Over-represented but not Understood: Sentencing Provisions as an Inadequate Response to the Over incarceration of Aboriginal Peoples in Nova Scotia.

By

Brady Tanner Reid

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Abstract

This paper will explore the over incarceration of Aboriginal offenders in Nova Scotia. It will critically examine s. 718.2(e) as well as *R. vs Gladue 1999* as a response to the over-representation of Aboriginal peoples in Canadian prisons. In 1996, Bill C–41 was introduced which defined the principles of sentencing for judges across the country and included a provision (s. 718.2(e)) that mandated judges to consider the situation of all Aboriginal offenders. However, over twenty years later, evidence demonstrates that the over incarceration of Aboriginal offenders has not decreased. This paper will analyze ten sentencing decisions from the Nova Scotia Provincial Court in order to understand better the implementation of s. 718.2(e) and *R. vs. Gladue 1999*. The results show that its use in court is inconsistent and inadequate to combat over incarceration. While judges recognize and identify the challenges faced by many Aboriginal offenders, they are still bound by the principles of deterrence and denunciation above those of rehabilitation and reintegration.

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Chapter 1: Introduction

"Until the lions have their own historians, the history of the hunt will always glorify the hunter." — Chinua Achebe

I come from a town on the West Coast of Newfoundland where the paper mill dominates the local economy. I come from a town on the West Coast of Newfoundland where the bay used to freeze over during the winter, but no longer does. I come from a town on the West Coast of Newfoundland where I lived down the street from my entire family. I am a member of the Qalipu Mi'kmaq First Nation. My lived experiences do not represent those of Aboriginal[1] people as they are normally discussed in scholarly literature. Instead, my lived experiences represent that of a boy who, through lineage from both maternal and paternal family members, is tied to Mi'kmaw peoples that have existed in Newfoundland for centuries[2]. It has taken me many years to build up the courage to put who I am into writing due to the fear that I have of claiming Aboriginal status. Questioning and doubting my identity is something that I have done for many years. I struggle with the concept of Aboriginality in my writing as it relates to self-identification as Aboriginal. My family does not live on reserve land; I do not feel any direct or indirect impacts of the residential school system nor do I actively participate in cultural activities within the Qalipu Mi'kmaq community. These are some of the characteristics that come to mind when thinking of any Aboriginal person. Despite the piece of plastic in my wallet legally defining me as Aboriginal, I hesitate to claim status because I am unable to identify with who traditionally has been seen as Aboriginal.

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[1] The term Aboriginal, as defined by the Canadian Government, is used in this paper to refer to a person identifying as First Nations (North American Indian), Métis or Inuk (Inuit) (Constitution Act, 1982, Section 35 (2))

[2] The island of Newfoundland has been considered part of Mi'kmaq territory for many centuries; however, it was not until 2011 that the Qalipu First Nations Band was formally recognized as another Mi'kmaq band in Newfoundland (Hanrahan, 2012).

Evidently, I am quite reflexive when thinking about my Aboriginal status and this has subsequently piqued my interest in Aboriginal issues more generally. The over incarceration of Aboriginal offenders is extensively discussed in the scholarly literature (Dioso & Doob, 2001; Roberts & Melchers, 2003; Latimer & Foss, 2005; Welsh & Ogloff, 2008; Balfour, 2012). Furthermore, as a response to the notable over-representation of Aboriginal peoples in Canadian prisons, the federal government introduced sentencing reforms in 1996. Newly introduced provision s. 718.2(e) in the Criminal Code mandates sentencing judges to consider the "circumstances of Aboriginal offenders" in their decisions (Bill C−41, 1996). Though generally highlighted across Canada as an issue that is increasingly discussed among policy makers and stakeholders in the Criminal Justice System, little research has been conducted in Nova Scotia on the sentencing of Aboriginal offenders and the implementation of s. 718.2(e).

Within my project, as I have indirectly discussed above, I position myself as an insider/outsider. Anti-oppressive research discusses at length the relationship between the researcher and the participants, the former coming from a position of privilege and the latter coming from the community being studied (Mason and Stubbs, 2010). Though I identify as Aboriginal, I have not experienced much of the hardship and marginalization that have affected many Aboriginal communities. To that effect, I consider myself an insider to the point that I am also Aboriginal. However, I separate myself as an outsider because I have never been involved with the criminal justice system nor have suffered direct disadvantage as a result of my heritage. Even though I am not conducting research on individuals where my positionality drastically alters the data that I am able to extract, I still feel a certain degree of tension. Considering the values of anti-oppressive research, research that is conducted with marginalized or oppressed communities should benefit the community itself, not just add to the body of knowledge on a

particular topic (Gobo, 2011). Thus, I question whether my research could possibly benefit the Aboriginal community in Nova Scotia or if I am just using my positionality as a privileged researcher in academia to add to the body of knowledge surrounding Aboriginal offenders. This question is important as I undertake research, however, I am able to ease my conscious by doing qualitative research that does not involve any human participants. I do not feel that I am undermining Aboriginal people directly in my research and I am still able to join in the academic discussion around Aboriginal over incarceration in Canada and Nova Scotia.

In this paper, I will be looking at both a sentencing provision found in the Criminal Code, section 718.2(e), as well as a Supreme Court Case, *R. vs. Gladue 1999*, in regards to Aboriginal offenders. Before going into any detail about each aspect, it is important to understand the relationship between s. 718.2(e) and *R vs. Gladue 1999*. Section 718.2(e) was a sentencing provision that was introduced in 1996 that mandates sentencing judges to consider the circumstances of all Aboriginal offenders before giving a sentence. This provision acts as an indicator to sentencing judges to remember the historical disadvantage that Aboriginal communities have experienced and to take this into consideration in sentencing. Three years after the implementation of s. 718.2(e), the provision was used in a Federal case that set significant precedence for future trials involving Aboriginal offenders.

In 1999, the Supreme Court of Canada set the benchmark for the interpretation of section 718.2(e) in its decision of *R. vs. Gladue*. Jamie Gladue, an Aboriginal woman living off-reserve in British Columbia, pleaded guilty to manslaughter in the death of her common law husband, an Aboriginal man. At sentencing, the trial judge noted several mitigating factors, such as being a young mother as well as having upgraded her education and attended alcohol abuse counselling (Rudin, 2008). Despite the mitigating factors identified by the judge and Gladue's status as an

Aboriginal person, the Supreme Court ruled that the crime was "a very serious one" and thus warranted three years' imprisonment (*R. vs Gladue*, 1999, p 3). Though not overturning the trial judge's sentence of incarceration, the Supreme Court narrowed the interpretation of s. 718.2(e) in the Criminal Code (Roach and Rudin, 2000). The term "narrowed" refers to the idea that the precedent outlined by the judge in *R vs. Gladue 1999* delineated the limits under which s. 718.2(e) was relevant. In effect, s. 718.2(e) was no longer able to play a large role in cases dealing with repeat offenders, serious offences, or dangerous offenders.

To that end, I will be reviewing ten sentencing decisions from the Provincial Court of Nova Scotia to better understand how s. 718.2(e) and *R. vs. Gladue 1999* are interpreted by sentencing judges. Through a lens of restorative justice, I argue that sentencing provisions implemented in the Criminal Code of Canada are not an adequate response to the over incarceration of Aboriginal peoples. Sentencing provisions continue to exist within the traditional justice system that has systematically disadvantaged Aboriginal offenders therefore it is unable to solve the problem that it itself created. The language used by each judge is unique to each case and exposes their interpretation of sentencing legislation as it exists in the Nova Scotia Provincial Court

Literature Review

Context and Background

Despite being the first inhabitants of the land that is now called Canada, Aboriginal peoples continue to be disenfranchised in the country that was formed around them. The effects of the marginalization of Aboriginal peoples range from staggering unemployment rates, lack of opportunity, and economic deprivation due to substance abuse, alienation, and community

fragmentation (Welsh and Ogloff, 2008). This marginalization is tangibly visible in the Criminal Justice System; a system that is heavily saturated with Aboriginal peoples from across the country. Due to the many long-lasting effects of the processes of colonization such as the creation of reserves and residential school, Aboriginal peoples across the country face a higher chance of being involved in the Criminal Justice System (Murdocca, 2013).

In their longitudinal study of incarceration rates in Canada from 1978–2001, Roberts and Melchers (2003) found that Aboriginal offenders are distinctly overrepresented in Canadian prisons. In 2001, "Aboriginal offenders accounted for 19% of provincial admissions … but only 3.3% of the population" (p. 211). The findings of this study suggest that the attempts of Parliament as well as the Supreme Court have not led to great reductions in the number of Aboriginal peoples admitted to custody, with the biggest decline visible from 1993 to 1994. However, Roberts and Melchers (2003) argue again that non-Aboriginal admissions into prison have gone down at an even faster rate. In this sense, it is evident that while the incarceration rates of Aboriginal offenders are not rising, they are decreasing at a slower rate than those of non-Aboriginal offenders. Therefore, the percentage of Aboriginal people in prison is increasing while the actual number of incarcerated Aboriginal people is not increasing. This over incarceration of Aboriginal offenders is highlighted by many other scholars producing literature in this field (Roach and Rudin, 2000; Dioso and Doob, 2001; Welsh and Ogloff, 2008; Balfour, 2012; Murdocca, 2013).

