

Connecting Gender and Colonialism in Sentencing Indigenous People:

The Application of Subsection 718.2(e) of the Canadian Criminal Code

By

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**Dedication**

In the memory of my brother Justin Ryan Coward

**Abstract**

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**Abstract:** This study examined seventy-two published case judgements involving Indigenous people being sentenced in criminal courts across Canada. The research analyses whether judges recognize the intersection of gender and colonialism in Indigenous women's lived experiences. I found that judges do not sentence intersectionally and an intersectional analysis shows that the practices of law are colonial and gendered. Section 718.2(e) is used by judges to define Indigenous identity. Judges strip Indigenous people of the power to define Indigenous identity, constructing Indigenous identity through restrictive definitions that exclude many Indigenous people from the benefits of section 718.2(e). Additionally, judges overlooked how gender interacts with colonialism when sentencing Indigenous women. For instance, domestic violence was often a precursor to Indigenous women's violence. Law treats gender and colonialism as mutually exclusive categories of experience making it difficult for judges to recognize Indigenous women's circumstances.

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**Connecting Gender and Colonialism in Sentencing Indigenous People:  
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## Chapter One: Introduction

In Canada, the over-representation of Indigenous people, and visible minorities, in the criminal justice system is an ongoing problem. All net growth in the federal prison population has come from an increase in Indigenous people, and visible minority groups. By contrast, the proportion of Caucasian prisoners has decreased (Sapers, 2013, p. 6). Between 2007 and 2016, while the overall federal prison population increased by less than 5%, the federally incarcerated Indigenous population increased by 39% (Office of the Correctional Investigator, 2017). For the last three decades, the federal incarceration rate has increased every single year for Indigenous people (Office of the Correctional Investigator, 2017). Indigenous peoples<sup>1</sup> – First Nations, Métis, and Inuit – comprise of less than five percent of the total Canadian population; however, they account for just under 27% of the total federal prison population. These statistics suggest serious issues related to how the Canadian criminal justice system operates.

The over-incarceration problem is particularly acute for Indigenous women (McGill, 2008, p. 92). The incarceration rate for Indigenous women increased by 109% between 2001/2002 and 2011/2012, with Indigenous women comprising 38% of the total women inmate population under the federal jurisdiction (Office of Correctional Investigator, 2017). These statistics indicate the necessity for a close examination of how Canadian criminal courts sentence Indigenous women.

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<sup>1</sup> The term to identify Aboriginal peoples throughout the thesis will be Indigenous unless the evidence used refers to Indigenous peoples by another name. The term Indigenous is a more encompassing term describing Indigenous peoples than for instance First Nations. First Nations excludes Inuit, Métis and non-status Indigenous peoples.

In addition to facing high incarceration rates, Indigenous women encounter significantly higher rates of violence than other women in Canada. Indigenous women are five times more likely to die because of violence than non-Indigenous women in Canada (Amnesty International, 2009, p. 1). Brownridge (2008) found that Indigenous women continue to face a greater chance of violent victimization by their intimate partners than non-Indigenous women. In addition, he argues that much of this elevated risk might be linked to colonialism (pp. 358 - 366). Balfour (2008) argues that the victimization and criminalization of Indigenous women are the effects of colonialism (pp. 101 - 102).

Colonialism in Canada is understood as Indigenous peoples forced disconnection from land, culture, and community by Europeans (The Canadian Research Institute for the Advancement of Women, 2016). The colonizer/colonized relationship is an unequal one that benefits the colonizer at the expense of the colonized (LaRocque, 2014). As Mohawk scholar Monture-Angus highlighted, colonialism is “the belief in the superiority of your ways, values and beliefs over the ways, values and beliefs of other peoples” (1998, p. 15). The history of Canada, to a great extent, is the history of the colonization of Indigenous peoples (LaRocque, 2014). Colonialism represents a misuse of power, which oppresses Indigenous peoples and produces negative effects within their communities.

Indigenous women experience colonialism differently than men because Indigenous women’s experiences of oppression are layered. Monture-Angus (1998) says she is not oppressed as an “Indian” and a “woman”, but as an “Indian woman”. Monture-Angus does not experience these categories “Indian” and “woman” as singular and unconnected (p. 14). Indigenous women’s layered oppression provides the context to



understand their disproportionate contact with the criminal justice system as victims and offenders (Sangster, 1999, p. 35).

As a result of the Royal Commission on Aboriginal Peoples, Parliament adopted Bill C-41 in 1996, including sentencing principles aimed at addressing the over-incarceration of Indigenous people (Adjin-Tettey, 2007, p. 185). The resulting section 718.2(e) of the Criminal Code of Canada instructs judges that in sentencing: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (*Criminal Code*, 1985, s. 718.2(e)). The aim of section 718.2(e) was to provide restraint in the use of imprisonment for Indigenous people. As evidenced by the statistics earlier, the reform has failed to reduce incarceration rates and address the effects of colonialism. The statistics also suggest the need for a gendered analysis of sentencing in the context of section 718.2(e). This will be discussed further in the literature review.

My thesis explores how Canadian judges implement the procedural requirements set out in section 718.2(e) of the Canadian Criminal Code. I have reviewed how judges consider the special circumstances of Indigenous people. I have used an intersectional approach to analyse judicial decisions involving Indigenous accused. My analysis investigates whether the intersection of gender and colonialism in Indigenous women's lived experiences are recognized when judges apply section 718.2(e). My research will contribute to existing research by acknowledging that Indigenous women have unique life experiences that need to be considered distinctly from those of Indigenous men in the design and application of law reform. My thesis addresses how gender and colonialism

shape the way Indigenous women and men are sentenced in regards to section 718.2(e) of the Criminal Code. My thesis also explores how the nature of law—claiming truth and disqualifying other discourses of social reality—stands as a barrier to the effective application of section 718.2(e). Based on past research and theory, my hypotheses are:

1. Judges fail to take an intersectional approach to the impact of gender and colonialism in sentencing Indigenous people, especially when dealing with Indigenous women.
2. An intersectional analysis reveals that the application of law adds to the marginalization of Indigenous women

To analyse the application of section 718.2(e) in relation to Indigenous women, I have compared sentencing decisions for cases involving Indigenous men and women. I have examined whether judges have considered the circumstances of Indigenous people in relation to colonialism and how they incorporated this information into their decision. Through comparing Indigenous men's and women's cases, my thesis explores the gendered practice of law. The courts, in the sentencing of Indigenous women, have ignored the intersection of gender and colonialism in their lives, including in the criminal justice system.

In the second chapter of this thesis, my literature review, I concentrate on the history of the colonization of Indigenous peoples in Canada. This chapter provides context for my argument. Also, I discuss Bill C-41 and section 718.2(e) and Parliament's attempts to address the over-incarceration of Indigenous people from the inception of Bill C-41 in 1995 until now. Despite these efforts, the over-incarceration of Indigenous people has only gotten worse.

In chapter three, I discuss my theoretical framework. I have chosen Carol Smart's argument on the power of law, and intersectionality theory, to guide this research. I discuss how liberal (colonial) law resists law reform by intentionally disqualifying other forms of knowledge, claiming truth. I use her work to show how law cannot accommodate the experiences of Indigenous women. In this chapter, I also describe intersectionality theory because it addresses the need to account for multiple layers of identity.

After I have laid the contextual background for my thesis, I then dive into my research methods in chapter four. I used qualitative content analysis to analyse judicial decisions related to section 718.2(e) to explore its application to Indigenous who came before the courts. Qualitative content analysis allowed me to condense a large amount of text into categories, which later evolved into emerging themes.

In chapter five I discuss my findings from my research. I lay out how judges incorporate the circumstances of the Indigenous person in their decision. I review how judges discuss colonialism and I argue the gender limits of section 718.2(e). Finally, I show how judges do not examine Indigenous women's intersecting identities.

In chapter six (analysis) and seven (conclusion) I address my hypotheses. I explore how the power of liberal law can explain why judges are not sentencing intersectionally and that an intersectional analysis reveals how the law is colonial and gendered. After I have answered my hypotheses, I end by discussing my own intersecting identities and conclude with future research suggestions.

## Chapter Two: Literature Review

This chapter provides a historical overview of the colonization of Indigenous peoples in the country now known as Canada. Colonialism has caused extensive intergenerational trauma within the Indigenous population (Legacy of Hope Foundation, 2014, p. 2). History and ongoing colonialism provide a context for the present-day relations between the Canadian government and Indigenous peoples.

Indigenous women have different histories than Indigenous men. Colonialism and patriarchy create an environment in which Indigenous women are vulnerable to violence within and beyond their own communities (Adjin-Tettey, 2007, pp. 194-195). Indigenous women's vulnerability to violence sets the context for many Indigenous women as offenders. Colonialism and patriarchy have led to the over-representation of Indigenous women in Canadian prisons (Dugas, 2012). Indigenous women's over-representation in prison indicates the need for an intersectional analysis of how courts deal with female Indigenous accused.

This chapter provides context for my subsequent argument that judges need to consider not only the circumstances of Indigenous women, including how the intersection of gender and colonialism shapes their experiences as offenders.

To do this I first give an overview of the historical and ongoing effects of colonialism. Then I provide information on the criminal justice system and law reform. I concentrate on Bill C-41, specifically section 718.2(e). This section was implemented to address the over-representation of Indigenous people in prison. Researchers were skeptical of whether section 718.2(e) would be able to address the over-representation of

Indigenous people in prison (Anand, 2000; Stenning & Roberts, 2001; Vasey, 2003). In fact, research post-Gladue<sup>2</sup> has confirmed some of these early concerns. Despite the Canadian government's attempts to address the over-representation of Indigenous people in prison, section 718.2(e) has yet to make its intended impact.

### **The Effects of Colonialism on Indigenous Peoples**

When Europeans first arrived in what is now known as the Americas, they exploited Indigenous peoples for their survival skills and expanded European territory onto Indigenous land by force. The Royal Proclamation of 1763 established procedures for European colonization of and settlement in the Americas. The Royal Proclamation established a monopoly over Indigenous lands by the British Crown, but stated that all land would be considered Indigenous land unless ceded by treaty. It prohibited settlers from buying land directly from Indigenous people. Land had to be bought first through treaty by the British Monarch and then sold to the settlers. The Royal Proclamation set guidelines for the process of establishing treaties; however, it was designed and written by British colonists without any contribution from Indigenous people (Aldridge, J., Fenge, T., Fenge, Terry, & Ebooks Corporation, 2015).

As newcomers, in growing numbers, began occupying traditional territories of Indigenous people, colonial authorities viewed the creation of reserves as the solution to land disputes and conflicts between Indigenous people and settlers. Indigenous people were unaware that treaties signed to share land and to respect their practices would turn

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<sup>2</sup> Post-Gladue is the period after December 19, 1999 when the Supreme Court of Canada decided on the sentencing principles under section 718.2(e) of the Criminal Code in *R. v. Gladue*. This decision guides judges on how to consider the circumstances of Indigenous people in sentencing. In 2012, the Supreme Court of Canada reaffirmed and expanded upon the principles discussed in *R. v. Gladue* in *R. v. Ipeelee*.

into being confined to a small allotment of land with little compensation indefinitely. Containment of Indigenous peoples onto reserves allowed European settlers to minimize the competition for land and products of the land (Neu, 2000, p. 274). The land base on the reserves was insufficient and could not sustain a traditional hunter/gatherer lifestyle. According to Neu (2000), the reserve system constituted reproductive genocide. Not only were Indigenous people given infertile land, they also were given little space. For example, in Nova Scotia, the Mi'kmaq people were given one percent of the land base (p. 275). Reserves are one example of how the colonial government and colonists have contained Indigenous peoples, as the government and colonists saw them as an impediment to successful white settlement.

One hundred years after the Royal Proclamation, in 1876, the Canadian government enacted the *Indian Act* (*Indian Act*, 1985). Still in effect today, it controls every aspect of Native life, and violates Indigenous peoples' fundamental right to govern themselves (Orkin, 2003, p. 446). Through the *Indian Act* the colonial state defines who has "Indian" status. As Oneida scholars Cannon and Sunseri highlight, the *Indian Act* controls "Indian" political structures, landholding patterns, resources, and economic development (2011, p. 276). The *Indian Act* has permitted the implementation of assimilation policies designed to eliminate Indigenous culture, economy, and politics (Lawrence, 2003, pp. 6 - 7). A federal government department, currently named Indigenous and Northern Affairs Canada (INAC), has long administered the Act. Most recently, the federal government under Trudeau has announced it is in the works of dismantling and restructuring INAC to continue to establish better relationships with Indigenous peoples (Scotti, 2017).

According to Mi'kmaw scholar Lawrence (2003), the *Indian Act* is much more than a body of laws. It has allowed the government to change the way Indigenous people understand their identity. The *Indian Act* is the “legislation that has intruded upon the lives and cultural status of Indians more than any other law” (Cannon & Sunseri, 2011, p. 276). Many Indigenous and non-Indigenous scholars perceive the *Indian Act* as a major contributor to the destitute situation faced by many Indigenous people in Canada. The detrimental effects of colonialism continue to survive through the *Indian Act* and “as long as the *Indian Act* remains in force, then colonialism remains a vibrant force in Indian communities” (Monture, 1999, p. 70).

Residential schools, active from the 1880's until the late 20th century, arose out of provisions in the *Indian Act*. Amendments to the *Indian Act* made it mandatory for all “Indian” children to attend residential schools (Jacobs & Williams, 2012, p. 20). The schools were designed to assimilate Indigenous children into white, Christian culture (Neu, 2000, p. 279). Over 100,000 children attended these schools (Macdonald, 2007, p. 1001). The quality of education in residential schools was significantly inferior to that provided to non-Indigenous children, and parents had little to no choice or voice in how their children would be taught (Neu, 2000, p. 280).

The recent Truth and Reconciliation Commission (2015) outlined the abuse and malnourishment of the children in residential schools. Because of the residential school system, generations of Indigenous people have experienced the loss of their cultures and languages and linked communication barriers between parents, grandparents, and children. The suppression of Indigenous languages and cultures were ensured through physical, sexual, and mental abuse in residential schools (Neu, 2000, p. 279). Today, the

legacy of residential schools has produced significant emotional, psychological, economic, and cultural problems for Indigenous people in multiple generations (MacDonald, 2007, p. 1001).

The Canadian government apologized for the inhumanity and violence that occurred in residential schools. In response to thousands of civil suits against churches and the federal government that ran these schools (Miller, 2012), the government of Canada came to an agreement with thousands of residential school victims recognizing the damage inflicted by residential schools (Indian Residential Schools Resolution Canada, 2007). One of the outcomes of this agreement was the establishment of the Truth and Reconciliation Commission (TRC). The commission has collected extensive documentation on the injustices and harms experienced by Indigenous people through residential schools, and works towards rebuilding better relationships among Indigenous people and the relationships between Indigenous and non-Indigenous Canadians. It took seven years from the time the TRC was established until the final report came out with its 94 recommendations. I would like to highlight two. The commission calls for a public inquiry into missing and murdered Indigenous women, and for federal, provincial, and territorial governments to work to reduce the over-representation of Indigenous People in prisons and jails (Truth and Reconciliation Commission of Canada, 2015, pp. 324 - 325). I would like to point out that section 718.2(e) was enacted in 1996 with the intent of ameliorating the over-representation of Indigenous people in prison and this social problem is still a recommendation in 2015 for the Canadian government to work to reduce. These recommendations reveal the troubled relationship between Indigenous people and the criminal justice system. Despite the government's efforts to address



colonialism, for many Indigenous communities the negative effects of colonialism will continue for generations even if all levels of government take the 94 recommendations seriously.

