign legal system and the heavy handed tactics of the Canadian government when dealing with Indigenous people, the rate of Indigenous offenders brought before the criminal justice courts was less than that of non-Indigenous people. Indigenous populations during this period made up approximately half of the overall population, but they represented approximately one-third of the people charged with criminal offences. This proportion changes dramatically by the late twentieth century and the underlying reasons for this change are explored below.

Residential Schools

The last part of the 19th century was the nadir for the Indigenous population on the prairies.[122] Up to the middle of the twentieth century most Indigenous peoples in Northern Saskatchewan were largely ignored by government - notwithstanding the imposition of residential schools and some enforcement of the *Indian Act*. Most Northern Indigenous people, therefore, retained their language and much of their culture until government policies in conjunction with global influences eventually intervened. This may have temporarily prevented Indigenous peoples from being overrepresented in custody during more than a half-century of cultural genocide[123] and assimilation. Unfortunately, events worsened for Indigenous people in the middle of the twentieth century and these events correspond with the beginning of the present ever-rising rate of custodial overrepresentation.

Part of the process of colonization was the forcible taking of Indigenous children from their families and the transporting of them to residential schools.[124] Canada's first Residential School was opened in Battleford, Saskatchewan in 1883.[125] The Crown's goal was to *kill* the Indian in the child.[126] Children were forced to denounce their language and culture, their hair was cut, and they were forced to wear Canadian clothes.[127] It is estimated that 100,000 Indigenous children aged 4 to 18 were removed from their families and placed in residential schools from the mid-1800s until late 1996.[128] Rather than being loved and cared for, they were neglected, malnourished, and forced to work

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[121] A.C. Hamilton & C.M. Sinclair *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 3.
[122] Daschuk, *supra*, at page 172
[123] See McLachlin *supra* footnote 98
[124] Honouring the Truth, Reconciling for the Future, *supra*;
[125] *Supra*, page 51
[126] *Supra*;
[127] *Supra*;
[128] *Supra*; Also see Smith, D., Varcoe, C. & Edwards, N. (2005). Turning around the intergenerational impact of residential schools on Aboriginal people: Implications for health policy and practice. Canadian Journal of Nursing Research, 37(4), 40; Moniruzzaman, A., Pearce, M.E., Patel, S.H., Chavoshi, N., Teegee, M., Adam, W., et al. (2009). The Cedar Project: Correlates of attempted suicide among young Aboriginal people who use injection and non-injection drugs in two Canadian cities. International Journal of Circumpolar Health, 68, page 2186.

without pay to subsidize the chronic under-funding of their school system.[129] They lived in overcrowded and poorly maintained conditions.[130] Many Indigenous children were also beaten and sexually abused.[131] A shocking number of Indigenous children died from the start of compulsory residential schools in the 1880's and onward through the decades.[132]

A report prepared by Dr. Peter Bryce for the Department of Indian Affairs in the early twentieth century stated that some schools had a death rate of 60% over a five-year period.[133] Two thirds of the last generation to attend residential schools did not survive.

It is no coincidence that so many survivors fell victim to violence, accidents, addictions, and suicide.[134] Furthermore, residential schools did not just harm individual children; the residential school policy harmed whole Indigenous communities. Some lost their ability to plan for or even envision the future of their community when their children were taken away.[135] Many of the survivors of residential schools felt that they did not fit in anywhere.[136] They felt that they could not fit into their home communities and they could not fit into the incomers' communities.[137] Some told the Truth and Reconciliation Commission that they no longer even fit with their family. Some resent their parents. Some cannot stop reliving the moments of victimization – even after years of being removed from the trauma. As discussed previously, there is also an intergenerational dimension to the trauma caused by the residential schools.[138]

Government Impediments to Agricultural Development

Southern Indigenous people did their best to adopt agriculture and band economies grew from 1897 to 1915.[139] Unfortunately, the Indian Affairs bureaucracy worked against Indigenous agriculture to protect incoming settlers from competition.[140] This practice

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[129] *Supra*;
[130] *Supra*;
[131] *Supra*;
[132] *Supra*;
[133] Report of the Royal Commission on Aboriginal Peoples, (online); *Report of the Aboriginal Justice Inquiry of Manitoba*, (Online). Honouring the Truth, Reconciling for the Future, *supra*;
[134] Smith, D., Varcoe, C. & Edwards, N. (2005). Turning around the intergenerational impact of residential schools on Aboriginal people: Implications for health policy and practice. Canadian Journal of Nursing Research, 37(4), page 39
[135] Evans-Campbell, T. (2008). Historical trauma in American Indian/Native Alaska communities: A multi-level framework for exploring impacts on individuals, families and communities. Journal of Interpersonal Violence, 23, 328. Also see Amy Bombay, Kim Matheson, Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes Among First Nations People in Canada", *Journal of Aboriginal Health*, 2009:6-47 at page 14.
[136] Bombay et al, *supra*, at page 14.
[137] Bombay et al, *supra*, at page 14.
[138] See pages 7 to 10 above. Also see Mohatt, N. V., Thompson, A. B., Thai, N. D. & Tebes, J. K. (2014). Historical trauma as public narrative: A conceptual review of how history impacts present-day health. Social Science & Medicine, 106, page 129. Also see Bombay et al, *supra*, at page 10.
[139] Bill Waiser, "Saskatchewan, a New History", Calgary, Fifth House Ltd. 2005, pages 174-175
[140] *Supra*

had disastrous results for Indigenous people. For example, a farmer in the Pelly area of Saskatchewan reported the following to the House of Commons in 1924:

> "I remember, about twenty years ago, when I first visited the Cote Indian reserve near Kamsack, that most of the Indians there were prosperous…self-supporting… I regret that… the Indians have become poverty-stricken… degenerating, losing out in every conceivable way… their individual efforts are controlled…they are not allowed to…do anything on their own behalf."[141]

A general lack of autonomy has been a constant obstacle for Indigenous peoples to overcome.

Racism and Continued Attacks on Indigenous Cultures and Religion

The expressed goal of assimilating Indigenous peoples was a constant insult to Indigenous culture for most of the twentieth century. Indian Affairs used coercion and control to wipe out "Indian-ness", including repressing Indigenous religious and cultural ceremonies.[142] The RCMP were regularly called upon to break up ceremonial gatherings.[143]

This cultural insult has been exacerbated by a racist segment of Saskatchewan's population. In 1929, the Ku Klux Klan had 25,000 members and 125 klaverns in Saskatchewan.[144] Peter Gzowski described racism in the North Battleford area in his 1963 Maclean's magazine article, "This is Our Alabama".[145] In January of 1991, a white supremacist, Carny Nerland, shot and killed a Cree trapper, Leo Lachance (Nerland was sentenced to four years for manslaughter). The Saskatoon police brought national attention to Saskatchewan with "the starlight tours" in the late 80s and early 90s. This list is not complete.

Indigenous Custodial Representation prior to the 1950s

Although Indigenous people were subjected to colonization including residential schools from the 1880s, Indigenous people in Saskatchewan and neighboring Manitoba were underrepresented in jails for the first half of the twentieth century.[146] The *Report of the Aboriginal Justice Inquiry of Manitoba* stated:

…Although the statistics are notoriously unreliable, the Superintendent (later Commissioner) of Penitentiaries did report annually to Parliament on the numbers of inmates in federal correctional institutions. In our brief survey of the Manitoba incarcerations, we discovered that the proportion of "Indians" and of "Indian half-

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[141] *Supra* pages-242-243
[142] *Supra* pages-175-180
[143] *Supra* page 242
[144] *Supra* page 351
[145] See online at http://www.macleans.ca/archives/this-is-our-alabama
[146] See *R. v. Carratt* 1999 SKQB 116 (CanLII) at paragraph 7; and A.C. Hamilton & C.M. Sinclair *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 3.

breeds," and of the various other equivalent designations that appeared in the reports for 1900, 1913, 1932–33, 1934–35 and annually until the 1949–50 report, in the Manitoba penitentiary population reflected no more than the Aboriginal proportion of the Manitoba population in this period. The Aboriginal proportion of the Manitoba penitentiary population increased in an extraordinary fashion during the decades after 1950. It is estimated that more than 55% of all jail admissions in 1989 were Aboriginal, at a time when the Aboriginal proportion of the provincial population was just under 12%. Policing agreements with the Royal Canadian Mounted Police likely played a large part in this story, due to the introduction of consistent Canadian law enforcement in communities where, until that time, Aboriginal law still operated.[147]

It is likely that Indigenous people in Saskatchewan were subject to similar influences with similar results. It is a testament to the resilience of Indigenous peoples that there is still no evidence of Indigenous overrepresentation in the criminal justice system at this point despite government policies of cultural genocide.