Despite the disproportionate representation of Aboriginal peoples in Canadian prisons, there is no consensus regarding the reasons that have led to this overrepresentation. Instead, the literature suggests the over incarceration of Aboriginal offenders occurs as a result of the intersection of a variety of different "social disorders" linked with colonization and colonial

ideologies that have leaked into the twenty-first century (Murdocca, 2009; Macmillan, 2011). Since the Europeans first made contact with the ancestors of the current Aboriginal peoples of Canada, Aboriginal peoples have been forced to conform to the colonial traditions of the settlers. As the European settlers expanded their presence in Canada, Aboriginal peoples were allotted small, poorly located reserves with little natural resources. Many Aboriginal communities became impoverished because of their inability to continue a subsistent lifestyle on reserve land (Isaacs, 2014). While reserves still exist across the country, Balfour (2012) argues that "prisons have been denounced as [the] 'neo-colonial reserve'" (p. 86). Balfour positions incarceration as another means by which Aboriginal communities are segregated from the general population. The important argument made by Balfour highlights the relationship between colonial practices such as the formation of reserves or residential schools and the overrepresentation of Aboriginal offenders in the Criminal Justice System.

In response to the disproportionate number of Aboriginal offenders in Canadian prisons, the Federal Government introduced Bill C–41,[3] which presented several amendments to the Criminal Code. Specifically, this new legislation outlined reforms to the judicial sentencing of offenders within the Criminal Justice System. The bill was passed in Canada in 1995 and enacted for the first time in the spring of 1996 (Snell and Bourassa, 1995). Bill C–41 outlined the purpose of sentencing, introduced conditional sentences, and emphasized the availability of alternative measures programs, among other provisions. In particular, targeted attention was given to Aboriginal offenders with the introduction of section 718.2(e) in the sentencing portion of the Criminal Code. Section 718.2(e) reads as follows, "All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders,

[3] Introduced in 1995, passed in 1996 and enacted in 1996 (Snell and Bourassa, 1995)

with particular attention to the circumstances of Aboriginal[4] offenders" (Snell and Bourasses, 1995, p. 4)

Section 718.2(e) attempted to divert Aboriginal offenders away from incarceration by mandating judges to consider alternate options for sentencing. However, Balfour (2012) concluded that since the introduction of sentencing reforms such as Bill C–41 in 1996, incarceration rates for Aboriginal peoples have continued to rise. It is then critical to question the purpose and effectiveness of legislation reforms as a means to address the over incarceration of Aboriginal peoples in Canada: Has Bill C–41 been successful in accomplishing its goal. In a short and succinct answer, it has not. According to the annual report on corrections in Canada, Howard Sapers identifies that in January of 2016, "25% of the inmate population in federal penitentiaries is now comprised of Indigenous people" (p. 43), which represents an almost 8% increase since the Roberts and Melchers study in 2003. Much of the scholarly literature that followed the introduction of Bill C–41 has problematized the idea of using a colonial structure such as the Criminal Code as a remedy to an issue that was itself created by the process of colonization (Adjin-Tettey, 2007; Murdocca, 2009 and 2013; Roach, 2014). Several common themes become apparent when conducting a review of the literature surrounding section 718.2(e) of the Criminal Code and the over incarceration of Aboriginal offenders in Canada. Sentencing reforms, the interpretation of section 718.2(e), and the non-legal factors affecting sentencing are three overarching themes common to the literature.

[4] Although I use an uppercase "A" throughout this paper writing the word Aboriginal, this word was kept lowercase in order to keep the integrity of the quotation.

Sentencing Reforms

In response to the many issues that plague the Criminal Justice System, the federal government often turns to legislative reforms to heal any wounds. Aside from the introduction of sentencing reforms through Bill C–41, scholars have critically analyzed commissions of inquiry as a solution to a specific problem. The scholars try to determine how effective legislation can be in exacting justice.

Donald Marshall Jr. was a 17-year-old Mi'kmaw youth living in Cape Breton, Nova Scotia in 1971 when he was convicted of second-degree murder. However, 11 years later, he was granted an acquittal when new evidence was introduced that proved his innocence. As a result, he received 1.5 million dollars as compensation for wrongfully spending 11 years in prison (Hickman, Poitras & Evans, 1989). Furthermore, the Nova Scotia Provincial Government produced the *Royal Commission on the Donald Marshall, Jr., Prosecution* which critically analysed the trial and highlighted the discrimination faced by Marshall Jr. throughout the proceedings. Finally, this Commission presented over 80 recommendations to be adopted to ensure that the injustice suffered by Marshall Jr. was never experienced by another offender. Analysing the Marshall Inquiry that followed the release of Marshall Jr., Manette (1988) highlights the inappropriateness of using the Marshall Inquiry as a "vehicle for juridical reflexivity" (p. 167). In other words, Manette discusses the ineffectiveness of a Royal Commission as a tool used by judicial officials to recognize their mistakes and to improve their practice. The study highlights how one might understand the purpose of a commission of inquiry as a vehicle to perpetuate hegemonic ideals; notably, dominant western ideologies of crime and punishment.

In addition, as a response to the growing population of Aboriginal youth involved in the

Criminal Justice System, the Youth Criminal Justice Act was implemented in 2003. Outlined by Corrado, Keuhn, and Margaritescu (2014) this policy reform mandates that all Aboriginal young people be diverted for all first-time and non-serious offenses-restricting remand and prison to the most serious offences. A main objective of this act is "to reduce the use of the formal youth criminal justice system for minor offences through alternative measures such as diversion" (Corrado et al., 2014, p. 43).

One of the most important reforms to legislation that was intended to have a large impact on the population of Aboriginal offenders was the introduction of section 718.2(e) in the Criminal Code. Reforms to sentencing legislation in Canada "were intended to address general criticisms of judicial sentencing practices and, specifically, Aboriginal overrepresentation" in the Criminal Justice System (Welsh and Ogloff, 2008, p. 493). The general principle underlying section 718.2(e) is to avoid the use of imprisonment as the main avenue for sentencing Aboriginal offenders and instead use community resources to rehabilitate offenders.

The sentencing reforms of 1996 were introduced through Bill C–41 to codify the purpose of sentencing and to "reduce the use of incarceration" of Aboriginal offenders (p. 86). Dioso and Doob suggest in their paper that the Government of Canada positioned their policy reforms (718.2(e)) in 1996 so as to be more appealing to the public. Instead of addressing the actual fundamental problems of the social and economic situation of Aboriginal peoples that contribute to higher levels of offending and therefore greater involvement with the Criminal Justice System, the Canadian government placed a bandage over the issue with section 718.2(e). Dioso and Doob argue that this bandage has been widely received as a solution to the underlying causes of Aboriginal over incarceration. Section 718.2(e) becomes "more legitimate" (p. 407) through the way in which the government frames the reforms.

As aforementioned, the study conducted by Roberts and Melchers in 2003 demonstrates that the attempts of the Canadian government to dramatically reduce the incarceration of Aboriginal offenders was unsuccessful. The authors note that overall incarceration rates were decreasing yet the incarceration rate of non-Aboriginal offenders from 1978–2001 was decreasing at a much faster pace than that of Aboriginal offenders. Roberts and Melchers (2003) argue that since the incarceration of non-Aboriginal offenders has decreased at an even faster rate, the "specific policy changes are not responsible for the Aboriginal decline" (p.212) The argument made by Roberts and Melchers is one that is supported by the work of many scholars who study the incarceration rates of Aboriginal offenders. For example, Welsh and Ogloff (2008) state that "existing empirical research examining determinants of sentencing outcomes … does suggest that the Bill C–41 statutory reforms may fail to adequately address overrepresentation" (p. 494). According to her quantitative study, Balfour (2012) posits that "in the nearly two decades that have passed since the enactment of the legislation, incarceration rates for Aboriginal peoples have continued to rise, especially for Aboriginal women" (p. 86).

In contrast with Balfour's assertion, Roach and Rudin (2000) highlight that using 718.2(e) as a solution to reduce the over incarceration of Aboriginal people is important yet "ambitious" (p. 358). This study examines the decision in *R. vs. Gladue 1999* as a promising decision as it recognizes Aboriginal over incarceration in Canadian prisons. However, it also highlights that "the most ambiguous part of *Gladue* is its applicability to serious offences" (p. 365). In *R vs. Gladue 1999,* the appeal judge dismissed the application for appeal because, despite the mitigating factors that were present, the judge believed that the original appeal judges had inappropriately interpreted s. 718.2(e) and that the seriousness of the offence outweighed the defendant's identity and the colonial context of Aboriginal peoples. On the contrary, Roach

(2014) rebounds in saying that the silver lining in the *Gladue* case was that she got day parole after 6 months and was ordered to reside with her father, "the type of conditional release as an alternative to imprisonment that should be encouraged by the case" (p. 366).

In her aforementioned study, Carmela Murdocca provides an in depth critique of section 718.2(e) as a response to the over incarceration of Aboriginal peoples. Structured as "appeals to cultural difference" (p. 4), Murdocca argues that restorative approaches in sentencing *entrench* further certain forms of racism and sexism. Section 718.2(e) perpetuates the idea that Aboriginal offenders are overrepresented in Canadian prisons due to "cultural differences" which could be embodied as the "social disorders" faced by Aboriginal communities that Murdocca had coined in 2009. This undermines the form of structured marginalization that has had a tremendous impact on Aboriginal groups across Canada.

