

Criminal Justice in Northern and Remote Communities: Redressing the Substantive Inadequacies in Achieving Long-Term Justice for Indigenous Youth

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Abstract

In spite of legislative, judicial, and governmental initiatives, Indigenous youth continue to face overrepresentation in the Canadian criminal justice system. While the Government of Canada appears to be closer than ever to accepting wide scale self-governance of Indigenous peoples, there are a number of obstacles within the proposed solutions that will continue to prevent Indigenous youth from achieving sentencing equity. This thesis asks the question, to what extent can the *Youth Criminal Justice Act* and supporting regulations be reformed in order to effectively “rehabilitate and reintegrate” Indigenous youth and serve the Government of Canada mandate of “reconciliation;” or, considering the colonialist underpinning of Canadian legislation, to what extent do Indigenous youth require alternative solutions to establish equitable justice? In answering this question, this thesis engages the theoretical framework of Critical Race Theory to examine existing legislation, jurisprudence, programs, and institutions geared towards creating sentencing equity for Indigenous youth in Canada, ultimately proposing recommendations for a more fair criminal justice system.

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Chapter 1: Framing the Issues: Introduction, Theoretical Framework and Literature Review

“Put simply, Canada can’t afford to squander the potential of another generation of First Nations children” ~ Charlie Angus, “Children of the Broken Treaty”¹

1. Introduction

It is generally recognized that Indigenous peoples² are marginalized throughout Canadian society. This is largely the product of the pervasive and ongoing effects of European colonization, and the racist government policies and programs that have followed.³ Indigenous youth are particularly affected by the residual effects of colonialism due to their inherent vulnerability as young people, and lack of autonomy over their circumstances.

One area of the law where the impact of this marginalization is particularly troubling is the Canadian criminal justice system. Indigenous peoples are over-represented in the Canadian criminal justice system, resulting in higher rates of incarceration.⁴ The issue of disproportionate rates of incarceration of Indigenous peoples has become such a problem that some authors are comparing jails to the Indian Residential School (“IRS”) system,⁵ where the Canadian government forcibly removed Indigenous youth from their homes in an attempt to detach them from their culture. Perhaps most worrisome, is the notable over-representation of Indigenous

¹ Charlie Angus, *Children of the Broken Treaty: Canada’s Lost Promise and One Girl’s Dream* (Regina: University of Regina Press, 2015) at XIX.

² This thesis refers to “Indigenous peoples” when speaking generally about First Nations, Inuit and Metis peoples of Canada. Where possible/relevant, I will refer to specific Indigenous groups or population, avoiding a “pan-Indigenous” approach to the issues discussed.

³ *R v Ipeelee*, 2012 SCC 13 at para 60, 280 CCC (3d) 265 [*Ipeelee*].

⁴ Truth and Reconciliation Commission of Canada, “Truth and Reconciliation Commission of Canada: Calls to Action,” (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at cls 30.

⁵ Nancy Macdonald, “Canada’s Prisons are the ‘New Residential Schools,’” *MacLean’s* (18 February 2016), online: <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>.

youth in Canadian prisons.⁶ The Government of Canada has been made aware of this issue through important initiatives such as the Truth and Reconciliation Commission of Canada (“TRC”). Yet, the gap in rates of incarceration continues to grow.

I hypothesize that in the context of youth, this inequity has occurred in part as a product of flawed and inherently racist legislation. The Canadian criminal justice system operates within a Western-liberal society, and therefore embodies Western-liberalist values, which are not necessarily compatible with other competing values.⁷ In Canada, the *Youth Criminal Justice Act* (“*YCJA*”) governs youth in the criminal justice system, whereas the *Criminal Code* is responsible for adults in conflict with the law and setting out the majority of criminal offences. One of the central purposes of the *YCJA* is “promoting the rehabilitation and reintegration of young persons who have committed offences.”⁸ The *YCJA* is currently failing in this objective as it applies to Indigenous youth in Northern and rural communities. This is caused in large part by a lack of resources dedicated to addressing the specific needs of this demographic. Thus, this thesis asks the following research question: to what extent can the *YCJA* and supporting regulations be reformed in order to effectively “rehabilitate and reintegrate” Indigenous youth and serve the Government of Canada mandate of “reconciliation;”⁹ or, considering the colonialist underpinning of Canadian legislation, to what extent do Indigenous youth require alternative solutions to establish equitable justice?

⁶ Truth and Reconciliation Commission of Canada, *supra* note 4 at cls 38.

⁷ For more on Western-liberalism in application to multicultural societies, see Will Kymlicka, “Testing the Liberalist Multiculturalist Hypothesis: Normative Theories and Social Science Evidence,” (2010) 43:2 *Canadian Journal of Political Science* 257 at 258.

⁸ *Youth Criminal Justice Act*, SC 2002 c 1 s 3(1)(ii).

⁹ While reconciliation is a Government of Canada mandate, it has also been generally accepted as a positive initiative by organizations such as the Truth and Reconciliation Commission, where the mandate includes “the truth of our common experiences will help set our spirits free and pave the way to reconciliation.” The fact that reconciliation is a shared mandate makes it more significant and important that it is successful. Truth and Reconciliation Commission of Canada, *Our Mandate*, online: Indian Residential Schools Settlement Agreement <http://www.trc.ca/websites/trcinstitution/index.php?p=7>.

In addressing this question, I have elected to focus on sentencing Indigenous youth. This decision has been made in light of the rich body of jurisprudence, research, and statutory law already dedicated to remedying this issue. While all of this research exists, the problem is ongoing, indicating parts of the issue are yet to be addressed.

Moreover, there is a gap in the literature addressing the unique obstacles specific to Indigenous youth in sentencing procedures, given their inherent vulnerability. While there are many other aspects that negatively influence the treatment of Indigenous youth in the criminal justice system, sentencing of Indigenous offenders is arguably one of the most well known. This can be credited to such high-profile cases as *R v Gladue*,¹⁰ as well as initiatives such as the Truth and Reconciliation Commission Calls to Action drawing attention to the disproportionate rates of incarceration of Indigenous peoples.¹¹ In spite of all these efforts, there remains a strong disconnect between the proposed remedies and the issues. I intend to critically analyze this disconnect and suggest new potential remedies.

I will answer the above research question in the following format: Chapter 1 will outline and explain the theoretical framework of Critical Race Theory (“CRT”), which will be used to analyze and critique the legislation and policies affecting Indigenous youth. This Chapter will also conduct a general literature review of the cases, legislation, and secondary sources used to inform this thesis and that are applicable to the themes covered herein. Chapter 2 will address the history, obstacles and application of the *YCJA* to Indigenous youth in Northern Canada. This will include an overview of the broad and specific obstacles unique to Indigenous youth. This Chapter will also take a close look at two of the most significant cases influencing sentencing

¹⁰ *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

¹¹ Truth and Reconciliation Commission, *supra* note 4, cls 30.

practices of Indigenous peoples, *R v Gladue* and *R v Ipeelee*, and how jurisprudence can contribute to criminal justice reform.

Chapter 3 will undertake to critically assess the existing approaches to mitigating the challenges faced by Indigenous youth in the criminal justice system. This includes but is not limited to *Gladue* courts, the relevance of youth diversion, and the presence of culturally sensitive sentencing models and restorative practices. This Chapter will also critically examine two youth cases where culturally sensitive approaches are applied by the court to Indigenous youth, *R v TDK* and *R v Anderson*.

Finally, Chapter 4 will tie all of the findings from the previous chapters together and draw conclusions on the efficacy of the *YCJA* as a means of healing Indigenous youth and preventing recidivism. This Chapter will also critique current self-governance efforts to achieve equity for Indigenous peoples in the justice system generally. In assessing the issues within the *YCJA*, this chapter will also address potential solutions, 1) within the context of the existing *YCJA*, i.e., suggestions for substantive legislative reform or developing regulations that better facilitate healing for Indigenous youth; 2) for institutional reform; and 3) for ideological/paradigmatic reform. Following that, this Chapter will identify outstanding questions for further research and draw a general conclusion for my thesis.

2. Theoretical Framework

i. Critical Race Theory

The theoretical lens with which this thesis will critique the pertinent issues outlined above is Critical Race Theory. Critical Race Theory is based on inherent power imbalances

amongst races and how they are expressed in legal frameworks.¹² Recognizing that race is itself socially constructed, Critical Race Theory operates on the premise that Canadian law does not represent the needs of Indigenous peoples and racial minorities generally because racism is normalized within Canadian society,¹³ both blatantly and systemically. Thus, laws geared towards redressing practices of racism are only capable of remedying the most egregious offences, and overlook the everyday or normalized racism faced by racial minorities.¹⁴ Furthermore, current mechanisms in place to remedy this in sentencing practices, such as restorative justice practices, do not support self-determination of Indigenous people,¹⁵ and instead, are another iteration of colonialism. Without minority-designed and focused justice mechanisms, there will not be equitable justice for racialized peoples in Canada.

Contrary to the positive objectives of the Canadian justice system (including the Truth and Reconciliation Commission of Canada, legislative reform focused on reducing incarceration rates of Indigenous peoples,¹⁶ and more), incarceration rates of Indigenous peoples have continued to rise.¹⁷ Critical Race Theory argues that the legislative process is insufficient as a means of creating anti-racist changes to the criminal justice system,¹⁸ therefore legislative reform

¹² Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 2d ed (New York: NYU Press, 2012) at 3.

¹³ *Ibid* at 7.

¹⁴ Richard Delgado, “Liberal McCarthyism and the Origins of Critical Race Theory,” (2009) 94 Iowa L Rev 1505 at 1511.

¹⁵ Carmela Murdocca, *To Right Historical Wrongs: Race, Gender and Sentencing in Canada*, (Vancouver: UBC Press, 2013) at 31.

¹⁶ Section 718.2(e) of the *Criminal Code*, RSC, 1985, c C-46, was passed by Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl, 1996, (as passed by the House of Commons 2 Feb 1996). This was a major initiative the Government of Canada undertook to address/codify the differences between Indigenous and non-Indigenous offenders as a means of creating sentencing equity.

¹⁷ Jamil Malakieh, “Adult and Youth Correctional Statistics in Canada, 2016/2017,” (2018) 85 Juristat 1-20, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=BNS8DqtR> at 6. Samuel Perreault, “The Incarceration of Aboriginal People in Adult Correctional Services” (2009) 29:3 Juristat 1 at 5. See also Julie Reitano, “Adult Correctional Statistics in Canada, 2015/2016” (2017) 85 Juristat 1 at 5.

¹⁸ David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 Sup Ct L Rev 655 at 659. The term “anti-racist” is not to be confused with “cultural competency” used later in this thesis. Tanovich uses the term “anti-racist” in the context of the capacity of democracy and legislation to encourage positive social actions and change behaviours or practices that

must instead empower Indigenous communities to sentence offenders internally,¹⁹ if at all. Thus, it is important to allow for traditional practices as the main source of rehabilitation.²⁰ Without this, the criminal justice system will continue to fail racial minorities, as it is not representative of their unique needs.

Critical Race Theory argues that minorities are not viewed as equals in North American society. Thus, as long as non-minorities are making the “rules” for society, minority interests will never be represented.²¹ In fact, CRT scholar Richard Delgado writes: “...[the] time-warp aspect of racism makes speech an ineffective tool to counter it. Racism is woven into the warp and woof of the way we see and organize the world— it is one of the many preconceptions we bring to experience and use to construct and make sense of our social world.”²²

Based on Delgado’s approach to CRT, racism is always a current phenomenon. As a result, some CRT scholars believe there is no solution to racism since it constantly operates in a contemporary setting. Thus, for the most part, people are not trying to be racist or offensive; instead, they almost always accepted racist behaviours as “normal” at the time they are occurring.²³ People engaging in this form of covert racism usually believe that what they are doing or saying is socially acceptable, and therefore, not oppressive or actually racist. Thus, any solutions to the pervasive problems within the justice system must be addressed at the systemic level, starting with shedding light on the socialized and institutionalized racism present in Canadian legal practices.

are racist. Cultural competency, which is defined in the next Chapter, is a more individual pursuit of empathy and understanding for the circumstances of other races.

¹⁹ Douglas Sanderson, “Redressing the Right Wrong: The Argument From Corrective Justice,” (2012) 62:1 University of Toronto LJ 93 at 104.

²⁰ Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) at 15.

²¹ Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) at 25.

²² Richard Delgado & Jean Stefancic, “Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?” (1992) 77 Cornell Law Review 1258 at 1279.

²³ *Ibid* at 1291.

Although there is a body of research applying CRT to liberalist frameworks,²⁴ and a separate body of research exploring sentencing practices of Indigenous youth and restorative justice,²⁵ there is no existing published research applying CRT to the sentencing practices of Indigenous youth. In addition, much of the prevailing research utilizing CRT is based within an American context, meaning that it is less frequently applied to marginalized communities in Canada, particularly in the context of Northern or rural areas. While the majority of CRT literature is focused on African-Canadians and Americans, it can be equally applied in the context of Indigenous people, who also represent a strong, historically marginalized minority²⁶ in Canada.

ii. *Why Not Indigenous Legal Theory?*

What benefit, one might ask, is there to utilizing CRT to critique the issues in this thesis rather than a more nuanced theoretical framework such as Indigenous Legal Theory (“ILT”)? While ILT is an extremely important and informative theoretical framework for issues affecting Indigenous peoples in relation to law, it can be limited as a mechanism for exploring the range of solutions I intend to scrutinize.²⁷ Generally speaking, ILT concludes that absent self-

²⁴ Charles W Mills, “Rawls on Race/Race on Rawls,” (2009) 47 South J Philos 161 at 173.

²⁵ Annie K Yessine & James Bonta, “The Offending Trajectories of Youthful Aboriginal Offenders,” (2009) 51:4 Canadian J Criminology & Crim Just 435 at 436; Lode Walgrave, “Restoration in Youth Justice,” (2004) 31 Crime & Just 543 at 547.

²⁶ Indigenous peoples in Canada are largely viewed as distinctive amongst minorities due to their experience of colonialism in Canada and status as First Peoples. David B MacDonald, “Aboriginal Peoples and Multicultural Reform in Canada: Prospects for a New Binational Society,” (2014) 39(1) Canadian Journal of Sociology 65 at 78. However, as raised by one of my examiners, Professor Larry Chartrand, Indigenous peoples can also be more appropriately characterized as political entities. See for example, Sonia Lawrence, “*R v Kapp*,” (2018) 30:2 Can J Women & L 268-291.

²⁷ To be clear, my thesis should not be interpreted as arguing that CRT is the superior theoretical framework with which to critically analyze these issues. My choice of CRT is in part personal. ILT is both a vast and nuanced framework that often relies on oral traditions in addition to other methodological approaches. Within the limited scope of an LL.M. and my personal position as a non-Indigenous scholar, I did not feel I would have sufficient access to materials in a way that would do this theoretical framework justice. However, I am also an advocate that important issues should be analyzed through as many theoretical lenses as possible in order to acquire the most holistic interpretation and accurate scope of any research question. As such, I believe that CRT has value and insight to contribute in framing and critiquing these issues in a different way than ILT.

determination and self-governance, the obstacles at the heart of the strained relationship between Indigenous peoples and the Canadian legal system will never be reconciled.²⁸ As Kristen Anker writes in reference to the TRC,

...the space of engagement is thus potentially an uncomfortable one, with ‘our’ grounds always unsettled and called into question. In this view, it is not enough for the TRC, for example, to strive simply for ‘relational,’ rather than ‘cheap,’ reconciliation, without also opening up the idea of reconciliation itself to engagement with Indigenous languages and traditions.²⁹

According to ILT, without sincere efforts on behalf of the Government to engage with and recognize Indigenous legal practices, the Canadian justice system will never meet the needs of Indigenous peoples and will continue to fail to address issues facing Indigenous communities.

However, that is not to say that all ILT scholars have necessarily viewed self-governance and decolonization as the exclusive solution to achieving equity for Indigenous peoples. There are a number of ILT scholars who have made efforts to bridge the gap between the ideal and reality in order to establish actions that can be taken right now to address the needs of Indigenous peoples in the Canadian legal system, including Val Napoleon and Hadley Friedland. As Napoleon and Friedland write, “Indigenous legal traditions are fundamentally about Indigenous citizenry, self-determination, and governance.”³⁰ In addressing these traditions, the authors do not abandon the central tenets of ILT. Yet, the authors go on to discuss options for shedding light on and utilizing Indigenous legal traditions in the here and now, including incorporating Indigenous legal education and practices into mainstream common law education and forms of practical application to current legal practices.³¹

²⁸ Gordon Christie, “Law, Theory and Aboriginal Peoples,” (2003) 2 Indigenous LJ 68 at 114.

²⁹ Kristen Anker, “Reconciliation in Translation: Indigenous Legal Traditions and Canada’s Truth and Reconciliation Commission,” (2016) 33:2 Windsor Y B Access Just 15 at 17.

³⁰ Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories,” (2016) 61:4 McGill LJ 725 at 727.

³¹ *Ibid* at 733. See also Patricia A. Monture, “Confronting Power: Aboriginal Women and Justice Reform,” (2006) 25:3 Canadian Woman Studies 25-33.

The movement to start introducing Indigenous legal practices into the non-Indigenous legal field is relatively recent. Ultimately, Napoleon and Friedland view this movement as an important step towards self-governance.³² This branch of ILT appears to acknowledge the idea that adoption of self-governance will likely not be instantaneous. This branch also seems to accept that self-governance frameworks in the context of legal systems are more likely to be successful if the legal community has already had some introduction to the nature of Indigenous legal practices through the avenue of Western-legal concepts.

iii. *ILT, Self-Governance, and the Government of Canada: Current Realities*

As of the time this thesis is being written, self-governance is unfortunately not yet a reality in Canada.³³ While I agree that self-governance and self-determination are the best and most effective way to ensure that Indigenous peoples have contextualized and sustainable justice systems, I also seek to explore interim solutions. That being said, some important efforts are being made to make self-governance possible in the future.

On February 14, 2018, Prime Minister Justin Trudeau addressed the House of Commons presenting Liberal government initiatives focused on reconciliation with Indigenous populations of Canada. In this speech, he announced that the Liberal government would be working with First Nations, Inuit and Métis communities to develop and implement a new “Recognition and Implementation of Indigenous Rights Framework.”³⁴ While very little detail has been provided

³² Val Napoleon & Hadley Friedland, *supra* note 30 at 752.

³³ This thesis is based on the contemporary law at the time that it was written (2018). I acknowledge throughout this thesis, particularly in Chapter 4, that there are a number of self-governing First Nations in Canada. However, the rights of self-governance do not extend to criminal law powers. As this is the area of the justice system that I am most concerned with, I will not be exploring current self-governance practices in depth. Government of Canada, *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (15 Sept 2010) online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>.

³⁴ Prime Minister Justin Trudeau, *Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework*, (14 Feb 2018) online: <https://pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>.

regarding what this framework will look like, Prime Minister Trudeau has been clear that it will not involve any amendment to the Constitution.³⁵

Indigenous rights embedded in the Constitution have long been the subjects of legal interpretation at Canada's highest courts. Section 35 of the *Constitution Act, 1982* states: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."³⁶ According to Prime Minister Trudeau's initial remarks, this clause will remain untouched. Instead, new regulations influencing how the Constitution is interpreted will be developed and implemented. Whether or not constitutional amendment is required in order to clarify and properly codify Indigenous rights is beyond the scope of this thesis. However, it is important to note that the current Government has unequivocally denounced this as an option for reform and does not view this as necessary to properly articulate the rights of Indigenous peoples.

Significantly, Prime Minister Trudeau has also indicated that the Framework will involve input from non-Indigenous parties as well as the provinces and territories.³⁷ Although Prime Minister Trudeau has said that this will be a collaborative initiative with Indigenous groups, it is potentially concerning that the Framework process is still rooted in Government influence and has such a large emphasis on collaboration, as opposed to greater emphasis on Indigenous driven initiatives. For self-governance to be sustainable and meaningful it must be rooted in the vision, history and tradition of Canada's many different Indigenous groups, recognizing plurality. Otherwise, self-governance runs the risk of simply resembling Western-liberalist governance structures.

On May 2, 2018, Prime Minister Trudeau had an opportunity to address the Assembly of First Nations ("AFN"), in Gatineau, Québec. Again, the Prime Minister announced the upcoming

³⁵ *Ibid.*

³⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 s 35.

³⁷ Prime Minister Justin Trudeau, *supra* note 34.

Indigenous Rights Framework, but provided very little detail about how such a Framework will be carried out, and whether it will address the specific interests of different Indigenous groups.³⁸

Since then, the Framework has faced serious delay as a result of negative feedback from stakeholders.³⁹ While it was anticipated that the legislation was going to be tabled by autumn of 2018, it has passed that deadline with no indication the legislation has even been drafted.⁴⁰

While the Government of the day appears to be in favour of the idea of self-governance, there is reason to fear that the proposal lacks substance, direction, and firm timelines. Furthermore, as it stands, there is no indication of what this will look like for the criminal justice system. Achieving full self-governance in the criminal justice system would be an enormous undertaking, requiring the establishment of processes that effectively reflect the interests of individual Indigenous groups, rather than taking a “pan-Indigenous” approach to justice. Perhaps an even greater obstacle is that the criminal justice system has always been subject to federal legislation. Would self-governance allow for Indigenous groups to draft and implement their own legislation, or would legislation even be a part of Indigenous interpretations of justice? If not, would self-governance actually respond to the root of the strained relationship between the Canadian government and Indigenous peoples, i.e. foreign laws forced onto peoples who already maintained their own sophisticated sets of laws and legal mechanisms? These are important questions that are yet to be answered.

It is for these reasons this thesis is geared towards challenging the status quo and seeking practical interim solutions for Indigenous youth trapped in the abyss that is the current criminal

³⁸ Prime Minister Justin Trudeau, *PM Trudeau Delivers Remarks at AFN Special Chiefs Assembly in Gatineau*, (2 May 2018) online: <https://pm.gc.ca/eng/video/2018/05/02/pm-trudeau-delivers-remarks-afn-special-chiefs-assembly-gatineau>.

³⁹ Jorge Barrera, “Promised Indigenous Rights Recognition Legislation Won’t be in Place Before Next Election,” *CBC News* (14 Nov 2018), online: <https://www.cbc.ca/news/indigenous/fn-rights-framework-1.4905705>.

⁴⁰ *Ibid.*

justice system in Northern and rural Canada. The issues in this thesis are pressing and time sensitive. Realistic short-term solutions are necessary.

3. Literature Review

i. Indigenous History in Canada: Perpetuating Injustice

For the purposes of this thesis, I will be focusing on Indigenous history post-contact with European settlers. Although Indigenous peoples have an incredibly rich and sophisticated history prior to colonization, it is only after contact that European interests began to influence Indigenous peoples and their way of life; culturally, spiritually, economically, linguistically and politically.⁴¹ The purpose of this section is to identify sources this thesis will use to illustrate and apply the turbulent history Indigenous peoples have faced as a result of colonization to the modern Canadian criminal justice system. While this is by no means intended to be a comprehensive analysis of every injustice Indigenous peoples have faced, this section does point to some of the monumental obstacles Indigenous peoples have encountered, directly caused by Canadian policy.

Shortly after the Government of Canada was established, Parliament took to establishing a number of inherently racist policies. Government officials implemented and utilized the *Indian Act*⁴² to codify and validate their decision to stifle Indigenous ways of life in an attempt to force assimilation. One important and devastating initiative of the *Indian Act* was to physically marginalize Indigenous populations to reserves.⁴³ These reserves were often on the least arable and most uninhabitable lands that European settlers would not tolerate. Brian Egan and Jessica Place (citing C. Harris) describe the process of establishing reserves as: “Canada’s colonial

⁴¹ Harsha Walia, “Decolonizing Together: Moving Beyond the Politics of Solidarity Toward a Practice of Decolonization,” *Briarpatch* (January/February 2012) 27 online: <https://briarpatchmagazine.com/articles/view/decolonizing-together> at 27.

⁴² *Indian Act*, RSC 1985, c 1-5.

⁴³ *Ibid*, s 18(1).

geography—characterized by separate and highly unequal spaces of Indigenous and settler life—reflected dominant understandings of the proper places for settlers and Indigenous peoples in the emerging nation.”⁴⁴ Clearly, the process of creating reserves was as much about asserting control over Indigenous peoples and carving out power dynamics as it was about establishing Canadian governance.

The creation of reserves required Treaties as a form of contract between the Government and an Indigenous group. When the Government entered into Treaty relationships with Indigenous peoples, they took on a fiduciary duty to act in the best interest of the Indigenous people occupying that reserve.⁴⁵ The nature of this fiduciary duty is still frequently litigated to this day, with outstanding confusion regarding what this duty actually entails.