The Colonization of the North - CCF Policies, the "Scoop" of Indigenous Children and the Traumatic Impact of these Policies on Indigenous Peoples

Colonization is considered to be one of the factors that caused the overrepresentation of Indigenous people.[148] Colonization usually causes the most harm when non-Indigenous people make decisions that concern the lives of Indigenous people without their input or approval. The Government of Saskatchewan under the leadership of the Co-operative Commonwealth Federation party (the "CCF") committed that error and thereby reinvigorated and amplified the colonization of Indigenous peoples in Saskatchewan.

There were approximately ten thousand people in Northern Saskatchewan in 1944 when the CCF was elected into office.[149] The Indigenous peoples of the North are composed mainly of the Woodland Cree, Métis, and Dene. The Cree and Dene had lived in the bush for millennia.[150] They had an intimate knowledge of their land and its bounty but had also adopted the fur trade and many had accepted the Catholic and Anglican Churches.[151] They had a cashless economy based on a centuries-old system of credit

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[147] See A.C. Hamilton & C.M. Sinclair *Report of the Aboriginal Justice Inquiry of Manitoba*, An Historic Overview where they also stated:

> The third justice regime continued to operate after World War II, but its effects were dramatically different. We are suggesting that the official rules did not change, but that the reality of contact and enforcement, as opposed to the theory, did supplant Aboriginal law in this period. Canada's laws and police impinged increasingly on the daily life of Manitoba's Aboriginal people after 1950 and the consequence has been disastrous for the Aboriginal community.

Also see M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 215; Also see Jonathon Rubin, Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going, Supreme Court Law Review (2008), 40 S.C.L.R. (2d)

[148] *R. v. Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 (CanLII) at paragraph 60

[149] David M. Quiring, CCF Colonialism in Northern Saskatchewan: Battling Parish Priests, Bootleggers, and Fur Sharks, Vancouver, UBC Press, 2004 – page xi

[150] Bill Waiser, "Saskatchewan, a New History", Calgary, Fifth House Ltd. 2005, page 22

[151] *Supra*

with the fur traders.

Although Northern Indigenous people were sustained by their heritage, culture, family and community, many found that the land would no longer feed or support them by the middle of the 1940s. Lumber companies had harvested Northern forests in the early twentieth century to meet the demand from settlers and the railroads.[152] Large-scale commercial fisheries removed millions of pounds of fish from Northern Lakes.[153] Fur-bearing animals were removed at a higher rate in the first part of the century due to increased demand.[154] These activities placed a severe strain on the traditional resources relied on by Indigenous people.[155] By 1908, subsistence hunting and fishing had declined by half of what it had been before colonization.[156] The Provincial and Federal governments began to apply provincial game laws to the Cree and Dene people in 1919 while allowing commercial fishing, lumbering and mining to go without conservation regulation.[157]

The strain on Indigenous resources grew in the 1930s when Southerners migrated north to mitigate their suffering during the Great Depression.[158] Itinerate white trappers overran Indigenous traplines and prospectors started forest fires to facilitate their work.[159] It was estimated that 80% of Northern forests burned in 1937 because of abnormally dry weather and the carelessness of settlers.[160] It was reported that Indigenous people "in the Ile-a-la-Crosse area had been reduced to subsisting on roots, fish, and the generosity of the local post and mission.[161] Few moose remained and Indigenous peoples could no longer rely on large animals. Canada's caribou population fell from 1.75 million in 1900 to 670,00 by 1951.[162]

This depletion of the Northern Indigenous resources caused many Indigenous people to suffer from hunger-related illness and pathogenic living conditions. There are no public health reports regarding the wellness of Northern Indigenous people in Saskatchewan during the 1940s but a medical report from neighbouring Northern Manitoba likely corresponded with the health of Indigenous people in Northern Saskatchewan during that period. The 1946 *Medical Survey of Nutrition Among Northern Manitoba Indians* stated that tuberculosis was the major cause of death for Indigenous people with 1,400 deaths per 100,000 in the area studied.[163] The authors stated that in winter frequently 10 to 12 Indigenous people lived in shacks 10 by 12 foot square.[164] The majority of Indigenous

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[152] *Supra* at 174
[153] *Supra*
[154] *Supra*
[155] *Supra*
[156] *Supra*
[157] *Supra* at 270
[158] *Supra* at 301
[159] *Supra* at 302
[160] *Supra*
[161] *Supra* at 301
[162] Quiring *Supra* at 202-205
[163] P.E. Moore, H.D. Kruse, F.F. Tisdall and R.S.C. Corigan, *Medical Survey of Nutrition Among Northern Manitoba Indians* Canada. M.J.A. Mar. 1946, Vol. 54.
[164] Moore et al, *supra*.

people slept on the floor in the winter and moved to tents in the summer[165] In contrast, "white people" in Manitoba had a Tuberculosis death rate of 27.1 deaths per 100,000.[166] Four years later (in 1950) the Northern Saskatchewan tuberculosis death rate was 400 per 100,000 when the provincial TB death rate was 18.5 per 100,000.[167]

The TB epidemic had a lasting impact on Indigenous people in Saskatchewan – and not just from death, grief and suffering. Families were also torn apart when patients were moved South for extended treatment.[168]

The Manitoba medical survey reporters discovered a death rate of between 1,000 to 3,000 per 100,000 among the Northern Indigenous people they encountered.[169] This was partly due to malnutrition. The average calorie intake in Norway House was 1,470 calories per day and 85% of those calories were from white flour, lard, sugar and jam.[170] The shirt size of Indigenous people they contacted had reduced from a size 16 to 17 forty years previous, to size 15.5 to 16 at the time of the report.[171] Pant sizes were also greatly reduced. Infant mortality was an astounding 400 out of 1,000 live births. The authors contrasted this figure with the infant mortality for "white people" which averaged 52 per 1,000.[172]

The Saskatchewan government failed to acknowledge health problems in the Northern Indigenous population when looking to the resources in Northern Saskatchewan. The CCF saw Northern resources as a means of diversifying the Saskatchewan economy, developing the infrastructure, and paying for their ambitious health and social programs.[173]

The CCF disapproved of the traditional Northern society and its economy and saw the North as a place where they were free from the restraints of electoral control – a place where they could force their socialist ideals to take root.[174] In particular, they

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[165] Moore et al, *supra*. Also see Ian Mosby, *Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952*, Social History, Volume 46, Number 91, May 2013, pp. 145-172; and Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 101 (online)

[166] Moore et al, *supra*.

[167] Quiring *supra* at 232

[168] *Supra*

[169] Moore et al, *supra*. Also see Ian Mosby, *Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952*, Social History, Volume 46, Number 91, May 2013, pp. 145-172; and Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 101 (online)

[170] Moore et al, *supra*. Also see Ian Mosby, *Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952*, Social History, Volume 46, Number 91, May 2013, pp. 145-172

[171] Moore et al, *supra*.

[172] Moore et al, *supra*.

[173] Quiring *supra* page xi

[174] *Supra*; Also see Bill Waiser, "Saskatchewan, a New History", Calgary, Fifth House Ltd. 2005, pages 347-351

disapproved of the roles of the Hudson's Bay Company and other traders and they disapproved of the influence of the Catholic and Anglican Churches.[175] The CCF strongly believed that Indigenous people were incompetent and could not make decisions for themselves.[176] The CCF's attempted to replace the existing markets for fur and fish with CCF sponsored marketing boards. The CCF's interference with the established markets harmed the traditional Northern economy to the detriment of the locals.

