

Living up to Gladue: Criminal Sentencing and the Over-incarceration of Indigenous Peoples in British Columbia

by

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Ethics Statement



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Abstract

This paper examines ways in which British Columbia's provincial government can counteract the over-incarceration of Indigenous peoples through policy interventions that repurpose the criminal sentencing process. I begin by providing a brief sketch of the long-standing issue of 'over-representation' in Canada focusing on competing accounts of the problem's precise origin and the recommendations for reform that follow from each position. I proceed with an overview of my research, which consists of a series of interviews with individuals intimately familiar with the problem as it exists both in BC and the country at large. On the basis of these interviews and a complementary literature review, I outline three policy options the province might pursue and a set of key criteria against which these alternative pathways should be assessed. After analysing each option in turn, I conclude by recommending that the province implement a standardized Gladue report system in the immediate future.

Keywords: Gladue; over-representation; incarceration; colonialism; sentencing; policy

For my brother Marshal

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List of Acronyms

AJS	Aboriginal Justice Strategy
ALS	Aboriginal Legal Services (Ontario)
BC	British Columbia
DCC	Downtown Community Court (Vancouver)
DOJ	Department of Justice (Federal)
DTCV	Drug Treatment Court of Vancouver
LAO	Legal Aid Ontario
LSS	The Legal Services Society
MOJ	Ministry of Justice (BC Provincial)
NGO	Non-governmental Organization
PSR	Pre-sentence Report
SCC	The Supreme Court of Canada
UBC	University of British Columbia

Executive Summary

Policy Problem and Research Objective

In British Columbia and Canada at large, Indigenous peoples are disproportionately incarcerated in federal and provincial correctional facilities (prisons and jails). Often described as an issue of over-representation, the dramatic difference in incarceration rates has persisted since at least the end of the Second World War and has been explicitly connected with the project of colonialism.

In the 1990s, federal legislation amending the *Criminal Code* and the Supreme Court of Canada's *Gladue* decision implicated criminal courts in the problem of over-representation and suggested that they had been too reliant on the use of imprisonment with respect to Indigenous peoples. Provisions introduced by the government and clarified by the Supreme Court require sentencing judges to consider the unique systemic and background factors impacting Indigenous peoples in any instance where incarceration might be applied. To date, there are few formal mechanisms supporting the courts in making these considerations. The continued reliance on incarceration, the failure to live up to *Gladue* and the worsening issue of over-representation are symptomatic of an inequitable application of justice.

The objective of this capstone is to explore provincial policies that might stem the use of incarceration in British Columbia and in turn ameliorate the issue of over-representation.

Methodology

The research conducted for this study has two parts. First, a literature review on the issue of over-representation in academic and legal scholarship, legislation and policy, case law, governmental and non-governmental reports. Second, a series of semi-structured interviews conducted with individuals familiar with criminal justice processes and their interaction with Indigenous peoples in BC and/or Canada. Interviews explore

the causes of over-representation, initiatives designed with a remedial objective, and barriers to the implementation of *Gladue*.

Policy Options and Recommendation

On the basis of participant interviews and background research, three policy options are selected and subsequently assessed against multiple criteria designed to highlight each alternative's relative strengths and weaknesses. The options evaluated are a provincially administered Gladue report system, an expansion of First Nations Courts, and the construction of a consolidated multi-service or Gladue Court specifically for Indigenous peoples. Criteria considered include each option's general effectiveness, approximate cost and level of administrative complexity, in addition to the amount of control assumed by Indigenous communities in their operation.

I conclude by recommending that the government implement a province wide Gladue report system that works to ensure the fair and immediate access of Gladue reports where Indigenous persons are facing the prospect of prison. A provincially administered report system is assessed to be an effective option on a case by case basis and can be available to individuals without geographic restriction. Furthermore, a report system can build on infrastructure and expertise already in place within the province, and would eliminate a developing private market posing further barriers to the fair and equitable application of justice.

Chapter 1. Introduction

Policy Problem

The disproportionate incarceration of Indigenous peoples in Canada is a well-known and appalling fact.¹ In 2014-15, Aboriginal men accounted for 24% of admissions to provincial/territorial jails and 22% of admissions to federal penitentiaries.² Aboriginal women accounted for 31% and 38% of admissions to jurisdictionally equivalent institutions.³ In British Columbia, Aboriginal peoples constituted 31% of all custodial admissions to adult correctional services,⁴ and in 3193 instances an individual self-identifying as Aboriginal was sentenced to provincial jail.⁵ Disparities in incarceration rates are often described as crises of ‘over-representation,’ given that the Indigenous

¹ In this paper I use the term Indigenous to refer collectively to First Nations, Métis and Inuit peoples, except when directly referencing materials that use Aboriginal or Aboriginal peoples synonymously.

² Julie Reitano, “Adult Correctional Statistics in Canada, 2014/15,” *Juristat*, March 22 2016, <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>. Offenders 18 years and older are admitted to federal custody when sentenced to a term of two years or more. The provincial/territorial system is responsible for adult offenders serving sentences of less than two years and for supervising offenders serving community sentences. Provincial/territorial facilities also hold offenders who are awaiting trial or sentencing (remand), including individuals facing the possibility of imprisonment in a federal facility.

³ Ibid. Note that “admissions” refers to individuals entering various points of the correctional system and does not designate the overall composition on a given day. In 2014/15 it was reported that Aboriginal women accounted for 35.5% of all women in custody while Aboriginal men accounted for 24.1% of all men in custody. See Public Safety Canada Portfolio Statistics Committee, “Corrections and Conditional Release Statistical Overview 2015,” *Public Safety Canada*, February 2016, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ccrso-2015/ccrso-2015-en.pdf>.

⁴ Reitano, “Adult Correctional Statistics,” Table 251-0022 <http://www5.statcan.gc.ca/cansim/a26>

⁵ Statistics Canada, “Adult correctional services, custodial admissions to provincial and territorial programs by aboriginal identity,” *CANSIM Table 251-0022*, last modified February 28, 2017, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2510022>.

populations of BC and Canada sit between 4-5%.⁶ However instructional, numerical disparities fail to articulate what Susan Zimmerman calls the “detrimental and debilitating effects such conditions have on the minds and spirits of the people who endure them,”⁷ and say nothing of the resistance and resilience by and of these same individuals, their families and their communities.⁸

Additional comparisons of the Indigenous and non-Indigenous ‘offender populations’ reveal equally stark outcomes. Indigenous peoples are more likely to be incarcerated than to be released on community supervision.⁹ Indigenous peoples serve a higher proportion of their sentence in a correctional institution. Indigenous peoples are less likely to receive full parole versus statutory release.¹⁰ Indigenous peoples are more likely to return to federal custody within two years of obtaining their freedom.¹¹

Imprisonment *itself* – including but not limited to the over-use of solitary confinement and the dearth of culturally appropriate services – amounts to an acute instrumental harm of Indigenous persons and communities by extension.¹²

⁶ Statistics Canada, “Aboriginal Peoples: Fact Sheet for British Columbia,” March 14, 2016, <http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016011-eng.htm>.

⁷ Susan Zimmerman, “The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System,” *University of British Columbia Law Review* 26, Special Edition (1992): 370.

⁸ See Christine Walsh and Jennifer Aarrestad “Incarceration and Aboriginal Women in Canada: Acts of Resilience and Resistance,” in *More Will Sing their Way to Freedom: Indigenous Resistance and Resurgence*, ed. Elaine Coburn (Winnipeg: Fernwood Publishing, 2016), 67-87.

⁹ Office of the Auditor General of Canada, “Preparing Indigenous Offenders for Release,” *Correctional Service Canada*, Fall 2016, http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html.

¹⁰ Ibid.

¹¹ Aboriginal Initiatives Directorate, “Strategic Plan for Aboriginal Corrections: Innovation, Learning and Adjustment,” *Correctional Service Canada*, 2006: 13, <http://www.csc-scc.gc.ca/aboriginal/092/002003-1000-eng.pdf>.

¹² To date, James B. Waldram’s *The Way of the Pipe* is the most comprehensive study of the experience of incarcerated Indigenous peoples. See James B. Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Peterborough: Broadview Press, 1997). For a more recent account see Michelle M. Mann, “Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections,” *Office of the Correctional Investigator*, 2009, <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20091113-eng.aspx> and “Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act,” *Office of the Correctional Investigator*, October 22 2012, <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20121022-eng.pdf>.

Disproportionate incarceration is, in terms of both cause and effect, intimately connected to the project of colonialism and deeply ingrained in the Canadian justice system. Decades of commentary and analysis contain countless recommendations for criminal justice and social reform. In this capstone I approach the problem of over-representation with an admittedly narrowed and modest scope. Paying particular attention to British Columbia, I define the problem as an over-reliance on incarceration in the criminal sentencing of Indigenous peoples, which represents an inequitable and harmful application of justice.¹³ Further explained in Chapter 2, this inequity is in part the result of the failure of courts to recognize the historical character of Indigenous-settler relations in Canada. Some additional qualifying remarks are necessary in order to better define my project's goals.

First, I examine over-representation only as it pertains to adult Indigenous peoples in British Columbia with the objective of proposing and assessing remedial provincial policies. Criminal law, the *Criminal Code* and procedural legislation in criminal matters are under the jurisdiction of the federal government,¹⁴ including any provisions that apply exclusively to Indigenous persons.¹⁵ The administration or operation of justice, including "the maintenance and organization of provincial courts," is the domain of the province.¹⁶ In focusing on the BC context I do not rule out the possibility that other provinces could pursue similar policy agendas.

Second, I analyse policy interventions directed exclusively at *one* aspect of the justice system: criminal sentencing. In Chapter 2 I explore sentencing as the focus of a political, legal, and historical struggle concerning over-representation in Canada. The existing legal and legislative framework holds the promise of immediate and tangible progress, a promise I believe must be fulfilled through targeted government action.

¹³ Carol LaPrairie argues that the over-use of imprisonment is central to the problem of over-representation. See "Examining Aboriginal Corrections in Canada," *Ministry of the Solicitor General*, 1996: ii, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/xmngng-brgnl-crrctns/xmngng-brgnl-crrctns-eng.pdf>.

¹⁴ *Constitution Act of 1982*, s. 91(27).

¹⁵ Wayne A. Mackay, "Federal-Provincial Responsibility in the Area of Criminal Justice," *University of British Columbia Law Review* 26, Special Edition (1992): 316.

¹⁶ *Constitution Act of 1982*, s. 92(14).

Third, I take the position – acknowledged by parliament and the Supreme Court – that imprisonment is often an *unfit* form of punishment for Indigenous peoples specifically, and that its use should be curtailed. Michael Jackson describes the plausibility of expanding alternatives to imprisonment in light of an incarceration crisis:

There has been in Canada an incremental acceptance of the legitimacy of diversion in its broadest meaning particularly in terms of encouraging greater community participation in criminal justice issues and in constructing viable alternatives to adjudication and imprisonment particularly through mediation, reconciliation and restitution.¹⁷

Finally, I concede that by focusing only on criminal sentencing, my analysis leaves the wider justice system and other factors shaping over-representation only partially altered. The policy options I put forward are not a panacea nor are they exhaustive of the ways in which a variety of agents and organizations can and should engage with this particular issue. Patricia Anne Monture-Okanee and Mary-Ellen Turpel-Lafond define two broad projects necessary in restructuring the relationship between Indigenous peoples and the Canadian criminal justice system at large:

- i) the development of internal community structures for aboriginal criminal justice; and
- ii) improvements to the non-aboriginal system, or the system aboriginal people encounter outside their communities.¹⁸

As a non-Indigenous researcher I affirm the absolute necessity of the former but generally limit my perspective to the latter. I assume at most that certain policy options presented here occupy a hybrid position between these two poles. The policies I analyse speak to matters of provincial authority and not to important questions of resurgent Indigenous Law. Monture-Okanee and Turpel-Lafond provide rich justification for these occasionally parallel, occasionally competing objectives:

¹⁷ Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities," *University of British Columbia Law Review* 26, Special Edition (1992): 174.

¹⁸ Patricia Monture-Okanee and Mary-Ellen Turpel-Lafond, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice," *University of British Columbia Law Review* 26, Special Edition (1992): 267-68.