The *Indian Act* is rife with other colonialist and racist policies, including that the Government of Canada will only officially recognize Bands on the “Band List,”⁴⁶ and only “Registered Indians” may receive government benefits.⁴⁷ Thomas King describes the central purpose of the *Indian Act* as “the main mechanism for controlling the lives and destinies of Legal Indians in Canada, and throughout the life of the [A]ct, amendments have been made to the original document to fine-tune this control.”⁴⁸ By creating a division between “Legal Indians”⁴⁹ and “Illegal Indians,” the *Indian Act* further marginalizes people who identify as Indigenous, but do not have status. Thus, “Illegal Indians” are alienated from the legal rights that “Legal Indians”

⁴⁴ Brian Egan & Jessica Place, “Minding the Gaps: Property, Geography, and Indigenous Peoples in Canada,” (2013) 44 *Geoforum* 129 at 130, citing Cole Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia*, (Vancouver: UBC Press, 2003).

⁴⁵ The precise nature of fiduciary duty in the Indigenous context continues to be litigated, but has been recognized and developed in a number of cases including *Manitoba Metis Federation Inc. v Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 at 49.

⁴⁶ *Indian Act*, *supra* note 42, s 5(1).

⁴⁷ *Ibid*, s 8.

⁴⁸ Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America*, 1st ed (Toronto: Anchor Canada, 2013) at 70.

⁴⁹ *Ibid*.

are entitled to.

Yet another way the Government of Canada attempted to alienate Indigenous peoples from their cultures was through the Indian Residential School (“IRS”) system. The IRS system was designed to tear children away from their families and communities in order to “kill the Indian in the child.”⁵⁰ These schools have become notorious for the heinous way they treated children, including raping, shaming, humiliation, isolation, and various other forms of physical and emotional pain and mistreatment.⁵¹ While some survivors of the IRS system report “positive and uplifting experiences in these institutions,”⁵² this is only one part of a much larger and complex story that is otherwise littered with devastation.

Amongst the many tragic stories of children being harmed at residential school is one of three little boys who went missing from the now notorious St. Anne’s Residential School in James Bay, Ontario in 1941.⁵³ It took months to notify the RCMP of the missing children, and ultimately, the boys were never seen again.⁵⁴ Of course, the families of the lost boys suffered greatly from this loss and the lack of closure that came as a result of inadequate authority figures and supervision. Stories like these are important to the context of this thesis because they are the source of the ongoing sense of distrust and strained relationships between many Indigenous communities and police services in Canada. Of course, this challenging relationship has had an impact on the way Indigenous peoples interact with the law and legal system today.

In recent years, the Government of Canada has recognized its central role in efforts to

⁵⁰ Truth and Reconciliation Commission of Canada, “About the Commission: Indian Residential Schools Truth and Reconciliation Commission,” *Historical Overview*, online: <http://www.trc.ca/websites/trcinstitution/index.php?p=39>.

⁵¹ John Borrows, “Residential Schools, Respect, and Responsibilities for Past Harms,” (2014) 64:4 UTLJ 486 at 486-487.

⁵² *Ibid* at 487.

⁵³ Charlie Angus, *supra* note 1 at 25.

⁵⁴ *Ibid* at 27.

eradicate Indigeneity. Although the Government of Canada has formally apologized⁵⁵ for the intergenerational trauma caused by the forced participation in the IRS system, meaningful reparations have been slow coming.

These examples demonstrate more than negligence on behalf of the Government of Canada to protect the welfare of Indigenous peoples. Instead of creating an environment where Indigenous peoples and culture could thrive, the Government of Canada went about oppressing Indigenous cultures as much as possible. In fact, the treatment of Indigenous people by the Government of Canada is often referred to as a “genocide,”⁵⁶ where the Government deliberately sought to dispose of Indigenous peoples from Canadian society, either physically, or culturally by way of destroying their traditions and ways of life. The last IRS closed as recently as 1996.⁵⁷ This is not very long ago for a program that has been so heavily criticized for failing Indigenous peoples. Furthermore, it is often questioned whether the intention of the IRS system has just been reallocated into different mechanisms throughout Canadian society.⁵⁸ This fact alone demonstrates that this is a part of Canada’s very recent and even ongoing history, leaving open wounds that demand immediate attention.

ii. *Intergenerational Trauma: A Trickle-Down Effect*

These programs and attempts to destroy Indigenous culture on behalf of the Government have had an insidious effect. The implementation of the *Indian Act* and the resulting government policies, as well as the poor condition of reserves and the IRS system have not just affected the individuals directly involved, but have inflicted intergenerational trauma on the relatives and

⁵⁵ Government of Canada, *Statement of Apology to Former Students of Indian Residential Schools*, (15 Sept 2010), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

⁵⁶ Matthew Wildcat, “Fearing Social and Cultural Death: Genocide and Elimination in Settler Colonial Canada- an Indigenous Perspective,” (2015) 17 *Journal of Genocide Research* 391 at 391.

⁵⁷ Cindy Blackstock, “Residential Schools: Did they Close or Just Morph into Child Welfare,” (2007) 6:1 *Indigenous LJ* 71 at 72.

⁵⁸ *Ibid* at 73.

communities of those people.⁵⁹ Some of the persistent problems that are associated with Canadian policy decisions include access to clean drinking water on reserves,⁶⁰ over-representation of Indigenous youth in the Canadian child welfare system,⁶¹ rundown schools or no schools at all,⁶² and higher suicide rates than non-Indigenous communities,⁶³ just to acknowledge a few. These issues affect the everyday lives of Indigenous peoples, and the opportunity for the next generation to thrive under these circumstances.

Across all provinces, the Canadian child welfare system has been heavily criticized. As Cindy Blackstock writes, "...there are more First Nations children in child welfare care today than at the height of residential schools by a factor of three."⁶⁴ Of course, the concept of alienating Indigenous youth from their families is very concerning given Canada's history of trying to destroy Indigenous cultures by way of the residential school system. Blackstock identifies a number of issues with the child welfare system in Canada, including its obvious incompatibility with Indigenous models of child welfare, which pre-date colonialism.⁶⁵ While the definition of abuse is not very different between Indigenous and non-Indigenous communities, the way each distinct society approaches the issue varies greatly. As Blackstock summarizes:

Provincial models do not consider whether or not parents can actually change the factors contributing to the risk to their child, but Aboriginal societies believe that parents should only be accountable for things they can reasonably change, and society is compelled to work with families to deal with the factors outside of the parent's sphere of influence.⁶⁶

⁵⁹ Carmela Murdocca, *supra* note 15 at vii.

⁶⁰ Jerry P White, Laura Murphy, Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox," (2012) 3:3 *The International Indigenous Policy Journal* 1 at 1. As the authors point out, Canada has 9% of the world's renewable drinking water and only 0.5% of the world's population.

⁶¹ Cindy Blackstock, *supra* note 57 at 74.

⁶² Charlie Angus, *supra* note 1 at 289.

⁶³ Melissa L Walls, Dane Hautala, & Jenna Hurley, "'Rebuilding Our Community:' Hearing Silenced Voices on Aboriginal Youth Suicide," (2014) 51:1 *Transcultural Psychiatry* 47 at 48.

⁶⁴ Cindy Blackstock, *supra* note 57 at 74.

⁶⁵ *Ibid* at 73.

⁶⁶ *Ibid*.

According to Blackstock, “factors outside the parent’s sphere of influence” include poverty.⁶⁷ The differences in these approaches are important. With so many Indigenous youth going into provincial care, child welfare models must reflect the needs and values of Indigenous communities. Otherwise, the results are simply a bandage solution with no sustainable change.

Additionally, studies have shown there is a direct correlation between Indigenous youth involved in the child welfare system and their future involvement in the criminal justice system.⁶⁸ In the Canadian penal system, “Aboriginal inmates had a more extensive history in the criminal justice system and less stability than non-Aboriginal inmates.”⁶⁹ The Canadian child welfare system is another example of pervasive and systemic racism, underpinning the likelihood for Indigenous youth to successfully extract themselves from the troubled histories plaguing their communities. This example also demonstrates that trauma cannot be compartmentalized. Rather, trauma experienced in one area of someone’s life can clearly influence their behaviours and successes in another area of their lives.

Another significant area that Indigenous communities have experienced loss resulting from the ongoing effects of colonization are in high rates of youth suicide. As one study points out, “across all age groups, completed suicide among Indigenous peoples in Canada is double that of the general population.”⁷⁰ The authors of this study further conclude that having a familial history of involvement with the IRS system is linked to ongoing suicidal ideation for Indigenous

⁶⁷ *Ibid.*

⁶⁸ Shelley Trevethan, Sarah Auger & John-Patrick Moore, “The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates,” (September 2001), online: Correctional Service Canada <http://www.csc-scc.gc.ca/research/r113-eng.shtml>.

⁶⁹ *Ibid.*

⁷⁰ Robyn Jane McQuaid & Amy Bombay, et al, “Suicide Ideation and Attempts Among First Nations Peoples Living On-Reserve in Canada: The Intergenerational and Cumulative Effects of Indian Residential Schools,” (2017) 62 *Canadian Journal of Psychiatry* 422 at 423.

peoples living on reserve.⁷¹ Suicide rates are even higher amongst youth, who have few tailored resources to deal with the unique struggles of young people, and little to no control over their circumstances.⁷²

Statistics indicate that it is five to six times more likely that an Indigenous youth will commit suicide in comparison to a non-Indigenous youth.⁷³ These statistics are startling. One well-publicized case study of extraordinarily high rates of suicide takes place in the Indigenous community of Attawapiskat. Attawapiskat declared a state of emergency in 2016 over the influx of youth suicide attempts. In this instance, between the months of September to April, 101 people were known to have attempted suicide, the youngest being seven years old.⁷⁴ Given the disproportionality of these rates with those of non-Indigenous communities, it is clear there is a connection between the living conditions and quality of life of Indigenous peoples on reserves, causing a higher likelihood of suicidal ideations in comparison with other communities.

Yet another obstacle to the success of Indigenous youth in Canadian society is a lack of accessible education. As mentioned above, poor quality schools and a lack of educational resources plague many Indigenous communities, often causing families to send their children to larger cities in their teen years in order to complete their schooling. In her book “Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City,” journalist and author Tanya Talaga investigates the deaths of seven young people between 2000 and 2011, who came to the City of Thunder Bay from surrounding Northern reserves to pursue their high school education.⁷⁵ In doing so, she identifies a number of issues Indigenous families and youth are facing in

⁷¹ *Ibid* at 427.

⁷² Melissa L Walls, Dane Hautala, & Jenna Hurley, *supra* note 63 at 48.

⁷³ *Ibid*.

⁷⁴ Kate Rutherford, “Attawapiskat Declares State of Emergency Over Spate of Suicide Attempts,” *CBC News* (9 April 2016), online: <http://www.cbc.ca/news/canada/sudbury/attawapiskat-suicide-first-nations-emergency-1.3528747>.

⁷⁵ Tanya Talaga, *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City*, (Toronto: House of Anansi Press Inc., 2017) at 59.

Northern and rural communities, including sending children from rural reserves to urban areas such as Thunder Bay. Oftentimes, children do not have family they can live with, and are instead put in boarding homes with strangers in order to receive their high school education.⁷⁶ The inability of young Indigenous people to receive a full and adequate high school education in their home communities forces them to navigate unfamiliar terrain with unfamiliar people, exacerbating the sense of isolation and confusion that many young people are already experiencing at this vulnerable time in their lives.⁷⁷

Talaga also sheds light on the racist policing practices exemplified in a number of Northern police services, including Thunder Bay. These improper practices range from treating Indigenous people as a nuisance,⁷⁸ failing to treat their complaints and reporting with the seriousness they are entitled, and taking individuals on “starlight tours,” where police drive Indigenous people to the outskirts of town, forcing them to walk back in often freezing conditions, and risking their safety.⁷⁹ Fundamentally racist police practices are becoming increasing well known, with international non-profit organizations such as Human Rights Watch issuing reports to the Government of Canada, describing distrustful and strained relationships between Indigenous people seeking to report criminal activity and police services.⁸⁰ This distrust has been caused by both historical and ongoing abuse of Indigenous peoples by police services throughout Canada.⁸¹ Fostering positive relationships between Indigenous youth and police is essential to the safety of Indigenous youth, and their faith that the justice system is meant to help

⁷⁶ *Ibid* at 96.

⁷⁷ *Ibid* at 98.

⁷⁸ *Ibid* at 113.

⁷⁹ Human Rights Watch, “Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence,” (19 June 2017) online: <https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-indigenous-women-saskatchewan-and-failures>.

⁸⁰ *Ibid* at 3.

⁸¹ *Ibid*.

them rather than persecute them.

In “Children of the Broken Treaty,” Charlie Angus takes a different approach to critiquing the inequity experienced by Indigenous youth in Northern and rural communities. In his book, Angus draws on his experience as a resident and Member of Parliament for the Timmins/James Bay region, and highlights the Government of Canada’s persistent failure to provide young people the essential services they require to be successful.⁸² Like Talaga, Angus identifies a lack of educational resources as a key obstacle to success in the North. One example he uses to illustrate this point is J.R. Nakogee Primary School. This school was built in Attawapiskat in 1976. As Angus describes, “construction of the school encouraged families who lived out on the territory to move into town. Even though many houses lacked running water and indoor plumbing, the presence of a school encouraged the 1,000 people living in the village to think that better days were coming.”⁸³ Evidently, schools are a big part of fostering pride and optimism in a community.

In any community, access to resources equates access to a better future. School/education is not only amongst the most fundamental resources we value as Canadians, but is also a prerequisite to success and cultural autonomy.⁸⁴ Shannen Koostachin was an Indigenous youth from Attawapiskat who made it her life’s work to advocate for a better school in her home community, making appearances on Parliament Hill and participating in letter writing campaigns to assert youth rights to an education.⁸⁵ Sadly, Koostachin died in a car accident at the age of 15, shortly after the government announced the building of a school in her home community.⁸⁶

⁸² Charlie Angus, *supra* note 1 at XVII.

⁸³ *Ibid* at 54.

⁸⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295 (entered into force on 2 October 2007) at Article 14.

⁸⁵ Charlie Angus, *supra* note 1 at 126.

⁸⁶ *Ibid* at 192.

Without such resources available to youth, who are already residing on the fringes of society, one cannot be surprised when Indigenous youth end up in conflict with the law, or worse, harming themselves or committing suicide.

In addition to all of these slightly more covert forms of racism, Indigenous peoples in Canada are undeniably victim to blatant, serious and often violent racism outside of government practices.⁸⁷ Again, using the example of Thunder Bay, ON as a case study, writer and columnist for *The Walrus*, Robert Jago, indicates, “while the city barely accounts for 5 percent of the Indigenous population in Ontario, it accounts for roughly 37 percent of the province’s Indigenous murder victims.”⁸⁸ This statistic clearly demonstrates that not only do Indigenous peoples have more to fear in their day-to-day lives, but they are also not offered the same protections as non-Indigenous peoples in Canada.

Perhaps one of the most shocking murders due to the unambiguous racism present and the fact that there was no pre-existing relationship between the victim and the accused is the death of Barbara Kentner, an Indigenous woman in Thunder Bay.⁸⁹ Kentner was only 34 years old when she was walking down the street in Thunder Bay with her sister and was struck in the abdomen with a trailer hitch. The accused, who had thrown the trailer hitch at her from a moving vehicle, was heard to have yelled, “oh, I got one!” after the trailer hitch hit Kentner.⁹⁰ Examples such as this clearly illustrate the extreme violence and inequity an Indigenous person faces by the simple fact of his/her heritage, without including the systemic discrimination that acts as the foundation of the Canadian criminal justice system. With this in mind, it is hard to ignore the

⁸⁷ Robert Jago, “The Deadly Racism of Thunder Bay,” *The Walrus* (23 Feb 2018) online: <https://thewalrus.ca/the-deadly-racism-of-thunder-bay/>.

⁸⁸ *Ibid.*

⁸⁹ Jody Porter, “First Nations Woman Dies After Being Hit by Trailer Hitch Thrown By Passing Car in Thunder Bay, Ont.,” *CBC News* (4 Jul 2017) online: <http://www.cbc.ca/news/canada/thunder-bay/trailer-hitch-death-1.4189426>.

⁹⁰ *Ibid.*

idea that non-Indigenous people, who are primarily responsible for developing, organizing and implementing criminal justice policy and procedure, are not pre-disposed to engage in covert discrimination themselves given the social realities that surround them.

Thunder Bay has recently received much publicity for the racism present in the community, demonstrating that society recognizes that something must be done to prevent it from continuing. While racist behaviours and perceptions tend to be denser in some areas of Canada than others,⁹¹ racism toward Indigenous peoples is nevertheless pervasive and toxic to equitable treatment of Indigenous peoples across Canada. Lashta, Berdahl and Walker argue that in a “multicultural society” such as Canada, contact theory can go a long way towards decreasing racist behaviours.⁹² As the population of Indigenous peoples in Canada continues to grow, they will increasingly interact with non-Indigenous peoples on a day-to-day basis. As this happens, “the effects of contact will only be generalized to the group if group membership is salient, meaning that if in-group individuals do not view the out-group people they are interacting with as representatives of the group, then contact may not be successful in reducing negative racial attitudes.”⁹³ Thus, contact between racial groups must be meaningful and on equal footing in order for racist patterns to meaningfully change.

It is undeniable that these modern issues are directly connected to the historical trauma Indigenous people have faced in Canada. This thesis intends to explore various means with which criminal law can identify the root of the problems, and address it with internal mechanisms. In this way, the criminal justice system does not need to wait for the Government of Canada to establish self-governance, or take action on the variety of crises affecting

⁹¹ Erin Lashta, Loleen Berdahl & Ryan Walker, “Interpersonal Contact and Attitudes Towards Indigenous Peoples in Canada’s Prairie Cities,” (2016) 39 *Ethnic and Racial Studies* 1242 at 1244.

⁹² *Ibid* at 1243.

⁹³ *Ibid* at 1255.

Indigenous communities on a daily basis, though of course this would be ideal. The criminal justice system can be internally accountable for the ways it contributes to perpetuating inequity in justice between Indigenous and non-Indigenous youth, thereby contributing to the ongoing impact of colonization.

iii. *Literature, Cases, and Legislation: How Canada Frames Indigenous Youth in the Criminal Justice System*

The starting point for understanding the obstacles facing Indigenous youth in the criminal justice system is to understand the legislation perpetuating injustice. While there are a number of pieces of criminal legislation that are applicable to youth, the two that this thesis will focus on are the *Youth Criminal Justice Act*⁹⁴ and the *Criminal Code*.⁹⁵ As previously stated, together these pieces of legislation outline the majority of substantive offences a youth can be charged with, as well as how youth are dealt with in the Canadian criminal justice system.

With this in mind, there are a number of important cases that are illustrative of the application of criminal law to Indigenous youth. These cases are significant as a means of demonstrating some of the problems with the criminal justice system that ultimately interfere with the ability of the accused to effectively rehabilitate and reintegrate into society. I will focus on *R v Gladue*⁹⁶ and *R v Ipeelee*⁹⁷ as cases to demonstrate the adaptation of the criminal justice system in an attempt to bridge the gap between Indigenous concepts of justice and Western-liberalist justice models.

By way of a brief overview, in *R v Gladue* the accused was 19 years old when she was

⁹⁴ *Youth Criminal Justice Act*, *supra* note 8.

⁹⁵ *Criminal Code*, *supra* note 16.

⁹⁶ *R v Gladue*, *supra* note 10.

⁹⁷ *R v Ipeelee*, *supra* note 3 at para 73.

convicted for the manslaughter of her common law partner.⁹⁸ During sentencing, there were a number of missed opportunities to consider her Indigenous heritage, and how it contributed to bringing the accused before the court.⁹⁹ As a result, this case was appealed to the Supreme Court of Canada (“SCC”), where the court made a number of important conclusions including: 1) It is irrelevant whether an Indigenous offender is raised in a rural/reserve area, or if they are raised in an urban area for the purposes of considering alternatives for sentencing;¹⁰⁰ and, 2) *Gladue* factors, or a series of contextual factors indicative of the circumstances of Indigenous offenders, must be considered during the sentencing process.¹⁰¹ This case was perhaps most important for the subsequent implementation of *Gladue* courts, *Gladue* reports and submissions during sentencing, all of which will be discussed in greater detail throughout this thesis.

In *R v Ipeelee*, the accused was brought before the court on a breach of a Long-Term Supervision Order (“LTSO”).¹⁰² He was sentenced to 3 years of custody, which the SCC ultimately overturned and replaced with a sentence of 1 year of custody.¹⁰³ Here, the SCC determined that the principles articulated 13 years ago in *R v Gladue* had been misinterpreted by lower courts,¹⁰⁴ and focused on clarifying the application of s 718.2(e) of the *Criminal Code* in future cases. Both of these cases will be critically analyzed in greater detail in the next chapter.

This thesis will also examine the cases *R v TDK*¹⁰⁵ and *R v Anderson*¹⁰⁶ to illustrate some of the factors contributing to youth involvement in the criminal justice system, and how

⁹⁸ *R v Gladue*, *supra* note 10 at para 6.

⁹⁹ *Ibid* at paras 12-18.

¹⁰⁰ *Ibid* at para 84.

¹⁰¹ *Ibid* at para 66.

¹⁰² *R v Ipeelee*, *supra* note 3 at para 13.

¹⁰³ *Ibid* at para 93.

¹⁰⁴ *Ibid* at para 85.

¹⁰⁵ *R v TDK*, 2015 MBQB 119 [*TDK*].

¹⁰⁶ *R v Anderson*, 2018 MBCA 42 [*Anderson*]. I selected *R v TDK* and *R v Anderson* as case studies because they are illustrative of how Indigenous youth cases are being handled. This is not intended to be a comprehensive analysis of all Indigenous youth sentencing cases.

circumstantial factors prevent holistic healing. In the Canadian context, the latter set of cases are not widely recognized as influential or important cases to the development of criminal law in application to youth, though they serve an important purpose for this thesis. While these are not SCC cases, they provide detailed information surrounding the circumstances of the case as well as the young offender's personal history. In doing so, they demonstrate how the court currently approaches identifying and applying sentencing factors to Indigenous youth.

In *R v TDK*, the accused is a youth found guilty of manslaughter. She identifies as Métis. Her mother is from Hollow Water First Nation in Manitoba, while her father is from Big Island First Nation in Ontario.¹⁰⁷ The accused had an extremely tumultuous childhood, moving around regularly. Though she is not identified as having herself been raised exclusively in a reserve area, there is a clear indication that the experience of her parents had severely affected her experience as a young Indigenous woman. As future chapters will go on to explain, the Judge in this case did exemplify contextual sentencing and the use of *Gladue* factors in an effort to seek the most appropriate sentence. In this case, the Crown was seeking 8 years of custody as an adult sentence, whereas defence counsel was seeking 3 years of probation youth sentence.¹⁰⁸

The Judge ultimately decided in favour of defence counsel, and imposed a youth sentence rather than an adult sentence.¹⁰⁹ While it was clear that the Judge considered relevant *Gladue* factors in assessing the background of the case itself, it was not clear how exactly the Judge factored in these considerations in the specific sentence. *Gladue* considerations did not come up again in his determination of the sentence.¹¹⁰

By comparison, *R v Anderson* is an example of an Indigenous youth from a small,

¹⁰⁷ *R v TDK*, *supra* note 105 at paras 23-24.

¹⁰⁸ *Ibid* at paras 26-27.

¹⁰⁹ *Ibid* at para 43.

¹¹⁰ *Ibid* at paras 43-53.

relatively remote community. The crime occurred in Wabowden, Manitoba, about an hour outside of Thompson, Manitoba.¹¹¹ Like TDK, Anderson's upbringing and the resources around him had an enormous impact on his young adulthood and the crime he committed. In this Manitoba Court of Appeal case, one of the factors the accused was appealing was the trial Judge's application of *Gladue* factors.¹¹² Again, this is a case where it is clear the Judge was considering the contextual factors related to the Indigenous youth's upbringing, including where he had lived, the history of his parents, and more.¹¹³ A *Gladue* report was also provided to the court.¹¹⁴

The appeal court Judge commented substantially on the use, or lack thereof, of *Gladue* factors at the trial level.¹¹⁵ While the appeal court Judge did not overturn the decision of the trial Judge, he was much more thoughtful in his consideration and application of the *Gladue* factors, demonstrating the thorough and reasoned approach anticipated in *R v Gladue* itself.¹¹⁶ *R v Anderson* is an excellent example of a court properly utilizing *Gladue* factors, regardless of the actual sentence imposed. This thesis will critically analyze these cases fully and explore alternatives to rehabilitating and reintegrating Indigenous youth into society, post-conviction.