Furthermore, McMillan (2011) problematizes the idea of using a contemporary Western framework of justice to address Aboriginal offenders. She states that many people, including legal professionals, believe that it is important to integrate customary Indigenous practices concerning Aboriginal offenders within a contemporary framework. McMillan (2011) highlights that this approach may "fulfill concerns of cultural appropriateness and fairness and are presented in opposition to the negative impacts of colonization and assimilative practices of the dominant society" (p.180–81). It is important not to implement traditionally colonial practices of justice as a solution to an issue that has itself been caused by colonization. The difficulty in combining a contemporary legal framework and customary Indigenous practices lies in deciding what these customary practices are. Aboriginal communities across Canada are extremely diverse, which at times limits the generalizability of customary Indigenous legal practices.

Interpretation of Section 718.2(e)

Dioso and Doob (2001) position the judge's decision in *R. vs. Gladue 1999* as "controversial for at least two reasons" (p. 405). First, this benchmark case created a divide between Aboriginal offenders and other offenders. In other words, s. 718.2(e) problematizes the sentencing of and mandates special consideration for Aboriginal offenders. Therefore, they argue that the injustices faced by other marginalized groups in the Criminal Justice System are undermined and seemingly overlooked. Second, *R. vs. Gladue 1999* specifically highlights sentencing as the core issue in the overrepresentation of Aboriginal offenders rather than "the more fundamental problem of the social and economic circumstances of Aboriginal people in Canada" (p. 406) Similar to Murdocca's (2009) argument that provision 718.2(e) in the criminal code is inadequate in addressing the over incarceration of Aboriginal offenders, Dioso and Doob suggest that attempting to divert Aboriginal offenders away from prison at sentencing is simply too late. They believe that action should be taken earlier to avoid interaction with the Criminal Justice System all together.

Murdocca (2013) provides a detailed analysis of *R v. Gladue 1999* and argues that s. 718.2(e) is inconsistent in its interpretation. She highlights that the likelihood of diversion away from incarceration is dependent on how well the offender "performs" his or her Aboriginality and on how apparent the link is between their Aboriginality and the crime committed. To further explain the argument identified by Murdocca, Rudin (2008) provides a description of the interpretation of s. 718.2(e) in *R. vs. Gladue*.

> The Court wanted to make clear that while section 718.2(e) mandated a different way in which an Aboriginal person was to be sentenced, it did not mean that on all occasions an Aboriginal person would receive a different sentence than a non-Aboriginal person in similar circumstances. (p. 696–97)

Basically, the sentencing judge must consider at what point the Aboriginality of an offender should receive more consideration than the aggravating factors in sentencing. This practice inherently undermines the historical marginalization faced by Aboriginal peoples as a whole and individualizes each offender, placing the onus on the accused to prove their Aboriginality and how it has impacted their behavior.

In Canada, Aboriginal peoples have been incorporated into policy and law-making, such as s. 718.2(e) in the Criminal Code. However, in 2009, Murdocca outlined that Aboriginal peoples have been placed in "two mutually exclusive positions: the objects of worry and the consultants to their own problems" (p. 30). In short, in order to deal with the issue of the overrepresentation of Aboriginal peoples in Canadian prisons, policy makers and other key actors in the Criminal Justice System have consulted with Aboriginal leaders. However, as Murdocca highlights, Aboriginal leaders that are brought into discussions around lawmaking and sentencing decisions must speak within the hegemonic discourse, (that was organized and is perpetuated by white society). Attempting to include Aboriginal leaders in the solution to over incarceration is problematic when the entire Criminal Justice System is built on colonial principles of deterrence and denunciation. Murdocca (2009) further highlights that "relating Aboriginal over-representation to social disadvantage (through various social indices) mis-states and over-simplifies a complex problem by ignoring the unique legacy of colonialism faced by Aboriginal people" (pg. 30). Adjin-Tettey (2007) adds that, "the over-incarceration of Aboriginal and other marginalized people reflects the legacies of colonization and is also evidence of their continuing victimization at the hands of the dominant white society" (p. 183). Unfortunately, the dominant white society in the Canadian context is also responsible for addressing the overrepresentation of Aboriginal peoples in Canadian prisons.

One remaining form of colonization that continued well into the twentieth century is residential schools. Residential schools separated families in an effort to destroy Aboriginal culture and assimilate Aboriginal children into western society. The lasting effects of residential schools exist today in the organization of reserves and unstable family structures that are prevalent among Aboriginal communities (Roach, 2014). In 2012, an important case heard by the Supreme Court of Canada, *R. vs. Ipeelee* set a precedence for the broader legacy of residential schools being taken into account for Aboriginal offenders (Roach, 2014). However, there exists a large number of criminal courts that have required an Aboriginal offender to establish a direct relationship between their crime and residential schools. In some cases, the accused were able to prove the direct link between their connection to residential schools and their specific crime in question, yet this unnecessarily brings into question the negative impact of the residential school system on the Aboriginal community as a whole. In other cases, less consideration was given to the offender's prior attendance at a residential school depending on the severity of the crime (Roach, 2014).

Aggravating Factors in Sentencing

It is interesting to note that the Government of Canada introduced s. 718.2(e) in the hopes of reducing discrimination against Aboriginal offenders at sentencing when much of the literature suggests that sentencing is not the main cause for the over incarceration of Aboriginal offenders. Latimer and Foss (2005) analysed the sentencing of Aboriginal youth and found that discrimination exists at several points in the Criminal Justice System. For example, in 1971, during the Donald Marshall Jr. murder-trial, there is evidence that indicates that the major actors involved in the trial were not practicing due process and instead simply pushed to convict

Marshall Jr. of the crime (Manette, 1988). Manette uncovers that the injustice suffered by Donald Marshall Jr. (and other Aboriginal offenders who face similar forms of discrimination) are caused by "human failures" among other things. These human failures can be understood as "racial attitudes, which prejudiced the normative functioning of judicial process" (p. 176). In short, Manette argues that the personal biases of the actors in the Criminal Justice System prevented them from investigating the case as objective parties and instead worked to prove that Marshall Jr. had committed the crime.

These human failures are also present in *HL vs. Canada 2005*, wherein an Aboriginal offender who had been sexually assaulted at the age of 14 while attending a residential school was convicted of several alcohol-related offenses (Roach, 2014). *HL* appealed his case to the Court of Appeal, attempting to show that his criminal activity was directly related to trauma endured while at a residential school. The Court of Appeal concluded that *HL's* "intentional acts" caused him to spend 40 months in prison and not the sexual assault at residential school. Roach (2014) outlines that in this case, *HL* was either considered "an innocent victim" of sexual assault or "a guilty offender" (p. 580), positions that were mutually exclusive from each other. This perception argues that the offender was acting independently, not as a result of his traumas and therefore undermines the impacts of colonization that s. 718.2(e) wishes to address.

As highlighted by the literature surrounding incarceration rates of Aboriginal offenders, there is no one specific factor that stands out as the main contributor to the over incarceration of Aboriginal offenders. Instead, it is the intersection of a variety of factors that ultimately lead to higher incarceration rates for Aboriginal peoples. Balfour (2012) argues that the recurring explanation for the overrepresentation of Aboriginal offenders in the Criminal Justice System is the socio-economic disadvantage of many Aboriginal communities. For example, low income,

poor education, transiency, and unstable family structures are all prevalent realities for members in Aboriginal communities across Canada. Furthermore, McMillan (2011) adds:

> The impacts of the history of colonization, informed by the experiences of residential schools, economic marginalization, systemic racism, class stratification, altered gender and generational roles, and criminalization of Mi'kmaq ways of life, all influence how people talk about, perceive and experience justice (p. 180).

McMillan highlights the effects that colonization has had on Aboriginal communities and therefore how it has altered their experience within the Criminal Justice System.

Specifically related to sentencing, Welsh and Ogloff (2008) state that the Supreme Court of Canada lists a variety of contextual factors relevant to Aboriginal offenders, such as "years of dislocation and economic deprivation, high unemployment rates, lack of opportunity, substance abuse, loneliness, and community fragmentation" (p.494). With these socio-economic factors leading to a higher occurrence of aggravating factors such as prior federal convictions and violent offences, sentencing judges may be unable to adequately apply s. 718.2(e) when giving out a sentence (Welsh and Ogloff, 2008). The socio-economic disadvantage faced by Aboriginal people is further perpetuated by systemic segregation onto reserves (Balfour, 2012). In fact, Balfour (2012) presents several statistics about the employment levels of on-reserve Aboriginal peoples. She states that 52% of people living on reserve are members of the working class while 44% of people on reserve are, in fact, unemployed (p.87). These staggering numbers of unemployed or poorly employed Aboriginal people on reserves is one poignant example of the socio-economic status in which most Aboriginal people find themselves.

In this chapter, I have unpacked some of the literature that has been written about Aboriginal offenders and justice inside Canadian courtrooms. As I have identified, little of this research exists in Nova Scotia. The next chapter will highlight the theoretical framework through

which I intend to structure my analysis as well as the methods that I will be using to gather relevant data.