The solutions most commonly discussed are a separate justice system for aboriginal peoples, parallel systems or considerable accommodation within the existing criminal justice system. Just as aboriginal peoples are not homogenous, it would be a mistake to characterize the solutions to the current problems as unitary choices. While the contours of aboriginal control over community life are negotiated in many areas and subsequently instituted, it will be necessary to improve the conditions of aboriginal offenders in the short-term through further accommodations within the existing system. Therefore, it would be misguided, in our view, to conclude that movement in one direction preclude initiatives in other areas.¹⁹

Outline of the Paper

In Chapter 2 I provide background on the issue of over-representation, including a survey of explanatory frameworks, the legislative and legal context, and existing federal and provincial initiatives. In Chapter 3 I outline the methodology guiding the collection and use of information collected over the course of this study. In Chapter 4 I present a summary of my research findings. In Chapter 5 I propose three policy options designed with over-representation in mind, and in Chapter 6 I lay out a series of assessment criteria by which those options are to be evaluated. Chapter 7 contains the analysis of each respective option and in Chapter 8 I conclude with a recommendation.

¹⁹ Ibid., 267.

Chapter 2. Background

Explaining Disproportionate Incarceration

Jonathan Rudin identifies three causal factors commonly cited as explanations for the over-representation of Indigenous peoples in Canada's prisons and jails: 1) culture clash; 2) socioeconomic disparity and; 3) colonialism.²⁰ Policy solutions often vary according to these divergent understandings of the problem's precise origin; I therefore discuss each framework in turn.

Culture Clash

Culture clash theory presumes that tensions between Indigenous peoples and the Canadian criminal justice system are the product of conflicting ontological positions or worldviews, working to the detriment of Indigenous peoples given the state's relative power. For example, individuals may be unnecessarily encouraged to accept charges they are well positioned to defend if an Indigenous cultural emphasis on taking responsibility for one's wrongdoing is conflated with pleading guilty at trial.²¹

The assumption that conflicting worldviews is at the root of over-representation lends itself to policy interventions attempting to bridge what is believed to be a *cultural* division. For instance, the federal government provides funding to provinces to develop and maintain an Aboriginal Courtwork Program. Court workers serve as liaisons for

²⁰ Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," *Ipperwash Inquiry*, 2005, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf.

²¹ *Ibid.*, 55.

Indigenous offenders requiring legal information and service referral.²² The Courtworker Program is characterized as an attempt to Indigenize Canada's courts, reduce misunderstanding, and generally improve access to fair and equitable justice.

While the program is no doubt a valuable tool, its remedial impact is unclear given that it leaves in place the criminal justice *processes* that most impact the outcomes of offenders.²³ Rudin is skeptical of the explanatory power of a theory that assumes and/or projects a cultural conflict in spite of the fact that the background of some individuals may not actually be at odds with the justice system.²⁴ What culture clash fails to account for is the active displacement and assimilation of Indigenous peoples and legal traditions, implying the need for a framework moving beyond a simplified or de-historicized Western/Indigenous binary.

Socioeconomics

An alternative and more common explanatory position assumes that socioeconomic differences can be predictive of crime and therefore incarceration by extension. In other words, situational factors connected to socioeconomic standing (income, educational attainment, etc.) have criminogenic consequences.²⁵ There is no shortage of information regarding disparities in economic, health and educational measures between Indigenous and non-Indigenous peoples in Canada. As the argument goes, the over-representation at the lower end of these indicators is (and would always be) telling for any demographic that also experiences high rates of imprisonment. As such, comparing Indigenous and non-Indigenous rates of incarceration may in fact

²² "Aboriginal Courtwork Program," *Department of Justice*, last modified June 4th 2015, <http://justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html>.

²³ Michael Jackson, "Locking Up Natives in Canada," *University of British Columbia Law Review* 23, no. 2 (1989): 248.

²⁴ Rudin, "Aboriginal Peoples," 23. See also Carol LaPrairie, "Aboriginal Over-Representation in the Criminal Justice System: A Tale of Nine Cities," *Canadian Journal of Criminology* 44, no.2 (2002): 181-208.

²⁵ David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons," *Alberta Law Review* 51, no. 3 (214): 625-27.

overstate the extent to which the use of imprisonment is disproportionate according to the more salient factor of socioeconomic disparity.

Socioeconomic theory is well regarded among governments and criminologists here in Canada and around the world.²⁶ The theory shifts responsibility away from the criminal justice system and toward larger societal considerations, particularly those connected to labour and income. But according to Jonathan Rudin the socioeconomic analysis “begs a larger question [...] what must be looked at are the factors that have continued to keep Aboriginal people at the bottom of all socioeconomic indicators and to determine how those factors can be overcome.”²⁷ In short, we can accept that different forms of inequity do well to predict issues of crime, but what are the factors that precede and explain pervasive inequities?

Colonialism

In 1989 Michael Jackson published “Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release.” Jackson explicitly connected the use of imprisonment with the project of colonialism in Canada, and Jonathan Rudin suggests that the report was a significant factor pushing the issue of over-representation into the public and political spotlight.²⁸

Like Rudin, Jackson is critical of the de-historicized socioeconomic approach to explaining disproportionate incarceration. He argues that focusing solely on the economic determinants of crime creates the conditions for the racialized identification of Indigenous peoples with criminal behaviour.²⁹ However, in the absence of a theory of colonialism, the acknowledgment of racialization is itself an inadequate and indirect explanation of over-representation. As Robert Nichols explains:

²⁶ See for example Samuel Perrault “The Incarceration of Aboriginal People in Adult Correctional Services,” *Juristat* 29, no. 3 (2009): <http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.pdf>.

²⁷ Rudin, “Aboriginal Peoples,” 25.

²⁸ *Ibid.*, 11.

²⁹ Jackson “Locking up Natives in Canada,” 218.

Over-representation is a highly ambiguous and malleable idiom, susceptible to multiple interpretations and easily rendered into diverse programs for action. For instance, disproportion may be construed as the result of economic or social pathologies exogenous to the criminal justice system itself. In this formulation, the over-representation of racialized populations in prisons merely *makes visible* broader social pathologies, albeit in a highly dramatic way. For instance, criminality is correlated to poverty, which in turn is correlated to racialization and marginalization. Thus, the over representation of certain populations in penal institutions may be thought a function of racism, but only in a highly mediated manner.³⁰

For these scholars, asymmetrical incarceration is part in parcel of colonial violence and what Susan Zimmerman calls “the disproportionate conflict between Aboriginal peoples and the criminal justice system *that has been imposed on them*” [emphasis added].³¹ Attentiveness to colonialism shifts the normative weight of over-representation and locates its origin in the actions of the Canadian state. For Rudin, the government’s position has been well documented:

That Canada’s express policy with respect to Aboriginal people was to hasten their disappearance was never really in question [...] Included in the process was the relocation of Aboriginal people to often marginal land bases, criminalization of spiritual practices, severe restrictions on fundamental rights and liberties of Aboriginal people with respect to freedom of speech and assembly, mobility, and voting.³²

One might add to this list the residential schooling system, notoriously aggressive child welfare practices, and the host of policies that fall under the auspices of *The Indian Act*.³³ Through the work of scholars like Jackson, the historical and conceptual connection of Indigenous/settler relations and the deepening issues of criminal justice had by the mid 1990s been firmly established in academic and political discourse. The federal government’s subsequent reaction marked one of the major occasions in the story of criminal justice in Canada.

³⁰ Robert Nichols, “The Colonialism of Incarceration,” *Radical Philosophy Review* 17, no. 2 (2014): 400, DOI: 10.5840/radphilrev201491622

³¹ Zimmerman, “Revolving Door,” 414.

³² Rudin, “Aboriginal Peoples,” 25-26.

³³ For a discussion of these issues as they relate specifically to incarceration, see The Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Legacy*, (Montreal: Queen’s University Press, 2005), 218-34, and Jackson, “Pathways,” 147-238.

Legislative and Legal Action

Bill C-41 and Sentencing Reform

In September 1996, parliament's enactment of Bill C-41 amounted to the federal government's most significant response to the legacy of over-representation. Among a series of comprehensive reforms to the *Criminal Code*, the government for the first time defined the fundamental purpose of sentencing as the need to:

protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community;
and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.³⁴

In section 718.2 judges are further directed to craft sanctions "proportionate to the gravity of the offence and the degree of responsibility of the offender" in accordance with a set of supplementary principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing

³⁴ *Criminal Code* R.S., 1985, c. C-46, s. 718.

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) *all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*³⁵ [emphasis added].

Of note, 718.2(e) requires that judges consider circumstances particular to Indigenous offenders. Former Minister of Justice Allan Rock stated before the Standing Committee on Justice and Legal Affairs that “the reason we referred specifically there to Aboriginal persons is that they are sadly over-represented in the prison populations of Canada” and that the government was seeking to “encourage courts to look at alternatives where it’s consistent with the protection of the public – alternatives to jail – and not simply resort to that easy answer in every case.”³⁶ To this end, Bill C-41 also created the conditional sentence of imprisonment, whereby sanctions carrying a custodial term of less than two years may be served in the community subject to a determined set of conditions and restrictions.³⁷

There is general agreement that, at minimum, Bill C-41 acknowledges a problem of over-representation and suggests a potential remedy in the form of more ‘appropriate’ sentencing.³⁸ Less certain is *how* these considerations with respect to Indigenous peoples would be made. Unsurprisingly, the nation’s highest court would have to intervene.

³⁵ *Criminal Code* 1995, c. 22, s. 6.

³⁶ Allan Rock quoted in *R. v. Gladue*, [1999] 1 SCR 688; Canada, House of Commons Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, No. 62, 17 November 1994, 62:15.

³⁷ *Criminal Code* 1995, c. 19, s. 38, c. 22, s. 6.

³⁸ Carol LaPrairie, “The Impact of Aboriginal Justice Research on Policy: A Marginal Past and an Even More Uncertain Future,” *The Canadian Journal of Criminology* 41, no. 2 (1999): 250.

The *Gladue* Decision

In its 1999 *R. v. Gladue* decision, The Supreme Court of Canada held that a BC trial judge had erred in his misapplication of section 718.2(e) of the *Criminal Code* when concluding that special considerations would not be made to an Indigenous defendant who had been living off-reserve.³⁹ The Court determined that section “718.2(e) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all Aboriginal offenders.”⁴⁰ What section 718.2(e) alters is “the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an Aboriginal offender.”⁴¹

Despite common perception to the contrary, neither 718.2(e) nor the *Gladue* decision guarantee an offender a more *lenient* sentence. What they require is a more nuanced analysis of a sentence’s *fitness* with respect to Indigenous peoples.⁴² The *Gladue* ruling outlined the duty of a sentencing judge to pay particular attention to the circumstances of all Indigenous offenders, accounting for:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.⁴³

According to the Court, these background or *Gladue*⁴⁴ factors include socioeconomic disparity,⁴⁵ “systemic and direct discrimination” and “the legacy of dislocation.”⁴⁶ The *Gladue* decision is also unique in that it evokes the problem of disproportionate imprisonment in the language of “over-incarceration” and not over-

³⁹ *R. v. Gladue*, 1999 SCR 688 at para 18.

⁴⁰ *Ibid.*, at para 92.

⁴¹ *Ibid.*, at para 33.

⁴² *Ibid.*, at para 33.

⁴³ *Ibid.*, at para 66.

⁴⁴ ‘*Gladue*’ will only be italicized when referring specifically to the Supreme Court’s decision.

⁴⁵ *Gladue* at para 67.

⁴⁶ *Ibid.*, at para 68.

representation,⁴⁷ suggesting that the purpose of sentencing reforms and section 718.2(e) be interpreted in a remedial fashion as a “reaction to the overuse of prison as a sanction,”⁴⁸ and making imprisonment “the penal sanction of last resort”⁴⁹ even where Indigenous diversion programs specific to the individual’s community is unavailable.⁵⁰

Julian Roberts and Philip Stenning argue that the distinction between over-incarceration and over-representation is important and often overlooked. Over-incarceration imputes that there is something at stake beyond a mere statistical anomaly, namely that disproportionate incarceration is an *injustice* “either because of discriminatory decision-making within the criminal justice system, *or because of some other inappropriate application of penal sanctions to such offenders*”⁵¹ [emphasis added]. Roberts and Stenning find little evidence to support a claim of discrimination at sentencing,⁵² but set aside whether or not the application of penal sanctions is inappropriate in certain circumstances. Their detractors propose that the problem of over-representation is situated within the justice system and its “undue emphasis on incarceration,”⁵³ specifically where Indigenous peoples are concerned.

Furthermore, there is good reason to believe that both section 718.2(e) and the *Gladue* decision are appeals to *substantive* rather than formal notions of justice not inconsistent with the overall application of justice in Canada. Member of Parliament Pierrette Venne unsuccessfully attempted to have to the portion of 718.2(e) specifically referencing Aboriginal peoples repealed, and Roberts and Stenning suggest that its application may amount to a procedural inequity.⁵⁴ This raises an important question of whether or not taking special considerations specifically for Indigenous peoples, and not

⁴⁷ *Ibid.*, at para 50.

⁴⁸ *Ibid.*, at para 57.

⁴⁹ *Ibid.*, at para 36.