Beyond the statutory law and jurisprudence, it is important to create a vivid image of what the criminal justice system in Northern communities look like. "Incorporating the Familiar"¹¹⁷ by Susan G. Drummond provides an anthropological account of the circuit court practices in Nunavik, Quebec. In her book, she effectively articulates the fanfare surrounding court sittings and compares the arrival of court to a circus, where unfamiliar people enforce

¹¹¹ *R v Anderson*, *supra* note 106 at para 6.

¹¹² *Ibid* at para 4.

¹¹³ *Ibid* at paras 20-25.

¹¹⁴ *Ibid* at para 27.

¹¹⁵ *Ibid* at para 40.

¹¹⁶ *Ibid* at paras 63-75.

¹¹⁷ Susan G Drummond, *Incorporating the Familiar* (Quebec City: McGill-Queen's University Press, 1997) at 15.

unfamiliar laws.¹¹⁸ While this example cannot possibly articulate the experience of all Indigenous communities, it provides an important illustration of some of the obstacles present in circuit courts. This also sheds light on restorative justice as a potential remedy to the inherent incompatibilities between Indigenous legal systems and Western-liberalist legal systems.¹¹⁹

Restorative justice and diversion will be a recurring concept throughout this thesis, as they have been prevalent alternatives for sentencing Indigenous offenders. For the purposes of this thesis, “restorative justice” will be defined in broad terms. John Braithwaite, cited in an article by Jeffery G. Hewitt, defines “restorative justice” as, “...not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct of the workplace, our practice of politics. Its vision is of holistic change in the way we do justice in the world.”¹²⁰ Using this definition, restorative justice can encompass a broad range of solutions, many of which this thesis will both explore and critique.

One way that restorative justice practices have been implemented is through *Gladue* courts, reports and submissions.¹²¹ *Gladue* courts are specialized courts meant to have a more nuanced understanding of the unique circumstances of Indigenous offenders.¹²² However, proliferation of these courts across Canada is still relatively limited, contributing to the regional disparity in Indigenous offenders receiving equitable treatment throughout the country.¹²³

Gladue reports, on the other hand, are praised as having more detail than pre-sentence

¹¹⁸ *Ibid.*

¹¹⁹ Jeffrey G Hewitt, “Indigenous Restorative Justice: Approaches, Meaning and Possibility,” 67 UNBLJ 313 at 316.

¹²⁰ *Ibid.*

¹²¹ Paula Maurutto & Kelly Hannah-Moffat, “Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts,” (2016) 31:3 Canadian Journal of Law and Society 451 at 452.

¹²² Sebastien April & Mylene Magrinelli Orsi, “*Gladue* Practices in the Provinces and Territories,” online: Research and Statistics Division, Department of Justice Canada http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/rr12_11.pdf at 4.

¹²³ *Ibid.*

reports, and for doing a better job contextualizing the offender in their circumstances.¹²⁴

However, there are additional limitations pertaining to the use of *Gladue* reports, including the time it takes to produce them,¹²⁵ and the often-limited access to report writers.¹²⁶ One author argues that one issue regarding *Gladue* reports is that “there is no positive right to a *Gladue* report in most jurisdictions.”¹²⁷ Furthermore, as a deeper analysis of the above mentioned cases will demonstrate in later chapters, *Gladue* submissions are not all of the same quality. The process of developing *Gladue* submissions can be quite subjective. This also affects how much weight a court will give them.

Overall, the success of *R v Gladue* and the mechanisms that came of the decision can be described as follows: “...while the intent of addressing the systemic incarceration of Aboriginal peoples...is appealing as a national project, and appealing to social justice advocates, the functionality of remedial sentencing as a program of government in the context of sentencing highlights how ineffective this project is as a tool to address the material reality of over-incarceration.”¹²⁸ It is obstacles such as these that prevent *Gladue* from achieving its potential in its remedial capacity. Critical Race Theory is a significant theoretical lens with which to analyze the aftermath of *Gladue*, as it provides a body of literature connected to institutionalized racism and its omnipresence.¹²⁹ As a result, CRT provides a framework to critique *Gladue* courts, reports and submissions and their efficacy in creating sentencing equity for Indigenous offenders.

¹²⁴ Kelly Hannah-Moffat & Paula Marutto, “Re-Contextualizing Pre-Sentence Reports,” (2010) 12(3) *Punishment & Society* 262 at 276.

¹²⁵ Paula Marutto & Kelly Hannah-Moffat, *supra* note 121 at 463.

¹²⁶ Sebastien April & Mylene Magrinelli Orsi, *supra* note 122 at 10.

¹²⁷ Alexandra Hebert, “Change in Paradigm or Change in Paradox: Gladue Report Practices and Access to Justice,” (2017) 43 *Queens LJ* 149 at 163.

¹²⁸ Carmela Murdocca, *supra* note 15 at 112.

¹²⁹ Richard Deglado & Jean Stefancic, “Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills,” (1992) 77 *Cornell Law Review* 1258 at 1282.

It is also important to explore theoretical approaches to *Gladue* practices,¹³⁰ or as one author introduces, the opportunity to utilize *Gladue* principles as a sword rather than a shield.¹³¹ In doing so, I will use a number of resources to assess the efficacy of *Gladue*,¹³² but also interpret what the failures of *Gladue* can teach the legal community for the future of restorative justice practices and common law development in Canada.

By critically analyzing the history of Indigenous peoples involved in the Canadian criminal justice system, and identifying the ongoing failures therein, this thesis intends to support an argument for improving and contextualizing the justice system, with emphasis on rehabilitating Indigenous youth.

¹³⁰ Sebastien April & Mylene Magrinelli Orsi, *supra* note 122.

¹³¹ Kelsey L Sitar, “*Gladue* as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial,” (2016) 20 CCLR 247 at 247.

¹³² Paula Marutto & Kelly Hannah-Moffat, *supra* note 121 at 451.

Chapter 2: Youth Criminal Justice Act: History, Obstacles, and Application to Indigenous Youth

“The principles of sentencing are roughly the following...’ seems to provide virtually no direction. We are under the impression that there is a single ideal of exactness and formality in law that is required before we can say we have a coherent legal system. But is this true?”¹

-Susan G. Drummond, author of *Incorporating the Familiar*.

1. Legislative History of the Youth Criminal Justice Act

i. From Young Offenders Act to Youth Criminal Justice Act

The *Youth Criminal Justice Act* (“YCJA”) came into force in April 2003, replacing the *Young Offenders Act* (“YOA”).² The *YOA* was a relatively short-lived piece of legislation, in effect only from 1984 to 2003.³ The purpose of this new legislation was to address a number of concerns about the development of the Canadian youth criminal justice system under the *YOA*.⁴ In the words of the Government of Canada, “these concerns included the overuse of the courts and incarceration in less serious cases, disparity and unfairness in sentencing, a lack of effective reintegration of young people released from custody, and the need to better take into account the interests of the victims.”⁵ In other words, the intention of the *YCJA* was to repair what has been perceived as a fundamentally unfair youth criminal justice system in Canada.

As a result of the *YOA*, for a period of time, Canada had been facing the highest rates of youth incarceration in the Western world.⁶ The *YOA* was also responsible for inconsistent approaches to sentencing across the country, causing confusion and uncertainty in the application

¹ Susan G Drummond, *Incorporating the Familiar* (Quebec City: McGill-Queen’s University Press, 1997) at 134.

² Karen Endres, “The Youth Criminal Justice Act: The New Face of Canada’s Youth Criminal Justice System,” (2004) 42:3 Family Court Review 526 at 526.

³ *Ibid.*

⁴ Government of Canada, *The Youth Criminal Justice Act Summary and Background*, (8 August 2017), online: Department of Justice Canada <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html>.

⁵ *Ibid.*

⁶ Karen Endres, *supra* note 2 at 527.

of sentencing principles and measures.⁷ This was not only concerning for the welfare of children and their ability to effectively rehabilitate into society post-conviction, but it was also a major financial burden on the criminal justice system.⁸

Overall, the intention behind the creation of the *YCJA*, and the amendments to the Canadian youth criminal justice system therein appears to reflect society's normative understanding that youth are less responsible than adults since they have "diminished moral blameworthiness or culpability."⁹ This principle alone is very different from those embodied in the *YOA*, which read, "while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions."¹⁰ This evolved understanding of the nature of youth criminal activity is an important starting point with which to approach a critical analysis of the *YCJA*.

For all intents and purposes, the *YCJA* is a major departure from its predecessor in many ways. Elements of the *YCJA* that were not present in the *YOA* include: Preamble, Declaration of Principle, Extrajudicial Measures, Youth Sentencing, and Custody and Supervision.¹¹ These new sections are important because they further illustrate a shift in perspective on behalf of the Government. For instance, the proliferation of extrajudicial measures for less serious youth crimes demonstrates an understanding of the need to rehabilitate young people, rather than

⁷ *Ibid* at 529.

⁸ According to one report, as of 2014, a single police warning/caution amounted to a total cost of \$1,402.33 per contact, whereas a charge alone cost \$1,048.83, not counting what it would then cost to deal with that charge. Dealing with the charge could range anywhere from an additional \$1,445.06 to \$44,279.80, not including additional cost for custody. Youth open custody costs around \$3,292.36 annually, whereas secure custody is around \$51,741.96 annually per youth. Thomas Gabor, "Costs of Crime and Criminal Justice Responses," (2016) online: Public Safety Canada <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2015-r022/2015-r022-en.pdf> at 26.

⁹ *Youth Criminal Justice Act*, SC 2002, c 1 s 3(1)(b).

¹⁰ *Young Offenders Act*, RSC 1985, c Y-1 s 3(1)(a.1).

¹¹ *The Youth Criminal Justice Act Summary and Background*, *supra* note 4.

incarcerate young people as a response to criminal activity. Under the *YCJA*, Canadian courts increasingly “divert” youth where possible, entering them into community programs that are more likely to help the accused and repair the harm caused by the incident, rather than punish them.¹² Other extrajudicial measures include warnings, police cautions, Crown cautions, and more.¹³

The results have been very positive, with statistics citing a large decrease in charging on behalf of the police, and a noticeable increase in the use of diversion programs.¹⁴ Now, Canada is left with generally more comprehensive and purposeful legislation. However, many questions still remain regarding whom exactly this legislation benefits. Are these changes enough to meet the needs of Canada’s racialized/marginalized youth who have historically faced different challenges in comparison to non-racialized youth? This subsequent analysis seeks to address this question.

ii. Pause for Reflection: Further Reform to the YCJA

The *YCJA* has demonstrably been a step in the right direction, in terms of ensuring youth are constructively handled in the criminal justice system. However, the Government of Canada did not get it right on the first try, and arguably, still have a long way to go. As a result, on October 23, 2012, further amendments came into force as a means of addressing “repeat and violent offenders,”¹⁵ as well as to tackle other pertinent concerns that were not remedied in the original drafting of the *YCJA*. Importantly, these amendments dealt with various areas of the Act, including adding to the “Purposes” section, stating that the “youth criminal justice system is

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

intended to protect the public by holding young offenders accountable; by promoting their rehabilitation and reintegration into society; and by preventing crime by addressing the circumstances underlying their offending behaviour.”¹⁶

With this new purpose, the *YCJA* is clear that protection of the public is the ultimate goal of the legislation, and the criminal justice system aims to accomplish this by way of programs and strategies that offer support for young people. Furthermore, it is significant that this relatively new piece of legislation has been changed as recently as six years ago. Like all areas of Canada’s justice system, the youth criminal justice system is constantly developing and under review as a means of addressing changing needs.

However, the changes to the legislation also appear to have made the *YCJA* stricter in application. The reforms have added additional sentencing principles in application to youth, including a specific deterrence and denunciation purpose of sentencing; a new and expanded definition of “violent offence;” allowing the court to consider prior extrajudicial sanctions in determining a pattern of criminal activity and ultimately contributing to the length and severity of the sentence imposed; and requiring the Crown to consider adult sentences for youth over the age of fourteen convicted of manslaughter, murder, attempted murder, or aggravated sexual assault.¹⁷ It seems as though since its implementation in 2003, the Department of Justice has struggled to find a happy medium between respecting the special considerations applicable to youth while also ensuring that the protection of the public remains the number one priority of the Crown’s office.¹⁸

¹⁶ Government of Canada, *Recent Changes to Canada’s Youth Justice System*, (23 Sept 2015), online: Department of Justice Canada <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/amend-modif.html>.

¹⁷ *Ibid*; referring to ss 234, 229, 239, 273 of the *Criminal Code*, RSC 1985, c C-46 .

¹⁸ *Ibid*.

What Canadians are left with is a piece of legislation that is still growing into itself. Application of this legislation is equally uncertain, with many of the extrajudicial measures requiring services that are not widely available in Northern and rural communities, inherently disadvantaging youth who reside there (to be discussed further below). As we have seen in the instance of school systems described in Chapter 1 of this thesis, when youth are forced to leave their remote home communities in order to access the education services they require, they are vulnerable to other obstacles to successful rehabilitation.¹⁹ A similar set of circumstances arises where youth are denied access to important resources in the justice system that the Act relies upon.

Clearly, the Canadian youth criminal justice system has undergone a lot of change and fine-tuning over the last 35 years. While these changes and reconsiderations of existing legislation have been important, within the context of this thesis, an important question remains: what legislative reform has been done to specifically address the outstanding injustices faced by Indigenous youth in the Canadian criminal justice system?

2. *Under the Microscope: The Effects of the YCJA on Indigenous Youth*

i. How the YCJA Has Attempted to Address the Needs of Indigenous Youth

With all the changes to the youth criminal justice system, there has been very limited legislative reform explicitly affecting the approach to the way Indigenous youth are dealt with by the courts. One of the important changes to the *YCJA* specific to Indigenous youth is under “Declaration of Principle” in s 3(1)(c)(iv). This section of the *YCJA* reads, “within the limits of fair and proportionate accountability, the measures taken against young persons who commit

¹⁹ Tanya Talaga, *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City*, (Toronto: House of Anansi Press Inc., 2017) at 67.

offences should...respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.”²⁰ No such clause existed under the *YOA*.

Adding the language of “aboriginal young persons” is an important change to the legislation, drawing awareness to the idea that Indigenous youth require special consideration. However, it is relatively unclear what exactly this phrase means and how it should be applied in practice.

The only other place where Indigenous youth are specifically referenced is in the context of the application of sentencing principles. Section 38(2)(d) reads,

...a youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles...all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.²¹

Like s 3 of the *YCJA*, this clause is an improvement insofar as it recognizes the unique needs of Indigenous youth during sentencing. However, it is also essentially a reiteration of the equivalent adult provision in the *Criminal Code* under s 718(2)(e). The provision in the *Criminal Code* states,

...a court that imposes a sentence shall also take into consideration the following principles...all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.²²

²⁰ *Youth Criminal Justice Act*, *supra* note 9, s 3(1)(c)(iv), emphasis added.

²¹ *Ibid*, s 38(2)(d), emphasis added.

²² *Criminal Code*, *supra* note 17, s 718(2)(e), emphasis added.

Again, it is significant that these are the only two instances in the entirety of the *YCJA* where the unique needs of Indigenous youth are set apart from those of the general population. Even in these two sections where Indigenous youth have been referenced, the drafters of the legislation have opted to use essentially the same language as has been used in the adult legislation, the *Criminal Code*. In terms of the legislation itself, it seems that little effort has been made to ensure that Indigenous youth and their unique needs both as a result of their various cultures and traditions, and in recognition of the historic inequity they have experienced, have been respected.

3. *Simply Lip Service? Issues With the Wording of the YCJA and Efforts to Bridge the Gap*

i. *The Role of Case Law*

Critical Race Theory (“CRT”) asserts that legislation cannot possibly remedy the injustices faced by racialized peoples in the Canadian criminal justice system.²³ However, the choice of wording in the legislation as an effort to establish equity is still important as a means of minimizing the differences experienced between racialized and non-racialized youth. It is the role of jurisprudence to give legislation meaning where it is vague.

Oftentimes, the Canadian criminal justice system fails to address race altogether, in both case law and legislation. In critiquing an important Canadian criminal law decision on the “limits of police to detain and search,”²⁴ *R v Mann*, David M. Tanovich criticizes the courts failure to acknowledge the accused’s race. “In failing to do so, particularly in *Mann*, the court lost an

²³ David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 Sup Ct L Rev 655 at 659.

²⁴ David M Tanovich, “The Colourless World of *Mann*,” (2004) 21 CR (6th) 47 at 1.

important opportunity to provide guidance on how this investigative power should be exercised and interpreted taking into account the historical and present experiences faced by individuals of colour everyday in this country, namely, over-policing and racial profiling.”²⁵

These missed opportunities on behalf of both the legislature and the judiciary are incredibly detrimental to the growth of Indigenous equity in the Canadian criminal justice system, especially where the accused is a youth and therefore particularly vulnerable. Although legislative reform does not have the ability to independently remedy systemic racism, legislation can operate as a means of ensuring Indigenous youth are approached with the context of their individual background in mind.

The *YCJA* is not only lacking in Indigenous specific provisions, but what is included is insufficient as a means of addressing the clear substantive problems Indigenous youth face in the criminal justice system. This is problematic for a number of reasons. First, by choosing to use vague wording rather than specific provisions in the “Declaration of Principle” and in the “Sentencing” section, the *YCJA* leaves it open to the court to interpret what exactly the needs of Indigenous youth are on a case-by-case basis. In some cases, this is necessary. Different parts of Canada, whether urban or rural, will present different obstacles to Indigenous youth,²⁶ and the judiciary needs to be able to have flexibility in considering all of them.

On the other hand, a provision this vague in nature, which only asks the judiciary to be aware of Indigenous offenders, gives courts the opportunity to simply acknowledge that they have considered the needs of the Indigenous accused without providing much more by way of

²⁵ *Ibid.*

²⁶ See, for example, Tanya Talaga’s recount of the seven youth who died in Thunder Bay after moving from a rural reserve area to an urban centre to pursue their education. While obstacles exist in both environments, they are unique and different and require acknowledgement: Tanya Talaga, *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City*, (Toronto: House of Anansi Press Inc., 2017).

explanation. The benefit of more detailed legislation is that it holds the judiciary accountable for making sure that they consider all possible factors and ask the appropriate questions to place the offender in the context of their background.

Again, an important purpose of jurisprudence is to provide context and rules of application to otherwise vague sections of legislation. It can be argued that there is a place for non-specific legislation if it is given the meaning required by jurisprudence. Perhaps the most important example where case law has attempted to bridge the gap between new legislation and social realities in the criminal law context is *R v Gladue*.²⁷ This case has been incredibly important not only for what it has contributed to the specific matter of sentencing Indigenous adults, but more importantly, for shedding light on the need to identify and address obstacles Indigenous peoples face generally in order to achieve sentencing equity. As this case will be referred to throughout the remaining chapters of this thesis, it will be briefly summarized in the following section.

ii. *R v Gladue*

The accused, Jamie Gladue, was 19 years old when she pled guilty to the manslaughter of her common law husband. The night of the offence was the accused's 19th birthday. She had suspected for some time that the victim had been cheating on her with her older sister. That night she said, "the next time he fools around on me, I'll kill him."²⁸ Later that evening, the victim was seen coming downstairs with the accused's older sister, causing the accused to suspect that they had engaged in sexual activity.²⁹ When the accused and the victim returned to their shared home that evening, the accused confronted the victim about the alleged infidelity. The victim insulted

²⁷ *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385.

²⁸ *Ibid* at para 3.

²⁹ *Ibid* at para 4.

her, telling the accused she was “fat and ugly and not as good as the others.”³⁰ Ultimately, the accused stabbed the victim in the chest, killing him. At the time of the incident, she was overheard yelling, “I got you, you fucking bastard.”³¹

At trial, defence counsel failed to raise the fact that the accused was Indigenous. Counsel also indicated that the accused was not from an Indigenous community, rather, was simply from “a regular community.”³² The trial judge found that because the accused was not from an “aboriginal community,” there were no special circumstances surrounding the offence that required consideration.³³

This case was appealed to the Supreme Court of Canada (“SCC”). Here, the sentence provided at trial of three years for manslaughter was upheld. However, two key and novel decisions were made: 1) The SCC decided that it is irrelevant whether an Indigenous offender is raised in a rural/reserve area, or if they are raised in an urban area for the purposes of considering alternatives for sentencing;³⁴ and, 2) *Gladue* factors, or a series of contextual factors indicative of the circumstances of Indigenous offenders, must be considered during the sentencing process.³⁵ These considerations include “a) unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and, b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular aboriginal heritage or connection.”³⁶

³⁰ *Ibid* at para 5.

³¹ *Ibid* at para 6.

³² *Ibid* at para 12.

³³ *Ibid* at para 18.

³⁴ *Ibid* at para 84.

³⁵ *Ibid* at para 66.

³⁶ *Ibid*.

In analyzing this decision, it is clear that the judges in *Gladue* intended to offer some important clarity to the criminal legislation explicitly pertaining to Indigenous peoples, particularly s 718.2(e) of the *Criminal Code*.³⁷ This is a perfect example of case law bridging the gaps left in legislation in order to harmonize it with society's contemporary values. As a result of this decision, every Indigenous person convicted of a criminal offence now has the right to request a *Gladue* report, and where available, attend *Gladue* court both of which will be described below, and critically analyzed in the next Chapter.³⁸

However, while these changes are significant, they have not provided a comprehensive solution to the systemic problems in the criminal justice system both caused by and perpetuating underlying racism. Although there are certainly many instances of explicit racism, racism is most often a covert phenomenon in society, where the dominant race (in Canada, white-Europeans), do not notice racism as it is happening.³⁹ This being the case, even where *Gladue* principles are correctly applied based on both statutory provisions and case law, the actual purpose of using *Gladue* principles is often misunderstood, or the principles are not scrutinized to the extent the SCC intended.⁴⁰ In other words, what is stopping judges, particularly those in areas of Canada with high rates of Indigenous peoples per capita, from becoming desensitized to the unique

³⁷ Though the decision in *R v Gladue* only explicitly speaks to provisions in the *Criminal Code* and not the *YCJA*, the principles of sentencing established in *Gladue* also apply to Indigenous youth as demonstrated by application in subsequent case law. See *R v TDK*, 2015 MBQB 119 and *R v Anderson*, 2018 MBCA 42 as described in Chapters 1 and 3 for example.

³⁸ Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts," (2016) 31:3 Canadian Journal of Law and Society 451 at 463.

³⁹ Richard Deglado & Jean Stefancic, "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills," (1992) 77 Cornell Law Review 1258 at 1282.

⁴⁰ It is important to note that there are a number of intersectional issues when considering Indigenous offenders and the proper application of *Gladue* factors, including gender. It has been argued that *Gladue* principles were not properly applied to the accused in the case *R v Gladue* itself. Instead, the SCC should have given greater weight to the gender inequalities present, specifically, the presence of what appeared to be ongoing domestic violence. While these issues are incredibly significant, they are beyond the central scope of this thesis, however, are illustrative of the inconsistency and ongoing confusion surrounding the proper application of *Gladue* factors. Jean Lash, "Case Comment: *R v Gladue*," (2000) 20:3 Canadian Woman Studies 85 at 88.

factors faced by an individual Indigenous person, when they hear *Gladue* submissions on a daily basis? In the 2012 SCC case, *R v Ipeelee*, the Court attempted to clarify certain misinterpretations of *Gladue* for lower court judges.

iii. *R v Ipeelee*

Although there are two accused in this case, for the purposes of this Chapter, I will focus on the accused whose appeal was successful, Manasie Ipeelee. Ipeelee has a long and violent criminal record spanning back to his youth, including sexual assaults, and many breach of probation convictions.⁴¹ As a result, he was put on a long-term supervision order (“LTSO”) with a number of conditions as a means of preventing further criminal involvement.⁴² Ultimately, it was a breach of the LTSO for failing to abstain from the use of alcohol that brought Ipeelee before the SCC.⁴³

At trial, the accused received a sentence of three years of custody for the breach. In deciding the sentence, the trial judge indicated that in the case of an LTSO, “the paramount consideration is the protection of the public and rehabilitation plays only a small role.”⁴⁴ The accused appealed the conviction to the Court of Appeal on the ground that the judge did not give appropriate consideration to the fact that Ipeelee was Indigenous.⁴⁵ The appeal was dismissed. Though the Court of Appeal did acknowledge that his Indigenous background is relevant, the judges found that such factors should not affect the sentence.⁴⁶ As a result, the matter was further appealed to the SCC.

⁴¹ *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 at para 3.

⁴² *Ibid.*

⁴³ *Ibid* at para 13.

⁴⁴ *Ibid* at para 15.

⁴⁵ *Ibid* at para 16.

⁴⁶ *Ibid* at para 18.

