Errata

Please be advised that this errata sheet contains the following correction made to this document. Any, and all, versions of this document that had been downloaded, cited, or otherwise accessed prior to 6 February 2019, should be considered as containing errors and invalid.

Page 11, Paragraph 2.............At the Supreme Court of British Columbia (hereinafter referred to as BCSC) Trial Court level, Gladue pled guilty to the lesser included offence of manslaughter and, as she had no prior criminal record apart from an impaired driving conviction, was sentenced to three years’ imprisonment on February 13, 1997.
Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System:

Implementation of R. v. Gladue in Prince Edward Island (PEI)

by

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A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the Graduate Academic Unit of Sociology

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THE UNIVERSITY OF NEW BRUNSWICK

January 2019

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ABSTRACT

The problem of overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system, particularly its prisons, has been well documented. In 1996, following a comprehensive review of the Criminal Code of Canada, federal legislation, commonly known as Bill C-41, received royal assent. One of its legislative amendments, section 718.2 (e), was, in part, introduced to remedy the overrepresentation problem, legally obligating judges to utilize incarceration as a remedy of last resort and with particular attention to the circumstances of Aboriginal offenders. In 1999, the Supreme Court of Canada (SCC) handed down the seminal R. v. Gladue decision, which constituted the first-time court responsibilities were set out in response to amendments made in the Criminal Code. Analytically centering settler colonialism, this project examines how section 718.2 (e) and R. v. Gladue has been implemented in the Province of Prince Edward Island (PEI). This research project reveals that in most jurisdictions across Canada, including PEI, remediation of the overrepresentation problem has not yet been fully realized, and, in fact, is getting worse. It explores, by way of case-law (document) analysis; interviews with key informants in the conventional adversarial Canadian criminal justice (legal) system, Indigenous Gladue Writers and Elders; the application of section 718.2 (e), R. v. Gladue, along with its guiding principles, and assesses how the implementation process should be operationalized in “theory,” compared to how it is currently taking place in “practice” in PEI.

Keywords: Indigenous peoples, section 718.2 (e), R. v. Gladue, key informant
DEDICATION

In loving memory of Aunt Edna J. Lavandier (1921-2017), one of my biggest fans.
ACKNOWLEDGEMENTS

Anyone who has completed a PhD dissertation can appreciate that it is not a journey which is undertaken without the support, guidance, and encouragement from many people along the way.

Several personnel from the University of New Brunswick (UNB) assisted me in achieving my goal. First and foremost, a special thanks to my supervisor, Dr. Tia Dafnos, for her countless hours of invaluable mentoring and unwavering support, and whose knowledge both challenged and broadened my intellectual horizons. Also, to members of my supervisory committee, Dr. Linda Neilson and Dr. Nick Hardy, for their valuable insight and constructive criticism. Thanks to Wanda Birch and Tracy McDonald, Administrative Assistants, for their support and advice; Alicia McLaughlin, Information Desk Coordinator, John B. McNair Learning Commons, Harriet Irving Library, for her courteous and obliging response to my many queries; Dr. Richard Spacek, Coordinator, Writing & Studies Skills Program, Harriet Irving Library, for his well-informed grammatical input; and Rob Glencross, Digital Publishing Assistant, Centre for Digital Scholarship, Harriet Irving Library, for his steadfast patience, affable disposition and willingness to go the extra mile.

A huge thank-you to all the interview informants, both from within the PEI criminal justice (legal) system and Indigenous Gladue Writers and Elders representing Indigenous communities in PEI. Your time and invaluable input made this research project achievable. A special thank-you to Lori St. Onge, Director of Indigenous Justice in the Province of PEI, for her stalwart support and true friendship since the beginning of this research project. Also, to Michele Dorsey, former Deputy Minister of Justice and
Public Safety and Deputy Attorney General for the Province of PEI, for her approval and support of legal informants’ participation.

Thank-you to Jonathan Rudin, Program Director, Aboriginal Legal Services in Toronto, Ontario, and Mitchell Walker, a Gladue Writer in the Province of British Columbia, who were both instrumental in piloting the questions for the legal and Gladue Writer interview guides, respectively. Also, to Cunliffe Barnett, retired British Columbia Provincial Court Judge, for his willingness to share his wealth of experience and expertise in the area of *R. v. Gladue*.

Last, but certainly not least, I would like to express my heartfelt appreciation to my partner, Judy, who supported and stood beside me every step of the way.
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Curriculum Vitae
List of symbols, nomenclature or abbreviations

AFN: Assembly of First Nations
AJI: Aboriginal Justice Inquiry (of Manitoba)
AJS: Aboriginal Justice Strategy
ALS: Aboriginal Legal Services
AM: Alternative Measures (Program)
BC: British Columbia
BCCA: British Columbia Court of Appeal
BCPC: Provincial Court of British Columbia
Bill C-41: An Act to amend the *Criminal Code* (sentencing) and other Acts in consequence thereof, S.C. 1995, c.22
CanLII: Canadian Legal Information Institute
CCC: *Criminal Code of Canada*
CIS: Community Impact Statement
CJS: Criminal Justice (Legal) System
CSC: Correctional Service Canada
CSO: Conditional Sentence Order
CWB: Community Well-Being (Index)
EFI: Eagle Feather Initiative
IJP: Indigenous Justice Program
IRSS: Indian Residential School System
LAO: Legal Aid Ontario
LGBTI: Lesbian, Gay, Bisexual, Transgender/Transsexual, Intersex
LSS: Legal Services Society (of British Columbia)
MCPEI: Mi’kmaq Confederacy of Prince Edward Island
MLSN: Mi’kmaq Legal Support Network
MOU: Memorandum of Understanding
MP: Member of Parliament
NB: New Brunswick
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<th>Symbol</th>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>Ontario Court of Appeal</td>
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<tr>
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<td>Presentence Report</td>
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<tr>
<td>RCAP</td>
<td>Royal Commission on Aboriginal Peoples</td>
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<td>RCMP</td>
<td>Royal Canadian Mounted Police</td>
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<td>TRC</td>
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<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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Chapter 1.
Introduction

The headline in the local newspaper reads, “Province of Prince Edward Island (hereinafter referred to as PEI) Judge rejects sentence recommendation for man who tried to sell drugs to students” (Ross, 2018). Indigenous (both parents of Cree ancestry) accused, 18-year-old George Nash McInnis, admitted selling marijuana to students at a local high school while he was enrolled there and was subsequently charged with possessing marijuana for the purpose of trafficking. A Gladue Report was prepared which indicated McInnis had been taken away from his parental home into “care” at birth and raised in a non-Indigenous home. The presiding trial judge noted McInnis was adopted by non-Indigenous parents, and “it appeared to be a loving home.” The Federal Crown, according to the same article, highlighted that McInnis had experienced racism growing-up, and made a joint sentencing submission with defence counsel requesting that the accused’s Indigenous ancestry be taken into consideration and recommended community-based supervision (Probation), with no time in jail. After hearing submissions from both counsels, the judge decided the joint recommendation was not in line with the principles of sentencing judges were required to follow, and sentenced McInnis to 90 days in custody, to be served intermittently (weekends). The sentence was appealed, heard by the Prince Edward Island Court of Appeal (hereinafter referred to as PECA) on December 11, 2018, and a decision is scheduled to be released early in 2019. Mr. McInnis was released pending the appeal. Once the Mi’kmaq Confederacy of Prince Edward Island (hereinafter referred to as MCPEI) heard about the appeal, they applied, and subsequently were granted non-party intervenor status in the matter.
Introduction

The McInnis case exemplifies the problem that my research seeks to explain: why overrepresentation\(^1\) of Indigenous peoples in the Canadian criminal justice (legal) system (hereinafter referred to as CJS), especially its prisons, continues to rise despite specific legislative and judicial remedial measures aimed at reducing the problem, section 718.2 (e) and \textit{R. v. Gladue}, [1999] 1 S.C.R. 688 (hereinafter referred to as \textit{R. v. Gladue} and retrieved from \url{http://canlii.ca/t/1fqp2}), respectively. I approach this problem from a framework that centres settler colonialism by examining how settler colonial relations are (re)produced through the manner in which the Canadian CJS operates (e.g. rule of law, proportionality, equality before the law, etc.). Although I analyze the implementation of \textit{R. v. Gladue} across Canada, my primary focus is PEI.

In 2014, PEI introduced \textit{Gladue} Reports and \textit{Gladue} Writers as a means of meeting its legislative and judicial requirements. Due to the geographical size of PEI, I was able to interview virtually all the key CJS actors within the PEI legal system who deal with Indigenous peoples who come before the court; as well as Indigenous peoples who are either involved in (e.g. \textit{Gladue} Writers) or, alternatively familiar with (e.g. Elders) the CJS. This provides analytical depth by enabling a concrete examination of the ways in which colonial discourses materialize in everyday practices in the PEI CJS and (re)produce settler colonial relations. It also presents concrete avenues for potential intervention. Despite the introduction of recent remedial initiatives (e.g. \textit{Gladue} Reports

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\(^1\) The overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system (CJS) was first officially documented in 1967 by the Canadian Correction Association’s Report – “Indians and the Law.” Next, the 1969 “White Paper,” formally known as the Statement of the Government of Canada on Indian Policy, recognized the problem of overrepresentation of Indigenous peoples in Canadian provincial/territorial correctional facilities, as well as federal penitentiaries/institutions. In 1974, the same issue was discussed by the Law Reform Commission of Canada’s “The Native Offender and the Law.”
and Gladue Writers) in the Province, unless and until legal professionals/actors adhere to section 718.2 (e) and R. v. Gladue and have a clear understanding of the ongoing debilitating impact of settler colonialism, the overrepresentation of Indigenous peoples in Canadian prisons will most likely continue.

The mass incarceration of Indigenous peoples continues to be a serious problem in settler-colonial contexts such as Canada, where, according to Glen Coulthard (2014), a member of the Yellowknives Dene First Nation, reconciliation discourses, particularly in the case of the Indian Residential School system (hereinafter referred to as IRSS2), become “framed as the process of individually and collectively overcoming the harmful ‘legacy’ left in the wake of this past abuse, while leaving the present structure of colonial rule largely unscathed” (p. 22). Furthermore, Coulthard (2014) suggests that there is a “much more challenging conversation that we need to collectively have about what it will take to truly decolonize the relationship between Indigenous and non-Indigenous peoples in Canada” (pp. 119-120), an exigent conversation which, in the estimation of Indigenous scholars like Coulthard, has not yet happened.

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2 For over a century, beginning in the mid-1800s and continuing into the mid-1990s, Indigenous (First Nations, Inuit, Métis) children in Canada were taken from their homes and communities and placed in institutions called Indian residential schools. These schools were run by religious orders in collaboration with the Federal Government and attended by children as young as four years of age. The children were separated from their families, often for years at a time. They were prohibited from speaking their mother tongue or language and practicing their culture and traditions. The vast majority of the over 150,000 children who attended these schools experienced neglect and suffering. The impacts of the sexual, mental and physical abuse, shame, and deprivation endured at these institutions continue to affect generations of Survivors, their families, and communities. Many died and were never to return home. Remarkably, in the face of this tremendous adversity, many Survivors and their descendants have retained their languages, cultures and continue to work toward their personal healing and reconciliation (Legacy of Hope Foundation, 2017, p. 1).
The problem of overrepresentation, according to Jackson (1992), “has been confirmed as the most disturbing feature of the criminal justice system” (p. 148) by a rapidly accumulating body of reports, commissions, inquiries. Razack (2015) asserts that “[d]espite the problem of Indigenous overrepresentation in the justice system […] and the unflagging efforts of many Indigenous and some non-Indigenous scholars to show that colonialism is a central explanation of these statistics, the plight of Indigenous people in Canada is seldom officially connected to colonialism” (p. 30). This research project highlights the connection between settler colonialism and the enduring problem of overrepresentation of Indigenous peoples in the Canadian CJS, specifically in PEI.

Over the last three decades, there has not only been considerable debate concerning the nature, significance and extent of overrepresentation, including whether the problem is regional or national in scope, but also the causes of overrepresentation. There are three dominant explanatory frameworks identified in the literature with respect to these causes: culture clash, socio-economic disadvantage, and settler colonialism. The latter framework is the one I adopted in completing this research project.

1.1. Historical context

Since its onset over 400 years ago, colonialism has wrought a broad swath of devastation for Indigenous peoples across the Canadian landscape, most often by way of “that most quintessential of colonial activities: the improvement of the colonized, or, in an old phrase, the civilizing mission” (Razack, 2015, p. 7). A critical engagement with distinct aspects of settler colonialism helped to shape the theoretical framework of this research project. Settler colonialism provides a key lens which focuses upon “the effects of colonial-generated cultural disruptions that compound the effects of dispossession to
create near total psychological, physical and financial dependency on the state […] it is the cumulative and ongoing effects of this crisis of dependency that form the context of First Nations existences today” (Alfred, 2009b, p. 42). Moreover, relying upon the words of Mohawk Nation scholar Patricia Monture-Angus (2000), as cited in Razack (2015), “if we view this landscape of persistent overrepresentation and disregard the role that colonization plays in producing this pattern, we assume that historical relations between colonizer and colonized have simply ended” (p. 197). This research project emphasizes that these relations continue to persist across the Canadian CJS landscape, including the Province of PEI.

Canada has long been regarded as a progressive, civil and just society, which treats its inhabitants with compassion, even-handedness, and parity. Nevertheless, justice and evenhandedness appear to exclude Indigenous peoples. Canada has been admonished by the United Nations Inter-American Commission on Human Rights (2014) for failing to protect Indigenous women; as well as by the International Covenant on Civil and Political Rights, Human Rights Committee (2015), wherein its concluding observations specifically expressed concern “at the disproportionately high rate of incarceration of [I]ndigenous people, including women, in federal and provincial prisons across Canada” (pp. 6–7). Manley-Casimir (2012) argues that the “myth of Canada as a neutrally situated peacemaker in the international community sits in sharp contrast to the ongoing oppression of Indigenous communities within Canada” (p. 231). Manley-Casimir (2012) further contends Canadian law, legislation and court decisions, all play “a central role in maintaining the colonial oppression of Indigenous peoples” (p. 231). Most, if not all, of the intractable problems Indigenous peoples in Canada face, ranging from injustices
associated with the *Indian Act, R.S.C., 1985, c. 1-5* (hereinafter referred to as the *Indian Act*) to overrepresentation in the CJS, are tightly interwoven with colonization. Ruddell (2017) summarizes several of the principal reasons why this may be the case specifically with respect to overrepresentation, including “marginalization, history of discrimination and forced assimilation […] and the possibility of biased treatment within the justice system” (p. 74).

In 1996, the Royal Commission on Aboriginal Peoples (hereinafter referred to as RCAP) released *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice*. The RCAP was established shortly after a 78-day armed standoff — known as the Oka Crisis — between the Mohawk community of Kanesatake, the Sûreté du Québec, and the Canadian army. The Commission was meant to help restore justice to the relationship between Indigenous and non-Indigenous peoples in Canada. Its mandate was twofold: first, to “review the historical and contemporary record of Aboriginal people’s experience in the criminal justice system to secure a better understanding of what lies behind their over-representation there”; and second, provide “a framework for change” (Dussault, & Erasmus, 1996, pp. xi-xii). This framework for change, according to Commissioners Dussault and Erasmus (1996), has two distinctive yet inter-related dimensions, the first involving reform of the existing CJS, “to make it more respectful of and responsive to the experience of Aboriginal people”; the second, “establishment of Aboriginal justice systems as an exercise of the Aboriginal right to self-government” (p. xii). The RCAP generated data that made clear to the Federal Government the need for criminal justice legislative reform. The Canadian Parliament had undertaken, between 1979 and 1995, an extensive review of the *Criminal Code of Canada* (hereinafter referred
to as CCC) and by 1996, was in the final stage of releasing its own comprehensive remedial legislation, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof. S.C. 1995, c.22* – otherwise known as Bill C-41. This constituted “the first major reform and codification of sentencing principles in the history of Canadian criminal law” (Maurutto & Hannah-Moffat, 2016, p. 455). Bill C-41, first introduced in the House of Commons on June 13, 1994, “moved the principles of sentencing out of the common law and enshrined them in the *Criminal Code*” (Rudin, 2008, p. 689), constituting, “not merely a codification of existing law and practice” as most criminal law reforms had in the past, but rather a new remedial frame of reference, “ushering in a new direction in sentencing” (Proulx, 2005, p. 87). According to Quigley (1999), up to this time, Parliament historically “had merely legislated the sentencing options available to judges and had left the development of sentencing aims, policy, principles, and procedure largely to the judiciary” (p. 131).

When legislative changes in the CCC were contemplated in the early 1990s, particularly as it pertains to the purpose and principles of sentencing, commonly referenced as section 718, proponents of the legislation heralded its coming into full force and effect in 1996 as not merely the codification of the objectives and principles of sentencing, but designed to bring about greater consistency and clarity to the overall sentencing process. These reforms “were seen to be significant in a country wherein judicial discretion had been at the core of the sentencing process” (Balfour, 2012, p. 85). Although the sentencing objectives “denunciation” (section 718 (a)), “deterrence” (section 718 (b)), “separation” from society (section 718 (c)), “rehabilitation” (section 718 (d)), and the fundamental principle of “proportionality” (section 718.1), remained
Introduction

and, typically capture the lion’s share of the spotlight when dealing with sentencing law, in this research project, section 718.2 (e), the “restraint” provision or so called “Aboriginal sentencing section,” (Rudin, 2008, p. 693) is my focal point. Jonathan Rudin (2008), Program Director, Aboriginal Legal Services (hereinafter referred to as ALS) in Toronto, Ontario, has said that this sentencing principle, expressly related to Indigenous offenders in Canada, “is unique among common law countries with Aboriginal populations as it is the only statute that specifically directs judges to consider the circumstances of Aboriginal offenders” (pp. 689–690).

By the mid-1990s, Indigenous peoples “comprised an estimated 3.7% of the Canadian population while accounting for 12% of the federal prison population and 16% of offenders in provincial institutions” (Pelletier, 2001, p. 471). The 1996 RCAP Report referred to the overrepresentation of Indigenous peoples in the Canadian CJS as “injustice personified.” One of the major findings of this influential Report clearly illustrates this point:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada – First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural – in all territorial and governmental jurisdictions. The principle reason for this crushing failure is the fundamentally different world views of Aboriginal and Non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice (René Dussault & Georges Henry Erasmus, a member of the Dene Nation, 1996, p. 309).

Doob (2012) suggests that of all the sentencing provisions associated with the enactment of Bill C-41, symbolically the most important “may be those that explicitly endorse restraint in the use of imprisonment” (p. 18). Reflecting the analysis of the RCAP, section 718.2 (e) states:

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

Since Bill C-41 received royal assent in the late summer 1996, judges have been governed by this legislated principle. Nonetheless, more than two decades later, this sentencing reform has not achieved its intended purpose of decreasing the incarceration of Indigenous peoples in Canadian prisons.

Granted, remedial attempts had already been made to reform criminal justice in relation to Indigenous peoples coming before the court prior to the RCAP releasing its findings in 1996. According to Dickson-Gilmore and LaPrairie (2005), these attempts “rarely went beyond the piecemeal and limited addition of an ‘Aboriginal perspective’ to extant justice structures through ‘indigenization’ and cross-cultural training for predominantly non-Aboriginal system personnel” (pp. 57-58). However, once the RCAP Report was released, the tone of the debate demonstrably changed, particularly as it relates to the relationship between the colonial CJS and Indigenous peoples in Canada. Prior to the RCAP, Canadian politicians had argued for over 30 years about the need to revamp the CCC to create a framework for punishment which was both coherent and principled. According to Doob (2012), the notion that imprisonment was a “necessary evil” and therefore “to be used sparingly – or only when necessary – was well established in Ottawa until the early to mid-1990s”; this principle of restraint in the use of imprisonment was “a position that was not challenged by any of the three national political parties until the 1990s” (p. 14). However, the RCAP documented clearly that this principle of restraint in the use of imprisonment did not seem to apply to Indigenous peoples.
Section 718.2 (e) was not without its critics. As Stenning and Roberts (2001, p. 138) argue, the legislative provision “went beyond general support for restraint and identified Aboriginal offenders as a group in need of special attention.” Specifically, in this regard, Murdocca (2013) indicates that during the Second Reading debate of Bill C-41 in Parliament on September 20, 1994, the proposed legislation led opposition Member of Parliament (MP), Pierrette Venne (Saint-Hubert) to remark: “[I]t is deplorable that the bill tries to sneak through the back door the concept of a parallel system of justice for Aboriginals […] so well hidden that it is almost necessary to read Clause 718.2 (e) twice to discover this enormity hidden under nine sneaky words” (p. 60). Yet despite these “nine sneaky words,” as Lewis (2012) points out, “words alone in a Federal statute are not enough to effect real change in the rates of overincarceration among Aboriginal people in Canada” (pp. 1-2); meaningful change will only take place if key people (e.g. politicians, CJS professionals) join ranks in a deliberative effort to achieve this objective.

Section 718.2 (e) did not transform the Canadian legal landscape instantaneously; however, with the subsequent rendering of the Supreme Court of Canada (hereinafter referred to as SCC) decision on April 23, 1999, in *R. v. Gladue*, the tide did begin to change, with respect to the governing principles. The SCC decision addressed “the issue of the proper interpretation of section 718.2 (e) for the first time” (Pelletier, 2001, p. 473). *R. v. Gladue*, according to Maurutto and Hannah-Moffat (2016), acknowledged what countless commissions and reports have long documented: “discrimination within the legal and criminal justice systems has contributed to a crisis of overincarceration (Law Reform Commission of Canada 1991; Royal Commission on Aboriginal Peoples, 1996)” (p. 456). Section 718.2 (e) and *R. v. Gladue* heralded a new approach by requiring
judges to engage in a new method of analysis that would take into account the adverse cultural circumstances that many Indigenous peoples in Canada experience.

1.2 R. v. Gladue

R. v. Gladue involved 19-year-old Jamie Tanis Gladue, who had a Cree mother and Métis father. Gladue was originally from McLennan, Alberta, a small town of 809 residents (circa. 2011), located 438 kilometers northwest of Edmonton. During the early morning hours of September 17, 1995, while celebrating her nineteenth birthday, Gladue confronted and subsequently mortally wounded her common-law partner, Reuben Beaver, because of his alleged involvement in an extramarital affair with her older sister. At the Supreme Court of British Columbia (hereinafter referred to as BCSC) Trial Court level, Gladue pled guilty to the lesser included offence of manslaughter and, as she had no prior criminal record apart from an impaired driving conviction, was sentenced to three years’ imprisonment on February 13, 1997. The Lower Court judge stated, as cited in R. v. Gladue, at paragraph 18, that even though both Gladue and the deceased were Indigenous, “they were living in an urban area off-reserve and not ‘within the A]boriginal community as such,’” and therefore did not deserve special consideration, pursuant to section 718.2 (e). The judge ultimately imposed a three-year custodial sentence, primarily because of the serious nature of the index offence. Gladue appealed the original sentence to the British Columbia Court of Appeal (hereinafter referred to as BCCA), in R. v. Gladue, 1997 CanLII 3015 (BCCA), (hereinafter referred to as R. v. Gladue (1997)), where “her new defense counsel argued that she was entitled to special consideration as an Aboriginal person regardless of where she lived” (Balfour, 2008, p. 112). The BCCA, in a majority decision, granted leave to appeal but could not find any
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...ground upon which to warrant interfering with the original sentence and therefore dismissed the appeal, although the same court “unanimously concluded that the trial judge had erred in concluding that section 718.2 (e) did not apply because the appellant was not living on reserve” (R. v. Gladue, para. 20). The sentence was subsequently appealed to the SCC on the basis that the trial judge did not adhere to the Parliamentary directives clearly enunciated in section 718.2 (e), in that the judge specifically did not consider Gladue’s Indigenous status. The SCC found the trial judge had erred in not properly considering the appellant’s relevant systemic and individual background factors as applicable or contributing to the offence; however, in the final analysis, the SCC still considered the original sentence of three years’ imprisonment “reasonable.” Gladue was granted day parole on August 13, 1997, after she had served six months of her original three-year custodial sentence. On February 25, 1998, she was granted full parole, and as a direct result of not regarding it “in the interests of justice to order a new sentencing Hearing in order to canvass the appellant’s circumstances as an [A]boriginal offender” (R. v. Gladue, para. 99), the SCC dismissed the appeal.

The unanimous decision in R. v. Gladue was the first SCC case to identify judicial obligations pursuant to section 718.2 (e), and from which the Gladue guiding principles emanated. Moreover, according to Maurutto and Hannah-Moffat (2016), “it affirmed that the overrepresentation of Aboriginals is not simply related to social disadvantage but to the more complex legacy of colonialism” (p. 456; Rudin and Roach, 2002), a proposition raised three years earlier by the RCAP and in 2015, reaffirmed by the Truth and Reconciliation Commission of Canada (hereinafter referred to as TRC). Justice Rowles, in a dissenting opinion in the R. v. Gladue (1997) decision and cited in R. v. Gladue, at
paragraph 21, acknowledged “the mischief that s. 718.2 (e) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of [A]boriginal people who are imprisoned, in particular.” Ultimately, when the case reached the SCC, the Court began “the process of articulating the rules and principles that should govern the practical application of s. 718.2 (e) of the *Criminal Code* by a trial judge” (*R. v. Gladue*, para. 24). In expanding upon the key objective of section 718.2 (e), the SCC, in *R. v. Gladue*, at paragraph 33, conceded:

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 [A]boriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.

SCC Justices Cory and Iacobucci, in the *R. v. Gladue* written judgement, asserted that in addition to reforming the purpose of sentencing in section 718, the specific directive to judges who sentence Indigenous offenders, pursuant to section 718.2 (e), reflected a new approach. Parliament had, more than ever before, “empowered sentencing judges to craft sentences in a manner which is meaningful to [A]boriginal peoples” (*R. v. Gladue*, para. 77). It is possible to argue that the purpose and/or intent of section 718.2 (e), as envisioned by the SCC in *R. v. Gladue*, was three-fold. First, it was to respond, in remedial fashion, to the “drastic overrepresentation of [A]boriginal peoples within both the Canadian prison population and the criminal justice system” (para. 64). Second, it was to raise the level of public consciousness of Canadians in that “widespread racism has translated into systemic discrimination in the criminal justice system” (*R. v. Williams*, [1998] 1 S.C.R. 1128, para. 58; Dussault & Erasmus, 1996, pp. 33-34; Hickman, Poitras, & Evans, 1989, p. 161). Third, according to Hasan (2012), it was to “shift the sentencing
paradigm for the Aboriginal offender from one that focused on incarceration to one that focuses on restorative justice” (p. 5).

Even though Canada’s highest Court stated in *R. v. Gladue* that the legislation was intended to remedy the overrepresentation of Indigenous peoples in Canadian prisons, for example “[t]hese findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it” (para. 64), it was, for the most part, ignored until the SCC’s decision in *R. v. Ipeelee* [2012] 1 S.C.R. 433 (hereinafter referred to as *R. v. Ipeelee* and retrieved from http://canlii.ca/t/fqq00). *R. v. Ipeelee* unequivocally endorsed *R. v. Gladue* and re-emphasized the importance of section 718.2 (e), as well as the factors Canadian courts are mandated to consider when sentencing Indigenous peoples. *R. v. Ipeelee*, at paragraph 60, for instance, states:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

The *R. v. Ipeelee* decision seems to be an acknowledgement by Canada’s highest Court that colonization and displacement continue to (re)produce negative social outcomes, including high levels of incarceration, for Indigenous peoples. However, what we do not see in this decision is an acknowledgement that law reflects, and the legal system enforces settler colonialism. Statistics Canada report that the proportion of Indigenous admissions to adult custody has been “trending upwards for over 10 years […] has increased steadily from 2006/2007 when it was 21% for provincial and territorial correctional services and 20% for federal correctional services,” to 30% and 27% in 2016/2017, respectively (Malakieh, 2018, p. 5). Even though the problem of overrepresentation of Indigenous peoples is more prevalent in the western provinces, this
research project examines how settler colonialism manifests in the CJS in PEI and how, in turn, it impacts the implementation of section 718.2 (e) and *R. v. Gladue*, along with its guiding principles.

1.3 Implementation of section 718.2 (e) and *R. v. Gladue* in PEI

Utilizing settler colonialism as my main analytical framework, this research project is a qualitative empirical analysis of PEI’s implementation of section 718.2 (e) and *R. v. Gladue*. Settler colonialism is a distinct type of colonialism in which colonizers displace Indigenous peoples to establish a settler society which, over time, develops a distinctive identity and sovereignty. Settler colonialism in Canada has historically and continues to dispossess Indigenous peoples of their territories, identities and self-determination. The structure and techniques through which settler colonialism is enacted are varied in scope and multidimensional.

Using interviews and case-law (document) analysis, this research project examines the knowledges, viewpoints and beliefs of key CJS informants, whose experiences have been framed by a colonial legal system, and the knowledges, viewpoints and beliefs of informants from Indigenous communities, including Indigenous Elders [hereinafter referred to as Elders] and Indigenous *Gladue* Writers [hereinafter referred to as *Gladue* Writers], in the Province of PEI. This research project has three overall objectives: (1) assess systemic and procedural barriers and tensions within the legal system in PEI that prevent full implementation of section 718.2 (e) and *R. v. Gladue*; (2) examine how knowledge and practices in PEI contribute to the enduring problem of overrepresentation of Indigenous peoples in the Canadian CJS, especially its prisons; and (3) make
recommendations to enable the implementation of section 718. 2 (e) and *R. v. Gladue* and its guiding principles in the legal system in PEI.

### 1.4 Research questions

My data collection and analysis were guided by four specific research questions, the first constituting the main question, from which the other three emanate:

- How does the broader context of Canadian settler colonialism shape the legal system’s understanding and responses to remedial legal outcomes for Indigenous peoples, at the micro (individual), meso (institutional or formal organization), and macro (societal) levels in PEI?

- What is the difference between the stated “ideals” of section 718.2 (e) of the *Criminal Code*, along with the “guiding principles” associated with the 1999 SCC decision in *R. v. Gladue*, and how they have been implemented in the CJS in PEI?

- What discrepancies exist between the expectations of CJS actors and members of PEI’s Indigenous community in connection with section 718.2 (e) and *R. v. Gladue*?

- What are the challenges associated with the implementation of section 718.2 (e) of the *Criminal Code* and *R. v. Gladue*, in order to address the overrepresentation of Indigenous peoples in the CJS in PEI?

### 1.5 Terminology

The identifying and cataloging of people and spaces have been integral to colonial/settler oppression and consequently I am cognizant of the potential of (re)producing dominant discourses by utilizing impugned terminology through an uncritical lens.
Throughout my dissertation, I use the term “Indigenous,” unless an analogous term (e.g. Aboriginal, Native, Indian, etc.) forms part of a direct quotation. The term Indigenous refers to the descendants of the peoples and Nations who are the original inhabitants of the territories in what we now call Canada prior to “contact.” Recognizing the distinctiveness of Indigenous communities and keeping in mind that in the Canadian context “Métis” and “Inuit” are considered different peoples from other Indigenous (First Nations) peoples, I utilize terms such as First Nation, Métis, Inuit, Nation, or Tribe. I chose not to utilize the term “Aboriginal,” as it is “imposed on the Native peoples of Canada, thus denying their right to self-determination” (Todorova, 2016, p. 674). In addition, according to Indigenous scholars, Taiaiake and Corntassel (2005), Aboriginalism is “a legal, political and cultural discourse designed to serve the agenda of silent surrender to an inherently unjust relation at the root of the colonial state” (p. 598). The term “Indigenous” is situated within the context of colonial oppression, referring to people who are native to the lands they inhabit, in contrast to settlers, however “also has global connotations, as it recognizes the vast differences between Indigenous peoples around the world but also captures their common struggles against oppression” (Todorova, 2016, p. 674; Wilson & Stewart, 2008). I consistently follow the practice of utilizing the term “Indigenous peoples,” the capital “I” emphasizing “the nationhood of individual groups, while use of the plural ‘peoples,’ internationalizes Indigenous experiences, issues and struggles […] and acts against the notion of an Indigenous homogeneity” (Smith & Wobst, 2005, p. 14).