Chapter 2: Design of the Research

"I have a dream that we won't have to talk about 'restorative justice' because it will be understood that true justice is about restoration, and about transformation. I have a dream." —Howard Zehr

Theoretical Framework

When addressing the over incarceration of Aboriginal offenders in Canadian prisons, the Federal government passed Bill C-41, which defined the principles of sentencing in the Criminal Justice System. It also included provision 718.2(e), which mandated sentencing judges to consider the unique circumstances of Aboriginal peoples when deciding on an appropriate sentence. However, Jane McMillan (2011) problematizes the idea of using a contemporary Western framework of justice to address Aboriginal offenders. While s. 718.2(e) may have been implemented to address the problem of over incarceration, the provision still exists within a traditional justice system that has historically disadvantaged Aboriginal peoples. McMillan asserts that to effectively combat the over-representation of Aboriginal offenders in prison, an alternative solution is more effective than continuing to use the system that perpetuates the marginalization of Aboriginal communities. Elliott (2011) agrees with this point when they state that, "the retributive system places the primary responsibility for issues like mental health, poverty, education and so on into the realm of criminal justice, which is not set up structurally or conceptually to address these issues" (p. 72). Elliott furthers the argument that as the racialized principles of colonialism continue to systematically disadvantage Aboriginal communities, finding a solution within the retributive justice system is ineffective.

Elliott (2011) highlights the important difference between a retributive justice system and a restorative justice system. Retributive justice can be defined as "a violation of laws or rules, where culpability is determined and the guilty are punished" (p. 65). In this sense, an offender is

viewed as someone who has broken the law under their own authority and therefore must be punished accordingly. This is problematic because it neglects the impacts that social factors such as poverty or a lack of education can have on one's ability to follow the law. Aboriginal people, for example, face higher rates of unemployment and substance abuse that stems from colonial practices such as the establishment of reserves or residential schools (Roach, 2014). In a retributive justice system, the consequences of colonialism are not considered and therefore systemic discrimination occurs when sentencing an Aboriginal offender. In contrast, restorative justice is an inclusive process that promotes the involvement of all stakeholders who have been impacted by the harm that has been caused. As a relational system, restorative justice works to repair the relationships that have been affected by the incident in a way that rehabilitates and reintegrates the offender back into the community (Elliott, 2011). Aboriginal offenders are able to benefit from restorative justice by having an opportunity to voice their story and hear other perspectives that can act as a vehicle for healing. Elliott (2011) argues that in order for restorative justice to be effective, it cannot exist within the current Criminal Justice System, instead it must be a new system with its own autonomy.

It is possible to infer that the failure of Bill C–41 to address the over incarceration of Aboriginal offenders has occurred because the government turned to the current retributive Criminal Justice System to solve a longstanding and complex issue. As such, I will be drawing on the literature surrounding restorative justice to better understand an Indigenous approach to justice. Through the wide lens of restorative justice, it will be possible to understand the pitfalls and consequences of relying on s. 718.2(e) and *R. vs. Gladue 1999* to directly address the over incarceration of Aboriginal offenders.

There is a close connection between traditional Indigenous interpretations of justice and

current restorative justice practices that exist across Canada. Hansen (2015) argues that "the downfall of Indigenous people in Canada and many other colonial countries is their alienation from their original justice systems" (p. 1). Since colonization, European settlers have attempted to divide Aboriginal peoples from their heritage which includes their language, culture, and forms of governance. Instead, Hansen (2015) argues that "what has been imposed on them is Western justice, more specifically, Western State-sanctioned justice; a retributive justice system that has been used to colonize and marginalize Indigenous peoples" (p. 1). Hansen further highlights the disconnection that exists between Aboriginal peoples in Canada and the Western justice system that is inherently biased and perpetuates their marginalization and disadvantage. In Manitoba in 1999, an Aboriginal Justice Inquiry was conducted by the provincial government. This inquiry asserts that "the purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged" (p. 22). With such vast differences between Indigenous and Western forms of justice, the difficulty of addressing the over incarceration of Aboriginal offenders in Canada through legislative means becomes evident. Currently, there are many institutions and justice associations that provide restorative justice opportunities for offenders across Canada. However, as Elliott (2011) highlights, restorative justice still works within the same retributive justice system to provide an alternative to punitive practices.

The retributive justice system is fuelled by an "economic and capitalist ideology in which the main goal is economic development" (Monchalin, 2016, p. 259). This ideology was born out of colonization and thus colonial practices and principles are still very much a part of modern society. The retributive system works to serve punishment to an offender who has broken the law

and therefore defied the state. In essence, it is supposed to give out in punishment what it has lost through the crime. It pits the state against the criminal and makes both parties mutually exclusive from each other (Monchalin, 2016).

Restorative Justice as an Alternative

Elliott (2011) underlines a caution that has to be taken with defining restorative justice in a fixed, limited manner. In chapter four of *Security with Care,* she brings to light the challenge of "clarifying purist versus maximalist models of restorative justice, where the former is a voluntary cooperative approach and the latter comprises court-imposed sanctions. Concerns raised by purists raise the warning bell of co-optation" (p. 66). It is important to remember that the adversarial system is still widely accepted as the best and truest form of justice and therefore restorative justice may have to exist and operate within the restraints of the principles of retributive justice. A purist definition of restorative justice can be helpful when establishing the groundwork for new operations or assessing the viability of a truly restorative practice. However, it is risky to neglect the existence of restorative justice in the traditional adversarial justice system. The restorative justice program that is most often referenced throughout this paper refers to the Nova Scotia Restorative Justice Program that has been designed under international guidelines of restorative justice. There is a variety of different approaches to restorative justice and the one that I include in my theoretical framework is a model that exists within the Criminal Justice System.

Restorative justice is an inclusive process whereby all stakeholders involved in an incident are invited to have a voice in the appropriate measures that need to be taken to rehabilitate the offender, the victim, and the community at large to ensure a holistic approach to

justice. A formal conference is held that may consist of the offender, offender supports, the victim, victim supports, trained facilitators, community members, police officers, and other invested participants who wish to have their voice heard (Zehr, 2002). Restorative justice works on many levels to meet the needs of the offender, the victim and the community in a way that prioritizes the accountability of the offender.

Elliott (2011) underlines Susan Sharpe who attempts to define restorative justice as "a justice that puts its energy into the future, not into what is past. It focuses on what needs to be healed, what needs to be repaid, what needs to be learned in the wake of a crime" (p. 67). Elliott asserts that restorative justice "renders the main parties central to the conflict, harm and crime in the process, rather than subordinating them to professional and institutional processes" (p. 69). She reaffirms the inclusiveness of restorative justice in a couple of ways. First, it asserts that the formal conference circle should be as inclusive as possible, including victims, victim supports, offender, offender supports, facilitators, community representation, police officers, etc. This allows for the truest form of restorative justice whereby all of the stakeholders are able to participate in the justice process and rebuild the relationship that has been broken. Second, the inclusivity of restorative justice urges that it is effective for all crimes, not only for minor and youth crimes but also applicable to violent and serious crimes. This may be difficult to achieve due mainly to public support. Restorative justice is much less accepted as a valid means of justice for violent and more serious crimes.

In 1997, Chief Justice of Canada. Edward Bayda, wrote a response to the principles of sentencing laid out in s. 718 and critiques its appropriateness in the society in which it exists. Bayda problematizes the "purpose" of sentencing that was codified in 1996 in a very succinct and important way. The purpose of sentencing in section 718 is "to contribute, along with crime

prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society" (p. 3). Bayda argues that the statement that all Canadians live in a "just, peaceful and safe society" is completely untrue for marginalized and racialized groups across the country. This quotation is entirely appropriate for the situation regarding Aboriginal offenders and sentencing. An attempt to remedy a problem within the system that has caused the problem itself is evidently not effective. As previously mentioned, Elliott (2011) cautions the use of restorative justice to mend an issue with Aboriginal offenders because it neglects to recognize the impacts of colonization on the lives of Aboriginal people. The argument made by Elliott (2011) is closely linked to that of Bayda (1997) in that both understand the importance of using an alternative method to address the over incarceration of Aboriginal peoples. Bayda (1997) highlights the mistake of assuming that society is just and peaceful, while Elliott (2011) asserts that retributive justice does not follow the values of Aboriginal justice.

In '*The Little Book of Restorative Justice'*, Zehr (2002) uses the term "truth-telling" that occurs within a restorative justice conference (p. 13). In his book, truth-telling refers to the transcendence of the experience of crime from the perspective of the victim when they are able to tell their story. Many of the cases that I analyzed highlighted the principles of deterrence and denunciation as paramount to the purpose of sentencing. However, one must critically determine whether or not these principles uphold the needs of the victims. Restorative justice practices define the needs of a victim from a third party perspective as problematic. For example, Zehr asserts that crime upsets the worldview that many people hold, often creating unwarranted fear or uncertainty in an otherwise safe person. Being able to tell their story as a victim, especially in the presence of the person who has caused the harm, allows for a deeper healing from both the victim's and the offender's perspective. The victim is able to have their story told in a public

setting where their feelings can be validated and the offender is able to understand the implications of their actions (Zehr, 2002).

Using restorative justice as a framework to understand the interpretation of both s. 718.2(e) and *R. vs. Gladue 1999* as a response to the over incarceration of Aboriginal offenders is significant because it exposes the tensions that exist between the traditional retributive and Indigenous restorative systems of justice. It provides a unique opportunity to understand the failure of s. 718.2(e) and *R. vs. Gladue 1999* as it exists in the Western system of justice that continues to perpetuate the marginalization and criminalization of Aboriginal peoples.