The main issue to be addressed by the SCC was how to apply the principles of sentencing, including *Gladue* factors, in a breach of a LTSO matter where the offender is Indigenous.⁴⁷ The SCC indicated that the main reason for the existence of s 718.2(e) of the *Criminal Code* was in response to the overrepresentation of Indigenous peoples in the prison system.⁴⁸ The Court also acknowledged that since *Gladue*, the problem of over-incarceration of Indigenous peoples has only worsened.⁴⁹ Significantly, the judges identified that the key issue following the decision in *Gladue* is the way the new law has been implemented by lower court judges.⁵⁰ In doing so, the SCC quotes Professor Quigley, stating, “Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.”⁵¹ This powerful quote indicates that there is a need for variance in the way that Canadian courts approach sentencing in order to achieve equitable sentencing, which is indeed an important principle.

The SCC further clarified that there need not be any causal link between the background factors contributing to bringing the offender before the court and the offence committed.⁵² The effect of requiring a causal link is to trivialize the intergenerational nature of the trauma experienced by Indigenous people and instead suggest that only related trauma can contribute to criminal behaviours.⁵³

The SCC went on to state that, “the second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to

⁴⁷ *Ibid* at para 34.

⁴⁸ *Ibid* at para 58.

⁴⁹ *Ibid* at para 62.

⁵⁰ *Ibid* at para 80.

⁵¹ *Ibid* at para 79.

⁵² *Ibid* at para 81.

⁵³ *Ibid* at para 82.

sentencing decisions for serious or violent offences.”⁵⁴ One way this misinterpretation has occurred is by lower courts misunderstanding *Gladue* to only apply to less serious offences.⁵⁵ Of course, this is nonsensical since in the case itself, *R v Gladue*, the offence in question is manslaughter, which is one of the most serious offences under the *Criminal Code*. The failure to correctly apply s 718.2(e) to all offences creates serious issues with consistency in the criminal justice system across Canada. The SCC concluded that it is necessary to apply *Gladue* principles to all cases involving an Indigenous offender. The alternative would result in unfit sentencing,⁵⁶ therefore, “the application of *Gladue* principles is required in every case involving an Aboriginal offender, including breach of LTSO, and a failure to do so constitutes an error justifying appellate intervention.”⁵⁷

Overall, the SCC determined that a fit sentence for Ipeelee would be one that focused on the actual incident (i.e. becoming intoxicated), rather than what could have happened (i.e. becoming intoxicated and causing a further violent offence).⁵⁸ The SCC substituted the trial judge’s sentence of 3 years custody with a sentence of 1 year of custody instead.⁵⁹ This was more appropriate given that the accused was not causing any harm to anyone when he was found intoxicated.⁶⁰

iv. What These Cases Communicate About Sentencing Indigenous Offenders

Based on the jurisprudence, it seems as though in the years following its decision, *R v Gladue* was largely a failure. However, it is also apparent that there has been an ongoing

⁵⁴ *Ibid* at para 84.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* at para 87.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at para 91.

⁵⁹ *Ibid* at para 93.

⁶⁰ *Ibid* at para 13.

movement by the highest court in Canada to ensure that the circumstances of Indigenous peoples are considered during the sentencing phase of criminal procedure. The fact that in *R v Ipeelee* the SCC took the opportunity to return to the principles they had articulated 13 years earlier in *R v Gladue* and explain that they were being applied incorrectly and inconsistently sends a strong message to lower courts. This also gives cause for optimism that the application of case law can be used as a means to bridge the gap between legislation and social realities on an ongoing basis, instead of one court decision becoming a static response to a current problem.

As previously mentioned, one of the most important products of the *Gladue* decision was the creation of *Gladue* reports and *Gladue* courts.⁶¹ Maurutto and Hannah-Moffat describe *Gladue* courts as, “regular criminal courts that apply Canadian law in cases involving Aboriginal offenders, but they are distinctive in their approach to sentencing.”⁶² *Gladue* reports, on the other hand, can be described as, “holistic and contextualized accounts that characterize the Aboriginal offender’s needs, risks and community options differently from the actuarial risk-based character of PSRs [pre-sentence reports].”⁶³ Together, both the courts and reports are intended to fulfill the principles outlined in *R v Gladue*, and ensure that Indigenous peoples are receiving equitable treatment in the criminal justice system.

However, what happens when the vast majority of criminal cases presided over by judges have an Indigenous accused? Judges are human, and while they are instructed to be impartial, they are still fallible to the content to which they are exposed. For instance, a judge who regularly presides in a jurisdiction with a higher population of Indigenous peoples per capita will likely sentence more Indigenous offenders in comparison to a judge presiding in an area with a

⁶¹ Paula Maurutto & Kelly Hannah-Moffat, *supra* note 38 at 453.

⁶² *Ibid* at 452.

⁶³ Kelly Hannah-Moffat & Paula Maurutto, “Re-Contextualizing Pre-Sentence Reports,” (2010) 12(3) *Punishment & Society* 262 at 265. As noted later in this Chapter, “PSR” is shorthand for “Pre-Sentence Report.”

smaller population of Indigenous peoples. As a result, the judge presiding regularly in the former jurisdiction is likely to have daily repeated exposure to *Gladue* reports and factors, and consider *Gladue* principles as status quo for offenders. The possible effect of this is it becomes more likely that judges will no longer be struck by the gravity of the submissions they hear on a daily basis. In turn, it is possible to become desensitized and lose sight of the significance of the unique factors, and fail to look at the offender as an individual. In this way, the core intent of *Gladue* is not fulfilled. Unfortunately, there is a lack of Canadian research existing around judicial apathy/desensitization. However, it is logical to conclude that repeated exposure to tragedy could desensitize a judge, causing what is known as “compassion fatigue.”⁶⁴

This is particularly significant in the context of PSRs and *Gladue* reports. Pre-sentence reports and *Gladue* reports serve similar purposes in terms of contextualizing the offence within the offender’s personal history, and helping the court reach a conclusion on an appropriate sentence.⁶⁵ Pre-sentence reports are risk-based in their recommendations for sentencing options and provide guidance to judges on possible alternatives. Some scholars and members of the legal profession believe that PSRs are insufficient, only offering “a decontextualized and limited understanding of the impact of racial histories on offending, sentencing and treatment options.”⁶⁶ This tool of the justice system appears to be largely failing offenders in assisting to get them the help and resources they need for recovery. Drafting a pre-sentence report is often quite time consuming.⁶⁷ This could disadvantage the accused, and in some cases, cause them to sit in custody while they wait to be sentenced.

⁶⁴ Katherine N Kinnick, Dean M Krugman, & Glen T Cameron, “Compassion Fatigue: Communication and Burnout Toward Social Problems,” (1996) 73(3) *Journalism & Mass Comm Quart* 687 at 687.

⁶⁵ Kelly Hannah-Moffat & Paula Maurutto, *supra* note 63 at 263.

⁶⁶ *Ibid* at 264.

⁶⁷ *Ibid* at 266.

Even with the slightly more nuanced Canadian laws pertaining to Indigenous offenders and the use of *Gladue* reports as an alternative providing contextualized background factors, “the PSR policy resulting from this new legal framework positions race (and gender) issues as secondary, or at best supplementary, to actuarial risk.”⁶⁸ Thus, *Gladue* is often criticized for placing race as secondary for the offender, “but simply adding race as an addendum does not sufficiently address the situational context of the Aboriginal person, nor the theoretical and methodological difficulties associated with the use of conventional risk/need assessment instruments on non-white and Aboriginal populations.”⁶⁹ Based on this critique of post-*Gladue* legal tools and legislation, it is clear that Indigenous peoples continue to face the reality that criminal legislation cannot substantively affect their role in the Canadian criminal justice system. Making race simply a “special consideration” demonstrates that legislative reform alone will fail Indigenous youth unless it coincides with fundamental changes to the system itself.

Of course, there is an alternative argument. This argument follows that race should only be a “special consideration” in sentencing procedure in recognition of the mandate that the criminal justice system is meant to protect the public,⁷⁰ and therefore that should be the dominant priority, if not the only. Following this line of thought, race should only be a minor consideration, and the emotions of the judiciary regarding an individual’s circumstances have no place in the decision-making process. However, this argument is generally incompatible with other Government goals such as reconciliation. I am not suggesting that sentencing procedures should intentionally evoke the emotions of the judiciary, and in fact agree with the necessity of

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 275.

⁷⁰ As per the Public Prosecution Service of Canada “Mandate and Role,” “decisions related to criminal prosecutions” depend on, amongst other things, “whether a prosecution best serves the public interest.” Government of Canada, *About the Public Prosecution Service of Canada*, (16 April 2018), online: Public Prosecution Service of Canada <http://www.ppsc-sppc.gc.ca/eng/bas/index.html?wbdisable=true>.

impartiality. Rather, it is important that the judiciary be competent in understanding and relying upon the values of the diverse members of society in order to use them as a compass to guide their decision-making.

Overall, as demonstrated by jurisprudence such as *R v Gladue* and *R v Ipeelee*, using case law as a means to bridge the gap between legislation and social realities of Indigenous peoples has been a historic failure. This is evident based on the continued disproportionate rates of incarceration of Indigenous youth (as discussed in greater detail later in this Chapter).⁷¹ The legislation provides no further guidance on what exactly is meant by these provisions, leaving it to case law to give meaning and even teeth to these sections. However, case law existing in a criminal justice framework rife with systemic racism towards Indigenous peoples and racialized minorities⁷² will continue to fail in effectively addressing the actual obstacles to meaningful justice.

One may ask the question whether this is a failure of the training of the judiciary, i.e., if judges receive enough training on cultural competency⁷³ and *Gladue* in sentencing procedure. While there are some articles indicating that the judiciary is increasingly receiving training on Indigenous issues,⁷⁴ there is surprisingly little academic literature outlining exactly what this sort of training embodies, and how it translates into the courtroom experience of Indigenous accused.

⁷¹ Jamil Malakieh, “Adult and Youth Correctional Statistics in Canada, 2016/2017,” (2018) 85 Juristat 1-20, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=BNS8DqtR> at 6.

⁷² David M Tanovich, *supra* note 23 at 661.

⁷³ The Canadian Bar Association defines cultural competency as, “the ability to function effectively in the context of cultural difference and the capacity to effectively adapt, accept and interpret culturally relevant behaviour. Think of cultural competence as a ‘lens’ that can accurately interpret culturally relevant behaviour and values.” This definition will be used for the purposes of this thesis. Jatine Bentsi-Enchill, “Client communication: Measuring your cross-cultural competence” (29 September 2014), online: The Canadian Bar Association <https://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2014/Client-Communication-Measuring-Your-Cross-Cultural>.

⁷⁴ Alyshah Hasham, “As the Law and Society Evolve, Canadian Judges Go Back to School,” *The Toronto Star* (2 July 2017) online: <https://www.thestar.com/news/crime/2017/07/02/as-the-law-and-society-evolve-canadian-judges-go-back-to-school.html>.

Thus, while there is evidently some training of the judiciary⁷⁵ on these important issues, there is more to be done regarding increasing transparency at the very least.

Another issue with the existing provisions in the *YCJA* is the fact that while many provisions pertaining to youth exist in the two different pieces of legislation, the provisions in the *YCJA* and the *Criminal Code* are essentially the same.⁷⁶ Unfortunately, the existing jurisprudence does not do anything to address this disparity or indicate how the principles developed in the case law uniquely apply to youth circumstances. Yet, the sheer fact that separate adult and youth criminal legislation exists demonstrates a recognized need for different provisions. As a result, the provisions in the *YCJA* feel like a contrived answer to what has been identified as a problem, and insufficient in meeting the needs of young people.

Herein lies the issue. There should not be equivalent youth provisions to those in the adult system, but there should be equitable youth provisions. If the Government of Canada recognizes a need to distinguish between youth and adults in the criminal justice system; and another distinct need to distinguish between Indigenous and non-Indigenous people in both the adult and youth system; it follows that there should also be greater differentiation in treatment between Indigenous youth and Indigenous adults with respect to the vastly different circumstances and obstacles they face. Since there has been no indication of how the *YCJA* or youth jurisprudence responds to this issue, the next place to look is in the *Criminal Code*, specifically, identifying how the *Criminal Code* and the case law involving Indigenous adults is transferrable to the youth system.

⁷⁵ National Judicial Institute, *Publications*, online: <https://www.nji-inm.ca/index.cfm/publications/>; Canadian Institute for the Administration of Justice, *Organization*, online: <https://ciaj-icaj.ca/en/about-us/our-organization/>.

⁷⁶ See *Youth Criminal Justice Act*, *supra* note 9, s 38(2)(d); *Criminal Code*, *supra* note 17, s 718(2)(e).

3. ***The Criminal Code: How Does This Affect Indigenous Youth in the Criminal Justice System?***

i. ***Section 718.2(e) Re-Visited***

As previously mentioned, s 718.2(e) of the *Criminal Code* speaks explicitly to special considerations for sentencing adult Indigenous offenders.⁷⁷ The SCC states the following in *Gladue*,

In our view, s 718.2(e) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in a particular case.⁷⁸

The wording “achieve a truly fit and proper sentence in a particular case” is very important, as it quite clearly articulates the concerns of the SCC. Although this interpretation of s 718.2(e) has not been adequately followed, the decision in *Ipeelee* confirmed that *Gladue* is still correct. Lower court judges have misinterpreted this principle, causing inconsistency in subsequent decisions.⁷⁹ It is also significant that the SCC chose to send a message to lower court judges that they are required to sentence Indigenous offenders with awareness of context and their individual background, and doing so is a part of upholding the principles of fundamental justice.⁸⁰ The SCC also clarified in *Gladue* that it is incumbent upon the judiciary to give the remedial purpose of s 718.2(e) real force.⁸¹

⁷⁷ *Criminal Code*, *supra* note 17, s 718.2(e).

⁷⁸ *R v Gladue*, *supra* note 27 at para 33.

⁷⁹ *R v Ipeelee*, *supra* note 41 at para 80.

⁸⁰ *Ibid* at para 87.

⁸¹ *R v Gladue*, *supra* note 27 at para 34.

However, as previously stated, this decision has generally been perceived as ineffective. While this section does not apply to Indigenous youth, as explained above, the *YCJA* contains an equal provision to s 718.2(e). So, if both the *Criminal Code* and the *YCJA* have clauses explicitly encouraging awareness of the unique circumstances of Indigenous peoples, and jurisprudence that further expands upon it, what are the obstacles still present for youth that the criminal justice system has not “fixed”?

ii. *Obstacles Present for Indigenous Youth in the Criminal Justice System*

While the *YCJA* does not necessarily create additional obstacles for Indigenous youth participating in the criminal justice system, it has been insufficient as a tool to remedy those that currently exist. Beyond what has been discussed thus far, Indigenous youth face a number of circumstantial disadvantages in comparison to non-Indigenous youth including but not limited to: higher rates of Foetal Alcohol Spectrum Disorder (“FASD”);⁸² lack of court mandated resources including probation services, mental health services,⁸³ and youth homes to be released to after custody; fewer mental health and healing resources available to their parents and guardians, let alone services that incorporate culturally sensitive principles;⁸⁴ fewer educational resources;⁸⁵ fewer after school programs and activities to participate in; and Indigenous youth are disproportionately more likely to be placed in care,⁸⁶ therefore alienating them from their own families, than non-Indigenous youth, just to name a few.

⁸² Truth and Reconciliation Commission of Canada, “Truth and Reconciliation Commission of Canada: Calls to Action,” (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at cls 33.

⁸³ Priscilla Ferrazzi & Terry Krupa, “Symptoms of Something all Around Us’: Mental Health, Inuit Culture, and Criminal Justice in Arctic Communities in Nunavut, Canada” (2016) 165 *Social Science & Medicine* 159 at 159.

⁸⁴ Malcolm King, Alexandra Smith, & Michael Gracey, “Indigenous Health Part 2: The Underlying Causes of the Health Gap,” (2009) 374 *The Lancet* 76 at 77.

⁸⁵ Tanya Talaga, *supra* note 19 at 127.

⁸⁶ Cindy Blackstock, “Residential Schools: Did they Really Close or Just Morph into Child Welfare,” (2007) 6:1 *Indigenous LJ* 71 at 74.

As a result of many of these factors, Indigenous youth are more likely to associate with negative peer groups, come from difficult family backgrounds and participate in the use of drugs and alcohol than non-Indigenous youth in Canada.⁸⁷ Not only does this lead to a higher likelihood of criminal involvement, but also make Indigenous youth more vulnerable to recidivism in the future.⁸⁸

In totality, all of these obstacles paint a dismal picture. When young people do not have access to what they need to be successful, they quite simply will not be successful. Moreover, as a society, we cannot expect all youth to be as self-motivated as adults. Without the kind of supervision that encourages young people to succeed, it will be increasingly difficult to do so.⁸⁹ For instance, if a young person is on conditions to contact probation services every week but the nearest landline is 5km away and the young person has no access to a car, they are almost certainly going to breach their conditions. These disparities are simply the reality for many youth residing in Indigenous communities.

Interestingly, the *YCJA* does attempt to reconcile the need for parental involvement in the legislation itself. Broeking and Peterson-Badali point out that the *YCJA* allows for young people who have been charged with a criminal offence to have a parent or guardian with them, and “expands the scope of parental roles from advocacy and support to socialization by instructing that ‘parents should be...encouraged to support [youth] in addressing their offending behaviour.’”⁹⁰ However, in a different piece, Broeking and Peterson-Badali emphasize that the *YCJA* does not explicitly provide positive avenues for parents or guardians to be present in their

⁸⁷ Annie K Yessine & James Bonta, “The Offending Trajectories of Youthful Aboriginal Offenders,” 51:4 *Canadian J Criminology & Crim Just* 435 at 452.

⁸⁸ *Ibid.*

⁸⁹ Julia Broeking & Michele Peterson-Badali, “The Extent and Nature of Parents’ Involvement in Canadian Youth Justice Proceedings,” (2010) 10:1 *Youth Justice* 40 at 41.

⁹⁰ *Ibid* citing the *Youth Criminal Justice Act*, s 3(1)(d)(iv).

child's involvement with the justice system.⁹¹ Parents are often placed in the difficult position of both wanting their child to be an honest, well-socialized person, and also wanting them to avoid involvement with the criminal justice system. Thus, it is common that parents will insist their child "tell the truth" to the police, which can lead to a young person providing the police with an incriminating statement.⁹²

Unfortunately, there is very little Canadian research analyzing the relationship between Indigenous youth and the involvement of other support figures such as probation officers in relation to how likely it is they will breach their probation conditions. However, there is a body of research from Australia examining the relationship between probation officers and youth, which ultimately concludes, "A good worker-client relationship combined with a strengths focus is likely to be effective regardless of the other skills used."⁹³ Thus, positive relationships are key for any youth involved in the criminal justice system, but perhaps some supervisory relationships are more important than others in order to build constructive relationships that will help prevent recidivism.

Another common circumstance that young people on probation will find themselves in is breaching conditions on their probation order.⁹⁴ For example, a youth might be put on probation for a minor offence they committed while intoxicated. As a result, the court will likely decide to put them on conditions to abstain from alcohol and drug use and to complete treatment within a specified amount of time. However, Indigenous youth are more likely to be in care or come from

⁹¹ Julia Broeking & Michele Peterson-Badali, "Parents' Involvement in the Youth Justice System: Rhetoric and Reality," (2010) 52 CJCCJ 1 at 4.

⁹² *Ibid* at 11.

⁹³ Chris Trotter & Phillippa Evans, "An Analysis of Supervision Skills in Youth Probation," (2012) 45(2) Australian and New Zealand Journal of Criminology 255 at 270.

⁹⁴ Jane B Sprott, "The Persistence of *Status Offences* in the Youth Justice System," (2012) 54:3 CJCCJ 309 at 311-312.

homes where drug and alcohol abuse is prevalent,⁹⁵ and even possibly accepted of children. In these circumstances, it is unrealistic to expect the youth to comply under such impossible surroundings, especially if they are already addicted to drugs or alcohol themselves.⁹⁶ Thus, as youth continue to breach their conditions, they continue to get charged. The *YCJA* does not account for this circumstantial difference, which inherently disadvantages Indigenous youth over non-Indigenous youth.

This is equally applicable when a young person breaches their bail conditions.⁹⁷ Youth are generally only supposed to be put on bail conditions in order to ensure their return to future court dates, or where it is necessary to protect the public.⁹⁸ Oftentimes, bail conditions end up being not directly related to the offence in question, and also more conditions than are necessary are often assigned to a young person.⁹⁹ Again, this increases the likelihood of the young person breaching his/her conditions, and ending up before the court on a series of new charges.¹⁰⁰

This phenomenon often results in the ridiculous outcome where a youth record reads one substantive offence (i.e., assault, theft, etc.), followed by a series of convictions for breach of probation/bail. After enough breach of probation/bail charges, the young person will start to receive custody or a larger sentence based on their previous convictions,¹⁰¹ and their record will carry over to their adult life. Given that one of the central purposes of implementing the *YCJA*

⁹⁵ Nico Trocmé, Della Knoke & Cindy Blackstock, “Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child Welfare System,” (2004) 78(4) *Social Service Review* 577 at 583.

⁹⁶ Though it is not the subject of this thesis, there is also the separate issue of criminalization of an illness as it relates to addictions. Michelle S Lawrence, “From Defect to Dangerous: Has the Door Opened for Recognition of an Addiction-Based Defence in Canadian Criminal Law?” (2017) 59(4) *CJCCJ* 572 at 574.

⁹⁷ Jane B Sprott & Nicole M Myers, “Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions,” (2011) 53:4 *Canadian J Criminology & Crim Just* 404 at 405.

⁹⁸ *Ibid* at 405.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

¹⁰¹ *Criminal Code*, *supra* note 17, s 727(1).

was to “reduce the use of court and custody for minor offences,”¹⁰² it seems contrary to the goals of the *YCJA* to incarcerate someone for a charge that would not be criminal if it were not for the fact that it is listed in probation conditions.¹⁰³

Importantly, the *YCJA* contains specific provisions geared towards seeking alternatives to the formal court system where youth are involved.¹⁰⁴ Section 4 of the *YCJA* requires police to presume that diversion is the most appropriate way to approach youth rather than charging them.¹⁰⁵ The *YCJA* also requires police officers to consider possible extrajudicial measures prior to court proceedings under s 6(1).¹⁰⁶ However, it is more difficult to divert breaches since usually no further substantive offence has occurred, so diversion is an inappropriate way of dealing with these offences since again, they otherwise would not be illegal. In fact, the rate of charging youth with failure to comply with their probation conditions has increased since the 1990s, though youth are now less likely to be referred to court on these charges.¹⁰⁷

The outcome of these cumulative obstacles facing Indigenous youth is not surprising. While the overall rate of youth incarceration and use of court intervention has decreased, as of 2016, the rate of Indigenous youth in custody has continued to rise. One study reports that, “in 2015/2016, 54% of Aboriginal youth admissions to correctional services were admitted to custody whereas the comparable figure for non-Aboriginal youth was 44%. The proportion of Aboriginal youth admissions to custody has grown over time.”¹⁰⁸ The report goes on to indicate that in 2011/2012 the rate of Indigenous youth incarcerated was 52%, whereas the rate of non-

¹⁰² Jane B Sprott, *supra* note 94 at 311.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* at 313.

¹⁰⁵ *Youth Criminal Justice Act*, *supra* note 9, s 4(c), (d).

¹⁰⁶ *Ibid*, s 6(1).

¹⁰⁷ Jane B Sprott, *supra* note 94 at 316.

¹⁰⁸ Jamil Malakieh, “Youth Correctional Statistics in Canada, 2015/2016,” (2017) 85 Juristat 1-15, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14702-eng.htm> at 5.

Indigenous youth incarcerated was 48%.¹⁰⁹ This is a relatively significant decrease for non-Indigenous youth, while Indigenous youth continue to be incarcerated contrary to the principles indoctrinated in the statutory law as well as the jurisprudence.

Alarming, in the most recent statistics released on June 18, 2018, Indigenous youth continue to be overrepresented in the Canadian criminal justice system.¹¹⁰ This report indicates that, “Aboriginal youth accounted for 46% of youth admitted to correctional services in 2016/2017, while representing 8% of the Canadian youth population.”¹¹¹ Perhaps more disturbing is that Indigenous youth now compose 50% of the incarcerated youth, while also making up 42% of youth under community supervision.¹¹² These statistics are demonstrative that something is not working. There is systemic racism present in the Canadian youth criminal justice system that is causing Indigenous youth to get left behind. Ultimately, it seems as though legislative reform has only succeeded in benefiting non-Indigenous youth.