The Legacy of Hope Foundation (LHF) is a national Indigenous charitable organization whose purpose is to educate people about the legacy of residential schools. The LHF points to the imposition of colonialism that led to “intergenerational trauma” among Indigenous peoples (2014, p. 2). Research has demonstrated that the effects of traumatic stress endured by individuals also affect those closest to them, especially their children. The stress cycle continues as their children in turn experience both their parents’ and their own trauma. Intergenerational trauma exemplifies colonialism’s violence against Indigenous peoples that in turn produces violence within the everyday life of Native communities (Lawrence, 2003, pp. 244 - 246). Indigenous communities continue to experience intergenerational trauma due to the forced assimilation that their people and cultures have suffered through colonializing institutions such as residential schools, and now foster care.<sup>3</sup> The First Nations Child and Family Caring Society, and the Assembly of First Nations filed a complaint about First Nations child welfare that has led to the Canadian Human Rights Tribunal ruling that the federal government discriminates and underfunds reserve child welfare by almost 40%, pushing kids into foster care (Canadian Child Welfare Research Portal, 2016). The Canadian government continues to fight this ruling.

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<sup>3</sup> Researchers estimate that 27,000 First Nation children are currently in foster care (Aboriginal Healing Foundation (Canada), 2012).

The over-representation of Indigenous children in the foster care system is another expression of colonialism. In 2011 Statistics Canada found that almost four percent of Indigenous children 14 and under were in foster care, compared to less than one percent of non-Indigenous children (Truth and Reconciliation Commission of Canada, 2015, p. 138). The TRC states that Canada's foster system is an attack on Indigenous children and families (Truth and Reconciliation Commission of Canada, 2015, p. 138). Social services continue to apprehend Indigenous children from their homes, by claiming that they see evidence of "bad parenting". Any lack of parenting skills among the Indigenous population may be attributed to the legacy of the residential school system. Residential school survivors and their families have been deprived of an environment that teaches them positive parenting skills (Lavergne, Dufour, Trocmé, & Larrivé, 2008).

### **The Effects of Colonialism on Indigenous Women**

For Indigenous women, colonialism intersects with patriarchy making them vulnerable to both criminalization and victimization. Based upon Canadian statistics, the Association of Elizabeth Fry Societies has created a composite portrait of Indigenous women in prison. They describe this Indigenous woman as:

the sole-support mother to two or three children. She is usually unemployed at the time she is arrested. She has often left home at an early age to escape violence. She may be forced to sell her body because she needs money and is unable to obtain a job. She is likely to have been subjected to racism, stereotyping and discrimination because of her race and colour [and] continued

sexual, emotional and physical abuse. (Amnesty International, 2009, p. 18)

This recent portrait of Indigenous women in prison differs from the experiences of Indigenous women in pre-colonial societies where Indigenous men generally respected women and their role in the survival of Indigenous communities (Gilden, 2007, p. 244). Compared to European women, Indigenous women exerted an immense amount of independence and had the opportunity to own property in pre-colonial Indigenous societies that held property. Indigenous women's labour was critical to the survival of a community especially during years of poor hunting (Cannon & Sunseri, 2011, pp. 46-47). Prior to European arrival, many Indigenous communities had matrilineal systems whereby assets, status, and inheritance were passed down through the mother (Lawrence, 2003, p. 20). In many cases, women were autonomous and performed political roles. For example, a Navajo origin tale depicts the first man and first woman created equally and at the same time. This depiction lies in stark contrast to the Christian biblical origins account of Adam and Eve (Gilden, 2007, p. 244).

Unfortunately, more egalitarian relations between Indigenous men and women diminished over time under the influence of European colonialism (Lawrence, 2003, pp. 244 - 246). Barker (2008) highlights how the *Indian Act* established sexist ideologies and practices within Indigenous communities. Western patriarchal inheritance practices eroded women's economic independence from men (p. 262). The *Indian Act* defined "Indian" status, and all the resources exclusively tied to it, so that individuals had to prove their status by relationships "through the male line, to individuals who were already status Indians" (Lawrence, 2003, p. 6). Thus, Indigenous women lost their

political, social, and economic status, and patriarchal legal structures of identity and property came to exist in Indigenous communities (Barker, 2008, p. 262). The *Indian Act* decreased the status of women in many traditional Native communities and "forcibly removed tens of thousands of Native women and their descendants from their communities for marrying non-status or non-Native men" (Lawrence, 2003, pp. 5 - 6). The patriarchal and racializing colonial state definition of status worked to separate most Indigenous people from their land. This is a prime example of how racism, patriarchy, and colonialism cannot be separated when looking at the circumstances of settler colonialism and Indigenous people in Canada, especially Indigenous women.

Western ideas and patriarchal principles have thus come to dominate in many Indigenous communities. As men were given more political power, violence against women in Indigenous communities increased (Barker, 2008, p. 263). The elevated status of men within Indigenous communities leaves Indigenous women vulnerable. Some argue that Indigenous men express their frustration with disempowerment in the context of Canadian colonialism through violence toward Indigenous women (Aboriginal Healing Foundation, 2003, p. 22; Barker, 2008, p. 263). The intersection of gender and colonial inequalities has created a high likelihood that Indigenous women will experience "violence, alcohol abuse, sexual assault during childhood, rape and other violence . . . at the hands of men" (McGill, 2008, p. 92). In recent years, several researchers have written on the subject of violence and Indigenous women (Balfour, 2008; Balfour, 2013; McGill, 2008; Barker, 2008; Brownridge, 2008). Adjin-Tettey (2007) explains that violence against Indigenous women at the hands of men in their communities is subjugation due to

the effects of the oppression created through colonialism. Colonialism lies at the root of the violence faced by Indigenous women in Canada (pp. 194 - 195).

As a result, Indigenous women suffer disproportionately from violence in Canada today. The 2009 General Social Survey (GSS) on victimization found the rate of victimization for Indigenous women was almost three times higher than that of non-Indigenous women (Brennan, 2009). Twenty-one percent of Indigenous women experience the most serious forms of spousal violence as compared to only six percent of non-Indigenous women (Balfour, 2013, p. 94).

Additionally, Indigenous women are over-represented among Canada's murdered and missing women. Indigenous women are not just vulnerable to violence within their communities, but are also targeted by non-Indigenous men beyond them. An example of this is the case of Robert Pickton, a serial killer in the 1990's who targeted and killed women, especially Indigenous women. The police were reluctant at the time to investigate missing Indigenous women (Keller, 2012). In 2014 the RCMP reported 164 missing and 1,017 murdered Indigenous women (RCMP, 2014, p. 3). Just over four percent of the female population in Canada is Indigenous, but over 11% of missing women, and 16% of murdered women are Indigenous (RCMP, 2014, p. 3).<sup>4</sup>

Indigenous women are also overrepresented in prisons. The number of federally incarcerated Indigenous women increased by 131% from 1998-2008 in Canada (Dugas, 2012, p. 8). Indigenous women comprised only three percent of the population in Canada (McGill, 2008, p. 92), yet 75% of federally incarcerated women were Indigenous. These

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<sup>4</sup> These numbers represent a conservative estimate because they only account for known cases where an individual was identified as Indigenous.

staggering over-incarceration rates continue to rise each year (Balfour, 2008, p. 86) demonstrating that the justice system has failed to protect Indigenous women and has instead over policed and criminalized them (Friedland, 2009, p. 111). The system should protect Indigenous women, yet Balfour (2008) argues that they have fallen into what she calls a “victimization-criminalization continuum” (p. 101). The justice system simultaneously ignores their victimization while punishing them for any apparent transgressions of the law (Balfour, 2008, pp. 101 – 102).

The Correctional system routinely classifies Indigenous women as higher security risks than non-Indigenous women. Once sentenced, Indigenous women are predominantly classified as maximum security for federal custody. While this could be attributed to Indigenous women's higher involvement in violent crimes (Savarese, 2005, pp. 136-137), Savarese argues that Indigenous women’s violent acts are a result of self-protection and disempowerment rather than a desire to harm (2005, p. 142). Instead of Indigenous women receiving protection they are further punished by the maximum-security classification. Indigenous women are further restricted, confined, and often denied cultural appropriate programming. The violence inflicted upon Indigenous women creates opportunities for further violence, perpetuating a cycle of violence that has had devastating effects on Indigenous communities.

### **The Criminal Justice System and Law Reform: Bill C-41 and Section 718.2(e)**

In 1991, the federal government established the Royal Commission on Aboriginal Peoples with the mandate to study the evolution of the relationship between Indigenous peoples, the Canadian government, and the Canadian society as a whole. The conclusion of the study on the criminal law was clear that the criminal justice system fails

Indigenous peoples because of fundamentally different world views of Indigenous and non-Indigenous people with respect to justice and the process of achieving justice (Rudin, 2005).

As a result of the Royal Commission on Aboriginal Peoples, the Canadian Parliament attempted to address the problem of the over-incarceration of Indigenous people in 1996 by passing sentencing reforms in Bill C-41. The Bill introduced the principle of restraint when considering incarceration for Indigenous people, and prioritized restorative justice and rehabilitation as sentencing goals. Bill C-41 also introduced conditional sentences, which provided an option to serve periods of incarceration in the community with strict provisions (Hurlbert, 2008, p. 397). Section 718.2(e) of the Criminal Code states that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders” (*Criminal Code*, 1985, s. 718.2(e)). The Harper government in Bill C- 32 replaced the language of section 718.2(e) by the following: “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders” (Jackson, 2015). This replacement has weakened the language of section 718.2(e).

According to the Report of the Aboriginal Justice Inquiry of Manitoba, traditional sentencing emphasizes punishment of a criminal act to make a person conform, or to protect members of society (The Aboriginal Justice Implementation Commission, 1999). Section 718.2(e) focuses on contextual sentencing, which aims to be a “holistic approach

to criminal justice that is attentive to the needs of offenders' victims and communities" (Adjin-Tettey, 2007, p. 183). Contextual sentencing often counts on elements in Indigenous culture and traditions to consider appropriate sentences aimed at remedying the effects of colonialism that contribute to the causes of Indigenous coming in contact with the law (Adjin-Tettey, 2007, p. 189). Thus, it aligns better with Indigenous legal traditions than Euro- Canadian legal traditions.

Since section 718.2(e) was implemented in 1996, several precedent setting cases have attempted to clarify its meaning. In 1999, *R. v. Gladue* established the principles through which judges could apply section 718.2(e). *R. v. Wells* followed a year later. Both cases direct the courts to consider non-custodial options when sentencing Indigenous people. *R. v. Gladue* and *R. v. Wells* provide the legal context for my research on section 718.2(e).

At the time of the offence, Jamie Gladue was a 19-year-old Métis and Cree woman. She lived with her common-law husband, whom she planned to marry, in a townhouse in Nanaimo, British Columbia. Gladue believed that her fiancée was having an affair with her sister (Vasey, 2003, p. 75). On September 16, 1995, the couple got into an argument, which led her to stab her fiancée in the chest, killing him (Pfefferle, 2008, p. 118). Gladue was charged with second-degree murder and pled guilty to manslaughter. Although court evidence illustrated a history of verbal and physical abuse by her partner, the judge did not find that Jamie was a battered or fearful wife. While on bail, Jamie was diagnosed with a hyperthyroid condition that can produce an intensified reaction to emotional situations, she went to counseling for alcohol and drug abuse, and completed grade 10. In the judge's decision, these mitigating factors were overshadowed by



evidence that Gladue had intentionally planned to harm her partner, stabbing him in the chest after chasing him from the home, and that she breached terms of her bail by drinking alcohol (Vasey, 2003, p. 76). Gladue was sentenced to three years' imprisonment and a ten-month weapon prohibition (Pelletier, 2001, p. 473).

At trial, Gladue's defense counsel did not enter her Indigenous heritage into evidence. The judge asked about Jamie's Indigenous heritage and the defense counsel stated that she was Cree. The judge and defense counsel made no other submissions about Gladue's special circumstances as an Indigenous person. Gladue's lawyers did not elaborate on her status as an Indigenous woman because she lived off reserve. The lawyers presumed that Gladue was, therefore, not embedded in an Indigenous community, and thus effectively not Indigenous (Pelletier, 2001, p. 473).

Gladue appealed the sentence because the trial judge failed to consider her circumstances as an Indigenous person. Gladue also sought to present new evidence at her appeal that, since the stabbing, she had attempted to re-establish ties to her Indigenous heritage. The Supreme Court concluded that the lower courts had erred by limiting the application of section 718.2(e) to the circumstance of Indigenous offenders living in rural areas or on-reserve. However, the Supreme Court ultimately upheld the sentence of three years' imprisonment. The justices argued that the sentence was reasonable given the seriousness of the offence because Gladue had been granted parole after she had only served six months and the Supreme Court felt the sentence was in the interests of both Gladue and society (*R. v. Gladue*, 1999, p. 692).

*R. v. Gladue* establishes that judges must take into account the unique circumstances of Indigenous offenders in sentencing, including status and non-status Indian, Métis or Inuit person, whether living on or off reserve. The ruling directs judges to consider:

(a) the unique systematic 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 heritage or connection. (*R. v. Gladue*, 1999, p. 690)

The case challenges judges to take a different approach to sentencing and to consider all reasonable alternatives to prison. In cases, post-Gladue, judges should recognize that the circumstances of Indigenous people differ from those of non-Indigenous offenders. While the poor social and economic conditions faced by many Indigenous people may not seem unique compared to non-Indigenous offenders, the colonial context is unique to the Indigenous population.

In *R. v. Wells*, an Indigenous man was accused of sexually assaulting an 18-year-old girl while she was sleeping. A judge sentenced Wells to 20 months in prison. Wells appealed the decision, referencing Gladue, looking for a conditional sentence. Wells felt the sentencing judge had not properly taken his Indigenous status into account. In his appeal, the Supreme Court ruled that the sentencing judge had adequately considered Wells' Indigenous status in sentencing. The Supreme Court held that a conditional

sentence would have failed to provide deterrence for or adequate denunciation of such an offense (Pfefferle, 2008, p. 118).

*R. v. Wells* clarified that a different approach to sentencing does not guarantee a different result. As the severity of the offense increases the applicability of section 718.2(e) may decrease. *R. v. Wells* established that violent and serious offenses involving Indigenous offenders should receive a sentence similar to non-Indigenous offenders (Pfefferle, 2008, p. 119). Both *R. v. Gladue* and *R. v. Wells* upheld the trial judges' sentences of imprisonment and weaken the remedial potential of section 718.2(e) (Vasey, 2003, p. 95).

#### **Concerns regarding Section 718.2(e) and R. v. Gladue.**

Early on, researchers expressed skepticism regarding section 718.2(e) and its potential to decrease the over-representation of Indigenous people in prison. Stenning and Roberts (2001) argued against the provision because of the lack of research evidence indicating that the over-incarceration of Indigenous people was due to inappropriate sentencing. They contended that section 718.2(e) would not change the levels of over-incarceration. Anand (2000) asserted that, in theory, the sentencing provision in section 718.2(e) should result in shorter prison sentences and more non-custodial sentences for Indigenous people compared to non-Indigenous people (p. 414). However, he remained skeptical of whether the provision could successfully alleviate the over-representation of Indigenous people in prison due to the internal contradictions in the Supreme Court's interpretation of section 718.2(e) in *R. v. Gladue*.