⁵⁰ *Ibid.*, at para 93.

⁵¹ Julian Roberts and Philip Stenning, “The Sentencing of Aboriginal Offenders in Canada: A Rejoinder,” *Saskatchewan Law Review* 65, no. 1 (2002): 80.

⁵² *Ibid.*, 81.

⁵³ Jonathan Rudin, “Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs,” *Criminal Law Quarterly* 54, no. 4 (2009): 448.

⁵⁴ Jonathan Rudin and Kent Roach, “Broken Promises: A Response to Stenning and Roberts,” *Saskatchewan Law Review* 65, no. 1 (2002): 22-23.

individuals who share difficult circumstances in common, is itself discriminatory,⁵⁵ a position that Kent Roach and Jonathan Rudin believe affirms a specifically formal principle of equality. They summarize the position in writing that “On a formal equality model, discriminatory sentencing would occur if a similarly situated Aboriginal offender received a harsher sentence than a similarly situated non-Aboriginal offender.”⁵⁶ An Indigenous person receiving a more *lenient* sentence than their similarly situated counterpart – by recourse to section 718.2(e) – would violate the same principle.

Rudin and Roach contend that the idea of a monolithic principle of formal equality in Canadian law has been demonstrably rejected by the Supreme Court of Canada in favour of an idea of substantive equality that “finds discrimination not only in formal discrimination, but also in failures to take account of the disadvantaged position of groups in Canadian society,” and that accepts “distinctions that are designed to ameliorate the positions of disadvantaged groups.”⁵⁷ In their words, a notion of formal equality that “treats all offenders the same, or does not allow for group-based amelioration of the disadvantaged, is only a recipe for continued inequality and colonialism.”⁵⁸ Rudin and Roach further suggest that this recognition is not necessarily in conflict with other principles of sentencing outlined in the *Criminal Code*. For example, 718.2(e) can be interpreted on the basis that it accounts for circumstances related to the reasons an offence was committed, impacting the consideration of an offender’s responsibility as required by section 718.1.⁵⁹

In spite of these implications, after *Gladue* it was still not clear “how a legal system that had contributed to the over-incarceration of Aboriginal people was suddenly to reconstitute itself to redress the same problem that it had a hand in creating.”⁶⁰ In 2001, when the federal government recommitted itself to reducing “the percentage of Aboriginal people entering the criminal justice system, so that within a generation it is no

⁵⁵ *Ibid.*, 23.

⁵⁶ *Ibid.*, 24.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 33.

⁵⁹ *Ibid.*, 29.

⁶⁰ Rudin, “Aboriginal Peoples”, 43.

higher than the Canadian average,⁶¹ incarceration rates had become even more disproportionate. They have only worsened since.

Bill C-41 and Gladue: Assessing the Impacts

The 1996 amendments to the *Criminal Code* have been described as the nation's "restorative justice experiment,"⁶² an approach that prioritizes victim and/or community restitution and offender responsibility.⁶³ David Milward adds that restorative processes often incorporate a "wider circle of persons" affected by conflict in order to achieve resolutions acceptable to all parties,⁶⁴ and seeks to address the root causes of criminal behaviour in light of conflicting evidence on the effectiveness of punishment as denunciation and deterrence.⁶⁵

Immediately following *Gladue* the overall rate of custodial sentences decreased in British Columbia and Canada at large, a change arguably explained by the creation of conditional sentences.⁶⁶ But since 2004, the number of Indigenous peoples sentenced to provincial custody has increased year over year in all but one instance, and in 2014-15

⁶¹ Speech from the Throne to Open the First Session of the 37th Parliament of Canada, Address by Prime Minister Jean Chretien, January 30 2001 <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2001-eng.htm>.

⁶² Megan Stephens, "Lessons from the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges," *Queen's Law Journal* 33, no. 1 (2007): 19-78.

⁶³ Julian Roberts and Loretta Stalans, "Restorative Sentencing: Exploring the Views of the Public," *Social Justice Research* 17, no. 3 (2004): 316.

⁶⁴ David Milward, "Making the Circle Stronger: An Effort to Buttress Aboriginal Use of Restorative Justice in Canada against Recent Criticisms," *International Journal of Punishment* Vol. 4 Iss. 3 (2008): 126-27.

⁶⁵ Raymond Paternoster, "How Much do we Really Know About Criminal Deterrence?" *The Journal of Criminal Law and Criminology* 100, no. 3 (2010): 765-824; Anthony Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice* 30 (2003): 143-95, and; Avinash Singh Bhati and Alex R. Piquero, "Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?" *The Journal of Criminal Law and Criminology* 98, no. 1 (2007): 207-253.

⁶⁶ Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (Cambridge: Cambridge University Press, 2004): 123.

there were 1262 more admissions than there had been in 2000-01.⁶⁷ The reforms have had no significant impact on over-representation.

A number of reasons have been offered to explain this apparent failure. In *R. v. Proulx* (2000) the Supreme Court of Canada declared that conditional sentences could achieve both punitive and rehabilitative goals,⁶⁸ leading to speculation that conditional sentences might draw offenders from probation – not incarceration.⁶⁹ Sentencing judges in certain jurisdictions may also be maintaining a commitment to denunciation and deterrence over and above the circumstances affecting Indigenous offenders.⁷⁰ Furthermore, most offences outside of first and second degree murder had initially qualified for conditional sanctions,⁷¹ but statutory limitations and mandatory minimum sentences have narrowed their use.⁷²

Also debated is whether a lack of progress is symptomatic of an under utilization of C-41's provisions, or if C-41 and *Gladue* together inherently lack remedial substance. As an example of this tension, Gillian Balfour suggests that the move toward restorative justice in Canada has conflicted with and appropriated feminist resistance to community reintegration in cases of gendered violence.⁷³ Continuing violence and the rapidly expanding rate at which Indigenous women are imprisoned are due in large part to “the

⁶⁷ Statistics Canada, “Adult correctional services, custodial admissions to provincial and territorial programs by aboriginal identity,” CANSIM Table 251-0022.

⁶⁸ *R. v. Proulx*, 2000, SCR 61.

⁶⁹ Renee Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons,” *Osgoode Hall Law Journal* 39, no. 2 & 3 (2001): 487.

⁷⁰ Kent Roach, “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal,” *Criminal Law Quarterly* 54 (2009): 470-505.

⁷¹ Julian Roberts and Thomas Gabor, “Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration,” *The British Journal of Criminology* 44, no. 1 (2004): 98.

⁷² For an examination of the impact of mandatory minimum sentencing see Christopher Sewrattan, “Apples, Oranges, and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples,” *University of British Columbia Law Review* 46, no. 1 (2013): 121-156 and Larry Chartrand, “Aboriginal Peoples and Mandatory Sentencing,” *Osgoode Hall Law Journal* 39, no. 2 & 3 (2001): 449-468.

⁷³ Gillian Balfour, “Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women,” *Feminist Criminology* 3, no. 2 (2008): 101-02. DOI: 10.1177/1557085108317551.

exclusion of women's narratives of violence and social isolation in the practice of sentencing law."⁷⁴

Across the spectrum of gender, it remains unclear how sentencing judges should consider the systemic factors at play affecting Indigenous peoples, and therefore how the system as a whole can re-orient itself in the manner imagined by *Gladue*.⁷⁵ One possibility, noted in the Supreme Court of Canada's 2012 *Ipeelee* ruling, is through the use of what are commonly called Gladue reports. Discussed further in Chapters 4, 5 and 7, Gladue reports are in-depth research documents surveying the historical and contemporary factors impacting Indigenous peoples. The Court's decision affirmed that these factors (including colonialism) are to be considered in *all cases*, even violent offences, clarifying what may have been an undue emphasis on "less serious" crimes stemming from the *Wells* decision in 2000.⁷⁶ It is written in *Ipeelee* that:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2 (e) of the *Criminal Code*.⁷⁷

⁷⁴ *Ibid.*, 102.

⁷⁵ Rudin, "Aboriginal Peoples," 48.

⁷⁶ *R. v. Wells*, 2000, SCC 10 at para 39.

⁷⁷ *R. v. Ipeelee*, 2012, SCC 13 at para 60.

Legal professionals have attested to the benefits of Gladue reports⁷⁸ but there is no statutory requirement that their use be mandatory.⁷⁹ They represent one attempt to address the failure of courts to consider the particular circumstances of Indigenous peoples, defined in Chapter 1 as an explanation for the continuing over-reliance on incarceration and the inequitable application of justice in the criminal sentencing of Indigenous peoples.

The BC Context

Across Canada, a patchwork of judges, NGOs and legal aid societies are working to transform the justice system on the basis of *Gladue*. Despite the role of the province in the administration of justice, policies designed specifically for this purpose are few and far between. A study of Gladue practices commissioned by the federal Department of Justice (DOJ) found that BC is one of a handful of jurisdictions with formal initiatives in place.⁸⁰

While it is difficult to capture the range of services addressing over-representation – either directly or by proxy – key initiatives are highlighted here to give the reader some sense of the province’s infrastructure.

Gladue in British Columbia

Summarizing the results of the DOJ study:

⁷⁸ See Brent Knazan, “Time for Justice: One Approach to R. v. Gladue,” *Criminal Law Quarterly* 54, no. 4 (2009): 437-39.

⁷⁹ Samantha Jeffries and Philip Stenning, “Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries,” *Canadian Journal of Criminology and Criminal Justice* 56, no. 4 (2014): 457. See also Brian Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” *Manitoba Law Journal* 38, no. 2 (2008): 124-26.

⁸⁰ Sébastien April and Mylène Magrinelli Orsi, “Gladue Practices in the Provinces and Territories,” *Department of Justice Canada*, 2013. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/rr12_11.pdf.

- Sentencing judges in BC receive Gladue related training⁸¹
- Information regarding the circumstances of Indigenous offenders are usually presented as part of pre-sentence reports (PSRs) prepared by probation officers employed by Correctional Service Canada or provincial equivalents⁸²
- Probation officers are trained to write pre-sentence reports tailored to Indigenous offenders⁸³

Pre-sentence reports are the most common example of an attempt to incorporate the unique and systemic factors impacting Indigenous peoples into the sentencing process. They are produced by regional probation officers at the request of the sentencing judge, Crown, or defence counsel. PSRs are defined in the *Criminal Code* but the particular form they take varies from province to province. In BC, PSRs may include information related to the individual's criminal history, the suitability and availability of community/support services, familial relationships, educational history, and personal characteristics including the willingness to participate in rehabilitative or non-custodial measures. Where individuals self-identify as Indigenous, probation officers are required to include Gladue considerations as part of the PSR.

As an alternative, the offender, defence counsel, Crown or the sentencing judge can request the production of an independently written Gladue report. Gladue Reports are longer and more detailed than PSRs, and place greater emphasis on inter-generational and systemic factors that most impact Indigenous individuals and their communities. Potentially included are the history of the individual's First Nation, familial experience with residential schools, medical and/or substance use issues and involvement in the child welfare system. Like PSRs, these reports also contain information on available rehabilitative and/or restorative supports that may prove as

⁸¹ Ibid., 6.

⁸² Ibid., 9.

⁸³ Ibid., 7.

effective alternatives to imprisonment, particularly if they are Indigenous specific and attempt to address the root causes of an offender's behaviour.

Gladue reports differ from PSRs in that they are usually drafted by persons familiar with the systemic circumstances most affecting Indigenous peoples, and not probation officers. The Legal Services Society (legal aid BC) maintains a roster of Gladue writers, a number of which were certified and trained through the Justice Institute.

Gladue reports are not mandatory and BC has no codified policy with respect to their use. Reports are usually produced at the request of defence counsel or a sentencing judge. They are funded by the Legal Services Society (LSS) only when the individual in question qualifies for legal aid, and where those funds are available.⁸⁴ The uncertainty and difficulty surrounding the production of Gladue reports is discussed further in Chapter 4.

First Nations Courts

In BC, four First Nations Courts are currently operational:

- The New Westminster First Nations Court on traditional Squamish, Tsleil-Waututh, and Musqueam territory, established in 2006.
- The North Vancouver Court on traditional Squamish and Tsleil-Waututh territory, established in 2012.
- The Cknúcwentn or Kamloops Court on traditional Secwepemc territory, established in 2013.

⁸⁴ To be eligible for legal aid, clients living alone must have a net monthly income below \$1520, which increases by increments of \$600 for each additional individual in the household. See Legal Services Society, "Do I qualify for legal representation?" accessed November 27th, 2016, http://www.lss.bc.ca/legal_aid/dolQualifyRepresentation.php.