I use the term substantive equality which looks not so much at whether people are treated equally, but more so if equal treatment has an equal impact on everyone. In other
words, it is about equalizing effects and outcomes rather than standardizing treatment and conduct. Substantive equality, unlike formal equality, according to Coughlan (2013), “rejects the mere presence or absence of difference as an answer to differential treatment […] insists on going behind the façade of similarities and differences […] asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances” (p. 325). Coughlan (2013) further states that the result of an inquiry into substantive equality may be “to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping” or “may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group” (p. 325; Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396). It would be my contention that both explanations are at play when attempting to ascertain why the problem of overrepresentation continues to persist in the Canadian CJS.

1.6 Dissertation outline

Following this Introduction, I begin chapter two by explaining my theoretical framework grounded in the analysis of settler colonialism as a distinct formation and engaging a framework which includes two main bodies of literature: settler colonial studies and Indigenous scholarship. Settler colonialism is compared to other colonial formations (e.g. franchise or dependent) to identify its specificity. I discuss the “logic of elimination” and outline six processes or discourses through which this logic works to eliminate Indigenous peoples and secure settler society. I also identify six critiques of settler colonial theory and explain how I address each of them in this research project.
In chapter three, I explain my qualitative methodological approach, notably my reasons for using semi-structured interviews and case-law (document) analysis to examine micro (individual), meso (institutional or formal organization), and macro (societal) level dynamics associated with how the settler colonial relationship is (re)produced or, alternatively challenged within the CJS in PEI. I describe my key informants, identification and recruitment process, data collection, case-law (document) analysis and coding. I also highlight methodological limitations and ethical considerations.

In chapter four, I critically review the scholarly literature and case-law regarding overrepresentation of Indigenous peoples in the CJS. I present the statistical evidence and discuss debates concerning the meaning of overrepresentation. I examine three dominant explanatory frameworks of overrepresentation found in scholarly and policy literatures: socio-economic disadvantage, culture clash, and emerging settler colonial studies and Indigenous perspectives. Contextually, I scrutinize formative inquiries and commissions such as the 1991 Aboriginal Justice Inquiry (hereinafter referred to as AJI) of Manitoba and RCAP (1996), which form part of the Canadian state’s political discourse specifically related to overrepresentation. In addition to section 718.2 (e) and R. v. Gladue, I emphasize other CJS related attempts to remedy overrepresentation (e.g. indigenization, accommodation).

Drawing on my case-law analysis and interviews, chapter five examines how legal informants in PEI view the “problem” of overrepresentation and the corresponding impact of settler colonialism and systemic racism. Many of the legal informants emphasize fundamental legal principles like the rule of law, proportionality and equality
before the law, thereby supporting dominant discourses within the CJS, which, in turn, 
indirectly (re)produce the authority of the CJS and by extension, the settler colonial state. 
Overrepresentation, for the most part, was attributed to either shifting demographics or 
differential offending. The majority of legal informants attributed overrepresentation to 
(1) Indigenous offender background histories (e.g. socio-economic status (SES), familial 
dysfunction, drug and/or alcohol addiction), which they perceived as similar, if not 
identical, when compared to their non-Indigenous counterparts; and (2) Indigenous 
peoples’ involvement in serious criminal activity, rather than settler colonialism and its 
impact on both individual Indigenous peoples and communities. Defining the “problem” 
informs a debate over who should, and how to, prepare *Gladue* Reports, with most legal 
informants expressing the need for CJS institutional oversight.

In chapter six, I move away from an examination of informants’ understandings 
of overrepresentation, to a discussion of the systemic and procedural barriers and tensions 
in the ongoing implementation of section 718.2 (e), *R. v. Gladue* and its guiding 
principles. I found that a broad array of barriers, ranging from systemic (e.g. privileging 
of judicial and/or prosecutorial independence, lack of culturally appropriate resources), to 
procedural (e.g. having to prove “authentic” Indigeneity, lack of a clear understanding of 
settler colonial dimensions and their impact on Indigenous peoples), constitute live issues 
of concern for Indigenous and legal informants alike. There is a heightened awareness of 
*R. v. Gladue* within the CJS in PEI, particularly in light of the *R. v. Legere*, 2016 PECA 7 
(hereinafter referred to as *R. v. Legere* and retrieved from [http://canlii.ca/t/gpj3x](http://canlii.ca/t/gpj3x)) 
Appellate Court decision in mid-April 2016. I observed a significant disjuncture between
“theory” (e.g. the way section 718.2 (e), *R. v. Gladue* and its guiding principles should be
implemented) and “practice” (e.g. the way in which they are actually being implemented). With respect to implementation success stories in PEI, several examples were noted (e.g. creation of the Indigenous Justice Program (hereinafter referred to as IJP), introduction of Gladue Reports and Gladue Writers); however, a common rejoinder from most informants was “we can do better.”

In chapter seven, I build on my discussion in the previous chapter concerning self-determination on the part of Indigenous peoples and discuss Indigenous vis-à-vis settler colonial justice paradigms. Indigenous informants emphasized the fundamental importance of familial “roots,” community, relationship-building, and the transformative healing power of telling one’s own story, often by way of a Gladue Report, as a means of achieving “justice.” Indigenous informants centred the importance of healing and spoke about Elders and the integral role they play in fostering the reparation of harm, restoration of social harmony, and rekindling of Indigenous community trust as part of an Indigenous justice paradigm. Most informants agreed the best way to move forward, when it comes to implementing section 718.2 (e), R. v. Gladue and its guiding principles, and, by extension, realizing Indigenous justice and remediating the problem of overrepresentation, was by working collaboratively with Indigenous communities, especially in the areas of peacemaking and restorative justice.

In chapter eight, I summarize my key research findings and discuss implications for implementation of section 718.2 (e), R. v. Gladue, and guiding principles across Canada and particularly in PEI. I also explore the implications of and possibilities for challenging settler colonialism. I conclude with limitations, recommendations, and future research directions stemming from my research project.
Chapter 2.  
Theoretical Framework

2.1. Introduction

This research project situates overrepresentation of Indigenous peoples in the Canadian CJS, particularly its prisons, within the context of settler colonialism. The purpose of this chapter is to systematically delineate the key theories, critiques and concepts I drew upon in forming a coherent theoretical framework. In my research project, I rely on contributions from the theorizing of settler colonialism, espoused by Veracini and Wolfe, and the growing field of settler colonial studies, and equally important contributions of Indigenous scholars such as Alfred, Borrows, Coulthard, Corntassel, Monture-Angus, and Turpel-Lafond. A key concept associated with theorizing of settler colonialism is the “logic of elimination” and its related processes of essentialism, erasure, dispossession, pathologization, exclusion, and lawfare. Each of these concepts describes practices that have already and continue to (re)produce a settler colonial state formation – yet their specific forms may change over time and place. It is important to note that “elimination” does not only refer to the physical elimination of Indigenous peoples (e.g. death, destitution, or incarceration), but also the destruction of indigeneity in cultural, political, social, and economic forms. This research project contributes to the theorizing and understanding of settler colonialism by examining how eliminatory logic manifests through these various processes in the specific context of PEI’s legal system.

Settler colonialism is a concept used in this research project to represent the complex “formation” we refer to as Canadian society, which is comprised of an amalgam of historical, political, economic, social, cultural processes, belief systems and
Eurocentric practices. Patrick Wolfe and Lorenzo Veracini are key scholars who have specifically developed a theory of settler colonialism as a distinct formation. Although, Wolfe did not coin the term settler colonialism, his work and that of Veracini have influenced the proliferation of literature drawing from his contributions. According to O’Brien (2017), “[n]o concept has reoriented the field of Indigenous studies recently more than the theoretical framework of settler colonialism” (p. 249). The settler colonial logic of elimination is premised “on the securing – the obtaining and the maintaining – of territory. This logic certainly requires the elimination of the owners of that territory, but not in any particular way” (Wolfe, 2006, p. 402). This is achieved through the homogenization, pathologization, and reductionism that is applied to Indigenous identities, such as that happening in settler colonial states like Canada. First, homogenization occurs when we fail to recognize unique attributes of Indigenous peoples and nations and assume common lived experiences. Second, according to Greensmith (2012), “locating pathology in the minds and bodies of Indigenous peoples [pathologization] renders their behaviours, actions and discussions around land disingenuous” (p. 34); and proclamations concerning “sovereignty and self-determination” unreasoned (Razack, 2012). Third, reductionism occurs when what Sayer (2005) perceives as “a complicated pattern of difference is reduced to two single, simple, purified opposites with no internal complexity and intermediate terms,” a form of dualism wherein “the two sides tend to be defined mutually and negatively in terms of what the other is not” (p. 17). Wolfe (2006) describes the logic of elimination as “an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence” (p. 388), and more concretely, “a logic of elimination which places a
colonized or sought-after territory’s Indigenous occupants as its singular target” (as cited in Geiger, 2017, p. 225).


Murdochca (2013) notes that Indigenous scholars such as Taiaiake Alfred, a member of the Mohawk Nation, consider it “imperative to understand the relationship between Indigenous peoples and the colonial state within a framework that recognizes the centrality of the law and the impact of legal doctrines on Aboriginal communities” (p.
11). The clear implication here is that if one decides to analyze settler colonialism, it is essential to also study the legal system as one of its central colonizing components. Mary Ellen Turpel (1991), a member of the Muskeg Lake Cree Nation, and the first Treaty Indian to be named to the judicial Bench in the Province of Saskatchewan, reminds us not to take a purely cynical view of the law and how it becomes operationalized in a colonial context “as the discourse which officially defines and sanctions political and social reality for [A]boriginal peoples,” or as if it functions in “a blindly oppressive manner,” in that Indigenous peoples “always lose their cases” (p. 19) and end up in custody. This simplistic view of the law, according to Hunt (1993), must be juxtaposed to “its real potentiality as a component of any serious strategy for social transformation” (p. 12). The legal system in Canada, a settler state, according to Mi’kmaq Nation scholar Bonita Lawrence and Ena Dua (2005), is premised on the need to “preempt Indigenous sovereignty,” which it does through “the assertion of a rule of law that is daily deployed to deny possibilities of sovereignty and to criminalize Indigenous dissent” (p. 124). Both settler colonial studies and Indigenous scholars have emphasized that resistance to colonialism has been enduring since “contact” turned towards elimination.

In this chapter, I outline how settler colonialism has been theorized as distinct from other colonial formations (e.g. franchise, dependent), specifically in being a land-centred project, the distinctiveness of settler/colonizer populations, and positionality of the Indigenous Other. I discuss key critiques of settler colonial studies through the lens of both settler and Indigenous scholars and address these issues in my research design and data analysis.
2.2. Settler colonialism vis-à-vis other colonial formations

At the core of Wolfe’s (1999, 2006, 2007, 2008, 2016) and Veracini’s (2008, 2010, 2011, 2013, 2014a, 2014b, 2014c, 2015) work is a detailed theorizing of settler colonialism as distinct from other forms of colonialism and characterized by explicit objectives, ideologies, and practices. Colonial and settler colonial phenomena, according to Veracini (2013), have been depicted “either as entirely separate, affecting inherently different geographical spaces, and involving inherently different constituencies, or as different manifestations of colonialism at large,” although neither stance “allows a proper appraisal of settler colonialism in its specificity” (p. 314). Arvin, Tuck, and Morrill (2013) characterize settler colonialism as having the consistent drive “to make itself seem natural, without origin (and without end), and inevitable” (p. 14). Indigenous scholars and settler colonial studies denaturalize settler colonialism, thereby making it visible so that it can be challenged.

Colonialism generally, according to Marianne Nielsen and Linda Robyn, a member of the Ojibwa Nation (2003), “refers to the expansion of European powers into non-European lands by conquest,” wherein “fundamental decisions affecting the lives of colonized people are made and implemented by colonial rulers, in pursuit of interests that are often defined in a distant metropolis” (p. 30). Although, settler colonialism also involves expansion and conquest, the difference lies in the way this expansion/conquest occurs. In settler colonies, Indigenous peoples were usually not perceived as free labor which could be exploited, as is the case with franchise colonialism, but rather as occupiers of “the land” to which the settler state could lay claim and eventually effect their disappearance, resulting in what Jacobs (2009) refers to as a “curious feature of
settler colonialism” in that “its founding and enduring narratives often obfuscate conquest and colonization and their attendant violence” (p. 4).

Veracini (2014b) states in contrast to the kind of colonial formation that “Cabral or Fanon confronted (e.g. franchise or dependent), settler colonies were not primarily established to extract surplus value from indigenous labor,” but rather “are premised on replacing indigenes from (or replacing them on) the land” (p. 628). Settler colonialism also “differs structurally from franchise colonialism” (Iyengar, 2014, p. 35), whereby “[c]olonizers and settler colonizers want essentially different things” (Veracini, 2011, p. 1). While the franchise colonial models “depend on native labor, settler colonialism is first and foremost a territorial project, whose priority is replacing natives on their land rather than extracting an economic surplus from mixing their labor with it” (Wolfe, 2008, p. 103). Unlike franchise or extractive colonial formations, which, according to Evans (2009), “support European interests through the application of (local or imported) labour to the natural resources of the colony, in settler colonies economic interest is in securing permanent control of the land through [N]ative populations” (p. 6). Furthermore, as opposed to enslaved people in a franchise form of colonialism, whose (re)production augment their owner’s wealth, Indigenous peoples obstruct settlers’ access to land, so their increase, along with their actual physical presence, are inhibitive to settler colonialism, thereby supporting Wolfe’s (2006) proposition that “[t]erritoriality is settler colonialism’s specific, irreducible element” (p. 388). It is this irreducible element of settler colonialism upon which I will now focus my attention.
2.2.1. Settler colonialism as a land-centred project

Wolfe (2006) defines settler colonialism as a “land-centred project that coordinates a comprehensive range of agencies, from the metropolitan centre to the frontier encampment, with a view to eliminating Indigenous societies” (p. 393); this “drive to elimination” is considered the foundational impetus of settler states (J. Kēhaulani Kauanui, a Kanaka Maoli (Native Hawaiian) & Patrick Wolfe, 2012, p. 248). For the settler, the mere presence of Indigenous peoples on the land constitutes a serious impediment, resulting in settler colonialism sometimes being regarded as “even more deadly to [I]ndigenous people than more classic types of extractive colonialism” (Jacobs, 2009, p. 4). By way of an explanation, at least in part, for this potential deadly encounter, Jacobs (2009) contends that the “ultimate goal of settler colonialism – the acquisition of land – lends itself to violence” (p. 4), a view similarly expressed by Veracini (2008), who argues that a settler society “is by definition premised on the traumatic, that is, violent, replacement and/or displacement of Indigenous others” (p. 364).

When clarifying the relevance of relationships within settler colonial states, Veracini (2011) refers to them as “a settler colonial ‘non-encounter,’ a circumstance fundamentally shaped by a recurring need to disavow the presence of [I]ndigenous ‘others’” (p. 2). The notion of “disavowal” is vitally important in understanding legal doctrines such as terra nullius, law of first possession and doctrine of discovery, which

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3 On June 26, 2014, in a unanimous decision, it marked the first time the Supreme Court of Canada (SCC) recognized the existence of Aboriginal title as it relates to a particular site. The highest Court made clear in *Tsilhqot’in Nation v British Columbia*, [2014] 2 S.C.R. 257, at paragraph 69, that: “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1.”
“underpin colonial appropriation of Indigenous land” (Mackey, 2016, p. 44). First, “terra nullius” is a Latin expression meaning “land belonging to nobody”; however, this Eurocentric doctrine does not connote “vacant” in the legal sense, but rather means “something that is in a ‘natural state of freedom’ (wild, uncultivated), and is not governed by human control” (Mackey, 2016, p. 45), resulting in the erasure of Indigenous presence. Second, “the basis of terra nullius is found in the ‘law of first possession,’” which states: “What presently belongs to no one becomes by natural reason the property of the first taken,” an expression emerging from Roman law and “deeply woven into the fabric of Anglo-American society as the notion of ‘finders keepers,’ or ‘first come, first served’” (Mackey, 2016, p. 45). And, third, the “doctrine of discovery,” having had its genesis in fifteenth century Europe, was initially utilized by European monarchies as a means of legitimizing, through the principle of terra nullius, the colonization of lands outside of Europe. Miller (2012) argues European countries “pursued the Discovery-influenced mission […] to destroy the cultures, laws, rights, and governments of Indigenous peoples” (p. 921). Coulthard (2014) defines terra nullius as “the racial legal fiction that declared Indigenous peoples too ‘primitive’ to bear rights to land and sovereignty when they first encountered European powers on the continent, thus rendering their territories legally ‘empty’ and therefore open for colonial settlement and development” (p. 175). Canada, as a settler state, is a product of the assertion of these terra nullius-based doctrines.

2.2.2. Distinctiveness of settler/colonizer population (e.g. permanent, transitory)
As Wolfe (2006) succinctly notes, “settler colonialism destroys to replace” (p. 388) the presence of Indigenous peoples with a settler society and its sovereignty. Moreover,
Veracini (2013) suggests settler colonialism “works toward its supersession” (p. 325), wherein the embodiment of its success is measured by the creation of a newly minted society in which there is no trace of the earlier Indigenous peoples/societies. Wolfe (2006) proposes that “settler colonizers come to stay: invasion is a structure not an event” (p. 388). Building on the work of Wolfe (2006), Veracini (2010) developed a “nuanced theory of settler colonial political belonging and narrative that differentiates settlers from other colonizers and imperial agents by the animus manendi, or the ‘intent to stay’” (as cited in Battell-Lowman & Barker, 2015, p. 25).

Veracini (2011) proposes even though both colonialism and settler colonialism “move across space, and both establish their ascendancy in specific locales” (p. 1), one of the principal differences is that “[s]ettlers are destroyers, not exploiters of [I]ndigenous life-worlds; they are not interested in extracting tribute while providing stability and governance”; colonial rulers in contrast “are by definition from somewhere else, and typically aim to return there; only settlers are genuinely committed to stay” (Veracini, 2014a, p. 239).

2.3. Settler colonialism – Logic of elimination and underlying processes

Settler colonial analysis allows us to view the CJS as an institution that (re)produces settler colonialism (Turpel, 1992; Monture-Angus, 2000; Crosby & Monaghan, 2012; Manley-Casmir, 2012; Cunneen, 2014; MacKey, 2016). This research project looks at how a “logic of elimination” associated with settler colonization manifests in PEI’s legal system in the contemporary context, through six underlying processes: essentialism, erasure, dispossession, pathologization, exclusion, and lawfare. First, these processes help to clarify the central role that settler colonialism plays with respect to Indigenous
peoples who come before Canadian courts. Second, they (re)produce a settler colonial state formation. Third, they change over time and space in distinct and concrete ways.

2.3.1. Logic of elimination

Settler colonialism operates according to a logic of elimination, which has as its “primary motive […] access to territory” (Wolfe, 2006, p. 388), and constitutes “the dominant settler response to a basic reality: the organized presence of other human beings on the land” (Collins, 2011, p. 32). Central to understanding the meaning of Wolfe’s logic of elimination, Veracini (2014c) reminds us “while the structure attempts to eliminate Indigenous peoples, it fails to do so” and that “Wolfe and those who quote him never assume the finiteness of settler colonial processes” (p. 311), notwithstanding, as reinforced above, the “outcome” is neither inevitable, nor permanent. Far from equating settler colonialism with elimination, “Wolfe’s ‘structure’ refers to a continuing [emphasis in original] relationship of inequality between Indigenous and settler collectives” (Veracini, 2014c, p. 311). The continuity of settler colonialism, according to Merlan (1997), lies, in part, with how the logic of elimination is “expressed in various ways at different times, as ‘confrontation,’ ‘carceration,’ and ‘assimilation’ – the former an abstraction of frontier practices of direct elimination, the latter two of the post-frontier era” (p. 10).

Settler governmentality requires the removal of “autonomous indigeneity” (Crosby & Monaghan, 2012, p. 426), which, in turn, renders “Indigenous death ‘ungrievable’” (Park, 2015, p. 274). Kauanui (2016) phrases it this way, “the logic of elimination of the native is about the elimination of the native as native [emphasis added]” (para. 3), signifying the elimination of Indigeneity, rather than the physical body.
Wolfe (2006) contends settler colonialism “is inherently eliminatory but not invariably genocidal” (p. 387). The elimination of Indigenous populations can be accomplished in many ways, according to O’Brien (2017), including “deliberately genocidal projects, by the unrestrained homicidal actions of boots-on-the-ground settlers, or by assimilatory campaigns of infinite imagination” (p. 249). Rowse (2014) contends that “Wolfe makes it clear that by ‘eliminate,’ ‘destroy,’ ‘replace,’ he does not mean physically exterminate,” (p. 299). Veracini (2010) speaks about what he terms “progressive disappearance” in a variety of different ways: “extermination, expulsion, incarceration, containment, and assimilation […] or a combination of all these elements” (pp. 16-17). Elimination, according to American historian Margaret D. Jacobs (2018), “contains an intellectual and cultural component as well – from the salvage ethnography of the nineteenth century that assumed the vanishing Indian, to ‘settler-humanism,’ to ongoing public debates about what constitutes an authentic Indian” (p. 3). A similar lack of uniformity is addressed by Nichols (2014) when he argues that the “settler colonial state has not gone away at all, or even become less of a physical, material presence – it has merely shifted its site of operation, perhaps most symbolically from the residential school to the prison” (p. 448).

The logic of elimination is best exemplified by the Canadian IRSS and concomitant trauma so many Indigenous peoples endured over more than 100 years of operation, with an estimated 6,000 children dying in what were purported to be “safe” places of learning. Crosby and Monaghan (2012), borrowing from settler colonial studies, argue that what Wolfe (2006) describes as a logic of elimination, “positions its security in relation to perceptions of indigeneity as insecurity,” which are veiled as “sources of threat” and therefore “expressions of [I]ndigenous values, practices, knowledges and
subjectivities must be eliminated through various mechanisms of security to ensure the prosperity of settler society” (p. 422). The Canadian CJS is a key mechanism of settler security, especially when it has placed inordinate numbers of Indigenous peoples in another version of the IRSS – Canadian prisons. Cree scholar Jeffrey G. Hewitt (2016) agrees that in some instances, “incarceration achieves the same sense of estrangement and isolation as Indian Residential Schools by removing Indigenous Peoples from their land, culture and laws,” however questions “why continue with the same actions in courtrooms across Canada every day” (p. 327), and illogically expect different outcomes. While the physical eradication of Indigenous populations constitutes but one manifestation of the logic of elimination, elimination has taken on innumerable configurations at different moments in time and geographical space. In the various iterations in the form of Canada’s colonial state, for example, settler colonialism has not functioned uniformly, but rather has varied appreciably over time and space, including: use of hunger and illness to “clear the plains” (Daschuk, 2013) in the days of early settlement; the Canadian IRSS; 1950s relocation of Inuit communities into the high Arctic⁴; in more contemporary times, inadequacy of infrastructure on First Nations

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⁴ On August 18, 2010, in Inukjuak, Nunavik, the Honourable John Duncan, former Minister of Indian Affairs and Northern Development, and Federal Interlocutor for Métis and Non-Status Indians, apologized on behalf of the Government of Canada for the relocation of Inuit to the High Artic, from Inukjuak and Pond Inlet to Grise Fiord and Resolute Bay, during the 1950s. Families were separated from their home communities and extended families by more than a thousand kilometers, not provided with adequate shelter and supplies, and not properly informed as to how far away and how different from Inukjuak their new homes would be. They were not aware that they would be separated into two communities upon their arrival in the high Arctic. Moreover, the Government failed to act on its promise to return anyone who did not wish to stay in the high Arctic to their old homes. The apology can be found at [https://www.aadnc-aandc.gc.ca/eng/1100100016115/1100100016116](https://www.aadnc-aandc.gc.ca/eng/1100100016115/1100100016116)
reserves\(^5\); continued disproportionate apprehension of Indigenous children in state care\(^6\); and the “advancement of apparently benevolent human rights legislation that aims to assimilate Indigenous peoples to be liberal subjects while curtailing their collective entitlements” (Park, 2015, pp. 277-278; Veracini 2011). As D’Arcy Vermette (2011), a member of the Métis Nation, indicates – colonialization projects can only end in two ways: “either the colonizing State removes its tentacles from Aboriginal lives and lands, or it manages to accomplish the genocide of entire cultures” (p. 72).

Veracini (2014c) emphasizes that Wolfe’s (2006) eliminatory logic “can be articulated in a plurality of ways” (p. 312) such as essentialism, erasure, dispossession, pathologization, exclusion, and lawfare, which all help (re)produce settler colonialism. It is to a discussion of each of these concepts I now turn.

2.3.1.1. Essentialism

Eliminatory logic is predicated on essentialism – a racial means by the settler colonial state to view Indigenous peoples as having inherently different characteristic natures or dispositions than non-Indigenous settlers. Essentialism (and racism) precede colonial/imperial projects as part of the justification for invasion, and still underlie contemporary colonial governance. The colonial project was and continues to be driven by the construction of Indigenous “others” as inferior (“savage,” not using land

\(^5\) The housing crisis in the northern Ontario reserve of Attawapiskat has emerged as a symbol of impoverished conditions of Indigenous communities in Canada. The article can be found at http://www.cbc.ca/news/indigenous/attawapiskat-s-housing-crisis-a-ground-level-perspective-1.2460256

\(^6\) In 2011, of the 30,000 children under 14-years-old in foster care in Canada, almost 50% were Indigenous, whereas they only represented 4% of the total number of children in Canada. Statistical and background information regarding this matter can be found at http://aptnnews.ca/2013/05/08/nearly-half-of-children-in-foster-care-aboriginal-statistics-canada/
productively, not modern, backward, etc.) to justify invasion and occupation. While not as explicit, we still see this essentializing in contemporary discourses and practices. Nayar (2015) defines essentialism as “the reduction of complex phenomenon such as human nature or culture to a set of elements or features which are then taken to be the defining features of the human individual, race or culture” through which “[t]he colonial comes to acquire comprehensive knowledge of the [N]ative” (pp. 67-68). Essentialism, according to Ashcroft, Griffiths and Tiffin (2007) can be characterized as “the assumption that groups, categories or classes of objects have one or several defining features exclusive to all members of that category” (p. 73). In a similar vein, Motamedi, Talarposhti, and Pourqarib (2017) define essentialism as “the perspective which considers a set of attributes for an entity which forms its identity and meaning” (p. 92). Motamedi et al. (2017) further contend that there “is a link between essentialism and classification of the society into superior and inferior” (p. 93), which is connected to racialization and systemic racism and embedded in the organization of social institutions such as the CJS.

Razack (2015) argues that settlers and the settler state “are both constituted as modern and exemplary in their efforts to assist Indigenous peoples’ entry into modernity […] killing becomes saving, and murder brings redemption. Law is absolutely crucial to this alchemical transformation” (p. 6). Proulx (2003) maintains “[c]olonizers created legal precedents and manipulated laws based on evolutionary theories and discourses of the day to legitimate their exploitative treatment of Aboriginal people” (p. 12). Moreover, in the colonial context, Engle-Merry (1999) argues that the law represents “both a means of transformation – articulating a new normative order and sporadically
enforcing it – and a mark of civilization” based on non-Indigenous notions of “civilization, rationality, equality and fair process” (p. 120). I examine how these discourses emerge in the current PEI CJS in chapters five to seven.

John Borrows, Anishinabe/Ojibway and a member of the Chippewa of the Nawash First Nation (2010), argues that “culture should not be essentialized” and “[t]radition must not be frozen in a past tense or within a reserve-only framework” (p. 219). Essentialism (and superiority vis-à-vis inferiority, racism) is not explicitly part of the CJS and other institutions in contemporary settler colonial states but, as critical race, Indigenous, and settler colonial studies scholars argue, it continues to inform these institutions and practices. Section 718.2 (e) and R. v. Gladue are examples where essentialism emerges in how “differences” in the culture, practices, and actions of Indigenous peoples (forming the basis for the “need” for remedial action) are handled by the CJS.

2.3.1.2. Erasure

Erasure, in the context of this research project, consists of two dimensions: the first refers to the logic of elimination in the “material” sense – the erasure of people/presence – by way of confinement, death, and assimilation; and second, in the conceptual sense – the erasure of the history of colonialism. According to Tara Williamson (2017), a member of the Opaskwayak Cree Nation, Indigenous peoples “began to disappear at the exact moment we were first seen” (p. 19). Canada, not unlike other white settler societies, is “legally organized through a doctrine of terra nullius, and as a result, is anchored by the idea of white settler entitlement to the land” (Murdocca, 2013, p. 12). For early settlers to
assert their own legal framework, it was essential for them to proclaim the New World both unoccupied and uninhabited.

Practices of erasure were/are varied in scope and many in number, ranging from what amounts to biological warfare through the distribution of smallpox infected blankets in the mid-18th century, to the IRSS which operated in Canada between the 1840s and mid-1990s; from the Draconian *Indian Act*, which was enacted in 1876 and introduced the IRSS and established reserves, to the patriation of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11* (hereinafter referred to as *Constitution Act, 1982*), which “ushered in a new model of assimilation based on the discourse of liberal rights and a national policy of multiculturalism” (Williamson, 2017, p. 19). For non-Indigenous Canadians, multiculturalism represents a celebration of diversity; however, according to Williamson (2017), “Indigenous people were erased as original peoples worthy of recognition in the forming of the nation and relegated to a space of general non-whiteness within the policy of multiculturalism” (p. 21). Benhabib (2002) challenges the empirical foundation upon which most contemporary theories of “mosaic multiculturalism” are based – what Benhabib (2002) terms the “reductionist sociology of culture” (p. 4; as cited in Coulthard, 2014, p. 81). Quoting the work of Turner (1993), Benhabib (2002) contends that advocates of this form of multiculturalism “often embrace a simplistic and sharply delineated conception of cultural identity” (as cited in Coulthard, 2014, p. 81). Furthermore, Turner (1993) submits when mosaic multiculturalism is institutionalized in the form of public policy, it “risks essentializing the idea of culture as the property of an ethnic group or race; it risks reifying cultures in terms that potentially legitimize repressive demands for communal conformity; and by
treating cultures as badges of group identity, it tends to fetish them in ways that put them beyond the reach of critical analysis” (p. 412; as cited in Coulthard, 2014, pp. 81-82).

Even though Indigenous peoples do have certain basic rights, the Canadian judicial system “maintains the capacity to narrow and gut those rights of all meaning,” with Canada’s current legal system “not much different than the one which first looked Indigenous people in the eye and said, ‘terra nullius’” (Williamson, 2017, p. 22). Barker (2015) utilizes the term – “colonial ambivalence” – to characterize “average Settler Canadian ideas of indigeneity” (p. 47). However, while only too happy to describe the relationship between Indigenous peoples and the Canadian settler colonial state “as a peaceful, liberal, multicultural polity defined by ‘peacemaking’ – but dominated by whiteness, capitalist property ownership, and individual rights – Canadians have often reacted with hostility to assertions of Indigenous sovereignty” (Barker, 2015, p. 47; Regan, 2010) thereby, in effect, contesting this depiction. Alfred and Jeff Corntassel, a member of the Cherokee Nation (2011), reject outright the notion that settlers are now peacemakers, but instead refer to them as “shape-shifting colonial powers” and further that these “instruments of domination are evolving and inventing new methods to erase Indigenous histories and senses of place” (p. 140), employing forms of violence sometimes even more subtle than those practiced by their settler colonial ancestors.

By denying that the land is occupied, settlers can simply move in, even though vast numbers of Indigenous peoples have inhabited the exact same geographical space since time immemorial. In addition to erasure of similar spaces in the law, official policies/practices of state institutions, education, maps, histories and cultural productions, Francis (2011a) describes the social-cultural erasure of Indigenous peoples as “ghostly
Indians” who “are both acknowledged and refused in the Canadian imaginary” (p. 12). One way this erasure occurs is spatial – Indigenous peoples leave the reserve to reside in urban centres, only to consequently have their Indigeneity erased in their new place of residence. Another factor, raised by Roberts and Melchers (2003), is that the Indigenous population in Canada has experienced “far greater mobility than the general population, along with continuing urbanization,” these changes plausibly influencing the “evolving differences” (p. 219) in custodial admission trends between Indigenous and non-Indigenous offenders. Whittles and Patterson (2009) propose in the Canadian experience that “urban Aboriginal people are often perceived as culturally dead, as people who left the remaining elements of their culture back on the reserve” (p. 97). Maddison (2013) further suggests that life on the reserve “is reified as the ideal for protecting and promoting Aboriginal identity, self-determination, and self-government,” whereas urban centres “are considered to be ‘disempowering … in both a physical and social-cultural sense’” (p. 299). Moreover, according to Razack (2000), “inhabitants of such zones were invariably racialized, evacuated from the category human, and denied the equality so fundamental to liberal states” (pp. 116-117). Barker (2015) suggests, “Indigenous space can exist anywhere; it requires only Indigenous peoples, in place, enacting their indigeneity” (p. 46), thereby dismissing the notion of one’s Indigeneity being restricted to a particular “zone” or “space.”