Anand (2000) raised another concern relating to how the public would perceive section 718.2(e). He argued that the phrase “with particular attention to the circumstances of Aboriginal offenders” suggests that Indigenous people will receive special treatment. Anand (2000) argued that judges need to give equal sentences for equal offences, instead of giving special treatment. The public would be more likely to approve of equality in sentencing than wording that suggests special treatment. The problem with this logic is Indigenous people’s circumstances differ from non-Indigenous offenders because many Indigenous people experience systemic and direct discrimination, legacy of dislocation, and are affected by poor social and economic conditions (*R. v. Gladue*, 1999, para. 68). The language of the clause does not suggest special treatment, but demands equal treatment to ameliorate the over-representation of Indigenous in prison.

Vasey (2003) raised another early concern in the debate about section 718.2(e). He agreed with others who suggested sentencing reform cannot decrease the over-representation of Indigenous people because sentencing is an individualized process. In addition, he argued that the oppression of Indigenous peoples exceeds the scope of the criminal justice system. Despite these concerns, Vasey (2003) argued that section 718.2(e) has social value. While section 718.2(e) will not ensure a reduced sentence, Vasey argued that if “taken seriously by judges it will result in a shift in the collective judicial mindset regarding the role of Aboriginal offenders in society” (2003, p. 75).

Additional early criticisms of the Supreme Court’s interpretation of section 718.2(e) in *R. v. Gladue* and *R. v. Wells* focused on the court’s failure to provide specific guidance to lower courts. Anand stated that the internal contradictions in the *Gladue* judgment make it nearly impossible for sentencing judges to come to appropriate

sentences for Indigenous accused (2000, p. 415). Anand argued that, on one hand, the Gladue decision interprets section 718.2(e) as calling for an automatic reduction in sentencing of Indigenous accused (2000, p. 414). Yet on the other hand, the Supreme Court stated in cases involving serious offences, sentencing should mirror a more traditional punitive approach. Stenning and Roberts (2001) similarly felt the Supreme Court has been unclear on the relevance of offense seriousness. Not only did the Supreme Court said that more serious offences should attract more traditional sentences, it also stated, in *R. v. Wells*, that sentencing judges must consider restorative justice notwithstanding the seriousness of the crime committed (Stenning and Roberts, 2001, pp. 163-164). Stenning and Roberts concluded that the Supreme Court thus left no indication of when to consider restorative justice. It could be that this lack of clarity has stood in the way of section 718.2(e) having its intended effects.

In the early 2000's, Gladue courts and reports emerged in some jurisdictions to address the lack of progress in making the Gladue decision a reality in the courts. The idea for the Gladue court arose at a conference for Provincial Court judges from across Canada in 2001 and the first opened a year later (Rudin, 2006, p. 2). Gladue courts adjudicate only matters that pertain to Indigenous people. The courts hear bail hearings and sentence those who have pled guilty or been found guilty in a trial. Gladue courts look similar to other courts; however, those who work in the courts have received training on issues relating to Indigenous people and their experiences in the criminal justice system (Rudin, 2006, p. 2). A Gladue Caseworker prepares a "Gladue report" for each person. These reports range from 12 to 18 pages and concentrate on the accused's background and context. The report provides recommendations for the judge to consider

in sentencing. Gladue Caseworkers can also write reports for Indigenous people who appear in court outside of the Gladue court system (Rudin, 2006, p. 2).

The Research and Statistics Division of the Department of Justice Canada (2013) studied Gladue practices in Canadian provinces and territories. They surveyed officials in every province and found a discrepancy among provinces in relation to Gladue courts and Gladue reports. The Department of Justice Canada found that eight jurisdictions (Alberta, British Columbia, Nova Scotia, Nunavut, Ontario, Saskatchewan, Yukon and Northwest Territories) had at least one specialized court for Indigenous accused. Three jurisdictions (New Brunswick, Newfoundland, Prince Edward Island) did not have a Gladue court (pp. 4 – 5). Only five jurisdictions (Alberta, British Columbia, Nova Scotia, Northwest Territories, and Ontario) said Gladue reports might also be provided in addition to pre-sentence reports (Department of Justice Canada, 2013, pp. 9 - 10). Legal Services Society of BC completed an evaluation of Gladue Reports and found that “Aboriginal offenders who received a Gladue report prepared by a Legal Services Society-trained writer (most of whom are Aboriginal) had fewer jail sentences than comparable offenders without a report” (Legal Services Society, 2013). This indicates the importance of Gladue reports and implies that Gladue reports prepared by Indigenous people are more likely to have a positive impact on sentencing because they give judges a fuller awareness of the colonial conditions producing Indigenous people’s increased conflict with the law.

Despite the importance of Gladue reports, a lack of resources hinders the ability for courts to request a Gladue report for all Indigenous offenders. Officials in every province/territory except Nunavut indicated that standard pre-sentence reports normally provide background information related to Indigenous people in the absence of a Gladue

report. British Columbia representatives stated that independent Gladue reports are rarely prepared on behalf of Indigenous people for three reasons: (1) most judges lack familiarity with the availability of Gladue reports; (2) most judges believe that pre-sentence reports will include information related to Gladue factors; and (3) there is limited funding for Gladue reports (Department of Justice, 2013, p. 10). A participant from Nova Scotia describes limitations to the preparation of Gladue reports:

Although the opportunity to request *Gladue* reports is available, access to this service is limited due to the current cost recovery model, which has resulted in the Mi'kmaw Legal Support Network placing constraints on the cases for which they can provide reports. (Department of Justice, 2013, p. 10)

Pfefferle (2008) argues that there is an inconsistency with judges ordering Gladue Reports. The author uses the case of *R. v. Thomas* to illustrate the inconsistency of ordering Gladue reports and the need for them. In *R. v. Thomas*, the Manitoba Court of Appeal dealt with an appeal by two offenders, Flet and Thomas, who were being sentenced for manslaughter. The sentencing judge accounted for the men's Indigenous status, but argued that deterrence and denunciation outweighed this. The appellate judge did not find error in sentencing the Indigenous man to a significant period in jail, but found it surprising a Gladue report was not proposed. The judge concluded that those involved in the process of sentencing Indigenous people need to do better to ensure the expectations in Gladue are fulfilled by having a thorough and comprehensive Gladue report. Based on this case, Pfefferle (2008) argues that merely mentioning an offender's Indigenous status does not replace a comprehensive 718.2(e) assessment. He further

asserts that when an Indigenous person's liberty is in jeopardy, Gladue reports should be mandatory (p. 124).

### *Gender and Gladue.*

Judges have focused solely on colonialism in assessing Indigenous people's unique circumstances in court. Gladue reports used to assess Indigenous people's circumstances are derived from *R. v. Gladue*, which is about a woman. Judges must not only consider colonialism, but also examine the intersection of gender and colonialism, considering Indigenous women's experiences as victims and offenders. Savarese (2005, p. 134) highlights that Gladue was a woman, yet the judge rarely mentions gender in the court case. The court interpreted *R. v. Gladue* blind to gender inequality. The judge failed to recognize the intersection of gender and colonialism in the sentencing process as evidenced by the fact that only one sentence in the *R. v. Gladue* ruling pertains to the imprisonment of Indigenous women (Savarese, 2005, p. 136). Savarese discusses the importance for judges to consider the victimization of Indigenous women as context for Indigenous women's offending (2005, p. 138; Balfour, 2008; Balfour, 2013).

Adjin-Tettey (2007) defines "gendered racism" as a form of oppression that occurs due to race and gender. She worries about the potential for "gendered racism" to emerge with the implementation of section 718.2(e). Adjin-Tettey argues that because the section predominately applies to Indigenous people, application of the section may foster racism because the victims of these offenders are often other Indigenous people, especially Indigenous women and children. There remains a risk that the victimization of



Indigenous women (by Indigenous men) is treated less seriously than the victimization of non-Indigenous women (p. 181).

Due to the possibility of gendered racism, Adjin-Tettey worries that restorative justice initiatives, inspired by 718.2(e), could take priority over Indigenous women's interests (2007, p. 193). Adjin-Tettey suggests that both restorative justice initiatives and decolonization have the potential to empower some and produce social injustice for others within the same communities. Adjin-Tettey stresses the need for balance because as "victims of colonial policies and as victims of domestic violence these Aboriginal women come to the sentencing circle dually disadvantaged and dually discriminated against" (2007, p. 195).

#### **Post Gladue.**

In the 18 years since Gladue, it has become clear that section 718.2(e) has not addressed the problem of the over-representation of Indigenous people in Canadian penal institutions. Researchers struggle to explain over-representation and how to solve the problem. Some argue that Indigenous cultures conflict with the Canadian justice system as they have two distinctive approaches to justice and this produces discrimination (Findlay, 2001; Adjin-Tettey, 2007). Others suggest that sentencing cannot correct the problem of over-representation because the root of the problem lies in the economic and social position of Indigenous people (Anand, 2000; Stenning & Roberts, 2001).

Rudin and Roach (2002) discuss the culture clash theory as one potential explanation for the over-representation of Indigenous people in prison. The culture clash theory suggests that over-representation results from two completely different approaches

to justice (p. 16). The Canadian criminal justice system emphasizes punishment and tries to reduce crime through punishment. In contrast, Indigenous societies stress the importance of restoring peace within the community after an individual has done wrong. Justice involves some resolution of the issue with the accused and with the individual(s) who have been wronged (The Aboriginal Justice Implementation Commission, 1999). Rudin and Roach (2002) argue that the culture clash theory explains why so many Indigenous people accused of crime plead guilty to offences. They may be unaware of the difference between taking responsibility for their actions and being legally guilty (pp. 16-17). However, culture clash, according to Rudin and Roach (2002), does not explain why Indigenous people who have not been raised according to traditional Indigenous concepts of justice find themselves behind bars.

Findlay (2001) emphasizes the need for decolonization in his assessment of the problem of over-incarceration. He criticizes the criminal justice system for focusing on individual Indigenous criminality rather than on the racism inherent in non-Indigenous institutions (p. 227). Without acknowledging the role law has played in the oppression and colonization of Indigenous peoples there can be no effective solution to the problems they face (Findlay, 2001, p. 228). Adjin-Tettey (2007) says because of the over incarceration of Indigenous people and other marginalized people, “[t]oday, the prisons of...North America are exploding with surplus populations that cannot be off-loaded to a penal colony...the prisons resemble the slave plantations and the penal colonies given the increasing disproportionate warehousing of minority individuals behind their walls” (p. 183).

Conditional sentences, seen by the Canadian criminal justice system as an opportunity to provide an innovative sentencing option, may have negative effects for Indigenous offenders. Roach and Rudin argue that conditional sentences, which allow an offender to serve his sentence within their community, are often “being ordered where probation orders, fines, and suspended sentences would normally have been ordered” (in Vasey, 2003, p. 82). Researchers have referred to the problem as net widening (Roach, 2000). Rather than ordering a conditional sentence for an offender that otherwise would go to jail, conditional sentences can be used as a harsher alternative to less restrictive selections, such as probation (Vasey, 2003, p. 96). This offers another potential explanation for the over-incarceration of Indigenous people.

The over-representation of Indigenous people in prison remains an issue because Indigenous people’s misconduct should be explained through the legacy of colonialism, rather than economic and social deprivation as unrelated to it. Anand (2000) argues that the over-representation of Indigenous people in prison persists because crime rates are higher in Indigenous communities than non-Indigenous communities (p. 416) and higher crime rates result from economic and social deprivation. Anand’s (2000) explanation for Indigenous criminality fails to identify that the economic and social deprivation that contributes to higher crime rates results from colonialism. The author’s argument also assumes that policing and prosecution of crime against Indigenous people is non-discriminatory, which is not the case. Adjin-Tettey states the criminal justice system works as a “mechanism for social control and the consolidation of imperialist hegemony” (2007, p. 188). She characterizes over-representation as reflecting the “persistence of the

colonial relationship between Aboriginal peoples and the Canadian...State” (Adjin-Tetty, 2007, p. 188).

**R. v. Ipeelee.**

Almost 13 years after *R. v. Gladue*, the Supreme Court of Canada released joint reasons in the appeals of *R. v. Ipeelee* and *R. v. Ladue* (cited together as *R. v. Ipeelee*, 2012). The appeals dealt with the application of section 718.2(e) to the breach of a Long-Term Supervision Order in the case of Indigenous offenders. The appeals allowed the Supreme Court to clear up the misunderstandings of both section 718.2(e) and the Supreme Court’s decision in *Gladue*. They attempted to resolve misunderstandings, clarify uncertainties and provide additional direction so that sentencing judges can properly implement section 718.2(e) (*R. v. Ipeelee*, 2012, para. 63).

The Supreme Court of Canada in *R. v. Ipeelee* reaffirmed the 1999 decision in *Gladue* that judges must take the circumstances of Aboriginal offenders into account in sentencing all cases, including when sentencing a long-term offender for breach of a Long-Term Supervision Order. The Justices felt the need to address certain issues with section 718.2(e) because they acknowledged the over-representation of Indigenous people in prison has worsened over the years since its enactment (Rudin, 2012, p. 375).

The Supreme Court identified two main issues that have caused confusion within the trial and appellate courts when trying to interpret section 718.2(e). The first error dealt with whether a direct connection between Indigenous people’s circumstances and the specific offence had to be established before having those matters considered by the sentencing judge. The Supreme Court clarified that a direct causal link was not necessary

and could rarely be proven. The second issue addressed the inconsistency with sentencing cases of serious or violent offences. The Justices emphasized that sentencing judges have a duty to apply 718.2(e) in all cases involving an Indigenous offender. Failure to apply 718.2(e) should be corrected by an appeal judge. Also, the Court indicated that the sentence of an Indigenous person might differ from a non-Indigenous person (Rudin, 2012, p. 376). *R. v. Ipeelee* showed that post-Gladue courts have failed to consider the special circumstances of Indigenous offenders in sentencing and if “effect is to be given to Parliament’s direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed” (R. v. Ipeelee, 2012, para. 30). The Supreme Court acknowledged the realities of colonialism and the need to sentence Indigenous offenders differently. Again, the decision does not guarantee that Indigenous people will receive a reduced sentence, but still has significant social value.

### Chapter Three: Theoretical Framework

#### Carol Smart: The Power of Law

Smart examined how law exercises power and disqualifies alternative accounts of social experience. She indicated that "law", stated in the singular, implies that law is a body of rules unified in intent, theory, and practice. Smart rejected this notion because, in her view, the law functions with conflicting principles and contradictory outcomes at every level (Smart, 1989, p. 4). The law exercises power by disguising contradictory principles through the appearance of unity and singularity. Smart argued that "law" operates as a claim to power and superiority disqualifying other knowledge and experiences (Smart, 1989, p. 4).

The law claims truth to exercise power over other discourses of social reality. Smart cited Foucault's definition of truth as "the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true" (Smart, 1989, p. 9). In a society that values truth, Smart argued that the law separates itself from other knowledge by making truth claims. She argued that close parallels exist between Foucault's concept of truth and the law's. Foucault argued that making the claim to be a science exercises power and other sources of knowledge become less valuable. Smart stated "law has its own method, its own testing ground, its own specialized language and system of results" (Smart, 1989, p. 9). Essentially, law is claiming truth, and truth is power. Law can therefore silence other discourses of social reality.

For Smart, the power of law lies, not only in truth claims, but also in the fact that people must turn to lawyers for legal assistance. Per Smart, the law disqualifies other

knowledge and experiences by requiring people to translate everyday issues into another form before they can become legal matters and processed through the legal system. This translation forces citizens to obtain lawyers in times of need. Lawyers listen to their clients' stories and decide the relevance of the information to the legal case. The lawyer may not use parts of the clients' story that the client considers important. Smart asserts that, for this reason, the law silences people's experiences (Smart, 1989, p. 11).