- The Duncan Court on traditional Cowichan territory, established in 2013.⁸⁵

First Nations Courts exist within the provincial court system, but each location employs a sentencing methodology emphasizing restorative justice and minimizing the adversarial nature of mainstream processes. To appear in First Nations Court, individuals must self-identify as Indigenous, plead or have been found guilty at trial and be approved by Crown counsel.

In New Westminster, the offender, defense, Crown counsel, Elders and the sitting judge work to develop a Healing Plan that provides alternatives to incarceration and/or connects individuals to support services designed to better address the factors that originally brought them before the court.

Unlike other specialized courts in BC, First Nations Courts receive no additional funding and operate within existing provincial budgets.⁸⁶ The provincial Ministry of Justice (MOJ) discusses the courts in a recently published “Specialized Courts Strategy,” emphasizing the need for stronger data collection strategies and performance evaluations.⁸⁷ The operation of First Nations Courts and the potential for their expansion are further discussed in Chapters 4, 5 and 7.

Aboriginal Justice Programs

In BC and the rest of Canada, a federal/provincial partnership known as The Aboriginal Justice Strategy (AJS) provides funding to support the development and operation of community-based justice initiatives acting as alternatives to the mainstream

⁸⁵ Shelly Johnson, “Developing First Nations in Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence +” *Journal of Indigenous Social Development* 3, no. 2 (2014): 8-9.

⁸⁶ *Ibid.*, 10.

⁸⁷ See British Columbia Ministry of Justice, “Specialized Courts Strategy,” *BC Ministry of Justice*, March 2016, <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/specialized-courts-strategy.pdf>.

criminal justice system in “appropriate circumstances.”⁸⁸ Between 26 and 30 Aboriginal Justice Programs exist in BC.⁸⁹

AJS Programs offer a variety of restorative justice services, including pre- and post-trial diversion, alternative dispute resolution, circle sentencing, mental health and substance use support, and victim restitution. Access to a restorative justice program requires that an individual accepts responsibility for their offence. The participation of victims or members of the offender’s community is voluntary.⁹⁰

Similar to First Nations Courts, in order for an adult offender to be diverted prior to the traditional trial phase, Crown counsel must determine if an alternative measures program is warranted relative to the severity of the crime. As such, pre-trial AJS programs are typically used when the offence is “less serious” and when the offender has no prior criminal history.⁹¹

Another prominent Aboriginal Justice initiative is the Aboriginal Courtworker program discussed previously in this Chapter. The Native Courtworker and Counselling Association of British Columbia provides accused persons with referral to legal services, and may act as a liaison between the individual and other criminal justice system personnel.⁹²

⁸⁸ Department of Justice, “Aboriginal Justice Strategy,” last modified March 22 2017, <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html>.

⁸⁹ Federal and provincial websites are conflicting as to the number of existing programs. BC Ministry of Justice, “Aboriginal Justice Programs and Services,” last accessed November 30th 2016 <http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/aboriginal-justice/programs-services> and Department of Justice, “Location of Aboriginal Justice Programs in Canada: BC” last modified January 7 2015, <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplace/bc.html>.

⁹⁰ Government of British Columbia, “Restorative Justice,” accessed December 4 2016, <http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/restorative-justice>.

⁹¹ The website further qualifies that “Not all minor offenders feel regret about what they have done. Some may still pose a threat to the community. In these cases, the offender is not given the option of alternative measures.” See Government of British Columbia, “Alternative Measures,” accessed December 4 2016, <http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/alternative-measures>.

⁹² Native Courtworker and Counselling Association of British Columbia, “Native Court Workers,” accessed December 4th 2016, <http://nccabc.ca/justice/native-courtworkers/>.

Summary

While the AJS and other government funded initiatives provide an array of justice-centered services across BC, these organizations should not be considered exhaustive of the programs (both Indigenous and non-Indigenous) available to individuals coming before the courts (First Nations or otherwise). First Nations themselves, health and social services, and a number of other NGOs are actively supporting offenders, whether or not they are formally recognized as doing so.

A further area of consideration is how the need for additional initiatives varies *within* the province. For instance, the four First Nations Courts are clearly limited to the southern area of British Columbia, while it is estimated that 30% of the province's Indigenous community live in the northern region.⁹³ Although not specific to Indigenous peoples, in 2015 2587 criminal court cases were completed in Prince George, 852 Fort St. John and 698 in Williams Lake, the three highest among the northern region (Prince George ranks 6th in BC).⁹⁴ In the same cities, there were 1896, 595 and 579 findings of guilt, respectively.⁹⁵ That said, available data suggests that in Surrey alone there were 5507 findings of guilt in 2012-13, highest among the province by far.⁹⁶

The information provided in this Chapter briefly surveys the horizon within which the problem of over-representation/incarceration is usually discussed. The history of colonialism, Bill C-41 and the *Gladue* decision are important reference points reoccurring throughout this capstone. Despite these legal and legislative measures, the problem described is still very much alive. In the following Chapters I present the original

⁹³ Data adapted from BC Stats, "Aboriginal Profiles of British Columbia: 2006, Health Service Delivery Area," accessed March 29 2017, <http://www2.gov.bc.ca/gov/content?id=A1A1A8C37D524E5D94F7D6CFC56468D6>.

⁹⁴ BC Stats, "Completed Court Cases by court level, division, class and locations," accessed March 28 2017, <https://catalogue.data.gov.bc.ca/dataset/courts-completed-court-cases-dashboard-data-by-court-level-division-class-and-locations>.

⁹⁵ BC Stats, "Completed Prosecutions Count by Finding Status," accessed March 28 2017, <https://catalogue.data.gov.bc.ca/dataset/bc-concluded-persons-count-by-finding-status-and-city/resource/829e98f9-9df2-4cc4-9b32-5e023a288c66>.

⁹⁶ BC Stats, "Concluded Prosecutions Count by Finding Status," accessed March 28 2017, <https://catalogue.data.gov.bc.ca/dataset/bc-concluded-persons-count-by-finding-status-and-city/resource/829e98f9-9df2-4cc4-9b32-5e023a288c66>.

research conducted for this study. The promise of reform can still be delivered, but further action is clearly required.

Chapter 3. Methodology

The research conducted for this study includes: 1) a literature review on the issue of over-representation in academic and legal scholarship, legislation and policy, case law, governmental and non-governmental reports, publicly available data and; 2) semi-structured interviews conducted with individuals familiar with criminal justice processes and their interaction with Indigenous peoples in BC and/or Canada at large.

As a non-Indigenous researcher I have attempted to be attentive to my structural position without denying or minimizing the distance from which I view the issues I discuss. As a non-Indigenous person I employ a non-Indigenous research methodology, mindful of the dangers – demonstrated by Linda Tuhiwai Smith – stemming from practices embedded in colonial and imperial paradigms.⁹⁷ I aim to navigate the tension Ruth Nicholls describes as a researcher's need to avoid essentialism while recognizing "the complexity and contestations that reflect the many different peoples who identify as Indigenous and indeed, the researchers who in turn recognise their alterity in relation to participants."⁹⁸

Interviews and Research Participants

Individuals interviewed for this study were identified on the basis that they have practical knowledge of or direct experience with the criminal justice system in its interaction with Indigenous peoples in BC or Canada. I contacted participants via email

⁹⁷ See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples, Second Edition* (London: Zed Books, 2012). Shawn Wilson describes a paradigm as a set of beliefs guiding the researcher's actions. See Shawn Wilson, "What is an Indigenous Research Methodology?" *Canadian Journal of Native Education* 25, no. 2 (2001): 175.

⁹⁸ Ruth Nicholls, "Research and Indigenous Participation: Critical Reflexive Methods," *International Journal of Social Research Methodology* 12, no. 2 (2009): 119, DOI: 10.1080/13645570902727698.

and obtained their consent to participate orally or through signature. I conducted most interviews over the telephone with each session lasting between 30 and 90 minutes. In one instance I interviewed two individuals simultaneously and in-person.

A list of discussion questions were provided in advance at a participant's request, however most interviews did not proceed according to a fixed schedule and were typically conversational in nature. Common topics included the source of over-representation, the *Gladue* decision, applications of *Gladue* in Canada, and general criminal justice processes. From November 2016 to March 2017 eleven interviews with nine individuals were completed for the purposes of this study. These individuals are:

- (1) Gladue consultant / Gladue report writer
- (1) Representative of the Gladue Writers Society of British Columbia / Gladue report writer
- (2) Representatives of the BC Ministry of Justice
- (1) Representative of the Office of the Correctional Investigator
- (1) Legal scholar specializing in Indigenous Law
- (1) Representative of the Legal Services Society
- (2) Legal practitioners representing the Indigenous Community Legal Clinic in Downtown Vancouver

Interview Analysis

Each interview was recorded and transcribed unless otherwise requested. A key set of themes established through reading and re-reading is highlighted and presented

summarily in Chapter 4.⁹⁹ Further findings are condensed and discussed in the generation of assessment criteria and the discussion of policy options in Chapters 5, 6 and 7.

Limitations

The individuals participating in this study are not exhaustive of the Indigenous and non-Indigenous perspectives on over-representation, and the absence of current or former prisoners with direct experience of the sentencing process is perhaps most glaring. My lack of familiarity with the setting of incarceration creates the possibility that I could introduce risk and/or cause harm to individuals who are or have been involved in these conditions. My lack of professional training leaves me inadequately prepared to conduct research with persons vulnerable to the introduction of physical, psychological, spiritual, or emotional distress. Given the time limitations of this study, I could not have become sufficiently prepared and comfortable enough to have these persons participate.

Another serious limitation is my inability to account for how policy initiatives intersect with issues of gender. Where Indigenous women represent the fastest growing segment of the prison population,¹⁰⁰ any policy aiming to ameliorate Indigenous over-representation in correctional institutions should account for its expected impact in light of this crucial consideration.¹⁰¹ Further research is clearly needed on this matter.

⁹⁹ For an overview of thematic interview analysis see Greg Guest, Kathleen M. Macqueen and Emily E. Namey, *Applied Thematic Analysis* (Los Angeles: Sage Publications, 2012), DOI: <http://dx.doi.org.proxy.lib.sfu.ca/10.4135/9781483384436>.

¹⁰⁰ Office of the Correctional Investigator, "Annual Report 2015-16," June 30 2016, <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf>.

¹⁰¹ As of the writing of this report, BC is only the second province to adopt a transgender inmate policy that assigns offenders to facilities according to gender identity and not physiological characteristics. See Travis Lupick, "B.C. Corrections makes it official policy to house transgender inmates based on gender identity," *The Georgia Straight* November 23 2015, <http://www.straight.com/news/583126/bc-corrections-makes-it-official-policy-house-transgender-inmates-based-gender-identity>.

Chapter 4. Interview Findings

Within this Chapter I highlight and summarize key interview themes and their implications for the generation and assessment of policy options in Chapters 5, 6 and 7. The four topics explored in this section are: 1) pre-sentence versus Gladue reports; 2) specialized courts and the role of communities; 3) the question of effectiveness and; 4) political and budgetary obstacles.

Pre-sentence versus Gladue Reports

Each of the individuals I spoke with is closely familiar with the application of *Gladue* in British Columbia, and most believed that the current standard – or lack thereof – is painfully inadequate. Participants often contrasted the use of pre-sentence reports with the sporadic use of Gladue reports. As mentioned, pre-sentence reports must include considerations pertaining specifically to Indigenous peoples. Within PSRs, these considerations were described as ranging from a few sentences to a few paragraphs in length.

A Gladue consultant I interviewed stated that, in contrast, Gladue reports are “generally about 12-14 pages long” given that they include “a compendium of information that comes from a number of different sources, from the Nations themselves, from historical documents,” and through interviews with offenders and members of his or her community. Reports typically take six weeks to produce, but should not lend to delays in a court’s processing time.

Participants rarely equated the function of PSRs and Gladue reports, despite the fact that both models technically meet the requirements of the *Gladue* decision. Commonly cited was that PSRs implicitly function as tools for risk assessment and that while grounded in empirical research, no formalized test of their methodology had been

done with Indigenous participants. As such, by presenting Gladue factors as a context for re-offending, PSRs and their authors have the potential to *reverse* the remedial impact of a judge's requirement to consider an Indigenous person's unique background. The Gladue consultant further described this unfortunate predicament whereby:

those adaptive life skills that meet your needs on the res, whether you're talking about seasonal employment so 'you're not fully employed,' you talk about violence, you talk about all the things that keep you alive, that keep you on your toes on the reserve, all those things are criminogenic risk factors.

The role of a Gladue writer, on the other hand, is to highlight these factors and interpret them through the lens of colonization, residential schools, the *Indian Act*, and so forth. A representative of the Gladue Writers Society of British Columbia described their method as "trying to take a broad historical view and filter that down into how its impacted the individual" and that "the whole point is: let's find an understanding as to why this person is who they are," ideally presenting the court with "reasonable alternatives to incarceration."