Finally, another common problem listed above is disproportionate rates of Indigenous youth in the child welfare system. Involvement in the Canadian child welfare system frequently leads to increased likelihood of involvement in the criminal justice system. One important study reports, “the research concerning family attachment, particularly to a primary caregiver, shows that lack of attachment often results in maladaptive and antisocial behaviour among children and adolescents.”¹¹³ This study also demonstrates that, “a larger proportion of Aboriginal than non-Aboriginal inmates were involved in the child welfare system when they were children. Overall,

¹⁰⁹ *Ibid.*

¹¹⁰ Jamil Malakieh, *supra* note 71 at 6.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Shelley Trevethan, Sarah Auger & John-Patrick Moore, “The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates,” (September 2001), online: Department of Justice <http://www.csc-scc.gc.ca/research/r113-eng.shtml>.

63% of Aboriginal inmates said they had been adopted or placed in foster or group homes at some point in their childhood, compared to 36% of non-Aboriginal inmates.”¹¹⁴ One cannot ignore the blatant connection between participating in the child welfare system and criminal activity. Yet, none of the criminal legislation in Canada addresses this as a significant consideration for sentencing purposes, for Indigenous youth or otherwise.

All of these underlying problems illustrate the covert systemic racism present in the Canadian criminal justice system. The source of this racism is two-fold. First, the obstacles facing Indigenous youth are yet another articulation of the intergenerational trauma experienced as a result of the effects of colonization. In many instances, the trickle down effect has influenced parenting skills,¹¹⁵ increasing the likelihood that Indigenous children will wind up in care.¹¹⁶ Based on this critical analysis, the second problem influencing the proliferation of systemic obstacles facing Indigenous youth is the lack of government resources allocated to redressing these issues.¹¹⁷ While the Government of Canada is aware of all of these pervasive issues in Indigenous communities, little meaningful change has occurred. Clearly, in order for change to be meaningful, it must occur at the systemic level, ensuring that Parliament and the legislature are likeminded in achieving the same goals.

4. *Criminal Legislation in Canada: A Tool for Reconciliation?*

¹¹⁴ *Ibid.*

¹¹⁵ While there is no real significant difference between the concept of “neglect” in Indigenous versus non-Indigenous communities, there is often a difference in the way at risk children are dealt with. Indigenous models of child welfare tend to only hold parents accountable for the actions within their sphere of control, whereas society is responsible to help remedy the obstacles that they cannot be personally held accountable for, such as poverty. Provincial models, on the other hand, do not consider such factors. Cindy Blackstock, *supra* note 86 at 73, citing Kathleen Earle Fox, “Are They Really Neglected? A Look at Social Workers Perceptions of Neglect Through the Eyes of the National Data System,” (2004) 1:1 First Peoples Child and Family Review 73.

¹¹⁶ Nico Trocmé, Della Knoke & Cindy Blackstock, *supra* note 95 at 578.

¹¹⁷ Cindy Blackstock, *supra* note 86 at 73.

It is clear that Canadian criminal legislation has not historically been utilized as a tool for reconciliation. While it is hard to pinpoint an exact date when it came to be, reconciliation with Indigenous peoples has been the mandate of the Government of Canada for over 20 years.¹¹⁸ The purpose of reconciliation is to repair relationships between the Government of Canada and Indigenous peoples and communities, particularly in light of the effects of the residential school system.¹¹⁹

In 2015, the Truth and Reconciliation Commission released a final report, recommending ninety-four Calls to Action¹²⁰ as a step towards reconciliation. Amongst these Calls to Action are seventeen recommendations applying to the justice system,¹²¹ as well as an additional three regarding “equity for Aboriginal people in the legal system.”¹²² It is clear from this initiative that one of the most important aspects of reconciliation is addressing the many disparities Indigenous peoples face in the Canadian justice system. This enumerated list of recommendations has provided the Government of Canada with clear opportunities to remedy the ways they have been failing Indigenous peoples.

While the criminal justice system has not been successful in supporting this objective thus far, it undoubtedly has the potential to do so. The major problem in achieving this appears to be the way in which the Government envisions the criminal justice system and how compatible

¹¹⁸ Government of Canada, Royal Commission on Aboriginal Peoples. *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, (1996), online: Minister of Supply and Services Canada <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

¹¹⁹ Government of Canada, *Delivering on Truth and Reconciliation Commission Calls to Action*, (3 May 2018), online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca/eng/1524494530110/1524494579700>.

¹²⁰ Truth and Reconciliation Commission of Canada, *supra* note 82.

¹²¹ *Ibid*, ss 25-42.

¹²² *Ibid*, ss 50-52.

that is with the various Indigenous visions of justice.¹²³ In discussing the relationship between the court and the geography of Nunavik (an Inuit community in Northern Quebec), Susan Drummond writes, “on whose territory, for example, is a crime committed if it happens on the ice over the sea of Nunavik and not the ice over the land...Shifting borders strains an already troublesome struggle for control of the territory.”¹²⁴

Drummond also states that, “the contours of the new political entity give rise to questions of legitimacy in the delivery of law in the area. They quietly draw attention to some of the artificiality of the official order.”¹²⁵ In other words, in an Indigenous Northern community, with unique boundaries both cultural and physical, how applicable even is the Western-liberalist formulation of criminal justice? Where the majority of the population is Inuit and has not traditionally relied on Canadian expressions of justice, it is hard to imagine circuit courts, where court parties fly in from southern communities, could be anything but invasive. Through the lens of Critical Race Theory, the answer to this question is that Western-liberalist justice models are inapplicable to this other quite separate legal philosophy.

However, it is important to examine the potential effects of allocating only pieces of the criminal justice system to Indigenous communities to self-govern. This would be a formulation of partial self-governance. In engaging in this exercise, a number of questions arise, including “whose police pursue whom onto whose territory becomes more complex, and more redundant. The very legitimacy of these institutions-police, court, territory- is undermined.”¹²⁶ Again,

¹²³ Again, it is important to consider that there are so many different Indigenous cultures, whether they are different traditions within Inuit cultures, First Nations or Métis. For a justice system to be compatible with the traditions of one culture does not inherently suggest it will be compatible with all, avoiding the temptation to adopt a “pan-Indigenous” approach.

¹²⁴ Susan G Drummond, *supra* note 1 at 29-30.

¹²⁵ *Ibid* at 28.

¹²⁶ *Ibid* at 30.

Canada is faced with a number of difficulties in pursuing the self-governance route. While this option likely offers the most comprehensive and sustainable solutions for Indigenous youth, it is probably the most complex solution requiring new innovations not yet explored. As discussed in more detail in Chapter 1, as a country, Canada simply is not there yet.

I am not arguing that Parliament has not attempted to embody principles of reconciliation in criminal legislation in the past. For instance, one important step towards reconciliation is reducing the over-incarceration of Indigenous people.¹²⁷ The concept that the Canadian criminal justice system likely fails in addressing the disproportionate rates of incarceration of Indigenous peoples has been articulated in both the *Criminal Code* as well as case law. In *R v Gladue*, the SCC clearly stated that, “Parliament’s choice to include [s 718.2] (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders.”¹²⁸ The SCC is clear that the sentencing provisions in the *Criminal Code* require the use of restorative justice where fitting,¹²⁹ and that incarceration should be employed as a last result, especially where the offender is Indigenous. This is all part and parcel of reconciliation, and undoubtedly positive steps, as long as mechanisms are in place to make this possible.

5. Conclusion

Both the *Youth Criminal Justice Act* and the *Criminal Code* have been ineffective in not only protecting and rehabilitating Indigenous youth, but also in supporting the goals of reconciliation. Years of legislative reform, and attempting to specifically address the needs of Indigenous communities via jurisprudence has largely failed as a means of bridging this gap.

¹²⁷ Truth and Reconciliation Commission of Canada, *supra* note 82, cls 30.

¹²⁸ *R v Gladue*, *supra* note 27 at para 711.

¹²⁹ *Ibid.*

Although the SCC recognizes not only the need for restorative justice, but also the Parliamentary choice to include it in the *Criminal Code*, the decisions in *Gladue* and *Ipeelee* do not speak to how this can be accomplished in a meaningful way that is respectful to Indigenous tradition and practice. Leaving it up to judges to make these decisions on a case-by-case basis has not been the success the SCC had anticipated.

Moreover, it is not the place of the judiciary to comment on the relevance of self-governance, as this is strictly the decision of Parliament. That being said, the *Criminal Code*, in collaboration with jurisprudence could accomplish pseudo-self-governing mechanisms that may act as a stopgap to rehabilitation of Indigenous offenders. If the legislature were to draft a provision loosening the framework for diversion programs and prioritizing Indigenous based counselling and healing initiatives, the courts could encourage the use of Native Friendship Centres and other culturally nuanced programming as a means of addressing the gap currently present in the criminal legislation. Potential options to supplement the current criminal legislation and seek to address the systemic inequities facing Indigenous youth will be the subject of the next Chapter.

Chapter 3: Existing Alternatives and Means of Addressing Contemporary Problems: Can Instruments of Equity in the Youth and Adult Systems Create Meaningful Change?

“The overwhelming message emanating from the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism. As Professor Carter puts it, ‘poverty and other incidents of social marginalization may not be unique, but how people get there is. No one’s history in this country compares to Aboriginal people’s.’”¹

-Per LeBel J., *R v Ipeelee*

1. Gladue Reports, Gladue Courts, and Submissions: A Deeper Look

i. Gladue: A Tool for Progress?

As discussed in previous chapters, *Gladue* reports, *Gladue* courts, and submissions are the product of the decision in *R v Gladue*.² There is no material difference in the way *Gladue* is applied to youth versus adults. This is especially pertinent as Canadian society continues to experience an increasing number of incarcerated Indigenous youth. As previously mentioned, as of June 18, 2018, Indigenous youth made up 50% of the incarcerated youth population, while also making up 42% of youth under community supervision.³ As Canada approaches the 20th anniversary of the *Gladue* decision, one must ask the question: what has the justice system accomplished in terms of facilitating justice for Indigenous youth? Moreover, how have the mechanisms resulting from *Gladue* helped to materialize these goals?

In earlier Chapters, I outlined the relevance and application of *Gladue* reports, *Gladue* courts, and factors as they apply to sentencing Indigenous youth. This section will take a closer look at the efficacy of *Gladue* and the substantive results it has had on young Indigenous

¹ *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 at 77, citing M Carter, “Of Fairness and Faulkner” (2002), 65 *Sask L Rev* 63 at 71.

² *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385.

³ Jamil Malakieh, “Adult and Youth Correctional Statistics in Canada, 2016/2017,” (2018) 85 *Juristat* 1-20, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=BNS8DqtR> at 6.

offenders, ultimately demonstrating the prevalence of structural determination⁴ in the Canadian criminal justice system.

ii. Overview

In order for laws to reflect the needs of Indigenous peoples in Canada, the legislature and judiciary must “look to the bottom”⁵ in establishing new laws that are intended to ameliorate the disparity between Indigenous and non-Indigenous peoples. *R v Gladue* is an effort to accomplish this. Culturally sensitive sentencing involves introducing Indigenous youth to their culture in order to help encourage cultural practices and connections. Programs with a cultural focus have proven to be instrumental in helping foster healthy lifestyles amongst Indigenous youth.⁶ However, for such a program to be successful, the initiatives must be driven by Indigenous communities.⁷ In discussing problems with the justice system in Nunavut, Scott Clark writes, “community alternatives in the form of community justice committees and youth justice committees hold real promise as assertions of Inuit commitment to the management of local problems.”⁸ Thus, in order for justice strategies to have a real and lasting effect, they must resonate from the bottom, up.

Unfortunately, there are no statistics clearly articulating exactly how effective or influential *Gladue* reports, courts, and submissions have been in increasing the cultural relevance of court proceedings. That being said, it is evident that the body of jurisprudence clearly

⁴ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 2nd ed (New York: New York University Press, 2012) at 31.

⁵ *Ibid* at 27.

⁶ Brittany Barker, Ashley Goodman, & Kora DeBeck, “Reclaiming Indigenous Identities: Culture as Strength Against Suicide Among Indigenous Youth in Canada,” (2017) 108:2 Can J Public Health 208 at 209.

⁷ John Hansen, “Indigenous-Settler Incarceration Disparities in Canada: How Tribal Justice Programming Helps Urban Indigenous Youth,” (2015) 25:3 Indigenous Policy Journal 1 at 7.

⁸ Scott Clark, “The Nunavut Court of Justice: An Example of Challenges and Alternatives for Communities and for the Administration of Justice,” 53:3 (2011) CJCCJ 343 at 364.

articulating the importance of recognizing the history of Indigenous peoples in sentencing has not successfully contributed to keeping Indigenous youth out of prison.⁹ Furthermore, there is a body of literature indicating that the availability of *Gladue* reports is highly dependent on jurisdiction, and the way each province has interpreted the application of *Gladue*.¹⁰ The natural effect of this is major disparities in access to justice for Indigenous peoples, and a stark misunderstanding and inconsistency in application of the law.¹¹ This does not even take into account the regional disparities, which “results in disadvantages in sentencing based on geographic location.”¹² It is very difficult for someone who is incarcerated to advocate for their rights, let alone if they are a youth. Thus, if the status quo in a jurisdiction is to simply provide Indigenous youth with a pre-sentence report (“PSR”) rather than a *Gladue* report, there is little the accused can do.

The statistics speak for themselves. It is clear that the mechanisms directly resulting from *Gladue* have done little to reduce the sentences of Indigenous youth, or even provide more culturally competent resources. Yet, the importance of cultural relevance in the criminal justice system does not stem from the *Gladue* decision alone. As previously mentioned, it also finds roots in the legislation, specifically, the *Youth Criminal Justice Act* (“YCJA”). In the following section, I examine statutory solutions and how they have affected the sentencing of Indigenous youth, absent the influence of Indigenous peoples.

2. Youth Diversion Programs and Extra-Judicial Measures

i. Requirements for Diversion

⁹ Jamil Malakieh, *supra* note 3 at 6.

¹⁰ Alexandra Hebert, “Change in Paradigm or Change in Paradox: *Gladue* Report Practices and Access to Justice,” (2017) 43 Queen’s LJ 149 at 163.

¹¹ *Ibid* at 170.

¹² *Ibid* at 168.

While there are a number of extrajudicial measures/sanctions available under the *YCJA*,¹³ diversion presents one of the best opportunities for the Canadian criminal justice system to address crime amongst Indigenous youth in a culturally sensitive manner. Police and Crown cautions, as provided for in the *YCJA*,¹⁴ are an important tool to prevent youth from entering into the criminal justice system in the first place. These mechanisms allow authorities to simply provide youth with a warning, avoiding court proceedings altogether.¹⁵ However, it is only diversion that offers an opportunity to address the root of the issue and substantively help a young person in conflict with the law while preventing a charge on their criminal record.

It is important that one of the overall goals of both the jurisprudence and legislation regarding sentencing Indigenous youth is ensuring that culturally sensitive sentences are made available, and that the needs of Indigenous youth are taken into account in the decisions of the Court. Youth diversion programs are a central form of “extrajudicial measures,” as outlined in the *YCJA*,¹⁶ and can ultimately act as a form of restorative justice.¹⁷

Importantly, youth diversion can come in two forms: pre-charge and post-charge diversion. Pre-charge diversion requires that police officers “exhaust all available extrajudicial measures before considering laying a criminal charge.”¹⁸ In doing so, police are responsible for selecting the extrajudicial measure that is most likely to rehabilitate the young person while also

¹³ *Youth Criminal Justice Act*, SC 2002, c 1 s 4(a).

¹⁴ *Ibid*, ss 6, 7, 8.

¹⁵ *Ibid*, s 7.

¹⁶ *Ibid*.

¹⁷ The term “restorative justice” for the purposes of this thesis, has been defined in Chapter 1 as “...not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct of the workplace, our practice of politics. Its vision is of holistic change in the way we do justice in the world.” Jeffrey G Hewitt, “Indigenous Restorative Justice: Approaches, Meaning and Possibility,” 67 UNBLJ 313 at 316.

¹⁸ Rose Ricciardelli, Hayley Crichton, et al, “From Knowledge to Action? The *Youth Criminal Justice Act* and Use of Extrajudicial Measures in Youth Policing,” (2017) 18:6 *Police Practice and Research* 599 at 601.

holding them accountable.¹⁹ In comparison, post-charge diversion arises in a situation where a police officer has already charged a youth under the *YCJA*. In this case, it is the Crown Attorney who refers them to a diversion program in court.²⁰

As previously mentioned, custody is the last resort in sentencing any youth, with special attention paid to the circumstances of Indigenous offenders.²¹ However, the *YCJA* itself does not outline what acceptable diversion programs include. Such programs will usually vary on a jurisdictional basis, depending on the availability of services, and whether they can meet the necessary timelines.²² In fact, the *YCJA* itself acknowledges that availability of youth diversion programs will vary.²³ The *YCJA* clearly states that in determining whether an alternative to custody is appropriate, the court must hear submissions regarding what alternatives to custody are available.²⁴

Furthermore, whether or not a youth will be entered into pre-charge diversion will be largely dependent on local police practices and the type of training that law enforcement has received, based on the historic availability of programs.²⁵ Based on this, it can be inferred that in jurisdictions where culturally sensitive youth diversion programs have not been accepted, they will not be included as part of a sentence.

Extrajudicial sanctions such as youth diversion are only permitted if, “it is part of a program of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the

¹⁹ *Ibid.*

²⁰ Government of Canada, *Police Discretion with Young Offenders*, (Jan 7 2015), online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/discre/descript/alt-rech.html#post>.

²¹ *Youth Criminal Justice Act*, *supra* note 13, s 38(2)(d).

²² Rose Racciardelli, *supra* note 18 at 601.

²³ *Ibid.*

²⁴ *Youth Criminal Justice Act*, *supra* note 13, s 39(3)(a).

²⁵ Rose Ricciardelli, *supra* note 18 at 609.

province.”²⁶ Thus, unless the Crown’s office approves a specific program, it will not be deemed a diversion program for the purposes of extrajudicial measures under the *YCJA*. A key obstacle to getting a culturally sensitive program approved is lack of communication between Indigenous organizations such as Friendship Centres and the Crown’s office. Oftentimes, there are important programs with cultural significance run out of Friendship Centres, such as programs specifically designed to teach Indigenous youth about their culture, how to live a healthy lifestyle, and various family support programs.²⁷ Unless the Crown’s office is aware these programs exist and then support their use as diversion programs, they will not be employed as extrajudicial measures.

In many jurisdictions, the Crown’s office will rely on diversion programming approved by the John Howard Society, or similar organizations. For example, in Ottawa, Ontario, the main youth diversion program is the Ottawa Community Youth Diversion Program (“OCYDP”),²⁸ which the John Howard Society helps facilitate. This program is run out of the Boys and Girls Club of Ottawa.²⁹ While this program is certainly an important alternative to custody, there is no indication in any of the available information that the OCYDP takes into account principles of cultural competency in any way. The program itself boasts, “an individualized risk/needs assessment is completed with each participant using standardized assessment tools,”³⁰ following which a goals-oriented program is put into place to help rehabilitate and reintegrate the youth. There is no indication that this assessment includes the cultural elements that are relevant or

²⁶ *Youth Criminal Justice Act*, *supra* note 13, s 10(2)(a).

²⁷ N’Swakamok Friendship Centre Sudbury, *Friendship Centre Programs*, online: <http://www.nfcsudbury.org/Programs.htm>.

²⁸ John Howard Society, *Prevention and Intervention* (2018), online: <http://johnhoward.on.ca/ottawa/services/prevention-intervention/>.

²⁹ *Ibid.*

³⁰ Boys & Girls Club of Ottawa, *Diversion*, (2018), online: <http://www.bgcottawa.org/child-youth-programs/community-support-programs/diversion>.

necessary to the young persons success, and how the OCYDP intends to bridge this gap when/where services are unavailable.

For these reasons and more, restorative justice programs for Indigenous youth have largely been perceived as a failure as a means of preventing over incarceration. As one author writes, “it is now apparent that the problem of over incarceration cannot be solved by Indigenous justice initiatives or restorative justice programs, or by the government.”³¹ With this in mind, it is important to explore the relevance of accessibility and availability of culturally sensitive programs, and what role this plays in the perceived absence of success of restorative justice initiatives.

ii. Availability- Unequal Access Not Reflected in Decisions

Given the general lack of human resources as well as financial resources, more isolated communities are less likely to have the range of culturally sensitive programs available in urban areas.³² Yet, the public is rarely made aware of this regional disparity since “lack of resources” is almost never cited in a judicial decision as a reason for a custodial sentence. Generally speaking, the average person is not aware that youth diversion even exists, unless they have come in contact with the criminal justice system. Thus, while the media frequently reports on the high rates of incarcerated Indigenous youth, the concept of diversion programs is a far less “sexy” issue for the purposes of news coverage.

The disparity between jurisdictions when it comes to culturally sensitive diversion programs is obvious in reviewing the rates of Indigenous youth who are incarcerated on a provincial basis rather than a national average. As mentioned above, over 50% of youth who are

³¹ John Hansen, *supra* note 7 at 6.

³² Alexandra Hebert, *supra* note 10 at 168.

incarcerated in Canada are Indigenous.³³ However, in the province of Manitoba the statistics are even more startling. More than 80% of youth incarcerated in Manitoba are Indigenous.³⁴ While alarming, these statistics are hardly surprising. In responding to the stark overrepresentation of Indigenous youth in the Canadian penal system, one former offender who is Indigenous stated to the CBC, "...awareness has to be raised about the opportunities that are out there for Indigenous youth so they can reach their full potential."³⁵ This speaks not only to the underlying racism in provinces such as Manitoba that have a higher rate of Indigenous peoples per capita, but also the lack of alternatives that are recognized by the justice system.

Moreover, this demonstrates the trickle down effect of limited resources. Some smaller communities do not have the resources for comprehensive pre or post charge diversion programs.³⁶ One study determines, "the geographic vastness hinders the use of more modern policing practices tied to technology and, as such, the rural and expansive population arguably poses barriers to the implementation of federal legislation such as the *YCJA*."³⁷ As a result, many police officers are not trained extensively on how to enter a youth into diversion since they work in a community where it comes up less frequently.³⁸

Perhaps most problematically is that the courts do not make any allowances for these disparities. This is a clear example of sentencing inequity. If pre or post sentencing diversion options are not available, the youth may simply get charged or be entered into a program that does not respond to their specific needs, cultural or otherwise. If one of the goals of diversion is

³³ Jamil Malakieh, *supra* note 3 at 6.

³⁴ *Ibid* at 20.

³⁵ Austin Grabish & Lenard Monkman, "More Than 80% of Incarcerated Manitoba Minors are Indigenous. These 3 Say That Can be Changed," *CBC News* (26 June 2018) online: <https://www.cbc.ca/news/canada/manitoba/indigenous-youth-incarceration-rates-manitoba-1.4721468>.

³⁶ Rose Ricciardelli, *supra* note 18 at 601.

³⁷ *Ibid*.

³⁸ *Ibid* at 609.

truly to help youth to rehabilitate and reintegrate into society,³⁹ then culturally sensitive options must be available.

Even where a youth is entered into a “culturally sensitive” or restorative justice based diversion program, it is not always clear what role the Government has in the program itself.⁴⁰ In other words, Indigenous justice systems are vulnerable to being absorbed by the Government justice system and being influenced by Western legal principles.⁴¹ As one author writes, “although total subjugation of Indigenous culture and methods of dealing with crime is no longer occurring to the present Canadian justice system, the early principles of Western domination remain as a feature of Indigenous justice.”⁴²

Thus, we are left with a paradox. On the one hand, the Canadian justice system requires the Crown attorney to authorize any diversion programs before they can be used in court. On the other hand, it is important that Indigenous restorative justice and diversion programs maintain their independence and autonomy in order to ensure the programs truly fulfill the goals of cultural competence and deliver their objective. Again, this illustrates the significance of the Critical Race Theory (“CRT”) principle that law making must come from Indigenous peoples themselves if the goal of the Government is to establish culturally relevant sentencing in earnest.⁴³ This is not, nor has it ever been the reality in Canada.

3. Cultural Competency: Alternative Ways Cultural Awareness Presents Itself in the Criminal Justice System

³⁹ *Youth Criminal Justice Act*, *supra* note 13, s 3(1)(a)(ii).

⁴⁰ John Hansen, *supra* note 7 at 7.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Richard Delgado & Jean Stefancic, *supra* note 4 at 31.

i. Indigenous Courtwork Program

Another way in which the Canadian criminal justice system attempts to address the lack of culturally competent resources is through the development of the Indigenous Courtwork Program.⁴⁴ There are three central purposes of this program. First, the Program is meant to “assist Indigenous people to understand their right to speak on their own behalf or to request legal counsel; and, to better understand the nature of the charges against them and the philosophy and functioning of the criminal justice system.”⁴⁵ Second, to increase awareness of those involved in the administration of the criminal justice system of the needs and culture of Indigenous peoples, and finally, to respond to challenges caused by insufficient communication.⁴⁶

Indigenous Courtwork Programs have been successfully implemented in most jurisdictions across Canada.⁴⁷ However, as of a study completed in 2013, the general perception of the program is that it is not doing enough to assist Indigenous accused.⁴⁸ There is extraordinary pressure on court workers to perform a large scope of tasks.⁴⁹ In fact, the roles and responsibilities of court workers have consistently expanded as other services have minimized their offerings.⁵⁰ The Indigenous Courtwork Program is another example of a positive initiative that has been fundamentally underfunded and not given the effort and attention necessary for the program to be successful.