Law resists feminist challenges with the legal method. The legal method has three elements: boundary, relevance, and case analysis. The boundary definition applies when certain matters are considered outside the jurisdiction of law (Smart, 1989, p. 21). For instance, Smart used prostitution in the UK. The UK considers prostitution a moral issue and outside the realm of law; however, the UK considers *soliciting* for prostitution a legal matter. She stated, "boundary definition is important not as a consequence of where the boundaries are drawn, but as a consequence of the neutrality that it confers on the law" (Smart, 1989, p. 22).

The second element of the legal method is defining relevance. Smart illustrated defining relevance in rape cases. Lawyers learn the significance of the victim's sexual history, yet the sexual history about the accused irrelevant. Lawyers employ an oppressive method towards women when defending rape cases. Law resists this critique because the making of the rules guiding rape cases is masked by the mists of time and myth of neutrality. If the attorney argues that the victim's sexual history should not be relevant, then they will be unsuccessful as a lawyer (Smart, 1989, 22).

Case analysis is the third element of the legal method. Judges apply case analysis by searching for legal cases to establish precedent in judicial decisions. Certain cases are considered good precedents and some bad. Judges use good cases as precedents and ignore bad cases. A vast choice of precedent case law exists. Smart raised the question how do judges and lawyers know which ones are relevant? She argued, “judges merely make their decisions and select the cases accordingly” (Smart, 1989, 22). Smart also asserted that because legal cases heard on appeal can overturn previous decisions multiple times, the unpredictability provides uncertainty about the reliability of the case analysis method (Smart, 1989, 22).

Smart disagreed with using law to fight women’s oppression based on her observations of the legal method. Feminism maintains that law reflects the interests of patriarchy. Discussing the influence of patriarchy on legal structures is necessary; however, through this discussion feminism surrenders to law the same power that law can use against women's claims. Smart stated, “in accepting law’s terms in order to challenge law, feminism always concedes too much” (Smart, 1989, p. 5). She called for defining women outside of law and exposing law’s operations (Smart, 1989, p. 5). In her view, law is complicit in the very exercise of power that oppresses women.

Smart discouraged feminists from believing that law “holds the key to unlock women's oppression” (Smart, 1989, p. 5). While early feminists perceived law as a primary source of women's oppression, Smart insisted that we should have limited expectations of legal reforms (Smart, 1984). She argued that law reform empowers law and law reform discounts women's experiences and produces consequences that make conditions worse for women. For example, Smart discussed the major advance of the



status of women on divorce in law, in the 1973 Matrimonial Causes Act in the UK. While the Act was a significant advance in law for women, Parliament did not foresee (except a few feminists in the House of Commons) the escalating rate of divorce and limited funding for a replacement income leaving women increasingly impoverished outside of marriage (Smart, 1995, pp. 152 - 153). Seeking advancement for women's rights through law reform can produce negative consequences that make situations worse for women. While Smart did not advocate for the abolition of law, she believed that feminists should resist deploying law to address women's inequality.

Smart further discussed the gendered nature of law. Law operates by producing fixed gender identities (Smart, 1995, p. 191). Smart stated that “woman” is a gendered subject that law brings into being (Smart, 1995, p. 192). Law, she argued, cannot be gender neutral. Smart illustrated her point by describing how law constructed a category of “dangerous motherhood” in the Mental Defective Act in the United Kingdom. Judges incarcerated unmarried mothers on the grounds of “moral imbecility” or “feeble-mindedness” (Smart, 1995, p. 196). Smart argued that the “unmarried” mother serves to reinforce our cultural understanding of what “proper” motherhood means (Smart, 1995, p. 197). This demonstrated how law creates categories of “woman” and the categories of women deemed acceptable. Smart stated, “it is this Woman of legal discourse that feminism must continue to deconstruct but without creating a normative Woman” (Smart, 1995, p.198).

Feminism, like law, creates a normative woman who imposes homogeneity and reflects White middle-class women. Feminism excludes women of colour, and their experiences become inexpressible (Smart, 1995, p. 198). Marchetti (2008) stated that

when “looking at race, law and legal processes rarely consider how other characteristics, such as gender, might complicate matters and create distinct and varied experiences of marginalization (p. 156). Judges have difficulty recognizing categories of difference because the law is designed around objectivity and universalism (Marchetti, 2008, p. 155).

Carol Smart's analysis regarding the power of law influenced my concern that section 718.2(e) would not address the inequalities faced by Indigenous women. Law silences the everyday issues Indigenous women experience, as women and as Indigenous people. I hypothesize that judges in their judicial decisions ignore and normalize the violence inflicted upon Indigenous women by separating their experiences as women and as Indigenous people. The violence Indigenous women experience should be considered within the context of both colonialism and gender. However, the theoretical framework for this study indicates that the law cannot accommodate the unique experiences facing Indigenous women. The power of law conceals contradictory principles through the appearance of unity and singularity. Law operating as a claim to power over other discourses of social reality may affect its ability to address gender and colonialism in sentencing.

### **Intersectionality Theory**

In 1989, Kimberlé Crenshaw coined the term "intersectionality" to describe the way women of colour experience multiple oppressions. She highlighted how dominant conceptions of discrimination train us to think about subordination as a disadvantage occurring along a single categorical axis (Crenshaw, 1991). In contrast, an intersectionality approach recognizes that multiple oppressions create a distinct

experience different from any single form. Intersectionality theory fills the need to account for multiple grounds of identity (Crenshaw, 1991, p. 1245).

Intersectional theory addresses one of the major concerns associated with feminist scholarship by accounting for differences among women (Davis, 2008). The feminist movement gains power in numbers using identity politics. Identity politics signifies political activity established through the shared interests of particular groups in society. The members of the group often share common experiences of injustice and challenge dominant oppressive representations of cultural difference (Heyes, 2002). Scholars criticize identity-based politics for ignoring intragroup differences (Crenshaw, 1991, p. 1242). Feminist efforts to politicize the experiences of women and anti-racist efforts to politicize the experiences of people of colour proceed as if racism and sexism exist on a mutually exclusive terrain (Crenshaw, 1991, p. 1242). Scholarship shapes us to deal with one or the other separately; however, women of colour are marginalized in both (Crenshaw, 1991, p. 1244). Carol Smart (1995) criticized feminism for silencing women of colour as if the experiences of middle White class women account for all women.

Intersectionality theory claims that feminist and racial liberation movements tend to ignore intragroup differences. Crenshaw (1991) stated, "women of color are marginalized because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both" (p. 1244). Therefore, examining race and gender separately cannot completely capture the lives of women of colour or any woman.

For example, Crenshaw illustrated how women of colour become lost in the politicization of domestic violence. In Crenshaw's article, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color* (1991), the Los Angeles Police Department would not release statistics reflecting domestic violence conditions in minority communities. Domestic violence activists within and outside the department feared that the statistics would undermine ongoing efforts to force the department to address domestic violence as a serious problem. Activists worried that the statistics might permit opponents to disregard domestic violence as a minority problem not deserving immediate action. Also, representatives from various minority communities opposed releasing the domestic violence statistics because they worried the statistics would "unfairly represent Black and Brown communities as unusually violent, potentially reinforcing stereotypes that might be used in attempts to justify oppressive police tactics and other discriminatory practices" (Crenshaw, 1991, p. 1252 – 1253). Women of colour can become lost in antiracist and feminist efforts. Crenshaw (1991) illustrated how the political priorities of antiracism and feminism suppressed information beneficial to addressing domestic violence in communities of colour (p. 1253).

The matrix of domination is a fundamental concept of intersectionality theory. The matrix of domination outlines the organization of intersecting oppressions. Collins (1990) organized intersecting oppressions through four domains of power: structural, disciplinary, hegemonic, and interpersonal. The structural domain manages oppression using the social structures of law, polity, religion and the economy. The structural domain consists of government organizations that control and organize behaviour through routine, rationalization, and surveillance. Government organizations conceal racism and

sexism under the façade of efficiency, rationality and equal treatment (Allan, 2011, pp. 540-541). In the structural domain, empowerment occurs only by transforming social institutions. Therefore, change occurs very slowly (Collins, 1990).

Collins (1990) applied the structural domain to explain how social institutions reproduce oppression over time. For instance, Collins looked at the experiences of African Americans. Collins argued that laws designed to protect African Americans from exclusion are the same laws used against them. In the landmark Supreme Court case of *Brown vs. Education*, the Supreme Court struck down segregation in public schools. Collins argued that *Brown vs. Education* started the colour blind ideology. The colour blind ideology disregards race to end discrimination. Collins stated, “equality meant treating all individuals the same, regardless of difference they brought with them due to the effects of past discrimination” (1990). Equality law and colour blindness have led some people to believe that the legal system has formally equalized individual access to housing, schooling, jobs, and any gaps between Blacks and Whites lie within the individuals themselves or their culture. Collins asserted that the only way to break this subordination is to transform the social institutions that foster this exclusion (1990).

I examined the structural domain in my research. I used the experiences of Indigenous people to show that laws intended to help Indigenous people are the same laws used against them. For instance, in my literature review I discussed how the *Indian Act* oppresses Indigenous peoples, and how the Parliament of Canada failed to alleviate the over-representation of Indigenous people in prison with the enactment of section 718.2(e).

Intersectionality theory exposes the limits of legal equality. Spade (2013) contended that legal and administrative systems attempt to appear race and gender neutral, but remain sites of gendered racialization<sup>5</sup> (p. 1031). Only a particular category of persons can obtain legal equality, and individuals who do not fit into these categories are excluded. Spade stated, “the ability to avail oneself of supposedly universal rights in fact often requires whiteness, wealth, citizenship, the status of being a settler rather than indigenous, and/or conformity to body, health, gender, sexuality, and family norms” (2013, p. 1029). Legal equality nullifies resistance to law while legitimizing and expanding systems of violence (Spade, 2013, 1047). Intersectionality draws attention to the violence of legal and administrative systems through legal equality.

Intersectional theorists reject the assertion of a universal experience and the idea that people affected by multiple oppressions simply experience single-axis harms added together (Spade, 2013, p. 1050). People experience interlocking oppression. Therefore, resistance to law attempted through single axis frameworks cannot transform conditions of intersectional violence and harm (Spade, 2013, p. 1050). Spade argued, “failure to depart from single axis analysis produces reforms that contribute to and collaborate with those conditions” (2013, p. 1050). Spade’s argument is critical in analyzing my research about section 718.2(e). Section 718.2(e) is formed on a single axis framework designed for a universal male experience of colonialism. An intersectional approach exposes law reform; specifically section 718.2(e) provides just enough transformation to preserve the status quo.

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<sup>5</sup> Gendered racialization refers to the simultaneous effects of race and gender on individuals, families, and communities (Ritzer, 2007).

An intersectional approach allows for a holistic examination of how Indigenous people experience oppression and how it affects Indigenous people's conflict with the law. Intersectional theory will allow me to examine the intersectional analysis, or lack thereof, of colonialism and gender in judicial decisions. Intersectionality theory opens doors to account for the differences between Indigenous men's and women's needs in law reform. Intersectionality proves beneficial to Indigenous women whose needs are overshadowed by the political movements of feminism and anti-racism.

### **Chapter Four: Research Methods**

Section 718.2(e) has not had the intended impact that was expected. The issue is that sentencing judges cannot think outside conventional discourses of sexism and colonialism (Findlay, 2001, p. 232). I analysed 72 judicial decisions related to section 718.2(e) to explore its recent application to Indigenous people who came before English Canadian courts (see Appendix A for a list of cases). To investigate the possibility of gender disparities, I compared an equal number of cases involving women and men.

Judges write judicial decisions to explain the reasoning that underlies their verdicts and sentences. The decisions state both the prosecution and defense lawyer's arguments, outline the legal issues, and delineate the logic by which judges reach their decisions. Under the common-law system in place in all jurisdictions of Canada outside Québec, each judicial decision provides a precedent for judges who are presented with similar cases.

Judicial decisions include several mandatory elements presented in a specific order at the beginning of each document. These include: name of the court, neutral citation (legal citation unique to cases), judgment date, docket number (unique number that the court assigns to each new case it accepts to identify that specific legal case), registry (if applicable), full style of cause (names of those who were parties to the litigation), translation notice (if applicable), publication restriction notice (if applicable), correction notice (if applicable), and name(s) of judge(s) hearing the matter (Canadian Citation Committee, 2002).



The courts determine the order of any optional elements included in a judgment. Optional elements include: dates and place of hearing and other dates, case of origin or judicial history, disposition (outcome of the case), reasons (rationale for judgment), names of counsel, appendices, and cover and backing sheets (Canadian Citation Committee, 2002).

### **Data Collection**

I accessed judicial decisions through the CANLII website. CANLII is a non-profit organization created and funded by the Federation of Law Societies of Canada that provides free public access to Canadian Law records: judgments, tribunal decisions, statutes, and regulations from all Canadian jurisdictions (CANLII, 2014). Utilizing a search of the CANLII database, I identified judicial decisions related to section 718.2(e) of the Criminal Code.

I analysed cases that have at least cited these two references: “718.2(e)” and “Gladue”. I selected the search terms “718.2(e)” and “Gladue” for this research because judges cite the section of the Criminal Code that relates to their decision, and *R. v. Gladue* is the landmark Supreme Court of Canada decision, described earlier. I designed additional criteria that needed to be met for legal cases to be included in my research sample. I included only lower court hearings involving adults. I focused on adults because young people are sentenced differently under the Youth Criminal Justice Act. I excluded trials because 718.2(e) provides provisions for sentencing and does not apply to trials. I excluded appeals because they tend to focus on legal technicalities. I also excluded cases in French because I did not have the ability to translate them into English.

To further my search, and limit the number of cases, I selected cases that occurred after the landmark case, *R. v. Ipeelee*. Cases in the research sample thus took place between March 24, 2012 and January 22, 2015. I limited the research sample to cases post *R. v. Ipeelee* because the Supreme Court of Canada revisited the issues in *R. v. Gladue* in this later case. In *R. v. Ipeelee*, the judge argued that *R. v. Gladue* had not effectively reduced the over-incarceration of Aboriginal people. The ruling stressed that section 718.2(e) must be applied to all Aboriginal offenders, including breaches of long-term supervision orders, and serious offenses. Limiting cases to post Ipeelee left me with a more manageable sample size and a way to determine a time frame related to a legal milestone.

I identified 382 cases that referenced section 718.2(e) of the Criminal Code and Gladue. I reviewed each case to determine if the judgment met the inclusion criteria for the research. A total of 253 cases fit.<sup>6</sup> To narrow down the sample further for manageability, I subsequently designed a stratified sample (a sample drawn from several subgroups so that it is representative) by including all 36 of the cases that involved a woman and choosing every sixth case involving a man. This gave me an equal number of cases involving men and women.<sup>7</sup> Thus, the sample size includes 72 legal cases, split evenly between men and women.

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<sup>6</sup> Cases that were entirely French, involved a young offender, involved an appeal, and/or not able to determine if the offender was Indigenous were excluded.

<sup>7</sup> In one case the judge sentenced both a woman and man accused resulting in the same sentence. This case was excluded from the sample.

## Data Analysis

**Content analysis.** Content analysis offers a flexible method for analyzing textual data (Hsieh & Shannon, 2005, p. 1277). According to Messinger (2012, p. 360) it is the “study of social artifacts,” human creations such as books, laws, art and media. The method condenses large amounts of words into fewer content related categories that share the same meaning (Elo & Kyngas, 2008, pp. 107-108).