Tragically, the CCF also adopted and expressed an agenda of assimilating Indigenous people into "modern Canadian society".[177] The CCF used Department of Natural Resources (DNR) officials, teachers, health care workers and others to force assimilation.[178]

The CCF adopted a well-needed conservation policy, but without any input from Indigenous people. The CCF "educated" Northerners regarding conservation through prosecution and punishment.[179] Maria Campbell, Métis author, Elder and Cultural Advisor at the University of Saskatchewan College of Law, remembers the time her father was caught providing for his family with game he had illegally hunted. She recalls that her father was arrested and handcuffed in front of her family as she screamed and cried.[180] Her father was jailed in Prince Albert and she did not see him for six months.[181] Her family had no money or meat during that time. They were barely able get by on credit from the store and by hunting rabbits.[182]

The North lacked roads, railways, electrical service, and communication systems.[183] Moreover, a large part of the North received little in the way of education, medicine, policing or other government services.[184] The CCF discriminated against Indigenous people when implementing its policies and imported Southerners to the North to fill full-time government jobs rather than train Northerners because they believed that Indigenous peoples were "hopeless" without direct supervision.[185]

The Saskatchewan government under the CCF built white middleclass staff housing for the imported Southerners. The homes of the white Southerners had central heating, electrical generators, sewer and water while Indigenous people lived in abject poverty.[186] Civil servants evolved into a white upper class and generally considered themselves superior to Indigenous peoples due to their race.[187] For example, Uranium City had a "one mile exclusion zone" to prevent Indigenous people from living near the civil

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[175] *Supra*
[176] *Supra* at xiv
[177] *Supra* at xii
[178] *Supra* at 42
[179] Quiring *supra* at 29
[180] Maria Campbell, "Half-Breed", Halifax, McMlelland and Stewart, 1973, page 60
[181] *Supra*
[182] *Supra* at 61
[183] *Supra*
[184] *Supra* xii
[185] Quiring *supra* at 33
[186] S*upra* at 32
[187] *Supra* at 34, 63-64

servants.[188] White people did not want their children attending school with Indigenous children for fear of contagious diseases and lower academic standards.[189] White people used censure to pressure those in their class to follow the rules of social segregation.[190] This attitude of white privilege was amplified when the government assigned white people with the role of imposing assimilation upon Indigenous people.

One of the principle and most pernicious instruments of assimilation was a policy of "nucleation" - removing, on a large scale, Indigenous people from their millenniums-old nomadic lifestyle of hunting, foraging, fishing and trapping and placing them into settlements.[191] The government reasoned that relocating Indigenous people into settlements would allow them to benefit from "modern ways" and bring Indigenous peoples under state control.[192]

It is difficult to understand how the government could have thought assimilation could be achieved by moving Indigenous people into extremely impoverished communities apart from the privileged non-Indigenous government employees.

Historian David M. Quiring wrote:

> Village life made the formerly nomadic people instantly poverty-stricken. They lost much of their access to subsistence items and instead needed a constant supply of cash to live. Living in urban shacks, Aboriginals found themselves depending on welfare and other payments from government.
>
> Government nucleation policies also had devastating effects on family dynamics and gender roles. Men possibly experienced the greatest impact, losing much of their former status as providers for their families. Women received federal family allowance payments and often also the family's welfare payments. They frequently had a larger cash income than did their husbands which increased women's status while decreasing that of men. Women also frequently received better education than did men and they took over much of the task of dealing with government bureaucracy. Male prestige declined further when CCF changes to the economic system resulted in trappers losing credit with traders. Although many trapped fished and hunted less than before, few other employment opportunities came their way. Consequently they found themselves in the villages with time on their hands… The reduction of Aboriginal men's status and self-esteem and their resulting dysfunctional actions, affected entire families and communities.[193]

Nucleation had the unpredicted consequence of expanding the Indigenous population.

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[188] *Supra* at 64
[189] *Supra*
[190] *Supra*
[191] *Supra* at 47; Also see Bill Waiser, "Saskatchewan, a New History", Calgary, Fifth House Ltd. 2005, pages 358-362
[192] *Supra* at 38 and 47
[193] *Supra* at 48

The Indigenous population in the North more than doubled from 8,500 in 1944 to 18,000 in 1964 while the population in the South remained roughly the same.[194] The population growth was caused by the immigration of White people from the South and a high rate of births amongst the Indigenous population in conjunction with a lower infant mortality rate that resulted from somewhat improved health service in the villages.[195] Of course this meant that there was a demographic shift towards a younger population.

Quiring states that a lack of consultation with Indigenous people and the poorly planned nucleation created filthy living conditions in the new Indigenous settlements.

> Numerous government reports decried the filthy conditions under which Aboriginals in settlements lived. The few white people in the communities often had the only outhouses. Part of the problem arose because the former nomads, not appreciating the hazards involved, transferred sanitation standards from the bush to the village. Methods that worked on the land did not work in permanent settlements, and excrement from people and hundreds of sled dogs lay around communities. Rain rinsed the ground surface, and runoff washed into the lakes or rivers next to which communities invariably sat. Fish-processing plants contributed to the pollution by dumping offal into the water. Residents then took their drinking water from the polluted water bodies. … Tourist fishing parties left "thoroughly disgusted".[196]

The CCF also damaged a significant portion of the Indigenous natural habitat. They did not consult with Indigenous people when they constructed hydroelectric dams to bring electricity to the South. Such dams caused serious damage to the Northern environment, local Indigenous economies, and lifestyles of the Indigenous people without benefiting them.[197]

Indigenous peoples were not overrepresented in custody prior to the CCF's ill-conceived social engineering. The RCMP in 1944 occasionally patrolled the North on dogsled or by canoe and the CCF believed that such policing in conjunction with the DNR was sufficient to keep law and order during those early years.[198] No magistrate was based in the North during the CCF era. Unfortunately, visiting magistrates from the South appeared to have a closer relationship with the local white authority figures than with Indigenous people.[199]

Indigenous people tended to think that the justice system treated them too harshly. White people, on the other hand, called for expanded law-and-order services including more severe treatment of drunk Indigenous people, delinquent Indigenous children and roaming sled dogs.[200] The RCMP presence was much lighter in the 1950s than it is today.

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[194] *Supra* at 66
[195] *Supra*
[196] *Supra* at 86
[197] *Supra* at 83
[198] *Supra* at 90
[199] *Supra*
[200] *Supra*

For example, Buffalo Narrows obtained an RCMP officer in 1952 but he left in 1954 so the RCMP policed that area from Ile-a-la-Crosse.[201] However, it is likely that Indigenous women in the North needed more police protection at that time. Quiring states that too many Indigenous women had long been the victims of sexual assault from both Indigenous and non-Indigenous men.[202]

The CCF underfunded Northerners relative to the Southern population because they did not want Northerners to become dependent on social assistance and take advantages of generous programs.[203] In addition, the CCF ignored the enormous wealth being extracted from Indigenous lands for the benefit of the South and concluded that Indigenous people should not receive full benefits because they paid little or no taxes.[204] The inferior benefits provided to Indigenous people were justified by a common belief that they were responsible for their own poverty.[205] (On the other hand, the CCF did not want Indigenous people to starve so it attempted to prevent the direst of poverty.[206])

Unfortunately, the CCF also grossly underfunded child welfare and in 1961 Social Welfare had only two workers to administer all the northern programs.[207] The social workers frequently apprehended large groups of children and transported these children to Southern foster homes or boarding schools without representation by their parents or legal counsel.[208] The social workers frequently represented the parents as being incorrigible and Judges made the children permanent wards of the Minister.[209]

From the 1950s to the 1960s the apprehension of Indigenous children grew across Canada from 1% to 30-40%.[210] The rate of Indigenous family intervention on the part of Child and Family Services has continued to increase since that time. In 1977, Indigenous children accounted for 51% of the children in care in Saskatchewan.[211] The rate of investigations involving Indigenous children was 4.2 times the rate of non-Indigenous investigations.[212] Investigations of Indigenous families for neglect were substantiated at a rate eight times greater than for the non-Indigenous population.[213] Indigenous children

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[201] *Supra* at 90
[202] *Supra* at 92
[203] *Supra* at 187
[204] *Supra*
[205] *Supra* at 189
[206] *Supra*
[207] *Supra* at 214
[208] *Supra* at 214-215
[209] *Supra* at 216-217
[210] Moniruzzaman, A., Pearce, M.E., Patel, S.H., Chavoshi, N., Teegee, M., Adam, W., et al. (2009). The Cedar Project: Correlates of attempted suicide among young Aboriginal people who use injection and non-injection drugs in two Canadian cities. International Journal of Circumpolar Health, 68, page 2186. Also see Sinclair, R. & Grekul, J. (2012). Aboriginal youth gangs in Canada: (de)constructing the epidemic. First Peoples Child & Family Review, 7(1), page 10.
[211] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 72 (online)
[212] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 187 (online)
[213] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 187 (online)

who come into contact with child welfare authorities are significantly more likely to die.[214]