Lawrence (2002) argues that in order to maintain the image of Canadians as fundamentally decent people “innocent of any wrongdoing, the historical record of how the land was acquired – the forcible and relentless dispossession of Indigenous peoples, the theft of their territories, and the implementation of legislation and policies designed to
affect their total disappearance as peoples – must also be erased” (pp. 23-24). Corntassel and Alfred (2005) contend contemporary settlers “follow the mandate provided for them by their imperial forefathers’ colonial legacy, not by attempting to eradicate the physical signs of Indigenous peoples as human bodies, but by trying to eradicate their existence as peoples through the erasure of the histories and geographies that provide the foundation for Indigenous cultural identities and sense of self” (p. 598). In speaking about Canada’s long-standing colonial-centred assimilation policy, epitomized by the Indian Act of 1876, and its proponents’ belief that it constituted the best option when “taking the Indian out of the child,” Borrows (2010) contends that Indigenous assimilation has been an abysmal failure, further stating “[a] wealth of evidence makes it clear that assimilation is the most hated and resisted policy for Indigenous peoples” (p. 127; Miller, 2004). Williamson (2017) argues that from her perspective as an Indigenous person, “colonialism has always been and will always be about erasing me […] [t]his erasure continues through literal killings (at alarming rates in the cases of suicide and murdered

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7 The policy of forced Indigenous assimilation in Canada “came into full force through the Indian Act (1876, 1880 and 1886) and Indian Advancement Act (1884). Methods of forced assimilation included: The abolition of Aboriginal status as independent, self-governed peoples; legislated rules for band membership; abolition of traditional political systems; imposition of federally-controlled election systems; banning of spiritual Aboriginal activities; formal creation of residential and industrial schools administrated by religious clergy; and, mandatory school attendance for Aboriginal children with the later imposition of fines and jail sentences for parents who failed to comply” (Herbert, 2009, p. 6).

8 The Indian Act is the principal statute through which the Federal Government administers Indian status, local First Nations governments and the management of reserve land and communal monies. It was first introduced in 1876 as a consolidation of previous colonial ordinances that aimed to eradicate Indigenous culture in favour of assimilation into Euro-Canadian society. The Act has been amended several times, most significantly in 1951 and 1985, with changes mainly focusing on the removal of particularly discriminatory sections. The Indian Act pertains only to First Nations peoples, not the Métis or Inuit. It is an evolving, paradoxical document that has enabled trauma, human rights violations and social and cultural disruption for generations of Indigenous peoples. The Act also outlines governmental obligations to Indigenous peoples and determines “status” — a legal recognition of a person’s Indigenous heritage, which affords certain rights, such as the right to live on reserve land (Henderson, 2006).
and missing Indigenous peoples), administratively through legislation and policy, or socially, in the pressure to assimilate into mainstream Canada” (p. 22). These multiple processes of erasure enable dispossession as a basis of settler state sovereignty.

2.3.1.3. Dispossession

Over the course of the last two centuries through colonial dispossession, Indigenous peoples in Canada have been moved to “the margins of their own territories and of our ‘just’ society” (Jackson, 1989, p. 218). Wolfe (2007) defines settler colonial dispossession as a process by which the sovereign “gathered together the totality of rights attaching to the territory concerned,” the process yielding “more than land for settlers. It also yielded sovereign subject hood: settlers became the sort of people who could own rather than merely occupy [their land]” (pp. 133-134). Settler colonies are not primarily established to extract surplus value from Indigenous labor, but rather, as Wolfe (1999) contends, “are premised on displacing indigenes from (or replacing them on) the land” (p. 1), either to access resources or for purposes of settlement, and whereby non-Indigenous settlers, rather than the colonized Other, indisputably benefit from this system of land dispossession. By conveying stories of emotional attachment and belonging to specific geographical spaces, settlers demonstrate a “sense of legitimate and rightful possession of the land”; yet these same emotional responses “to home, to the land, can also be mobilized to defend expectations of entitlement and certainty in settler possession of land and contribute to legitimizing Indigenous dispossession” (Mackey, 2016, p. 84).
One common form of dispossession or removal occurs when Indigenous peoples move to Canadian urban centres\(^9\), which is where at least 50% of Indigenous peoples currently reside (Environics Institute, 2010, p. 6; Coulthard, 2014; Barman 2007). The relationship between Indigenous peoples and urban centres, according to Coulthard (2014), “has always been one fraught with tension” and Canadian cities were “originally conceived of in the colonial imagination as explicitly non-Native spaces – as civilized spaces – and urban planners and Indian policy makers went through great efforts to expunge urban centres of Native presence” (pp. 173-174; Barman, 2007). Coulthard (2014) contends the dispossession which “originally displaced Indigenous peoples from their traditional territories, either onto reserves or disproportionately into the inner cities of Canada’s major urban centres [or for that matter into Canadian prisons] is now serving to displace Indigenous populations from the urban spaces they have increasingly come to call home” (p. 175). Coulthard (2014) suggests guardians of the settler-colonial state tend to rationalize this dispossession by treating the “lands in question” (e.g. inner cities, low-income areas), as “terra nullius,” and progressing forward toward “gentrification” (urban renewal), through which “Native spaces in the city are now being treated as urbs nullius\(^{10}\) – urban space void of Indigenous sovereign presence” (pp. 175-176).

\(^9\) Jean Barman (2007), in a book entitled Erasing Indigenous indigeneity in Vancouver, indicated more and more people (Indigenous and non-Indigenous people alike) are choosing to reside in urban, rather than rural (including reserves) communities, suggesting “[u]nder a fifth did so in 1867, according to the first census to be held after Canada was formed the same year. The proportion surpassed a third by 1901, was over half by 1951, and reached 80 percent by 2001” (p. 3).

\(^{10}\)With the onset of urbanization in the 1950s and 1960s, the “segregation of urban space” replaced earlier spatial practices (e.g. slum administration replaced colonial administration by way of confinement to reserves), resulting in inner cities becoming “racialized space, the zone in which all that is not respectable is contained” (Razack, 2000, p. 97).
However, dispossession connotes more than physical displacement, it also has political and economic dimensions, related specifically to settlement and territoriability. According to Wolfe (2016), “[t]erritoriality, the fusion of people and land, is settler colonialism’s specific irreducible element,” with the settler seizing Indigenous land, constituting more than “simply a transfer of ownership” but resulting in “settler/Native confrontation” (p. 34). Turpel (1992) argues Indigenous peoples and their encounters with the CJS “cannot be separated from a history of colonial dispossession” and are in fact “indivisible” (p. 166). For example, Turpel (1992) asserts that alcoholism in Indigenous communities is “connected to unemployment,” which, in turn, “is connected to the denial of hunting, trapping and economic practices […] loss of hunting and trapping is connected to the dispossession of the land and the impact of major development projects,” which is connected to “the loss of cultural and spiritual identity and is a manifestation of bureaucratic control over all aspects of life” (pp. 166-167). Razack (2011) extends Turpel’s analysis of dispossession by arguing that Indigenous peoples are often viewed, especially if they are legally apprehended and subsequently held in police custody, to be in every practical sense “already dead, and thus a body on whom a full measure of care would be wasted […] the only thing we can expect from a disappearing race” (p. 352). Dispossession from land, restricted access to resources and/or through confinement contribute to erasure.

Indigenous scholars like Lawrence (2002) and Coulthard (2014) propose that “Indigenous resurgence hinges on its ability to address the interrelated systems of dispossession that shape Indigenous peoples’ experience in both urban and land-based
settings” (p. 176), often a daunting challenge, especially when combined with the pathologization of Indigeneity.

2.3.1.4. Pathologization

Scholars like Razack (2011) contend Indigenous peoples tend to be characterized “as possessing a pathological frailty that is more often than not associated with alcohol abuse,” leading to the conclusion that if they “are a dying race and a people unable to enter modern life, then they are people that no one can really harm or repair” (p. 353). By pathologizing Indigenous peoples, “settlers can continue to understand themselves as the rightful inhabitants and owners of Turtle Island11” (Greensmith, 2012, p. 19). Simultaneously, pathologization ignores (invisibilizes) these same frailties as the effects of colonialism, instead attributing them to individualized factors that are essentialized as cultural characteristics. In echoing Razack’s (2011) notion that “indigeneity becomes pathology,” Greensmith (2012) suggests continuous activism on the part of Indigenous peoples involving “access to land and human rights is constructed as pathology […] [t]he Indigenous mind becomes a pathologized mind […] settlers use pathologizing tropes in order to produce Indigenous peoples as defective and reckless and in turn construct settlers as rightful inhabitants and owners of the land” (p. 32). Razack (2011) suggests that “Indigenous bodies and minds are pathologized and cannot be understood as having the ability to proclaim sovereignty and self-determination,” ultimately assuming

11 The name “Turtle Island” comes from Indigenous folklore, with most Indigenous peoples agreeing that the turtle is part of the Creation story (a story about how everything came to be). Some Indigenous peoples refer to the continent of North America as Turtle Island, while others, such as the Ojibwa, refer to it as the whole world.
Indigenous peoples “naturally belong to spaces of pathology” (as cited in Greensmith, 2012, pp. 34-35). This supposition denies Indigenous political autonomy and conversely legitimates settler sovereignty.

Based on a quantitative analysis of 168 reported sentencing decisions involving Indigenous offenders to determine the impact of sentencing law reforms, such as section 718.2 (e) and \textit{R. v. Gladue}, on Indigenous men and women convicted of violent offences, Balfour (2012) proposes that “[u]nlike the sentencing of non-Aboriginal offenders wherein logics saturate the assessment of the offender’s conduct, resulting in an emphasis on therapeutic management, Aboriginal offenders were not deemed to be transformative subjects” (p. 96). In an earlier study of Indigenous and non-Indigenous men sentenced for sexual assault offences, Balfour and DuMont (2012) found “white middle-class men were seen by the courts to be deserving of a conditional sentence because of their status in the community as an employer or professional” (as cited in Balfour, 2012, p. 96), and for these men, “embarrassment was denunciation enough” (\textit{R. v. K.R.G.} [1996] O.J. No. 3867, para. 28). By contrast, Balfour (2012) discovered that Indigenous men who had received a Conditional Sentence Order\textsuperscript{12} (hereinafter referred to as CSO) “were viewed by the courts as men of limited intellect and low self-esteem” (p. 97); further pathologized by the judge in \textit{R. v. Tulk} [2000] O.J. No. 4315, at paragraph 15, in that “poorly educated and unsophisticated men also needed to be protected from the dangers

\textsuperscript{12} A Conditional Sentence Order (CSO) is “[a] disposition in which the accused is found guilty and sentenced to imprisonment but serves the sentence in the community so long as he or she successfully fulfils conditions. A conditional sentence of imprisonment is popularly referred to as ‘house arrest’” (Coughlan, 2013, p. 67).
of imprisonment.” The pathologizing of marginalized groups by the CJS has been long
documented in sociology and criminology.\textsuperscript{13}

Almost every study that has been completed, according to Jackson (1988),
emphasizes the high rate of alcohol-related offences in which Indigenous peoples are
involved, and “at its baldest, there is an equation of being drunk, Indian and in prison” (p.
5). Allan and Smylie (2015) argue that stereotypes such as “‘drunken Indian,’ ‘hyper-
sexualized squaw,’ ‘bad mother,’ ‘deadbeat dad,’ all serve to justify acts of belittlement,
exclusion, maltreatment, or violence at the interpersonal, societal and systemic levels,”
and constitute “examples of the ways in which the dominant stories in Canadian society
of who we as Indigenous peoples are and how we are, are told about us and not by us” (p.
3). Various stereotypes (e.g. Indigenous peoples and their use of alcohol) contribute to
pathologization, focusing on individual pathological markers rather than settler
colonialism as the fundamental problem. Something else to consider is that when anyone
is pathologized, it is relatively easy to cast aspersions and regard these same people “as
sick, disorganized and dysfunctional” (Alan & Smylie, 2015, p. 4), and/or attribute blame
if they do become involved in criminal behaviour.

A case in point. It was an Easter weekend in mid-April 1995, when Pamela
George, a Saulteaux (Ojibway) Nation mother of two young children, was brutally
murdered in Regina, Saskatchewan, by two 19-year-old middle-class, white university

\textsuperscript{13} For example, American sociologist, Aaron V. Cicourel, completed a study entitled \textit{Power and Negotiation of Justice} in 1968. This study involved both middle and working class, and white and black juvenile delinquent defendants in two California cities in the United States; wherein Cicourel challenged the conventional view which assumes juvenile delinquents are natural social types and developed one of the first theories to recognize the role of power (e.g. CJS) in creating deviance/criminality.
athletes (Steven Kummerfield and Alex Ternowetsky). These two young men had just completed their final exams and were celebrating by drinking alcohol and cruising “the Stoll,” considered one of Canada’s worst neighborhoods at the time (Gatehouse, 2007). They convinced George to get into their car, drove her to an isolated area outside the city, and then following oral sex, brutally beat her and left her for dead, lying face down in the mud. At trial, two years later, defence counsel for Kummerfield and Ternowetsky argued that since they were both highly intoxicated at the time of the offence, they bore diminished responsibility. Because Ms. George was a prostitute, both crown and defence counsel agreed that this should be taken into consideration and form part of the trial judge’s instructions to the jury. The two accused were convicted of manslaughter, rather than first or second-degree murder, and sentenced to six-and-a-half years in prison.

Razack (2000) argues there were a number of factors which “contributed to masking the violence of the two accused and thus diminishing their culpability and responsibility for the death of Pamela George,” principally because she belonged to “a space of prostitution and Aboriginality, in which violence routinely occurs, while her killers were presumed to be far removed from this zone, the enormity of what was done to her and her family remained largely unacknowledged” (p. 93). Razack (2000) further contends that the racial or colonial aspects of this “encounter” can be traced through “two inextricably linked collective histories”: first, Pamela George was “abstracted from her history and remained for the Court only an Aboriginal woman working as a prostitute in a rough part of town”; and second, Steven Kummerfield and Alex Ternowetsky were similarly abstracted as “simply university athletes out on a spree one Easter weekend” (p. 94). Razack (2000) summarizes her analysis of the murder of Pamela George by proposing that “[m]oving
from respectable space to degenerate space and back again is an adventure that confirms that they are indeed white men in control who can survive a dangerous encounter with the racial Other and who have an unquestioned right to go anywhere and do anything” (p. 95).

Within Canada’s CJS, there is “an increasing consensus that the oppressive colonial structure within which Aboriginal peoples live produces social and material inequities that result in health disparities that persist over several generations,” which “have all been linked to an overarching colonial structure” (Butler-Jones, 2008, p. 3). Considering that the CJS is based on an individualized, non-contextualized, sanction-based approach to justice, whereas Indigenous peoples tend to have a more holistic, contextualized, restorative justice approach, recognition of settler colonialism as a factor in Canadian courts varies.

2.3.1.5. Exclusion

Veracini (2014a) states settler colonialism involves the “exclusion of ‘others’” and describes it as “an inherently exclusive political order” (p. 242). Tangible exclusionary practices in settler colonial states such as Canada have included diverse practices such as the disenfranchisement of “status Indians,” and being unable to cast their vote in federal elections until 1960, to both the reserve system and “historical and contemporary exclusion of Indigenous people from owning private property in land under the Indian Act” (Thielen-Wilson, 2014, p. 190). Galabuzi (2006) suggests in Canada, as is the case in other industrialized societies, social exclusion “represents a form of alienation and denial of full citizenship experienced by racialized groups or individuals,” and manifests in many ways, including “high levels of poverty, uneven access to employment and
employment income” (p. 208), as well as disproportionate involvement with the CJS, particularly its prisons.

Although Indigenous peoples in Canada were granted usufructuary interests, pursuant to section 91(24) of the Constitution Act, 1867, 30 & 31 Victoria, c. 3. (U.K.) (hereinafter referred to as Constitution Act, 1867) to “lands reserved for the Indians,” they still have to navigate their way through a complex web of treaties, as well as unceded and non-treatied stolen/settler-occupied land, only to discover that “ultimate sovereignty and exclusion rested with the Crown, leaving Indigenous peoples reliant upon its goodwill for their access to, and withdrawal of, resources” (Gombay, 2014, p. 6). The restriction on the right of Indigenous peoples to travel freely “provides the clearest illustration of the operation of exclusionary liberalism […] best seen as a matrix of laws, regulations, and policy meant to ‘elevate’ Indigenous people while simultaneously securing the interests of non-Indigenous newcomers” (Smith, 2009, p. 60), one of the most injurious being the so called “Pass System14.” The colonial relationship has always been fundamentally defined by Indigenous peoples finding themselves, especially when engaging with the CJS, in what Patrick Wolfe refers to as a “zero-sum game,” which is “aimed solely to eliminate Indigenous populations” (Smithers & Newman, 2014, p. 6). In other words, it is extremely difficult, if not impossible, for Indigenous peoples to win in this “game”; therefore, the implication is that the rules of the game (involving the CJS)

14 The “Pass System” was a Department of Indian Affairs administrative policy that was never enacted as law and “had no legal basis, but nonetheless required reserve residents to secure a pass from their Indian agent before leaving their reserve for any reason” (Smith, 2009, p. 60). The Pass System constituted a form of racial segregation and denied Indigenous peoples the basic freedom to travel as was the right of non-Indigenous people. It was introduced in 1885, enforced into the 1940s, remained in force until following the end of Second World War, and was repealed in 1951.
have to be changed. Morgensen (2011) contends that the “settler colonial elimination of Indigenous peoples requires them to have existed and to tenuously exist in settler societies, for only their perpetual replacement demonstrates settlers’ achievement of Western law where it would not otherwise exist” (p. 68), something Brown (2014) refers to as “vanishing logic” (p. 2), and Wolfe (2006) “continuity through time” (p. 390).

Reading (2015) maintains that Indigenous peoples in Canada experience “structural violence,” with examples of exclusion evident in a variety of different areas: accessing “social goods such as adequate housing on First Nation reserves, insufficient funding for Aboriginal programs and services, in addition to improper infrastructure in Aboriginal communities and health systems that fail to provide prompt and adequate care” (pp. 9-10; Galabuzi, 2004; Reading & Halseth, 2013). This type of violence in Canada’s ongoing colonial project is addressed by Razack (2004), when she speaks about a “race to innocence” (p. 10), in which settlers “assume they can stand outside hierarchical social relations, and therefore are innocent of complicity in structures of domination” (Lawrence & Dua, 2005, p. 139). Whyte (2008b) argues we take a “horrible risk” if we focus exclusively on “indicators of social failure,” to explain serious social problems like “widespread offending and victimization,” or overrepresentation of Indigenous peoples in Canadian prisons, by linking these to “an entrenched condition of Aboriginal communities” (p. 113). Too many Indigenous communities, according to Whyte (2008b), “do not enjoy social practices that produce […] either hope for their future or strategies for escaping deprivation” (p. 113), and unless and until resolution to these problems can be found, hope is restored, and healing takes place, marginalization and exclusion will likely continue.
2.3.1.6. Lawfare

As discussed, the legal institution has enabled processes of erasure, pathologization, dispossession, and exclusion to persist, and consequently, settler colonialism be (re)produced. In this context, these processes can be further understood as what Comaroff (2001) describes as “lawfare.” The utility of the concept – lawfare – is that it speaks to the dialectical aspect of law: first, as a means of “domination,” and second, as a means of “counterinsurgent, contestatory possibilities inherent in even the most oppressive colonial legal regimes” (Comaroff, 2001, p. 307).

The first “wave” of the scholarly literature on law and colonialism demonstrates “the importance of legalities, broadly defined in the imposition of control by Europe over its various ‘others,’” or the “effort to conquer and control [I]ndigenous peoples by the coercive use of legal means” (Comaroff, 2001, pp. 305-306). This form of “coercive control,” a term first coined by Susan Schechter (1982), underlies Machiavellian statecraft machinations as the Indian Act, IRRS, 60s Scoop, disenfranchisement, reserve and Pass systems. The Indian Act, for example, is viewed by Schmidt (2018) as “an archetype of settler-colonial law that dispossesses Aboriginal peoples in Canada from lands and resources and structures using institutions […] and boundary practices that perpetrate and extend state policies of violence, oppression, and elimination” (p. 904).

Later analyses of colonial legal systems have considered how colonial law “soon produced its own antithesis […] that subordinated peoples ‘frequently mobilize[d] aspects of the introduced legal system to challenge both old and new hierarchies of power’” (Merry, 1994, p. 40; as cited in Comaroff, 2001, p. 306). Also, “when they begin to find a voice, peoples who see themselves as disadvantaged often do so either by
speaking back in the language of the law or by disrupting its means and ends” (Comaroff, 2001, p. 306). The dialectical point of rest between these two waves, according to Comaroff (2001), “sees law as a vehicle simultaneously of governmentality and of its subversion, of subjection and emancipation, of dispossession and reappropriation” (p. 307).

Lawfare delegitimizes Indigenous peoples in a variety of different ways, ostensibly in pursuit of the public peace and equality before the law. This same pursuit “paradoxically eliminates fundamental rights and freedoms in the ‘name of security’” (Morrissey, 2011, p. 297). Western liberal democratic states like Canada “define their criminal justice systems as neutral, fair, and universal in their application; indeed, their legitimacy demands that these principles be upheld […] yet it is clear there has been a substantial gap in universality and equality when it comes to [I]ndigenous people” (Cunneen, 2014, p. 11).

Trachtman (2016) draws a direct comparison between military and legal confrontations, arguing “[b]oth kinetic warfare and legal dispute are forms of contestation” and “[c]urrent military campaigns are not waged solely on the physical battlefield, but in multiple other arenas,” including lawfare, which involves “legal activity that supports, undermines, or substitutes for other types of warfare” (p. 267). Viewed as a substitute for modern kinetic warfare, a euphemism for military action involving lethal force, conflicts/disputes are increasingly taking place, according to Comaroff and Comaroff (2006), in the realm of the law and unabated within the settler colonial project. Lawfare, according to Comaroff and Comaroff (2007), is a practice wherein authorities “resort to legal instruments, to the violence inherent in the law, to commit acts of political
coercion, even erasure” (p. 144). Comaroff and Comaroff (2006) contend lawfare “always seeks to launder brute power in a wash of legitimacy, ethics, propriety” (p. 31), consistently obscuring its eliminatory objective by historically employing innocuous terms like assimilation and equality. Lawfare describes the way that law, in the context of a colonial or settler colonial state such as Canada, creates its own contradictions through which marginalized, oppressed, and colonized Indigenous peoples are exploited by their oppressors but also constitutes a potential site for challenging that oppression. Lawfare is significant in my analysis as it is useful in considering the possibilities for change and challenging settler colonialism structures (e.g. legal institution), in that they are not permanent, nor is the formation that they support or reproduce.

Comaroff (2001) argues that according to colonial rationale, Indigenous peoples were “mired” in customary law, and “obviously lacked corpus juris [body of law], a modern sense of right-bearing selfhood […] and most seriously of all, anything approaching ‘civilized’ judicial procedures” (p. 306). My analysis, in the chapters which follow, provide an empirical analysis of section 718.2 (e) as lawfare, in terms of its potential to be used as a “weapon of the weak,” while taking part in settler colonial relations. Comaroff (2001) suggests that it is one thing to state “that colonial law was both an instrument of domination and a weapon for the weak”; and quite another to “explain when it was the former, when the latter, and in what proportions” (pp. 306-307). Indigenous rights, law and governance Métis scholar, Larry Chartrand (2012), for instance, addresses the latter, reminding us that Indigeneity was a relevant sentencing factor at least 25 years prior to the enactment and codification of sentencing provisions in the CCC by way of section 718.2 (e) in 1996, “thus requiring a more nuanced
consideration of the Aboriginal offender’s lifestyle and culture and the effect of the
criminal justice system and sentencing on the offender” (p. 395). This is specifically
addressed in Regina v. Fireman, 1971 CanLII 450 (ONCA), where the original sentence
was reduced on appeal due to the Trial Court’s failure to take sufficient account of
Indigenous cultural differences.

Chartrand (2012) regards both R. v. Gladue and R. v. Ipeelee as clearly
establishing that section 718.2 (e) constitutes more than a simple codification of existing
sentencing provisions, but “is directly tied to considerations of Aboriginal cultural
difference and the negative dynamics of the colonial relationship” (p. 398). But,
Chartrand (2012) does not stop there – he further contends that Indigenous rights to self-
government and cultural protection, and freedom from systemic discrimination and
prejudice “are not just about correcting a disadvantaged ‘condition’ of life.’ They are
(whether in purpose or effect), as the Supreme Court of Canada reminded us in Haida
Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, about reconciling
‘pre-existing Aboriginal sovereignty [emphasis in the original] with assumed Crown
sovereignty’” (p. 405). Chartrand (2012) notes that section 718.2 (e) is the only provision
in the CCC that “expressly identifies Aboriginal peoples for special positive treatment
regarding sentencing,” and exists because Indigenous peoples “have a distinct cultural
background and experiences that require special consideration,” and “thus deserving of
recognition as a legal right belonging to Aboriginal peoples” (pp. 409-410). While
Chartrand (2012) provides the legal rationale for a “weapon of the weak” for Indigenous
peoples who appear before the court, albeit in the form of a “defensive shield,” Hewitt
(2016) is not so circumspect in his criticism of what he perceives as Canadian courts “too
often” sentencing Indigenous peoples without the benefit of *Gladue* Reports or adhering to section 718.2 (e). In this regard, Hewitt (2016) rhetorically asks how long it will be before *Gladue* Reports “become widely available” if these same “courts refuse to sentence without full background statements on Indigenous offenders” (p. 334). Maybe it is time, once again, to bring this “weapon of the weak” to the fore. Whereas section 718.2 (e) and *R. v. Gladue* mandate the court to ensure Indigenous accused background information is taken into consideration prior to sentencing, this “right” is not always adhered to.

Turpel (1989) questions if it is inevitable in a settler colonial state such as Canada that Indigenous traditions and customs “have to take the form of ‘rights’ which are brought to courts, proven to exist then enforced,” and furthermore, if such is the case, does everything have “to be adjusted to fit the terms of the dominant system?” (p. 151). Turpel (1989) explains how “Aboriginal rights” inappropriately coerce Indigenous peoples to participate in a CJS that has been imposed on them and how these “rights” also impose severe limitations politically and legally on full recognition of Indigenous autonomy and understandings of law and justice. Indigenous scholars Alfred and Corntassel (2005) propose that the “demand to have Indigenous rights affirmed is inherently decolonizing” and “[r]emembering our ceremonies, traditions, laws, and autonomous nations is a journey of what they refer to as ‘self-conscious traditionalism’” (as cited in Cannon and Sunseri, 2018, p. 123). Chickasaw and Cheyenne Nations member James (Sákéj) Youngblood-Henderson (2002) asserts that Canada is “based on the foundation of shared sovereignty […] a relationship between nations […] a belief in autonomous zones of power, freedom, and liberties” (pp. 419, 422); and even though
Canada, according to Youngblood-Henderson, “has not respected our treaty rights, they are nonetheless real and binding to the parties originally promising to uphold them” (as cited in Cannon and Sunseri, 2018, p. 124).

In 1982, Indigenous and treaty rights were recognized and affirmed through section 35 of the Constitution Act, 1982, although no effort to define these rights was undertaken. Numerous studies, reports, papers, commissions, and conferences have recommended recognizing Indigenous rights in legislation (e.g. White Paper (1969); RCAP (1996); United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007); TRC (2008-2015)). The UNDRIP was not legally binding on member states and according to Cannon and Sunseri (2018), “does not pose a threat to their sovereignty” (p. 123); however, this did not stop the Federal Conservative party at the time from rejecting the Declaration on September 13, 2014, at the United Nations General Assembly (144 states voting in favour, 4 votes against, including Australia, New Zealand, United States of America, and Canada). In choosing to reject the Declaration, the Conservative Party at the time “failed to acknowledge the distinct nature of equity claims and the historicity of Indigenous rights” (Cannon and Sunseri, 2018, p. 123). On November 12, 2015, the newly appointed Indigenous and Northern Affairs Minister Carolyn Bennett announced that the Federal Liberal government would implement the UNDRIP. One of the latest rights-related initiatives launched by the Canadian Government is the National Engagement on the Recognition of Indigenous Rights on February 14, 2018. This “engagement,” according to a Crown-Indigenous Relations and Northern Affairs Canada (2018) news release, will focus on, among other things, “accelerating progress toward self-determination, with a focus on nation and government
rebuilding and rights recognition” and “legislation to anchor Canada’s relationship with First Nations, Inu̱it and Métis in rights recognition and develop tools for the recognition of Indigenous governments” (para. 6). Time will indeed tell if members of the Federal Liberal Party will live up to their promise.

Comaroff (2001) speaks about how colonial law “justified itself by sustaining the premodernity of ‘overseas subjects,’ whom it tribalized, ethnicized, and racialized, constantly deferring to erasure of precisely those differences that were held to make the difference between colonizer and colonized” (p. 307). Section 718.2 (e), which legally mandates courts across Canada to treat Indigenous accused “differently” (as opposed to equally) in a court of law, can be understood as a specific site of lawfare. While articulated as a means of equitable treatment or remedying systemic inequalities, courts, for the most part, have failed to do so for the last two decades; yet still maintain that the federal legislation pursuant to section 718.2 (e), as well as R. v. Gladue and its guiding principles, are being, in a manner of speaking, properly adhered to. Lawfare as it pertains to the body politic, involves the “use of its own rules – of its duly enacted penal codes, its administrative law […] its norms of engagement – to impose a sense of order upon its subordinates by means of violence rendered legible, legal, and legitimate by its own sovereign word” (Comaroff & Comaroff, 2006, p. 29). Comaroff and Comaroff (2006) further assert that modern nation-states, like Canada, have “always been erected on a scaffolding of legalities” (p. 22), as a basis of legitimacy particularly if Canada, as a settler colonial state, is premised on the elimination of any other sovereign claim.

The law is a powerful element in the assertion of settler-colonial sovereignty, with the eliminatory processes outlined herein constituting distinct enactments of that same
sovereign power, and Indigenous peoples in Canada having little, if any, say in how the corresponding federal legislation (section 718.2 (e)) is written and/or the way it is enforced by way of relevant case-law (\textit{R. v. Gladue}). While Indigenous peoples have been denied legal standing in making law, they have certainly actively challenged and rejected it in many ways, often leading to criminalization and incarceration.

2.3.1.6.1. Rule of law

The “rule of law” is a fundamental element of lawfare in the liberal democratic context. The origins of the rule of law as a legal principle clearly demonstrate how it is a mode/means of lawfare. According to Merry (2004), the rule of law “was forged in the colonial era, one legacy of this history is a racialized system of law, in which different legal systems are used for racially distinguished populations” (p. 569). British jurist and constitutional theorist, A. V. Dicey (1835-1922), describes the rule of law principle as comprised of three fundamental elements: “1) the absence of arbitrary or discretionary power on the part of government; 2) every man is subject to the ordinary law of the land administered by ordinary and usual tribunals; 3) the general principles of law, the common law rules of the constitution, in contradistinction to the civil law countries of Europe, are the consequences of rights of the subject, not their source” (Dicey, 1982, p. xx). Hussain (2003) describes the rule of law as “the preeminent form of a modern political rationality, but also as the central and distinguishing feature of English politics, morality, and civilization” (p. 4). American historian, Edmund S. Morgan, once referred to the rule of law as “‘that potent fiction,’ thus conjuring up its amorphous and talismanic qualities,” confirming that it is “a phrase that is notoriously difficult to pin down” (as cited in Hussain, 2003, p. 8). The rule of law is the central organizational component of
the Commonwealth of Nations and their respective legal systems, including Canada’s. In the written decision in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, McLachlin J., speaking for the majority, declares that the “rule of law is at the heart of our society; without it there can be neither peace, nor order, nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect” (as cited in Hogg & Zwibel, 2005, p. 730).