⁴⁴ Government of Canada, *Indigenous Courtwork Program: Overview*, (22 June 2017), online: Department of Justice Canada <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html>.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Government of Canada, “Aboriginal Courtwork Program Evaluation,” (March 2013), online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/13/acp-paa/acp-paa.pdf> at 1.

⁴⁸ *Ibid.* at 58.

⁴⁹ *Ibid.* at 59.

⁵⁰ *Ibid.*

Even with the success that the Indigenous Courtwork Program has experienced, it is not effective at addressing the root causes of the problems facing Indigenous youth. Instead, the Courtwork Program is ultimately a bandage solution meant to “assist” Indigenous peoples through an otherwise broken system. As John Hansen states,

...Indigenous justice initiatives, once they have become standardized the people are unable to adjust their response to wrongful behaviour. Although standardization of restorative justice certainly looks like culturally sensitive justice; it has a deeper intent. This standardization has an influence in producing and sustaining within Indigenous peoples a consciousness of dependency, which in turn fosters subservient and powerless attitudes. Such attitudes are necessary for maintaining control over Indigenous people.⁵¹

Standardization, or regulation of Indigenous justice initiatives on behalf of the Government of Canada, could have the effect of essentially relinquishing self-determination in exchange for the incorporation of Indigenous elements in the Canadian justice system. While it is extreme, and I argue, incorrect to suggest that standardizing restorative justice must result in “subservient and powerless attitudes,”⁵² it is far more effective for such initiatives to be Indigenous run, resonating from the bottom up⁵³ in order to respond to the needs of the peoples they are designed to help. Absent self-determined justice structures and subsequent mechanisms, the issues facing Indigenous youth in the Canadian criminal justice system will not be reconciled.

ii. Representation of Indigenous Peoples Appointed to the Bench

Another potential way to establish more Indigenous-centred justice is by focusing on promoting more Indigenous peoples to the bench. In doing so, the intention is to diversify the judiciary and insure a better, broader understanding of the unique issues facing Indigenous peoples. While there is little existing research on the tangible benefits of creating opportunities

⁵¹ John Hansen, *supra* note 7 at 7, emphasis added.

⁵² *Ibid.*

⁵³ Richard Delgado & Jean Stefancic, *supra* note 4 at 27.

for Indigenous judges, there is a body of literature exploring restorative justice practices and the benefits of involving Indigenous judges.⁵⁴

In one of these studies focusing on sentencing circles for domestic violence, the 27 judges who participated were all white, save for one, who identified as First Nations.⁵⁵ This was acknowledged as a possible limitation to the study, given how the judges were expected to speak to their experience in the sentencing circle, and the possible obstacles the obvious lack of diversity would cause.⁵⁶ Overall, the findings of this study summarized that the judges were aware that Indigenous people had better insights into the needs of their communities than non-Indigenous peoples, including judges.⁵⁷ Ultimately, the study found that sentencing circles were better than the mainstream alternative for the most part, though they would benefit from more Indigenous representation.⁵⁸

Clearly, there is a benefit to increasing representation of Indigenous peoples on the bench for the purpose of diversifying perspectives.⁵⁹ Moreover, a number of organizations have been calling for increased Indigenous representation on the bench for years, with limited success.⁶⁰

⁵⁴ There is, however, also a body of research suggesting that female judges and feminist movements generally have the power to influence and change legal perspectives, providing “‘a new way of seeing’ both the reality of our present lives and a new way of imagining a better one.” Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes,” (1986) 3 *Austl J L & Soc’y* 30 at 48. Moreover, feminist judges inherently seek to improve women’s lives by shedding light on their circumstances and struggle, and providing a female perspective. Rosemary Hunter, “Can Feminist Judges Make a Difference?” (2008) 15:1 2 *International Journal of the Legal Profession* 7 at 27. Again, this can address the intersectional issue of gender, and speak to the significance of having female-Indigenous voices on the bench.

⁵⁵ Joanne Belknap & Courtney McDonald, “Judges’ Attitudes About and Experience with Sentencing Circles in Intimate-Partner Abuse Cases,” (2010) 52:4 *CJCCJ* 369 at 376.

⁵⁶ *Ibid* at 377.

⁵⁷ *Ibid* at 388.

⁵⁸ *Ibid*.

⁵⁹ Michael Tutton, “Canada’s Shortage of Non-White Judges Creates ‘An Obvious Gap,’” *CBC News* (19 July 2016) online: <https://www.cbc.ca/news/canada/nova-scotia/canada-shortage-of-non-white-judges-creates-an-obvious-gap-1.3685026>.

⁶⁰ Such organizations include, but are not limited to the Indigenous Bar Association, *News*, online: http://www.indigenousbar.ca/main_e.html; the Assembly of First Nations, and the Truth and Reconciliation Commission. Kristy Kirkup, “Top court’s bilingual rule a barrier to Indigenous judges: Sinclair, Bellegarde,” (16

Yet, the Canadian judiciary remains relatively culturally homogenous, particularly at lower courts.⁶¹ This lack of diversity prevents Indigenous voices from being heard where it often matters most.

iii. Workshops, Training Opportunities, Cultural Competencies

Cultural competence is undoubtedly of great importance for all parts of the justice system, but particularly for the roles of Crown counsel, defence attorneys, and the judiciary. There are certain responsibilities that are inherent to the power and privilege granted to these members of the legal community. As a result, the question arises, what sort of responsibility should members of the legal community have to insure they are educated about the history and culture of Indigenous peoples?

It is frequently argued that education on Indigenous legal practices must start during the earliest phases of legal training.⁶² In this way, Indigenous legal traditions (such as oral histories, narratives, and stories)⁶³ can be integrated into common law traditions in order to embrace, “its foundational potential for the kind of robust and respectful engagement needed to work critically and usefully with Indigenous legal traditions today- thereby bringing them into their ‘rightful place among the world’s dispute resolution systems’ in the future.”⁶⁴ Educating future and current legal professionals about Indigenous legal traditions and how to incorporate them into current legal practices is important to influence the future of the courts and how they respond to the needs of Indigenous accused.

May 2018) *The Globe and Mail*, online: <https://www.theglobeandmail.com/news/national/supreme-courts-bilingual-requirement-unfair-sinclair-bellegarde/article32011596/>.

⁶¹ Michael Tutton, *supra* note 59.

⁶² Val Napoleon & Hadley Friedland, “An Inside Job: Engaging With Indigenous Legal Traditions Through Stories,” (2016) 61:4 McGill LJ 725 at 728.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

However, even the authors of literature advocating this approach are aware that education is not a “cure all” solution.⁶⁵ In fact, using Indigenous pedagogy in collaboration with common law approaches is only one possible methodology for teaching Indigenous legal history.⁶⁶ It is also important to recognize the influence of colonization on the existing Indigenous legal traditions and narratives.⁶⁷ While Indigenous peoples can try in earnest to preserve their histories, they have changed as a result of white influence. Thus, while it is important to embrace Indigenous legal traditions and respect the pluralistic legal traditions in Canada this is not an especially effective way to address the systemic problems facing Indigenous communities in the short-term.

Indigenous legal educational opportunities are not limited to the forum of law schools. Some employers and lawyers will find opportunities for mandatory cultural competency training. In May 2018, the Law Society of Ontario in collaboration with The Advocates’ Society and the Indigenous Bar Association released a “Guide for Lawyers Working with Indigenous Peoples.”⁶⁸ This guide is meant to be, “a starting resource to help lawyers and others in the justice system to learn about Indigenous cultures and understand the interplay between Indigenous legal orders and the Canadian legal system.”⁶⁹ Law Societies will also offer Continued Professional Development (“CPD”) modules focused on cultural competency, which lawyers can take to meet their required CPD hours. Problematically, these educational opportunities are generally optional,

⁶⁵ *Ibid* at 753.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ “Guide for Working With Indigenous Peoples,” (May 2018), online: The Advocates Society, The Indigenous Bar Association, The Law Society of Ontario http://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf.

⁶⁹ *Ibid* at 4.

making it incumbent on either the individual lawyer or the employer to make cultural competency training mandatory on a case-by-case basis.

There is a distinct gap in research available on the efficacy or availability of cultural competency workshops. However, speaking from personal experience, most workshops are often short, spanning a few days, with little to no follow up on applying skills or reviewing what was taught at the seminar. Overall, cultural competency training opportunities for lawyers offer avenues for education and awareness building. Although this is important, none of these programs substantively change the experience of Indigenous peoples in the justice system in an immediate sense.

4. *Putting Theory into Practice: Applying Culturally Sensitive Approaches to Indigenous Youth*

One of the most effective ways to assess the success of the programs and mechanisms put into place for the purposes of equity in youth sentencing is by looking at jurisprudence where these principles have been applied. As mentioned in Chapter 1, this thesis intentionally looks at youth cases that are not especially well known. The reasoning for this decision is two-fold. First, there are few youth cases at the Supreme Court of Canada (“SCC”) where application of *Gladue* factors was a central issue, and secondly, using lower court cases that are not as well known is arguably more effective at showing how the average trial or appeal level judge may choose to apply these factors. This thesis critically assesses two cases that clearly illustrate how judges typically apply *Gladue* factors in the context of Indigenous youth, and whether that differs from adults. These two cases are *R v TDK* and *R v Anderson*.⁷⁰ Unfortunately, the efficacy of case law

⁷⁰ Contrary to the style of cause, this case does involve a youth accused. The accused was still legally a youth when charged, however was given an adult sentence. As per s 110(2)(a) of the *YCJA*, the prohibition against publishing

is limited as a means of assessing educational tools or the relevance of Indigenous judges. Thus, these cases will be used to examine the cultural competence, awareness, and engagement with *Gladue* factors on behalf of the judiciary.

i. R v TDK

a. Case Summary

As briefly discussed in Chapter 1, *R v TDK* involves a youth accused. TDK was found guilty of manslaughter after a lengthy jury trial.⁷¹ The facts of this case are the following: At the time of the offence, the accused had been drinking with her boyfriend. At some point in the evening, the accused and her boyfriend began to argue, which led him to start choking her. The victim arrived and intervened, separating the two. The accused's boyfriend then sprayed him with bear spray. More people became involved, and chased the accused and her boyfriend away. The boyfriend called his mother and stepfather for assistance because he wanted to return and get his bike, so the 4 of them returned to the location. When they arrived, the fighting had escalated so TDK went to sit in the van. When someone threw a brick through the van window, she decided it was time to leave. TDK drove down the busy street, intoxicated. A car, operated by the victim, hit her van. She continued to try to leave by driving over the curb, ultimately striking two other individuals.⁷²

During sentencing, the Crown sought an adult sentence pursuant to s 64 of the *YCJA*.⁷³ Specifically, the Crown was seeking 8 years of custody in an adult sentence, whereas defence

the name of the accused is lifted when the accused is given an adult sentence. *Youth Criminal Justice Act*, SC 2002, c 1 s 110(2)(a).

⁷¹ *R v TDK*, 2015 MBQB 119 at para 1.

⁷² *Ibid* at paras 9-11.

⁷³ *Ibid* at para 2.

counsel was seeking 3 years of probation as a youth sentence.⁷⁴ In making his decision, the Judge relied on s 72(1) of the *YCJA*, which outlines the factors to be considered when sentencing a youth with an adult sentence.⁷⁵ In doing so, the Judge decided that the following 3 factors must be considered: “(i) the seriousness and circumstances of the offence; (ii) the age, maturity, character, background and previous record of the young person; (iii) any other factors that the court considers relevant.”⁷⁶ Using these parameters, which are discussed in greater detail below, the court ultimately made a decision that the accused should receive a youth sentence.

In addressing the first factor, while the offence of manslaughter is serious, the Judge carefully considered the specific circumstances of the offence described above. Based on the evidence, the Judge found the circumstances to be closer to an accident, fueled by fear and a desire to leave the situation before it escalated.⁷⁷

Next, the Judge considered the second factor, the background, age and maturity of the young person.⁷⁸ The court relied heavily on a PSR prepared for TDK.⁷⁹ This report revealed a tumultuous past, rife with sexual abuse, neglect, drug abuse, gang involvement, and ultimately involvement with Child and Family Services (“CFS”) commencing at the age of 6.⁸⁰ TDK also had a child of her own at the age of 16, and eventually lost custody.⁸¹ Importantly, TDK was also diagnosed with at least 4 mental health disorders, in addition to low scores in cognitive testing.⁸² However, after having her mental health issues diagnosed and addressed, incidents of conflict had decreased, and TDK was participating in a number of positive programs, including working

⁷⁴ *Ibid* at paras 26-27.

⁷⁵ *Ibid* at para 3.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at para 40.

⁷⁸ *Ibid* at para 12.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at para 13.

⁸¹ *Ibid*.

⁸² *Ibid* at para 14.

towards completing her GED.⁸³

The court did eventually address some of the *Gladue* factors in this matter, though there is no evidence indicating a *Gladue* report was completed. The court identified the presence of Indigenous specific considerations under the final factor identified above, “(iii) other factors.”⁸⁴ In doing so, the court discovered that TDK identifies as Métis.⁸⁵ Her mother is from Hollow Water First Nation in Manitoba, while her father is from Big Island First Nation in Ontario.⁸⁶ Both her parents had a history of physical abuse and substance abuse.⁸⁷ She also had grandparents who were victims of the residential school system.⁸⁸ The accused had an extremely volatile childhood, moving around regularly. Though she is not identified as having herself been raised exclusively in a reserve area, there is a clear indication that the experience of her parents had severely affected her experience as a young Indigenous woman. The Judge did draw a connection between her upbringing, and the offence in question.⁸⁹

The Judge ultimately decided in favour of defence counsel, and imposed a youth sentence rather than an adult sentence.⁹⁰ However, the judge applied greater weight to the success TDK had while in pre-sentence custody, and the improvements she made as a person during this time, in comparison to the relevant *Gladue* factors.⁹¹ The Judge also clearly indicated the need for ongoing programming and preparation in advance of her release.⁹²

b. Application of *Gladue* and Culturally Sensitive Considerations in *R v TDK*

⁸³ *Ibid* at para 17.

⁸⁴ *Ibid* at para 22.

⁸⁵ *Ibid* at para 18.

⁸⁶ *Ibid* at paras 23-24.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 24.

⁸⁹ *Ibid* at para 25.

⁹⁰ *Ibid* at para 43.

⁹¹ *Ibid* at para 45.

⁹² *Ibid* at para 49.

Overall, there are a number of problems within this decision. While it was clear that the Judge considered relevant *Gladue* factors in assessing the background of the case generally, it was not clear how exactly the Judge factored in these considerations in the sentence itself, the role a *Gladue* report played (if any), and no indication of the importance of culturally sensitive sentencing.

To start, it is clear that the Judge used *Gladue* factors to assist him in reaching the conclusion that it would be inappropriate to sentence TDK as an adult, however, did not emphasize how much weight he gave that consideration. As previously mentioned, the Judge outlined some central *Gladue* considerations under the final factor, “(iii) Other factors.”⁹³ However, under the subtitle “Decision”⁹⁴ in the Judge’s written decision, he does not revisit the *Gladue* factors, demonstrating how he comes to the detailed sentence he ultimately reaches. It is important that society not only sees that the Judge considered the *Gladue* factors, but also understands how they were related to the decision and outcome of the case. In *R v TDK*, the reader does not get this benefit, and therefore it does not effectively contribute to the development of the jurisprudence.

Furthermore, the Judge fails to incorporate culturally sensitive programs or resources in his final sentence. While he acknowledges earlier in the decision that TDK had benefitted from an “Aboriginal spiritual caregiver and attends sharing circles at WCC,”⁹⁵ he makes the conscientious decision not to require further services as a part of her sentence. It cannot be assumed that TDK will necessarily continue to receive these services both while finishing her custodial sentence or while serving the out of custody portion of this sentence. The Judge did

⁹³ *Ibid* at para 22.

⁹⁴ *Ibid* at paras 43-53.

⁹⁵ *Ibid* at para 18.

require TDK to have “ongoing programming and support,”⁹⁶ however; he chose not to require any of this to be culturally sensitive. This is a significant failure on behalf of the judiciary. Not only was the Judge aware that TDK is Indigenous, he was also aware that she as an individual had benefitted from this tailored care in the past. Given the inconsistency in availability of Indigenous-specific resources, and the significance of doing anything possible to help facilitate the “rehabilitation and reintegration of youth”⁹⁷ into society, the Court failed by not ordering that TDK participate in culturally sensitive programs, and exploring the availability of such programs in the jurisdiction.

Perhaps most importantly, this case demonstrates that absent clear and precise legislation, it is easy for courts to ignore or misinterpret the central tenets of sentencing Indigenous youth. In this case, the Judge relied on the 3 considerations he cites in s 72(1) of the *YCJA*. Significantly, none of these considerations require the court to specifically address *Gladue* factors, or remind the court of the relevance of cultural competency at the sentencing phase. One might argue that because the *YCJA* articulates the need to consider Indigenous background in other provisions,⁹⁸ it is unnecessary to further reiterate the necessity of paying special attention to the needs of Indigenous youth in this section. However, this case is an example of the Court systematically applying factors set out in legislation, and as a result, context is not given enough weight. The limitations within these provisions are a clear problem that is not limited to s 72(1) of the *YCJA*. The *YCJA* as a whole creates too many opportunities to ignore the specific principles and considerations of sentencing Indigenous youth.

On the other hand, the Judge made some key considerations that did positively reflect the

⁹⁶ *Ibid* at para 49.

⁹⁷ *Youth Criminal Justice Act, supra* note 13, s 3(1)(ii).

⁹⁸ As discussed in Chapter 2, the only areas of the *YCJA* explicitly referring to the circumstances of Indigenous youth are s 3(1)(c)(iv) and s 38(2)(d). *Youth Criminal Justice Act, SC 2002, c 1*.

correct application of *Gladue* principles. One important decision the Judge made was in the way he considered *Gladue* factors. Instead of trying to connect the exact factors to the offence in question, he used them to contextualize TDK's background, and develop a historical context of what brought her before the court.⁹⁹ This is important because it follows the SCC decision in *R v Ipeelee*. In this case, the Court clearly states,

...Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.¹⁰⁰

It is important to note that while there is a threshold for a connection between the offence and the background factors of the offender, that threshold is very low. Thus, there is no requirement that a criminal offence stem directly from one or more of the contextual factors. Rather, like in the circumstances of *Ipeelee* (described in greater detail in Chapter 2), contextual factors should be applied in the sentencing of all Indigenous offenders, beyond "attenuated consideration."¹⁰¹

Similarly, this judgment effectively applied one of the key aspects of the decisions in *Gladue*; that an offender is not required to reside on reserve to be entitled to *Gladue* consideration.¹⁰² Rather, the Judge in *R v TDK* correctly determined that although TDK did not reside on reserve, she still faced a number of obstacles in the criminal justice system as a result of her Indigenous heritage.¹⁰³ These examples demonstrate that the Judge was conscientious of the *Gladue* factors present in the circumstances of TDK. However, there appears to remain some

⁹⁹ *R v TDK*, *supra* note 71 at paras 22-25.

¹⁰⁰ *R v Ipeelee*, *supra* note 1 at para 83, emphasis added.

¹⁰¹ *Ibid* at para 90.

¹⁰² *R v Gladue*, *supra* note 2 at para 92.

¹⁰³ *R v TDK*, *supra* note 71 at para 23.

confusion, or at best inconsistency, in the way they are applied.

It is more difficult to assess the efficacy of Crown and defence in fulfilling their responsibilities to inform the Court of *Gladue* factors surrounding the accused, as this case does not go into detail on the sentencing submissions received from counsel. That being said, one can conclude that between any submissions offered by the Crown, defence, and the judiciary itself, this case demonstrates a situation where *Gladue* considerations were not given the teeth that are necessary to properly influence the decision. Furthermore, the fact that this case was not appealed does not say anything substantial in terms of the correctness of this decision. The decision to appeal can be determined by a number of factors, including the severity of the sentence, and the cost of a potentially lengthy appeal. Here, TDK was only facing 8 months of custody going forward.¹⁰⁴ Thus, the perceived advantages of pursuing an appeal were limited.

ii. *R v Anderson*

a. Case Summary

R v Anderson provides an example of an appeal level case that demonstrates more effective application of *Gladue* factors and consideration of culturally appropriate programs where the accused is Indigenous. The facts of this case are particularly heinous, involving the second-degree murder of a “cognitively challenged victim,”¹⁰⁵ with the mental capacity of roughly a 7 or 8 year old.¹⁰⁶ Here, the accused was appealing the trial courts decision to sentence Anderson as an adult. Leave to appeal was allowed, but the appeal itself was dismissed.¹⁰⁷

¹⁰⁴ *Ibid* at para 51.

¹⁰⁵ *R v Anderson*, 2018 MBCA 42 at para 1.

¹⁰⁶ *Ibid* at para 6.

¹⁰⁷ *Ibid* at para 5.

In exploring the circumstances of the offence, the Judge found the following factors to be significant: Anderson was from Wabowden, Manitoba, which is a small Indigenous community of roughly 500 people.¹⁰⁸ On the day of the incident, the accused found the victim looking for some money she had misplaced. The accused offered to have sex with her in exchange for five dollars.¹⁰⁹ They had had previous sexual encounters, and the victim agreed.¹¹⁰ However, the accused had been embarrassed about his sexual relationship with the victim because of her cognitive disability, so he had tried to hide it.¹¹¹

During intercourse, the accused's penis began to bleed.¹¹² The accused felt that this specific detail of their intercourse would make the victim's story believable if she told anyone, as her story could be corroborated by stories of intercourse with other women.¹¹³ After intercourse, the accused wiped off his penis with a sock, and then threw a rock at the victim, striking her in the head.¹¹⁴ The victim collapsed but was not dead. The accused struck the victim with the rock at least three more times, "stopping only when he could see brain tissue."¹¹⁵ He hid the rock, threw out his bloody underwear, tried to hide the victim's body in greenery, and went home, as if nothing had happened.¹¹⁶

During the investigation of the murder, the accused lied to police about his involvement and relationship with the victim.¹¹⁷ Ultimately, the accused moved to the neighbouring town of

¹⁰⁸ *Ibid* at para 6.

¹⁰⁹ *Ibid* at para 8.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid* at para 9.

¹¹² *Ibid*.

¹¹³ *Ibid* at para 9.

¹¹⁴ *Ibid* at para 10.

¹¹⁵ *Ibid* at para 11.

¹¹⁶ *Ibid* at para 12.

¹¹⁷ *Ibid* at para 14.

Thompson, Manitoba and hid in plain sight for nearly three years,¹¹⁸ until the accused provided police with a voluntary DNA sample that matched the DNA in the sock the police had found at the scene of the crime.¹¹⁹ It was only then the accused was charged, after which he still continued to deny his involvement.¹²⁰

b. Application of *Gladue* and Culturally Sensitive Considerations in *R v Anderson*.

After outlining the circumstances of the offence, the Judge looked at the circumstances of the offender, starting with the fact that he is Indigenous.¹²¹ Here, the Judge was able to identify a number of *Gladue* factors. The accused's young life had been tumultuous, including the fact that he was moved around, his parents had separated, and his mother died when the accused was only 14 years old.¹²² He had had little involvement with his mother as a result of her own addiction issues and traumatic life up to that point.¹²³ His maternal grandmother was also a residential school survivor.¹²⁴ While residing in Wabowden, the accused faced a number of challenges including the fact that his father and stepmother openly abused substances in front of him, sexual assault, and three of his siblings had been apprehended and put in care.¹²⁵

As this case had come before the court on appeal, it was incumbent upon the judge to review the decision of the trial judge. Importantly, during sentencing, the trial judge noted, “*Gladue* factors are notionally relevant here. However, considering his upbringing, the absence of any impact of his aboriginal heritage to him or this crime, and the grave nature of the murder,

¹¹⁸ *Ibid* at para 16.

¹¹⁹ *Ibid* at para 17.

¹²⁰ *Ibid* at para 18.

¹²¹ *Ibid* at para 20.

¹²² *Ibid* at para 22.

¹²³ *Ibid*.

¹²⁴ *Ibid* at para 28.