The amplified colonization instigated by the CCF began in 1944 and corresponded with the rise of Indigenous incarceration rates. The mid-1950s marked the first time statistics revealed that Indigenous peoples were overrepresented in custody. By 1957, 60% of Indigenous males over the age of sixteen years and under the age of thirty years had been to prison an average of 1.75 times.[215] By 1963, Indigenous men made up 25% of the provincial corrections population and Indigenous women made up 20% of that population.[216] To put this in perspective, "Indians" and Metis made up 7.5% of Saskatchewan's population at this time.[217]

It now seems clear that southern Saskatchewan's colonization of the North caused an increase in the dosage of Indigenous-trauma and in turn caused higher rates of Indigenous criminal behaviour. The overrepresentation of Indigenous peoples in custody dramatically increased through the second half of the twentieth century. By 1976-77, when Indigenous peoples made up 10% of the population of Saskatchewan, Indigenous males made up 63.7% of all admissions.[218] [219] "Treaty Indian" males over the age of 15 years were 37 times more likely to be admitted into provincial custody.[220] "Treaty Indian" women over the age of 15 years were 131 times more likely to be admitted to Provincial custody than non-Indigenous women.[221] The rate of recidivism was 60% for "Treaty Indians", 50% for "non-status Indians" and 32% for "non-Natives".[222] [223] [224] A substantial portion of the offences (60%) resulted in incarceration for a period of less than 90 days and only 10% of the offences were offences against the person.[225]

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[214] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada page 188 (online)
[215] *Supra* at 92
[216] *Supra*
[217] Allyson Stevenson, *Selling the Sixties Scoop, Saskatchewan's Adopt Indian and Metis Project*, Archivehistory.ca http://activehistory.ca/2017/10/selling-the-sixties-scoop-saskatchewans-adopt-indian-and-metis-project/
[218] John H. Hylton, "Locking Up Indians in Saskatchewan: Some Recent Findings" Chapter 3, page 61, in Thomas Fleming and L.A. Visano editors, Deviant Designations, Crime Law and Deviance in Canada, Toronto, Butterworths, 1983
[219] During the same period, 85.1% of female admissions were Indigenous women. *Supra*
[220] Furthermore, "Non-status male Indians and Métis" over 15 years were 12 times more likely to be admitted *Supra* at 64
[221] Furthermore, "Non-status Indian" women over the age of 15 years were 28 times more likely to be admitted. *Supra*
[222] *Supra*
[223] "Male Treaty Indians" turning 16 years of age in 1967 had 70% chance of being incarcerated at least once in a provincial correctional centre by the age of 25 years. *Supra*
[224] A similar "male non-status Indian or Métis" had a 34% chance and a similar "non-Native male" had an 8% chance. *Supra*
[225] *Supra* at 65

Indigenous Victimization and Incarceration

The previously stated waves of Indigenous trauma have culminated in a secondary source of trauma – the victimization of Indigenous people by Indigenous people. As stated above, trauma causes criminal behaviour including violent behaviour. Indigenous people have been disproportionately traumatized since Western Canada was colonized. Trauma theory predicts that some traumatized people will victimize those around them.[226] A significant percentage of the victims of such violence become traumatized thus perpetuating an internally generated cycle of traumatization and violence.

This prediction is borne out by statistics on Indigenous victimization. Indigenous people are at least three times more likely to be victimized than non-Indigenous people.[227] The 2004 General Social Survey found that approximately 40% of Indigenous people aged 15 years and over reported having been victimized at least once in the proceeding 12 months.[228] Indigenous people are seven times more likely to be victims of homicide.[229] On-reserve violent crime rates are eight times higher than the rest of Canada.[230] Katie Scrim states that,

> Perpetrators of violence against Aboriginal people are most often other members of the Aboriginal community such as spouses, relatives, or friends of the victim, and as such, victimization among Aboriginal people in Canada is often regarded as a mirror image of Aboriginal offending.[231]

(The statistics on Indigenous victimization are lower than the actual level because 74% of Indigenous domestic violence goes unreported.)[232]

Historic Indigenous trauma has created a cycle of violence within Indigenous communities. A significant number of Indigenous children are victimized and a subset of those children mature to become perpetrators of violence. This cycle of violence tends to be ignored or under appreciated. An Indigenous victim will be treated with sympathy one day then vilified on another day for delinquent behaviour.

The cycle of violence is a positive feedback loop that tends to increase in volume before stabilizing. Trauma theory predicts that Indigenous criminal behaviour will increase in step with increases in the dosage of trauma. That prediction is borne out by the evidence.

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[226] Katie Scrim, *Aboriginal Victimization in Canada: A Summary of the Literature*, Victims of Crime Research Digest No3, Department of Justice, http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html;
Also see Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, Victimization and offending among the Aboriginal population in Canada, Statistics Canada – Catalogue no. 85-002, Vol. 26, no. 3 at page 1
[227] *Scrim supra*
[228] Brzozowski, Taylor-Butts and Johnson *supra* at page 5
[229] *Supra* page 1
[230] *Supra*
[231] *Scrim supra*
[232] *Supra*

The overrepresentation of Indigenous peoples in the criminal justice system has risen in Saskatchewan at an alarming rate. The supporting statistics for these assertions will be reviewed below.

The criminal justice system may be amplifying the cycle of violence by further traumatizing Indigenous people with punitive sentences rather than therapeutic treatment. In addition, control theory and subculture theory predict that locking a person away from the positive influences of family and friends makes them vulnerable to delinquent sub-groups. In other words, incarceration, stigmatization and lack of positive social control impede an Indigenous person's healing and reintegration.

In the mid-1990s, Carole LaPrairie, one of Canada's leading criminologists, was critical of the criminal justice system's over-reliance on incarceration – a policy that harms both Indigenous and non-Indigenous people.[233] She stated that:

> Two factors are central to understanding the over-representation of Aboriginal people in Canadian correctional institutions. The first is the over-reliance in Canada on the use of imprisonment; the second is that more of the Aboriginal than the non-Aboriginal population falls into the socio-economic group most vulnerable to involvement in the criminal justice system…
>
> …In Saskatchewan, admissions are approximately 6.8 times higher than would be expected from the provincial aboriginal population.[234]

She found that during the first part of the 1990s Saskatchewan had the highest rate of Indigenous sentenced admissions (73% compared to the next highest, Manitoba, which had 57%) and the highest rate of Indigenous people admitted to remand (70% compared to the next highest, Manitoba, which had 55%) than any other province.[235] The Indigenous/non-Indigenous ratio of sentenced admissions was nearly 25 times higher for Indigenous people in Saskatchewan.[236] Saskatchewan also had the highest rate of overrepresentation of Indigenous women admitted to custody - but oddly the lowest level of Indigenous women on remand.[237] From 1988 to 1995 the most common *Criminal Code* offences for which Indigenous offenders were admitted for both sentencing and remand were administration of justice offences such as breaches of conditions.[238]

However, Indigenous offenders received shorter sentences for person, property, administration/public order, and weapon offences compared to non-Indigenous offenders.[239] A higher proportion of all federal and provincial offenders in Saskatchewan

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[233] Carole LaPrairie Examining Aboriginal Corrections in Canada Aboriginal Corrections, Ministry of the Solicitor General, 1996. at ii.
[234] *Supra* at 33
[235] *Supra*
[236] *Supra*
[237] *Supra* at 34
[238] *Supra* at 40 and 41
[239] *Supra* at 43

(but particularly of Indigenous offenders) served sentences of less than 30 days and Saskatchewan had the fewest offenders who served 367+ days. LaPrairie attributed the variation in sentence length, in part, to type of offence committed - more Indigenous offenders were serving sentences for administration of justice and provincial offences.[240] She argued that such overrepresentation was caused by a historic process that has made some reserve communities socially dysfunctional and that such communities could not provide social control to foster their youth to behave in a pro-social manner.[241]

The rate of Indigenous custodial overrepresentation continued to rise after LaPrairie's reporting. By 2011, 77.6% of Saskatchewan's custodial admissions were Indigenous people over the age of 18 years at a time when Indigenous peoples made up only 16% of Saskatchewan's general population.[242]