Since the rule of law constitutes the cornerstone of the Canadian CJS, it is important to understand its full breadth and scope. Once one has a sense as to how the dominant decontextualized, individual, incident-based, adversarial CJS operates, it is easier to understand how this compares with an Indigenous-based CJS. The Canadian CJS represents a system which is counterintuitive to how Indigenous peoples deal with dispute resolution (e.g. holistic, contextualized, healing-centred, community-based) and buttresses lawfare in the sense that the CJS, particularly its adoption of common law\(^{15}\), carries out erasure, pathologization, dispossession, and exclusion in its ordinary course of doing business. An illustration of how an Indigenous and non-Indigenous CJS differ is in the way the legal system arbitrarily imposes disjointed and divisive categories (e.g. criminal law, family law, child protection and civil law) that serve settler colonial state interests. These categories and the laws that accompany them mandate the legal

\(^{15}\) Common law is the “system of jurisprudence, which originated in England and was later applied in Canada, that is based on judicial precedent rather than legislative enactments […] Common law depends for its authority upon the recognition given by the courts to principles, customs, and rules of conduct previously existing among the people. It is now recorded in the law reports that embody the decisions of judges, together with the reasons they assigned for their decisions” (Coughlan, 2013, p. 64).
assumption that responsibility for one’s action is based on individual freedom of choice, while simultaneously separating that assumption from the family, social, cultural and historical context in which choice and action occur. This allows the CJS to impose individual responsibility and “blame,” while avoiding any responsibility to examine blame on the part of the law or settler society in which the law is embedded; and reinforces the need for more than a “tinkering” to the CJS (e.g. indigenization and accommodation) – there needs to be a fundamental shift in how the CJS deals with Indigenous peoples who come in conflict with the law and appear before the court.

The rule of law, according to Hogg and Zwibel (2005), describes “a society with an effective legal system that respects individual liberty [emphasis added] […] presupposes that laws will usually be obeyed […] breaches of the law will usually meet with enforcement […] government will be limited in its powers, and that courts and the legal profession will be independent of government and of powerful private interests” (p. 716). According to Turpel (1989), the Assembly of First Nations (hereinafter referred to as AFN) argued before the Parliamentary Committee on Aboriginal Affairs in 1982: “[as] Indian people we cannot afford to have individual rights override collective rights […] the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 (hereinafter referred to as the Charter) is in conflict with our philosophy and culture.” Furthermore, “individual-rights based law like the Charter could result in further weakening the cultural identity of Aboriginal communities” (p. 153). This also raises a tension in that the Indian Act, reserve system, 60s Scoop and IRRS were all sanctioned in and through Canadian law under the auspices of the “rule of law.” The preceding discussion speaks to the
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safeguards normally arising from the rule of law, with Indigenous peoples being excluded from these same protections. For instance, Manley-Casmir (2012) submits the “Canadian court system has been heavily criticized for rendering judgements that maintain the status quo and serve colonial interests” (p. 233; McNamara, 2000). In liberal colonial states such as Canada, according to Cunneen (2014), equality before the law and protection of the law “are seen as the defining features of the rule of law – which itself is understood as a universal principle and a fundamental good” (p. 11). Canadian definitions of legal equality which rely on the rule of law, according to Monture-Angus (1999b), “often guarantee only rights of sameness,” which extended to the political realm, “casts Aboriginal difference as a form of special rights” (p. 32). Once this happens, the argument is then constructed as “no one deserves special treatment and rights. This reasoning must be understood for what it is – the colonial mentality” (Monture-Angus, 1999b, p. 32).

The Canadian rule of law, expressly by way of federal legislation (section 718.2 (e)), and subsequent 1999 SCC decision in *R. v. Gladue*, “has played a central role in maintaining the colonial oppression of Indigenous peoples” (Manley-Casimir, 2012, p. 231), by way of judicial decisions which do not necessarily reflect the anticipated remedial effect, or alternatively, maintain the status quo. The purpose and intent of section 718.2 (e), along with *R. v. Gladue*, in ideological terms, embody the rule of law and appear to be consistent with how the rule of law works in practice, reinforcing the legitimacy of the legal system, and, by extension, the Canadian settler state. However, what works in theory does not always work in practice. As cited by Plains Cree Nation scholar, Matthew Wildcat (2015), the works of Coulthard (2014) and Wolfe (2006)
support a similar view, in that “significant legal and political shifts in Canada and Australia from the 1970s onwards did not fundamentally alter Indigenous – settler relationships” (p. 407). This was certainly the case when the tenure of former Prime Minister Stephen Harper and his Conservative Party’s “tough on crime” philosophy ended in early November 2015, and Justin Trudeau’s Liberal Party took power. Apart from, as previously referenced, implementing the UNDRIP in late November 2015 and launching the National Engagement on the Recognition of Indigenous Rights on February 14, 2018, few material changes have occurred.

As a fundamental principle underlying Canadian democracy, the rule of law is of critical importance in understanding why disproportionate numbers of Indigenous peoples continue to end up in the Canadian CJS, particularly its prisons. First, Canada, as a settler colonial state, crafts the law by way of a legislative process, with which Indigenous peoples have little, if any, meaningful involvement and/or input. Second, is the enforcement process, which sometimes is discriminatory in its practical application, particularly in federal correctional institutions (e.g. the low percentage of Indigenous offenders being released from custody at their statutory release date, not being granted parole, not taking part in in-house correctional programming, receiving higher initial security classifications, disproportionately over-represented in segregation placements, use of force interventions, incarceration in maximum security institutions and self-injurious incidents) (The Office of Correctional Investigator Canada, 2017, pp. 49-50). Third, a judicial process perceived by Indigenous accused as foreign and a forum in which they are expected to prove the “authenticity” of their Indigenous identity. This perception is not based so much on a lack of familiarity, but more so, as Indigenous
scholars, Patricia Monture-Okanee and Mary Ellen Turpel (2011), contend that the Canadian CJS “is constructed with concepts that are not culturally relevant to an [A]boriginal person or to [A]boriginal communities,” including its “requirement that judges decide matters ‘impartially,’” who Indigenous peoples regard as “simply an outsider without authority” (pp. 242-243). And, fourth, a legal process, which appears to be more so concerned about fundamental sentencing principles like proportionality, separation from society, and equal treatment under the law, than with allowing for differences and being innovative in creating interventional methodologies customized for Indigenous peoples who come in conflict with the law. These four dimensions reinforce the ideology of the “rule of law” and how this principle stands in stark contrast to Indigenous self-determination, autonomy and overall wellbeing.

According to Friedland (2009), “if modern law must constantly repeat its myths of origin, which require a ‘savage slot’ to reconcile its authority with the modern paradoxes in which it finds itself, then the level of violence against Aboriginal people may not actually fracture our legal order. It may affirm it” (p. 131). In other words, if Indigenous peoples are perceived as breaking the law and committing more serious criminal acts compared to their non-Indigenous counterparts, this provides sufficient demonstrable “proof” as to why more Indigenous peoples appear before the court and spend inordinate amounts of time in Canadian prisons, in disproportionate numbers, rather than this being the direct result of discriminatory settler colonial state legal practices.
2.3.2. Positionality of Indigenous/colonial Other vis-à-vis the settler/colonizer

A colonial system of relationships is premised on “the presence and subjugation of exploitable Others” (Veracini, 2014b, p. 615). Colonial subordination maintains this “relationship” as a dialectic, defined by Osterhammel (1997) as a “master [/] servant relationship marked by ethnic difference” (p. 108) and further that “[r]ejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule” (p. 16). To quell the challenge of Indigenous peoples to the settlers’ right of occupancy, according to Battell-Lowman and Barker (2015), “we often insist that history begins with our national inception – with explorers, pioneers, soldiers, and traders, not the incredible span of Indigenous histories” (p. 25) and rich heritage of Indigenous peoples. Moreover, settler colonial “disavowal” subordinates Indigenous peoples, so acting as a means to eventual elimination. Without this disavowal, settlers would, according to Barker (2012), be “forever reminded of their status as foreigners and, more accurately, invaders and exploiters” (p. 330) of Indigenous space.

Veracini (2011), in speaking to the positionality of the Indigenous Other and settler colonizer, maintains that “in the case of colonial systems, a determination to exploit sustains a drive to sustain the permanent subordination of the colonized” (p. 2), whereas settler colonialism is predicated on occupation by the “colonizer” and elimination of the Indigenous “colonized.” The level of unevenness of the settler colonial encounter is predicated, in part, on what Wolfe (2006) refers to as “targeting,” whereby Indigenous North Americans “were not killed, driven away, romanticized, assimilated,
fenced in, bred White, and otherwise eliminated as the original owners of the land but as
*Indians* [emphasis in the original]” (p. 388).

In looking at the settler colonial formation from Wolfe’s (2006) vantage point, as
a “structure” rather than an “event,” the legal system constitutes a key colonial institution
(re)producing settler colonialism by means of a broad array of constantly adaptive
processes, including elimination, erasure, dispossession, and exclusion. Federal
Government initiatives like the *Indian Act* and IRSS provide two examples of how the
settler colonial state is (re)produced by enforcing the law and, in turn, legitimizing the
process of elimination. Mackey (2016) reiterates a similar message when she suggests
that settlers “build ‘self-sustaining’ states, nations and legal systems that are organized
around settlers’ [ongoing] political domination over the Indigenous population” (p. 4). In
this research project, I am looking at how this (re)production occurs within the context of
the CJS in PEI and how it impacts the colonial relationship and ultimately Indigenous
peoples who come before the court.

The Canadian legal system has been deliberately removing Indigenous peoples
from their families, communities, and land for centuries under different mechanisms,
including the *Indian Act*, IRSS, Pass System, dispossession of lands, 60s Scoop, and
incarceration, with similar traumatic and often intergenerational injurious impacts. These
colonial state-sanctioned initiatives are established on the foundational premise of a
disproportionate distribution of power. Anishinaabe scholar, John Borrows (2010)
addresses the configuration of power of legal institutions, including the Canadian CJS,
and argues: “Indigenous peoples should not be forced to accept and integrate into
institutions that are designed to conform to the current structures of the colonial state,”
but rather be given the latitude to meaningfully challenge “public institutions that contribute to Indigenous peoples’ domination by not recognizing their identity, culture, and need for thoroughgoing participation throughout public life” (p. 219). At the micro-level, the same power imbalance is epitomized by Indigenous peoples rarely occupying a role other than the “accused” sitting by themselves at the defence table, whereas settlers are typically the ones with the power and making transformative decisions, while making the argument in a court of law or, alternatively sitting on the courthouse Bench and holding the gavel. To contextualize the judicial decision-making processes, this research project situates these colonial dynamics within the broader settler colonial formation, which have “remained impervious to regime change” (Wolfe, 2006, p. 402), involving settler political governments.

Settler colonialism “is characterized by a persistent drive to ultimately supersede the conditions of its operation […] ‘tame’ a variety of wildernesses […] effectively repress, co-opt, and extinguish indigenous alterities,” with its final trajectory claiming to be no longer a settler colonial state, but more so “putatively ‘settled’ and ‘postcolonial’” (Veracini, 2011, p. 3). However, Veracini (2014c) contends that settler colonialism is neither inevitable nor triumphant because settler colonialism “as a structure dialectically encompassing both the settler will to eliminate and the Indigenous capacity for survival” (p. 313), is never resolved. As an ongoing dialectical struggle, settler colonialism is not a relic of the past and Indigenous peoples continue to experience deleterious effects as a result, including their overrepresentation in Canadian prisons.

When it relates to postcolonialism in Canada, Clarke (2003) unequivocally states, “we are postcolonial now only in relation to Britain, whose cultural influence in Canada
is pretty much nil” (p. 28); however, “Canada as a colonizing power in relation to First Nations must bear scrutiny” (Moss, 2003, p. 2). Yet to discuss postcolonial existence for Indigenous peoples, the move from a settler colonial formation to postcolonialism means either (a) the realization of true Indigenous self-determination/sovereignty, (b) complete elimination of an Indigenous presence that requires colonial control (i.e. the settler colonial state’s supersession), or (c) dismantling of the Canadian settler colonial state in its entirety.

It cannot be overstated how significant it is to fully comprehend “the radical challenge that the assertion of Indigenous political autonomy poses to settler colonial political structures, and also to Settler Canadian identity and culture,” particularly when you consider that Canada, as a nation, “is built on the premise that Indigenous peoples are either absent or that Indigenous political challenges are ‘settled’” (Barker, 2015, p. 46; Regan, 2010). In general, the importance of Indigenous self-determination is best illustrated by the fact that Indigenous peoples across Canada have neither capitulated, nor given up their ongoing struggles to achieve autonomy. It also should be noted that Indigenous peoples in Canada were prohibited from formal political organizing, pursuant to the Indian Act, until the early 1950s, although this certainly did not mean different forms of self-determination and/or resistance were not taking place simultaneously, sometimes simply by ongoing survival. As Kauanui (2016) contends, “the operative logic of settler colonialism may be to ‘eliminate the native,’ as the late English scholar Patrick Wolfe brilliantly theorized, but that Indigenous peoples exist, resist, and persist” (para. 1). Audra Simpson (2014), a member of the Mohawk Nation, echoes the same sentiment in reiterating that Indigenous peoples are still here and, in fact, have never left.
2.4. Critiques of settler colonial theory and settler colonial studies

In this section, I discuss six key critiques or limitations when it comes to the theorizing of settler colonialism and settler colonial studies as a field. I take-up each critique in turn, explaining how I address each of the critiques in my research project.

2.4.1. Settler colonial studies – an exercise in intellectual curiosity

The first critique of settler colonial studies is that it constitutes merely an exercise in intellectual curiosity, rather than contributing to our overall understanding and ultimately addressing the enduring problems associated with the structures and practices of settler colonialism and what Veracini (2015) refers to as the “colonial present,” including the overrepresentation of Indigenous peoples in Canadian prisons. Settler colonial studies is defined by Veracini (2014c) “as an intellectual endeavor” (p. 315), and he proposes that for scholars who have collectively contributed to settler colonial studies, “the settler colonial paradigm remains a heuristic tool, not an attempt to revolutionize relationships […] only ultimately accountable for the way it is effective in explaining things […] intended as an interpretative tool, not a transformative one” (p. 312). Furthermore, many American historians (e.g. Shoemaker, 2015) according to Jacobs (2018), “dismiss ‘settler colonialism’ as a trendy intellectual fad,” a form of dogma, if you will, although Canadians and Australian scholars “have been refining the concept since the 1990s” (p. 3).

This critique should not be dismissed out of hand and accordingly, is regarded as a valid criticism. I address this critique in my research project by drawing on Indigenous and non-Indigenous critical scholarship and engaging in empirical research with key legal actors employed in the CJS, along with Indigenous peoples who deal with Indigenous accused who come before the court in the Province of PEI. Keeping the warning of the
Marxist philosopher Louis Althusser (1970) firmly in mind that theoretical concepts about the “real” world are all “brought into the world by human abstraction” (p. 82), the explicit linkage in this research project between a theoretical framework (e.g. settler colonialism) and empirical research can reduce the disparity between the theoretical abstract and the real concrete, even if incapable of removing it. Even though settler colonial scholars such as Veracini define the settler colonial paradigm as an interpretative tool rather than a transformative one, does not mean that scholars cannot use this tool as part of a transformative approach.

2.4.2. Settler colonial studies – “elimination” as a common denominator

A second critique of settler colonial studies is the way Veracini, Wolfe and other settler colonial studies scholars view “elimination” as a common denominator with respect to their understanding of settler colonialism and how it impacts Indigenous peoples. In other words, when adopting this concept, settler colonial scholars reduce everything to “elimination,” neither taking into consideration other factors which are also undoubtedly coming into play, nor establishing how elimination occurs in the first place. Rowse (2014) argues that Wolfe (2006) restricts his analysis to an “eliminationist paradigm,” which, in turn, seems to drive him “towards seeing so many different phenomena as manifestations of the structure of elimination” (p. 301). Veracini (2014c) asserts that this type of “singular unbending logic” misrepresents both Wolfe (2006) and settler colonial studies’ interpretative approach, if only because “Wolfe refers to a logic [emphasis in original] of elimination, not to elimination itself” (p. 311). Furthermore, Veracini (2014c), in critiquing Rowse’s misunderstanding of Wolfe’s “logic of elimination,” suggests that Rowe’s “preference for ‘contending structures’ rather than ‘structure’ can
only be argued by dropping the ‘logic’ from ‘logic of elimination,’” since the term “logic” was there in the first place “to indicate that ‘elimination’ can be articulated in a plurality of ways – precisely what Rowse prefers” (p. 312).

This also constitutes a valid criticism, since settler colonialism is a complex social phenomenon which cannot be fully explained by reducing the level of abstraction to a single concept (e.g. elimination). I adopt the concept “logic of elimination,” understanding “logic” as referring to a way of thinking, as well as a means of organizing actions, relations, or institutions; and involves organizing relations around the removal of Indigenous presence from the land. I adopted the concept due to its explanatory power (the ability of a hypothesis or theory to effectively explain the subject matter it pertains to) with respect to how settler colonialism manifests in material ways. This allows me to focus on the complexities of different processes (essentialism, erasure, dispossession, pathologization, exclusion, and lawfare) rather than simply relying on “elimination” as an explanation. By not restricting my understanding of the logic of elimination to one concept (e.g. elimination), it enables a more nuanced analysis of a range of processes, including their contradictions and failures, which each have explanatory power. The logic of elimination is useful to situate settler colonial institutions (e.g. CJS) and the corresponding impact on Indigenous peoples who appear before the court.

2.4.3. Settler colonial theorizing homogenizes Indigenous peoples and settlers

According to Rowse (2014), a third critique of settler colonial studies is that the studies tend to homogenize settlers and Indigenous peoples in the process of making a case for the distinctiveness of settler colonialism as a formation, a process he refers to as “reduced sensitivity to Indigenous heterogeneity” (p. 297). Gary Boire (1990) and Māori scholar
Linda Tuhiwai-Smith (1999), warn against the postcolonial homogenization of Indigenous experiences of colonization. Boire (1990) argues that “the superficial crime of superimposition may have been the same in all colonies, but given the specificities of history, ethnicity, gender, culture and geography, there are significant and subtle variations between each repetition and amongst the multiple reactions to it” (p. 306). Similarly, Tuhiwai-Smith (1999) argues that the final “s” in Indigenous peoples “has been argued for quite vigorously by Indigenous activists because of the right of peoples to self-determination,” although “is also used as a way of recognizing that there are real differences between different Indigenous peoples” (p. 7; Smith & Wobst, 2005). In response to these critiques, Veracini (2014c) states: “It is not settler colonial studies that homogenizes, it is settler colonialism that does so in its attempt to eliminate indigenous alterity” (p. 314). This emphasizes the importance for those interested in understanding settler colonialism to engage in qualitative empirical research and examine specificities of Indigenous peoples’ lived experiences and of settler colonial formations in different times and spaces.

This critique speaks directly to an important facet of my research project, in that Indigenous peoples are not only different from non-Indigenous people regarding their involvement in the CJS, but also are uniquely different in terms of their respective cultural backgrounds. The result of this homogenization is that individual Indigenous accused are perceived as having the identical lived experience and as a result their own unique life’s story remains untold and/or simply becomes part of what is known as “institutional knowledge.” By utilizing a qualitative methodological approach, involving a combination of case-law (document) analysis, the writings of Indigenous and non-
Indigenous scholars, and informant interviews, I was able to examine the lived experiences of Indigenous peoples from a variety of different perspectives and thus mitigate the issue of homogenization.

### 2.4.4. Flattening of Indigenous lived experiences

A fourth critique involves the “flattening” of Indigenous lived experiences. As an analytical framework, settler colonialism, according to Jacobs (2018), “can deterministically flatten out the textures of on-the-ground encounters and lived experiences” (p. 4). This is not unlike the previous critique of homogenization and failing to recognize unique Indigenous characteristics/attributes of individuals within the broader scope of Indigenous communities. Snelgrove, Dhamoon, and Corntassel (2014) propose that settlers must focus more on building relationships and interdependence with Indigenous peoples “as a way to counter the flattening of differences that occurs amongst settlers, particularly in solidarity work […] doing our own work and challenging ‘our’ institutions and practices that serve to protect or further colonization” (p. 21). They go on to say, at the same point of reference, that “we can’t do this if we flatten the differences and ignore the inequalities and power relationships that exist within settler society.”

Historically, the Canadian settler colonial state only accepts certain “flattened” Indigenous legal traditions (e.g. Correctional Service Canada (hereinafter referred to as CSC) Indigenous healing lodges and spending time with an Elder), and more specifically, “only those aspects that do not require the use of coercive force or enforced separation from society,” a narrative which “completely and problematically conflates ‘Aboriginal justice’ with ‘restorative justice’ or rallies around a singular description of justice as ‘healing’” (Napoleon & Friedland, 2014, p. 236). This predominant narrative of “justice
as healing” is not necessarily false, although according to Napoleon and Friedland (2014), it is “dangerously incomplete” and “flattens the complexity of Indigenous legal traditions and raises real questions about their utility to effectively respond to the ‘pressing reality’ of the ‘unprecedented levels of violence experienced within Aboriginal families and community in the current generation’” (p. 236; Turpel-Lafond, 2005). The Indigenous justice paradigm is so much more than a space for healing, something which this research project speaks to by relying, in part, on the perspectives of Indigenous scholars.

One of the fundamental reasons I chose to include Indigenous Gladue Writers and Elders as part of this study was to highlight the lived experiences of Indigenous peoples, and not restrict the conversation to non-Indigenous legal actors who do not necessarily share the same frame of reference.

2.4.5. Settler colonial studies – decentring of Indigenous lived experiences

A fifth critique of settler colonial studies is that because it is largely produced by settler scholars, it decentres Indigenous peoples’ lived experiences, and, by implication, reinforces settler dominance as “experts.” Alfred (2009a) maintains that despite all the wisdom available within Indigenous traditions, “most Native lives continue to be lived in a world of ideas imposed on them by others” (p. 94). This decentring is no more clearly demonstrated, according to Maurutto and Hannah-Moffat (2016), than in traditional Western legal practices, which “tend to privilege individualized accounts of criminal behaviour while discounting the colonialism and racism experienced by racialized minorities,” which, in turn, “disqualify or subjugate Aboriginal and racialized minorities” (pp. 451-452; Monture-Angus, 1999a). Settler colonialism decentres Indigenous peoples’
lived experiences by way of colonial assimilation policies such as the Indian Act and IRSS, or dispossession-related initiatives such as the reserve system or placing them in custody. This critique of decentring Indigenous voices is something that I have addressed in this research project by both relying extensively on Indigenous scholarship and incorporating it in my research design by including Indigenous informants.

2.4.6. Settler colonialism as an inevitable or permanent formation

A sixth critique is that despite theorizing to the contrary, settler colonial studies often inadvertently end up treating settler colonialism as inevitable or a permanent formation and as such, making transformational changes to this structure seem improbable, if not impossible. Likewise, if settler colonialism is inevitable, disassembling and/or reconfiguring its component parts (e.g. Canadian CJS) for Indigenous peoples who appear before the court are probably impossible. In addition, decolonizing and/or dismantling the settler colonial system (i.e. unilateral Canadian sovereignty vs Indigenous self-determination and nationhood) would also seem virtually impossible or futile. Moreover, in the case of Indigenous peoples in Canada, various indigenizing initiatives (e.g. creating Aboriginal Persons/Gladue Courts) are equally doomed to fail as means towards transformation if the prevailing system/structure is permanent and therefore not subject to change. Although, Wolfe (2006), describes settler colonialism as both a “complex social formation and as continuity through time […] a structure rather than an event” (p. 390), this does not necessarily mean that it is permanent, but that these social forces “hold” in their present configuration for a period of time (granted, even hundreds of years) but are not “permanent.”
If settler colonialism is both inevitable and permanent, as well as a formation impervious to change, this would, in turn, nullify any attempts (initiated by either Indigenous and/or non-Indigenous actors) to reconfigure the formation, intended to remedy discriminatory CJS practices (e.g. overrepresentation of Indigenous peoples in Canadian prisons). In addition, the settler colonial formation is not fixed in time and space in the way that it has been produced and therefore can be taken apart and is subject to change (e.g. through modifying problematic practices, legislation and/or case-law). Also, Indigenous resistance and/or resurgence forces settler colonialism to constantly shift/change. It is also important to consider what factors sustain the settler colonial formation (e.g. institutions like the law), something which formed part of my qualitative empirical study of micro-processes.

This critique is addressed in this research project, in part, by providing concrete avenues to potentially contribute to decolonizing the CJS, for example by making space for Indigenous storytelling within the CJS in PEI, by way of Indigenous *Gladue* Writers and *Gladue* Reports.

**2.5. Conclusion**

This chapter systematically delineated the key theories, concepts and critiques I draw upon for my theoretical framework. I adopt this framework grounded in the analysis of settler colonialism, as theorized by Indigenous and non-Indigenous scholars, as a way of understanding the setting in which this research project takes place.

The concept of eliminatory logic underlies six key processes associated with settler colonialism: essentialism, erasure, dispossession, pathologization, exclusion, and lawfare. These processes are related to each other by the logic of elimination and
Theoretical Framework

contribute to (re)producing settler colonial relations in the combined space of the Canadian criminal justice and legal systems, and the broader settler colonial formation. As evidenced in this research project, this (re)production takes place both through coercive and “liberal” forms of law, including ostensibly attempting to find a balance between “public safety/security” and “liberty.” These processes could not take place without the facilitation provided by the historical and contemporary structural conditions of settler colonialism that have been argued to underlie the Canadian state.

Drawing on this framework, this research project critically analyzes how the implementation of section 718.2 (e) and the 1999 SCC decision in *R. v. Gladue* takes place as a “practical application” in the courts in the Canadian CJS generally, and as it relates to Indigenous peoples coming before the court in the Province of PEI, more specifically.

By examining concrete CJS practices at the micro-level in PEI, this research project contributes to our understanding of settler colonialism and how settler colonial institutions endure, even as gains are arguably being made by Indigenous peoples by way of constitutional rights, section 718.2 (e), and *R. v. Gladue*. Concentrating my attention on the CJS in PEI avoids overgeneralization and/or assuming homogeneity of colonial processes. My analysis in chapters five to seven shows how processes of elimination manifest in day-to-day CJS activities in complex ways. These processes reveal the tensions between liberal legal remedial measures, how they are implemented, and their effects.

An overarching issue in studying settler colonialism is the need to address how settler colonialism as a formation is (re)produced, keeping in mind that it does not exist in
perpetuity and is not inevitable. Cognizant of the limitations and critiques of how settler colonialism has been theorized, and drawing on the insights of Indigenous scholars, my qualitative methodological approach utilized a combination of informant interviews and case-law (document) analysis. This methodological approach proved useful in capturing the nuances often associated with “conversational” interviews and the exploration of themes which gradually evolved during this research project. Semi-structured interviews also permitted the informants, particularly Indigenous interviewees, to convey their own stories, without being constrained by a set of preordained questions and answers. This approach also enabled me to avoid “flattening” Indigenous lived experiences by examining the complexities of the settler – Indigenous relationship, in a specific time and place (e.g. PEI), and not merely in the abstract.
Chapter 3.
Methods

3.1. Introduction

I adopt a qualitative research approach to examine how section 718.2 (e) and the 1999 SCC decision in R. v. Gladue have been articulated, understood and implemented in PEI’s CJS. I employ a two-pronged methodological approach, utilizing semi-structured interviews with key informants and case-law (document) analysis of written sentencing decisions arising from the various levels of court\(^\text{16}\) across Canada. I utilize these two methods to identify the material ways in which the settler colonial relationship is (re)produced and/or challenged within the CJS in PEI.

Using document analysis to examine relevant written decisions from across Canada provides valuable insight into how members of the legal profession articulate and apply section 718.2 (e) and R. v. Gladue in sentencing Indigenous peoples and in generating the case-law that shapes these decisions. Semi-structured interviews with informants employed in the PEI legal system, Indigenous informants who work under the administrative umbrella of MCPEI as Gladue Writers, as well as Elders, provide insights into understandings and practices at the micro-level of analysis.

\(^{16}\) There are different levels and types of courts in Canada, which differ in terms of their overall jurisdiction and upon which issues/matters they have the authority to decide. The different types of courts include at the provincial/territorial level: Provincial and Territorial Courts, Provincial and Territorial Superior Courts; and Provincial and Territorial Courts of Appeal. Whereas, at the federal level: Federal Court, Federal Court of Appeal, specialized federal courts (e.g. Tax Court of Canada and Court Martial Appeal Court of Canada). Every province and territory (except Nunavut) have a provincial or territorial court. Provincial and territorial courts are sometimes referred to as the “lowest level” courts, which deal with matters involving provincial or territorial laws and other criminal and civil matters that the Federal Government has given them the authority to decide.
Semi-structured interviews and case-law (document) analysis build upon one another to generate an understanding of the context and rationales underlying judicial decision-making when dealing with Indigenous peoples. This is something not easily gleaned from quantitative analysis such as statistical analyses of incarceration rates. I used an inductive approach in which themes emerge from richly descriptive interviews and texts. These themes, where deemed appropriate, were brought forward and formed part of the interviews and/or document analysis and enabled me to pursue emerging research areas of interest.

I utilize micro (individual), meso (institutional or formal organization), and macro (societal) analytical lenses to examine interactions at each of these three distinct levels of analysis. My micro-level of analysis with respect to case-law, as well as having informants represent various perspectives within the PEI CJS at the institutional level, provide insight into how the settler colonial formation (macro-level) is (re)produced by shaping the everyday interactions of people; and how these interactions (re)produce discursive and structural aspects of settler colonialism. The institutional constraints on micro-level interactions, such as the way that conventional CJS processes militate against transformative change, are explored.

In this chapter, I describe why I chose to use semi-structured interviews, who my informants are, how I identified and recruited these informants, and the data collection and analysis process. I then explain my second methodological approach of case-law (document) analysis. I next clarify how I coded the raw data. Finally, I discuss the methodological limitations and corresponding ethical considerations associated with this research project.
Koster, Baccar, and Lemelin (2012) specify one of the problems associated with traditional research methods being applied in Indigenous communities is that such research projects “have largely been developed within a dominant Western research paradigm that values the researcher as knowledge holder and the community members as passive subjects” (p. 195). Throughout this research project, I am mindful of my “settler” status, as well as having been employed with the Department of Justice and Public Safety in PEI for 30 years. As a result, I took concrete steps to mitigate against potential bias on my part, including engaging MCPEI from the very beginning of this research project.

3.2. Interviews

I conducted 20 interviews with key informants between May 6th and June 29th, 2016. Semi-structured interviews afforded me the flexibility to use open-ended, context-specific and probing questions, encouraged a free-flowing conversation, and enabled informants to respond by using their own words and telling their own unique story, “rather than forcing them to choose from fixed responses” (Mangal & Mangal, 2013, p. 162). Additionally, this interviewing approach allowed for responses which were “meaningful and culturally salient to the participant, unanticipated by the researcher, rich and explanatory in nature” (Mack, Woodsong, MacQueen, Guest, & Namey, 2005, p. 4).

3.2.1. Informants

I conducted interviews with a total of 20 people, recruited by way of purposive, non-probability sampling and comprising five informant groups: Elders, Gladue Writers, Provincial Court Judges (hereinafter referred to as Judges), Crown Attorneys (hereinafter referred to as Crowns), and Defence/Legal Aid Attorneys (hereinafter referred to as Defence). These five groups, in turn, comprise two distinct informant clusters, the first –
“legal actors” (three Judges, eight Crowns, and three Defence) employed in the PEI CJS, and who comprise, apart from one person, the entire complement of legal professionals primarily associated with the CJS of PEI. Second, I recruited all three *Gladue* Writers (employed at the time), as well as three Elders, who represent key members of Indigenous communities in PEI.

### 3.2.2. Identification/recruitment process

These informants, primarily from within the legal profession and *Gladue* Writers, represent key decision-makers in the PEI CJS in relation to Indigenous peoples who appear before the court. When identifying and recruiting the three Elders, I solicited the assistance of Lori St. Onge, Director of the IJP and one of the leading voices in Indigenous justice in the Province. The three Elders who participated in this research project reside in each of the three Counties (Kings, Queens, and Prince) in PEI and represent both Lennox Island First Nation and Abegweit Mi’kmaw Nation.

The second informant group comprised three *Gladue* Writers in PEI. All three are of Mi’kmaq ancestry, two belonging to the Lennox Island First Nation and the third, to the Abegweit Mi’kmaw Nation. *Gladue* Writers in PEI are responsible for the completion of contextualized, case-specific *Gladue* Reports (typically requested for sentencing purposes) and are employed under the administrative umbrella of MCPEI and IJP.