Problem Statement and Research Question

After a thorough review of the literature surrounding the incarceration rates of Aboriginal people in Canada, it is quite apparent that the introduction of s. 718.2(e) in the Criminal Code as a response to the over incarceration of Aboriginal offenders is both controversial and ineffective. Many of the scholars working in this field have highlighted several legal and non-legal factors contributing to the over incarceration of Aboriginal offenders.

However, while much of the research that I have reviewed has been done across Canada, there is no study that was conducted solely in Nova Scotia. I believe this to be a significant oversight due to several salient characteristics that shape the Nova Scotia legal system, in particular regarding Aboriginal offenders. After the wrongful conviction of Donald Marshall Jr., a Royal Commission was produced in 1989 to evaluate the legal proceedings inside the Nova Scotia legal system to assess how to best address Aboriginal offenders. This Commission presented over 80 recommendations to the provincial government and other key institutions within Nova Scotia to ameliorate criminal trials involving Aboriginal offenders. This occurred

before the introduction of s. 718.2(e) in 1996 and thus it is fair to assume that in Nova Scotia the proceedings in courtrooms already had somewhat of a headstart when tackling the question of discrimination. This study specifically examines the implications of s. 718.2(e) as they apply in a Nova Scotia context post Royal Commission in 1989. My research aims to answer the following question: "*In the context of the Nova Scotia Legal System, how do the sentencing judges in the Nova Scotia Provincial Court interpret s. 718.2(e) and the precedent set in R vs. Gladue 1999?*"

Method(ology)

My goal is to further understand the implications of s. 718.2(e) in the Criminal Code in Nova Scotia. To do this, I conducted a qualitative content analysis of ten sentencing decisions that came out of the Nova Scotia Provincial Court from 2006–2016. Qualitatively, I examine the language used by sentencing judges in Nova Scotia in their sentencing decisions. I excluded sentencing decisions from the Nova Scotia Court of Appeal, the Nova Scotia Supreme Court, cases involving youth offenders, and any cases that do not deal directly with an Aboriginal offender. As much of the literature states, s. 718.2(e) and *R. vs. Gladue 1999* do not play major roles in the sentencing of Aboriginal offenders at the federal level due to the seriousness of the crime that is required to be tried at that level. The more serious the crime, the less likely s. 718.2(e) and *Gladue* will be referenced and considered in sentencing (Roach and Rudin, 2000). I am choosing to analyze sentencing decisions from Nova Scotia due to the unique history of the criminal justice system in that province.

I narrowed my research to analyse only sentencing decisions due to the reach of s. 718.2(e) as a response to the over incarceration of Aboriginal offenders. As much of the literature suggests, this over incarceration comes from a vast number of factors related to the

historical colonization and marginalization of Aboriginal peoples and communities. However, the federal government introduced Bill C–41 and s. 718.2(e) as a solution to the problem despite its relevance to only the sentencing of Aboriginal offenders. For this reason, I decided to only analyse sentencing decisions to understand how judges interpret s. 718.2(e) and *R. vs. Gladue 1999.*

I conducted a search on www.canLII.org, the public domain where court documents are accessible to the general public. I narrowed my search down to include any decisions made in accordance to s. 718.2(e) and *Gladue* in Nova Scotia. In the search terms, I have "Aboriginal" in the document text search terms and "*R. vs. Gladue 1999*" in the cited cases. I conducted a close reading of 10 sentencing decision from 2006–2016 from different courts around the province. I have three guiding questions that I will use to identify significant information in each document. These questions are as follows:

1. What language does the judge use to describe the offender, case, or incident?
2. What tensions are expressed in the sentencing decision between the law and *R. v. Gladue 1999?*
3. What forms of resistance exist to the purpose or legitimacy of the principles expressed in *R. v. Gladue 1999*?

I am looking for consistent patterns that are apparent throughout the material as they apply to sentencing decisions of Aboriginal peoples in Nova Scotia. Due to time restrictions associated with the honours project, a close reading of sentencing decisions is a strong method of data collection. Learning how Nova Scotia judges interpret s. 718.2(e) and *Gladue* precedence can shed light on the sentencing of Aboriginal offenders in the province and how the unique circumstances of the Nova Scotia legal system influence the language they use. Comparing and

contrasting the actual sentence received by the offenders to the severity of their crime is significant in understanding how relevant the principles of s. 718.2(e) and *R. v. Gladue 1999* are in sentencing Aboriginal offenders.

Limitations

The largest limitation to my study was the level of severity in offence that I was able to find. Due to the fact that s. 718.2(e) and *R. vs. Gladue 1999* both play little role in more serious cases, I was restricted to lower level provincial courts. While it is significant to note the proverbial glass ceiling that restricts sentencing provisions for Aboriginal offenders, it is not entirely relevant to my study, which is looking at its use in courtrooms. Furthermore, I was restricted by the time allotted for this project. A concrete comparison between sentencing provisions and the recommendations of the Royal Commission on Donald Marshall Jr. would be useful however it did not fit within the limits of my project.

Chapter 3: Due Process

"I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." —Abraham H. Maslow

Introduction

After conducting a comprehensive search on CanLII, the online public database that documents sentencing decisions from across Canada, I narrowed my search to ten cases that dealt with Aboriginal offenders in the Nova Scotia Provincial Court. The cases were heard in provincial courts in Truro, Shubenacadie, Sydney, Pictou and Kentville. Six different judges presided over the ten trials. These included Anne S. Derrick, John G. MacDougall, A.P. Ross, Del W. Atwood, Jean M. Whalen, and Alan T. Tufts[5]. Appendix A includes a table that shows each case, the presiding judge, as well as the charges for each defendant. For example, some of the charges range from the breach of an undertaking and assault to kidnapping and sexual assault. Each case is unique, despite some overlap between certain judges. Within this chapter, I will also highlight a judge who presided over two cases separated by two years, with definitive differences in sentence given.

I do not intend my analysis to be generalizable to the rest of Canada nor even other trials across Nova Scotia. I have chosen ten cases in order to understand better the proceedings inside the Nova Scotia Provincial Court. These ten cases deal with, in some capacity, s. 718.2(e) and *R. vs. Gladue 1999*. The results I present here are valid for the ten cases I have analysed and while some aspects may be considered accurate for other cases, it is not my intention nor my objective

[5] In many of the cases, the judges will cite and reference other case law and the words of other judges, however I will be citing only the sentencing decisions that I have analyzed. It is significant to note that these judges take a conscious effort to select a section of the case to present, thus validating my approach to include any information that is presented in the sentencing decisions as relevant.

to generalize. Throughout my analysis, I noticed particular patterns in the way that sentencing judges would address the defendant, the charges laid against the offender, and the invocation of both section 718.2(e) and *R. vs. Gladue 1999*. Specifically, I noted a distinct chronological pattern that flowed from the start to finish of the case that I have labelled definition, contradiction and justification.

First, the judge usually begins by highlighting the offender's past, giving some context to the colonization of Aboriginal peoples in Canada. The judge will normally describe the marginalized and disadvantaged situation faced by Aboriginal communities as a result of colonization in Canada that has led them to the courtroom. Second, I noticed that the judges then often contradict themselves in the proceedings after outlining the circumstances of the defendant. Finally, in the court cases that I have analysed, the judges justify their sentence by explaining that the principles of deterrence and denunciation outweigh the principles of rehabilitation and reintegration.

In this chapter, I will explore the proceedings of the ten cases that I have analyzed as they follow the pattern of definition, contradiction, and justification. Through a restorative justice lens, the tension that exists between a retributive justice system and a restorative justice system will become apparent.

Definition

Previous studies on the sentencing of Aboriginal peoples across Canada also highlight similar patterns in their research. For example, Roach, Kent, and Rudin (2000) discuss how the court recognized that there had been an increase in the over-representation of Aboriginal peoples in Canadian prisons, which could be caused by a host of social disadvantages such as poverty and a

lack of employment opportunities. The judges in Nova Scotia that I have reviewed discuss similar historic marginalization. Honorable Judge Anne S. Derrick states, "I recognize that like so many First Nations people, you have had a difficult and challenging life" (*R vs. John Freeman Julian*, 2006, p. 20). Acknowledgements such as these in the Nova Scotia Provincial Court demonstrate that the actors in the legal system are themselves aware of the disadvantage that Aboriginal communities face, which may lead to a higher level of involvement within the Criminal Justice System. What I find significant is that the Criminal Justice System has failed to adopt an adequate solution to address the over incarceration of Aboriginal peoples despite the recognition by the judges of the marginalization that exists to this day.

Furthermore, in 2009, Judge A. P. Ross stated "the situation of the offender, her past and present position in her community, the initiative she has shown in advancing her own education, and her potential to be an example to young people in classrooms in First Nations communities are therefore especially persuasive factors" (*R. vs Constance Stevens*, p. 9). Much of the language used to describe Aboriginal offender's past speaks to the impacts that colonization has had on their communities to this day. An Aboriginal family's ability to thrive off the land, as is traditionally their way of life, becomes stunted when segregated onto a reserve. Moreover, the horrendous treatment in federally mandated residential schools that were built to eradicate Aboriginal culture has had huge long-term effects on communities. The judges refer to this troubled history in their own way and recognize the impacts that this had on each individual defendant. For example, Judge John G. MacDougal states "trauma of the event and subsequent involvement with the justice system left her disillusioned and with a feeling of powerlessness" (*R vs. D.M.G. and A.J.G., 2006, p. 3).* In this case, the judge understands the relationship between the history of the Aboriginal defendants and their involvement with the Criminal Justice System.