The length and type of sentences for Indigenous offenders have increased in severity since LaPrairie's 1996 study. The Courts in Saskatchewan generally apply the "step principle" when sentencing repeat offenders and this principle has been increasing the length of sentences for Indigenous repeat offenders. The "step principle" is based on the theory that a dosage of punishment should be increased for an individual when a previous dosage of punishment was not effective. This principle assumes that increasing dosages of punishment is effective. There is no credible evidence showing that increased periods of incarceration are effective. On the contrary, there is very credible evidence that increased periods of incarceration cause increased rates recidivism.[243] The "step principle" likely causes longer sentences to be administered to Indigenous offenders because Indigenous people receive higher doses of trauma than non-Indigenous people and, therefore, are more likely to act out in a criminal manner. A systematic study of the Saskatchewan criminal cases published on CanLII from 1996 to December 2015 found the following:

1. Indigenous people in Saskatchewan have been sentenced to nearly twice the amount of total jail time as those people where there is no indication that they are Indigenous ("NII").[244]
2. On average, Indigenous people were sentenced to over twice as much jail time per person.[245]
3. Indigenous people were disproportionately affected by Part XXIV of the *Criminal Code's* dangerous and long-term offender provisions.[246]

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[240] *Supra*
[241] *Supra* at 62 to 69
[242] Adult Correctional Statistics in Canada, 2010/2011. Statistics Canada reports at Chart 7
[243] *Supra*
[244] Indigenous peoples were sentenced to a total of 21,498.2 months of custody while NII people were sentenced to a total of 11,581 months of custody. See James T.D. Scott, "Reforming Saskatchewan's Biased Sentencing Regime", (2017) vol. 65 C.L.Q. 91 at 94
[245] There were 241 Indigenous people who received written sentencing decisions in CanLII and they were sentenced to an average of 89.2 months custody per person. There were 311 NII people who received written sentencing decisions in CanLII during that same time period and they were sentenced to an average of 37.2 months custody per person. See Scott *supra*.
[246] For example, regarding the average months of custody per person for which Indigenous peoples sentenced for aggravated assault (123.7 months per person), 11 out of the 18 sentencing decisions involved

4. Saskatchewan designated people as dangerous offenders at a rate that is vastly disproportionate to its population when compared to all other provinces and Indigenous people were vastly overrepresented in this designation.[247]

Indigenous peoples continue to be grossly overrepresented in the present criminal justice system in Saskatchewan although the rate of increase appears to have stabilized in recent years. The percentage of total admissions into custody for Indigenous peoples in Saskatchewan was 78% in 2013. This percentage went up to 79% of total admissions in

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dangerous offender applications. Out of those 11 Indigenous dangerous offender applications, 6 resulted in the Indigenous person being designated as a dangerous offender and 5 resulted in the Indigenous person being designated as a long-term offender. In contrast, of the 8 NII aggravated assault offenders (49.5 months per person), only 3 NII offenders were submitted to dangerous offender applications with only 1 NII being designated as a dangerous offender and the remaining NII being designated as a long-term offender. Regarding the average months of custody per person for which Indigenous people were convicted of assault with a weapon (122.8 months per person), 4 of the 5 sentencing decisions were dangerous offender applications which resulted in Indigenous peoples being designated as dangerous offenders in 3 of the applications and designated as long term offenders on one other application. In contrast, none of the 4 NII assault with a weapon offenders were submitted to dangerous offender applications. The absence of dangerous offender applications of NIIs resulted in those offenders being sentenced to 12 months per person – 10 times less than for an Indigenous offender. An even more dramatic example could be found regarding the average months of custody per person for which Indigenous peoples in Saskatchewan were convicted of assault causing bodily harm (125.1 months per person). Five out of the 10 sentencing decisions were dangerous offender applications which resulted in Indigenous people being designated as dangerous offenders on 4 of those applications and designated as long-term offenders on one of those applications. In contrast, none of the 6 NII assault causing bodily harm offenders were submitted to dangerous offender applications and 5 of those NII offenders were sentenced to a non-custodial sentence which resulted in an average sentence of only 2.5 months per person or 50 times less than for an Indigenous offender; *Supra* at 95 to 97.

[247] Saskatchewan had over 4 times the rate of dangerous offenders compared to Alberta and Manitoba. Public Safety Canada states (at Table E3 of their Corrections and Conditional Release Overview for 2013) that as of April 14, 2013, "Aboriginal offenders account for 29.4% of the dangerous offenders and 20.5% of the total federal offender population". It also states that Saskatchewan had designated 61 people as dangerous offenders since 1978 compared to Manitoba's 18 dangerous offenders and Alberta's 53 dangerous offender designations. *Supra* at 97

Based on the CanLII written sentencing decisions, 41 Indigenous offenders had been designated as dangerous offenders in Saskatchewan (where the length of sentence was recorded) with a total of 9,669 months of custody for an average of 235.8 months per person. Over the same period, 30 Indigenous people had been designated as long-term offenders in Saskatchewan (where the length of sentence was recorded) with a total of 2,898 months or 96.6 months per person. On the other hand, only 11 NII people in Saskatchewan had been designated as dangerous offenders (where the length of sentence was recorded) for a total of 4,356 months of custody averaging 396 months per person. The low life expectancy for Indigenous people is the most likely explanation for the higher dangerous offender months in custody per person for NII people versus Indigenous people. Indigenous people are expected to live 180 months less than NIIs so Indigenous people would serve that much less time in custody as compared to NII people. Over the same period in Saskatchewan, only 9 NII people have been designated as long-term offenders (where the length of sentence was recorded) with a total of 925 months of custody averaging 10.3 months per person – 9 times less than for Indigenous people.

The Crown's success rate in achieving dangerous offender or long-term offender designation, as recorded on CanLII, was remarkable. Out of the 98 dangerous offender and long-term offender applications recorded for Saskatchewan on CanLII only 2 such applications were completely dismissed. *Supra* at 97 to 98

2014 but down to 77% in 2015.[248] These are the types of fluctuations to be expected in a stable system.

There also remains a disparity between Indigenous people and non-Indigenous people regarding the use of conditional sentences in Saskatchewan. The use of conditional sentences for non-Indigenous offenders remained higher than the use of conditional sentences for Indigenous offenders from 2000 to 2015. In other words, Indigenous offenders in Saskatchewan received a smaller proportion of conditional sentences compared to non-Indigenous offenders during that time.[249]

Summary

The macro history of colonization, displacement and residential schools in Saskatchewan reveals a pattern of social harm to Indigenous cultures, communities, families and individuals that causes a disproportionate number of Indigenous people to be placed into custody.

The federal and provincial governments have acted paternally, treating Indigenous peoples as if they lack the capacity to make decisions in their own self-interest. Indigenous people have not been consulted regarding policies that have direct impact upon their lives and their future. Such policies include assimilation and various forms of social engineering.

Trauma Theory, Subculture Theory, Social Learning Theory and Control Theory provide a theoretical basis for understanding how the history of colonization, displacement and residential schools cause some Indigenous people to commit crimes. Historical trauma came in corrosive waves of social and personal harm. Trauma causes many social ills including criminal behaviour.

The sentencing Judge, Crown and Defence counsel have almost all the information needed to formulate a sentence once they have 1) a broad understanding of the history of colonization, displacement and residential schools in Saskatchewan, 2) an understanding of the history of a particular Indigenous offender's community from the online Indigenous Communities Database and 3) have discovered the person's family and personal history. They only need to discover what suitable resources are available for this particular offender to effectively promote public safety.

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[248] Julian V. Roberts and Andrew Reid, "Trends in Aboriginal Incarceration in Canada since 1978, Every Picture Tells the Same Story", *Canadian Journal of Criminology and Criminal Justice*, Volume 59 Issue 3, July 2017, pp. 313-345

[249] Andrew A. Reid, "The Differential Utilization of Conditional Sentences Among Aboriginal Offenders in Canada", (2017) *Canadian Criminal Law Review*, *22*(2), 133-157, Page 11 online https://www.arcabc.ca/islandora/object/dc:17185?solr_nav%5Bid%5D=b632f464c1342be7d466&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=1

Sentencing a Traumatized Indigenous Person

Sentencing decisions ought to be based on the best evidence that can be practically brought before the court. Each offender comes from a unique background and circumstance and must be sentenced based on the evidence in their particular case. One particular Indigenous offender cannot be considered to be a representative of all such offenders. Therefore, I will imagine a composite Indigenous offender for the purpose of this broad-stroke sentencing analysis.