Within the legal informant cluster, I interviewed all three Provincial Court Judges, who have jurisdiction to adjudicate adult criminal cases and are responsible for all criminal matters involving the CCC in PEI. These three Judges have jurisdiction throughout PEI, which encompass four Provincial Court locations: Summerside, Charlottetown North, Charlottetown South, and Georgetown.
I interviewed eight Crowns, also representing the full complement in PEI, who are employed with the Department of Justice and Public Safety and responsible for prosecuting all criminal cases under the CCC.

The other informant group of legal professionals consisted of three of the four Defence in PEI, who are responsible for providing legal assistance (criminal as opposed to family) to Legal Aid clientele, a program administered under the general powers of the Department of Justice and Public Safety in the Province.

Throughout my 30-year career with the Department of Justice and Public Safety, I had the opportunity of working with all but two of the legal informants; and was familiar with at least five of the six Indigenous informants. Once the potential informants had been identified, the next phase in the recruitment process came in the form of an “initial e-mail invitation to key informant” (see APPENDIX A), requesting their participation in a face-to-face interview. This invitation included a brief personal introduction, an overview of this research project, preliminary information related to confidentiality, and my contact details. If potential informants, in turn, expressed an interest in participating, they were asked to reply, by return e-mail, within a two-week period. Upon receipt of confirmation by way of return e-mail, I contacted informants either by e-mail and/or telephone and determined a preferred location, date, and time for the interview to take place. Once these logistics had been agreed upon, I then forwarded the second “follow-up e-mail on face-to-face interview” (see APPENDIX B), which expressed my appreciation for their willingness to participate; confirmed the location, date, and time of the interview; provided additional details, including how the interview was going to be conducted (e.g. audio-recorded and/or note-taking); and lastly, its anticipated length (60-
90 minutes). In addition, a “participant consent form” (see APPENDIX C) was attached, which was to be signed by informants prior to the commencement of the interview. To help familiarize informants beforehand regarding the interview, this second e-mail also included an “overview of topics/themes to be covered in the face-to-face interview” (see APPENDIX D).

Once the informants accepted the invitation to participate and interview dates had been confirmed, I maintained open lines of communication, thereby ensuring strict adherence to research ethic protocols. The jurisdictional focus on PEI in this research project constitutes one of its strengths. While PEI is relatively small, compared to other Canadian jurisdictions, a corresponding benefit was that it enabled me to be comprehensive in my analysis by including all key actors in the CJS, who have considerable influence in the everyday activities of the Province’s CJS, specifically in relation to Indigenous peoples, and including both legal informants, as well as Gladue Writers.

This research project, as a result, fills an empirical gap in the existing scholarly literature. There has, up until now, not been any systemic series of interviews with key legal and Indigenous actors who work with Indigenous accused who come before the court. Adding to the uniqueness of this research, nothing has previously been studied that covers legal professionals and Indigenous peoples from across a province/territory, providing them with the opportunity to share their informed opinions about: first, how federal legislation, by way of section 718.2 (e) and the ground-breaking SCC decision in R. v. Gladue, have been implemented to date; second, the part settler colonialism may play in the implementation process; and third, what ways and means may exist to
Methods

improve the relationship between the CJS and Indigenous peoples in Canada, more
generally, and in PEI, more specifically.

3.2.3. Data collection and analysis

I prepared separate interview guides for each of the five informant groups (Appendix E-I,
inclusive); these guides consisted predominately of open-ended questions regarding
informants’ understandings of the overrepresentation of Indigenous peoples in the
Canadian CJS and their experiences and views on the ongoing implementation process as
it relates specifically to section 718.2 (e) and R. v. Gladue. I piloted or pre-tested these
guides for the legal informant cluster by interviewing Jonathan Rudin. Mr. Rudin is one
of the leading legal authorities on section 718.2 (e), as well as R. v. Gladue and notably
represented one of the interveners, ALS\textsuperscript{17} in Ontario, in the companion 2012 SCC case,
R. v. Ipeelee. My second pilot was completed with the assistance of experienced Gladue
Writer, Mitchell Walker, who completed numerous Gladue Reports in British Columbia
(hereinafter referred to as BC), which similarly assisted me in developing meaningful
interview questions, primarily for the three Gladue Writers. I completed my third and last

\textsuperscript{17} Aboriginal Legal Services (ALS), formerly Aboriginal Legal Services of Toronto (ALST), was
established February 21, 1990, following a needs assessment by the Native Canadian Centre of Toronto in
the mid-1980s. ALS is responsible, in part, for preparing Gladue Reports for Indigenous peoples in at least
22 different courts, located at different geographical locations across the Province of Ontario. ALS, a non-
profit organization, has instituted a policy directive which clarifies how and when Gladue Reports should be prepared,
such that, they are only prepared following a guilty plea being entered or a finding of guilt rendered, and not in
anticipation of a guilty plea. In the Province of Ontario, Gladue Reports are therefore normally completed when the
Crown Attorney is seeking a custodial sentence of at least 90 days for a “client” who is currently out-of-custody or,
alternatively three additional months for a client who is currently in-custody. In 2017, ALS established a new practice,
whereby in those cases where the Indigenous accused is, in all probability, going to receive less than a 90-day custodial
sentence, a Gladue Letter will be prepared, rather than a full Gladue Report. These Letters are completed over a shorter
period (typically four to five weeks, rather than the standard six to eight weeks), necessitate fewer meetings/interviews
with individual Indigenous accused and most importantly, be prepared with the intended goal to “connect” individual
Indigenous accused with the appropriate resources and/or service(s) immediately, rather than the accused sometimes
waiting for inordinate periods prior to accessing same.
pilot as it relates to the three Elders by speaking with several different leaders in Indigenous communities across PEI, including Lori St. Onge, Director of the IJP for the Province. I was cognizant of my pilot participants having their own perspectives about the subject matter under consideration; however, the three pilots were useful in deciding how many questions I should have, identifying additional points of inquiry, and recognizing that the interviews were not so much about the questions asked, but the nature, depth and scope of the ensuing “conversation.”

One of the potential issues going into the informant interviews was that less than 10 *Gladue* Reports had been prepared for judges in PEI up until the late spring/early summer 2016. Thus, legal informants, for the most part, were not familiar with them. I therefore decided to introduce examples of *Gladue* Reports in the interviews. I requested and received three redacted *Gladue* Reports from Jonathan Rudin for the sole purpose of allowing legal informants (Crowns, Defence, and Judges) the opportunity to review the same three *Gladue* Reports prior to their respective interviews. All personal information had been previously redacted, and Mr. Rudin consented to provide these to me under the proviso that they be utilized solely for research purposes, and that their dissemination be strictly confined to these three informant groups. With this stipulation in mind, I hand-delivered all three hard-copy *Gladue* Reports to these informants approximately one week prior to the interview taking place, retrieved them from said informants on the same day as their scheduled interviews, and destroyed them thereafter.

### 3.3 Case-law (document) analysis

The second method of data collection involved case-law (document) analysis of written sentencing decisions. In this research project, and not unlike other analytical methods in
qualitative research, “document analysis requires that data be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge” (Bowen, 2009, p. 27). I analyzed approximately 125 case-law decisions related to Indigenous accused originating from Lower/Trial and Appellate Courts, as well as the SCC, commencing with *R. v. Gladue*, 1997, to the Ontario Court of Appeal (hereinafter referred to as ONCA) with the *R. v. Macintyre-Syrette*, 2018 ONCA 259 decision on March 19, 2018.

The 1999 SCC decision in *R. v. Gladue* is the most significant precedent-setting case, as it provides guidelines for the judicial interpretation of section 718.2 (e). Relevant case-law was, for the most part, considered for inclusion in this research project if the matter before the court was decided following the 1999 *R. v. Gladue*’s SCC decision date. Specific criteria for selecting cases involved a broad array of themes and/or topic areas, which were directly or indirectly related to section 718.2 (e) and *R. v. Gladue*, ranging from “get-out-of-jail-free cards,” as addressed in *R. v. Kakekagamick*, 2006 CanLII 28549 (ONCA) (hereinafter referred to as *R. v. Kakekagamick* and retrieved from [http://canlii.ca/t/1p52k](http://canlii.ca/t/1p52k)), and *R. v. Brookwell*, 2012 ABCA 226 (hereinafter referred to as *R. v. Brookwell*); to “demarcation between less serious and more serious offences,” addressed in *R. v. Gladue; R. v. Wells*, [2000] 1 S.C.R. 207 (hereinafter referred to as *R. v. Wells*); and *R. v. Ipeelee*. To gain access to these written decisions, I relied on three different databases: Canadian Legal Information Institute (hereinafter referred to as CanLII) database, LexisNexis Quicklaw database, and WestlawNext Canada database.
3.4 Coding and analysis

Following completion of the informant interviews in late June 2016, the corresponding audio-recordings were transcribed. Interview transcripts were individually coded to ensure I could readily identify individual informants and what they had said in the interview, without personally identifying them. I had a discussion with individual informants about the problem of anonymity prior to beginning the interviews. According to Statistics Canada, as of July 1, 2018, PEI’s population was estimated to be 153,244 (Prince Edward Island Statistics Bureau, 2018, para. 1). Considering its relatively small population, completing research in PEI typically involves small numbers, and such was the case in my research project. Several informants acknowledged that considering PEI’s small geographical size and limited number of people occupying all five informant groups, the identification of individual informants, by reviewing the dissertation, would be relatively easy and anonymity could certainly not be guaranteed. All informants, except one, agreed to be personally identified. As the consent form did not have an explicit bullet about using one’s name, I wrote, by hand, on the front page of the Interview Guide, the following: “Name referenced in data analysis/dissertation – yes or no.” I also double-checked with informants about identifying them by name when I initially forwarded the transcripts and subsequently direct quotes (some of which I intended to use in my dissertation) for their review. I ultimately decided to use anonymized codes rather than proper names, primarily because the informant's position/title in relation to the CJS was more analytically significant. Also, I wanted to ensure as much anonymity as possible.
Once all the informant interviews had been completed and corresponding audio-recordings transcribed, I listened to the recordings, to ensure the resulting transcripts accurately captured what was said during the interview. Once I had finished reviewing all the transcripts, I forwarded them to individual informants, affording them two weeks to both consider the transcript and make any revisions they deemed appropriate prior to proceeding to the data analysis stage. All but one informant chose to give their consent to being personally identified by name, and all but one agreed to be audio-recorded during the interview. After being given the opportunity to review the transcripts, 11 informants did not request any revisions, whereas eight requested minor grammatical, stylistic and/or clarification related changes. The informants were also subsequently provided copies of direct quotes taken from the transcripts for potential inclusion in my dissertation, which resulted in 11 informants not requesting any revisions, whereas eight requested minor grammatical, stylistic and/or clarification related changes. Of these 11 informants, only five requested revisions in both the transcripts and direct quotes (four belonging to the legal informant cluster and one belonging to the Elder and Gladue Writer cluster), whereas four of the six in the Elder and Gladue Writer informant cluster, and four of the 13 in the legal informant cluster did not request any revisions in either of the two documents.

I developed a coding scheme, once identifiers had been removed from informant interview transcripts, whereby specific informants were assigned different numbers which enabled me to focus on what was being said, rather than merely who was making the comments. Coding in this manner allowed me to (1) include comments in the dissertation by an informant from within a specific informant group; (2) avoid over
exposure to any single informant’s views; and (3) identify a specific informant if she or he had decided to either terminate, or, alternatively curtail her or his participation in this research project.

Bouma, Ling, and Wilkinson (2012) state, “qualitative researchers look through interviews, textual data, and observational data for recurring ‘themes’ or issues” (p. 235). After formulating my research problem, and prior to approaching my data (i.e. before the informant interviews and coding of transcripts), I utilized the literature and case-law to generate sensitizing concepts or preliminary themes. I used the case-law in terms of their outcomes and analyzed the discourses in the reasoning of judges in their written decisions. By focusing on the preliminary themes which appeared most often, I was able to identify core and sub-themes. I then created a master list of themes which I organized and coded by ascribing specific numbers to these same themes. I used these numbers to create an index, such that, I could readily access them as needed. This index, in addition to identifying individual themes, provided details (e.g. author, source, date, page number(s)) and description (i.e. context) of each theme. As I continued my analysis of additional case-law decisions and interview transcripts, I identified additional themes and assigned specific numbers. Some themes were subsequently deemed less significant, as they were less apparent in either case-law decisions or informant interviews, whereas others were considered recurring themes of significance across informants and in the case-law. I also found that certain themes which had been identified relatively early had to be broadened or modified later, as core or sub-themes.
3.5 Methodological limitations

Methodological limitations refer to gaps or shortcomings in using a specific approach. Qualitative analysis encourages interviewees/informants to expand on their initial responses, as well as express their respective attitudes and/or thoughts about a specific subject matter. When the number of informants is relatively small, as was the case here, it might be viewed as challenging to generalize the results to the wider Canadian CJS. However, based on my theoretical framework and methodological approach of in-depth interviews with virtually all key CJS informants in PEI, this constitutes a strength, rather than a limitation. It was not my objective to generalize my findings outside PEI, but rather examine the implementation process associated with section 718.2 (e) and \textit{R. v. Gladue} when dealing with Indigenous peoples who come before the court in PEI. At the same time, by situating PEI as part of the CJS in the Canadian settler colonial state, my research findings do have relevance in other jurisdictions comprising the broader legal institution. While the specifics are distinct to PEI, the analysis has analytical significance elsewhere in Canada.

Another methodological limitation involving my use of semi-structured interviews is the interpretive aspect and accurately capturing what informants communicated during the interviews. I addressed this by providing transcripts and subsequently direct quotes for informant review, with the opportunity to make any revisions they deemed appropriate without fundamentally altering the raw data. The relationship between me as a researcher and informants from both clusters posed another potential issue. As previously noted, my history of employment with the Department of Justice and Public Safety involved working with Indigenous communities and legal
professionals in PEI. Overall, I believe this history facilitated the level of participation and rapport with informants, rather than it being an impediment.

A potential limitation is homogenizing Indigenous peoples and their experiences and/or doing research and analysis from a Eurocentric (settler) perspective. In carrying out qualitative research, there is always the possibility of engaging in what Glenn (2015) calls “liberal inclusion,” thus working within “the very narratives, logics, and epistemologies that undergird settler colonial projects,” relying on “strategies and solutions that adhere to modernist concepts of progress, individuality, property, worth,” which ultimately “are fated to reproduce the inequalities that colonialism has created” (p. 55). I approached each interview by not presupposing the stance/position of individual informants on any of the issues under discussion, and/or based solely on the group cluster to which she or he belonged. The semi-structured interview approach provided informants the opportunity to shape interview content by allowing unanticipated themes to emerge. To avoid homogenization, I focused my research on one Canadian jurisdiction (PEI) in order to examine micro-level specificity of settler colonialism in terms of Mi’kmaq and non-Indigenous peoples’ experiences and perspectives in a specific time and space.

It is important to keep in mind that my own biases, observations, and opinions, as a non-Indigenous researcher, may not only have influenced individual informant responses, but also the very nature of this research project. The analytical trap I attempted to avoid involved both my employment history with the CJS in PEI and more recently, the expansion of my intellectual horizon regarding Indigenous peoples and their enduring struggle with the Canadian settler state, potentially resulting in my having pre-conceived
notions of what constitutes the “rule of law” and “justice.” Furthermore, I recognized that my positionality as a settler and researcher could potentially shape multiple aspects of carrying out the research, beginning with my initial preparation to conduct this project, formulation of the research questions, development of pilots from which the interview guides were crafted, the manner in which the interviews were conducted, and the way I carried out the data analysis and prepared the dissertation. This reflexivity enabled me to have what Callaway (1992) characterizes as a “continuing mode of self-analysis” (p. 33). As is the case with this or any other research project utilizing qualitative methods, every aspect “has been mediated by who I am, and the lens through which I view the world” (Bourke, 2014, p. 5).

3.6 Ethical considerations

Prior to retiring in 2010, as previously noted, I was employed with the Department of Justice and Public Safety in PEI, primarily in community-based corrections, and more specifically, Probation Services. During my time with Probation Services, I was the sole Probation Officer assigned to the Lennox Island First Nation reserve (see Appendix J) for several years, thereby in a position of authority. Considering my positionality with respect to both informant clusters, it was imperative for all informants to fully understand that I was not serving in my former capacity as a Probation Officer, but rather solely as a researcher. In this role, it was not so much about eliminating bias altogether, as it was being cognizant of, and adapting to, how my positionality as a settler had shaped my relationship with informants and as a result, had the potential to impact the overall research project.
Based upon the relatively small size of PEI, and, by extension, the limited number of persons who deal with Indigenous peoples who come before the court in the Province, I informed each informant early in the research process that it would be virtually impossible to guarantee that their identities would remain completely anonymous, which I have discussed above. I also advised informants before individual interviews commenced that they were participating in this research project wholly on a voluntary basis and if, for any reason, she or he became uncomfortable with a certain line of questioning, they could either refuse to respond, terminate the interview and/or withdraw from this research project. No informants chose any of these three alternatives. However, as previously noted, one informant expressed the wish not to be audio-recorded and one did not want to be personally identified, both requests were honoured.

Throughout the course of this research project, I was acutely aware of the need to maintain strict confidentiality, particularly when dealing with Gladue Reports, which contain highly sensitive personal background information. This level of awareness was not only based on an undertaking I had previously made with Jonathan Rudin, or, for that matter, my previous employment with the Department of Justice and Public Safety, but more so because these three Gladue Reports conveyed unique stories of individuals who had come before the court. Indiscriminate dissemination of these Reports would have constituted a serious ethical breach and I undertook the following tangible steps to mitigate this ethical concern: first, none of the three Indigenous accused, concerning whom these Gladue Reports were prepared, resided in PEI; second, all three Reports were prepared by different Gladue Caseworkers with ALS in Toronto; third, upon receipt, all three Reports had been redacted, with identifiers already removed; fourth, I
hand-delivered the three Reports to individual informants prior to the interviews taking place with the mutual understanding that the Reports would be returned to me immediately following the interview; fifth, the three Reports were utilized for the sole purpose of this research project and apart from when they were being reviewed by informants, were in my possession; sixth, upon completion of the interviews, I retrieved the Reports from informants and destroyed them. Finally, once a legal matter has been dealt with according to law, the resultant Gladue Report, as is similarly the case with a Presentence Report (hereinafter referred to as a PSR), is considered part of the so-called public record18.

In an attempt to alleviate a commonly held and legitimate concern of informants about the dissemination of information following the completion of any research project, all forms of communication such as informant contact details, e-mail messages, letters of introduction, audio-recordings, thumb-drives, participant consent forms, interview notes, interview guides, and transcripts were collected and stored either on my own password protected, personal laptop computer, or, alternatively kept in a locked, fireproof container, inaccessible to anyone, other than myself and my PhD Faculty Supervisor.

18 As part of the public record, in PEI, there is a protocol to follow with respect to the distribution of Gladue Reports following final resolution of a case. To ascertain this protocol, I spoke with Donna L. Arsenault, Deputy Registrar, Department of Justice and Public Safety, Legal and Court Services, in Summerside, PEI, prior to the commencement of the interviews in the spring 2016. At that time, I was informed if a member of the public wanted to have access to a Gladue Report, protocol in the Province dictated that the person making the request would have to first speak with a Provincial Court Clerk about the matter. Subsequently, if it was determined the case in question had already been properly disposed, a written request would have to be made to the presiding Judge who had heard the original matter. The same Judge would then consider the request and make the final determination as to whether the Report should be released, in whole or in part, to the person making said request. This protocol is virtually identical to the formal process involved in a Freedom of Information and Protection of Privacy Act (FOIPP) request in the Province of PEI.
Personal identifying information, other than duly signed “participant consent forms” and/or names or addresses of those who were provided electronic copies of individual interview transcripts and subsequent direct quotes I intended to utilize in the dissertation, were stored separately from the raw data, and removed during the transcription phase, to help further ensure confidentiality.

3.6.1. Ethical considerations vis-à-vis Indigenous informants

Throughout the course of three decades, I engendered long-standing relationships with members of Indigenous communities in my home Province, although did not fully appreciate my positionality as a settler during the same time-span, in terms of how I engaged with Indigenous peoples who came before the court. However, it was significantly important for me, as a non-Indigenous researcher, to fully comprehend that the way I carried out my research was inextricably linked to my status as a settler. I was also cognizant of the fact that participating in a formal interview and talking therein about the sensitive issue of overrepresentation of Indigenous peoples in the Canadian CJS, especially its prisons, may cause undue stress for some informants, especially Elders. Therefore, prior to these interviews taking place, the three Elders were afforded the option of having a support person/advocate present during the interview, although all three declined.

One of my primary ethical considerations as a non-Indigenous researcher was to avoid (re)producing the historically exploitive relationship between the academy and Indigenous peoples by reminding myself of how Tuhiwai-Smith (1999) describes research as “one of the dirtiest words in the [I]ndigenous world’s dictionary […] it stirs up silence, it conjures up bad memories, it raises a smile that is knowing and distrustful”
Concrete measures taken to mitigate this potential harm included: engaging Indigenous informants early and often about the research process, being mindful of potential harm, building upon the existing level of trust and mutual respect, and being honest and forthright throughout the entire research project.

I reviewed and applied the principles of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (2014), Considerations and Templates for Ethical Research Practices (2007) and requirements set out by the University of New Brunswick (hereinafter referred to as UNB) Research Ethics Board (hereinafter referred to as REB). Equally important, I first ensured that my research project complied with Mi’kmaw Ethics Watch (2009) and requirements of MCPEI Ethics Review Committee prior to the commencement of interviews with any informants. I received MCPEI and then REB approval prior to scheduling interviews or speaking with any Indigenous peoples directly affiliated with this research project. I also shared transcripts and direct quotes with informants to ensure they were comfortable with same.

3.6.2. Ethical considerations vis-à-vis legal informants

Due to my prior employment history, I worked alongside the majority of people comprising the legal informant cluster for many years in my capacity as a Probation Officer and then later as Manager of Probation Services for the Province. This long-term working partnership undoubtedly helped me gain access to informants and strengthen the degree of trust and rapport in the interviewer-interviewee relationship; however, I was conscious of the fact that my role as a researcher was quite different from my previous role as a Probation Officer. This dramatic shift was especially challenging when it came to the data analysis. For instance, having a sense of allegiance/loyalty to many of these
same legal informants, both on a professional and personal level, I was aware of sometimes being inclined to be protective of what they and the legal system represent.

Over the course of this research project, I was mindful of certain CJS accused being identified, principally by informants during individual interviews. In this regard, it was never my intention, as a researcher, to collect or retain any information whatsoever on specific accused or their respective cases, unless their identities already formed part of the public record (e.g. case-law, completed court cases, and/or the news media).

3.7 Conclusion

In this research project, I utilized a two-pronged qualitative research approach which combined the use of semi-structured informant interviews and case-law (document) analysis to address the research project’s four research questions. These methods enabled me to examine the problem of overrepresentation of Indigenous peoples in the Canadian CJS, notably its prisons, at the micro, meso, and macro levels of analysis, to better understand how the 1999 SCC decision in *R. v. Gladue*, along with its guiding principles, have been implemented, to date, in PEI.

I purposely recruited informants from within the CJS and Indigenous communities across PEI, such that, this research project takes into consideration the views of people whose everyday actions (or inactions) have material effects on what happens to Indigenous peoples in the CJS, specifically as it relates to the implementation process associated with *R. v. Gladue*. In this chapter, I provided a detailed discussion concerning the interview guides, as it relates to the five informant groups, including my use of pilots. I discussed my approach of case-law (document) analysis in relation to the informant interviews and examined my data collection and coding processes.
There are several limitations of the methodological approach I utilized, from the relatively small number of key informants, to my positionality as a non-Indigenous researcher. I concluded the chapter by reflecting on some ethical considerations which had to be dealt with throughout the course of this research project.
4.1 Introduction

In this chapter, I critically review the general conceptual literature and corresponding case-law regarding overrepresentation of Indigenous peoples in the Canadian CJS, particularly its prisons. I address two questions: first, how scholars have approached defining overrepresentation, and second, developments in the debate regarding overrepresentation itself. As part of this review, I also consider the statistical evidence associated with overrepresentation in Canada. The following discussion focuses on the three dominant explanatory frameworks in the scholarly literature through which overrepresentation has been elucidated: 1) socio-economic disadvantage, 2) culture clash, and 3) settler colonial studies and Indigenous perspectives. I show why and how the latter emerging framework is the most appropriate in explaining overrepresentation, in comparison to the other two.

I also examine the major official attempts\(^\text{19}\) to define and address the problem of overrepresentation in Canada. These include the influential White Paper (Chrétien, 1969); Locking up Natives in Canada: A Report of the Canadian Bar Association Committee on

\(^{19}\) A sampling of some of the less well known inquires/commissions include: Government of Canada, Aboriginal People and Justice Administration: A Discussion Paper, 1991; Law Reform Commission of Canada, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice, 1991; Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, Legacy of Hope: An Agenda for Change, 2004. The Royal Commission on Aboriginal Peoples (RCAP) alone cites more than 30 additional commissions and inquiries which have come to the same conclusion, as that reached in the 1967 Canadian Correction Association’s Report – Indians and the Law, in that overrepresentation of Indigenous peoples in the Canadian criminal justice system, particularly its prisons, continues to constitute a significant problem.

Even though empirical quantitative research on overrepresentation of Indigenous peoples in the CJS does exist (e.g. Welsh & Ogloff, 2008; Balfour, 2012; Roberts & Reid, 2017), I observed a gap in the literature as it pertains to empirical qualitative research, particularly data derived from face-to-face interviews with legal professionals (e.g. judges, crown attorneys, legal aid/defence attorneys) currently employed in the Canadian CJS. This research project helps to fill this gap, following interviews with all three Provincial Court Judges, all eight Crown Attorneys, and three of the four Legal Aid/Defence Attorneys employed in the Province of PEI. The literature that does exist is based principally on official federal and provincial/territorial statistics which typically are missing raw data from certain jurisdictions, resulting in findings that are not necessarily
representative of actual practice in the field. This also constitutes the first time that this type of qualitative research has taken place in connection with how section 718.2 (e) and 
*R. v. Gladue* are being implemented in PEI. This study has the additional advantage of looking at the problem of overrepresentation through the lens of Indigenous *Gladue* Writers and Elders.

### 4.2 Overrepresentation – What does it mean? What is the nature of the debate?

When speaking about the problem of “overrepresentation” in the Canadian CJS, particularly its prisons, the term erroneously implies there is a normal or acceptable rate of incarceration pertaining to Indigenous peoples. Rudin (2005) contends that to draw any conclusions regarding overrepresentation, two types of data are required: first, “the percentage of the particular group of the overall population, and second, the proportion of the group among those in the criminal justice system” (p. 9). Thus, “all things being equal, groups should be represented in the criminal justice system in roughly the same proportion they are represented in the general population” (Rudin, 2005, p. 9; Dickson-Gilmore, & LaPrairie, 2005). The stark reality for Indigenous peoples tells an entirely different story. According to Jackson (1989), in the case of statistics measuring the “impact of the criminal justice system on [N]ative people the figures are so stark and appalling that the magnitude of the problem can be neither misinterpreted nor interpreted away” (p. 215). In this regard, Jackson (1989) suggests “Native people come in contact with Canada’s correctional system in numbers grossly disproportionate to their representation in the community” and more so than any other group in Canada “are subject to the damaging impacts of the criminal justice system’s heaviest sanctions” (p. 215).
Stenning and Roberts (2002) propose that it is important to distinguish between “overrepresentation” and “overincarceration,” suggesting that nobody can reasonably deny Indigenous peoples are overrepresented in Canada’s prisons, wherein their representation is “disproportionate to their representation in the community generally”; however, they contend that “the extent and implications of such ‘over-representation’” (p. 80) are open to debate. According to Stenning and Roberts (2002), something that is all too often lost in the overrepresentation vis-à-vis overincarceration debate is “the mere fact of statistically disproportionate representation of Aboriginal people in Canada’s criminal justice and correctional systems cannot simply be assumed to be evidence of ‘overincarceration’ in this latter sense of unjustified disproportionate representation” (p. 80). Contrary to this assertion by Stenning and Roberts (2002), most of the literature (scholarly and the state’s own reporting) consistently finds that overincarceration persists.

In explaining their opposition to the introduction of section 718.2 (e), Stenning and Roberts (2002) contend that the available knowledge concerning the nature and extent of Indigenous overrepresentation in Canada’s prisons and “the use (and questionable relevance) of the historical disadvantages which Aboriginals have collectively experienced, for understanding and effectively responding to modern-day over-representation, do not provide solid grounds for such an exclusive exemption for Aboriginal offenders within sentencing principles [emphasis added], especially when the over-representation of other groups in society is taken into account” (pp. 89-90). Furthermore, Roberts and Stenning (2001) argue there is evidence, to the extent that sentencing judges discriminate between Indigenous and non-Indigenous offenders, that “they were more likely to discriminate in favour of [emphasis in the original] rather than
against [emphasis in the original] Aboriginal offenders (i.e. more likely to give non-carceral sentences and, if carceral sentences were given, more likely to order shorter terms of incarceration)” (p. 145). Similarly, LaPrairie (1996) asserts that even though “overall, [A]boriginal offenders committed more serious offences” (p. 42), they received less [emphasis added] custodial time than non-Indigenous offenders.

When attempting to differentiate between the terms “overincarceration” and “overrepresentation,” Stenning and Roberts (2002) argue some people believe the representation of Indigenous peoples in Canada’s prisons “is not only disproportionate [emphasis in the original], in the limited statistical sense […], but also that it is unjustified [emphasis in the original]” (p. 80). This implies that Indigenous peoples, by way of overincarceration, are being “unjustifiably” sentenced to prison, either due to discriminatory-based decision-making within the CJS, or some other inappropriate application of remedial sanctions. Stenning and Roberts (2002) suggest this important distinction sometimes is overlooked and that “unjustified disproportionate representation” is not the same as “statistically disproportionate representation” and should not be regarded as such.

The crux of the argument being made by Stenning and Roberts (2001) is that while the overrepresentation of Indigenous peoples in Canadian prisons is “an undeniable, important, and pressing problem, there is little evidence that the problem has arisen as a result of discriminatory sentencing per se” (p. 165). They also argue that resolving the problem of overrepresentation is outside the purview of the presiding judge. The contention is socio-economic disadvantage, for example, is not unique to Indigenous peoples and that any remedial benefit accruing from section 718.2 (e) and R. v. Gladue as
a direct result, should be equally available to any offender whose life circumstances
warrant its application, regardless of her or his racial or cultural origins. Doing otherwise,
according to Stenning and Roberts (2001), “violates a cardinal principle of sentencing
equity that is relevant to all kinds of offenders, victims, and communities, and this
violation is simply not fair” (p. 168).

Stenning and Roberts (2002) contend that “it is not fair to sentence non-
Aboriginal and Aboriginal offenders differently solely by reason of their race without
regard to any other characteristics which they may share,” further stating “we adhere to a
desert-based perspective, which privileges proportional sentencing, and which carries a
requirement of parity of sentencing” (p. 84). One of the main reasons Stenning and
Roberts (2002) “are opposed to the Aboriginal sentencing provision in paragraph
718.2(e) is that it violates” (p. 85) the “parity principle” (section 718.2 (b) of the
Criminal Code), which states:

a sentence should be similar to sentences imposed on similar offenders for similar
offences committed in similar circumstances.

Whereas Rudin and Roach (2002), as well as Carter (2002), contend that the
impact of colonialism “must be front and centre in considering [modern day] Aboriginal
over-representation,” Stenning and Roberts (2002) proffer another “plausible”

explanation:

[A]n increasing resort to conditional sentences for relatively “high risk”
Aboriginal offenders, combined with a lack of resources within Aboriginal
communities to support such offenders and to help them avoid breaching
the conditions of their sentences, may be resulting in disproportionately
high numbers of Aboriginal offenders being incarcerated for breach of
sentence conditions, thus increasing the overall incarceration of
Aboriginal offenders (p. 88).
The same authors contend that another problem with looking at colonialism as the root cause of overrepresentation is the challenge of explaining “significant regional variation in Aboriginal over-representation today” (Stenning & Roberts, 2002, p. 82), with the problem considerably more serious in western Canada than is the case in the Province of Quebec and Maritime Provinces.

In chapters five to seven, I examine why and how overrepresentation and overincarceration continue to happen, as viewed through the lens of informants who have everyday practical experience with and first-hand knowledge of the presenting issues and situate these in the institutional context of the CJS.