Quantitative content analysis offers a more systematic method for analyzing text. The approach uses word frequencies to produce summative statistics. Words and phrases mentioned more frequently in a text reflect important concerns in the communication (Oleinik, 2011, p. 860).

Qualitative content analysis focuses on the contextual meaning of the text (Hsieh & Shannon, 2005, p. 1278). It provides the researcher with an interpretivist method that provides greater qualitative detail in the analysis. The process of coding identifies themes or patterns, which pull out meaning from the text (Oleinik, 2011, p. 860). Qualitative content analysis can be more effective in understanding the details of social reality through a richness of description, as compared to quantitative analysis.

Both types of content analysis have perceived limitations. Quantitative content analysis restricts content analysis to numerical counting exercises (Oleinik, 2011, p. 860); qualitative content analysis is less systematic and more impressionistic (Oleinik, 2011, p. 860). I used a qualitative content analysis to explore all reported sentencing decisions that met the inclusion criteria. This method is appropriate for how I investigate judicial decisions related to section 718.2(e) because my research question warrants a method that interprets detailed meaning from the context of the text data.

This study applied a directed content analysis approach. Directed content analysis utilizes prior theory and research findings as a guide for creating initial codes (Hsieh & Shannon, 2005, p. 1277). I developed codes out of my literature review. Based upon my research questions I created temporary categories that developed further after evaluation (Hall and Wright, 2008, p. 107). The operational definitions, used to define each category, were established using theory (Hsieh & Shannon, 2005, p. 1281).

**Coding.** The work of Johnny Saldaña (2013), *The Coding Manual for Qualitative Researchers*, guided the qualitative content analysis for this research study. Per Saldaña (2013, p. 4), a code “is a researcher-generated construct that symbolizes and thus attributes interpreted meaning to each individual datum for later purposes of pattern detection, categorization, theory building, and other analytic process.” Saldaña (2013) provided detailed instructions for what he refers to as “first cycle coding.” I chose attribute and holistic coding for this research study (p. 58).

Attribute coding is a data management technique that situates the context for analysis of the data set. Attribute coding catalogues basic descriptive information such as demographics and time frame (Saldaña, 2013, p. 70). In this study, initial coding of the data utilized attribute coding to organize the name, age, gender, time frame, province, Gladue report, the offense, previous criminal record, number of children, employment, relationship status, education, sentence length, and whether it was conditional. This information was organized by an Excel spreadsheet for analysis.

Holistic coding is an exploratory method where the researcher applies a single code to a large unit of data in a collection of written texts to capture a sense of the overall contents (Saldaña, 2013, p. 142). This method enables the researcher to interpret issues in

the data as a whole. Holistic coding attempts to identify basic concepts or issues rather than coding line by line. The researcher reads the text, in this case the judicial decision several times to try and envision the larger picture. After holistic coding is complete, the researcher brings all the data for a specific code together and examines it as a whole (Saldaña, 2013, p. 142). The codes can represent different amounts of text from half of a page to the entire document. In this study the document analysed was an entire judicial decision. Holistic coding allowed me to interpret the text in depth because one can lose site of the content as a whole when coding line by line (Saldaña, 2013, p. 143).

**Categorizing.** A category represents the transition of data analysis from single codes to a group of codes that have been organized and grouped together because they share similar characteristics. This research study utilized the “tabletop” method as described in Saldaña (2013) to create categories after initial coding. Tabletop analysis involves the “literal spatial arrangement on a table of coded and categorized data” (Saldaña, 2013, p. 205). After completing initial coding within the margins of the hard copy of the printed legal cases, I wrote the codes on index cards. To identify categories I sorted the index cards by laying them out on the table. Each category included several related codes. Finally, I stapled and labeled the categories of piled coded data on index cards.

**Identifying concepts.** Evolving categories into themes or constructs involves more general, higher level, and abstract thinking (Saldaña, 2013, p. 13). Saldaña referred to this phase as “second cycle of coding.” He stated that, at this point, the researcher should have identified several major categories. I selected pattern coding to identify major themes from the categories derived from this research study. Pattern coding

identifies emergent themes, configurations, or explanations from large amounts of data and creates meaningful units of analysis. Saldaña (2013) referred to pattern coding as “super coding”, which finds relationships between codes (p. 210). Pattern coding organizes the collection of written texts and applies meaning to that organization.

For example, I analysed cases that displayed Indigenous women accused’s relationships with men in the following categories: man takes advantage of woman, man is jealous, man is controlling, man is physically abusive, accused has substance abuse issues. These categories were coded into the pattern code “causes for Indigenous women coming in contact with the law”.

The final step in pattern coding is to use the pattern code to develop a statement that describes a major theme. In this example, I developed the following statement: “Indigenous women’s criminal actions are because of self-protection”.

**Post-coding/pre-writing.** Saldaña (2013) referred to the final phase of data analysis as “after second cycle coding.” In his manual, after second cycle coding involves post coding and pre-writing techniques. These writing techniques develop the analytical work and provide a guide for the written report of the analysis. Saldana described the “touch test” as one of his useful tools for this step.

The touch test poses the question "can I physically touch it?" to the latest categories developed from the research study. If a category can be "touched" then Saldaña (2013) instructs the researcher to reword the name of the category and transform the data into more abstract concepts. For illustration Saldaña (2013) used the example of drugs. A researcher can physically touch drugs; however, they cannot touch dependency, addiction, coping mechanism or escaping from. The touch test is important because it

transforms categories from topic to concept, from the real to the abstract, and from the particular to the general (Saldaña, 2013, p. 249). A researcher should evolve to higher level thinking by the end of data analysis.

The final phase of my analysis includes what Saldaña (2013) described as "findings at a glance." This is a simple text chart that outlines the research findings and their connections within the study. This study used a matrix display with three different columns. Column one was the code or theme. Column two contained the datum supporting the code or theme as represented by an example from the text. Column three covered my interpretive summary.

The evolution from codes to categories to theory using the methods described by Saldaña (2013) allowed me to repeatedly immerse into the research data to develop a meaningful analysis of the legal cases. It also provided me with a way to ensure that my analysis evolved from empirical codes to conceptual themes.

### **Limitations**

Although this research was carefully prepared, there are still limitations to this study. First, because of time limits when writing a master's thesis, the research was conducted on a small sample size. To generalize the results the study should have involved more judicial decisions. Second, I utilized the CANLII database to access cases for my research. While CANLII is a reputable site for accessing law records, I am aware that my study was not able to access oral decisions. Lastly, using cases that have at least cited: "718.2(e)" and "Gladue" was a good way to narrow a manageable sample of judicial decisions that involved an Indigenous accused. However, I do realize that it is

also a limitation to my research because I am not able to analyse cases that involved an Indigenous offender where the judge may have not sited these two terms.



## Chapter Five: Findings

### Description of Sample

The Office of the Correctional Investigator (Sapers, 2015) reported that, compared to non-Indigenous offenders, Indigenous offenders are younger, less formally educated, and more likely to present a history of substance abuse, addictions, and mental health concerns. They are more likely incarcerated for a violent offence, to have a criminal record, and to come from backgrounds involving domestic or physical abuse. The Correctional Investigator also reported that Indigenous offenders in the prairie region are the most over-represented in the country where they account for 47% of all inmates (Sapers, 2015).

The Indigenous people in the cases I studied were similar. Table 1 shows some descriptive data. Most people in these cases were under the age of 35 (56%). Over half of the sample consisted of Indigenous accused who are less formally educated than the average Canadian offender, having only completed up to grade ten. In ninety percent of cases, judges described the effects of substance abuse on the Indigenous person convicted. A higher percentage of Indigenous people accused in this study reside in the prairie region of Canada (32%), typically had children (65%), and were unemployed (59%) (see Appendix B, Table 1).

The cases in my research sample included a higher proportion of violent offences compared to the overall rate of violent offences in the Adult Criminal Court Statistics in Canada (Maxwell, 2015).<sup>8</sup> In my sample, assault constitutes the largest proportion of

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<sup>8</sup> Cases that involved more than one charge are represented by the most serious offence.

offences (26%). In adult criminal court generally, impaired driving makes up the largest proportion of charges (11%) and more than three quarters of all cases are non-violent (76%). A higher proportion of Indigenous people convicted in my study have a previous criminal record (69%), and had been remanded before sentencing (64%). Most adults convicted in Canada receive a sentence of fewer than six months' incarceration (Sapers, 2014). Only 3% of adults convicted in Canada receive a federal sentence of 2 or more years. In this study, just under half of the Indigenous people accused received a federal sentence (44%). In the general population of adult court cases 43% of adult offenders received probation (Sapers, 2014). In my sample, 83% of Indigenous people received a sentence of incarceration (see Appendix B, Table 2).

These characteristics are important to explain the reasons why Indigenous people are over-represented in the justice system. The characteristics point to ongoing manifestations of colonialism leaving Indigenous peoples socially and economically marginalized, which, through sentencing, make Indigenous people more likely to become incarcerated.

### **Application of Section 718.2(e)**

The statistics above show the effects of colonialism and should compel judges to incorporate 718.2(e) into their decision making, but my findings revealed most judges are not seriously considering section 718.2(e). In 18% of all cases analysed judges only mentioned section 718.2(e) once and briefly. Judges mentioned section 718.2(e) in passing more often in cases involving men. In *R. c. Cloud* (2014), the judge mentioned

section 718.2(e) in a footnote. The judge's use of 718.2(e) consisted of one small phrase imbedded in his introduction. The judge says:

This case concerns the application of the surcharge and requires consideration of the relation among principles of sentencing. These include the fundamental principle of proportionality and other principles, purposes and objectives in sentencing: individualisation of decision-making, consideration of aboriginal offenders, parity, restraint, and totality. (p. 2)

In some cases, judges mentioned section 718.2(e) only in response to defense counsel. For example, in *R. v. Lepine* the only mention of section 718.2(e) in the entire judicial decision occurred when the judge stated the defence counsel "raised the apparent conflict amongst the principle of proportionality, the three-year starting point, and Section 718.2(e), which deals with the Court's obligation with respect to aboriginal offenders, in support of a departure from the three-year starting point" (2013). In *R. v. Lutz* (2013), the defence counsel's submission for sentencing is the only mention of section 718.2(e). The defence counsel "implored [the judge] not to send [a] 27-year-old First Nations man to a federal penitentiary, citing *R. v. Ipeelee*, 2012 SCC 13, and s. 718.2(e) of the Criminal Code" (*R. v. Lutz*, 2013). All the examples above resulted in a custodial sentence, revealing the lack of application of section 718.2(e).

Only 38% of judges seriously discussed section 718.2(e) in their rulings. In my sample, all judges at least mentioned section 718.2(e) for legal requirement, but limited judges mention the provision in their reasoning for the actual sentence. Many considered

section 718.2(e) and then prioritized traditional sentencing objectives of deterrence and denunciation, leading to a sentence of incarceration. Very rarely in my sample did judges seriously consider section 718.2(e) and link their reasoning to the type of sentence or sentence length in a way that demonstrated a reduced sentence.

My analysis of the sample judicial decisions revealed that 58 % of judges used their own an assessment of Indigenous identity to determine how much weight to give to the circumstances of the Indigenous person convicted when applying section 718.2(e). When assessing Indigenous identity, judges utilized multiple indicators that comprised two broad categories: bloodline and connection to culture.

Three judges used blood quantum to measure Indigenous identity in three cases, all of which involved women. In *R. v. T.A.P.*, for example, the judge suggested that the woman convicted had “some Aboriginal lineage, given her unwavering assertion on this issue, her *viva voce* evidence, and the confirming *viva voce* evidence of her cousin P.N. As a grandchild of C.N., T.A.P. would be either 1/8th or 1/16th Aboriginal” (2013). This judge decided that being 1/16<sup>th</sup> Aboriginal constituted the threshold for a Gladue analysis; however, to fraction Indigenous identity is problematic. It puts Indigenous identity on a biological racial scale and treats Indigenous people with more than one race as less Indigenous than those who are not multiracial. In *R. v. Simms* (2013), the judge decided that the woman convicted was 25% Inuit. The judge also referred to the time Ms. Simms spent in the Northwest Territories and Nunavut to determine her eligibility under section 718.2(e). The judge states:

Roxanne Simms is 25 percent Inuit; her father is Caucasian, her mother had an English father and an Inuit mother. I want to point that there is no magic in the percentage number. Born in Guelph, Ontario, she has lived in Yellowknife, N.W.T., then back to Ontario; Aylmer, Quebec; and Victoria, B.C. But the most significant period of her life was spent in Iqaluit, Nunavut for grades five through six, and eight through twelve. Afterward, she attended Fashion College in Toronto. For purposes of this sentencing hearing, she is considered to be an Inuit person. (*R. v. Simms*, 2013)

The problem with the judge's analysis lied again in assigning a percentage to Ms. Simms's Indigenous identity as well as using geography to substantiate that she is Indigenous enough for a Gladue analysis when the Supreme Court has not set a qualification. In *R. v. M.A.B.*, Ms. M.A.B. is a member of the Manitoulin Island First Nation because her father is a member of that First Nation. She has had no contact with her father since she was three-years old, and her mother is Dutch. The judge stated that, with little connection to her culture, "it might be said that she is only 'technically' aboriginal" (2014). The judge did consider Gladue factors because Ms. M.A.B. experienced sexual abuse by her father's relatives on the reserve at the age of three, which led to her mother leaving the reserve. Despite the judge considering the Gladue factors, the phrase "she is only 'technically' aboriginal" is concerning.

Judges more commonly used connection to culture to measure Indigenous identity and decide how much emphasis to place on section 718.2(e) when sentencing. Judges gave more weight to section 718.2(e) when they believed that the Indigenous person

convicted had lived what they defined as a more traditional lifestyle. Activities such as hide tanning or beading indicated traditional lifestyle.

If the Indigenous person convicted grew up in an environment that the judge defined as traditional or Indigenous, then judges placed more emphasis on section 718.2(e). For example, in *R. v. McCook*, the judge focused on Ms. McCook carrying on hide tanning and beadwork hobbies as well as spending “considerable time teaching the grandchildren Tahltan language and many traditional cultural practices” (2015). The judge saw this as illustrating her connection to her community and justifying a section 718.2(e) analysis. In *R. v. Lepine*, the judge described how Lepine’s grandfather taught him how to trap and hunt. The judge stated, “he has participated throughout his life in the traditional activities of his culture, and it appears that he is well connected to his aboriginal heritage and traditions” (2013). Similarly, in *R. v. Utye* (2013) the judge focused on how connected the Indigenous person convicted remained in his culture to substantiate taking judicial notice of section 718.2(e). The judge defined connection to culture for Mr. Utye as maintaining “his connection to the land” (*R. Utye*, 2013).