Bill C–41 became law in 1996. The oldest court case that I analyse dates back to 2006, therefore years after the implementation of s. 718.2(e) and the decision in *R. vs. Gladue 1999*. Seeing as the discourse around Aboriginal offenders, discrimination, and over-incarceration has changed very little (if at all) over a decade, it should be apparent that Bill C–41 was not an effective response to the over-representation of Aboriginal offenders in Canadian prisons. It is possible to note a clear difference in the discourse of one judge on two separate cases five years apart. For example, in *R vs. Constance Stevens 2009*, Judge A. P. Ross describes the past of defendant Ms. Stevens in a positive light. He states:

> The situation of the offender, her past and present position in her community, the initiative she has shown in advancing her own education, and her potential to be an example to young people in classrooms in First Nations communities are therefore especially persuasive factors (p. 9)

In this excerpt, the judge outlines the relationship that the defendant has with her heritage and conscribes her ability to serve a sentence in the community to her value as a teacher in a First Nations context. Judge A. P. Ross describes the defendant's past as a mitigating factor in sentencing. Five years later, in *R vs. Dana Smith 2014*, Judge A. P. Ross makes assumptions and handles the past of the defendant in a very different manner. The judge in this case positions the *Gladue* report in the following way:

> Here I see that he is actually of Ojibwe and Cree descent although his parents became members of the Membertou First Nation. I am not going to deal with the report in great detail. I am going to touch on just a few parts of it here and there (p. 10)

In this second instance, Judge A. P. Ross undermines the validity of the defendants' heritage and describes his past in a significantly different manner. He places minimal relevance on the *Gladue* report that decreases the weight given to his past as mitigating factors. These two cases, though involving the same judge, demonstrate the inconsistencies that exist in the interpretation of s. 718.2(e) and its ineffectiveness as a response to the over incarceration of Aboriginal offenders.

Interestingly, if one analyses the language used by the judge through the lens of restorative justice, it is possible to recognize the needs of the victims of crime as well as unpack the concept of "truth-telling" as it applies to the lives on the offenders. The situation of the offenders in both cases were described by the judge, in two different capacities. Instead of allowing the defendant to have a voice of their own, the judge assumes this role and therefore it is difficult to achieve consistency in the "truth-telling."

Zehr (2002) astutely identifies the offender as a victim. He states that it is understood through many studies that have been conducted that "many offenders have indeed been victimized or traumatized in significant ways" (p. 29). It is important to recognize this trauma as it may be a large contributing factor to the reason why a person has caused harm. As was mentioned earlier, the concept of "truth-telling" is significant in this instance. As Zehr (2002) explains, "truth-telling" is the cathartic experience through which an offender participating in a restorative justice circle is able to share their story. While this does not justify the offense, it allows for those impacted to develop empathy for the offender. However, in the cases that I have analyzed, it is the judge who interprets statements from the offender in a way that may make assumptions about their past. For example, in *R vs. Kathleen Andrea Brooks 2008,* Judge Derrick states "she has a good relationship with each of her parents, who are no longer together, and reported no issues of violence or substance abuse in the home when she was growing up" (p. 8). In this statement, Judge Derrick reads from a report that was produced about the defendant, without giving the defendant a voice of their own to speak. Removing the voice of the offender limits their ability to describe their life experience and does not allow for the Crown or judge to accurately view an Aboriginal offender as a victim of colonization.

In the Criminal Justice System, there is little voice given to the offender to talk about the harm that was caused and any underlying factors that may have contributed to their decision to cause harm. However, it is important to allow the offender to have a voice in order for the victim to understand exactly what created the space for the offender to commit the act that they did. In a very complicated cycle, according to Zehr (2002), restorative justice allows the victim of crime to hear the story of the offender which works to decrease the distance between the victim and the offender. Another notable example that demonstrates the ways in which an offender is stripped of their voice in a retributive justice system is in *R vs. Stephen Richard Rose 2013*. Judge Whalen stated that "he does have a history of gainful employment and has been described as a 'reliable employee'" (p. 3). In this excerpt, the judge again speaks for the defendant and describes their life to everyone present in the courtroom. As a third party, the judge is unable to present the life of the offender in the same detail that the offender would be able to describe themselves. The concept of "truth-telling" that emerged from Zehr's book is lost in the retributive justice system. Therefore, one can infer that the implications of s. 718.2(e) are not as visible when a third party defines the life of an Aboriginal offender as opposed to the offender having the opportunity to talk about their lived experiences and how that has led to the incident.

Restorative justice highlights how an offender was most likely a victim at one point which then motivated their actions. Zehr cautions, however, that this is a controversial topic and is not always seen as important by all victims. To justify a crime seems like a crime in itself and moreover "it is difficult to explain why some people who are victimized turn to crime and others do not" (p. 29). For example, in *R vs. Dana Smith 2014,* Judge A. P. Ross states that "other young people have found themselves in trouble with drugs even though they had excellent upbringings" (p. 12). This quotation exemplifies Zehr's caution about describing the offender as

a victim. Judge Ross demonstrates this caution by pointing out that a person's upbringing does not necessarily account for their actions. It is evident that some victims of crime may be unsatisfied with the story of the offender because they are simply locked into the traditional punitive way of thinking and feel obligated to see a fit punishment for the offender.

Furthermore, Zehr states that "because the community is involved, discussions within the circle are often more wide-ranging than in the other forms" (p. 53). In the situation of Aboriginal offenders and the description of the disadvantage that they have in society, I believe it is fair to show how Aboriginal people in general have been victimized by the Criminal Justice System and the Western ideals of justice. For example, in *R vs. Stephen Joseph Dakota Maloney 2013*, Judge Del W. Atwood states "The court takes judicial notice of the broad, systemic, cultural and background factors affecting members of First Nations communities who come into conflict with the law" (p. 2). Judge Atwood recognizes the broader injustice that is felt by an Aboriginal offender who finds themselves involved in the Criminal Justice System. Inside the retributive model of justice, victims are more likely to want a punishment that is fitting of the crime committed by the offender because they are unable to empathize. Aboriginal offenders by definition have been marginalized and disadvantaged in a way that has affected their ability to live a productive life and therefore I believe the restorative model of justice is more appropriate when a case involves an Aboriginal offender.

By first defining the situation of the defendant, the judge is able to identify why they will include s. 718.2(e) and *R vs. Gladue 1999* in their decision. Section 718.2(e) mandates that the judge considers the circumstances of Aboriginal offenders so they describe the defendant's past as a means to find mitigating factors in sentencing. However, as will be evident in the following

section, there is usually some form of contradiction following the description of the defendants past by the judge.

Contradiction

Throughout my analysis, a pattern of contradiction emerges in the form of a rebuttal to the discourse around the circumstances of Aboriginal offenders. After defining or describing the disadvantage and marginalization experienced by Aboriginal people, the judge or the Crown may present a contradiction of this understanding. For example, in *R. vs. Stephen Richard Rose 2013,* the judge asserts that, "the defendant's problem has been drugs and alcohol for a very long time. Those addictions far outweigh any problems he may have encountered being an Aboriginal person" (p. 5). Following the judge, the Crown argues that "the *Gladue* factors were relevant when the defendant was younger, not older… and that the defendant has risen above his difficulties" (p. 5). In this excerpt, the Crown undermines the Aboriginality of the defendant by neglecting to recognize the legitimacy of the impacts of the colonization of Aboriginal peoples. Later in the case, Judge Jean M. Whalen sympathizes with defendant Stephen Rose. He states, "Aboriginal defendants are not required to establish a direct nexus between their cultural heritage or personal antecedents and their conflict with the law" (*R. vs. Stephen Richard Rose,* 2013, p. 10). The judge continues to say that "Stephen Richard Rose has personally experienced the adverse impact of many factors continuing to plague Aboriginal communities since colonization" (p. 12–13). Judge Whalen contradicts the Crown and validates the factors affecting the defendant as an Aboriginal offender. Imbalances and inconsistencies between the different actors such as demonstrated above in the courtroom are frequent.

However, these contradictions may also exist in the rhetoric of the same actor. For example, Judge A. P. Ross explains that "the *Gladue* report I think is written primarily for the Court's benefit. However, I would like to think and it is reasonable to think that it may also serve to give Mr. Smith himself some measure of self-understanding that he might not gain otherwise" (*R. vs. Dana Smith*, 2014, p. 10). Ross asserts this briefly after stating: "*Gladue* factors on Mr. Smith's part do not necessarily justify a different sentence but they provide necessary context for understanding and evaluating case specific information provided by counsel" (p. 8). In this instance, Ross diminishes the value of a *Gladue* report, a binding document meant to provide context in sentencing for a particular offense that has occurred. Instead, the judge views the report as nothing more than a learning opportunity for the defendant.