4.2.1. Statistics/evidence of overrepresentation and overincarceration in Canada

According to Statistics Canada (2015), Canada’s incarceration rate in 2013/2014, (118 persons in custody per 100,000 population) ranks somewhere in the middle of Organisation for Economic Co-operation and Development (hereinafter referred to as OECD) countries, with the United States of America having the highest ranking (707 per 100,000), and Iceland the lowest (45 per 100,000). In a more recent report by The Office of the Correctional Investigator (2017), it is noted that between 2007 and 2016, “while the overall federal prison population increased by less than 5%, the Indigenous prison population increased by 39%,” and further, over the last three decades, “there has been an increase every single year in the federal incarceration rate for Indigenous people” (p. 48).

Indigenous adults are overrepresented in custodial admissions to both provincial/territorial (approximately 28%) and federal (approximately 27%) correctional services, while representing 4.1% of the Canadian adult population (Malakieh, 2018, p. 4). In 2014/2015, Indigenous adults were overrepresented in custody in most
jurisdictions, especially British Columbia, Saskatchewan, Manitoba, and Ontario (Department of Justice Canada, 2017a, para. 8), whereas the “proportion of Indigenous adults in custody relative to their proportion in the population was 8 times higher for Indigenous men and 12 times higher for Indigenous women” (Department of Justice Canada, 2017a, para. 10). Stenning and Roberts (2002) contend it is “indisputable” that the extent of overrepresentation of Indigenous peoples in the Canadian CJS “has varied significantly between different regions of the country, such that it is most serious in the Prairie provinces, less acute in Ontario and the Maritime provinces, and has apparently been non-existent in Quebec” (p. 81). Furthermore, Canada’s incarceration rate, although approximately one-sixth that of the USA, is higher than many European countries of similar social and economic development.

The problem of overrepresentation is not restricted to custodial admissions to provincial/territorial and federal correctional facilities in Canada. The Office of the Correctional Investigator (2017) identifies the “significant, seemingly intractable, performance gap that separates Indigenous from non-Indigenous offenders” serving time in federal custody in Canada, including: Indigenous offenders are released later in their sentence; disproportionately overrepresented in segregation placements as a result of the use of force in maximum security institutions and self-injurious incidents; and more likely to be returned to prison due to suspension or revocation of parole (p. 50; Nichols, 2014). On this point, Correctional Investigator, Dr. Ivan Zinger, indicates despite “faster entry into correctional programs and higher program completion rates, Indigenous offenders are still being released later and revoked more often than their counterparts,” results he suggests simply “defy reality” (The Office of the Correctional Investigator,
These statistics highlight that the overrepresentation problem is not restricted to a disproportionate percentage of Indigenous peoples spending time in custody, thereby constituting an overrepresentation problem, it also signifies that there is an “overincarceration” problem, which challenges the thesis of Stenning and Roberts. While these statistics challenge Stenning and Roberts’ overall thesis, their analysis resonates with corresponding dominant explanatory frameworks.

4.2.2. Dominant frameworks that explain overrepresentation

There has been considerable debate over the last three decades concerning the significance and extent of the Indigenous overrepresentation problem in Canada, as well as its causes. Rudin (2005) suggests that in the case of overrepresentation of Indigenous peoples in Canadian prisons, “we must try to understand why the phenomenon exists before we can attempt to address the problem” (p. 20). Three dominant explanatory frameworks in the scholarly literature which help to explain the overrepresentation of Indigenous peoples in the Canadian CJS are: socio-economic disadvantage, culture clash, and an emerging settler colonial studies and Indigenous perspective. These same frameworks have also been evident in policy venues (e.g. inquiries, commissions) to varying extents.

4.2.2.1. Socio-economic disadvantage

The first of three dominant explanatory frameworks for Indigenous overrepresentation is “socio-economic disadvantage” and begins with the correlation between socio-economic status (hereinafter referred to as SES) and greater likelihood of coming in contact with the CJS. From this perspective, the higher incarceration rates of Indigenous peoples can be explained by the greater socio-economic disadvantage generally experienced by
Indigenous peoples. SES can be defined as based on “occupation, education, and income” (Hull, 2001, p. 24). According to LaPrairie (2002), “criminological literature would suggest that these factors are critical to understanding the involvement of certain disadvantaged groups with the criminal justice system” (p. 185). Clark (2015) suggests by any standard of “measuring socio-economic well-being and opportunity, Aboriginal people register on the lowest level” (p. 6). However, LaPrairie (2002) argues while risk factors associated with “single parents, poverty, racial segregation and isolation, oppositional culture, criminogenic commodities (like alcohol and drugs) and collective efficacy have long been part of the analysis of the crime phenomena in American cities, these have largely escaped scrutiny in explaining [A]boriginal over-representation in the criminal justice and correctional systems in Canada” (pp. 185-186). In her study of nine Canadian cities (Halifax, Montreal, Toronto, Thunder Bay, Winnipeg, Regina, Saskatoon, Edmonton, and Vancouver), LaPrairie (2002) found “that ‘disadvantage’ factors (low income, employment, education, high mobility, and lone parenting) […] are differentially distributed for [A]boriginal people in the nine cities, and regional distributions parallel those for over-representation” (p. 197). Reinforcing one of her thematic statements in the same article, LaPrairie (2002) proposes that “[i]n all nine cities the [A]boriginal populations are generally disadvantaged in relation to the non-[A]boriginal populations but the degree of disadvantage [emphasis in the original] varies widely and is directly related to the level of over-representation in the relevant region” (pp. 182-183).

While Stenning and Roberts (2001, 2002) base their explanation of overrepresentation principally on socio-economic disadvantage, others (Jackson, 1992; Dussault & Erasmus, 1996; LaPrairie, 2002; Rudin & Roach, 2002; Rudin, 2005) regard
it as only one contributing factor to consider. Socio-economic disadvantage constitutes a conventional criminological explanation of criminality and, in turn, overrepresentation in Canada’s CJS, particularly its prisons, with respect to Indigenous peoples; however, a major critique of this explanation is that the “problem” rests with disadvantaged individuals or, alternatively Indigenous communities, rather than discriminatory practices carried out by the CJS. Moreover, an implication of studies such as those of Stenning and Roberts (2001, 2002), as well as LaPrairie (2002), is that imprisonment rates reflect “actual” disproportionate offending by Indigenous peoples. The other consideration is that this explanation does not address why there is such systemic disparity (e.g. colonialism, racism and racial discrimination).

One of the central questions surrounding socio-economic disadvantage as an explanation of overrepresentation, according to Whyte (2008b), “is whether negative social conditions arising from the experience of colonization have led to over-representation in the criminal justice system, […] or whether the specific features of the experience of the colonization of Indigenous peoples – alienation, oppression, disempowerment, and delegitimation – have produced these levels of offending through exacerbating the effects of social deprivation” (pp. 117-118). Jackson (1992) provides one possible rejoinder when he indicates “[s]tripped of their land, some First Nations people are forced into existing communities that are not viable and often the only reaction to situations of despair, poverty and powerlessness manifests itself in alcoholism, substance abuse, family violence and suicide to name but a few” (p. 156).

RCAP co-chairs, Dussault and Erasmus (1996), agree “economic and social deprivation is a significant contributor to the high incidence of Aboriginal crime and
over-representation in the justice system”; however, “a further level of understanding is required beyond acknowledgement of the role played by poverty and debilitating social conditions in the creation and perpetration of Aboriginal crime” (p. 46). For Dussault and Erasmus (1996), this greater understanding “comes from integrating the cultural and socio-economic explanations for over-representation with a broader historical and political analysis” and thereby concluding that “over-representation is linked directly to the particular and distinctive historical and political processes that have made Aboriginal people poor beyond poverty” (p. 46; Jackson, 1992) – the process of colonization. Dussault and Erasmus (1996) further contend that socio-economic disadvantage “contributes directly to the systemic discrimination that swells the ranks of Aboriginal people in prison” (p. 43). Murdocca (2013) critiques the socio-economic disadvantage explanation for the overrepresentation problem by suggesting, “[r]elating Aboriginal overrepresentation to social disadvantage misstates and oversimplifies a complex problem by ignoring the unique legacy of colonialism faced by Aboriginal people” (p. 41).

Socio-economic disadvantage, as a framework, is effective in explaining overrepresentation, at least in part, because it resonates with prevailing liberal discourses of individualized responsibility. According to Rudin and Roach (2002), while socio-economic disadvantage has considerable explanatory power in terms of overrepresentation, and as “a general rule, if one wants to discover who is at the bottom of the socio-economic ladder in a country, the best place to look is in the jails, for it is there that those who are different from the majority are found,” the RCAP’s problem with this framework is that it “does not explain why Aboriginal people are found at the bottom
of the socio-economic ladder” (p. 17). In similar fashion, Raven Sinclair, a member of the George Gordon First Nation (2016), notes socio-economic disadvantage has played a significant role in the lives of Indigenous peoples in Canada for decades, further stating information contained in the most recent Community Well-being (hereinafter referred to as CWB) index20 (Strategic Research Directorate Aboriginal Affairs and Northern Development Canada, 2015), “revealed that of the ‘bottom’ 100 communities in Canada rated on dimensions of education, income, labor force participation, and housing, 96 were First Nations communities” (p. 9). Likewise, the United Nations Special Rapporteur, James Anaya (2015), reports “the most jarring manifestation of these human rights problems is the distressing socio-economic conditions of [I]ndigenous peoples in a highly developed country” (p. 7) like Canada and further observes, “there had been no reduction in disparities between Indigenous people and other Canadians since 2004” (p. 4).

Stenning and Roberts (2001, p. 158) base their explanation of overrepresentation primarily on socio-economic disadvantage, although they do not limit the framework’s influence to Indigenous peoples, arguing if “the kinds of factors that place many Aboriginal people at a disadvantage vis-à-vis the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar

20 The Community Well-Being (CWB) index is a means of examining the well-being of individual Canadian communities. Various indicators of socio-economic well-being, including education, labour force activity, income and housing are combined to give each community a well-being "score." These scores are used to compare well-being across First Nations and Inuit communities with well-being in non-Indigenous communities over time.
disadvantage?” Rudin and Roach (2002) take a demonstrably different approach and contend that the “impact of colonialism must be front and centre in considering Aboriginal over-representation,” otherwise “it will not be possible to address the fundamental question of how over-representation can be stopped” (p. 17). Stenning and Roberts (2002, p. 82) counter this argument by asking whether colonialism is “significantly less malign (or at least adverse to the interests of Aboriginal people) in Quebec and the Maritimes than in the Prairies?” On this point, Stenning and Roberts (2002) suggest that while they do not deny that colonialism played a significant role “in generating the disadvantageous situation of many, if not most, Aboriginal people in Canada today, its relevance for understanding and responding effectively to the problem of over-representation of Aboriginal people in our criminal justice system in general, and to the sentencing of individual Aboriginal offenders in particular is, we believe, much more open to question” (p. 82). Stenning and Roberts (2002) further contend that the “fact and extent of regional variation in the modern over-representation of Aboriginal people in our criminal justice system suggests that factors other than the history of colonialism are much [emphasis in the original] more important in understanding it and responding to it effectively” (p. 82; LaPrairie, 2002), particularly as it relates to socio-economic disadvantage and culture clash. Stenning and Roberts (2002) are essentially arguing here that colonialism helped to explain discrimination and inequality when it came to over-representation in the past, although colonialism no longer exists in Canada.

Jackson (1992, p. 154) asserts “[w]hile not denying the harsh reality of poverty, its correlation with criminality and imprisonment, there is a body of opinion, to which most [N]ative peoples themselves subscribe, which maintains that poverty by itself is not
a sufficient explanation for high [N]ative crime and incarceration rates.” According to Carter (2002), “poverty and other incidents of social marginalization may not be unique, but how people get there is” (p. 71). Shelly Johnson, a member of the Saulteaux Nation (2014), proposes, “the devastating history of colonization, social inequality, racism, and Canada’s historic and modern government policies of oppression and alienation of lands and resources contribute to the current socio-economic conditions affecting Indigenous peoples” (p. 3).

Although socio-economic disadvantage has considerable explanatory power concerning the problem of overrepresentation, focusing strictly on socio-economic deprivation factors ignores or at the very least, diminishes the distinct experience of colonialism for Indigenous peoples in producing these systemic conditions.

4.2.2.2. Culture clash

A second dominant explanatory framework is “culture clash,” sometimes referred to as the “culture clash theory of discrimination.” According to Rudin (2005), this explanation starts from the premise that “Aboriginal concepts of justice and Western concepts of justice are very different” and concludes “when Aboriginal people are required to fit into a system that does not recognize their values, overrepresentation occurs” (p. 22). As is similarly the case with socio-economic disadvantage, the scholarly literature promulgates the notion that culture clash cannot stand-alone in explaining overrepresentation, although does have its own level of explanatory power (Jackson, 1992; Dussault & Erasmus, 1996; Rudin and Roach, 2002; Rudin, 2005; Hurlburt & MacKenzie, 2008; Murdocca, 2013; Comack, 2014).
Comack (2014) adopts a culture clash type of explanation in likening Indigenous peoples’ encounters with the Canadian CJS as being in unfamiliar and precarious terrain, suggesting, as Monture-Okanee and Turpel (1992) do, that it is a system “constructed with concepts that are not culturally relevant to an Aboriginal person or Aboriginal communities” (p. 49). Moreover, Comack (2014) suggests while violence has come to be associated with “racialized spaces of the inner city – especially in the Prairie provinces, where inner-city neighborhoods are heavily populated with Aboriginal people – violence in white, middle-class neighborhoods is constituted as different from the “Other” (Indian) spaces” (p. 59; Razack, 2000). Murdocca (2013) claims that “culture clash” mistakenly results in the view that the impact of colonization on Indigenous peoples and its legacy “is anchored in a fundamental problem of cultural difference” and consequently, “obscures the very conditions of colonial violence and genocide in favour of a language of cultural difference that exists outside of the very historical and colonial conditions that produced it” (pp. 42-43). Additionally, the term “clash” tends to denote “failure” on the part of Indigenous people to “adapt,” rather than imply a power-imbalance between Canada, as a settler colonial state, and Indigenous peoples individually and as a whole. Murdocca (2013) argues that even though the RCAP “highlights the impact of colonialism and colonial dispossession in Aboriginal communities, it ultimately found in its conclusion that Aboriginal encounters with the criminal justice system are framed by a clash of cultural proportions” (p. 42). The first major finding of the RCAP seems to articulate a framework of culture clash, wherein it states that the principal reason that the Canadian CJS has failed the Indigenous peoples of Canada so badly is because of “the fundamentally different world views of Aboriginal and non-Aboriginal people with
respect to […] the substantive content of justice and the process of achieving justice” (Dussault & Erasmus, 1996, p. 309).

Hubbard and Razack (2011) argue that “this is not simply two [culturally different] worlds colliding but a collision between colonizers and colonized, a violent, deadly collision” and it “remains to be seen whether the gulf between the two worlds can be bridged” (pp. 327-328). This collision is so much more than two comparably powerful cultures at odds with each other but is rather a fundamentally oppressive colonial relationship characterized by immense power inequalities/imbalances. Like socio-economic disadvantage, “culture clash” minimizes historical-structural context. Hubbard and Razack (2011) further suggest “[w]e need to reframe the preferred settler vision of individual ‘bad acts’ with a wider lens, to see clearly what Sherene [Razack] names as the sociopathology of state-sponsored colonialism” (p. 331), and a “clash” on an uneven field. The Euro-Canadian justice system “espouses alien values and imposes irrelevant structures on First Nations communities” and additionally, “in all its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness” (Jackson, 1992, p. 156), and by logical extension, the problem of overrepresentation. The notion that the CJS is “designed” to function as it does, seemingly implies overrepresentation is a direct byproduct or purpose of that same design.

The scholarly literature referenced in this section examines the interaction of Indigenous peoples with the settler colonial CJS and its impact. This narrative is similarly conveyed in the case-law and chronicled by both Indigenous and non-Indigenous scholars alike. In the Final Report of the TRC of Canada (2015), for example, commissioners
“heard numerous accounts of the hardships experienced by former residential school students who became involved with the justice system” and for many, “there were painful parallels between their time in school and their time in jail” (p. 171). Furthermore, Alfred (2009a) suggests as Indigenous peoples, “[w]e need to realize that ways of thinking that perpetrate European values can do nothing to ease the pain of colonization and return us to harmony, balance, and peaceful coexistence that were – and are – the ideals envisioned in all traditional Indigenous philosophies” (p. 65). TRC (2015) commissioners maintain that until “Canadian law becomes an instrument supporting Aboriginal peoples’ empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force” (p. 205).

Rudin and Roach (2002) proffer that “culture clash theory is helpful in understanding why, for example, Aboriginal people so often plead guilty to offences,” especially if you consider that “many, if not most, Aboriginal cultural practices require people to take responsibility for their actions” and “terms like ‘guilt’ and ‘innocence’ were unknown concepts in Aboriginal languages” (pp. 16-17). Hurlbert and McKenzie (2008) explain it this way, “Aboriginal values of dignity, reluctance to plead not guilty and testify in court, conflict with the traditional Canadian combative court procedure and criminal sanction” (p. 147). Gang (2010) proposes “[o]ne of the reasons that Western formal justice does not translate well into collective societies is that manipulation of guilt cannot easily be substituted for manipulation of shame; collective societies reliant on playing a role in the creation of shame are left without a role” (p. 32).

Yet critics raise points which appear to undermine some of the main tenets of culture clash theory. One of these is the insight by Murdocca (2013, pp. 40-41) that one
“problem with the culture clash theory,” according to the RCAP, “is that it does not explain why Aboriginal people who have not been raised in traditional homes find themselves behind bars.” Rudin and Roach (2002) agree with this assessment, stating “[t]he RCAP study found that in some prisons in Canada, over 95 per cent of the Aboriginal inmates had been adopted or raised in foster care. If the cause of over-representation was a clash of cultures, one would expect Aboriginal people who were raised primarily, if not exclusively, in non-Aboriginal homes to buck the over-representation trend; this has not occurred” (p. 17). Furthermore, one’s residency (on- or off-reserve) has serious implications when it comes to ascertaining “authentic Indigeneity,” a topic discussed in chapter seven.

A third, and emerging dominant explanatory framework is settler colonial studies and Indigenous perspectives, and it is to this discussion that I now turn.

4.2.2.3. Settler colonial studies and Indigenous perspectives

Proponents of settler colonial studies and Indigenous perspectives, as an emerging dominant explanatory framework, understand overrepresentation in the context of ongoing colonialism and as a systemic form of elimination (e.g. Coulthard, 2014; Alfred 2009a; Simpson, 2014; Nichols, 2014). This framework forms the foundational theoretical underpinning for this research project. This section focuses on what Veracini (2011) refers to as “settler colonialism in its specificity” (p. 2), principally in the context of the Canadian CJS, and through the experiences of Indigenous peoples. While the dominant model of justice is based on an individualized, sanction-based, and proportional approach; Indigenous peoples take a more holistic and restorative justice-type approach, whereby harmony, balance, and healing take precedence. Cunneen (2011) speaks about
the importance of understanding Indigenous perspectives when researching Indigenous justice issues such as overrepresentation, suggesting it is “not that [I]ndigenous people are ignored – quite the contrary they are the object of intense scrutiny and interventions. However, their understanding and explanations for their own predicament vis-à-vis western law and justice is ignored” (pp. 256-257).

Monture (2011) submits that Canadian study after study has demonstrated that “Aboriginal people do not view the criminal justice system as a system that represents or respects them,” and as a result, “the perceptions of Aboriginal peoples (while keeping in mind their diversity) thus thoroughly challenge the perspective of those who regard Canada to be a free and democratic state” (p. 244). Monture-Angus (1999a) suggests “a criminal court is not interested in hearing about this long trail of individualized and systemic colonialism which leads to conflict with the law […] are only interested in whether you committed a wrong act with a guilty mind,” constituting what she referred to as “a clear example of how the individualized nature of law obscures systemic and structural factors” (p. 27). Furthermore, this does not constitute a culture clash per se, but more so takes place at the institutional-individual level, where individual Indigenous accused appear before the court and are dealt with according to law.

Cunneen (2014) states that the problem of overrepresentation of Indigenous peoples “needs to be contextualized within the broader framework of the effects of colonization,” these effects ranging from “long-term social and economic marginalization, and limited recognition of indigenous law and governance” (p. 1). Even though the ground-breaking SCC decision in R. v. Gladue did not use the term “colonialism,” David Leo Milward, a member of the Beardy’s and Okemasis First Nation
(Cree) and Debra Parkes (2014) contend “it is important to the implementation of section 718.2 (e) that the overincarceration of Aboriginal people be understood as one of the many manifestations of colonialism and systemic discrimination faced by Aboriginal people in Canada” (p. 119). Rudin and Roach (2002) propose “the legacy of colonialism faced by all Aboriginal people provides a richer explanation of over-representation and suggests that s. 718.2 (e) is appropriately targeted at all Aboriginal people,” and not “fatally and dangerously under-inclusive” (p. 5), as critics Stenning and Roberts (2001) purport. For scholars who centre settler colonialism, culture clash and socio-economic disadvantage are rooted in the violence of settler colonialism, which, in turn, places the emphasis on settler colonialism and the legal system as the problem.

4.3. Indigenous overrepresentation as part of the Canadian political discourse

This section provides background for the overrepresentation of Indigenous peoples in Canadian prisons and how the problem has been taken up by two levels of government (i.e. Federal and Provincial), particularly by legal professionals in the CJS. Sentencing in Canada is beset by numerous problems, “including disparity […] little transparency […] a general overuse of custody as a sanction […] low levels of public confidence,” yet one weakness “stands above the rest: the high number of Aboriginal persons in prison” (Roberts & Reid, 2017, p. 314). At a certain point in time, in virtually every country with an Indigenous population, it is recognized that the state CJS has failed and continues to fail Indigenous peoples. Napoleon and Friedland (2014), for example, contend that across the globe, “the grim statistics are similar. Indigenous peoples face substantially higher rates of incarceration than their non-Indigenous counterparts and they also face disproportionately higher rates of violent crime, victimization and death” (p. 9).
The scholarly literature supports the view that the overrepresentation of Indigenous peoples “has not been part of Canada’s criminal justice system for its entire history,” first emerging, according to Rudin (2005), “as an issue following the Second World War” (p. 11). Hamilton and Sinclair (1991), in the seminal AJI of Manitoba, affirm this fact when they contend that prior to the Second World War, “Aboriginal prison populations were no greater than Aboriginal representation in the [general] population” (p. 101; Rudin, 2008, p. 687; Palys, Isaak, & Nuszdorfer, 2012; Pelletier, 2001). Following the Second World War, ensuing economic boom, and end of the Draconian Pass System in 1951, the result, according to legal scholar and emeritus professor of law at the University of Saskatchewan in Saskatoon, Saskatchewan, Tim Quigley, was “the urbanization and consequently ghettoization of Indigenous peoples, especially in western Canada” (personal communication, September 18, 2018). Neilson and Robyn (2003) state this “urbanization,” in turn, coincided with “educational failure, juvenile delinquency, and rising crime, all symptomatic of family breakdown, loss of traditional social control by [E]lders, and alienation” (p. 39; LaPrairie, 1994), ultimately resulting in more and more Indigenous people spending time in Canadian prisons. Additionally, Jackson (1988) argues that in Canada, for approximately six years following the Second World War, if Indigenous peoples committed an offence under the Indian Act, they were imprisoned for participating in “potlatch or feast system” ceremonies, which “amongst several Indian Nations” continue to function “as a vital part of community decision-making” (p. 44). This criminalization practice began in 1884.

Another factor which came about after the Second World War and is referenced by AJI of Manitoba, Aboriginal Justice Implementation Commission, Commissioners
Larry Chartrand and Wendy J. Whitecloud, a member of the Sioux Valley Dakota Nation (1999), involves policing agreements\textsuperscript{21} with the RCMP and enforcement of Canadian law. Scott (2018) argues RCMP policing agreements “played a large part in this story, due to the introduction of consistent Canadian law enforcement in communities where, until that time, Aboriginal law still operated” (p. 23). Therefore, the causal implication is if you have more RCMP policing, there will be more contact and thus more arrests.

Further, Chartrand and Whitecloud (1999) state the “third justice regime\textsuperscript{22}” continued to operate after World War II, although its effects were dramatically different, submitting “the official rules did not change, but that the reality of contact and enforcement, as opposed to theory, did supplant Aboriginal law in this period […] and the consequence has been disastrous for the Aboriginal community.” Chartrand and Whitecloud (1999) also suggest the 1955 Bracken Report, “which led to the wider availability of alcoholic beverages in the province [Manitoba], accelerated the trend to greater Aboriginal

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\textsuperscript{21} From 1932 to 1938, the Royal Canadian Mounted Police (RCMP) took over provincial policing in Alberta, Manitoba, New Brunswick (NB), Nova Scotia (NS) and Prince Edward Island (PEI), nearly doubling in size to 2,350 members. The years following World War II saw a continued expansion of the RCMP’s role as a provincial force. In 1950, it assumed responsibility for provincial policing in Newfoundland and absorbed the British Columbia provincial police (Royal Canadian Mounted Police, 2017, paras. 9 and 10).
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\textsuperscript{22} The “third justice regime” extends from the time of Manitoba’s entry into Confederation in 1870 to the present. The third justice regime differed drastically in official character from its predecessor. Indeed, all the rules changed for Manitoba’s Aboriginal inhabitants. After Canada assumed responsibility for the West, its administrators actually attempted to take control of the lives of Aboriginal people. Their approach relied on three key steps: first, the signing of the treaties which transferred vast tracts of land to the government; second, the passage of the \textit{Indian Act} which granted absolute power over Indian people to a Federal Department and its agents (both the treaties and the \textit{Indian Act} were in place by the end of the 1870s); and, third, the direction of the Metis, separated from Indians by these administrative and legal decisions, onto a different path in 1870. Within two decades, Aboriginal people had been pushed aside by incoming settlers. They remained in a backwater, neglected by Ottawa and offered little support by the province (Chartrand & Whitecloud, 1999).
}
involvement in the justice system.” While this is noteworthy, it suggests a pathologizing of Indigenous peoples’ alcohol abuse within the context of Manitoba.

It appears that even though overrepresentation first emerged as an issue following World War II, it “did not become a matter of significant public policy until the late 1980s” (Rudin, 2005, p. 11). While the existence of Indigenous overrepresentation had been a reality for some time prior to its publication, the release of Locking up Natives in Canada (1988) brought the issue to the fore. The Report written by Professor Michael Jackson of the University of British Columbia, “provided a comprehensive Canada-wide look at Aboriginal overrepresentation” (Rudin, 2005, p 11). The Report detailed levels of Indigenous overrepresentation throughout Canada, with an emphasis on the western provinces, and showed that “approximately 10 per cent of federal male inmates and 13 per cent of federal female inmates were Aboriginal. Even more worrying was the fact that rates of overrepresentation were increasing over time” (Rudin, 2008, p. 688).

McNamara (1991, p. 48) contends that over the last two decades, a number of key reports addressing CJS reform in Canada were released with the aim of better accommodating Indigenous peoples, most notably: Justice on Trial – Report on the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (Cawsey, 1991); Saskatchewan Indian Justice Review Committee, Report of the Saskatchewan Indian Justice Review Committee (Linn, 1992a); and Saskatchewan Métis Justice Review Committee, Report of the Saskatchewan Métis Justice Review Committee (Linn, 1992b). Rudin (2008) maintains both the Manitoba and Alberta Reports “highlighted the issue of Aboriginal over-representation and raised concerns about the need to address the trend of ever-increasing rates of over-representation” (p. 688);
whereas, the AJI of Manitoba “advocates for Aboriginal communities a level of autonomy in the administration of justice which is unprecedented since the erosion of traditional Aboriginal social and political institutions began following Manitoba’s entry into Confederation in 1870” (McNamara, 1991, p. 48).

The Royal Commission on the Donald Marshall, Jr. Prosecution in the late 1980s, according to McMillan (2016), “remains the most important public inquiry into the relations between First Nations peoples and the criminal justice system in the history of Nova Scotia” (p. 187). This was true because Marshall’s wrongful conviction and life sentence for a murder he did not commit in 1971 “exemplified the profound systemic discrimination experienced by Indigenous peoples as they encountered the Canadian justice system” and “generated 82 recommendations to correct systemic faults in the administration of justice which, when adopted, significantly transformed the criminal justice system in Nova Scotia and across Canada” (McMillan, 2016, p. 188). The Marshall Commission, according to McMillan (2016), “confirmed that the Mi’kmaw have distinct cultural understandings and customary law practices by identifying […] the need for a community-controlled ‘Native Criminal Court’ [recommendation 20] and a ‘Native Justice Institute’ [recommendation 21] to provide holistic Indigenous approaches using customary law principles as an alternative to the adversarial justice system” (p. 189). Over the course of the last three decades, both of these recommendations have come to fruition, 21 in July 2002, when the Mi’kmaq Legal Support Network (hereinafter
referred to as MLSN\textsuperscript{23} opened its doors in Truro, NS. Recommendation 20 was realized with the introduction of the Province’s first Indigenous Wellness and Gladue Court\textsuperscript{24} in April 2018, which is situated in Wagmatcook First Nation in Cape Breton Island, NS. Furthermore, McMillan (2016) suggests the Mi’kmaw in the Province of NS “welcomed efforts to indigenize [emphasis added] the system but cautioned, ‘[a]n indigenization of the present system will only serve to improve the administration of a non-Mi’kmaq form of justice, law enforcement and incarceration upon the Mi’kmaq’” (p. 190).

Friedland (2009) purports “[n]o one seriously questions the assertion that the criminal justice system has failed Aboriginal people on a massive scale, though there is considerable debate about the reasons and best solutions” (p. 106). The AJI of Manitoba in 1991 echoed a similar assessment, when AJI of Manitoba’s commissioners, in their Report’s opening statement, assert, “[t]he justice system has failed Manitoba’s Aboriginal people on a massive scale” (Hamilton & Sinclair, 1991, p. 1). The AJI of Manitoba commenced its Hearings on September 14, 1988, the impetus being the deaths of Helen

\textsuperscript{23} The Mi’kmaq Legal Support Network (MLSN) was established in July 2002, with the mandate of developing and maintaining a sustainable justice support system for all Mi’kmaw and Indigenous peoples involved in the criminal justice system in Nova Scotia (NS). The goal of the MLSN is to establish and maintain a new relationship between the criminal justice system and the Mi’kmaq and Indigenous peoples in NS. The MLSN is the only agency administering Gladue Reports in the Province of NS and hire Indigenous Gladue Writers as independent contractors. The Province, through Court Services, pays the corresponding fee for service.

\textsuperscript{24} The first Indigenous Wellness and Gladue Court in the Province of Nova Scotia (NS) was officially opened in Wagmatcook First Nation in Cape Breton Island on June 21, 2018, coinciding with National Aboriginal Day. The specialized court serves both Wagmatcook and Waycobah First Nations communities, as well as all residents in surrounding Victoria County. When announcing the establishment of the Indigenous Wellness and Gladue Court, the NS Justice Department indicated the Court would help address the problem of overrepresentation of Indigenous peoples in the criminal justice system. Chief Paul Prosper, Justice Lead for the Assembly of NS Mi’kmaq Chiefs, proclaimed that establishing NS’s first Wellness and Gladue Court in one of NS’s Mi’kmaq communities was a welcomed step toward implementing the Truth and Reconciliation Commission Calls to Action (2015) and recommendations of the Marshall Inquiry (1988).
Betty Osborne, a 19-year-old Cree woman from Norway House Reserve and John Joseph Harper, a 37-year-old member of the Wasagamack Indian Band, who was shot and killed by a police officer in early March 1988. Osborne was killed on November 13, 1971, although it wasn’t until December 1987 that the accused murderer, Dwayne Johnston, was convicted and sentenced to life in prison. These two incidents were seen by many as troubling examples of the way Manitoba’s justice system was failing Indigenous peoples. Indigenous criticism of the justice system generally has been unfavourable, and the need for change conspicuously obvious. The scope of the AJI of Manitoba included all components of the justice system, including policing, courts and correctional services and was to consider if, and the extent to which, Indigenous and non-Indigenous accused persons were treated differently by the justice system and whether there were specific adverse effects, including possible systemic discrimination against Indigenous peoples.