¹²⁵ *Ibid* at para 23.

it would defy common sense here to assess him or his blameworthiness through the *Gladue* lens.”¹²⁶ Amongst the issues present in this appeal, one of the most significant is the accusation that there was, “an abdication of the legal duty to apply *Gladue* principles because of the severity of the crime.”¹²⁷ This became the biggest obstacle for the Court of Appeal judge to overcome in his reasoning.

In addressing the relevance of *Gladue* principles in sentencing this young offender, the judge determined that *Gladue* first requires that non-custodial sentences be favoured over custodial sentences; and where a custodial sentence is necessary, a shorter sentence should be implemented where appropriate.¹²⁸ In analyzing the trial judge’s decision, the Court of Appeal stated, “to decide whether the judge abdicated his legal duty, as the young person alleges, his reasons have to be read in light of the record and the submissions of counsel on the standard of adequacy as to whether he fully engaged the application of *Gladue* principles to the question of the rebuttal of the presumption of diminished moral blameworthiness or culpability.”¹²⁹ Again, this illustrates the responsibility of the judiciary, defence counsel, and the Crown in totality to fulfill the requirements of *Gladue*.

The Court of Appeal judge indicated that although the submissions from the Crown were non-existent, and the submissions from defence counsel were sparse, the judge still had access to reports from the probation officer and mental health specialists to supplement the information provided in court.¹³⁰ In spite of this, the Court of Appeal judge found, “the *Gladue* factors in this case do not play a ‘significant role’ (*Gladue* at para 60) in terms of the analysis required under s

¹²⁶ *Ibid* at para 42.

¹²⁷ *Ibid* at para 47.

¹²⁸ *Ibid* at para 55.

¹²⁹ *Ibid* at para 64.

¹³⁰ *Ibid* at para 65.

72(1)(a) of the YCJA...”¹³¹ Perhaps most importantly, the judge stated, “while a direct causal link between the young person’s unique and systemic background factors and the commission of the offence is not required, I am not satisfied that the *Gladue* factors here diminish the young person’s moral blameworthiness or culpability in a meaningful way.”¹³² In other words, the court found that in spite of what the accused and his family had been through, he had still grown into a fairly normal and well-adjusted teenager.¹³³ He had made the conscious choice to commit murder, and it had very little to do with the cultural and historical background factors present.

That being said, it was necessary for the trial judge to consider the accountability of the accused in determining whether an adult sentence was appropriate. In doing so, it was incumbent upon the Judge to consider *Gladue* factors again at this stage of the analysis. The trial judge did not give reasons relying on *Gladue*. Thus, the Court of Appeal had to take a fresh look at the question of accountability.¹³⁴ In doing so, the Court determined that the *Gladue* factors present were not sufficient in and of themselves to reduce the sentence. While *Gladue* factors must be considered, they had little effect on the accountability of the accused in this case. Citing *Gladue* at paragraph 80, the Court reminds us that *Gladue* factors must consider “the circumstances for ‘this offence, committed by this offender, harming this victim, in this community.’”¹³⁵

Although this appeal did not affect the actual outcome for the accused, the judge demonstrated the significance of appropriate application of *Gladue* in the context of deciding the sentence for a young offender. This appeal was heard in 2018, nearly twenty years after the decision in *R v Gladue*. It is disappointing that so many years later the main issue the Court of

¹³¹ *Ibid* at para 68.

¹³² *Ibid* at para 74.

¹³³ *Ibid* at para 73.

¹³⁴ *Ibid* at para 91.

¹³⁵ *Ibid* at para 102.

Appeal had to address was whether the trial court mistreated the *Gladue* factors present and how they should influence the decision.¹³⁶

This decision is an important example in demonstrating that although *Gladue* factors will not always affect the outcome of a case or the sentence imposed; it is always incumbent upon the court to consider *Gladue* factors. Also, the court must demonstrate that *Gladue* factors have been considered; otherwise, it is grounds for appeal. The Court of Appeal granted leave to appeal, however, dismissed the appeal itself.¹³⁷ The importance of the court to fulfill this responsibility is clear.

iii. What These Cases Demonstrate Together

Both of these cases demonstrate the inefficacy of the decision in *Gladue* for Indigenous youth. Overall, *Anderson* is an example where the Court of Appeal was explicit in exploring and articulating the relevant *Gladue* factors. In comparison to *TDK*, the Court was far more detailed and specific, clearly drawing connections between the case law and the final decision of the Court. However, while this case did have superior demonstrated reasoning, the *Gladue* principles still did not materially affect the sentence, suggesting that *Gladue* is meaningless in more serious cases. As in *TDK*, the Court still failed to provide a sentence that clearly required the use of cultural competency or programs that would draw on the accused's Indigeneity to help develop a sentence focused on rehabilitation and reintegration. In this way, both of these decisions have failed to fulfill the provisions of the *YCJA*, and yet again demonstrate how the racist underpinnings of Canada's criminal justice system prevent Indigenous youth from accessing equitable sentencing.

¹³⁶ *Ibid* at para 47.

¹³⁷ *Ibid* at para 5.

In both of these cases, the judges did not articulate the availability of culturally sensitive programs offered within the community or in the detention facility. Regardless of whether or not they did use them as part of the sentence, the fact that it was not communicated in the decision speaks volumes. Since jurisprudence relies on prior court decisions to set progressive precedents, providing only limited information poses an obstacle to ensuring culturally sensitive sentencing in the future. This is a failure of the judiciary.

Both Judges approached the application of *Gladue* in different ways, assigning weight to the identified background factors in the way they thought best. Perhaps this speaks to a greater problem. It is not only that judges have failed to apply *Gladue* correctly and consistently overtime, but rather, principles derived from existing jurisprudence, in combination with the *YCJA* itself, is simply insufficient in comprehensively addressing the needs of Indigenous youth.¹³⁸

5. Conclusion

The purpose of this Chapter is to critically assess the mechanisms available to both youth and adults designed to help Indigenous peoples achieve equity in the Canadian criminal justice system. The *YCJA* and supporting jurisprudence are not implemented in the same way in all areas of Canada,¹³⁹ thereby preventing equitable application of sentencing principles. By revisiting *Gladue*, analyzing extrajudicial measures, and assessing a number of programs meant to increase Indigenous presence on the administrative side of the criminal justice system, it is

¹³⁸ There are a number of youth cases involving an Indigenous accused where *Gladue* principles are applied in a way that contributes to reducing the sentence. One such example is in *R v M(SR)*, 2018 MBQB 86 at 107-111, where the Crown had requested the accused be sentenced as an adult. The judge decided against this, citing *Gladue* factors as one of the reasons. However, the sentence involved 3 years incarceration going forward. Again, this does not demonstrate how *R v Gladue* has helped to attack the root of the problem; rather, at the best of times it seems to help reduce sentences somewhat marginally.

¹³⁹ Rose Ricciardelli, *supra* note 18 at 601.

clear that this has been a failure overall as a means of creating equity for Indigenous youth involved in the criminal justice system. The tools present in the adult system have been insufficient to address the needs of Indigenous adults, let alone when they are haphazardly applied to Indigenous youth, who face even greater systemic obstacles.

Judge A. Wolf wrote in his supplemental ruling on a *Gladue* application at the British Columbia Provincial Court,

Imagine a young Indigenous person, making their way through the youth system, never having the benefit of a *Gladue* report; graduating into an arena of adult *Criminal Code* charges; finally ending up in jail for some crime, such as a breach of probation. Would they have ended up there if they had the benefit of a *Gladue* report at an early stage of their lives? Is it possible that culturally appropriate interventions might have been suggested in the *Gladue* report? Perhaps a criminal record might have been avoided, thus increasing the chance of employment. There are endless possible outcomes that exist for an Indigenous person with a *Gladue* report versus those that do not have the benefit of one.¹⁴⁰

This quotation speaks for itself. Insofar as *Gladue* has the potential to be effective, there remains unequal access, and similarly unequal application of *Gladue* reports and submissions. In many instances, the issue of inequitable sentencing for Indigenous youth is the difference between whether or not they will have a chance at success in their adult lives.

As Delgado and Stefancic write referring to landmark court decisions influencing minority rights, "...after the singing and dancing die down, the breakthrough is quietly cut back by narrow interpretation, administrative obstruction, or delay. In the end, the minority group is left little better than it was before, if not worse."¹⁴¹ This is the great fear and reality with landmark court cases such as *R v Gladue*. After the pomp and ceremony of the decision are over, Indigenous peoples have been left with little substantive change. As demonstrated in the above

¹⁴⁰ *R v CJHI* 2017 BCPC 121 at para 25.

¹⁴¹ Richard Delgado & Jean Stefancic, *supra* note 4 at 29.

critical analysis of *TDK* and *Anderson*, judges now perform their due diligence in considering *Gladue* factors, but ultimately they have little meaningful impact in the outcome of the sentence.

The decision in *Gladue* can be partially credited for spurring the Indigenous Courtwork Program, increasing education amongst employees of the justice system, and increasing cultural competency. While these have been positive initiatives, it is important to keep in mind what they have actually accomplished. Although having greater Indigenous presence in court administration is important, these are not the significant results anticipated following *Gladue*, and reiterated in *Ipeelee*.

We live in a society where structural determinism guides the hand of justice. Structural determinism is the, “idea that our system, by reason of its structure and vocabulary, is ill equipped to redress certain types of wrong.”¹⁴² The Canadian criminal justice system is broken, and no amount of bandages will heal the festering wound. Fundamental, structural change is necessary in order to render meaningful results. Courts must take into consideration unequal access to services in judicial decision-making. Absent this, it is not possible to break out of the cycle of structural determinism within which Indigenous youth are trapped.

The next and final Chapter will look at the future of the criminal justice system for Indigenous youth, and draw conclusions in answering the original research question: to what extent can the *YCJA* and supporting regulations be reformed in order to effectively “rehabilitate and reintegrate” Indigenous youth and serve the Government of Canada mandate of reconciliation; or, considering the colonialist underpinning of Canadian legislation, to what extent do Indigenous youth require alternative solutions to establish equitable justice?

¹⁴² *Ibid* at 31.

Chapter 4: Accessible Solutions and Looking to the Future: Conclusions and Recommendations

Yet, the process of decolonization will not be a collaborative one. Canada surprised First Nations with the announcement of the committee. The committee was formed with no Indigenous input or representation, except for that of the Justice Minister. “Decolonization” would be driven largely by non-Indigenous Canadians and in what has become an established pattern of unilateral imposition across the Rights Framework.¹

1. System Overhaul: Recommended Legal Reform and Restructuring

In this thesis, I set out to answer the following question: to what extent can the *Youth Criminal Justice Act* (“YCJA”) and supporting regulations be reformed in order to effectively “rehabilitate and reintegrate” Indigenous youth and serve the Government of Canada mandate of “reconciliation;” or, considering the colonialist underpinning of Canadian legislation, to what extent do Indigenous youth require alternative solutions to establish equitable justice?

The short answer to this question is this: no amount of reform to the *YCJA* alone will provide the tools necessary to rehabilitate and reintegrate Indigenous youth into society post-charge. There must also be simultaneous systemic change. While Indigenous youth clearly require alternative solutions and programming specifically designed to meet their unique needs, the power to create and implement such programs must rest in the hands of Indigenous peoples, organizations, and governance structures. The Government of Canada should only be a participant insofar as funding is required. This final Chapter will elaborate upon these conclusions, examining a variety of proposed recommendations, and tying together the critiques in the first three Chapters.

¹ Reflections on the cabinet committee to decolonize Canadian laws: Hayden King & Shiri Pasternak, “A Special Report: Canada’s Emerging Indigenous Rights Framework: A Critical Analysis” (5 June 2018) Yellowhead Institute at 21.

i. Indigenous Rights Recognition and Implementation Framework: A Meaningful Source of Reform?

As briefly discussed in Chapter 1, on February 14, 2018, Prime Minister Justin Trudeau announced that the Liberal government would implement a new “Recognition and Implementation of Indigenous Rights Framework.”² In doing so, Prime Minister Trudeau clearly indicated that the Framework would not involve any amendment to the *Constitution of Canada*.³ However, in spite of the known importance of self-determined and independently developed legal mechanisms,⁴ the Framework will not be Indigenous driven.⁵ In a critical report released by the Yellowhead Institute, the writers are concerned that, “the danger of accepting government messaging, and the Rights Framework as currently articulated, is settling for a very narrow vision of Indigenous jurisdiction over lands, resources and self-determination generally.”⁶ Thus, there is good reason to remain cautious of the zealous promises made by the Government.

Since the February 14, 2018 announcement, very little has been done in terms of fleshing out the Framework. The Minister of Crown-Indigenous Relations and Northern Affairs, Carolyn Bennett, has been attending national engagement sessions in order to collect input from

² Prime Minister Justin Trudeau, *Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework*, (14 Feb 2018) online: <https://pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>.

³ *Ibid.*

⁴ The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous peoples to autonomy and self-governance and managing their own affairs. *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295 (entered into force on 2 October 2007) at cls 4. Indigenous legal scholars such as Professor Tracey Lindberg have argued that Canadian law and Indigenous law are completely different, and therefore Canadian law cannot apply to Indigenous peoples. Tracey Lindberg, “Critical Indigenous Legal Theory Part 1: The Dialogue Within,” (2015) 27:2 *Can J Women & L* 224 at 227.

⁵ Hayden King & Shiri Pasternak, *supra* note 1 at 5.

⁶ *Ibid.*

stakeholders, which will ultimately be used to inform the Framework.⁷ However, the Government's vision of self-determination leaves Indigenous peoples in a position where, "provincial, territorial and federal governments will continue to patronize and intervene in the lives and lands of First Nations peoples."⁸

Accepting a less than perfect Framework creates obstacles for future independence of Indigenous peoples. This is especially so where the proposed changes are confined to certain areas of the justice system, and focus on administration rather than authentic self-governance, as is the case with the Framework.⁹ If the rights of Indigenous peoples are not broadly allocated within the early drafts of the Framework, it will be more difficult to expand on them in the future.

Overall, it is evident that the Framework as it is currently expressed is not a meaningful source of reform, limiting the ways in which self-governance may be expressed by Indigenous peoples. Furthermore, at this point, it is unclear what impact this Framework will have on the criminal justice system, if any. At this stage, the Framework does not promise a better future for Indigenous youth involved in the criminal justice system.

ii. Other Efforts for Self-Governance/Self-Determination

At the time of writing, the Recognition and Implementation of Indigenous Rights Framework is the only publicly available mechanism being explored by the Federal Government with the purpose of moving towards Indigenous self-governance. However, that does not necessarily mean that it is the only tool facilitating the process of self-governance for specific

⁷ Government of Canada, *What We Heard About the Recognition and Implementation of Indigenous Rights Framework*, (11 July 2018), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1522086494578/1522086520382>.

⁸ Hayden King & Shiri Pasternak, *supra* note 1 at 27.

⁹ *Ibid.*

Indigenous groups. Some groups and Nations have worked with the Government to commence self-governance strategies on a case-by-case basis, some of which have been successful.¹⁰ Again, there is no evidence indicating that these First Nations have achieved full self-governance over their criminal justice system or courts. For instance, Vuntut Gwitchin First Nation is one of the First Nations that are self-governed.¹¹ On the website for Vuntut Gwitchin First Nation, under the “Health & Social Programs” page, there is the listed role of “Native Court Worker,” but no indication of Indigenous sovereignty in the justice sector.¹² This is the case for most of the First Nations identified by the Government of Canada as self-governing.

In fact, of the 11 self-governing First Nations, only two of their official websites indicate they have their own Department of Justice.¹³ These two First Nations are the Teslin Tlingit Council (“TTC”) and the Kwanlin Dun First Nation (“KDFN”).¹⁴ In 2012, the Teslin Tlingit Council signed an Administration of Justice Agreement with the Government of Canada and the Government of Yukon.¹⁵ This Agreement acknowledges and empowers the TTC right to govern certain areas of the administration of justice based on the First Nation’s traditional legal practices.¹⁶

Based on their webpage, the KDFN is currently in talks with the Government to develop a similar Agreement, but in the meantime, it supports restorative justice initiatives and land

¹⁰ For example, in the Yukon Territory in Canada, there are 11 self-governing First Nations. For most of these First Nations, the *Indian Act* no longer applies to them. Government of Canada, *Differences Between Self-Governing First Nations and Indian Act Bands*, (15 Sept 2010), online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca/eng/1100100028429/1100100028430>.

¹¹ *Ibid.*

¹² Vuntut Gwitchin First Nation, *Health & Social Programs*, online: <https://www.vgfn.ca/hs.php>.

¹³ Teslin Tlingit Council, *Justice Department: Overview*, online: <http://www.ttc-teslin.com/justice-home.html>;

Kwanlin Dun First Nation, *Kwanlin Dun Justice Department*, online: <http://www.kwanlindun.com/index.php/justice>.

¹⁴ *Ibid.*

¹⁵ Teslin Tlingit First Nation, “Administration of Justice Agreement,” online: <http://www.ttc-teslin.com/administration-of-justice-agreement.html>.

¹⁶ *Ibid.*

based healing programs.¹⁷ The TTC and KDFN are undoubtedly examples of progress towards complete self-governance over the criminal justice system. However, there is certainly room to expand independence and judicial decision-making power in the future.¹⁸

These are not the only First Nations that are seeking self-governance and engaging in discussions with the Government of Canada. The Government has undertaken to participate in a process known as modern Treaty making and developing self-governance structures with a variety of Indigenous groups.¹⁹ These conversations have mainly been significant to land claims and establishing Government support for Indigenous governance and governing institutions.²⁰

At this point, there is no publicly available information about First Nations with full self-governing power over their criminal justice system. That being said, the Government of Canada has made a number of public commitments with respect to their relationship with Indigenous peoples. The Government of Canada has formally recognized the following:

1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.
3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

¹⁷ Kwanlin Dun First Nation, *supra* note 13.

¹⁸ According to the TTC Administration of Justice Agreement, the longest sentence the TTC may impose is a period of imprisonment of six months. This would inherently narrow the jurisdiction the TTC has over more serious offences or offenders with a history of recidivism. Teslin Tlingit Council, *Administration of Justice Agreement*, (21 Feb 2011), s 7(4)(2), online: <http://www.ttc-teslin.com/administration-of-justice-agreement.html>.

¹⁹ Government of Canada, *Indigenous and Northern Affairs Canada- 2017-18 Departmental Plan*, (09 March 2017), online: Indigenous and Northern Affairs Canada http://www.aadnc-aandc.gc.ca/eng/1483561566667/1483561606216#P1_1.

²⁰ *Ibid.*

5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions, which impact them and their rights on their lands, territories, and resources.
7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
9. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.²¹

These broad principles seem to indicate a general approval of future full self-governance.

Thus, this list of recognized principles provides an avenue to argue the need for self-governance in the criminal justice system, and a platform with which to make that happen.

iii. Obstacles to Self-Governance

This thesis was written on the premise that self-governance is not progressing quickly enough and the potential outcome of the proposed mechanisms will be mixed at best, with skepticism colouring the confidence of many Indigenous peoples and advocates. While it seems as though the Government of Canada is not opposed to self-governance expanding to the realm of criminal justice, there is little indication that this will happen and what exactly full self-governance will look like. After all, the Canadian criminal justice system is firmly rooted in federal law and provincial administration. Creating a tripartite or broadly plural criminal justice

²¹ Government of Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (14 Feb 2018), online: Department of Justice Canada <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

system is not only unprecedented in Canada; but would likely require a fundamental change in the way criminal justice is carried out.²²

The main obstacle to self-governance is applicability of Canadian law to Indigenous peoples. Canadian law was not designed to represent the voices of the marginalized; it was meant to represent the interests of the majority. Charles W Mills writes, “so the historic reality is that race–white racial privilege and non-white racial subordination–has been foundational to the actual ‘basic structure’ of the United States. How theoretically useful is it then going to be in the philosophical investigation of social justice to start from a raceless ideal so remote from this reality?”²³ In other words, society cannot rest on the idea that legislation and legal structures were designed with the unique interests of each social stratum in mind. This principle is easily transferrable to the Canadian context, where similar Western-colonialist values have acted as the bedrock of society.

Furthermore, the concept of legal inapplicability is pertinent to the experience of many Indigenous peoples in the Canadian legal system more specifically. One Indigenous legal scholar, Tracey Lindberg, writes, “There was not an idiom for the violently colonizing nature of Canadian law and legislation.”²⁴ The idea that Canadian law is not only a relic of colonization, but also an active means of oppression, is hugely significant to envisioning potential models of self-governance. If Indigenous self-governance continues to be embedded in Canadian laws and

²² See discussion of binationalism later in this Chapter, citing David B MacDonald, “Aboriginal Peoples and Multicultural Reform in Canada: Prospects for a New Binational Society,” (2014) 39(1) Canadian Journal of Sociology 65.

²³ Charles Mills, “Rawls on Race/Race on Rawls,” (2009) 47 The South J Philos, 161 at 170.

²⁴ Tracey Lindberg, *supra* note 4 at 227.

legal practices, it will be impossible for Indigenous peoples to authentically self-govern on their own terms.²⁵

Of course, there are a number of obstacles to full self-governance, including the realities of implementation, capacity, resources, and more. However, legal applicability is the most significant obstacle to meaningful self-governance. Absent applicable laws and structures, self-governance will fail to achieve equitable justice for Indigenous youth.

2. Can Reform Within the YCJA be Successful?

Up to this point, I have emphasized how the *YCJA* has failed to comprehensively address the needs of Indigenous youth, largely ignoring the root cause of the issues present. It is clear that the reform required for the criminal justice system to meet the needs of Indigenous youth goes well beyond the scope of the *YCJA*, and requires an interdisciplinary and multi-level organizational reform.

To briefly re-state the discussion in Chapter 1, there are a number of underlying issues contributing to Indigenous youth overrepresentation in the Canadian criminal justice system, many of which originally stem from the historical trauma Indigenous peoples have endured. These include but are not limited to, access to clean drinking water on reserves,²⁶ overrepresentation of Indigenous youth in the Canadian child welfare system,²⁷ rundown schools or no schools at all,²⁸ and higher suicide rates than non-Indigenous communities.²⁹ These

²⁵ Gordon Christie, "Law, Theory and Aboriginal Peoples," (2003) 2 *Indigenous LJ* 68 at 113-115; Tracey Lindberg, *supra* note 4 at 230, 245.

²⁶ Jerry P White, Laura Murphy, Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox," (2012) 3:3 *The International Indigenous Policy Journal* 1 at 1.

²⁷ Cindy Blackstock, "Residential Schools: Did they Close or Just Morph into Child Welfare," (2007) 6:1 *Indigenous LJ* 71 at 74.

²⁸ Charlie Angus, *Children of the Broken Treaty: Canada's Lost Promise and One Girl's Dream* (Regina: University of Regina Press, 2015) at 289.

problems have been caused by colonization, and have now created a trickle down effect into the modern welfare of Indigenous youth.

One might argue that it is not the role of the *YCJA* to address these obstacles; rather, this piece of legislation is better suited to establishing criminal law and procedure in application to youth. In some ways, this thesis agrees with this contention. There must be other institutional structures with the sole purpose of ensuring Indigenous youth do not experience huge disparities in any social sphere, helping to ameliorate the long list of systemic issues plaguing Indigenous communities. However, in the event that such broad-based intersectional reform is not effective or even immediately possible, the *YCJA* must maintain stopgap solutions in order to address the needs of Indigenous youth at the criminal justice level. In this way, remedies existing within the *YCJA* should be a last resort in the event that other institutional structures have not been successful. As it stands, the criminal justice system lacks the foundational requirements to support a progressive reiteration of the *YCJA*.

i. Recommendations for Reform of the YCJA

With all of this in mind, I propose two key ways the *YCJA* can and should be reformed in anticipation of stronger social resources. The first means of reform involves legislatively requiring culturally sensitive diversion options, and in the event they are not available in the jurisdiction, offering a lesser sentence or discharge of the accused. Sacrificing individual liberties is taken very seriously in Canada, and in Western-liberal democracies generally. According to s 7 of the *Canadian Charter of Rights and Freedoms*, “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the

²⁹ Melissa L Walls, Dane Hautala, & Jenna Hurley, “‘Rebuilding Our Community:’ Hearing Silenced Voices on Aboriginal Youth Suicide,” (2014) 51:1 *Transcultural Psychiatry* 47 at 48.

principles of fundamental justice.”³⁰ Thus, criminal legislation must reflect the gravity of depriving someone of their liberty, taking into account their background circumstances, while maintaining an emphasis on equity.

This recommendation is not an enormous leap from the legislation in its present form. Both the *Criminal Code* and the *YCJA* require incarceration be the last resort for sentencing any offender, with particular emphasis on the circumstances of Indigenous offenders.³¹ This additional inclusion of exploring and providing culturally sensitive diversion options would simply codify the jurisprudential principle that culturally sensitive and relevant sentences are necessary for the rehabilitation of Indigenous peoples.³² The goal of such legislative reform would be to ensure that the judiciary is seeking all possible sentencing options and incorporating culturally appropriate institutions where possible. It would also encourage jurisdictions where culturally appropriate sentencing options are not currently available to make them available, or else accused will face a lesser sentence.