Almost universally, participants affirmed that Gladue reports are more thorough and therefore preferable to PSRs, or attested to the significant need for their expanded production across the province. There was some disagreement on the number of reports LSS can and does fund, with estimates falling between 62 and 85 per year. Reports take an average of 30 to 50 hours to draft, though LSS currently funds authors for a maximum of 18.

Where individuals do not qualify for legal aid assistance, reports can be obtained privately at the expense of the offender, who may or may not be able to afford one. According to a representative of LSS that I interviewed, the lack of available resources creates:

delays in the production of the reports because there are not enough writers. And the thing is these are hard reports to write. They require a high level of detail, they're typically talking about the most difficult circumstances in people's lives and it would be very stressful. Not surprisingly we've had people drop out.

Needless to say there are serious concerns that an absence of publicly funded Gladue reports poses a significant barrier to the access of justice. Furthermore, there are few incentives for individuals to become report writers in the first place. Suggested to me by a legal scholar is that while a judge has the ultimate discretion as to whether or not the duty to meet the requirements of section 718.2(e) have been fulfilled, the province can play an important role in setting a higher standard:

the province could say: to ensure that we meet that standard we are now putting money behind Gladue workers so that these reports can be put together, and we expect that all of our courts would have this resource person available.

Specialized Courts and the Role of Communities

Aside from Gladue reports, the existence of specialized sentencing courts was highlighted as a particularly commendable development in the application of Gladue considerations. Examples include the Gladue Court at Old City Hall in Toronto and the four First Nations Courts now in BC.

Participants compared and contrasted the way in which each speciality court system had been pieced together and applied in their respective provinces. Both systems deal exclusively with Indigenous peoples, but similarities generally ended there. The Gladue Court receives substantial funding from the Ontario government and a host of other sources. First Nations Courts exist within provincial budgets. As part of Old City Hall, offenders can be immediately connected with a variety of support services prior to and after court hearings. In First Nations Courts, support workers often appear on a voluntary basis. In Toronto, Gladue reports are available for persons appearing in speciality court, and a Gladue aftercare worker follows up with offenders to monitor progress with the conditions of a sentence. In First Nations Courts, like all of BC, the production of Gladue reports is inconsistent.

Participants also compared the Gladue model with Vancouver's Downtown Community Court (DCC), an integrated service hub established in 2008. The DCC is not

an Indigenous-specific court and has a defined catchment area, but employs a number of similar services, minus Gladue report writers and aftercare workers.

In spite of the limitations, a representative of LSS stated a belief that First Nations Courts are “a very important development in terms of how Canadian justice works for Indigenous peoples,” in large part due to the incorporation of Elders into the sentencing process. Moreover, this participant suggested that the development of the Kamloops Court was especially significant in that it was primarily a community initiative in contrast to what are usually judicial enterprises:

It’s run by the community, it’s not a judge led initiative. The Kamloops Tribal Council, a couple of people there got members of the non-Indigenous community involved and they lobbied and got funding from the city of Kamloops to get a First Nations court up and running. In the office we train the Elders and we provide duty counsel so we’ve been involved with these things all along. Not owning them but supporting them.

Community involvement was further described as somewhat mediating the need for Gladue reports, given the opportunity for individual statements during the sentencing process. With respect to developing specialty courts, participants placed substantial emphasis on ensuring community interest and consent, with an eye to building legitimacy and encouraging meaningful involvement on the part of its members.

Each of BC’s First Nation Courts currently sits once per month and generally hears cases that would result in less than two years incarceration. Despite the fact that First Nations Courts are not receiving additional funding, a number of participants believed this model – while slightly nuanced in each of the four circumstances – could nonetheless be effective and reproduced in other jurisdictions. This is partly due to the fact that First Nations Courts prioritize casual, informal environments, and as such may not require a traditional court setting. That said, First Nations Courts do require traditional court staff.

The Question of Effectiveness

To varying degrees, the spectrum of formalized initiatives appearing in the wake of Bill C-41 and the *Gladue* decision were portrayed as positive, albeit incremental changes to the criminal justice system. Strategies to reduce incarceration rooted in *Gladue* were described as more or less effective dependent upon their ability to draw attention to historical and systemic circumstances that courts are otherwise unequipped to know about. A representative of LSS summarized it best when saying that “here’s what I think: the more information the judge has in front of them in making decisions, and the more options available, the better.”

In describing the connection between 718.2(e), *Gladue* and the issue of over-representation, participants typically phrased their understanding of effectiveness in indirect terms. Ways in which Gladue factors are brought before the courts differ according to the *depth* at which they address the mitigating circumstances specific to Indigenous peoples and the benefits of avoiding custodial punishment. A generalized notion of ‘thoroughness’ emerged across interviews. A nuanced account of both an offender’s personal situation and relationship to his or her community (including that community’s history) expands the possibility for a judge to consider less-punitive, non-custodial sanctions.

For some, questions remain about what should serve as the most appropriate measure of effectiveness, and what qualifies as *evidence* to support the particular measure. A representative from BC’s Ministry of Justice considered the state of existing information:

there’s certainly anecdotal information, and certainly if you were to go out and meet any of these people who participate, whether it be Elders, whether it be Crown counsel or duty counsel or judges, they believe that they’re getting better outcomes for Indigenous offenders going through this [First Nations Court] process, but there’s no quantitative data information to suggest for example that recidivism rates are lower, or that there’s a significant change in any of the patterns including whether it does or doesn’t lead to reducing the over-representation of Indigenous offenders in the criminal justice system. And I’m not saying it doesn’t. We don’t have the evidence one way or another at this point.

The apparent lack of both qualitative and quantitative data led some participants to highlight the need for enhanced collection strategies. Others urged for reevaluation and movement on the existing (and largely positive) anecdotal accounts. While it was suggested that initiatives specifically targeting the sentencing process can and do address the issue of over-representation, scepticism remained about the extent to which these interventions can have an impact. The same representative from BC's MOJ stated that:

So I think it's difficult to conclude that they make a substantial difference, but do they make a difference? I have no doubt about that. I have no doubt that a sentencing judge is far more comfortable having received a Gladue report where they feel like they've received very complete information about an offender than in the absence of it. Now having said that, there are other ways of getting that information before the court and there are, certainly within British Columbia, the pre-sentence reports that are prepared where an offender self-identifies as being Indigenous, include a specific portion that addresses those particular needs. But by no means is that a Gladue report, it's not meant to be a Gladue report, it simply tries to address the principles in section 718.2(e) of the *Criminal Code* and address those factors so that the sentencing judge has the information necessary to comply with the section of the code.

Arguably, there is a crucial distinction between simply complying with existing legislation and rising to a level at which the original intentions of Bill C-41 can be met. No participant I interviewed described the use of Gladue reports or specialized courts as unworthy of praise. However, most participants were pessimistic that all or even one of these models would be taken up and deployed on a larger scale.

A number of participants also described the need for upstream investments and more radical social reform. Child welfare practices were a common source of scrutiny and criticism. Court personnel and the general public would likely benefit from educational initiatives that enhance the awareness of Indigenous history, particularly in its relation to the Canadian state. Specific to criminal justice, some participants believed Gladue reports were already fulfilling this role, but that there was clearly room for improvement. Gladue reports were described as *most* effective when counsel and judges were familiar with their purpose, but educational initiatives were not seen as a substitute for relaying the Gladue factors relevant in individual instances.

Political Obstacles and Budgetary Constraints

Political hurdles and budget limitations preventing a full and robust realization of the remedial capacity of section 718.2(e) and *Gladue* were one of the most frequent topics touched on in my interviews.

Participants noted that the federal government had not increased funding to the justice system on the basis of the 1996 amendments, nor the 1999 *Gladue* decision. In stating that “there are resource issues, there is never unlimited resources in the justice system or any place else, so it’s a matter of prioritizing where do you put the resources so that you’re going to get the most effective outcomes,” a representative of the BC MOJ suggested that budgetary reallocations are largely a matter of priorities. More simply put, a *Gladue* consultant declared that “it gets down to money, at the end of the day it gets down to money.”

Other participants believed the situation to be somewhat more complicated, gesturing that the question of resources always intersects the issue of politics. In some cases, the absence of government action was correlated with a lack of awareness of Indigenous issues. In other instances, systemic discrimination was specifically cited.

Another obvious political barrier is the disinclination for governments to appear ‘soft’ on crime, or to lend to a perception that they’re providing ‘race-based’ justice. The government’s reluctance to make criminal justice procedures less punitive is assumed to reflect the public’s desire for harsher or ‘tougher’ justice policies, which participants noted is perpetuated by media fervour over exceptional cases. A representative for the *Gladue* Writers of British Columbia suggested that:

For a government to fund *Gladue*, it’s so politically unpalatable. The idea that we would spend taxpayer money, more taxpayer money, to address what on its face might resemble a two-tiered justice system, people who don’t understand colonialism or the impacts of colonialism on the criminal justice system, it’ll just look like “reverse racism.”

Regardless of the motivation, from the perspective of the research participants consulted for this study it was abundantly clear that neither BC nor the rest of Canada should anticipate dramatic shifts in the problem of over-representation. By and large,

they believed that without significant and immediate government intervention, the issue is more than likely to deepen.

Summary: Implications

An important insight drawn from my interviews is that interventions designed to target over-representation are rarely, if ever, mutually exclusive. Provinces could pursue any combination of strategies that involve the use of Gladue reports and/or specialized courts. But despite the fact that these options *could* be pursued in tandem, a critical assumption is that governments simply cannot or will not do so. Taken up individually, each option carries a set of relative tradeoffs according to various criteria. The purpose of the following chapters is to assess what those tradeoffs would be.

In constructing policy options, I do not assume unlimited resources would suddenly be made available, nor that political will would shift dramatically overnight. Each alternative is ambitious but not unrealistic. The general belief that ‘more is better’ does not, unfortunately, mean that the most is possible.

Chapter 5. Policy Options

Criteria for Selection

Policy options outlined in this Chapter are included on the basis of background research and participant interviews. While the salient features of each alternative may not be universally agreed upon, simplifying assumptions are necessary to fairly assess initiatives relative to one another. These assumptions do not represent an ideal scenario, but are designed to reflect a certain measure of contextual reality (e.g., resource scarcity). Two further clarifying comments are worth repeating at the outset.

First, included options are endogenous to the justice system and under the authority of the provincial government. In narrowing the scope of this capstone I do not wish to give the impression that exogenous factors are irrelevant to matters of justice. For example, child welfare policies and generalized education initiatives are assumed to be important and in need of further support. However, a fair assessment of policies (and other efforts) that impact over-representation in this mediated fashion is far beyond the depth of my research.

Second, as endogenous to the justice system, no option represents an autonomous form of Indigenous justice. Each intervention is subject to the *Charter* and maintains a high degree of fidelity to standard practice. Policy options can and should be defined by Indigenous peoples, but it is not the purpose of this capstone to assess

initiatives completely internal to Indigenous communities.¹⁰² No single solution is expected to “speak to the diversity of experience, geography and culture” of Indigenous peoples.¹⁰³

Option 1: Provincially Administered Gladue Report System

As described, Gladue reports in British Columbia are funded privately or through the Legal Services Society and no policy exists with respect to their use. Ontario is the only example of a province employing anything close to a systematic Gladue report system.¹⁰⁴ That said, BC is already home to a number of practising report writers, partly as a result of a three-year pilot project funded by The Law Foundation.¹⁰⁵

Through LSS, writers are connected to defence counsel and eventually the offender when a request for a report is made, assuming legal aid conditions are satisfied. A provincially administered roster would remove the financial burden from LSS and make reports available to individuals who do not meet the income criteria.

Constructed as a policy option, the administration of a province-wide Gladue report system assumes the following features:

¹⁰² I do not attempt to define what sorts of justice processes *could* be possible under the Constitution and the *Charter* or what a separate Indigenous system should or would look like. For a discussion of some of these issues see Wayne Mackay, “Federal-Provincial Responsibility in the Area of Criminal Justice and Aboriginal Peoples,” *University of British Columbia Law Review* 26, Special Edition (1992): 314-323 and David Milward *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

¹⁰³ Monture-Okanee and Turpel-Lafond, “Aboriginal Peoples and Canadian Criminal Law,” 253.

¹⁰⁴ The Ontario Government, in partnership with the federal government and Legal Aid Ontario (LAO), funds Gladue writers covering 18 areas of the province. See Ministry of the Attorney General of Ontario, “Ontario Working Towards Reconciliation with Indigenous Peoples New Elders Council and Gladue Summit Contributing to a More Responsive Justice System,” November 29 2016, <https://news.ontario.ca/mag/en/2016/11/ontario-working-towards-reconciliation-with-indigenous-peoples.html>.