As previously highlighted by Elliott (2011), a restorative model of justice is designed to address the future of the offender and to repair and learn from the incident in a meaningful way. In the retributive Criminal Justice System, the emphasis is placed on past actions and the sentencing deserving of the offender. The tension that exists between these two models is exemplified when Honorable Judge Jean M. Whalen stated that "in crafting the appropriate sentence the Court must have regard to the factors set out in the *Code* as well as the nature of the offence committed and the personal circumstances of the offender" (*R vs. Stephen Richard Rose*, 2013, p. 7–8). The judge in this case follows the discourse around the social disadvantage of Aboriginal communities, however, he first highlights a responsibility to consider the Criminal Code and the nature of the offence. In essence, the judge contradicts himself by placing a hierarchy on the factors that must be considered in sentencing an Aboriginal offender. Furthermore, in the most recent case that I analysed from 2016, Judge Atwood asserts:

> The court is certainly aware of the fact that, as offences become more prevalent and serious, the sentences imposed upon members of the First Nations communities will

> come to approximate more closely the sentences imposed ordinarily upon non-Aboriginal offender (*R vs. Leroy David Denny, p. 7)*

This excerpt is significant because it not only highlights the tension that exists between the retributive and restorative models of justice, it demonstrates the limits that surround the interpretation of section 718.2(e). Atwood perpetuates the fact that as the seriousness of a crime increases, weight given to the mitigating factors of Aboriginal offenders decreases. This pronounced hierarchy accounts for the inability of sentencing judges to apply section 718.2(e) and the precedence set by *R vs. Gladue* in more serious cases involving Aboriginal offenders.

In the most serious case that I have analysed, *R vs. Gordon Frank Nickerson 2013*, the offender kidnapped and sexually assaulted two female victims. This was not his first charge of kidnapping. I was most interested to see how the judge would refer to the Aboriginal status of the offender. In this case, Judge Alan T. Tufts began by stating:

> Mr. Nickerson was conflicted around his Aboriginal heritage because of his fair skin colour, hair and eyes. He felt he was not fully accepted in the Aboriginal community but at the same time viewed by the white community as a Native person (p. 26)

The description of the identity crisis that affected the offender demonstrates an acknowledgement of the negative impact that colonization has had on him throughout his past. The judge continued to state that "*Gladue* considerations thus only receive predominant weighting in an s. 753(4) [Dangerous Offender] sentencing if the public can reasonably be protected with a sentence which is motivated by *Gladue* considerations" (p. 48). In this instance, the judge contradicts himself by first outlining the role that his Aboriginal status has played in the lifestyle that he leads and then continuing to undermine the validity of his circumstances by highlighting the nature of the offense. Referring back to the definition of retributive justice provided by Elliott (2011), Judge Tufts is unable to adequately impose section 718.2(e) due to

the priority given to the seriousness of the event. Interestingly, in this instance, it is the judge who must decide whether an offender is a danger to the greater public; the public has no voice to decide for themselves whether or not they believe the offender is dangerous. In a restorative model of justice, the perspective of the community would be heard and a more accurate picture of the dangerousness of the offender would be visible.

Sentencing judges who wish to address the over incarceration of Aboriginal peoples consistently contradict themselves because they are still bound under a retributive model of justice that prioritizes the principles of deterrence and denunciation before rehabilitation and reintegration. For example, in *R vs. Kathleen Andrea Brooks 2008*, Judge Derrick states that "*Gladue, Wells, and Kakekagamick* make it clear that more violent and serious offences will likely merit similar sentences for Aboriginal and non-Aboriginal offenders" (p. 21). In this case, Judge Derrick is unable to interpret accurately s. 718.2(e) and the defendant as an Aboriginal person as a mitigating factor because the case law that she cited delineated the limits of sentencing provisions. The more serious the crime gets, the less likely the judge will consider the situation of the offender as a mitigating factor. After the contradiction of the situation of the offender and the ineffective interpretation of s. 718.2(e), the judge often justifies their sentence. This justification normally emerges from the principles of deterrence and denunciation that are paramount in the retributive justice system.

Justification

Following a contradiction in trial, the judge will determine the sentence that is fitting for the crime and justify their decision. Before coming to a final decision, the judge will hear from both Crown and Defense to understand their opinions on a just sentence. Through most of the cases,

the Crown will present a sentence they feel is fitting of the offense with a rebuttal of the Defense who will present their recommended sentence for the offender. For example, in *R vs. Kathleen Andrea Brooks 2008,* the defendant was charged with assault. The Crown recommended a twelve-month prison sentence while the Defence submitted that the defendant should serve a four-month conditional sentence in the community. In this particular case, Judge Anne S. Derrick recognized that "there is a reasonable alternative to sending Ms. Brooks to jail. A jail sentence will remove the defendant from her community and prevent her from having a role in holding her to account" (p. 30). This observation is significant in this case because it demonstrates that the judge is aware of the implications that serving a sentence in the community can have to hold the offender accountable to their actions. As previously mentioned by Zehr (2012), accountability is an integral part of restorative justice and it is important that an offender be held accountable for their actions. In this case, Judge Derrick decided to follow the suggestion of both Crown and Defence and gave a final sentence of twelve months conditional sentence to be served in the community followed by eight months' probation. When sentencing in favor of the Crown, the judge most often decides to highlight the principles of deterrence and denunciation in lieu of rehabilitation and reintegration. In this case, the judge found a balance between both the retributive and restorative justice.

Two of the ten cases that I analysed were presided by Judge Anne S. Derrick. Two years before *R. vs Brooks 2008,* Judge Anne S. Derrick presided over *R vs. John Freeman Julian 2006.* In the earlier case, the defendant had been charged of assault among other charges such as breaching an undertaking and probation. The assault in this case, however, was one of domestic violence, and the resulting sentence is indicative of the offence. After hearing from both Crown and Defence, and presenting the *Gladue* report that determines the influence of the defendant's

Aboriginal status on the incident, Judge Derrick gave a sentence of fourteen months in prison (less the six months already served) with two years of probation. The probation had strict conditions such as not being permitted to be present at Indian Brook, and follow treatment orders as given by the probation officer. Finally, Judge Derrick stated that "deterrence and denunciation in cases of domestic violence must be foregrounded and emphasized" (*R. vs. John Freeman Julian*, 2006, p. 16). Judge Derrick's sentence highlights the principles of deterrence and denunciation above that of rehabilitation and reintegration. She justifies this by underlining the nature of the offence and the seriousness of domestic violence. The inconsistencies that exist between the interpretation of s. 718.2(e) and *Gladue* by the same judge just two years apart exemplifies the ineffectiveness of sentencing provisions as a response to the over incarceration of Aboriginal offenders.

Furthermore, in *R vs. Stephen Joseph Dakota Maloney 2013,* Judge Del W. Atwood further perpetuates the idea that as the seriousness of the crime increases, their ability to effectively use section 718.2(e) as a mitigating factor decreases. He asserts:

> Although I do take into account Mr. Maloney's status as a member of a First Nation community, I do apply the principles set out by the Ontario Court of Appeal in *R. v. Jacko 2010;* that case dealt with an Aboriginal offender, and the Court held that, as the seriousness of an offence elevates, there will follow as a consequence greater parity with sentences imposed upon non-Aboriginal offenders. (p. 4)

This quotation further demonstrates the continual justification that exists in the ten cases that I have analysed when giving a sentence in favor of the prosecution. In 2006, Judge John G. MacDougall spoke about the defendants and the "horrendous experiences suffered by both accused in their early lives" (*R. vs D.M.G. and A.J.G.*, p. 2). However, he continues to say that "neither the pre-sentence report nor the *Gladue* reports suggest D.M.G. has expressed particular interest in her native heritage" (p. 21). The second excerpt justifies his sentence of two years less

a day on house arrest with a host of conditions to follow. While the judge is in fact considering the disadvantaged situation of Aboriginal offenders, he emphasizes the principles of deterrence and denunciation and then justifies this sentence with undermining the level of "interest" that the accused has of her Aboriginal heritage.

Previous literature also highlights the legitimacy of Aboriginal status in legal proceedings. Kent Roach (2014) states that despite *R vs. Ipeelee 2012* setting a precedence for the broader legacy of residential schools being taken into account for aboriginal offenders, there are still a large number of criminal courts that have required an Aboriginal offender to establish a direct relationship between their crime and residential schools. In some cases, "the accused were successful in demonstrating a direct causal connection between their residential school experience and their crime. For example, a survivor who started drinking again as a result of the stress of his civil residential-school claim received a conditional sentence" (p. 585). In this case, Roach posits that a judge may be unable to see the historical marginalization of Aboriginal peoples as a mitigating factor in sentencing unless a direct link between the crime and discrimination exists. In *R vs. Constance Stevens 2009,* Judge A. P. Ross states:

> This sentence is also informed by *R. v. Gladue* … I say this not in the sense that her circumstances and background are causal factors for her crime. Rather, it is the shift of emphasis away from deterrence towards the restorative and remedial aspects of sentence that I have in mind. (p. 8)

This excerpt demonstrates the inability for Judge Ross to perceive the systematic disadvantage and marginalization experienced by Aboriginal communities to be a factor in an offense committed by the defendant. Further in the case, Judge Ross asserts that "apart from the issue of whether to jail an offender, does *Gladue* assist in deciding what form of sentence is fit and appropriate?" (p. 9). The implications of s. 718.2(e) and *R vs. Gladue 1999* were intended to identify the historical disadvantage that Aboriginal communities experience as a direct result of

colonization. Instead, Judge Ross is unable to see past its use as a deciding factor whether there is a sentence of incarceration. Whether or not a direct causal link can be identified between the crime and an incident influences the justification of judges when sentencing an Aboriginal offender in Nova Scotia. While *Gladue* reports in Nova Scotia are not always interpreted appropriately and therefore the weight given to Aboriginal status as a mitigating factor is inconsistent and inadequate.