Growing up in what judges described as non-traditional or non-Indigenous cultural environment, created a disadvantage for Indigenous people in sentencing. In *R. v. Serré*, the judge described how the convicted woman lives with her aunt, also an Indigenous person, who did not adopt what the judge defined as traditional Indigenous practices. The judge focused on Ms. Serré’s lack of participation in Indigenous ceremonies in her childhood and did not give much weight to her circumstances as an Indigenous person in sentencing. The judge acknowledged Ms. Serré’s Indigenous heritage; however, the judge’s assessment of her environment had more weight. The

judge in *R. v. Toews* (2013) stated that he considered the *Gladue* factors and fully appreciated that Indigenous people are over-represented in the prison population. However, the judge argued that “Ms. Toews has minimal, if any, past or present contact with Native culture or heritage” (*R. v. Toews*, 2013). Ms. Toews may lack connection to culture, but Ms. Toews’ family had to leave the reserve because the reserve showed “no hope for a future” (*R. v. Toews*, 2013). In *R. v. J.R.H.*, the judge again partially considered *R. v. Gladue* because of living in a non-Indigenous environment. The judge described the Indigenous man convicted as:

a member of the Tahltan Nation, but he was raised in mostly a non-aboriginal environment since the age of two. Because he is a member of the Tahltan Nation, the provisions concerning sentencing as set out in the decision of *R. v. Gladue*, *R. v. Ipeelee*, *R. v. Ladue*, and *R. v. Jacko* all apply, but in this case, they would apply to a much lesser extent than in many other cases. (2013)

Traditional was defined in a historical context rather than a modern context. Judges only recognized activities as traditional if they were pre-colonial activities like hunting and trapping, hide tanning and beadwork, teaching the Tahltan language as seen above. Rather than evolving, judges’ ideas of “tradition” were frozen in time, which ignored cultural change, including in the face colonialism.

Judges selectively quoted from *R. v. Gladue* to justify not applying section 718.2(e). For example, 17% of the sampled judicial decisions, in relying on incarceration in sentencing, repeated the phrase from *R. v. Gladue*: “s. 718.2(e) should not be taken, as

requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is Aboriginal” (*R. v. Chambers*, 2013; *R. v. Dennis*, 2014; *R. v. Dicker*, 2013; *R. v. Elliot*, 2013; *R. v. Hansen*, 2014; *R. v. McCallum*, 2012; *R. v. N.B.*, 2012; *R. v. Serré*, 2013; *R. v. S.G.*, 2014; *R. v. Simms*, 2013; *R. v. Toews*, 2013). Taken out of context this phrase damaged the remedial potential of *R. v. Gladue*.

Almost a quarter of judicial decisions in my sample repeated the passage on seriousness of offence from *R. v. Gladue* (*R. v. B.(D)*., 2013; *R. v. Beaulieu*, 2014; *R. v. Bouchard*, 2012; *R. v. Buggins*, 2014; *R. v. C.G.*, 2013; *R. v. Dennis*, 2014; *R. v. Dicker*, 2013; *R. v. George*, 2012; *R. v. Hansen*, 2014; *R. v. J.R.H.*, 2013; *R. v. McCook*, 2015; *R. v. N.B.*, 2012; *R. v. P.*, 2012; *R. v. Papin*, 2013; *R. v. Paquette*, 2012; *R. v. Peters*, 2014; *R. v. S.G.*, 2014). The passage states:

the more violent and serious the offence, the more likely it is, as a practical reality, that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing. (*Gladue*, 1999)

Judges referenced this statement in *R. v. Gladue* to justify a carceral sentence despite clarifications in *R. v. Ipeelee* stating that this statement is not meant to be a principle of universal application and that the judge must look at the circumstances of the Indigenous offender (2012).

Some judges in my sample, however, resisted this approach. In *R. v. Bear*, the judge states:



trying to carve out an exception from Gladue for serious offences would inevitably lead to inconsistency in the jurisprudence due to ‘the relative ease with which a sentencing judge could deem any number of offences to be ‘serious’ (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. (2012)

Judges tended to prioritize deterrence and denunciation over any other sentencing objectives when dealing with a serious offence. Judges in my sample might reference Indigenous circumstances; however, they emphasized the importance of deterrence and denunciation for serious crimes. For example, the judge in *R. v. C.G.* (2013) explained that, despite the mitigating factors in the case (guilty plea, sparing the victim of having to testify, remorse, youthful offender, good prospect for rehabilitation, limited prior criminal record, Indigenous circumstances), the primary emphasis in their ruling does not shift to rehabilitation, but rather focuses on the primary consideration of denouncing the behaviour and deterring anyone from committing the crime. In *R. v. Cook* (2013), the judge acknowledged the accused’s Indigenous background, but focused on the serious nature of the crime. The judge concentrated on deterrence, denunciation, retribution and punishment. In *R. v. Rathburn* (2013), the judge briefly mentions section 718.2(e), *R. v. Gladue*, and *R. v. Ipeelee*; however, their analysis focused solely on deterrence and denunciation. The judge stated that “even though Mr. Rathburn was not the principal actor, the illegal situation in which he participated is a very serious one...The principles of denunciation and deterrence are the primary sentencing principles to be considered” (*R. v. Rathburn*, 2013). The judge ruled in favor of incarceration (16 months). In *R. v.*

*Serré* (2013), the woman was convicted as a public official illegally giving special treatment, for money, to immigrants coming to Canada. The judge stated that “in cases of this nature involving breach of trust by a public official, the most important objectives are general deterrence and denunciation” (2013). These examples show that judges in my sample gave more weight to deterrence and denunciation than to applying the principles of section 718.2(e) when sentencing serious offenses despite the reaffirmation of Gladue principles in *R. v. Ipeelee*.

Only a limited number of judges in my sample connected past and present colonialism with the circumstances of Indigenous people convicted (see Appendix B, Table 3). To evaluate whether a judge incorporated an assessment of colonialism, I looked at whether they discussed colonialism, displacement, or residential schools. I also looked for an acknowledgment of the ongoing effects of colonialism among the Indigenous population: lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, vulnerability to violence and relatedly higher levels of incarceration for Indigenous people (*R. v. D.T.G.*, 2013).

In *R. v. Dicker* (2013) the judge explained that Mr. Dicker identified with the Mushuau Innu community and speaks mainly Innu-aimun. The judge described the history of the Mushuau Innu as a nomadic people. The judge also stated that:

settlers, of course, did not really show, or very few of them showed, any respect for your language, your customs and your way of life. There was thus a lot of difficulty in the community concerning alcohol abuse, domestic violence, suicide and gas sniffing. In addition to poor housing conditions it was hard to get back on

the mainland, particular[ly] in the spring from the island. (*R. v. Dicker*, 2013, p. 45)

The judge then went on to connect Mr. Dicker circumstances with the effects of colonialism. The judge clarified:

an alcoholic offender in a community where, for example, alcoholism is a major symptom of cultural and linguistic alienation, where more people are alcoholics than elsewhere, and where the individual and the community have made efforts to face this problem through treatment programs may receive some understanding from a sentencing judge. (*R. v. Dicker*, 2013)

The judge sentenced Mr. Dicker to 7 months in jail for aggravated assault after taking a special approach for the Indigenous person accused (*R. v. Dicker*, 2013, p. 48). The maximum sentence for aggravated assault is 14 years in prison. I believe this case resulted in a reduced sentence because the judge understood the circumstances of Indigenous people.

In *R. v. Charlie*, the judge stated that Mr. Charlie's "parents attended residential school and the negative impacts of this upon Mr. Charlie are apparent and very real...Mr. Charlie is an offender whose circumstances cause him to fall squarely within the principles established in *R. v. Gladue*" (2014). The judge sentenced Mr. Charlie to nine additional weeks of incarceration after 14 months of remand to prepare for re-entry into society. The judge said they would have given him a conditional sentence if the provisions of the Criminal Code allowed this (*R. v. Charlie*, 2014).

In *R. v. Elliot*, the judge highlighted the connection between alcoholism and the negative effects of colonialism. The judge stated that Ms. Elliot's family came back from the residential school system and "used alcohol as a means of coping with their experiences" (2013). This judge acknowledged that colonialism produced the accused's circumstances. The judge sentenced Ms. Elliot to a conditional sentence of 18 months to be served in the community.

In *R. v. Knockwood*, the judge described how Ms. Knockwood has sustained many of the systemic experiences of Indigenous Canadians including:

a broken home, involvement with alcohol at a young age, the death of family members from alcoholism, living with alcoholism and family violence, minimal education or employable skills, teenage pregnancy, poverty, victimization by sexual abuse, crack cocaine addiction, loss of children through state apprehension, multiple domestic relationships, and failed attempts at addiction control. (*R. v. Knockwood*, 2012)

Further, the judge said Ms. Knockwood is a product of her environment and these systemic experiences assist in understanding who she is and how she came before the courts. The judge then goes on to explain that her background factors are not ones shared by ordinary Canadians or even other drug couriers for that matter (*R. v. Knockwood*, 2012). The judge said: "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's" (2012). Unfortunately, in *R. v. Knockwood*, while the judge considered the Indigenous woman's circumstances, they ruled that importing heroin into

Canada was too serious a crime and sentenced her to six years' incarceration. The maximum sentence for importing heroin is life in prison and the judge said he took into consideration her Indigenous circumstances when coming up with this sentence.

In *R. v. McCook*, the judge says the Canadian criminal justice system fails Indigenous people, and that the disproportionate number of crimes committed by Indigenous people across Canada ties to the legacy of colonialism (2015). This judge understood that the overrepresentation of Indigenous people in the criminal justice system results from colonialism. The judge enacted a conditional sentence order of two years less a day with three years' probation. The judge based the decision on:

Ms. McCook's personal circumstances, her lack of previous criminal behaviour, the able submissions of counsel, the considerations and approaches that must be entertained in light of *Gladue* and subsequent similar cases and the purposes and principles of sentencing described in the *Criminal Code* the incarceration of a First Nations grandmother in her 50s, would do little to protect society and would only serve to add to the over-representation of Aboriginal people in our prison system without any genuine benefit to the community. (*R. v. McCook*, 2015, p. 53)

This judge understood that prison should be a sanction of last resort. The judge applied the provision as it was intended by taking a sentence request from the Crown for as much as 4 years' imprisonment, and instead sentencing the accused to a conditional sentence. The judge believed that putting Ms. McCook in prison would do nothing to benefit the community.

The adverse effects of the residential school system upon Indigenous peoples are intergenerational. For example, in *R. v. First Charger*, the judge reinforced that the consequences of the residential school system experienced by the parents of the person convicted have "directly or indirectly impacted their parenting skills and thus impacted the offender from the moment of her birth" (2013). The judge in *R. v. Bouchard* (2012) also identified the intergenerational impact of violence, neglect, and substance abuse upon the woman convicted because of residential schools. In the case of *R. v. Charlie*, the judge stated that the consequences of residential schools are "far-reaching, horizontally, in the present, and vertically down through succeeding generations" (2014). The last residential school closed in 1996, but the damage from the traumatic experiences proves to last many generations in Indigenous communities. For instance, the damage of the residential school system has lasted multiple generations in Ms. McKenzie-Sinclair's family. In their ruling the judge presented Ms. McKenzie-Sinclair as the third generation of the cycle of broken lives as a result of colonization and the residential school system, experiencing "poverty, in a home with domestic violence, sexual abuse, racism, substance abuse, emotional abuse, lack of attachment, lack of employment, poor housing, depression, poor parenting, dysfunctional family and personal relationships" (*R. v. McKenzie-Sinclair*, 2015, p. 9).

The judge's recognition of the effects of residential schools seemed to impact sentencing. In *R. v. First Charger* (2013) the accused was sentenced to 9 months to be served in the community and in the rest of the cases described above the judges reduced the length of incarceration based on *R. v. Gladue* factors.

The positive examples shown in this study are extremely limited and are shown in detail to demonstrate how judges should apply section 718.2(e) to reduce a sentence. In these examples the judges considered the unique circumstances of the Indigenous convicted. Judges considered their systemic context when taking judicial notice of section 718.2(e) in ways that impacted sentencing. However, only 17% of cases I studied resulted in a non-custodial sentence.

Most judges in my sample did not make a connection between past injustice and the present-day circumstances of Indigenous people. Few judges in my sample explicitly discussed the legacy of colonialism. The word colonialism appeared in only 14 percent of the cases examined. Also, judges hardly discussed the intergenerational effects of the residential school system. Judges talked about the residential school system in only a third of the 72 cases, but even fewer judges connected how the residential system indirectly affects Indigenous people through other circumstances like substance abuse, poverty, or physical and sexual abuse.

Judges failed to connect the circumstances of Indigenous people convicted with historical and ongoing colonialism. For example, in *R. v. Dennis* (2014), the judge states:

I am not able to conclude that she was under the influence of alcohol or drugs when she committed this offence, as I do not believe there is any evidence of this sufficient to rely on. I do conclude that this offence occurred when she was attempting to collect a drug debt from Mr. Peters, which does not seem to me to have any great connection to her Aboriginal background. (*R. v. Dennis*, 2014)

The judge failed to acknowledge the connection of the accused's drug dealing with her lifelong addiction to alcohol and cocaine after she left her Indigenous community when her brothers sexually abused her. Since the age of 14, Ms. Dennis lived on the streets. She struggled financially and never could give her children a stable home. Directly before she commits the aggravated assault for which she is convicted, she left a recovery house and lived back on the streets. While the judge provided all this background, they did not connect these experiences to the historical and ongoing colonialism experienced by Indigenous people.

Most judges in my sample only discussed the residential school system when the Indigenous accused experienced direct harm from the system. For example, the judge addressed that Ms. McCook suffered a loss of language and culture when "harshly physically disciplined by the nuns for speaking her own language and expressing traditional aboriginal beliefs" (*R. v. McCook*, 2015). Ms. P is recognized as suffering sexual and physical abuse as a student of a residential school (*R. v. P*, 2012). Judges did not discuss the indirect effects of residential school systems, which are crucial to understanding the circumstances of Indigenous people.

### **Gender Limits of Section 718.2(e)**

One of the purposes of my research was to examine gender in the application of section 718.2(e). Men and women represented in these cases differed in important ways. In my sample, Indigenous women were charged with less violent offences than Indigenous men. A higher proportion of Indigenous men in the research sample were charged with manslaughter (17%) and sexual assault (31%). Indigenous women were more often charged with impaired driving (11%) and property offences (28%) than men.



Indigenous women in my sample received less punitive sentences than the men: a sentence of less than two years (47%) or a conditional sentence (19%) (see Appendix B, Table 4). This may result from the less serious nature of their convictions compared to those of Indigenous men. However, despite Indigenous women being convicted for less violent offences, the statistics still demonstrate that judges chose incarceration over other sanctions for 72% of these women. The majority of Indigenous men had a previous criminal record (83%) and served pre-trial custody (81%) compared to Indigenous women where 56% had a criminal record and 47% served pre-trial custody.

Notwithstanding these vast differences between men and women, I did not find a gender difference in how judges examined Indigenous identity or gender differences in the number of judges who applied section 718.2(e) versus the number of judges who did not apply section 718.2(e). Judges did more often repeat the passage on seriousness of offence for cases involving men (59%) than women, but this may be related to the fact that men were charged with more serious offences.

I did find gender differences in a few areas. Judges tended to discuss residential school system more often in cases involving women. In addition, judges talked extensively about parenthood in cases involving women. Judges mentioned domestic violence as background to a charge in 38% of the total cases examined, however domestic violence did not influence sentencing. The cases I examined revealed high levels of violence toward Indigenous women by Indigenous men. In my case findings, Indigenous men inflicted high levels of violence toward the Indigenous women in their communities. In *R. v. C.G.*, an Indigenous man was convicted of breaking into a woman's home on reserve, viciously beating and sexually assaulting her, and calling her

horrendous names (2013). Mr. C.G. stabbed the victim 30 times leaving visible scars all over her body including the middle of her face. In *R. v. Peters*, Mr. Peters was convicted of killing his common-law wife by stabbing her. He had no recollection of the event because of severe intoxication (2014). In *R. v. Chambers*, the accused plead guilty to breaking and entering another man's house to drag his own common-law partner back home, where he punched her twice in the face.