¹⁰⁵ See The Legal Services Society of BC, “Gladue Report Disbursement: Final Evaluation Report,” 2013, <http://www.lss.bc.ca/assets/aboutUs/reports/aboriginalServices/gladueReportDisbursementEvaluationJune2013.pdf>.

- A provincially recognized certification standard and/or training module.
- A provincially administered report-writing roster.
- Provincially established standards for reports.¹⁰⁶
- Consistent and predictable funding for the production of reports.
- A significant effort to meet requests for reports in British Columbia.

Option 2: Expanded First Nations Courts

While four First Nations sentencing Courts already exist in BC, this option considers a provincially supported strategy to pursue their expansion. As of now, each court developed as a judicial- or community-led initiative. First Nations Courts receive no additional funding on behalf of the province.¹⁰⁷ Elders are provided an honorarium through the Legal Services Society and the presence of social workers, drug and alcohol counsellors or Gladue report writers is welcomed but not guaranteed.¹⁰⁸

Expanding First Nations Courts in British Columbia is likely to be limited to a handful of high-interest/needs areas. Currently, a number of circuit courts operate on an infrequent basis in small or remote communities. However, interest in a more consistent, established system is present in (at least) Hazelton, Merritt, and Williams Lake.¹⁰⁹ As noted in Chapter 2, there is likely a particular need for expansion in the northern region, but possibly in the Lower Mainland as well. A general assumption is made that new First Nations Courts could occupy a hybrid position between circuit and more traditional courts. That is, they would be developed in collaboration with a community not currently or sufficiently served, they would sit on a consistent basis relative to need (though likely

¹⁰⁶ The Legal Services Society of BC produced a “Gladue Primer” outlining the information most relevant to judges. See “Gladue Primer,” 2011, <http://www.lss.bc.ca/resources/pdfs/pubs/Gladue-Primer-eng.pdf>.

¹⁰⁷ Johnson, “Developing First Nations Courts in Canada,” 10.

¹⁰⁸ Johnson, “Developing First Nations Courts in Canada,” 6.

¹⁰⁹ Office of the Chief Judge of BC, “Provincial Court of BC: Annual Report 2015/16,” 2016, <http://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2015-2016.pdf>.

not every day), and they would not require the construction of a courtroom and could be held in a less formal setting (e.g. community centre). New First Nations Courts would not make determinations of innocence or guilt.

An expansion of First Nations Courts recognizes that the *process* of mainstream sentencing courts may be an ineffective system for many individuals and communities. Constructed as a policy option, the expansion of First Nations Courts within BC further assumes the following features:

- The provincial government, in partnership with the judiciary, will actively consult and collaborate with First Nations communities with the purpose of developing additional First Nations Courts. The decision-making and governance structure of each respective court will involve all three parties.
- The province will support the courts through budgeting, planning, court staffing and data collection. Judges will be assigned by the judiciary.
- A unilateral sentencing process will not be imposed on each respective court, but will reflect the values and objectives of particular communities within the existing legal framework.¹¹⁰
- First Nations Courts may receive additional funding for core community personnel (e.g., Elders), but will otherwise work within existing provincial budgets.
- First Nations Courts will serve only individuals who self-identify as Indigenous and who have plead or been found guilty at trial. First Nations Courts will hear cases that can carry a sentence of incarceration, subject either to approval by Crown counsel or through limitations pre-determined by each governance structure.

¹¹⁰ Circle Sentencing is one of the best-known models in Canada, but it should not be assumed to reflect the values of Indigenous communities across the country. See Barry Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System," *International Journal of Comparative and Applied Criminal Justice* 20, no. 2 (1996): 291-309.

Option 3: Consolidated Gladue Court

The final option discussed in this report is inspired by what is widely considered to be one of the most innovative and comprehensive applications of section 718.2(e) in Canada: the Gladue (Aboriginal Persons) Court in Toronto, Ontario. In response to the legislation and the *Gladue* decision, Aboriginal Legal Services (ALS) of Ontario and a Provincial Court Judge established the Gladue Court at Old City Hall. More courts have since been established throughout the province.

Like First Nations Courts in BC, Gladue Courts are sentencing courts for individuals who either plead or are found guilty at trial. The court operates with a set of dedicated legal personnel well versed in the issues relevant to Indigenous peoples, in addition to an Aboriginal Courtworker, one or more Gladue report writers, and a Gladue aftercare worker overseen by ALS and funded jointly by Legal Aid Ontario (LAO), the provincial government, and the federal government.¹¹¹ An observational study of the Ontario Gladue Courts found that aside from the information contained within Gladue reports, judges and lawyers attempted to solicit information from offenders and connect their appearance before the Court with the circumstances of their background.¹¹²

The Gladue Court also houses a wealth of pre- and post-court support or ‘triage’ services that can inform court proceedings. By ‘consolidated’ I mean to distinguish this key feature of a Gladue Court from traditional sentencing or other First Nations Courts.

Discussed in my interviews was whether or not the Downtown Community Court, which in many ways already resembles a Gladue Court, could be retrofitted to specifically serve Indigenous peoples on a limited basis (e.g., allotted days where only Indigenous offenders appear). Generally speaking, participants didn’t believe that such a dramatic shift in the operation of the DCC was possible or desirable. Despite the cost-effectiveness of that idea, a new court offers much more in the way of tailoring services

¹¹¹ Paula Maurutto and Kelly Hannah-Moffat, “Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts,” *Canadian Journal of Law and Society* 31, no. 3 (2016): 460.

¹¹² *Ibid.*, 461.

to Indigenous peoples specifically, and for meeting the demand for alternatives to mainstream courts.

Another important question facing the pursuit of a consolidated court in BC is the determination of its location. The Lower Mainland is far and away the most populous region of British Columbia, and participants spoke to the particular need for a new sentencing court in Surrey. The need for courts in smaller communities is more likely to be addressed by the expansion of First Nations Courts.

Constructed as a policy option, developing a consolidated Gladue court within BC assumes the following features:

- The provincial government will establish a new sentencing court, likely in the Lower Mainland, specifically for Indigenous peoples. The court will sit on a frequent basis and will be open to any individual self-identifying Indigenous. The ability for individuals to appear before the court will also depend on pre-established criteria (e.g. possibility of prison time or discretion of Crown counsel).
- The provincial government, in partnership with the judiciary, will coordinate and integrate justice, health and social services staff, including Gladue writers and a Gladue aftercare worker, in addition to traditional court staff.

Chapter 6. Assessment Criteria

In order to provide a policy recommendation, the trio of options presented in Chapter 5 are assessed against a set of evaluative criteria developed through background research and in consultation with interview participants. These criteria are not entirely discrete. They represent key considerations made in the evaluation of policy direction *by government*, and are not necessarily exhaustive of the priorities of all parties impacted by the issue of over-representation. Each criterion is categorized according to the general policy objectives of effectiveness, equity, and administrative considerations.

Effectiveness

Enhancing the Consideration of Gladue Factors

The general objective of this capstone is to reduce the reliance on incarceration in the criminal sentencing of Indigenous peoples. It was suggested in Chapter 2 that one avenue for achieving this is through the application of a substantive equity principle, on the basis of both Bill C-41 and *Gladue*. However, the ability to mitigate the use of incarceration is ultimately constrained. Sentencing judges are obliged to apply the principles of the *Criminal Code* to the particular circumstances of each and every offence. Judicial discretion can only be exercised within a certain continuum, and it is therefore acknowledged that the use of incarceration will not be avoided in all cases.

The BC Ministry of Justice has noted the difficulty in both establishing and measuring effectiveness in the criminal justice setting and with criminal sentencing in particular. A number of criteria have been suggested, including efficiency (processing times), reductions in the rate of re-offending (recidivism), and a reduction in overall

crime.¹¹³ Furthermore, each criterion is difficult to measure given the impact of a wide range of additional variables, including demographic and or/legal changes.¹¹⁴ Finally, there is the difficulty of achieving what can properly be called an experimental design, assuming that quantitative data are the ultimate goal.¹¹⁵

The BC MOJ has also noted the anecdotal evidence of effectiveness certain initiatives achieve, which includes the availability of “enhanced sentencing options which employ proven alternative treatment and supervision methods.”¹¹⁶

As discussed, the consideration of Gladue factors does not amount to a ‘get out of jail free card.’ In line with the interview findings discussed in Chapter 4, an effective policy will reduce the use of incarceration in an indirect fashion. That is, on a case by case basis, an assessment of effectiveness measures the extent to which policy options enhance the ability for courts to consider Gladue factors and (potentially) craft non-custodial sanctions.¹¹⁷

Given the unavailability of quantitative data, the capacity for each option to perform this function is assessed on the basis of participant interviews, and supplemented with additional information wherever possible.

Scope

The effectiveness of each option is further assessed by estimating the scale of its impact. Where the previous criterion evaluates each option’s effectiveness in a single

¹¹³ BC MOJ, “Specialized Courts Strategy,” 9.

¹¹⁴ Ibid., 10.

¹¹⁵ Ibid.

¹¹⁶ Ibid., 8.

¹¹⁷ For a discussion of the effectiveness of these practices, see Chassidy Puchala et al., “Using Traditional Spirituality to Reduce Domestic Violence Within Aboriginal Communities,” *Journal of Alternative and Complementary Medicine* 16, no. 1 (2010): 89-96, DOI: 10.1089/acm.2009.0213 and Mark Umbreit, “Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment,” *Western Criminology Review* 1, no. 1 (1998), <http://www.westerncriminology.org/documents/WCR/v01n1/Umbreit/umbreit.html>.

instance, the scope criterion estimates the number of instances where the intervention can be applied.

Equity

Community Control

A central theme emerging across participant interviews conducted for this study is the need to enhance engagement with Indigenous communities in the criminal justice process. John Borrows writes that, “Canadian law rests on shaky foundations within Indigenous communities because it pays so little attention to their values and participation.”¹¹⁸ Absent a fully parallel legal system, achieving equitable treatment for Indigenous peoples within current infrastructure has been prefaced on Indigenous peoples being “partners in developing a criminal justice system outside aboriginal communities that can and does reflect aboriginal cultures.”¹¹⁹

This criterion assesses the extent to which policy options are defined by Indigenous communities and/or include and support the perspective of Indigenous peoples in the policy’s operation. It places priority on the authority assumed by Indigenous participants in recognition of a basic premise that “a system of sentencing which is insensitive to the history and culture of aboriginal peoples does not take basic difference into consideration and contradicts the progressive notion of equitable treatment and respect.”¹²⁰

In light of critiques charging that the victims of gendered violence can be coercively diminished, included in this criterion is a consideration of the extent to which options address concerns regarding community safety.

¹¹⁸ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010): 207.

¹¹⁹ Monture-Okanee and Turpel-Lafond, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice,” 249.

¹²⁰ *Ibid.*, 252-53.

Administrative Considerations

Political Acceptability

Each option is assessed according to its predicted level of governmental acceptability. While not a direct measure of *public* acceptability, it is assumed that the government's perspective attempts to reflect the position of the wider population. Studies have demonstrated that Canadians believe sentencing practices are too lenient,¹²¹ and interview participants generally believed that governments are more sceptical of policies that appear 'soft' on crime or deliver 'race-based' sanctions. As such, the notion of political acceptability involves the extent to which each option's pursuit of substantive equity in the sentencing process could be interpreted as a differential application of justice.

Complexity

A complexity criterion assesses each policy alternative on the basis of the perceived difficulty of its implementation and operation. Roughly measured, complexity is assumed to increase with the number of governmental or non-governmental bodies involved in order for the policy to function.

Cost

Approximate costs are determined for each option through 'back of the envelope' calculations. All other things being equal, it is assumed that relatively expensive options are less desirable than their low-cost alternatives.

¹²¹ Julian Roberts, Nichole Crutcher and Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," *Canadian Journal of Criminology* 49, no. 1 (2007): 75-107.

Chapter 7. Analysis

Policy options are assessed on the basis of background research and the participant interviews conducted for this study. Where possible the assessment is supplemented with publically available data. Each option is discussed relative to the criteria defined in Chapter 5.

Option 1: Gladue Report System

A provincially administered Gladue report system would function to provide information on the unique, systemic, and intergenerational factors impacting Indigenous peoples coming before the courts and facing the possibility of imprisonment. Reports are a well established tool designed to assist judges in applying section 718.2(e) of the *Criminal Code*. Time, sensitivity, training and experience equip report writers to answer basic questions as to how and why an offender finds him- or her-self involved in the criminal justice system, all of which can be enhanced through a provincial system. A Gladue consultant and experienced report writer described the working process as follows:

you're looking at not only their personal social history, educational and substance history and all that, you're also looking at information on the community, whether it be an urban community, why? Why do they have that type or quality of relationship, or why do they not? You're also looking at the family's history. I like to think that it's a funnel. You look at the impacts of colonization and discrimination on the Nation, through that historical lens. You provide that historical context: what they were like pre-contact, what they were like after contact, how it affected them in their cultural traditions, their laws, their communities. Then you look at their family, and you look at the house do they belong to: are they matrilineal? How they were affected, the real story of that, and then how that flows down through the line to that family and the individual.