The key recommendations of Commissioners Hamilton and Sinclair (1991), resulting from the AJI of Manitoba, did not relate directly to the issue of overrepresentation, but more so recommended, in part, that the Government of Manitoba “recognize the right of Aboriginal communities to establish an Aboriginal justice system and work toward its implementation […] beginning with the establishment of Aboriginal courts” (p. 642); “appoint resident Aboriginal probation officers in each Aboriginal community and in urban centres, proportionate to the presence of Aboriginal people in the provincial population at a minimum” (p. 648); “ensure that at least 50% of Aboriginal people on staff in correctional institutions speak an Aboriginal language” (p. 651); and “ensure that diversion and alternate measures are applied by the police, Crown attorneys, judges and others to keep young people out of the courts” (p. 652).
The Federal Government of Canada established the RCAP in 1991, in the wake of two distinct national crises which erupted during the tumultuous “Indian summer” of 1990. The first involved the legislative stonewalling of the Meech Lake Accord by Cree Manitoba Member of the Legislative Assembly, Elijah Harper. Indigenous opposition to Meech Lake was steadfast and vociferous, in large part because Indigenous groups had not been involved in negotiating the Accord and that it was about to be ratified without public consultation. The second crisis involved a seventy-day armed “standoff” beginning on July 11, 1990, between the Mohawk Nation of Kanesatake, Quebec provincial police (Sûreté du Québec) and Canadian armed forces near the town of Oka, Quebec (Coulthard, 2014, pp. 115-116), on which date, Sûreté du Québec Cpl. Marcel Lemay was killed.

The RCAP’s comprehensive mandate included the investigation of “the evolution of the relationship among [A]boriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole […] propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and confront [A]boriginal peoples today […] examine all issues which it deems to be relevant to any or all [A]boriginal people in Canada” (p. 12). The RCAP issued its Final Report in November 1996. The five-volume, 4,000-page Report covered a vast array of issues; its 440 recommendations calling for sweeping changes to the relationship between Indigenous and non-Indigenous peoples and governments in Canada. The AJI of Manitoba was referenced only briefly in two of the five volumes, once in Volume 1, where Dussault and Erasmus (1996) speak about the “oppressive Canadian approach to bringing non-Aboriginal justice to Indians” and virtually unbridled
judicial authority of Bureau of Indian Affairs Indian agents, who “could direct that a prosecution be conducted and then sit in judgement of it,” whereas Indigenous accused “were excluded totally from the process” (p. 266). And second, in volume 3, where it was cited that AJI of Manitoba Commissioners Hamilton and Sinclair found that Elders and traditional healers were discouraged from visiting Indigenous inmates in correctional facilities “because they and their sacred articles were not accorded proper respect by correctional staff,” while non-Indigenous clergy and health professionals “were not required to undergo the same security procedures (as cited in Dussault and Erasmus, 1996, p. 278).

RCAP Commissioners, Dussault and Erasmus (1996), refer to the problem of Indigenous overrepresentation as “[i]njustice personified” (p. 28). The Report centred on a vision of a new relationship, founded on the recognition of Indigenous peoples as self-governing Nations, with a unique standing in Canada. It set out a 20-year agenda for change, recommending new legislation and institutions, additional resources, redistribution of land and rebuilding of Indigenous Nations, governments and communities. The RCAP called for action in four specific areas: healing, economic development, human resources development, and the building of Indigenous institutions, as well as provided the contextual framework in which sentencing principles, including section 718.2 (e), could have their genesis. However, over two decades later, it is compelling to note that few (estimated at 1%) of the 440 recommendations have been implemented and the scholarly literature and relevant case-law consistently confirm that the overrepresentation problem continues to worsen (Anand, 2000; Dickson-Gilmore, 2016; Jackson, 1988; Jeffries & Stenning, 2014; LaForme, 2005; Milward & Parkes,
Roberts and Reid (2017) observe that despite judgements from the SCC (R. v. Gladue, R. v. Ipeelee) and Provincial Courts of Appeal (R. v. Kakekagamick in the ONCA), “as well as several other remedial interventions, such as the creation of so-called Gladue Courts and an alternate form of custody [CSO] that would be served in the community, the problem of Aboriginal overincarceration has worsened, not improved” (p. 314). Defining their “purpose” as “primarily descriptive rather than explanatory,” Roberts and Reid (2017) argue that “there is no evidence that Aboriginals benefitted from interventions designed to reduce admissions for that category of offender” (p. 323), further asserting explanations for this trend remain “elusive.” Roberts and Reid (2017) proffer several of their own explanations for the failure of remedial efforts to date, “principally with a view to stimulating further explanatory research” (p. 335). First, section 718.2 (e) as a statutory provision, along with the formative SCC decisions in R. v. Gladue (1999) and R. v. Ipeelee (2012) “have been inadequately implemented by lower courts” (Roberts & Reid, 2017, p. 335; Pelletier, 2001; Balfour, 2012). Second, “defence advocates have been slow to bring this provision (and related judgements) to the attention of courts at sentencing” – in other words “business as usual” (Roberts & Reid, 2017, p. 335; Rudin, 2005). Third, the relatively “modest nature” of section 718.2 (e) means that “it was never likely to achieve the sea change in the sentencing of Aboriginal persons that would be necessary to significantly reduce the overincarceration problem (Roberts & Reid, 2017, p. 335). And, fourth, “a more radical possibility,” in that section 718.2 (e) has been “systematically invoked in sentencing submissions and subsequently applied by
judges across Canada, but the problem is beyond the power of the courts to remedy” (Roberts & Reid, 2017, p. 335; LaPrairie, 1990).

Roberts and Reid (2017) conclude by asserting that a much more robust effort is required to “ensure consistent application of the principles enunciated by the Supreme Court in \textit{R. v. Ipeelee} and related cases” and secondly, “a more ambitious sentencing methodology is required, one that goes further than simply encouraging courts to consider alternatives” (p. 336). However, neither of these solutions is likely to prove as successful as a holistic approach in addressing the social conditions giving rise to criminal activity and resultant overrepresentation problem within Indigenous communities. In this regard, the social conditions of Indigenous peoples in Canada, according to Sawchuck (2018), “vary greatly according to place of residence, income level, family and cultural factors and classification (i.e. First Nations, Métis and Inuit). Areas of particular social concern include housing, employment, education, health, justice, and family and cultural growth” (para. 1). Scott (2018) proposes the history of Indigenous peoples in Saskatchewan “is best understood by examining the waves of trauma-causing events [e.g. colonization, displacement, residential schools, and 60s Scoop] that crashed over Indigenous peoples and their cultures […] increasing Indigenous involvement in the criminal justice system” (p. 14). Moreover, Scott (2017) argues that a potential problem arises when traumatized Indigenous peoples are faced with the prospect of incarceration – “a disproportionately high number of dangerous offenders” (p. 132). Menzies (2008) contends discriminatory practices and racism compound the impact of trauma by fostering both oppression and what he terms
“insidious trauma,” which “becomes normalized to the point that the group does not realize how social conditions continue to oppress them” (p. 43).

Despite a succession of official reports, inquiries and commissions, as well as academic commentary, remedial reforms have been few and modest in scale. The legislative attempt, by way of section 718.2 (e), to reduce the use of incarceration for Indigenous peoples who come before the court emerged in 1995, “when Parliament codified special consideration for Aboriginal offenders as part of an omnibus sentencing reform Act, Bill C-41” (Roberts & Reid, 2017, p. 314; Daubney & Parry, 1999; Roberts & Cole, 1999; Murdocca, 2013). Stenning and Roberts (2001) speak to the importance of the AJI of Manitoba in the legislative formulation of section 718.2 (e), with the Federal Minister of Justice at the time, The Honourable Allan Rock, referring to it specifically “in explaining why the Aboriginal sentencing provision was included in Bill C-41” (p. 146). The AJI of Manitoba fostered the notion of establishing a separate, yet parallel, Indigenous justice system in Canada, although “stopped short of suggesting that discriminatory sentencing practices were responsible for Aboriginal over-representation in the correctional system” (Stenning & Roberts, 2001, pp. 146-147). This constituted the first time in Canadian history that this type of legislative approach was utilized in the area of sentencing reform, specifically as it relates to Indigenous peoples.

4.3.1. Section 718.2 (e) and R. v. Gladue

Across Canada, as in most Western countries in the 1990s, complex legislative and policy changes were taking place in the areas of crime control and social policy, whether it involved the Ontario Safe Streets Act (1999) or The Victims of Family Violence Act (1996) in PEI. At the time of its implementation in early September 1996, Bill C-41
constituted an innovative legislative platform from which the long-standing and persistent inordinately high rate of incarceration could be alleviated, principally by utilizing section 718.2 (e). According to Cameron (2008), Bill C-41 proposes that “reducing the use of incarceration, particularly in relation to Aboriginal peoples, was one of the main goals of section 718.2 (e)” (p. 164). When the SCC decision in *R. v. Gladue* was released three years later, it was hailed by some as “historic” (Rudin, 2009, p. 447), “unlike any other” (Knazan, 2009, p. 432), “ground-breaking” (Rudin, 2006, para. 8), and a “watershed” (Roach & Rudin, 2000, p. 378; Turpel-Lafond, 1999, p. 34) moment in Canadian jurisprudence. Speaking specifically about section 718.2 (e), Foley (2014) argues “[f]or Canada, its extension to consider relational aspects in its sentencing jurisprudence began with the influence of the landmark decision of *R. v. Gladue*” (p. 121).

Even though the justices in *R. v. Gladue* acknowledged many of the injustices facing Indigenous peoples in Canada and outlined therein steps towards alleviating some of the impacts of systemic discrimination, the decision in *Gladue* cannot be celebrated as a victory. Pelletier (2001), for instance, contends that based on the SCC’s “narrow view of systemic factors, the limitation it places on section 718.2 (e) through its discussion of serious offences, and the number of practical problems inherent in the application of the Court’s section 718.2 (e) framework” (p. 475), the seminal 1999 decision is a disappointment. Moreover, sentencing judges tend to rely on legally relevant factors such as “the presence of a prior criminal record, an offender’s employment status, and an offender’s education level,” which can have “an undue influence on the imprisonment rate for Aboriginal people (Pelletier, 2001, p. 475). This type of analysis fails to acknowledge and identify a number of systemic or background factors helpful in
understanding the rationale behind Indigenous overrepresentation in Canadian prisons. Furthermore, while drawing a link to one’s Indigenous heritage and culture may constitute an integral component in the lives of many Indigenous peoples, the SCC in *R. v. Gladue* “does not appear to make room in the application of section 718.2 (e) for the Aboriginal offender who has been unable to participate in his or her culture” (Pelletier, 2001, p. 477), an omission of particular significance considering the trend of many Indigenous peoples to move off-reserve and relocate to urban centres.

The other consideration with regard to section 718.2 (e) and its intended remedial legislative purpose, according to Anthony, Bartels, and Hopkins (2015), is that as a “restraint” provision, it “was not construed so as to interfere with the principle of individualized justice or equality before the law, or operate as a ‘race-based discount,’” but to the contrary, “was designed to remedy a systemic judicial failure to take proper account of the unique circumstances of individual Aboriginal offenders coming before the court” (p. 67). The principle of restraint was codified by way of section 718.2 (d) CCC, wherein it states, “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.” In combination, sections 718.2 (d) and 718.2 (e) discourage the use of imprisonment if a “less onerous sanction will satisfy the relevant sentencing principles” (Manson, 2001, p. 95). As dictated in *R. v. Gladue*, at paragraphs 36-41, “restraint means that prison is the sanction of last resort.” However, the 1996 amendments to the CCC go well beyond making imprisonment a last resort:

Restraint means that when considering other sanctions, the sentencing court should seek the least intrusive sentence [emphasis added] and the least quantum which will achieve the overall purpose of being an appropriate and just sanction. [...] [T]he Supreme Court has interpreted the recent amendments as imposing on sentencing judges the obligation to expand the use of restorative justice principles. While this is a change in
direction of general applicability, it has a special meaning when courts are responding to Aboriginal offenders (Manson, 2001, p. 95).

Whereas *R. v. Gladue* is most often cited as a remedial response to the overrepresentation of Indigenous offenders in Canada’s prisons, with “Parliament’s direction for restraint deeply embedded in an awareness of ongoing systemic inequality”; the same SCC decision also articulates a “broader social context view” that accounts for “contemporary institutional and societal forms of discrimination” (Ozkin, 2012, p. 171), which, in turn, echoes the findings of both the RCAP and AJI of Manitoba.

A holistic contextualized approach to sentencing, involving the consideration of both individual and systemic background factors, constitutes “a shift from the rights-based individualistic focus of traditional liberal legal frameworks with its emphasis on formal equality” (Adjin-Tettey, 2007, p. 184). This, according to Adjin-Tettey (2007), marks a departure from the adversarial CJS’s “preoccupation with punishment of offenders and the supposed protection of victims and society, which sometimes end up victimizing offenders” (p. 184). Within such a contextualized framework, Adjin-Tettey (2007) argues that the overrepresentation of Indigenous peoples in the CJS “is situated in broader structural and systemic processes, specifically the legacies of colonialism and neo-colonialism, rather than simply being due to their individual moral failings or some inherent predisposition to criminality” (p. 184).

Devlin and Sherrard (2005) suggest that in several leading cases, such as *R. v. Gladue* and *R. v. Lavallee*, [1990] 1 S.C.R. 852, the SCC similarly “has confirmed that it is legitimate, indeed essential, that judges explore the significance of the social context as they fulfil their responsibility for impartial judgement” (pp. 410-411). The judiciary failing to consider social context, particularly at the sentencing stage of legal
proceedings, is tantamount to heightening “the deep-rooted systemic issues that
necessitated the imposition of a remedial provision like section 718.2 (e) in the first
place” (Ozkin, 2012, p. 160). Devlin and Sherrard (2005) maintain this heightened level
of sensitivity to social context related issues should not be viewed as limited to judges
alone but argue “it is the responsibility of all members of the criminal justice system,”
thereby constituting “a systems value” (p. 438). In the sentencing process, Ozkin (2012)
contends “social context evidence must be taken into account as a mitigating factor on
sentencing in each and every case regardless of the nature of the offence” (pp. 164-165).

Empirical evaluations of section 718.2 (e) have been mixed. Balfour (2012), for
instance, utilizes quantitative analysis to examine 168 reported sentencing decisions and
assess the impacts of “progressive law reforms” introduced in 1996, including CSOs, and
found that “the potential of sentencing law reforms is realized unevenly across Canada”
(p. 85), particularly in the case of Indigenous women. In their quantitative study, Roberts
and Melchers (2003) examine provincial custodial sentenced admission statistics for
Indigenous and non-Indigenous offenders between 1978 (the year national statistics,
including the ethnicity of the offender, were first published) and 2001, and found that
even with the introduction of section 718.2 (e) in 1996, R. v. Gladue in 1999, and R. v.
Ipeelee in 2012, “little progress has been made in reducing the number of Aboriginal
sentenced admissions over the past few decades” (p. 212). Another quantitative study was
conducted by Johnson and Millar (2016), who examined manslaughter cases involving
Indigenous offenders in Manitoba (41 cases) and Saskatchewan (34 cases), dating back to
1989 (seven years prior to the codification of section 718.2 (e), up until 2012, 16 years
following codification. In the same study, these two jurisdictions were chosen due to their
disproportionately high Indigenous populations. One of the findings was that “judges state that the serious nature of the offence warrants a sentence similar to that of non-Aboriginal offenders and that the sentencing objectives of denunciation and deterrence take precedence over section 718.2 (e)” (Johnson & Millar, 2016, p. 42). Qualitative studies like mine, which involve interviews with legal actors, are conspicuously absent in the scholarly literature. This research project addresses that gap.

Section 718.2 (e) has been characterized by Devlin and Sherrard (2005) as an “unequivocal mandate” (p. 427) which “may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process” (R. v. Gladue, para. 64). However, in the case of certain offences, according to Pelletier (2001), section 718.2 (e) has been stripped of its remedial strength, and further that “disallowing the application of section 718.2 (e) for ‘serious’ offences does more than limit its remedial force – it renders the provision virtually useless” (pp. 480-481). Similarly, in speaking about the “nullification” of section 718.2 (e) Balfour (2012) argues that the “potential for decolonizing legal practice – one that locates the blameworthiness of Aboriginal offenders as relational to conditions of endangerment such as those that confronted Jamie Gladue as well as the lack of resources within their communities – is diminished by a retrenchment of retributive sentencing principles of deterrence and denunciation” (p. 91). Moreover, Haslip (2003) emphasizes it is highly unlikely that section 718.2 (e) alleviates the problematic issue of overrepresentation unless CJS practitioners first acknowledge “the duty falling on defence and crown counsel to bring the circumstances of Aboriginal offenders to the attention of the sentencing court and the
role of the judiciary in relation to this information” (p. 254). Nonetheless, speaking specifically about the Province of Manitoba, Milward and Parkes (2011) assert, “[d]espite admonitions by the Supreme Court and other appellate courts that judges and lawyers are obliged to facilitate the gathering of information on the circumstances of Aboriginal people and on appropriate and available rehabilitative resources, there is no dedicated program […] to support this endeavour” (pp. 87-88). Pelletier (2001), in speaking about the “nullification of section 718.2 (e)” and the corresponding aggravation of Indigenous overrepresentation in Canadian prisons, contends this problem “is, in large part, a consequence of the discrimination inflicted upon them by the Canadian criminal justice system” (p. 473).

Contrary to the anticipated remedial purpose and intent of both section 718.2 (e) and R. v. Gladue, specifically in terms of overrepresentation, Welsh and Ogloff (2008) conducted a content analysis of archival Canadian sentencing decisions and found that “several aggravating and mitigating factors cited by judges, including offence seriousness, prior criminal history, and the plea of the offender were significantly related to sentencing decisions” (p. 492). The study examined 691 randomly sampled sentencing decisions to determine the extent to which Indigenous status was correlated with judges’ sentencing decisions relative to other legally relevant factors/principles that have traditionally guided sentencing. According to Jeffries and Stenning (2014), the Welsh and Ogloff (2008) study constitutes the only methodologically robust statistical analysis of adult sentencing in Canada. The study revealed that section 718.2 (e) “had not reduced the likelihood of imprisonment for Aboriginal offenders” and resulted in “no significant
differences in the likelihood of Aboriginal and non-Aboriginal defendants receiving a custodial disposition” (p. 457).

Stenning and Roberts (2002), in referring to an article they had written the year before, asserted section 718.2 (e) “represented a well-intentioned yet misguided attempt to reduce the number of [A]boriginal persons in Canada’s prisons,” which instead “could undermine other codified sentencing principles such as parity of treatment” (p. 75).

Haslip (2003) underscores the likelihood that section 718.2 (e) “will play a meaningful role in the reduction of the overincarceration of Aboriginal offenders in Canadian penal institutions is directly tied to the extent to which Canada’s judiciary follow the SCC’s direction in Gladue” (p. 248). If the last two decades are any indication of how Indigenous peoples who come before the court are going to be dealt with in accordance with the corresponding legislative (section 718.2 (e)) and juridical (R. v. Gladue) mandates, the successful implementation of either remedial initiative is unlikely. The other factor identified by Saguil (2010) is the notion of “replication” with respect to Canadian law and how legal professionals legitimate their own actions in the courtroom at the micro-level, and thereby solidify their group cohesion at the meso (institutional) level by “giving justification to particular notions of legal ethics and legal practice” (p. 170). This reproduction process is clearly evidenced in the data analysis section of this research project.

Cameron (2008) emphasizes, based on what the SCC asserts in R. v. Gladue, that “sentencing judges must go beyond the decontextualized, individual, incident-based approach embedded in the principles of mens rea and actus reus, and they must seriously consider aspects of offenders’ lives that reflect larger social forces at work” (p. 165).
Attempting to come to a better understanding of this critically important frame of reference, Adjin-Tettey (2007) declares that contextual or alternative variants of sentencing outcomes for Indigenous accused often rely “on elements in Aboriginal cultures and traditions to fashion appropriate sentences aimed at remedying some of the traumatic experiences arising from colonization that contribute to the causes of Aboriginal criminality” (p. 189). The SCC, in *R. v. Gladue*, at paragraphs 65 and 67, references some of these contextualized socio-economic disadvantage-related factors: poverty, dislocation, low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. Thirteen years later, the 2012 SCC decision in *R. v. Ipeelee*, at paragraph 60, claimed that these same elements, in and of themselves, do not necessarily justify a different sentence in the case of Indigenous accused, but rather “provide the necessary context [emphasis added] for understanding and evaluating the case-specific information presented by counsel.” Saguil (2010) raises the germane point that considering *R. v. Gladue* and its guiding principles in the judicial decision-making process was not so much about having a different sentencing outcome, but more so “about the importance of incorporating them into our thinking process” (p. 181).

Stenning and Roberts (2001) introduce another critique in the ongoing debate concerning overrepresentation, when they characterize the SCC’s explanation of section 718.2 (e) in *R. v. Gladue* as not overly “coherent,” particularly when the SCC, at paragraph 37, asserts that many systemic and background factors (e.g. high unemployment, lack or irrelevance of education, substance abuse, community fragmentation) are “unique, and different from those of non-[A]boriginal offenders.”
Stenning and Roberts (2001) contend “[n]one of the factors that the Court listed; however, is unique to Aboriginal offenders, either in kind or degree; nor are the factors listed relevant for all Aboriginal offenders” (p. 157). Seemingly taking a contrarian view, one of the pivotal findings in the study by Welsh and Ogloff (2008) suggests that “non-Aboriginal offenders were significantly less likely to receive a custodial disposition following the implementation of section 718.2 (e)” (pp. 505-506). Roberts and Reid (2017) submit the “last scholarly exploration of Aboriginal and non-Aboriginal correctional trends” (p. 315) was published 14 years before by Roberts and Melchers (2003), who asserted that “any attempt to interpret trends with respect to admissions to custody must consider the effect of three important influences: demographics, crime rates and criminal justice policy changes […] whether statutory or jurisprudential” (p. 213). Furthermore, Roberts and Melchers (2003) assert that the post-Bill C-41 period between 1997-1998 to 2000-2001 “reveals an increase in the volume of Aboriginal admissions to custody at 3%, while non-Aboriginal admissions declined by fully 22%” (p. 226). A more recent study by Perreault (2009), revealed that for the period 1998-2008, the proportion of Indigenous peoples admitted to custody “increased from 13% to 18%” (p. 9). These findings are counterintuitive to the intended remedial effect associated with the introduction of both section 718.2 (e) and R. v. Gladue, whereby alternative remedial measures, other than imprisonment, were to be utilized in the case of Indigenous peoples who come before the court.

While some legal scholars had hoped section 718.2 (e) and R. v. Gladue would inspire greater flexibility and innovative sentencing practices that “recognized the pathway between the impacts of colonialism and the life chances of Aboriginal peoples,”
the sentencing decisions examined by Balfour (2012) “suggest judges remain tied to
common law principles of individual blameworthiness and punishment proportionate to
the seriousness of the offence” (p. 98). Even though Canadian courts are legally obligated
to “take judicial notice of such matters as the history of colonialism, displacement, and
residential schools and how that history continues to translate into higher levels of
SCC “provides clear guidelines as to which factors must be considered” (Lewis, 2012, p.
12). Over the last two decades, the absence of guidelines has been the source of
considerable tension. This is especially true in relation to judges and other legal
professionals who have attempted to interpret [R. v. Gladue](https://www.canlii.org/en/ca/supreme-court-of-canada/doc/1996/scc210/1996scc210.html) in the way it was originally
envisioned. In my research, it became increasingly evident that the Province of PEI,
along with many other legal jurisdictions across the Country, have experienced their fair
much more than section 718. 2 (e) being enacted into law in 1996, and the decision in [R.
examine the day-to-day inner workings of legal actors in the CJS, involving people who
are very much engaged in decision-making when Indigenous peoples come before the
court, are seemingly nonexistent. This research project is intended to fill this gap.

4.3.2. Other attempts to alleviate overrepresentation

Over the last two decades, in addition to section 718. 2 (e) and [R. v. Gladue](https://www.canlii.org/en/ca/supreme-court-of-canada/doc/1996/scc210/1996scc210.html), different
Canadian jurisdictions have introduced a broad array of initiatives which have been
varied in scope and design and purportedly aim to remedy the problem of
overrepresentation. Moreover, best practices are highlighted in reports such as [Gladue](https://www.canlii.org/en/ca/supreme-court-of-canada/doc/2008/2008scc25/2008scc25.html)
Practices in the Provinces and Territories by April and Margrinelle-Orsi (2013) and booklets such as Gladue Primer by Istvanffy (2011). In addition to the introduction of Gladue Reports, Gladue Writers, and various types of “circles” (e.g. sentencing circles\(^{25}\)) in PEI in recent years, one such innovative practice is the Eagle Feather Initiative (hereinafter referred to as EFI), introduced by the Royal Canadian Mounted Police (hereinafter referred to as RCMP) in the Province of Nova Scotia (hereinafter referred to as NS) on October 30, 2017. This initiative provides Indigenous victims, witnesses, suspects and police officers with the option to “swear legal oaths on an eagle feather” (Thatcher, 2017, para. 1). Since March 8, 2018, all 12 RCMP detachments in NS, which support/police Indigenous communities, have had an eagle feather available for this specific purpose, and it would appear that the NS Department of Justice is tentatively looking at the possibility of introducing the EFI in courts across NS in the near term. As of March 2018, the RCMP in PEI was supposedly considering the matter and engaging other key partners to determine the viability of adopting the same initiative.

Irrespective of practical, well-intentioned attempts to remedy the overrepresentation problem, Makin (2012, para. 7) quotes ALS Program Director Jonathan Rudin, as stating, “[t]he impact of Gladue across the country has been very mixed, in some jurisdictions, it has been embraced, in many others, it has virtually been...

\(^{25}\)Sentencing circles are employed when an individual in a community has broken the law and found guilty of an offence by the mainstream adversarial justice system. Usually, a circle is established when the accused has admitted guilt and is willing to accept responsibility for her or his actions, while acknowledging the harm done to family and neighbors. The goal of a sentencing circle is to shift the focus from punishment to rehabilitation; it also offers the courts an alternative to incarceration. [...] Many [Indigenous] communities in Canada have adopted sentencing circles, which have also become popular with federal and provincial officials. Sometimes, though, customary law is unable to reconcile itself with sentencing circles (Belanger, 2018, p. 286).
ignored.” Arguably, the Province of Ontario is at the forefront of the *R. v. Gladue* implementation effort, leading the way with the creation, in October 2001, of the first of what have since become commonly known as Aboriginal Persons/Gladue Courts, the introduction of Gladue Caseworkers, and preparation of forward-thinking, holistic and context-specific Gladue Reports. Toward the other end of the spectrum, in PEI, a total of five Indigenous Gladue Writers have been hired since 2014; some sentencing circles have taken place, commencing in 2007; and a relatively small number of Gladue Reports (a grand total of 40) prepared, or in progress, as of January 24, 2019, even though the overrepresentation of Indigenous peoples still constitutes a chronic problem Canada-wide, including in the Province of PEI.

The range of initiatives aimed at addressing overrepresentation reflect two approaches: “indigenization” and “accommodation,” which have been and still are, relied upon, primarily by the CJS, to remedy the overrepresentation problem. Indigenous peoples have long-since expressed a deep alienation from a system of justice that appears to them foreign and inaccessible. Indigenization constitutes an effort to address this situation and involves a broad array of activities/initiatives that ostensibly aim to remedy the problem of overrepresentation by incorporating some measure of “inclusion” of Indigenous peoples. During the 1970s and 1980s, for instance, policies were guided by the premise that if only more Indigenous peoples could be encouraged to participate in the Canadian CJS (e.g. police, correctional officers, judges, lawyers), then the system would come to better understand Indigenous peoples and deal with them more appropriately. Whereas, Indigenous peoples would become more knowledgeable about and receptive to Canadian justice. An example of policy from this period was the
RCMP’s “special constable” program that was initiated to recruit Indigenous peoples into the “force” (Palys, et al., 2012, p. 2). Even though some of these initiatives (e.g. Gladue Reports) have been well received by some members of Indigenous communities, Palys, et al. (2012) suggest that with respect to its “putative objective of dealing with over-representation, however indigenization accomplished nothing” (p. 2), as overrepresentation has only increased.

Alternatively, accommodation strategies or initiatives involve Indigenous-based traditions and customs being inserted into the broader CJS, forming an extension of same, rather than an autonomous entity, when it comes to Indigenous peoples and their ongoing engagement with the same system. Accommodation constitutes a remedial effort to address the overrepresentation problem in Canada’s system of justice. During the 1980s and 1990s, accommodation strategies were implemented, where the Canadian justice system, according to Palys et al. (2012), “flexed in various ways to try and better accommodate Aboriginal traditions and processes” (p. 2). Correctional institutions, for example, promised to recognize Elders as spiritual advisors, and allow practices such as sweat lodges for Indigenous inmates, “many of whom were only discovering their cultures in prison after the 60s scoop saw them raised in foster care with no connection to the communities in which they were born” (Palys, et al., 2012, p. 2). In the courts, Yukon Circuit Court Judge Barry Stuart first experimented with what he called a “sentencing circle” in R. v. P.M., 1992 CanLII 2814 (YKTC), to find ways and means for the courts to involve Indigenous communities in the dispositional process and accommodate restorative practices that are integral to justice in most Indigenous communities. Supporters praised Judge Stuart’s “recognition of the futile imposition and re-imposition
of Canadian justice on Aboriginal people and communities for whom that system had little meaning or authority,” whereas critics suggested sentencing circles “still asserted the primacy of Canadian courts, and by reserving final authority, implicitly reaffirmed Aboriginal communities’ inferior status […] second guessing by the same Canadian justice system that had served it so poorly for so long” (Palys, et al., 2012, p. 2).

Moreover, Jeffries and Stenning (2014) propose there “has been no specific statutory basis for Gladue Courts, Gladue Reports, or circle sentencing in Canada; they are all simply adaptations of the mainstream criminal court processes that have been implemented by judges in attempts to make them more responsive to the needs and circumstances of Aboriginal offenders and communities” (p. 457).

To understand why overrepresentation continues to be a problem in Canada and initiatives introduced by the conventional CJS have not been successful in remedial interventions to date, Palys, et al. (2012) proffer three explanations: First, Indigenous justice “is not an appendage or artificial construction by Aboriginal people but rather a contemporary reflection of how conflict has been addressed and managed in Aboriginal communities for Millenia.” Second, the Canadian justice system that was imposed on Aboriginal communities is a foreign system that has been found repeatedly by one commission/inquiry/report after another to have “failed Aboriginal people at every stage.” And third, it has come to be recognized both in Canada and internationally that Indigenous peoples have a “right to promote, develop and maintain their institutional structures and their distinctive customs […] traditions, procedures, practices and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards” (pp. 25-26).
Despite the “devastating effects” on Indigenous peoples that settler colonial practices, such as those of the Canadian CJS have indisputably had, Monture-Angus (1999a) maintains that “little has been accomplished to do more than accommodate Aboriginal persons within the mainstream system” (p. 27), typically via token attempts to “indigenize” Canadian justice institutions, rather than actively pursuing substantive ways and means to achieve sustained and meaningful systemic change. Lisa Monchalin (2016), a member of the Algonquin, Huron, and Métis Nations, suggests one of the key ways that government has undertaken to reduce Indigenous overrepresentation “has been through ‘tinkering’ with the Canadian criminal justice system, for example, changing laws in an effort to divert Indigenous peoples from the prosecutorial process or modifying the system slightly to make it ‘fit’ Indigenous peoples” (pp. 267-268). In this regard, Monture (2014) has admittedly “grown very impatient” with the notion that Canadian law is a solution to problems faced by Indigenous peoples, providing the example of the court adapting “its own rules of evidence to ‘accommodate’ oral history,” nominal change whereby “the overall structure is not challenged, but just one unfortunate consequence of the evidentiary rules” (p. 73).