When discussing domestic violence in Indigenous men's cases, judges often depicted domestic violence as an intergenerational cycle of colonialism. For instance, in *R. v. S.G.* (2014), the judge noted that Mr. S.G.'s grandfather was a victim of the residential school system. The grandfather subsequently beat his wife and children, resulting in the death of his grandmother. S.G.'s father, also forced into the residential school system, inflicted physical, sexual, and emotional abuse on his wife and children (including S.G., convicted of sexual assault). In this case the judge recognized that multiple generations of the family exposed Mr. G to domestic violence. In a second case, the judge recognized that Mr. McCallum experienced domestic violence growing up as well. His "father abused alcohol and...was physically violent towards both his wife and his children, including the offender" (*R. v. McCallum*, 2012). In *R. v. Bear*, the judge presented Mr. Bear's father as "a violent alcoholic, with the family members, particularly his mother, being the primary target of his violence" (2012).

In cases involving Indigenous women accused, domestic violence did not have an influence on sentencing. Judges normalized the violence experienced by Indigenous women despite the history of them being victimized. For example, in *R. v. Simms* the judge recognized that Ms. Simms's partner "viciously assaulted her by pounding her in

the face, pinning her to the floor, elbows surrounding her throat, and kicking her. She almost lost consciousness” (*R. v. Simms*, 2013). However, per the judge she had viable means of removing herself from the situation, and the judge sentenced her to imprisonment for aggravated assault against her partner (*R. v. Simms*, 2013, p. 10). Another judge noted that Ms. Omeasoo had to call the police against her husband for domestic violence, but ended up arrested in the end along with her husband (*R. v. Omeasoo*, 2013).

In *R. v. T.A.P.* (2013), the judge noted that Ms. T.A.P. called the police on a man for a violent domestic altercation and ended up arrested for the possession of a loaded prohibited firearm. T.A.P. received 90 days of prison and three years of probation. She plead guilty to the possession of a loaded prohibited firearm and the charges were dropped against the man whom she called the police about the domestic altercation. In *Regina v. SMC* (2014), the convicted woman’s relationships with men also involved their physical abuse toward her.

In *R. v. Brertton* (2013), the judge normalized the violence experienced by the convicted woman by not seriously considering domestic violence in the decision. The judge briefly mentioned in the agreed facts, located in the appendix at the end of the document, that the victim attacked Ms. Brertton in a heated argument prior to the incident in question. Additionally, the victim got out of jail for domestic violence against another woman earlier that day. The judge did not consider the violence inflicted upon Ms. Brertton in the judicial reasoning. The judge portrayed Indigenous women’s circumstances involving domestic violence as if they are disconnected from the ongoing history of colonialism.

Another example of judges not sentencing intersectionally is in *R. v. Arcand* (2014). The judge wrote, "Ms. Arcand says she found herself in a 'dire financial situation,' partly as a result of debts incurred by a former romantic partner. She was unable to find suitable employment. She and Mr. Bear decided to sell drugs 'to get them through a tough patch.'" (*R. v. Arcand*, 2014). Unemployment is a common misfortune for Indigenous women due to colonialism and patriarchy. According to Indigenous and Northern Affairs Canada (2012), "Aboriginal women make less money, work in lower-level jobs, are less likely to find employment than non-Aboriginal women and Aboriginal men." However, the judge in *R. v. Arcand* could not connect her financial troubles to the ongoing history of colonialism.

In my sample cases, convicted women's motherhood proved a more significant mitigating factor in judges' sentencing than the effects of colonialism and unique circumstances of Indigenous women. Judges' recognition of motherhood affected their decisions on the length of the sentence. Judges in my sample did not want to place Indigenous mothers in federal prison (i.e. assign them a custodial sentence of two years or more) if they did not have to, because federal prisons make it hard for women to see their kids. In *R. v. Harry* (2013), the judge described Ms. Harry as a young single mother. The judge's reasoning for a shorter sentence was that "a sentence of less than 2 years will allow you to serve the sentence in Manitoba, where you will be closer to your family supports and your child" (*R. v. Harry*, 2013). In *R. v. T.A.P.*, the judge sentenced Ms. T.A.P. to 90 days of custody intermittently, which would not remove Ms. T.A.P. from her home with her daughters. The judge wrote "a determinate jail sentence of up to two years would achieve the sentencing principles of denunciation and deterrence, but it would

remove T.A.P. from her very vulnerable daughters who need her” (*R. v. T.A.P.*, 2013). In *R. v. C.T.* (2014), Ms. C.T. was not the sole caretaker of her child, and it still affected sentencing. Ms. C.T.'s young child lived in foster care, and the judge was concerned with providing C.T. "the necessary opportunity for [her] to demonstrate [her] stated intention to be an active and appropriate parent to [her] child" (*R. v. C.T.*, 2014). In my analysis of judicial decisions, judges seemed more reluctant to reduce sentences based on principles outlined in section 718.2(e) and Gladue compared to motherhood. I would like to note that 65% of Indigenous people in my sample have children. Therefore, even though motherhood proved to be a more significant mitigating factor than the effects of colonialism this is still occurring in a low percentage of cases.

In my sample judges rarely considered fatherhood in sentencing Indigenous men, and barely discussed children in Indigenous men’s cases. Parenting did not have an effect on male cases. In two cases out of 36 judges went into detail on the parenting of the men involved, and one of those cases pictured the man in a negative light. The judge, in *R. v. Cardinal*, portrayed Mr. Cardinal as a father who had not been in his child’s life. The judge wrote that he "has had two women in his life and one of them bore him a daughter after a four-month relationship. Although he professes to want to parent that daughter, he has never contacted her nor taken any real steps to contact her" (2013). The judge's description of parenting in the second case was the opposite of that in *R. v. Cardinal*, and the only case in my sample in which the judge recognized fatherhood. In *R. v. Anderson* (2014), the judge portrayed Mr. Kelly as a "standup father". Mr. Kelly not only took care of his daughter, but also took care of his girlfriend’s son from another relationship while Mr. Kelly was in jail. The judge noted that Mr. Kelly considered this little boy to be his

son, and the children made weekly visits to the prison to spend time with Mr. Kelly (para. 10). The lack of discussion from judges about fatherhood shows the power of how society has created gender roles, and defined femininity and masculinity, to not associate children with men. This exposes gender work and the gender limits in judicial reasoning. Judges saw fit to reduce sentences due to a woman's status of mother. They did not do the same for men and therefore are not sentencing in a gender-neutral manner.

## Chapter Six: Analysis

In the analysis chapter, I explore the power of law and intersectionality. I address my hypotheses that I laid out at the beginning of this thesis. Based on my analysis of the data, I have concluded that judges do not take an intersectional approach when sentencing Indigenous people and that the practices of law add to the marginalization of Indigenous women. My findings indicated that judges, as colonial actors, exclude many Indigenous people from the benefits of a section 718.2(e) analysis through restrictive definitions of Indigenous identity and that this exclusion affects women and men differently. Judges failed to connect domestic violence and colonialism. By not taking an intersectional approach judges overlooked the differential effects of colonialism on men and women.

### Power of Law

Carol Smart explored how law exercises power and the extent to which it resists and disqualifies alternative accounts of social reality. Smart argues that law exercises a form of power, which is comparable to the development of power associated with scientific knowledge. Smart states that like science law claims truth<sup>9</sup> and thus can exercise power in a society that values this concept of truth (Smart, 1989, p. 9). Law “has its own method, its own testing ground, its own specialized language and systems of results” (Smart, 1989, p. 9).

Law exercises power by setting itself apart from other discourses through the legal method. Judges made their decisions in a post hoc fashion and used the third element of the legal method, case analysis, to justify their choice (Smart, 1989, p. 22).

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<sup>9</sup> Truth is defined as the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true (Smart, 1989, p. 9).

For example, judges chose sections of *R. v. Gladue* that justified their decision instead of focusing on the purpose of section 718.2(e). As noted in my earlier chapter, some judges took quotes from *R. v. Gladue* out of context. This shows how the legal method allows judges to exercise the power of law in particular ways. Also, I would like to point out that judges cite each other citations. This means they can replicate each other's mistakes. How are judges supposed to ameliorate the over-representation of Indigenous people in jail if they continue to use mistaken case analysis for guidance.

Smart argues that law's claim to truth is not established in its practice, but in the ideal of law. In this sense it does not matter that judges in my sample fell short of the ideal of section 718.2(e) in practice. Smart demonstrates a comparison with science's claim to power. For example, it does not matter that experiments do not work or that medicine cannot find a cure for all ills (Smart, 1989, p. 11). While law is not a science it is able to make the same claims to truth as science thereby exercising power that is not under threat despite mistakes in practice (Smart, 1989, p. 14).

Section 718.2(e) empowers law. To use law reform to address Indigenous people's over-representation is giving power to the idea that law has the power to give or withhold rights. Carol Smart said law reform gives power to the idea that law is constructed as a force of linear progress, a beacon to lead people out of darkness. This notion indicates that law is a power to right wrongs and extending rights rather than creating wrongs (Smart, 1989, p. 12). In my findings, I showed evidence of the lack of discussion about the legacy of colonialism. Few judges talked about how the criminal justice system is failing Indigenous people and that the disproportionate number of crimes committed by Indigenous people is tied to the legacy of colonialism. Section



718.2(e) is then portrayed as a provision to right historical wrongs instead of focusing on how the law and criminal justice system create wrongs. Smart argues this is because law sets itself outside social order. Through legal method and rigour it is given the power to reflect upon the world (Smart, 1989, p. 11).

As evidenced in the cases I studied, law is complicit in the very exercise of power that oppresses Indigenous people. Indigenous people's concerns become stuck in using the law to emancipate Indigenous people, but Indigenous people then risk ceding to law the very power that can deploy Indigenous people claims. The problem with challenging a form of power is that by accepting its own terms of reference you then lose the battle before it has begun (Smart, 1989). It is clear through the statistics in my research that even after clarification of section 718.2(e) in *R. v. Ipeelee* the over-representation of Indigenous people is not reducing. An overwhelming portion of my sample was given custodial sentences. Judicial discourse showed that judges are focused on deterrence and denunciation rather than considering other options other than prison for Indigenous people. Section 718.2(e) is not successful in ameliorating the over-representation of Indigenous people in jail and prison. Drawing on the work of Carol Smart Indigenous people should not look to law for the solution to Indigenous people's over-representation in prison. Indigenous people need to look at non-legal strategies to attempt to de-centre law wherever possible (Smart, 1989, p. 5).

### **Judges Do Not Take an Intersectional Approach When Sentencing Indigenous People**

Kimberlé Crenshaw (2016) discussed when facts do not fit an available frame people have a difficult time incorporating it into their thinking. Intersectionality provides

us a way to see people's experiences of discrimination and disempowerment when they do not fit into an available category. Kimberlé Crenshaw developed the theory in Black feminism, but shows the power of intersectionality to all people who experience oppression. She says there are many kinds of intersectional exclusions not just those experienced by black women, but other women of color, not just people of color, but people with disabilities, immigrants, LGBTQ people, **Indigenous people** (Crenshaw, 2017). I use this principle of intersectionality to understand my findings of how judges are excluding Indigenous people from a section 718.2(e) analysis.

In my sample, judges framing of Indigenous identity is through a traditional historical context rather than a modern context. Rather than evolving, Judges' ideas of tradition are frozen in time and defined by colonial actors. Connolly (2006) has described the "frozen rights" strategy in court, in which, traditional present day Indigenous practices are those that are considerably like pre-colonial Indigenous practices (p. 28). TallBear also argues that Indigenous identity defined by colonial actors relies on simple, traditionalist rhetoric. TallBear writes, "Indian authenticity is often depicted as rooted in vague spiritual connections to nature...[and] romanticized and racial ideals about who constitutes 'traditional' Indians" (2001, p. 4). It is difficult for judges to incorporate into their thinking that Indigenous identity is constantly evolving, therefore, they deny the legal recognition of cultural change. The Indigenous people represented in the cases analysed had to fit into judges' racialized frame of identity and those who did not were given less consideration as to their Indigenous circumstances. Judges stripped Indigenous people of the power to define their own identity.

Section 718.2(e) maintains dominant social relations because judges are not sentencing intersectionally. This can be explained through the matrix of domination, also known as the vectors of oppression and privilege. The matrix of domination refers to how differences among people (class, race, gender etc.) serve as oppressive measures. The concept of the matrix of domination was developed to help shape our understanding of oppression through the idea of privilege. To maintain its privilege the dominant group needs to control Indigenous identity. Judges do this by failing to acknowledge how Indigenous identity has changed over time through the intersection of culture, nation and colonialism. To deny the legal recognition of cultural change helps maintain dominant social relations (Collins, 1990, pp. 221-238).

### **Intersectionality Reveals That Law Contributes to Indigenous Women's Marginalization**

I argue that the law that is supposed to protect Indigenous women is further marginalizing them by refusing to consider their oppression at the intersections of identity and experience. Indigenous women and men experience social and legal issues in different ways. It is important to talk about gender, when talking about Indigenous issues. Section 718.2(e) is a single axis solution that, in practice, excludes Indigenous women's interests. Looking at my research judges did not think about multiple disadvantages (gender and colonialism) while sentencing under section 718.2(e). Section 718.2(e) is a provision focused in a limited way on masculine experiences of colonialism and judges erased Indigenous women's experiences by overlooking how gender and colonialism intersect.

Intersectionality describes the hierarchal nature of power and how belonging to multiple discriminated groups can lead to one's issues being ignored (Williams, 2008). Indigenous women are penalized by their experience of colonialism and gender. Judges almost exclusively reflected the experiences of Indigenous men when discussing Indigenous issues, which continued the discourse about colonialism as gendered male, further marginalizing Indigenous women. Judges failed to acknowledge the magnified oppression that Indigenous women face, so Indigenous women are left without a voice. Judges failed to acknowledge that the accused was a woman, as well as an Indigenous person. There was only one reference to Indigenous women's over-imprisonment in 36 decisions. Judges did not consider how gender and colonialism might create a distinct experience of oppression.

Indigenous women's issues involving domestic violence were also ignored. Indigenous women have an intersectional vulnerability to domestic violence in sentencing. Judges did not consider the abusive environment that is often a precursor to Indigenous women's violence. My data showed evidence of many cases involving Indigenous women offenders, where the victim in the accused woman's case assaulted the accused before the incident in which the accused was convicted. Literature shows many Indigenous women find themselves criminalized for their actions against their abusers. Balfour (2008) argued that the criminal justice system harshly punishes Indigenous women who are violently victimized by their intimate partners. In Balfour's terms, the linked victimization and criminalization of Indigenous women are the effects of colonialism (p. 101 – 102). In the cases examined, judges overlooked domestic violence as a unique and/or mitigating circumstance in the cases of Indigenous women

accused. Not sentencing intersectionally meant judges missed that Indigenous women's violent acts are a result of self-protection and disempowerment rather than a desire to harm (Savarese, 2005, p. 142).

Another issue that was missed by judges not taking an intersectional approach is the over surveillance and under protection of Indigenous women. Cases analysed showed Indigenous women call the police for help with a domestic violence dispute and then get convicted for an unrelated crime. Balfour (2008) argued the police and justice system simultaneously ignore Indigenous women's victimization while punishing them for any apparent transgressions of the law (p. 101 – 102). My findings align with what Balfour calls the victimization-criminalization continuum. Indigenous women are falling victim to the victimization-criminalization continuum and judges are not taking their abusive environment into consideration when sentencing them.