As discussed above, a traumatized Indigenous offender has two fundamental hurdles to recovery – such a person needs to both deal with their trauma and to disassociate themselves from the sub-group whose members fail to control delinquent behaviour or who foster such behaviour. If they do not deal with their trauma, their legal problems will reoccur and they will have difficulty being accepted in a pro-social group. It is also difficult to be supported by a pro-social group when they are stigmatized by a criminal record. If they return to their delinquent social group, they will get the wrong kind of support and will have difficulty dealing with their trauma as well as have difficulty staying out of trouble.

A number of treatments have been shown to be effective for victims of trauma, including cognitive, behavioural, interpersonal, and mindfulness therapies.[250] The Intergenerational Trauma Treatment Model, a joint treatment for the traumatized caregiver and their traumatized child, has also shown to be effective.[251] Unfortunately, such treatments tend to not be provided to Indigenous trauma sufferers (nor to most non-Indigenous trauma victims). Most Indigenous trauma victims are marginalized, are not aware of potential treatments, and/or are worried about the stigma associated with mental illness and do not seek out treatment. Often medical professionals do not recognize that their Indigenous patients are suffering from the impact of trauma.[252] It was my experience that such treatment was only provided to my Indigenous clients at the Regional Psychiatric Centre

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[250] Neil J. Kitchiner, Neil P. Roberts, David Wilcox, and Jonathan I. Bisson, *Systematic review and meta-analyses of psychosocial interventions for veterans of the military*; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3516833/
Stephen C. Hayes, "Acceptance and Commitment Therapy: Rational Frame Theory and the Third Wave of Behavioral and Cognitive Therapies", Behavior Therapy 35; 636-665, 2004. https://pdfs.semanticscholar.org/31bd/ae90f0b3cf6039fa48e9884a25b4dd950c66.pdf
Powers, Zum Vorde, Sive Vording, Emmelkamp, "Acceptance and Commitment Therapy: A Meta-Analytic Review, Psychother Psychosom 2009; 78;73-80 https://www.karger.com/Article/Abstract/190790
Bisson J. I, Ehlers A, Matthews R, Pilling S, Richards D, Turner S. Psychological treatments for chronic post-traumatic stress disorder: Systematic review and meta-analysis. British Journal of Psychiatry. 2007;190(2):97–104 - https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3516833/
Butler A. C, Chapman J. E, Forman E. M, Beck A. T. The empirical status of cognitive-behavioral therapy: A review of meta-analyses. Clinical Psychology Review. 2006;26(1):17-31. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3516833/

[251] Valerie E. Copping, Diane L. Warling, David G. Benner, Donald W. Woodside, A Child Trauma Treatment Pilot Study, Journal of Child and Family Studies, Vol 10, No. 4. December (2002) pp. 467-475, http://www.theittm.com/files/Journal%20Article-proof%20version.pdf

[252] William Aguiar and Regine Halseth, *Aboriginal Peoples and Historic Trauma: The Process of Intergenerational Transmission* – National Collaborating Center for Aboriginal Health. https://www.ccnsa-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf - at page 8

in Saskatoon. Although treatments are theoretically available, such resources are lacking to treat Indigenous people for trauma.

A group of Indigenous scholars and therapists have recently suggested that a "trauma-informed, strength based, community engaged, spiritually grounded" Indigenous worldview is an effective means for restoring the wellbeing of Indigenous people in Saskatchewan.[253] They state that culturally based healing practices have been shown to improve functioning in all areas of wellness for Indigenous people.[254] They point to mindfulness techniques which are used "to create new and healthy neuropathways while changing negative harmful pathways associated with colonization".[255] Former Crown Prosecutor Rupert Ross has examined Indigenous healing and sees parallels with the western treatments for complex PTSD – notwithstanding the differences in cultural perspective, including the Indigenous emphasis on the interconnectedness of all things.[256] Many of my Indigenous clients sought help from traditional healing and ceremonies. Those of my clients who have embraced traditional healing claimed to feel better. It was my experience that the vast majority of my clients had not been exposed to effective western treatment and that some found traditional healing to be more accessible to them.

I have not seen an Indigenous person who has benefited from treatment in prison. A prison is not the optimum environment for healing because "a feeling of safety" is an important aspect of trauma recovery.[257] People do not feel safe in custody and they tend to be humiliated by the prison environment.[258] Prisoners are entitled to the same health care services as would be provided in the community (the Mandela rules), but prisoners are treated in a manner that is harmful to their mental health and they do not receive proper mental heath care.[259] It is unsurprising that Indigenous offenders are not healed in a prison environment.

There are few resources designed to help Indigenous offenders reintegrate into a pro-social group. Former lead Chaplain at the Saskatoon Correctional Centre, Father Andre Poilievre, says that a person leaving an old delinquent group (such as a street gang) to join a new pro-social group is like a refugee escaping to a new country – they leave everything and everyone behind and need to start over in an unfamiliar environment.

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[253] JoLee Sasakamoose, Terrina Bellegarde, Wilson Sutherland, Shauneen Pete and Kim McKay-McNabb, *Miýo-pimātisiwin Developing Indigenous Cultural Responsiveness Theory (ICRT): Improving Indigenous Health and Well-Being*; The Interntional Indigenous Policy Journal, Volume 8, Issue 4, Reconciling Research: Perspectives on Research Article 1 Involving Indigenous Peoples—Part 2 (Oct 2017) – page 3 and 10

[254] *Supra*

[255] *Supra* at page 9

[256] Rupert Ross, *Indigenous Healing – Exploring Traditional Paths*, (Toronto: Penguin, 2014) 116-129;

[257] May Jo Bolton, "The Trauma Informed Tool Kit", Second edition. Klinic Community Health Center, Pages 90 - 91 http://trauma-informed.ca/wp-content/uploads/2013/10/Trauma-informed_Toolkit.pdf

[258] Owens B, Wells J, Pollock, Muscat B, Torres S. Gendered violence and safety: A contextual approach to improving security in women's facilities. Washington, DC: US Department of Justice, Office of Justice Programs, National Institute of Justice; 2008 https://www.ncjrs.gov/pdffiles1/nij/grants/225338.pdf

[259] Annual Report, Office of the Correctional Investigator 2016-17, http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf

Father Andre is a co-founder of STR8UP,[260] an organization in Saskatoon that is designed to assist gang members who are considering, or are in the process of leaving their gang. STR8UP is also involved in the prevention of gang membership through youth mentorship programs, school presentations, and workshops in the community.[261]

Street gangs are the most structured and the least common of delinquent sub-groups but they are the only type of such sub-group where the members are treated as being influenced by the sub-group rather than as disconnected individuals. They are a useful example of how members of other delinquent sub-groups can be treated.

STR8UP has a reintegration ceremony for former gang members. I have attended one such meeting in my community and found the ceremony to be very moving. A number of former gang members met in a school gymnasium with about a hundred people from the neighborhood. The former gang members talked of their traumatized childhoods, the emotional pain that they continue to suffer, the support they received from their gang, and their journey towards a pro-social life. After all of the former gang members had told their stories, the people in the community were invited to greet them and shake their hands. The people in the gym formed a line and each shook the hand of the former gang members. Unfortunately, STR8UP is grossly underfunded and cannot come close to meeting the demand for its services.

STR8UP will only accept gang members who have renounced gang affiliation ("dropped their colours"). They will not recruit gang members. There is a notable de-criminalizing organization in Boston, Massachusetts, named 2018 Roca Inc.[262] which does recruit. Roca claims to serve the highest-risk 17 to 24 year old men who are **not** ready, willing or able to participate in programs or jobs. These young men have prior arrests, are actively involved in gangs, and are on track for future long-term incarceration. Roca claims that 79% of the participants stay each year and that 84% of their graduates have no new arrests. They claim to have an evidence-based data-driven intervention model and that they successfully recruit gang members with a "relentless outreach" program – persistently contacting gang members until the member succumbs to treatment and integration. Roca uses a simplified form of mindfulness behavior therapy that involves mnemonics and heuristics. Former gang members rely on these aides to develop self-control. Roca is privately financed and has many more resources than STR8UP.