Participants I interviewed affirmed that well-researched and well-written Gladue reports yield sentences less punitive and more humane than those in comparable cases where reports could not be produced. Gladue reports expand the possibility for judges to craft non-carceral sanctions – without diminishing other principles of sentencing – by contextualizing an offender’s actions and through establishing the availability of services suitable for each individual’s specific needs. Gladue reports do not situate offenders within a framework of risk or criminogenic predictors,¹²² an especially salient point given the concern that gender considerations could be subject to stereotype and oversimplification.¹²³

An evaluation of BC’s three-year Gladue pilot project supports these findings. The study compared 42 criminal cases where a report was used with 42 similar cases for Indigenous clients when no reports were generated. Fewer clients aided by Gladue reports received jail time (23 vs. 32). Those that did receive a custodial sanction had a shorter median sentence length than their non-Gladue counterparts (18 days vs. 45).¹²⁴

The effectiveness of Gladue reports may be limited by an absence of non-custodial community options. However, the sole purpose of a report is not to determine how and where offenders should ultimately serve their sentence, and the lack of community services does not necessitate a more punitive sanction. Furthermore, a BC respondent to a DOJ study noted that communication barriers prevent courts from learning about Indigenous justice programs, and as such that it is not always an issue of their non-existence.¹²⁵ Community leaders and knowledge-keepers play a crucial role in telling this story to report writers, articulating their willingness and capacity to support offenders if and when a community sentence is possible. A Legal Services Society representative I interviewed stated that reports are primarily “about the stories of the communities, and about the stories of the people in the communities.”

¹²² Kelly Hannah-Moffat and Paula Maurutto, “Re-contextualizing Pre-sentence Reports: Risk and Race,” *Punishment and Society* 12, no. 3 (2010): 277.

¹²³ See Toni Williams, “Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada,” *Cleveland State Law Review* 55, no. 3 (2007): 269-88.

¹²⁴ Legal Services Society, “Gladue Report Disbursement,” 2.

¹²⁵ Sébastien April and Mylène Magrinelli Orsi, “Gladue Practices,” 20.

Perspectives of the offender, the offender's family, Elders and other community representatives are also important in that they inform and occasionally corroborate the contents of each Gladue report. While report writers are unlikely to consult victims or victim's family members, they place considerable emphasis on their duty to present information objectively and without bias. Authors of Gladue reports have occasionally been questioned at sentencing, most notably in *R. v. Florence* (2013), where certain information contained in a report was believed to be inaccurate and misleading.¹²⁶

One key advantage of having the government assume responsibility for a province-wide system is the increased capacity to ensure quality and consistency through training and oversight. The lack of systematic standards to track, measure, evaluate and innovate is a common theme in literature surrounding these initiatives, challenges the provincial government is well equipped to meet. Participants familiar with the application of Gladue in Ontario believe that the model employed by Aboriginal Legal Services, where a program director supervises and reviews the production of reports, can and should be replicated.

A second major advantage is that a provincially administered system can guarantee a high level of accessibility for offenders across BC, including those individuals not meeting legal aid's income criteria. LSS reports are currently funded through non-government revenue provided by The Law Foundation, and participants estimated that between 62 and 85 had been produced in 2016. Despite the fact that the number of *private* reports produced is unknown, interview participants cited a substantial need for increased availability across the province. Reductions in legal aid funding,¹²⁷ coupled with the fact that 25% of BC's legal aid clients are Indigenous,¹²⁸ are likely to exacerbate this shortfall.

¹²⁶ An appeal of the decision was upheld by the BC Court of Appeal in October 2015. See *R. v. Florence*, 2015, BCCA 414.

¹²⁷ Statistics Canada, "Provincial and Territorial Government Contributions to Legal Aid Plans," CANSIM Table 258-0006, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580006>.

¹²⁸ Shirley Bond, "Making Justice Work: Improving Access and Outcomes for British Columbians," *Report to the Minister of Justice and Attorney General 2012*, 8, <http://www.lss.bc.ca/assets/aboutUs/reports/submissions/makingJusticeWork.pdf>.

Even assuming this stated need, difficulties remain in determining the cost, acceptability and complexity of administering a program at an unprecedented scale. From a relative standpoint the organization of a report system would involve far fewer stakeholders than either model of specialized court, and may appear more acceptable given that the government would assume total control. Interview participants generally suggested that the province's reluctance to pursue responsibility up to this point is largely a matter of resources. While it is unclear how many reports would constitute sufficient provincial coverage in a given year, we know that in 2014-15 individuals self-identifying as Aboriginal accounted for 3193 admissions to sentenced custody in provincial correctional facilities.¹²⁹

Looking to other jurisdictions, in 2006-07 Legal Aid Ontario funded two full-time report writers at a cost of \$166,980, covering a \$40,000 salary, training, supervision, travel expenses and rent when required.¹³⁰ Between the two authors, 100 reports were produced in the 12 month period, corresponding with estimates provided by interview participants that reports generally take between 30 and 50 hours to complete. Aboriginal Legal Services recently added four additional report writers to cover four new jurisdictions in southwestern and northern regions of Ontario, at a total cost of \$467,376.¹³¹ Taken together, these figures suggest an average yearly expenditure between \$80,000 and \$120,000 to employ and oversee a single full-time author.

According to these estimates, a provincially administered report program employing 40 Gladue writers could produce roughly 2000 reports – assumed to be a high degree of coverage – with an annual budget somewhere between \$3,200,000 and \$4,800,000.

¹²⁹ These instances do not necessarily represent unique individuals. Statistics Canada, "Adult correctional services, custodial admissions to provincial and territorial programs by aboriginal identity," CANSIM table 251-0022, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2510022>.

¹³⁰ Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Three October 2006-September 2007," March 2008, 5, <http://www.aboriginallegal.ca/assets/gladueyear3.pdf>.

¹³¹ Legal Aid Ontario, "Legal Aid Ontario funding expands *Gladue* services to four new locations," March 12 2015, http://www.legalaid.on.ca/en/news/newsarchive/1503-12_newgladuefunding.asp.

As a policy option, the Gladue report system therefore performs relatively well according to criteria of effectiveness, scope, and complexity. The major drawback is its considerable cost. The analysis of a Gladue report system is summarized in Table 1.

Table 1: Report System Summary

Objectives	Criterion	Summary Assessment
<i>Effectiveness</i>	Enhancing Gladue considerations	In-depth reports provide a high degree of detail on Gladue factors.
	Scope of option	Up to 2000 cases per year.
<i>Equity</i>	Degree of community control	Community members can relay history through Gladue reports but do not control the process.
<i>Administrative Considerations</i>	Political acceptability	Lack of political support for Gladue reports thus far.
	Complexity	Few external stakeholders.
	Cost	Roughly \$3.2-4.8 million per year.

Option 2: First Nations Courts

An expansion of First Nations Courts works from the assumption that the sentencing process they employ better suits the interests and priorities of Indigenous communities. Interview participants attested to the emphasis these courts place on restorative justice and achieving offender-victim and offender-community restitution. The Ministry of Justice describes the model as a holistic pursuit of culturally appropriate solutions to criminal offences through the recognition of the “unique circumstances of First Nations offenders within the framework of existing laws.”¹³² A Gladue consultant familiar with the development and operation of the New Westminster Court confirmed that “certainly it worked very well for the people we had coming through” and described it

¹³² BC MOJ, “Specialized Courts Strategy,” 27.

as “a community court in the purest sense.” Other anecdotal accounts appear to support these findings.¹³³

Despite receiving no additional funding from the province, participants believed First Nations Courts were successful on the basis of their community-driven, non-adversarial model. This is due in part to the consistent involvement of Elders and other representatives working with appointed judges to improve court proceedings and generally define justice on the community’s terms.¹³⁴ Judges are not elevated above the rest of the court, and individuals speaking to sentencing are considered partners in the restorative process. Opinions varied greatly on the extent to which First Nations Courts can and do express basic tenets of Indigenous legal traditions, but there was little doubt of the fundamental role played by community leaders. Elders speak to the impacts of systemic poverty, spiritual trauma and familial disruption rooted in colonialism, and their participation is critical even where offenders are ‘unattached’ to a particular First Nation community.

In Duncan, an Elder’s advisory panel trained in the operation of Canadian criminal justice forms a core component of the Court’s governance structure.¹³⁵ As the representative of LSS I spoke with put it: “I’ve learned more from working with them [Elders] in the last 5 years than I learned in a couple of decades. That’s partly because they have a good perspective on how things work and how they ought to work.”

In addition to the presence of Elders, the most commonly cited reason supporting the success of First Nations Courts is the sense of responsibility and commitment assumed by offenders. Contrary to public perception, participants emphasized that these courts add a layer of accountability and commitment absent from the mainstream justice

¹³³ Anecdotal reports of reductions in the rate of reoffending for individuals processed through First Nations Courts are quoted in Ted Palys “A Programme Evaluation of Vancouver Aboriginal Transformative Justice Services Society (VATJSS),” *Simon Fraser University* 2014, 40, <https://www.sfu.ca/~palys/VATJSEvaluation-2014.pdf> and Karen Whonnock, “A Tale of Two Courts: The New Westminster First Nations Court and the Colville Tribal Court,” *University of British Columbia Law Review* 44, no.1 (2011):101.

¹³⁴ David Milward connects the definition of justice with the larger project of self-determination, see *Aboriginal Justice and the Charter*, 213.

¹³⁵ BC MOJ, “Specialized Courts Strategy,” 34.

system, and noted specific instances where offenders returned to court to update judges on their progress, even when it wasn't required by their sentence.¹³⁶ The Gladue consultant I interviewed contended that:

it's much harder to get in front of your peers and to acknowledge what you've done and how you're going to fix it, and make things proper, than it is to just go into a mainstream court and say ok I'll take my fine or I'll take my jail, and I'll be out the door and nobody will be the wiser.

Participants suggested that concerns of community safety are present but well accounted for through the role of a judge, who builds relationships with and understands the communities they serve. It was noted that victims of gendered violence may or may not speak at sentencing. In some cases, Victims Services may be present. The emphasis on balance in the community and the authority of the judge to uphold standards of public safety contribute to fit sentencing, not leniency.

. Interviews revealed conflicting assessments of the relative demand for existing First Nations Courts in the Lower Mainland (i.e., whether or not they needed to sit more than once per month), but there was general agreement that interest for new courts is present across BC. Regardless, First Nations Courts are unlikely to reach a significant number of offenders without a dramatic expansion, which is believed to be unlikely in the short term.

In attempting to determine the political acceptability of new First Nations Courts, interview participants cited the lack of funding for current initiatives and the lack of commitment to additional infrastructure in the MOJ's "Specialized Courts Strategy" as reasons for believing they are particularly unpalatable. Participants also expressed the belief that specialized courts could be interpreted as 'race based' applications of justice (however misguided), in light of the fact that they only see individuals identifying as Indigenous.

Given that new courts would largely exist within provincial budgets, this expansionary option is relatively low cost when compared to other alternatives. However

¹³⁶ These scenarios are also described by Karen Whonnock in "A Tale of Two Courts," 101.

any courtroom personnel redirected to new First Nations Courts would need to be moved from another setting, potentially putting a strain on an already burdened system. The appointment of new personnel may mitigate this issue, albeit at an added price.

Based on the simplifying assumptions attached to this option, the pursuit of First Nations Courts is by far the most accommodating to community concerns, a crucial consideration in the pursuit of a meaningful, legitimized justice system. Given their informality, First Nations Courts may also prove to be cost-effective, at least relative to other options. That in mind, establishing new courts is likely to be a complex, politically fraught exercise, and their development is unlikely to be swift. The analysis of expanded First Nations Courts is summarized in Table 2.

Table 2: First Nations Courts Summary

Objectives	Criterion	Summary Assessment
<i>Effectiveness</i>	Enhancing Gladue considerations	Community members speak directly to sentencing. Historical considerations are improved with the presence of Elders.
	Scope of option	Without significant expansion, FN Courts are unlikely to reach a high volume of individuals.
<i>Equity</i>	Degree of community control	High degree of community collaboration and control.
<i>Governmental Considerations</i>	Political acceptability	Subject to charge of 'race-based' justice in multiple settings.
	Administrative complexity	Considerable collaboration and consultation required.
	Cost	Courts would largely operate within existing budgets, though additional staff may be required.