Intersectionality not only gives a fuller understanding of complex identities, but also draws attention to the narrow vision that grounds advocacy and intervention on whose behalf (African American Policy Forum, 2013, p. 5). Crenshaw uses the example of a car accident to address the obvious injury suffered by Black female plaintiffs in the *Degraffenreid v. General Motors* case (African American Policy Forum, 2013, p. 5). I intend to use this same car accident example to explain my data. If section 718.2(e) was called to the scene of an accident they would be uncertain whether the accident was caused exclusively by race, gender, or colonialism. As stated in my theory section when “looking at race, law and legal processes rarely consider how other characteristics, such as gender, might complicate matters to create distinct and varied experiences of marginalization” (Marchetti, 2008, p. 156). Each ambulance would speed away leaving

Indigenous women accused lying in the intersection, highlighting the ways in which social movements and law are ill-equipped to address the needs of Indigenous women who struggle against more than one disadvantage or discrimination. Intersectionality theory shows that racialized women are marginalized because of their intersectional identity as both women and members of racialized and colonized people. Examining colonialism and gender separately cannot entirely capture the lives of Indigenous women. Judge failed to consider how gender creates a distinct experience of colonialism for Indigenous women.

### Chapter Seven: Conclusion

I have a Caucasian mother and an African Nova Scotian father. I am very light in complexion and I am often asked the question: What are you? Irritated, but polite, I answer that I am black and white. I am often asked which one of my parents is Black and which one is White. Then, awkwardly, I must give a breakdown of my family dynamics. My father is Black and my mother is White. I always wonder why this matters? If my father is White does that make me more white? If my father is Black does that make me more Black? I identify as a woman who is both Black and White. Not a woman who is 50 percent White and 50 percent Black. As Ebrahim Aseem (2015) says:

mixed people are NOT “half-Black”. They are Black. Fully. Period. By that I only mean, you have just as much right to embrace 100% of every culture you spring from, just as much as someone of your culture who is not mixed. Just because you spring from more than one ancestry, doesn’t make you half off it, half-Black or a fraction White. If you are biracial you are NOT half & half. You are WHOLE & WHOLE.

According to Aseem, racial identity should not be divided. You have just as much right to embrace every culture you come from.

Section 718.2(e) puts the onus on Indigenous people to prove their identity based on judges’ definitions as colonial actors. My data shows judges evaluate Indigenous people’s identity based on bloodline and their historically-based ideas of being connected to their culture. If I were to commit a crime and section 718.2(e) was used in my case as a Black woman, I would not be able to tell you my connection to my culture. I am African

Nova Scotian and my ancestors come from the Caribbean islands. I do not practice any African or Caribbean historical traditions, but I still experience racism and oppression. I have been racially profiled while driving a car with tinted windows, and rims. I have a distrust for police because of it. I have had to try to defend in conversation that racism still exists and is not a thing of the past, that racism exists in Canada and is not just a problem of the United States. Indigenous people should not have to be analysed with colonial definitions to prove their Indigenous identity. The nature of law leads this to happen because it disqualifies other discourses of social reality. Law claims truth and thus a judge's definition of Indigenous identity is held superior over Indigenous people's definition. A key point to note is that only 1 percent of Canada's 2160 judges are Indigenous (Tutton, 2016). This number shrinks even more when discussing Indigenous female judges. For example, just this year Catherine Benton became the first Indigenous female judge in Nova Scotia (Googoo, 2017).

Judges' interpretation of section 718.2(e) excluded Indigenous people who do not have a connection to culture as defined by colonial actors. This is a mistake because Indigenous people who do not have a connection to culture as defined by judges can still go through the same hardships living as Indigenous people outside of the courts. Based on my experience reading case judgments on section 718.2(e) if I were to go to court the judge would most likely conclude that I have a Black father, but I do not stay connected to my culture and therefore section 718.2(e) would apply at a lesser extent. Despite my racial identity, I would not receive the benefits of section 718.2(e) and the court system would completely dismiss my experiences growing up in Nova Scotia as a Black woman. Section 718.2(e) needs to be applied differently because colonial judges wrongly define



Indigenous identity and strip away the power from Indigenous communities to define themselves.

Carol Smart's analysis regarding the power of law influenced my concern that section 718.2(e) would not address the inequalities faced by Indigenous women. The provision was not designed with Indigenous women in mind. Law silences the everyday issues Indigenous women experience, as women and as Indigenous people. Judges in their judicial decisions ignored and normalized the violence inflicted upon Indigenous women because they overlooked the intersection of gender and colonialism. The normalizing of violence is a product of patriarchal colonialism. The violence Indigenous women experience should be considered within the context of gender and colonialism. However, the theoretical framework and data for this study indicated that the law cannot accommodate the unique experiences facing Indigenous women. Law operating as a claim to power over other discourses of social reality affects its ability to address gender and colonialism in sentencing Indigenous women.

Indigenous peoples' issues were not a focus by the 22<sup>nd</sup> prime minister, Steven Harper, at the beginning of my research. With the new Prime Minister Justin Trudeau that has changed. Justin Trudeau promised to implement all 94 of the recommendations from the Truth and Reconciliation final report during his campaign. As discussed in a previous chapter, my research fits in well with two of those recommendations. The commission calls for a public inquiry into missing and murdered Indigenous women, and for federal, provincial, and territorial governments to work to reduce the over-representation of Indigenous people in prisons and jails. My research looks at statistics of missing and murdered women in my literature review. Also, my work sheds light on Indigenous

women and their unique circumstances, especially when it comes to the amount of violence they experience, and conflict with law, because of colonialism. My findings address judges' interpretation of section 718.2(e) and I conclude that judges do not properly apply the provision to ameliorate the over-representation of Indigenous people in jail and prison. I argue that the nature of law makes it difficult to apply section 718.2(e). To properly apply section 718.2(e) law would have to concede its claim to power, in order to allow for Indigenous people's experiences to claim truth.

### **Future Research Directions**

In Nova Scotia, there exists only two cases where a judge used a cultural assessment in sentencing African Nova Scotians. One of the cases involved a 27-year-old Black man, convicted of second-degree murder. Judge Pamela Williams delayed sentencing to conduct a cultural assessment. Williams believed in assessing how racial and heritage factors contribute to crime (Stagg, 2016). The use of cultural assessments is extremely rare in Nova Scotia courts. Judge Williams, the chief judge of the Nova Scotia provincial court, said that she has never actually seen a cultural assessment before, but they are like Gladue Reports. The only other case where a cultural assessment was used in Nova Scotia involved a youth convicted of attempted murder of another teenager. Judge Anne Derrick set a groundbreaking precedent that being African Nova Scotian should be an important factor in sentencing youth offenders (Tattie, 2015). Section 718.2(e) was not referenced in these cases. Future research should explore the option of using cultural assessments or 718.2(e) in the sentencing of African Canadians.

Additionally, future research needs to be done with a focus on how section 718.2(e) affects Indigenous men by looking at the intersection of gender and colonialism.

The research should look at why and how judicial decisions fail to adequately apply section 718.2(e) to Indigenous men. Often we forget that gender is not just about women. Future research can add on to my findings where for instance judges did not consider fatherhood versus motherhood.

### **Final Comments**

Despite the Supreme Court directing judges in the application of section 718.2(e), my study demonstrates that after 17 years since the enactment of *R. v. Gladue* (1999), judges still fail to consider and apply the principles in section 718.2(e). The inconsistencies in *R. v. Gladue* make it difficult for judges to apply the provision despite clarification in *R. v. Ipeelee*. The criminal justice system's reliance on punishment and being "tough on crime" is the downfall of the provision. Judges relied on deterrence and denunciation in sentencing. Section 718.2(e) theoretically has the potential to decrease the over-representation of Indigenous people in prison, but in practice is failing and keeping stereotypes alive through colonial actors' definitions of cultural difference.

The power of section 718.2(e) is in the ideal of the provision and not the practice. According to the power of law theory, it does not matter that section 718.2(e) does not ameliorate the over-representation of Indigenous people. Section 718.2(e) is seen as a provision to right historical wrongs instead of law creating them in the first place. Therefore, judges can get away with a lack of discussion on colonialism. The power of law disqualifies alternate accounts of reality, which explains why Indigenous people's experiences are disqualified in law.

Judges do not sentence intersectionally. Intersectionality in sentencing could provide a way to see people's experience of discrimination and disempowerment and shift the frame of thinking. However, Intersectionality does not fit the available frame of law, which explains why judges have a difficult time incorporating it into their thinking.

Intersectionality highlights the limits of law. Law cannot completely capture the circumstances of Indigenous people when sentencing them, which is the purpose of section 718.2(e). Section 718.2(e) is designed for judges to apply an understanding of why Indigenous people end up before the courts and therefore use incarceration as a last resort when sentencing them. The judges in this research sample have done neither. Law is designed to translate Indigenous experiences into the language and framework of law. During this translation key components of Indigenous peoples experiences are lost. As we have seen through literature and my research section 718.2(e) cannot reduce the over-representation of Indigenous people in prison. I call for the government to allow Indigenous communities to be able to handle criminal justice matters in their own communities separate from the Canadian criminal justice system.

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**Appendix A****List of Cases Analysed**

R. c. Cloud, 2014 QCCQ 464  
R. c. Labbé, 2012 QCCQ 2794  
Regina v SMC, 2014 BCPC 0144  
R. v. Abraham, 2012 MBPC 77  
R. v. Anderson, 2014 BCSC 1519  
R. v. Arcand, 2014 SKPC 012  
R. v. Baines, 2013 ABPC 92  
R. v. B.(D.), 2013 ONCJ 389  
R. v. Bear, 2012 ABPC 305  
R. v. Beardy, 2013 MBQB 15  
R. v. Beaulieu, 2014 BCSC 2068  
R. v. Bouchard, 2012 ONCJ 425  
R. v. Bourke, 2013 NWTTC 7  
R. v. Brertton, 2013 BCSC 1029  
R. v. Buggins, 2014 NWTSC 24  
R. v. Cardinal, 2013 BCPC 0282  
R. v. C.D.M., 2012 SKQB 245  
R. v. C.G., 2013 MBPC 73  
R. v. Chambers, 2013 YKTC 77  
R. v. Charlie, 2014 YKTC 17  
R v Cook, 2013 MBQB 100

R. v. Cote, 2013 BCSC 2424

R. v. C.T., 2014 BCPC 0042

R. v. Dennis, 2014 BCSC 692

R. v. Dicker, 2013 NLPC 1711A00370

R. v. Dickson, 2013 YKTC 27

R. v. D.T.G., 2013 BCPC 0156

R. v. Elliott, 2013 BCPC 0270

R. v. Eric Montour, 2012 ONSC 4006

R. v. First Charger, 2013 ABPC 193

R. v. Firth, 2012 YKTC 116

R. v. Friday, 2012 ABQB 371

R. v. Gambler, 2012 SKPC 060

R. v. George, 2012 ONCJ 756

R. v. Gladue, [1999] 1 SCR 688

R. v. Gratton, 2012 ONCJ 735

R. v. Hansen, 2014 BCSC 625

R. v. Hanska, 2014 MBQB 184

R. v. Harry, 2013 MBQB 237

R. v. Ipeelee, [2012] 1 SCR 433

R. v J.L.C., 2012 BCSC 623

R. v. J.R.H., 2013 BCPC 143

R. v. Kanayok, 2014 NWTSC 75

R. v. Kenny, 2014 NWTSC 3

R. v. Key, 2014 SKPC 122

R. v. Knockwood, 2012 ONSC 2238

R. v. Lepine, 2013 NWTSC 19

R. v. Lewis, 2012 ONSC 5085

R v LLC, 2012 ABPC 103

R. v. L.M.L., 2012 ABPC 84

R. v. Lutz, 2013 YKTC 17

R v. MAB, 2014 ABPC 293

R. v. Marchand, 2014 BCSC 2554

R. v. McCallum, 2012 SKPC 162

R. v. McCook, 2015 BCPC 1

R. v. McKenzie-Sinclair, 2015 MBPC 5

R. v. Nagano, 2014 YKTC 55

R. v. N.B., 2012 SKPC 099

R. v. Omeasoo, 2013 ABPC 328

R. v. P., 2012 ONCJ 460

R. v. Papin, 2013 ABPC 46

R. v. Paquette, 2012 BCSC 1497

R. v. Peters, 2014 BCSC 1009

R. v. Pijogge, 2013 NLTD(G) 7

R. v. Rathburn, 2013 YKTC 90

R. v. R.S., 2014 BCPC 0227

R. v. Samson, 2014 YKTC 33

R. v. Serré, 2013 ONSC 1732

R. v. S.G., 2014 ONSC 6309

R. v. Simms, 2013 YKTC 60

R. v. Sinclair, 2014 MBPC 13

R v TAP, 2013 ONSC 797

R. v. Toews, 2013 BCSC 2474

R. v. Utye, 2013 NUCJ 14

R. v. Wells, [2000] 1 SCR 207

## Appendix B

Table 1: Description of Accused

Variable	Frequency	Total Percent (%)
<b>Gender</b>		
Male	36	50
Female	36	50
n = 72		
<b>Age</b>		
18-24	13	19
25-34	25	37
35-44	15	22
45-54	12	18
55-64	1	2
65 and up	1	2
n = 67		
<b>Education</b>		
Grades 1-6	2	4
7-10	24	50
11-12	12	25
College/University	10	21
n = 48		
<b>Substance abuse</b>		
Yes	65	90
No	7	10
n = 72		
<b>Regions</b>		
Atlantic Provinces	2	3
Central Canada	13	18
Prairie Provinces	23	32
West Canada	19	26
Northern territories	15	21
n = 72		

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**Children**

Yes	47	65
No	25	35

n = 72

**Employment Status**

Unemployed	41	59
Employed	28	41

n = 69

**Table 2: Characteristics of Case**

Variable	Frequency	Total Percent (%)
<b>Charge</b>		
2 <sup>nd</sup> Degree Murder	1	1
Manslaughter	7	10
Assault Offences	19	26
Sexual Assault Offences	12	17
Impaired Driving Offences	5	7
Property Offences	14	19
Drug Offences	6	8
Other	8	11
n = 72		
<b>Criminal Record</b>		
Yes	50	69
No	22	31
n = 72		
<b>Pre-trial Custody</b>		
Yes	46	64
No	26	36
n = 72		
<b>Sentence Type</b>		
Over 2 Years Imprisonment	32	44
Under 2 Years Imprisonment	28	39
Conditional Sentence	9	13
Other Non-carceral Sanction	3	4
n = 72		
<b>Sentence</b>		
Incarceration	60	83
Non-incarceration	12	17
n = 72		



**Sentence length**

Two years and over	32	44
Under two years	40	56

n = 72

**Table 3: R. v. Gladue passages**

Variable	Frequency	Total Percent (%)
<b>Automatic reduction of sentence</b>		
Yes	12	17
No	60	83
<b>Taking account their difference</b>		
Yes	0	0
No	0	0
<b>Seriousness of offense</b>		
Yes	17	24
No	55	76

**Table 4: Gender Differences**

<b>Variable</b>	<b>Male</b>	<b>Female</b>
	<b>Total Percent (%)</b>	<b>Total Percent (%)</b>
<b>Charge</b>		
2 <sup>nd</sup> Degree Murder	3	0
Manslaughter	17	3
Assault Offences	22	31
Sexual Assault Offences	31	3
Impaired Driving Offences	3	11
Property Offences	11	28
Drug Offences	6	11
Other	8	14
<b>Sentence Type</b>		
Over two years Imprisonment	64	25
Under 2 Years Imprisonment	31	47
Conditional Imprisonment	6	19
Sentence		
Other Non-carceral Sanction	0	8
<b>Criminal Record</b>		
Yes	83	56
No	17	44
<b>Pre-trial Custody</b>		
Yes	81	47
No	19	53