It is no secret that there are few available supports and treatments for traumatized Indigenous people in Saskatchewan. However, a sentencing Judge needs to be aware of the types of support and treatments that could be effective in those cases where it is apparent that the offender is a victim of intergenerational trauma and/or personal trauma - even if the community does not make such treatments available. In those cases where the

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[260] http://str8-up.ca

[261] Laura Orton, Giselle Patrick, Terri Cordwell, Kayla Truswell, and Stephen Wormith, "Process Evaluation of the Saskatoon STR8UP Program: Evaluation Report Prepared for: The John Howard Society of Saskatchewan, Saskatoon Branch", 2012, at page 21 - online https://www.usask.ca/cfbsjs/research/pdf/research_reports/STR8UP%20Process%20Evaluation%20Final%20Report.pdf

[262] http://rocainc.org/

needed resources are lacking, the sentencing Judge needs to state that there is a lack of support and treatment so that the offender is not blamed for not obtaining treatment. The Court should also consider and give reasons as to why the offender's sentences have not been effective in the past and whether the sentence will be effective in the case at hand so that the mode of sentencing can be understood, evaluated and improved over time. The offender and others can learn and profit from an analysis of past ineffective sentences.

As stated above, waves of trauma caused by colonization, displacement and residential schools have caused the overrepresentation of Indigenous people in the justice system. A sentencing Judge must take notice of this history and carefully consider how it has impacted a particular Indigenous offender in order to fashion an effective sentence. Sentencing an offender is one of a Judge's hardest tasks as the stakes are very high and the issues are complex, and sentencing an offender requires careful deliberation. Unfortunately, most sentencing decisions are made orally and under severe time restraints. The vast majority of sentencing Judges demonstrate respect for the dignity of offenders. Unfortunately, the system-imposed time restraints leave the impression that most Indigenous offenders do not sufficiently matter to warrant a written sentencing decision. The history of colonization reveals a pattern of marginalizing and underfunding Indigenous peoples. This pattern should be avoided in the criminal justice system to advance Reconciliation. If the sentencing Judge does not have the time to make a written decision, he or she should say so. Indigenous people should be provided with all information that profoundly impacts them.

The sentencing Judge needs to be aware of the likely impact of a custodial sentence on a traumatized Indigenous offender. The evidence regarding both incarceration and the "step principle" should be considered in sentencing. Studies show that there is an increase in both recidivism and anti-social behaviour linked to incarceration.[263] Furthermore, there is very credible evidence that increased periods of incarceration cause increased rates recidivism.[264]

The sentencing Court should also be aware of the crime rates in Saskatchewan when fashioning a sentence for an Indigenous person. Statistics Canada reports that the rate of crime in Saskatchewan is climbing at an alarming rate – contrary to the falling rate of crime in much of Canada.[265] Indigenous people make up nearly 80% of those statistics. These statistics indicate that the sentencing precedents for Indigenous offenders have not made Saskatchewan safer. Sentencing precedents must be reconsidered based on the evidence.

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[263]: The Effects of Prison Sentences of Recidivism, Ottawa: Solicitor General Canada - Public Safety Canada at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/index-en.aspx; Also see, The Effect of Prison on Criminal Behavior, Public Safety Canada at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffct-prsn/index-en.aspx; and Valerie Wright, "Deterrence In Criminal Justice, Evaluating Certainty Versus Severity Of Punishment"; November 2010 at http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf).

[264] *Supra*

[265] http://www.statcan.gc.ca/daily-quotidien/170724/t002b-eng.htm

Summary

A Gladue report writer need only research an Indigenous offender's personal and family history once the sentencing Judge takes judicial notice of the above noted history of colonization, dislocation and residential schools. The only history then needed by the Court would be the history of the Indigenous offender's community and this could be done by searching the Indigenous Communities Database. A Gladue writer or Defence Counsel may do further research to discover any resources and support available to an offender.

This would greatly reduce the time and cost of a Gladue report and provide the Court with the optimum available knowledge of the offender's circumstances for sentencing. A sentencing Court could not be expected to do more when attempting to remedy the overrepresentation of Indigenous people in custody.

Sentencing Judges ought to provide an explanation for why Indigenous people are overrepresented in custody so that the offender and his or her family and community can better understand the rational behind the sentence. Providing a Court record of the facts contained in the judicial notice of the history of colonization, dislocation and residential schools in relation to Trauma Theory helps provide such an explanation.

The offender and his or her community will be in a better position to reform behaviour and relationships once they understand the root causes of the offending behaviour and the rational behind the sentence. This understanding is best provided in a well-written Gladue report. This is an important aspect of sentencing that is often overlooked when considering the merits of a Gladue report. If the sentencing Judge lacks the resources to obtain a Gladue report for an Indigenous offender, the Judge should state so – neither the criminal justice system nor the offender should take the blame for the lack of such resources.

The above is intended to be first step towards an authority or agreed statement of facts for Judges and Counsel to rely upon when considering the basis for taking judicial notice of the history of colonization, displacement and residential schools. Such an authority needs to be enhanced, ongoing and perpetually peer reviewed. Everyone in the sentencing process may have differing opinions on the law but the facts related to Indigenous history ought not be subject to varying opinions. Judges taking judicial notice of Indigenous history should be considering an agreed upon statement of facts that contains that history. It is my position that Indigenous sentencing will be more resistant to systemic discrimination once such an authority is agreed upon and in use. Sentencing Judges taking this approach may also assist in creating pressure to make appropriate treatments and sentencing options more readily available – an indirect but important benefit.

Appendix

Gladue Reports and Presentence Reports[266]

Introduction

There are obstacles to be overcome before the information contained in the Gladue portion of a presentence report (PSR) would become as effective as the information contained in a Gladue report. One obstacle to a PSR's effectiveness is a perception of bias held by Defence Counsel and offenders with respect to the authors of PSRs. It is difficult for Indigenous offenders and their family to open up and trust probation officers because they perceive probation officers as part of the punitive aspects of the criminal justice system. Another obstacle is a lack of training for probation officers on how to interact with Indigenous people suffering from the impact of historic and intergenerational trauma. Probation officers are not trained to write Gladue reports so they may not have the skills and understanding necessary to talk about traumatic events arising from Indigenous history in Saskatchewan. For a probation officer to be an effective Gladue report writer, they would need to have a background in Indigenous culture, an ability to gain the trust of traumatized Indigenous people and the ability to communicate with such people without harming them and breaching their trust.

Bias

Bias is a major concern surrounding Gladue reports. Writers involved in the LAS Gladue report pilot project (the "Pilot Project") stated that they strive to be objective and some used an editor to help correct any tendency towards bias. The Crown and Defence Counsel also stated that they valued objectivity and were critical of any perceived bias in a Gladue report.

Most Defence Counsel and offenders do not consider PSRs to be objective. Many of the Defence Counsel and some of the offenders consider that PSRs are biased in favour of the Crown's position. The concerns of Defence Counsel include that the writers of PSRs have a general bias against the offender [or in favour of the police and/or Crown], that PSRs contain a risk assessment which nearly always establishes there is a risk to reoffend, and that probation officers often solicit self-incriminating statements from offenders. It will not be easy for Defence Counsel and offenders to gain trust in a probation officer's impartiality, whether or not such trust is warranted.

Interviewing and writing skills

A trained Gladue report writer with an Indigenous background is best equipped to gain the trust needed to discover an Indigenous offender's personal history. Nearly everyone involved in the Pilot Project stated that it is extraordinarily difficult for a person to

[266] Information from this Appendix has been taken from the Report on the LAS Legal Aid Gladue Report Pilot project.

recount his or her deeply personal stories of trauma, abuse, and shame. Most of the Writers personally visited the offender, their family, and their community. This process involves sacrifice on behalf of the teller and of the listener. The interview process can traumatize both the teller and the listener. One Informant stated that they "were a mess for weeks" after an interview. Aftercare often needs to be provided for such people to mitigate any re-traumatization.

Most, if not all, Indigenous offenders lack the knowledge and understanding to provide an autobiographical Gladue report. They tend to lack the requisite insight and need help from someone who knows what information is required by the criminal justice system. A Gladue report writer is trained to properly interview informants so that the Court receives the relevant, reliable information regarding an offender's personal history and circumstances. Most family members and community members are reluctant to provide the required information regarding the offender's past and their circumstances without establishing some level of trust with an experienced, culturally sensitive, listener. It takes time, skill, intelligence, and experience to persuade the members of the offender's family and communities to arrive at a level of trust sufficient for them to open up to the Gladue report writer and tell him or her their own painful story and their recollection of the offender's background.