Option 3: Consolidated Gladue Court

The Gladue Court at Old City Hall in Toronto, Ontario is widely believed to be the standard of excellence in meeting the requirements laid out by Bill C-41 and the 1999

Gladue decision. Bringing together social and support services, Gladue authors and a Gladue aftercare worker, the Gladue Court provides judges with a wide variety of non-custodial sentencing options. As such, a consolidated court is expected to be the most effective alternative on a case by case basis.

A three year study observing 1032 cases in two Ontario Gladue Courts found that their operation illustrates “how the historical context of colonialism and racism can be meaningfully integrated into sentencing practices and how this context can be applied to purposefully alter the sentencing practices that contribute to over-incarceration of minority groups.”¹³⁷ The Ontario study’s findings corroborate my own: a number of participants I interviewed affirmed that the Gladue Court in Toronto is the most significant and encouraging development in the criminal sentencing of Indigenous peoples in Canada. In describing the Court’s ability to differentiate “between individual Gladue factors that are associated with Aboriginal disadvantage (i.e., poverty, lack of education, parental substance abuse” and “contextualized knowledges that document how these factors are rooted in colonial histories and discrimination,”¹³⁸ the study further confirms that the Gladue Court operates on similar principles prioritized by the Gladue writers I spoke with. The study also states that:

In general, our findings indicate that information generated by lawyers about accused Aboriginal people may identify cultural factors that have led to discrimination; however, this information is not consistently grounded in histories of colonialism and race relations. By contrast, reports produced by trained Gladue writers result in substantially different kinds of knowledge that draw connections between an accused’s actions and specific Aboriginal histories of colonialism.¹³⁹

Interview participants suggested to me that the Gladue Court makes use of experts to account for the history of residential schools and their impact on Ontario First Nations. The role of Elders and community members is less clear. Studies of the Gladue Courts tend to highlight the role of Gladue writers and triage services in meeting the

¹³⁷ Maurutto and Hannah-Moffat, “Aboriginal Knowledges,” 455.

¹³⁸ *Ibid.*, 454-55.

¹³⁹ *Ibid.*, 456.

needs of an urban environment.¹⁴⁰ Interview participants further suggested that the Toronto Court was comparable to the DCC or the Drug Treatment Court of Vancouver (DTCV). Evaluations of both the DCC and DTCV demonstrate tangible reductions in recidivism,¹⁴¹ attesting to the impacted of well resourced and consolidated specialized courts.

Vancouver's Downtown Community Court, which sits daily but is not limited to Indigenous persons, deals with roughly 2000 accused individuals in a given year.¹⁴² In Toronto, a Gladue Court sitting twice per week heard 242 cases representing 94 Indigenous persons in a 7 month period.¹⁴³ Worth considering is whether or not the existence of the DCC and DTCV diminishes the need for an additional Indigenous persons court in the Lower Mainland. While technically open to Indigenous persons across the province, difficulties and costs of travel and potentially the discretion of Crown counsel are barriers to access. It is expected that this option would impact fewer individuals than a report system, though more than expanded First Nations Courts.

The coordination of support staff means that pursuing a consolidated court involves a certain degree of complexity. As a possible proxy measure, the DCC lists the following personnel located in the courthouse:

A Provincial Court judge, Crown counsel, defence counsel, Vancouver police officers, sheriffs, court clerks, probation officers, forensic liaison workers, an occupational therapist, a licensed practical nurse, nurses,

¹⁴⁰ Ontario Federation of Indian Friend Centres, "Gladue Rights: A Call for Recommitment and Accountability," 2012, 16, <http://ofifc.org/sites/default/files/content-files/2012-05-18%20Position%20Paper%20-%20Gladue.pdf>.

¹⁴¹ See Julian Somers et al., "Examining the Impact of Case Management in Vancouver's Downtown Community Court: A Quasi-Experimental Design," March 5 2014, <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0090708&type=printable> and Somers et al., "Drug Treatment Court of Vancouver (DTCV): An Empirical Evaluation of Recidivism," *The International Journal of Drug Policy* 23, no.5 (2012): 393-400. DOI: <http://dx.doi.org/10.1016/j.drugpo.2012.01.011>. Other studies suggest the importance of substance treatment programs. See Doug Heckbert and Douglas Turkington, "Turning Points: A Study of the Factors Related to the Successful Reintegration of Aboriginal Offenders," *Correctional Services of Canada* 2001, <http://www.csc-scc.gc.ca/research/r112-eng.shtml>.

¹⁴² BC MOJ, "Specialized Courts Strategy," 24.

¹⁴³ Scott Clark, "Evaluation of Gladue Court: Old City Hall, Toronto," *Aboriginal Legal Services* 2016, <http://nccabc.ca/wp-content/uploads/2014/07/display-mbair-ipad-iphone.pdf>.

social workers, employment assistance workers, victim services workers, BC Housing support workers and Native Court workers. A forensic psychiatrist is also available to offenders in the community court.¹⁴⁴

A consolidated court would likely require an initial investment to create or expand infrastructure, and a substantial operational budget given the services it should employ. Unsurprisingly, participants suggested that on a per offender basis, a consolidated court would be significantly more expensive than a First Nations Court. The annual budget of the Downtown Community Court, which sits daily, is roughly \$2.4 million, with another \$2.6 million in support service costs, in addition to the \$6.2 million initially provided by the MOJ to renovate the building.¹⁴⁵

A consolidated court is the most ambitious, targeted, but ultimately costly policy alternative. There are good reasons to be concerned that the need for an urban, consolidated option is mitigated by BC’s existing infrastructure, where a number of specialized courts already operate. The Gladue Court option is summarized in Table 3.

Table 3: Gladue Court Summary

Objectives	Criterion	Summary Assessment
<i>Effectiveness</i>	Enhancing Gladue considerations	Gladue reports and in-house support services available.
	Scope of option	Can process a high volume of Lower Mainland cases, but is otherwise limited.
<i>Equity</i>	Degree of community control	Less community involvement in the operation of the court.
<i>Governmental Considerations</i>	Political acceptability	Subject to charge of ‘race-based’ justice limited to a single setting.
	Administrative complexity	High degree of coordination limited to a single setting.
	Cost	Large infrastructural investment and high operating cost.

¹⁴⁴ BC MOJ, “Specialized Court Strategy,” 30.

¹⁴⁵ Ibid.

Chapter 8. Recommendation and Conclusion

Each option presented within this capstone represents an important possibility for change in the criminal sentencing of Indigenous peoples and the application of justice in British Columbia. Each comes with significant benefits and costs. While not a mutually exclusive set of alternatives, I believe one pursuit can and should be prioritized. It is my recommendation that at this moment the provincial government should pursue the development and administration of a Gladue report system. I make this recommendation for the following reasons.

First, while unlikely to be as effective as a consolidated court on a case by case basis, a report system has the significant advantage of province-wide availability. Access to justice is a serious concern, and specialized courts can and do pose significant obstacles. As a representative of the Legal Services Society put it to me:

it's radically different when you get into the smaller communities, and it's not practical to say you'll somehow travel 200 miles to do something, it's just ridiculous for the folks who are our clients. They're living below the poverty line so they hitchhike, which is just another risk. So I do think the reports are important.

Where specialized courts offer wrap-around services and/or an alternative sentencing model, the major distinction of a provincial report system is its ability to reach a large number of persons without geographical restrictions. Furthermore, there is a strong belief that reports are effective, informative and generally well received by provincial judges.

A report system is also considerably less difficult to organize and administer, particularly in the short term. That said, if and when a system is developed, the province should make their purpose and availability well known to both legal personnel and communities at large, such that they become utilized appropriately as part of standard practice.

There is an obvious need for further research. The implementation of any alternative should come with a serious commitment to understanding and evaluating their impacts and effectiveness. Data collection strategies – both quantitative and qualitative – are sorely lacking. The implementation of any option should be monitored, supported and generally well understood.

I do not challenge the merit or appropriateness of other pursuits. This recommendation is in no way a condemnation of specialized courts both within BC and across Canada. The simplifying assumptions I employed are characteristics of *my analysis*, which do not necessarily represent how each alternative may be modified and applied up in the future. My analysis does not prioritize Gladue reports for communities seeking other options. The collective focus of First Nations Courts cannot be understated, and the determination and definition of each and every policy should be informed and defined in collaboration with Indigenous peoples. First Nations Courts are an important and meaningful development I believe can be pursued much further than they have already been. Where the province can act, it should. Gladue is a promise over two decades old; there is little reason left to wait.

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Appendix A.

Participant Consent Form/Script



Participant Consent Form/Script

Research Project: Designing Policy to Reduce the Over-Representation of Indigenous Peoples in Canadian Prisons

You are invited to participate in a student research project examining policies that concern the over-representation of Indigenous peoples in Canadian prisons. Your participation involves one or two 30-45 minute telephone interviews, depending on your preference. The goal of the interview(s) is to help improve the understanding of issues surrounding the incarceration of Indigenous peoples, and the sorts of policies and interventions that could effectively impact this problem. If you choose to participate in a second interview, a second consent form will be sent before the interview is conducted.

Who is conducting the study?

My name is Connor Morris and I am a second year Master's student at Simon Fraser University's School of Public Policy. I'm conducting these interviews as part of my major research project called a Capstone. I am seeking the insight of individuals who have knowledge and experience regarding the incarceration of Indigenous peoples in Canada.

Your participation is voluntary

Your consent to participate in this study is completely voluntary and can be withdrawn at any time before, during, or after an interview is conducted until the presentation of the final report in April 2017.

What does your participation involve?

If you are interested in being interviewed, your participation will involve the following:

1. Contact me via email at [email]
2. Read and sign this consent form.
3. Establish a date and time for the telephone interview whenever convenient for you in either November or December, 2016.

4. Take part in one or two 30-45 minute interviews. You are free to end an interview early should you want to. The interview will be audio recorded unless you request otherwise.
5. The audio recordings will be transferred from a digital recording device to SFU Vault, the university's cloud-based and secure IT service. Audio recordings will be transcribed on a password protected personal laptop and then deleted. The transcription will be confidential and de-identified. De-identification means that your name and other identifying characteristics will be removed from the transcripts and will not be included in the final report, unless you request otherwise. The transcripts will be kept on SFU Vault and an encrypted and password protected USB key that will be stored in a locked drawer. Transcripts will be deleted two years after the completion of the final report in April 2017. The only individuals who will see the transcripts are my project supervisor, Professor Maureen Maloney, and me.

Is there any reason you shouldn't participate in this study?

It is my belief that this study involves a minimal amount of risk for participants. Interview topics should be relevant to your own professional experience, and can be provided before an interview takes place if that is your preference. You can withdraw your consent to participate in this study before, during, or after an interview takes place.

Why should you take part in this study?

Your involvement in this process will help to foster my own understanding of the issue in question and aid in the creation of a publically available report that discusses and analyzes potential *solutions* to this problem. You will be provided an outlet to voice your particular thoughts and concerns on this issue, and the option of being de-identified may provide you a greater degree of freedom to express your personal opinions.

How will your identity be protected?

Every effort will be taken to respect and maintain your confidentiality. You have the option of having your name and other identifying information removed from both the transcripts and the final report. Information that discloses your identity will not be revealed without your consent, unless required by law. Interviews will be one on one, but due to the nature of telephones and Skype, privacy cannot be 100% guaranteed.

Payment or remuneration

There will be no payment or remuneration offered for participating in this study.

Study Results

The results of this study will be published in a major research paper called a Capstone. Participants and the general public will be able to access the report as of May or June 2017 through Simon Fraser University's Summit website (<http://summit.sfu.ca>).

Who can you contact with questions about the study?

I am available to answer any questions you may have about the study at [email]. My Capstone supervisor, Maureen Maloney, can also be reached at [email].

Who can you contact with concerns about the study?

If you have concerns about your rights as a research participant and/or about your experience in participating, please contact Dr. Dina Shafey, Associate Director of Simon Fraser's Office of Research Ethics, at [email].

What else will your interview data be used for?

Interview information will only be used for the purposes of this study, and not for future purposes or other projects.

Participant Consent

I (Connor Morris) **have/have not obtained approval from your employer to conduct this interview.**

Have you received your employer's consent to participate in this study?

Please check one

Yes_____ No_____

Your participation in this study is completely voluntary and can be withdrawn at any time.

Do you consent to participating in this study?

Please check one

Yes_____ No_____

Signature of Participant_____

Date Signed_____

Do you consent to having your interview audio recorded for the purposes of this study?

Please check one

Yes _____ No _____

Do you consent to having your name, title, and organization used when referencing your comments and/or direct quotes while participating in an interview for the study?

Please check one

Yes _____ No _____