Based on the review of the literature and case law in this area, it is evident that jurisprudence alone has been inadequate as a means of addressing the inequity facing Indigenous youth in the criminal justice system. The intent in this proposed legislative amendment is to end the ongoing misinterpretation of *R v Gladue*,³³ and explicitly state the need for culturally appropriate sentences in the legislation itself. By amending the *YCJA* to go beyond paying “particular attention to the circumstances of aboriginal young persons,”³⁴ and actually legislating

³⁰ *Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³¹ *Criminal Code* RSC, 1985, c C-46, at s 718(2)(e); *Youth Criminal Justice Act*, SC 2002 c 1 s 38(2)(d).

³² *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385 at para 68.

³³ *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 at para 63.

³⁴ *Youth Criminal Justice Act*, *supra* note 31, s 38(2)(d).

accountability measures for judges and lawyers, the *YCJA* will be a better tool for rehabilitation and reintegration.

The second recommended source of legislative reform is related to extrajudicial measures more generally. In the context of the *YCJA*, the “extrajudicial measures” section currently gives police the power to release a young person on a caution,³⁵ or deem that no further action³⁶ is required. The *YCJA* should be amended to legislatively require police officers, or where applicable, Crown attorneys to provide Indigenous youth and their parent/guardian with information on culturally sensitive community resources. Usually a caution or no further action will be provided where the accused has infrequently or never been in conflict with the law before.³⁷ In order to prevent an Indigenous youth from further involvement in criminal activity, they must be made aware of organizations or programs they can turn to for support.

Where police or the Crown offer diversion, they must also have a responsibility to seek out culturally appropriate alternatives (as indicated above) as part of the legislated obligation to administer the most appropriate solution.³⁸ According to s 6(1) of the *YCJA*, a police officer may refer a young person to a community program to prevent recidivism.³⁹ However, s 6(2) states, “The failure of a police officer to consider the options set out in subsection (1) does not invalidate any subsequent charges against the young person for the offence.”⁴⁰

The fact that there is no requirement that police officers ask Indigenous youth about their background and whether they wish to be referred to culturally sensitive programs is problematic.

³⁵ *Youth Criminal Justice Act*, *supra* note 31, ss 6-8.

³⁶ *Ibid*, s 6(1).

³⁷ *Ibid*, s 4(d). It is important to note that according to this section, a youth may be eligible for extrajudicial sanctions whether or not they have been convicted of a past criminal offence.

³⁸ *Ibid*, s 4(a).

³⁹ *Ibid*, s 6(1).

⁴⁰ *Ibid*, s 6(2).

It is further problematic that police are not accountable or questioned when they elect to take further action, rather than administer a caution, reprimand, or refer a youth. The *YCJA* must be amended to reflect the responsibility of police to help Indigenous youth by providing them relevant community programs, and hold police accountable when they elect to charge an Indigenous youth where other options were available. In this way, police officers, in addition to the judiciary, the Crown and defence are all accountable for ensuring that Indigenous youth are sentenced in a way that truly supports their rehabilitation and reintegration into society, rather than leaving it up to probation or custodial services alone to make sure this happens.⁴¹

ii. *Obstacles to Legislative Reform*

While these opportunities for reform are important, there are a number of obstacles to their success. As identified in Chapter 3, police practices and awareness of diversion programs tend to vary based on jurisdiction, and are largely dependent on the type of diversion programs that have historically been available in the community.⁴² Thus, changes to the “extrajudicial measures” section of the *YCJA* will likely require federal regulation of police training in order to ensure all police officers are made aware of the procedural differences in dealing with Indigenous youth versus non-Indigenous youth, particularly in terms of referral services. This is a perfect example of how legislative reform must happen in harmony with institutional reform, or else there will be no meaningful change.

Furthermore, it is important to acknowledge that there are also a number of intersectional issues that are not necessarily addressed by looking exclusively at Indigenous background in sentencing Indigenous youth. Intersectional issues may include “race, sex, class, national origin,

⁴¹ *Youth Criminal Justice Act*, *supra* note 31, s 3(1)(ii).

⁴² Rose Ricciardelli & Hayley Crichton, et al, “From Knowledge to Action? The *Youth Criminal Justice Act* and Use of Extrajudicial Measures in Youth Policing,” (2017) 18:6 *Police Practice and Research* 599 at 609.

and sexual orientation, and how their combination plays out in various settings.”⁴³ Indigenous youth start out facing two sources of marginalization: the fact that they are both Indigenous and legally children. Many Indigenous youth will also face other sources of oppression, some of which are listed above. Thus, the Indigenous background of the accused may be only partly responsible for their marginalization. Ideally, members of the justice system will work to seek sentences that hopefully reconcile the intersectional issues contributing to the circumstances of the young accused.

Another potential obstacle to the success of legislative reform is the role of essentialism in the criminal justice system. The central premise of essentialism states that all marginalized people face the same oppression.⁴⁴ Of course, this simply is not true for most cases. Discrimination and oppressive practices can vary greatly depending on individual experience, or even regional disparities. There are many types of oppression, which can take the form of less obvious microaggressions.⁴⁵ Other forms of oppression are openly violent, such as the high murder rate of Indigenous peoples in Thunder Bay, Ontario.⁴⁶ To characterize all oppression as essentially the same is to undermine the experiences and diversity of Indigenous peoples.

All this said, a fundamental question remains: Even where there is harmonized reform of the *YCJA* and the social institutions, can this actually address the fallout of historical injustices while simultaneously remaining a fundamentally Western-liberalist justice system? The answer to this question is that reform can only be successful if the change sought is truly systemic, embracing Indigenous culture, values, beliefs, and legal traditions. Critical Race Theory

⁴³ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 2nd ed (New York: New York University Press, 2012) at 57.

⁴⁴ *Ibid* at 62.

⁴⁵ *Ibid* at 2.

⁴⁶ Robert Jago, “The Deadly Racism of Thunder Bay,” *The Walrus* (23 Feb 2018) online: <https://thewalrus.ca/the-deadly-racism-of-thunder-bay/>.

demands, “when we are tackling a structure as deeply embedded as race, radical measures are required. ‘Everything must change at once;’ otherwise the system merely swallows up the small improvement one has made, and everything goes back to the way it was.”⁴⁷ Thus, while these proposed changes are important steps to establishing an equitable justice system for Indigenous youth, the Government of Canada must decide to embrace a multi-juridical society,⁴⁸ and create space for an independent Indigenous justice system to thrive. Anything else is simply a bandage solution.

The goal in engaging in legislative reform of the *YCJA* is to address the root causes of over-incarceration of Indigenous youth. The next section will explore possible opportunities for reform outside of the scope of the *YCJA*. These recommendations exist within the justice system, though reform is also possible and necessary across other social structures in Canada.

3. *Can Broader, Institutional Reform be Successful?*

While this thesis has set out to establish meaningful reform within the *YCJA*, one of the conclusions reached is the need for broader, systemic reform. The possibility of legal reform bleeds into all aspects of the criminal justice system as well as other institutions. As such, there are a number of social institutions that would benefit from reform in order to ensure larger scale change throughout the criminal justice system. Some potential options for reform will be explored in the following subsection.

i. Recommendations for Institutional Reform

⁴⁷ Richard Delgado & Jean Stefancic, *supra* note 43 at 64.

⁴⁸ See discussion below.

The first recommendation for systemic reform outside the scope of the *YCJA* is in the publication of jurisprudence and re-envisioning the way that decisions are articulated. It is incredibly important that written decisions reflect how the judge decided upon a sentence, and how that sentence is meeting the unique and individual needs of the offender, especially where the accused is an Indigenous youth. As it stands, this is often not an essential or obvious aspect of reasoning for sentencing. As a result, reasoning in jurisprudence often only articulates the severity of the sentence rather than the approach it has adopted, and how it is meant to specifically rehabilitate and reintegrate the offender back into society. This principle is especially significant for lower court judges, who set the initial precedent that will only change in the event it is appealed.⁴⁹

Judges often fail to draw the explicit connection between how *Gladue* factors have influenced the sentence, and what that sentence involves to help rehabilitate the specific offender. Yet, in cases where this has been done successfully, it can be very poignant. In the British Columbia Provincial Court case *Regina v CJHI*,⁵⁰ Judge A. Wolf made a supplemental ruling on a *Gladue* application. In this 18-page ruling, he discussed his reasons for ordering a *Gladue* report for an Indigenous accused where the expense of the report was an issue, and it was unknown how it would be funded.⁵¹ The key question the judge explored was, “should an accused have the benefit of a full report for breach of bail charge? Even if jail is being sought by the Crown?”⁵²

⁴⁹ See cases referred to in Chapter 3 of this thesis: *R v CJHI*, 2017 BCPC 121; *R v TDK*, 2015 MBQB 119; *R v Anderson*, 2018 MBCA 42; *R v M(SR)*, 2018 MBQB 86.

⁵⁰ *R v CJHI*, 2017 BCPC 121.

⁵¹ *Ibid* at para 1.

⁵² *Ibid* at para 5.

In his reasons, the judge directly quoted paragraphs 66 to 85 of *Gladue* in recognition that “every word in my view is worth repeating.”⁵³ Ultimately, the judge found that the possibility of jail is not a requirement for the provision of a *Gladue* report.⁵⁴ Furthermore, the judge importantly recognized that jurisdictions outside of British Columbia, such as Alberta, require a *Gladue* report be commissioned in any instance where the accused is Indigenous,⁵⁵ noting the clear regional disparity Indigenous peoples face in the Canadian criminal justice system.

Although these supplemental reasons are a far cry from the weight of Supreme Court of Canada (“SCC”) jurisprudence, they are illustrative of two important ideas: 1) judges have the ability and responsibility to demand that Indigenous accused are treated equitably in the criminal justice system even where there are systemic issues present such as lack of funding or resources; and, 2) well articulated and precise reasons set precedents. If enough judges in British Columbia were to order *Gladue* reports as a means of ensuring all the contextual information available were brought before the court, it is more likely that eventually funding would be made available for *Gladue* report writers. Clearly articulating the limited culturally sensitive principles present within the Canadian criminal justice system is a small but meaningful step in the right direction.

A second recommendation for systemic reform outside the scope of the *YCJA* is to allocate more Government funding into Indigenous-centred restorative justice initiatives specifically targeting Indigenous youth. While some restorative and rehabilitative programs targeting Indigenous youth do exist, the availability depends on the jurisdiction.⁵⁶ Furthermore, important roles in the justice system such as the Crown attorney are not necessarily made aware

⁵³ *Ibid* at para 9.

⁵⁴ *Ibid* at para 24.

⁵⁵ *Ibid* at para 20.

⁵⁶ Alexandra Hebert, “Change in Paradigm or Change in Paradox: *Gladue* Report Practices and Access to Justice,” (2017) 43 *Queen’s LJ* 149 at 168.

of the existence of culturally sensitive programs, creating obstacles to recognizing these programs as actual diversion options.⁵⁷

Part of the possible success of this recommendation will rely on increasing communication between Friendship Centres and other community resources, and the Crown's Office. This way, more existing programs will be accepted as a means of diversion or extrajudicial measures. In order for this to be successful, grassroots community building will be mandatory. Legislating a requirement that culturally sensitive diversion options be made available means nothing if they do not exist, or the Crown's office does not approve them. Thus, this recommendation could work in tandem with the recommendations for reform within the *YCJA* outlined above.

A final recommendation for systemic reform outside the scope of the *YCJA* involves establishing mandatory and meaningful cultural competency training programs for all employees of the criminal justice system. Cultural sensitivity in the courtroom has been criticized as being an extension of cultural racism which, "...claims not to be racism—instead, it is about practice and not appearance."⁵⁸ In this way, cultural racism recognizes that there is a difference between cultures, but instead of respecting that difference, it decries outside cultural practices and behaviours as inferior to mainstream social norms.⁵⁹ As a result, cultural racism is able to hide within the folds of cultural sensitivity.⁶⁰

⁵⁷ *Youth Criminal Justice Act*, *supra* note 31, s 10(2)(a).

⁵⁸ Sonia N Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom," (2001) 13 Can J Women & L 107 at 113.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* citing Sherene Razack, "Beyond Universal Women: Reflections on Theorizing Differences Among Women," (1996) 45 UNBLJ 209 at 225; and Francis Henry, Carol Tator, Winston Mattis & Tim Rees, *The Colour of Democracy: Racism in Canadian Society*, 2d ed (Toronto: Harcourt, 2000) at 30.

This being the case, any future cultural competency training must be progressive, changing the negative connotation it has inherited. To be effective, this training must involve cultivating what is known as “multiple consciousness.”⁶¹ The concept of multiple consciousness, as described by Mari Matsuda, is not randomly adopting different outlooks with which to view an issue, but rather, “a deliberate choice to see the world from the standpoint of the oppressed.”⁶² In doing so, “the jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important as we set out on the road to justice.”⁶³

Matsuda contends that multiple consciousness is an educational pursuit that can and should be taken on by all legal professionals.⁶⁴ In reality, this is an enormous undertaking. To enter all legal professionals into a comprehensive and most likely ongoing training session would be very expensive and time consuming. However, as I have already argued, any solution to inequitable justice will require Government funding. Proper training is a necessary expenditure in order to ensure that all members of the Canadian legal system are not only familiar with, but also compassionate to the oppression of Indigenous youth.

Multiple consciousness can be expressed in a number of ways, “including interdisciplinary research, different intellectual methodologies and use of multiple subject positions.”⁶⁵ Learning to understand the world through the eyes of Indigenous youth can be a difficult process since, “anyone who pursues the critical inquiry faces the relentless weight of

⁶¹ Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method,” (1992) 14 *Women’s Rts L Rep* 297 at 299.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid* at 300.

⁶⁵ Neil Gotanda, “Reflections on Mari Matsuda’s Multiple Consciousness as Jurisprudential Method,” (2012) 18 *UCLA Asian Pac Am LJ* 103 at 103.

mainstream thought.”⁶⁶ However, if the critical inquiry is premised on a greater understanding of justice,⁶⁷ it can be very fruitful in lending an empathetic and conscientious eye to the issues before the court.

ii. *Obstacles to Institutional Reform*

The key obstacles to institutional reform are funding, training, and ideology. To implement all three of these recommendations would be both cumbersome and time consuming. Furthermore, they would require extensive training of all employees of the criminal justice system.

However, if funding could be acquired to implement these changes, training programs could be designed relatively quickly, focusing on understanding issues from the perspective of Indigenous youth. It is a major undertaking to ensure that all staff receive ongoing multiple consciousness training, especially in larger jurisdictions. Yet, this too can be overcome with proper resource allocation. The greatest obstacle to these recommendations is reception to the proposed changes. Since the criminal justice system is a people-driven institution, in order for training to be effective, members of the justice system must be open-minded and willing to learn. However, the ability to shift consciousness is an important skill in legal advocacy and, “encompasses as well the search for the pathway to a just world.”⁶⁸

Overall, the obstacles present are possible to overcome, and doing so would likely render a positive change in the way the criminal justice system approaches Indigenous youth. That

⁶⁶ *Ibid* at 104.

⁶⁷ *Ibid* at 106.

⁶⁸ Mari J Matsuda, *supra* note 61 at 299.

being said, success will also largely hinge on ideological reform in order to ensure the reformed institutions can exist in a supportive framework.

4. *Is Ideological Reform Possible/Can it be Successful?*

Any legal or social reform undertaken as a means of ameliorating the inequity experienced by Indigenous youth in the criminal justice system would need to be flexible in order to address intersectional issues, and holistic to reach Indigenous youth in all jurisdictions. Any reform will likely have to reach outside of the criminal justice system, influencing other social spheres.

While the recommendations made thus far are certainly positive steps towards achieving equitable justice for Indigenous youth, they are not enough independently. In order to truly effect change in social norms, there must be radical reform,⁶⁹ recognizing the historic blatant and covert oppression of Indigenous peoples in Canada. These recommendations have merely identified opportunities to address some of the startling problems in the criminal justice system in its current form. In order for the holistic change needed to occur, there must be changes in the way Canadians think about the criminal justice system. This next section will assess the shifts in social paradigm that should happen to support the recommended reforms.

i. Forget Multiculturalism and Embrace Plurality

Canada has historically prided itself “as being a world trendsetter in multiculturalism.”⁷⁰ However, as David B MacDonald writes, “multiculturalism sits uneasily with many Aboriginal people, in part because multiculturalism as promoted from 1971 was not designed to recognize

⁶⁹ Richard Delgado & Jean Stefancic, *supra* note 43 at 64.

⁷⁰ David B MacDonald, *supra* note 22 at 66.

Aboriginal distinctiveness.”⁷¹ Although multiculturalism promises celebration of diversity on its surface,⁷² it poses a number of problems for Indigenous peoples including integration of culture,⁷³ rather than recognition and acceptance of differences.

Ultimately, Indigenous peoples have been integrated into Canada without their consent.⁷⁴ Multiculturalism resists any challenge to the dominant perceptions held by colonialists.⁷⁵ Instead, “binationalism”⁷⁶ would promote, “power sharing and an ethos of ‘majority-to-majority partnership,’ rather than ‘majority-minority relations.’”⁷⁷ The Government of Canada must view Indigenous peoples and structures of governance at parity, or else the structural change necessary to holistically address the obstacles facing Indigenous youth will not happen.

ii. A New Normal

Undoubtedly the biggest task in achieving sentencing equity for Indigenous youth is by addressing social norms that allow inequity to exist. In Canada, racism is absolutely normalized.⁷⁸ It is omnipresent within Canadian society, whether taking form in microaggressions,⁷⁹ or rearing its head in more obvious ways such as violence. This being the case, oppressive and racist behaviours are unlikely to cease unless the normative understanding of social hierarchies changes.

⁷¹ *Ibid.*

⁷² *Ibid* at 76, citing Will Kymlicka, *Multiculturalism: Success, Failure, and the Future*, (Washington DC: Transatlantic Council on Migration, 2012).

⁷³ *Ibid.*

⁷⁴ *Ibid* at 78.

⁷⁵ *Ibid* at 80.

⁷⁶ *Ibid.* “Binationalism” is the terminology used by David B MacDonald in his article “Aboriginal Peoples and Multicultural Reform in Canada: Prospects for a New Binational Society.” MacDonald uses the term “binational” to envision a different reality where Indigenous peoples experience distinct and equal recognition with English and French peoples of Canada.

⁷⁷ *Ibid.*

⁷⁸ Richard Delgado & Jean Stefancic, *supra* note 43 at 7.

⁷⁹ *Ibid* at 2.

To materially change the way Canadian society views and interacts with national minorities⁸⁰ is no easy feat, given the ubiquitousness and accepted nature of racism today. However, Critical Race Theorists (“CRT”) as well as other academics and even front line workers in the criminal justice system have worked tirelessly toward addressing these issues. Now, progressive members of society are embracing CRT principles, as they seek to address common issues such as racial profiling⁸¹ and disproportionate rates of incarceration.⁸² There is hope in these movements, which have gained momentum and awareness overtime. It will be incumbent upon members of these academic and legal communities to continue this fight, in hopes to influence long-term and widespread ideological change.

5. Questions for Further Research

While this thesis has accomplished what it has set out to do as a critical monograph, there is undoubtedly further research necessary. In particular, more research needs to be done on the success rate of restorative justice initiatives in application to Indigenous youth. There appears to be more existing research in the Australian and New Zealand context,⁸³ and while this can provide insight to the Canadian criminal justice system, it is important to conduct research with a nuanced focus on Canada.

Another outstanding research question that only time can answer is whether the Recognition and Implementation of Indigenous Rights Framework will be successful. The future of self-governance will depend largely on the involvement of Indigenous groups in the

⁸⁰ David B MacDonald, *supra* note 22 at 72, citing Will Kymlicka, *Multicultural Citizenship*, (Oxford: Oxford University Press, 1995) at 19.

⁸¹ Richard Delgado & Jean Stefancic, *supra* note 43 at 128.

⁸² *Ibid* at 129.

⁸³ For example, see Sarah Xin Yi Chua & Tony Foley, “Implementing Restorative Justice to Address Indigenous Youth Recidivism and Over-Incarceration in the Act: Navigating Law Reform Dynamics,” (2014) 18 AILR 138.

Framework, and the willingness of the Government of Canada to enter uncharted territory. Given the timeline of this thesis, these questions can only be answered at a later date.

Further research is also required in exploring the intersectional issues relating to Indigenous youth involved in the criminal justice system. Due to length constraints, unfortunately I could not explore the unique issues facing Indigenous youth who identify as female as opposed to male, different sexualities, or even issues that may differ between different Indigenous groups or Nations. These themes of oppression are diverse and important, and require more time and detail than this thesis allowed.

Finally, there was limited discussion in this thesis examining what a pluralistic legal structure would look like in Canada. For the purposes of further research, it would be important to engage in a comparative analysis of other countries where pluralistic legal structures exist. Furthermore, more research generally comparing qualities of different legal structures and how they affect the treatment of Indigenous youth would be very useful as a means of adopting a closer analytical approach to problem solving using international successes and failures as a benchmark.

6. Conclusion

This thesis set out to answer the question, to what extent can the *YCJA* and supporting regulations be reformed in order to effectively “rehabilitate and reintegrate” Indigenous youth and serve the Government of Canada mandate of “reconciliation;” or, considering the colonialist underpinning of Canadian legislation, to what extent do Indigenous youth require alternative solutions to establish equitable justice? In doing so, I have explored and critically analyzed the root causes of the inequity experienced by Indigenous youth in the criminal justice system; the

development of youth criminal legislation and how it has responded to the unique needs of Indigenous youth; various mechanisms and initiatives geared towards helping Indigenous youth; and I have looked closely at the relevant jurisprudence and how it has contributed to the betterment of the criminal justice system for Indigenous youth, and how principles articulated in the jurisprudence have been reflected in subsequent decisions.

By critically analyzing these considerations through the lens of Critical Race Theory, it is evident that the efforts of the legislature to create equitable sentencing provisions; the efforts of the courts to acknowledge and address the needs of Indigenous youth, and the alternative means of assisting Indigenous youth in navigating the criminal justice system have all been part of a Western-liberalist legal system. As a result, these efforts all embody liberal values, with no meaningful effort to involve the diverse and unique Indigenous communities they are meant to serve. As stated at the beginning of this Chapter, no amount of reform to the *YCJA* will independently serve to rehabilitate and reintegrate Indigenous youth into society. While Indigenous youth clearly require alternative solutions and programming specifically designed to meet their unique needs, the power to create and implement such programs must rest in the hands of Indigenous peoples, organizations, and governance structures. Absent self-governance, there must be ideological, institutional, and legislative reform.

In answering this research question, I have illuminated flaws in the *YCJA* and have proposed opportunities for legislative reform. Similarly, this thesis has highlighted flaws at the institutional level of the criminal justice system, and has offered further opportunity for institutional reform. Finally, I have shed light on theoretical and paradigmatic issues contributing to the oppression of Indigenous youth in Canada, and have offered opportunity for long-term ideological reform in order to better the circumstances of Indigenous youth. Ultimately, I

conclude that none of these recommendations can be successful independently. Ideally, theoretical and ideological reform will serve as a framework with which to build more inclusive and independent Indigenous institutions, which will ultimately support reformed legislation. In other words, holistic reform is essential to address the over incarceration of Indigenous youth, thereby contributing to reconciliation.⁸⁴

Chapter 1 of this thesis clearly indicated that one of the benefits of utilizing Critical Race Theory instead of Indigenous Legal Theory was to explore a broader range of systemic reform apart from self-governance. While Indigenous-driven self-governance remains the best possible solution to addressing the oppression of Indigenous youth, it is not yet a reality, nor will it be in the near future. Some of the recommendations I have offered suggest intermediate solutions, while others are more long-term goals. It is incredibly important these pressing issues be assessed through as many theoretical lenses as possible in order to achieve the most well-rounded and interdisciplinary understanding of the obstacles we face as legal professionals and in academia. While there remain many gaps in the research surrounding Indigenous youth involved in the Canadian criminal justice system, this thesis has contributed to narrowing that gap by critiquing the state of the justice system, and offering potential solutions going forward.

The social and political climate is ripe for systemic change. We must recognize the need for equity as a country, as provinces, as communities, and as individuals. It is only when we accept that bettering the circumstances of the oppressed and marginalized benefits everyone, will we experience meaningful change.

⁸⁴ Truth and Reconciliation Commission of Canada, “Truth and Reconciliation Commission of Canada: Calls to Action,” (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at cls 38.

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