Gladue report writers stated that the sharing of such stories is best done in person and often involves visiting the offender's community. Talking to Informants over the telephone saves time and money, but offenders, members of their families, and members of their communities suggested that a telephone interview with a traumatized informant is neither effective nor humane. Moreover, meeting with an informant in person can uncover issues that might otherwise not be apparent. One Gladue report writer told of a language-barrier that was overcome by interviewing the individual in person. Another Gladue report writer told of a person with a hearing problem that was best handled by interviewing them in person. On the other hand, risks can arise when meeting with informants in person. One Gladue report writer stated that they felt that they were at risk during an in person interview with family members. This writer stated that those family members were "using" at the time and the Gladue report writer had to re-schedule the interview for another time.

Gladue report writers stated that it is very difficult to track down and communicate with people who are marginalized and impoverished. Most of these people do not have telephones and tend to be relatively transient. Many of the Gladue report writers stated that tracking down such people takes persistence – they "had to keep digging".

Most probation officers do not presently have the skills and knowledge to interview traumatized Indigenous informants or the time to dedicate to develop relationships of trust or track down marginalized and impoverished individuals.

Early Gladue Reports in Saskatchewan

There were enormous challenges and obstacles which confronted Gladue report writers and Defence Counsel when investigating and writing Gladue reports for the Pilot Project. These challenges and obstacles had an impact on the Gladue reports. Prior to 2013, no Gladue reports had been prepared in Saskatchewan and there was no one in Saskatchewan who had the knowledge or experience to write one. Few people in Saskatchewan knew of the difficulties involved in writing a Gladue report or what a Gladue report would look like. Defence Counsel did not know what to expect or what to ask for. Experienced Gladue report writers had to be imported from outside of the Province and these writers were not familiar with Saskatchewan, nor with the resident people, the cultures, and the circumstances of the various Indigenous communities in Saskatchewan. These writers were unfamiliar with the lawyers and judges in Saskatchewan's criminal justice system and with the various agencies, organizations, and correctional institutions in Saskatchewan. Not only did some Gladue report writers face the challenges listed above, they also attempted to mentor students/assistants with the goal of training Saskatchewan-based Gladue report writers. None of the people involved in the Pilot Project had ever attempted anything like this before. All of the challenges and obstacles listed above were aggravated by time pressures from Counsel and the Courts. One of the main complaints from Counsel was that the Gladue writing process was not done in a timely manner. The Gladue reports produced from the Pilot Project were mostly effective in spite of these challenges.

Opinions Regarding Gladue Reports and PSRs

Nearly all of the Defence Counsel who responded to the survey for the Pilot Project stated that a Gladue report was better than a PSR although one Defense Counsel stated that they had "a couple of exceptional probation workers" in their area who can sometimes write a good PSR. Defence Counsel, including myself, stated that 9 offenders' sentences benefited from the Gladue report. On the other hand, Defence Counsel stated that 9 offenders' sentences did not benefit from the Gladue report. Defence Counsel stated that they were disappointed with the sentencing result in 6 of their matters where Gladue reports were written. Two Defence Counsel stated that the Gladue report might have changed the Crown's position on sentencing.

Some Defence Counsel stated that the Gladue report was less risky than a PSR because of the likelihood that a client will incriminate themselves when interviewed for a PSR. Moreover, a Gladue report does not involve the prejudicial aspects of the risk-assessment portion contained in PSRs. Some Defence Counsel stated that the Gladue report allowed them to place their client's personal information discreetly before the Court without having to harm their client and their client's family by revealing such information in open court. Other Defence Counsel stated that the Gladue report allowed them to get information before the Court without subjecting their client to the risks associated with cross-examination. One Defence Counsel stated the Gladue report convinced the Court that the offender's apparent evasiveness while testifying was the result of cultural differences.

Respondents to the Pilot Project survey indicated that a well prepared Gladue report is an invaluable, lifelong, asset for an Indigenous offender. Offenders and their loved ones stated that the Gladue report provided the offender with a better understanding of themselves, their family, and their community. Offenders stated that their Gladue report changed their thinking about themselves and their circumstances in positive ways and their Gladue reports gave them hope that they can change their life. Gladue reports also provided some with information on resources and treatments as well as options for improving their lives.

Offender Views on Gladue Reports

One offender stated that their family could not communicate with each other about substantial issues and, as a result of the Gladue report process they were able to talk more openly and heal their relationships. Subjects of the Gladue reports told of family and spouses who are now able to understand their loved one's destructive behaviour and who are now in a better position to help. Some told stories of communities improving their relations with the offender and re-thinking their understanding of the offender, and of themselves, as a result of taking part in the Gladue report writing process.

All of the offenders who responded to the survey stated that the Gladue process was difficult but worthwhile. One Defence Counsel stated that their client considered withdrawing from the Gladue process after a Gladue interview because they thought that the process and a non-custodial sentence would be harder than jail. Counsel advised that that offender is now glad that they went through the Gladue process.

Offenders and others repeatedly stated that the Gladue report humanized the person who was the subject of the report – that the offender was no longer just another Indigenous person who drank too much and got into trouble – they were now a person with a story that explained their behaviour. The offender became "one of us" through the Gladue process.

Absolutely none of the offenders or their families had anything positive to say about a PSR.

Views from the Correctional System

Very few of the professional Informants stated that they used a PSR as a guide for better understanding an inmate. People in the Federal and Provincial correctional systems stated that an offender with a Gladue report has an advantage in the system because of the understanding those in the system gain about the offender. In the Federal correctional system, a Gladue report helps with the placement of an Indigenous person within the institution, with development of their programs and treatment, and with their release plans. Employees in the correctional systems advised that Gladue reports are also used for internal infractions and investigations and that Elders and liaison officers in the

Federal system are asking for any available Gladue reports to assist with their work with inmates.

Two of the Federal corrections people stated that they undertake a process which is similar to the Gladue report process as part of their procedure pursuant to s. 84 of the *Corrections and Conditional Release Act.* This is done for Indigenous people from both urban and rural communities. They investigate and find out what resources are available in the offender's communities. As with a Gladue report, the people who do a s. 84 assessment tend to have an Indigenous background. One person stated that they are aware of a program in which the history of various Indigenous communities was being accumulated through the Intake Assessment Unit in the Federal system. They stated that a Gladue report is helpful for the s. 84 process.

People involved in the Federal system stated that Gladue reports are valued because approximately 60% of the people managed in the Federal system in Saskatchewan are Indigenous people. Almost every one in the Federal system involved in the survey stated that they wanted Indigenous people to have access to more Gladue reports.

Survey respondents from the Provincial correctional system stated that they would like to have better access to Gladue reports and that they see far too few Gladue reports. Individuals within the Provincial system advised that when Gladue reports are available, the reports are not as helpful as in the Federal system when determining programming for an inmate because of the limitations on programming provided in the Provincial system. However, they stated that a Gladue report is beneficial in the Provincial system regarding the one-on-one relations with the inmate and for release plans.

Other Uses for Gladue Reports

Unlike a PSR, a Gladue report contains information that can be applied to a variety of circumstances. One lawyer/informant stated that a Gladue report assisted a client in an Adult Guardianship and Co-decision Making application to preserve a residential school claim settlement award. That lawyer regretted that they did not have the Gladue report for the residential school claim itself. Some Defence Counsel stated that they would like to use Gladue reports for bail hearings and for child apprehension matters. One Defence Counsel stated that a Gladue report was used at a not criminally responsible ("NCR") review hearing.

Summary

No one involved in the investigation for the Pilot Project, other than the Crown counsel, stated that they gained any significant understanding of an offender from a PSR. In particular, no offender, nor their family members, stated that they had obtained a better understanding of the offender from a PSR. No one told stories about a PSR assisting an offender with their relationships or their rehabilitation. No offenders stated that they had reread and contemplated their PSR. However, many told stories of people personally benefiting from their Gladue report. There is very little similarity between a Gladue

report and a PSR. A Gladue report benefits the offender, their family and community. A PSR has little positive impact on the offender – if any.