Throughout my analysis, the tension between the retributive justice system and provision 718.2(e) are evident. The values of deterrence and denunciation that are integral to the retributive justice system contradict the values of rehabilitation and reintegration that emerge through section 718.2(e). For example, in *R vs. Nickerson 2013*, Honorable Chief Judge Alan T. Tufts states "however, the *Gladue* principles do not override the fundamental purpose of the Dangerous Offender provisions – the protection of the public … *Gladue* considerations thus only receive predominant weighting in an s. 753(4) [Dangerous Offender] sentencing if the public can be reasonably protected with a sentence which is motivated by *Gladue* considerations" (p. 48). This decision by Tufts is representative of the majority of high-profile offences that undergo scrutiny through s. 718.2(e) and *R. vs Gladue 1999*. A hierarchy is placed upon the factors that influence sentencing and often the principles of deterrence and denunciation come out on top. This particular case is relevant because of the nature of the crime. Nickerson, the accused, had kidnapped two female victims and sexually assaulted them on multiple occasions. As this is not the first offence of this nature for Nickerson, it was recommended that he be identified as a Dangerous Offender under s. 753(4) of the Criminal Code. The judge justifies this by highlighting that the protection of the public is of utmost concern. Automatically the judge has excluded the offender as a member of the public and speaks for the community in assuming that

they felt unsafe. Whether or not the community did feel unsafe would be better decided within the community instead of by the judge acting as a representative of the community.

Within the retributive justice system, s. 718.2(e) and *R. vs Gladue 1999* principles are not prioritized due to the other factors that must be considered. Alternatively, in a restorative justice setting, the victims, the community-at-large, and legal officials would have been able to come together to decide the fate of offenders and to evaluate exactly what led to this offence. While it is uncertain whether an alternative sentence would have been administered through restorative justice, it is undeniable that the situation of Aboriginal offenders would have played a larger role in the sentence. The voice of the offender and the community would have been heard and I believe these to be important perspectives concerning an Aboriginal offender due to the circumstances of their situation.

In essence, it is the justification that demonstrates the inability of sentencing judges to adequately interpret s. 718.2(e) when sentencing Aboriginal offenders. As they are still bound by the principles of deterrence and denunciation within the retributive justice system, sentencing judges are unable to assess the circumstances of an Aboriginal person as a mitigating factor. After defining the situation of the defendant and subsequently contradicting this discourse, the judge finally justifies their decision within the retributive justice system as the greatest priority.

In this chapter, I have discussed the three themes that I have discovered through my analysis of the ten sentencing decisions from the Nova Scotia Provincial Court. Through a comparison with previous literature as well as the tension between retributive and restorative justice, it is possible to understand the implications of section 718.2(e) and *R vs. Gladue 1999* in Nova Scotia. In the next and final chapter, I will be making final comparisons as well as

conclude my thoughts on the use of sentencing provisions as a response to the over incarceration of Aboriginal offenders.

Chapter 4: Conclusion

"There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice" —Charles de Montesquieu

Aboriginal justice remains a controversial topic that is both heavily debated and increasingly important. With such a large over representation in Canadian prisons, Aboriginal communities continue to face marginalization, discrimination, and disadvantage from all levels of government. While governments have recognized the horrific past and present that Aboriginal people endure as a result of colonization, their response has been both inappropriate and inadequate. In order to address the over incarceration of Aboriginal offenders in Canada, the Federal government introduced sentencing provisions through Bill C–41 in 1996 that defined the principles of sentencing. The provisions also mandated sentencing judges to consider the situation of *all* Aboriginal offenders. These provisions were further solidified in 1999 through the Supreme Court case of *R. vs. Gladue 1999*. In essence, the Federal government targeted sentencing as the intersection in the justice system that is responsible for the over incarceration of Aboriginal peoples.

The difference between retributive and restorative justice is key to the discussion around Aboriginal over incarceration. Though traditional retributive justice systems may vary from nation to nation, they are still built on similar key principles of rehabilitation and reintegration. Aboriginal justice is akin to restorative justice in that it works with the community to understand the harm that has been caused and to identify exactly how that harm can be repaired and the offender can rejoin the community as a productive member of society.

Furthermore, it is ineffective to attempt to solve a problem that is caused by the Criminal Justice System within that same system. Retributive justice was born of the era of colonization

and therefore shares some responsibility for the creation of the many social problems that face Aboriginal peoples (Monchalin, 2016). Throughout this paper, it is clear that a tension exists between a retributive justice system and a restorative justice system. Retributive justice continues to perpetuate social disadvantage for Aboriginal peoples and maintains their community's low level of autonomy. Instead, the Federal government must focus on alternative forms of justice to begin healing Canada's relationship with Aboriginal peoples instead of targeting sentencing as the primary issue.

Throughout this project, I have learned more about myself and my identity as an Aboriginal person. I am honoured to have learned more about the problems that continue to plague Aboriginal communities across Canada and, more specifically, in Nova Scotia. I have been able to better understand the relationship between the Federal Government and the interests of Aboriginal people. Though recognizing the distinct over incarceration of Aboriginal offenders in prisons across Canada, it is evident that introducing sentencing legislation through section 718 was not effective as a solution. Instead of turning to the current Criminal Justice System that promotes a retributive model of justice, it is necessary to look at alternative means by which they can address discrimination toward Aboriginal offenders.

The conversation around Aboriginal offenders in Canada and the over-representation of Aboriginal people in Canadian prisons have become key social and political concerns in Canadian society. However, since the introduction of sentencing reforms in 1996, many scholars have shifted their focus in understanding the effectiveness of legislation used as a response to the over incarceration of Aboriginal offenders. It is important that this scholarly discussion continues, but I think that it is important that researchers do not lose sight of the main goal that is held throughout: decreasing the over incarceration of Aboriginal offenders in a decolonizing,

anti-oppressive manner. Research should not simply add to the body of literature on Aboriginal communities or produce a project that moves little ground in regards to over incarceration. It is important that researchers carefully design their research, collaboratively with the communities they are working with, so as to be as beneficial to that particular community as possible. In closing, it is important that actors in the Criminal Justice System do not accept s. 718.2(e) as the panacea of the over incarceration of Aboriginal offenders and that instead they look to alternative means of justice to navigate the issue.

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Appendix A

Case	Specifics	Charges
R. vs. John Freeman Julian	Honourable Judge Anne S. Derrick Truro, Nova Scotia November, 2006	s. 267(b) – assault causing bodily harm s. 733.1 – failure to keep the peace s 145(5.1) breach of an undertaking
R. vs. D.M.G. and A.J.G	Honourable Judge John. G. MacDougall Truro, Nova Scotia November, 2006	s. 236 – accessory after the fact to manslaughter
R. vs. Kathleen Andrea Brooks	Honourable Judge Anne S. Derrick Shubenacadie, Nova Scotia September, 2008	s. 267(b) – assault causing bodily harm s. 733.1 – failure to keep the peace
R. vs. Constance Stevens	Honourable Judge A. P. Ross Sydney, Nova Scotia September, 2009	s. 267(a) – assault with a weapon
R. vs. Stephen Joseph Dakota Maloney	Honourable Judge Del W. Atwood Pictou, Nova Scotia April, 2013	s. 430(4) – mischief in relation to property s. 333.1 – theft of a motor vehicle s. 334(a) – theft of goods valued at more than five thousand dollars
R. vs. Stephen Richard Rose	Honourable Judge Jean M. Whalen Sydney, Nova Scotia October, 2013	s. 261.1(1)(a) – breach of a recognizance s. 145(3) – breach of an undertaking

		s. 348(1)(b) – breaking and entering a place and committing an indictable offence
R. vs. Gordon Frank Nickerson	Honourable Chief Judge Alan T. Tufts Kentville, Nova Scotia October 2013 and January 2014	s. 279(1.1)(b) – kidnapping with intent to cause her to be confined (two counts) s. 272(2)(b) – commit a sexual assault while carrying an imitation weapon (two counts) s. 348(1)(d) – break and enter and commit an indictable offence s. 159(1) – commit non consensual anal intercourse (two counts) s. 811(a) – breach a peace bond s. 266(a) – assault (two counts) s. 249(2)(a) – operate a motor vehicle on a highway in a manner that was dangerous to the public s. 252(1) – have care and control of a vehicle that was involved in an accident with a vehicle, with intent to escape civil or criminal liability
R. vs. Dana Smith	Honourable Judge A. P. Ross Sydney, Nova Scotia September, 2014	s. 344(b) – robbery s. 90 – carrying a concealed weapon s. 733.1 – breach of probation s. 351(1) – possession of break-in instrument
R.. vs Valerie Claudette Sack	Honourable Judge Del W. Atwood Pictou, Nova Scotia December, 2014	s. 145(3)(a) – breach of an undertaking s. 334(b) – theft below five thousand dollars

		s. 354 – possession of stolen property (ten counts)
R. vs. Leroy David Denny	Honourable Judge Del W. Atwood Pictou, Nova Scotia April 2016	s. 254(5) – failure to comply with a breathalyzer (two counts)