Indigenization can take on a variety of different forms, ranging from the IJP, which deals with minor criminal offences via community-based programming (e.g. Alternative Measures (AM) Program26 for adult offenders), to various types of circles27,

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26 The Alternative Measures (AM) Program for adult offenders is affiliated with the Department of Justice and Public Safety in PEI and diverts offenders from the formal criminal justice system, while still holding the offender accountable for her or his criminal activity. The investigating police and crown attorney make a referral to the AM Program, which operates under the administrative umbrella of Probation Services. This referral can occur either prior to a charge for a criminal offence has been laid or following the offender.
which take place in the Indigenous person’s home community, both initiatives currently available in the Province of PEI. Indigenization and accommodation can also happen by way of a judicial decree, whereby *R. v. Gladue* uses the ambiguous term “may” in considering alternatives to sentencing for Indigenous peoples, whereas *R. v. Ipeelee* uses the more unequivocal term “must.” It also should be acknowledged that typically when attempts are made to indigenize the CJS, it may result in Indigenous peoples having “greater influence and control,” although at the end of the day, “the consent and final decision-making authority remains with Crown lawyers and judges” (Carey, 2007, p. 33), thereby retaining authority within the settler colonial state’s CJS. As clearly evidenced in this section, despite many attempts to establish programs/initiatives which either “indigenize” or “accommodate” Indigenous peoples in the Canadian CJS, and thereby remedy the enduring overrepresentation problem, the number of Indigenous peoples serving time in custody continues to rise and consequently, the promise of section 718. 2 (e) and *R. v. Gladue* remains, for the most part, unfulfilled.

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27 In PEI, there are several different types of Indigenous justice circles (conflict-resolution circles, early intervention circles, sentencing circles, healing circles, and reintegration circles). Sentencing circles are used when the accused is to be sentenced for crime(s) committed. These circles can either be part of the formal adversarial court system, with the judge present or can be held outside the formal court in the judge’s absence. If the judge is absent, recommendations from the circle are presented to the sentencing judge for her or his consideration, although recommendations emanating therefrom are not legally binding.
4.4 Conclusion

There has been considerable debate in the scholarly literature over the last three decades concerning the nature, significance and extent of Indigenous peoples’ overrepresentation in Canadian prisons, with some scholars minimizing the nature and extent of the problem, whereas others regard it as regional in scope. Stenning and Roberts (2001), for example, conclude that there is “strong evidence” that overrepresentation “varies significantly from one region of the country to another” (p. 165), with western Canada consistently having the most serious problem, and Atlantic Provinces, including PEI, experiencing a negligible impact. By viewing overrepresentation as a regional issue, Stenning and Roberts are inferring that it therefore cannot be the result of systemic colonialism as an enduring formation. Terminology continues to be the source of considerable debate, particularly as it relates to the distinction between “overrepresentation” and “overincarceration,” with most researchers agreeing that the number of Indigenous peoples spending time in custody is disproportionate to their representation in the general population, although there is less consensus that this constitutes “overincarceration.”

The dominant explanatory approaches concerning overrepresentation (socio-economic disadvantage, and culture clash), along with the emerging framework associated with settler colonial studies and Indigenous perspectives, were discussed. In critiquing the first two explanatory frameworks, socio-economic disadvantage and culture clash have considerable resonance in relation to explaining the problem of overrepresentation and closely coincide with the dominant settler state discourse, particularly the former. However, many scholars agree overrepresentation cannot be fully understood unless it is situated in the unique Indigenous experience of Canadian settler
colonialism and therefore comprehensive explanations remain tenuous, thereby emphasizing the importance of the third explanatory framework, particularly in the way it draws attention to the CJS itself as a problem.

Official attempts to define and address the overrepresentation problem of Indigenous peoples in the Canadian CJS, including, albeit not limited to, the AJI of Manitoba (1991) and RCAP (1996) were discussed. Numerous reports, inquiries, and commissions, along with academic commentary, have been brought to bear over the last two decades, with limited discernible effect with respect to reducing rates of incarceration for Indigenous peoples. I provided historical context for the 1996 ground-breaking federal legislative reforms contained in Bill C-41, specifically section 718.2 (e), as well as the determinative SCC decision in *R. v. Gladue*. Since the *R. v. Gladue* decision was rendered in 1999, scholars suggest its overall implementation, largely by way of its guiding principles, has been fragmented at best. The remedial promise of section 718.2 (e) and *R. v. Gladue* remains demonstrably unfulfilled in virtually every jurisdiction across Canada, with certain areas in the Province of Ontario considered the “flagship” (Palys et al., 2012), while most other provincial/territorial jurisdictions, including PEI, continue to experience systemic and procedural barriers and tensions.

The literature concerning the ongoing implementation of section 718.2 (e) and *R. v. Gladue*, as well as initiatives associated with indigenization and accommodation, clearly reveal two key themes: first, that overrepresentation continues to represent a serious problem for Indigenous peoples; and second, neither section 718.2 (e), nor *R. v. Gladue* have “worked” in the way in which they were originally intended. As I show in the following three chapters, the failure of this promise can be attributed, in part, to how
legal professionals understand the problem of overrepresentation and work within the constraints of an institutional system that reinforces, rather than remedies, the effects of settler colonialism.

In chapters five and six, I move beyond an abstract discussion involving statistics and sentencing decisions, as it relates specifically to the problem of overrepresentation, to examine the multiple processes and discourses (sometimes operating in contradiction to each other) which, in turn, ultimately lead to these outcomes. In chapter seven, I juxtapose legal and Indigenous informant voices regarding, for example, overrepresentation, potential transformative power of Gladue Reports, and the importance of relationship-building.
Chapter 5.
Overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system – “fact” or “fiction”

5.1. Introduction

In introducing this chapter, I quote one of the three Mi’kmaq Elders from the Indigenous informant cluster. In speaking with Elder 019 about the ongoing problem of disproportionate numbers of Indigenous peoples spending time in custodial institutions across Canada, she emphasized that, “If we have one, it’s one too many.” I utilize this quote in juxtaposition to the core theme in this chapter that there is still ambiguity in how some legal informants view the “problem.”

Within PEI’s CJS, there is an enduring contestation among legal informants over the significance of colonialism in contributing to overrepresentation of Indigenous peoples within the Canadian CJS. Throughout relevant case-law and informant interviews, this contestation emerges in one form through the denial, dismissal or diminishment of the nature, breadth and scope of the problem of overrepresentation. This denial is entwined with a broader denial of both historical and ongoing colonialism as evidenced in this research project by (1) the denial of overrepresentation in statistical terms, especially in PEI; (2) the basis of overrepresentation (i.e. that Indigenous peoples commit more serious offences, more often); and (3) the notion that there is often no appreciable difference between non-Indigenous and Indigenous accused in relation to either their individual, familial or systemic background factors. Legal actors generally, by way of case-law and interviews, articulate discourses (e.g. proportionality, rule of law) which are informed by and enable settler colonial relations.
Denial is a fundamental mechanism of sustaining settler colonialism in a contemporary context but is seldom as explicitly articulated as in former Canadian Prime Minister Stephen Harper’s 2009 claim that Canada has “no history of colonialism” (Coulthard, 2014, pp. 105-106; Simpson, 2016, p. 439; Monchalin, 2016, p. 296; Shrub, 2014, p. iii). Prime Minister Harper had issued a formal apology only 16 months earlier, yet these comments, according to Simpson (2016), “ostensibly commemorated colonial violence by the State” (p. 439), by way of the IRSS. This denial, which often emerges from (or is a product of) a lack of understanding on the part of non-Indigenous people that settler colonialism is an ongoing process, underlies comments found in case-law and expressed in informant interviews that section 718.2 (e) amounts to a “racial discount” or “get-out-of-jail-free card.”

In this chapter, I speak to the disjuncture in established legal conventions (e.g. preparation, content, purpose) with regard to Presentence and *Gladue* Reports, the former eliciting descriptors (specifically in the informant interviews) such as “factual” and “objective,” whereas the latter are characterized as “advocative” and “subjective.” These conventions can distract from the intended purpose of section 718.2 (e) and *R. v. Gladue* and its guiding principles, thereby negatively impacting Indigenous peoples who come before the court. Turpel (1991) offers one possible explanation for this disjuncture in that “Courts have been unable to grasp the impact of [A]boriginal peoples’ treatment by a colonial legal system because this would require its dismantling and a critical examination of the court and law in perpetrating the oppression” (p. 40). In denying or dismissing the significance of settler colonialism and reinforcing the prevailing individualistic, incident and sanction-based approach of the CJS, there is a tendency to
pathologize Indigenous peoples, thereby reducing them to just another ethnic group, which, in and of itself, denies the specificity of settler colonialism. Additionally, stereotyping (e.g. Indigenous peoples have problems with alcohol) contributes to pathologization of not only individuals but Indigenous peoples as a whole, resulting in informants focusing on the pathology rather than settler colonialism as the problem, often without any apparent awareness of doing so, reminiscent of what Cohen (2001) describes as “implicit denial.” In terms of my overall analysis, “complicity” played an essential role, even though for legal informants, it appeared to be unintentional and/or unconscious in nature. I also found that complicity was, for the most part, associated with a lack of sufficient understanding of the continuing effects of settler colonialism and resulting disconnect between positive intention and effectiveness of action.

These discourses of denial, dismissal or diminishment are significant because actors within the Canadian CJS regularly make decisions which directly impact the lives of Indigenous peoples and, consequently (re)produce settler colonial relations. If these decision-makers do not accept the initial premise that there is an overrepresentation problem with respect to Indigenous peoples in Canada, or have an understanding of this in the context of settler colonialism, then this has the potential to make it virtually impossible to implement section 718.2 (e), along with R. v. Gladue, and, in tandem, secure the community-based resources by which to address the problem.

5.2 Overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system – the nature, breadth, and scope of the problem

This section examines legal informants’ perceptions of whether overrepresentation signifies an enduring problem in Canada, including PEI., and if it is perceived explicitly
or implicitly as a systemic problem of inequality or requires the distinct remedy of section 718.2 (e).

Notwithstanding that both the scholarly literature and case-law indisputably substantiate the linkage between the overrepresentation of Indigenous peoples in Canadian prisons and Canada’s legacy of settler colonialism, some legal informants in PEI questioned the validity of such a link and by extension, the legislative requirement to deal with Indigenous peoples who appear before the court “differently” from their non-Indigenous counterparts. Informants expressed several reasons for why Indigenous peoples appear before the court in disproportionate numbers, including: (a) Indigenous peoples are more likely to find themselves in social and environmental conditions associated with high crime rates; (b) Indigenous peoples engage in more (and more serious) offences; (c) Indigenous youth constitute the fastest growing age demographic in Canada; (d) more people identify as Indigenous now than previously had been the case; and, similarly, (e) more Indigenous peoples went to prison in the past, although did not necessarily identify as Indigenous.

5.2.1. What do you mean, we have a problem?

Almost half of the legal informants emphasized fundamental principles like the “rule of law” and “equality before the law” when discussing parity and proportionality in the sentencing process and that, as a consequence, incarceration rates were proportionate. For instance, several legal informants asserted that neither section 718.2 (e), nor R. v. Gladue were ever intended to be a “get-out-of-jail-free card” or “racial/Aboriginal discount” (Crows 001, 002, 006; Defence 008), thereby implying both Indigenous and non-Indigenous accused should be treated equally in accordance with the rule of law.
Violence or “risk” were common themes raised by informants related specifically to proportionality. Crown 012, for instance, reminded me that the role of the crown was “to represent the public interest, that’s what our job is.” The same Crown argued, “if I’m dealing with an Aboriginal offender, who I believe poses a compelling risk, I’m going to be arguing for an incarceration disposition, notwithstanding 718.2 (e), because that’s only one factor that’s considered amongst all the other factors and when I look at public safety and I think there’s a public safety risk, I’m going to be arguing for jail every time.”

Defence 008 argued that “some judges, and understandably so, have a genuine sense or concern about fairness,” as it pertains specifically to the applicability of the rule of law.

Two foundational legal principles (“rule of law” and “equality before the law”) imply that the resultant decision-making, especially on the part of individual members of the judiciary, will be both impartial and fair-minded. The problem with this implication is twofold: First, the rule of law (keeping in mind that technically speaking, section 718.2 (e) and R. v. Gladue and its guiding principles are also part of the rule of law) does not take into account Indigenous self-determination in decision-making. According to Coughlan (2013, p. 300), the rule of law is “a foundational principle of the Canadian constitution, dictating that the law is supreme over any body of government or individual.” However, as Borrows (2010) writes, “Canadian law rests on shaky foundations within Indigenous communities because it pays so little attention to their values and participation” (p. 208). Youngblood-Henderson (1985) suggests Canadian courts have become “caretakers of the racism of the late nineteenth and twentieth centuries,” and further that in its approach to the “rights of [N]ative peoples, the law becomes tyranny at worst and an ineffective apologist at best” (p. 220). Second, to
achieve fairness in a court of law, it is important to understand the difference between “equality in application” and “equality in outcome.” Equality in application means treating everyone the same when law is applied (which (re)produces and reinforces structural inequalities predating the application of law). Whereas, equality in outcome (which takes inequality and cultural context into account in order to design legal outcomes or remedies which will have equal impact on all) means providing everyone with what they need to receive a “fair” outcome. In the CJS, equality of outcome can only be achieved after inequalities and injustices are addressed. Section 718.2 (e) and R. v. *Gladue*, while imperfect in terms of achieving full equality of outcome, at least allow the legal system to take culture and inequality into account when sentencing Indigenous offenders. This is in contrast to the priority given to the rule of law and equality in the application of law posed by many legal informants. Anthony et al. (2015) recognize the significance of “collective Indigenous experiences of colonisation, discrimination and social exclusion […] the strength of group identity” and frame an approach to sentencing Indigenous offenders that would “give rise to fairness in sentencing to promote individualized justice and to resist assumptions of racial neutrality that undermine substantive equality” (p. 74). The effect of articulating the rule of law and equality before the law in a way that essentially nullifies section 718.2 (e) or privileges “equality” over equity, disputes the proposition that there is a problem of overrepresentation or that it is more so a problem of “overincarceration.”

Overrepresentation related statistics can be rather misleading when utilizing demographic statistics and calculating percentage rates which are derived per 100,000-person population, particularly when you consider that PEI’s population as of July 1,
2018 was 153,244 (Prince Edward Island Statistics Bureau, 2018, para. 1). Some legal informants were aware of this specific statistical consideration, which resulted in tendencies to question the existence of overrepresentation in PEI and/or excuse overrepresentation as crime-related, rather than a social problem, the latter usually taken to refer to social conditions that disrupt or damage society as a whole. For example, Crown 001 expressed reservations about the true meaning of specific “numbers” (statistics) when attempting to ascertain if overrepresentation constitutes a problem, stating “it really doesn’t mean anything unless you get down a layer, in terms of why they’re there, in terms of criminal record and offense – put those two things together, do the comparison and then you can address whatever issue is leading you to consider overrepresentation […] it’s not enough to say that we have a large number of people in the institution who are Aboriginal – what offenses, what background, and then away you go.” Moreover, Judge 004 maintained, “I don’t think we [PEI] have an overrepresentation problem,” although was not certain as to whether statistics were available to either confirm or refute this claim. Although many informants (both legal and Indigenous) did question if overrepresentation constituted a problem in PEI, the majority agreed that overrepresentation is more so a problem in western Canada, where the relative percentage of Indigenous peoples appearing before the court is both substantively and proportionately higher than in any other jurisdiction in the country.

In 2016/2017, PEI admitted the lowest percentage of Indigenous peoples (4%) to what Statistics Canada refers to as “total correctional supervision,” which involves two constituent parts. First, CSC “is responsible for the federal system and has jurisdiction over adult offenders (18 years and older) serving custodial sentences of two years or
more and is responsible for supervising offenders on conditional release in the community (such as parole and statutory release)” (Malakieh, 2018, p. 3). Second, according to Malakieh (2018), provincial and territorial correctional services programs “are responsible for adults serving custodial sentences less than two years, those who are being held while awaiting trial or sentencing (remand), as well as offenders serving community sentences, such as probation” (p. 3). In stark contrast to PEI, the total correctional supervision rate in Manitoba was 70%, 75% in Saskatchewan, 87% in the Northwest Territories, and 100% in Nunavut (Malakieh, 2017, p. 16). According to The Office of the Correctional Investigator Annual Report (2017), between 2007 and 2017, “while the overall prison population increased by less than 5%, the Indigenous prison population increased by 39%”; and further, “the number of Caucasian offenders decreased by 14.7% over the same period” (p. 48). With respect to community supervision at the federal level in 2015-2016, “[o]nly 12% of Indigenous offenders had their cases prepared for a parole hearing once they were eligible,” whereas an “overwhelming 83% of Indigenous offenders postponed their parole hearings” (The Office of the Correctional Investigator, 2017, p. 48). Nonetheless, Crown 007 questioned if PEI had an overrepresentation problem, suggesting if “you take four people, four Aboriginals in custody, of a 3% population base, that’s going to skew [the overall percentages], that’s going to look quite different in a graph than it does in reality.”

Furthermore, according to Crown 002, “it is simply a matter of scale.”

The Macdonald-Laurier Institute, in its inaugural CJS report card, rated PEI first in Canada with respect to its CJS. This classification was based on five principal objectives: public safety, support of victims, cost and resources, fairness and access to
justice, and efficiency. Nonetheless, the same Report went on to say that the “proportion of Aboriginal people in custodial admissions in PEI is disproportionate but lower than in other parts of Canada” (Perrin & Audas, 2016, p. 13). Perrin and Audas (2018) reiterate similar findings in their second CJS report card, indicating “in 2016, the ratio of Indigenous people in total custodial admissions as a proportion of the Indigenous persons was 6.2 (meaning that Indigenous persons are significantly overrepresented in new admissions to penitentiaries and jails)”; (p. 15) and further, that custodial admissions in PEI remain “disproportionately high, but still lower than in many other provinces” (p.17). This lower rate of disproportionality is considered by some informants to be a justifiable means by which to challenge the contention that there is an overrepresentation problem in PEI, in comparison to other jurisdictions.

Three legal informants (Judge 011, Crowns 001 and 002) expressed the opinion that one of the reasons why Indigenous peoples continue to be overrepresented in Canadian prisons, including PEI, is that they tend to commit more serious, often more violent, offences. Judge 011, for example, noted when you consider the type of offences Indigenous peoples are committing in various jurisdictions across Canada, “they’re very violent offences,” including “sexual assaults, often resulting in deaths,” and concluded by saying, “if people are going to engage in this type of criminal behavior, then it would ordinarily attract a period of time in custody, by itself, regardless of their ancestry.” Crown 001 stated “Aboriginal offenders are committing serious crimes” and “I think one has to be careful just to categorize it as – Aboriginals are overrepresented.” Reflecting the view of at least three other legal informants, Crown 001 further suggested that “under our traditional system, there is overrepresentation because basically that’s what they
[Indigenous offenders] were entitled to.” Alternatively, the same Crown blamed the problem, at least in part, on legal system delays in responding to Indigenous criminogenic factors, further asking “did the system wait too long to put them in the position that that was the last resort.”

Moreover, Crown 002 suggested the CJS was never overly adept at “taking into account ‘social factors,’ especially considering this same system spends so much time and effort attempting to deal with individuals because of their ‘actions,’ not so much the corresponding social issues, especially when dealing with serious and violent behavior.” This logic appears to be in accord with SCC Justices Cory’s and Iacobucci’s comment in R. v. Gladue, at paragraph 78, wherein they state, “clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.” This demarcation between less serious and more serious offences was reinforced in R. v. Wells, which constituted a follow-up judgement to R. v. Gladue and wherein the SCC, at paragraph 50, noted that the generalization drawn in R. v. Gladue to the effect that the more violent and serious the offence, the “more likely as a practical matter for similar terms of imprisonment to be imposed on [A]boriginal and non-[A]boriginal offenders, was not meant to be a principle of universal application” but merely that the judge must take into account the circumstances of individual Indigenous accused. In R. v. Wells, at paragraph 42, the SCC expanded on this notion, as held in R. v. Gladue, at paragraph 79, declaring that in serious violent cases “the appropriate sentence will not differ as between [A]boriginal and non-[A]boriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.” Despite this assertion by the SCC, Roberts and Melchers (2003) point out
that “offenders convicted of serious crimes often receive a mitigated sentence, for example, juvenile offenders or offenders who enter guilty pleas”; whereas, “Aboriginal offenders (especially women) are being sentenced to custody, and rates for non-Aboriginal offenders have declined” (as cited in Balfour, 2012, p. 97). According to Milward and Parkes (2014), the SCC addressed this issue “head-on” in \textit{R. v. Ipeelee}, at paragraph 63, wherein the court stated that “the bifurcation of serious and less serious offences and the limiting of the applicability of \textit{Gladue} to a small range of less serious offences amounted to ‘a fundamental misunderstanding and misapplication of both section 718.2 (e) and this Court’s decision in \textit{Gladue}’” (p. 133).

Despite the consistent statistical evidence, both nationally and in PEI, evidence confirmed by data collected by official commissions (RCAP, TRC, etc.) and inquiries (AJI of Manitoba, etc.), there is continued questioning of overrepresentation in the legal system. Some legal informants were somewhat reticent to admit to and/or were unaware of discrimination or racism occurring within their own professional ranks, thereby providing a possible explanation for why they question that there is an overrepresentation problem. In this regard, Defence 003 stated,

\begin{quote}
 a lot of people in this Province have not got a clue, really, they’re not conscious that we have an Aboriginal community at all, and if they are, their consciousness is negative [...] spotty [...] discriminatory and essentially useless [...] it isn’t positive [...] it’s a lack of education and I get really annoyed with other lawyers who are quite happy to give an opinion with regard to something that might involve an Aboriginal person but they don’t go to any of the seminars that are offered [...] they’re not interested in learning anything, they just presume they know and that really annoys me.
\end{quote}

Some informants, at times, reverted to what I would term a “default” position, whereby if they did identify overrepresentation as a problem, they attributed blame to the
broader CJS, without acknowledging settler colonialism or their own role within the CJS. This default position can take on several different forms, whether it be by way of CJS actors proposing that alternatives to custody are limited when it comes to violent offences, as discussed in this chapter, or, alternatively the use of prosecutorial or judicial independence, referenced in chapter six. However, Crown 006 expressed an opposing view, acknowledging that “what we have done to First Nations persons in this country and the reason that they’re so overrepresented in custodial facilities […] because the system itself is inherently unfair or biased.” The same Crown further stated that “experience tells us ongoing colonial power/authority, including within the criminal justice system, is never easily relinquished and as a result Aboriginal people, yet again, are the ones who are ultimately harmed as a consequence.”

Monture-Okanee and Turpel (2011) deal with what they perceive as a distinct form of colonial-grounded distraction this way:

We believe that the era of collecting data about the over-representation of [A]boriginal people in the criminal justice system must end. This gross over-representation is well documented and obvious. It is now time to begin to focus on meaningful change, to correct over-representation and to generate respect by implementing changes which allow [A]boriginal cultural practices to be recognized and supported (p. 245).

When legal informants did acknowledge that overrepresentation is a problem, it was attributed to either demographics or differential offending and/or a reflection of the “proper” application of the rule of law. Few of the legal informants attributed overrepresentation to the social and cultural context of settler colonialism.

5.2.2. Indigenous youth – the tip of the iceberg

One of the critically important realities which continues to unfold in Indigenous communities across Canada is the rapidly growing youth demographic, which was
presented by some informants (both legal and Indigenous) as one possible explanation for the ongoing overrepresentation problem. Criminologists have long observed a strong correlation between age and crime. It is understood, according to Cornelius, Lynch, and Gore (2017), that “crime increases throughout adolescence and then peaks at age 17 (slightly earlier for property crime than for violent crime) and then begins to decrease over the life course moving forward,” a trend which has “withstood stringent testing and examination across time periods and maintains consistent results regardless of race/ethnicity, education level, or income” (p. 25).

The Canadian Centre for Justice Statistics released a report on June 19, 2018, stating youth aged 12 to 17 “accounted for 46% of admissions to correctional services in 2016/2017, while representing 8% of the Canadian youth population” (Malakieh, 2018, p. 6). Even though this research project deals specifically with adults (aged 18 and above), it is instructive to have a sense of the overrepresentation problem within the younger Indigenous age cohort. The proportion of Indigenous youth admissions to correctional services in Canada, according to Malakieh, 2018), “went from 21% in 2006/2007 to 35% in 2015/2016 and reached 37% in 2016/2017, whereas Indigenous youth were “overrepresented in both custody and community supervision, making up 50% of custody admissions and 42% of community supervision” (p. 6.). Malakieh (2018) also points out, as is the case with adults, that “Aboriginal females made up a greater proportion of [provinces and territories] custody admissions among youth relative to their male counterparts, accounting for 60% of the admissions, while non-Aboriginal females accounted for 40% in 2016/2017” (p. 6). However, attributing overrepresentation to the broader youth demographic diverts attention from the reasons Indigenous youth are
offending, foregoing the need to scrutinize historic social and cultural factors produced by settler colonization that have created high rates of Indigenous youth crime in the first place and coming up with distinct culturally-appropriate remedies.

Speaking about the fluctuating Indigenous demographic, Monchalin (2016) maintains that because of “the disruptions of colonialism, not to mention the attempts to eradicate ‘Indians,’ the numbers of Indigenous peoples diminished for a time. But now, Indigenous peoples are gaining in numbers and momentum” (p. 170). According to Statistics Canada (2013), the Indigenous population is younger than the non-Indigenous population “in every province and territory,” primarily due to “higher fertility rates and shorter life expectancy” (p. 16). In 2011, the overall Indigenous population was estimated at “more than 254,515 Aboriginal youth aged 15 to 24, representing 18.2% of the total Aboriginal population, and 5.9% of all youth in Canada,” whereas “[n]on-Aboriginal youth numbered just under 4.1 million, and accounted for 12.9% of the non-Aboriginal population” (Statistics Canada, 2013, p. 15). Currently, there are many critically important issues facing Indigenous peoples in PEI, not all that dissimilar to other Indigenous communities across Canada. According to Elder 021, “we’re the fastest growing population, we’re a young population,” a demographic pattern Elder 019 viewed as “going to have some effect” on crime rates and the rate of imprisonment.

From Defence 003’s perspective, Abraham Harold Maslow’s (1908-1970) “hierarchy of needs” comes into play in PEI, as it relates specifically to Indigenous youth who come before the court, including the need for “adequate housing” and “kids looking for food here in PEI” where “they’re in custody and they’re so happy because there’s so much food.” The same Defence regarded these issues as “more the explanation for why
there are more Aboriginal people in custody, as opposed to relating it directly to changes in the law.” Defence 003 was not suggesting section 718.2 (e) and *R. v. Gladue* were inconsequential, but rather, by themselves, “certainly not ever going to stop” or resolve these presenting issues “since they are so deeply embedded that people are growing up in circumstances that almost guarantee they’re not going to be successful in life.” When asked to explain why overrepresentation of Indigenous peoples in Canadian prisons continues to be a problem, Defence 008 raised the issue of “demographics,” the fact that “the Aboriginal population is growing faster than the non-Aboriginal population and there’s more of the Aboriginal population in social and environmental conditions that are associated with high crime rates.” Defence 003 asserted “when you have more children in that situation, and the largest percentage of the population in the Aboriginal community are young people,” one of the consequences can be that “they’re criminalized at a far greater percentage than middle-class Canadians.” *Gladue* Writer 018 suggested one of the potential explanations for the overrepresentation problem involved “younger kids who are flying into the bigger cities, trying to cope and purposely getting caught for becoming involved in criminal activity,” a set of circumstances she characterized as “systemic.” Similarly, some informants perceived a link between structural conditions like educational attainment or income level and Indigenous youth encounters with the CJS out of a sense of desperation and/or hopelessness, whereas other informants perceived it differently and suggested it was simply the result of the rule of law being properly applied.
5.2.3. Comparing the “circumstances” of the Indigenous and non-Indigenous offender populations – is there that much of a difference?

One of the central themes that emerged in interviewing legal informants centred on the ostensibly egalitarian view that there is no discernible distinction between Indigenous and non-Indigenous accused, expressly when considering individual and systemic background factors, such as dysfunctional families, poverty, unemployment, lack of formal education, drug and/or alcohol addiction, and mental health. When, for instance, Judge 004 was asked about the root causes of the ongoing overrepresentation of Indigenous peoples in Canadian prisons and to compare the two offender groups, they indicated that Indigenous offenders, for the most part, are no different from the non-Indigenous population. The same Judge described an endless cycle, where “once anyone is born into a set of circumstances, it just seems to be self-perpetuating – where there is poverty, alcohol abuse, drugs, mental health concerns” and after reading about their family history, “you know they didn’t have a chance from the day they were born.” Judge 004 further suggested “the only difference is that it may have been inflicted more upon the Aboriginal community, through residential schools and those sorts of things, as opposed to just the socio-economic circumstances of our rural population or whatever.”

I found that when this type of conflation (Indigenous and non-Indigenous peoples) did occur, legal informants rarely articulated an understanding of how the distinctive features of settler colonialism have already and continue to impact the everyday lives of individual Indigenous accused. During the interviews, for instance, I found that some legal informants limited their discussion of settler colonialism to the Canadian IRSS, suggesting this “event” had little, if any, impact on the younger generation of Indigenous peoples, who did not experience it first-hand. For example,
Crown 007 suggested as time passes, it becomes more and more difficult for Indigenous peoples to make that “connection.” Crown 012 echoed the same sentiment, suggesting, “I sometimes struggle with that – to what extent can you blame your current circumstances on history?” This type of conflation also runs counter to what learned SCC Justices Cory and Iacobucci spoke about in R. v. Gladue, wherein at page 690, they underscored that section 718.2 (e), the so called “restraint provision,” was intended “to undertake the sentencing of such offenders individually, but also differently, because the circumstances of Aboriginal people are unique.” In this regard, according to Turpel-Lafond (1999), the Canadian Parliament’s decision to add section 718.2 (e) to the CCC meant that “one must, as a matter of criminal law, recognize that Aboriginal people experience incarceration differently than others” (p. 45). Defence 008, in speaking about how Indigenous peoples tend to view traditional Eurocentric ‘justice,’ proposed “justice is something that’s done to them, rather than something that they see themselves participating in, acknowledging, and taking responsibility.” The same Defence further contended that Indigenous peoples “don’t always respond to the rehabilitative purposes of incarceration […] they go in, they tend to serve longer because they don’t participate in the so-called rehabilitative programs and that’s the way the system’s structured […] and if you don’t have any of that, they serve a longer time.”

Ozkin (2012) phrases it another way by asserting, “rather than offending the principle of parity or amounting to a ‘race-based discount,’ differential treatment of offenders on the basis of factors that led to the commission of their crimes is the only way to attain substantive equality in sentencing” (p. 160). Carter (2002), in speaking specifically about the issue of “reverse discrimination,” states, “our law long ago stopped
automatically equating different treatment with ‘discrimination’ in any sense that matters” (p. 70). Further, Justices Cory and Iacobucci, in R. v. Gladue, at paragraph 70, when attempting to clarify why Indigenous and non-Indigenous offenders should not be viewed through an identical lens, argued, “traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these [Indigenous] offenders and their community,” whereas “most traditional [A]boriginal conceptions of sentencing place a primary [emphasis in original] emphasis upon the ideals of restorative justice,”28 a tradition “extremely important to the analysis under s. 718.2 (e).”

The seminal 1996 RCAP provides a compelling rationale for what co-chairs Dussault and Erasmus (1996) characterize as the “crushing failure” (p. 309) of the Canadian CJS vis-à-vis Indigenous peoples due to, as it states in R. v. Ipeelee, at paragraph 74, “the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.” Yet, this “world view” perspective does not actually address settler colonialism. The equating of Indigenous and non-Indigenous offender histories and, by extension, their respective propensities to become engaged in criminal activity, helps perpetuate the notion that criminal behaviour is a product of indistinguishable, or at least similar, socio-economic backgrounds. Overrepresentation is

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28 The restorative justice approach had its modern-day application inception in Canada in 1974, when the Mennonite Central Committee of Kitchener-Waterloo, Ontario, introduced victim-offender mediation in the early stages of court proceedings. The restorative justice movement in North America originated from four main sources: Indigenous justice teachings, faith communities, prison abolition movement, and the alternative dispute resolution movement. A restorative justice remedy is one that places the emphasis on healing the harm done by the offence and rehabilitating the offender to avoid future harms. Such processes are in line with the Indigenous justice paradigm (Melton, 1995).
then explained by the fact that more Indigenous than non-Indigenous peoples face socio-economic disadvantage. This deflects attention from history, culture and colonial responsibility, enabling the argument that Indigenous peoples should be dealt with in the same manner as non-Indigenous people who are disadvantaged when they come in conflict with the law.

Crown argued that “overall, our criminal offenders will have a background that will tell you that they grew up in an abusive family, a dysfunctional family, where drugs were an issue, or where they were introduced to alcohol very early in life,” and further that “it’s very rare” a PSR would say the same individual was “raised in a perfectly healthy environment, no issues whatsoever and then commits this horrendous offence.” Moreover, when speaking about the intergenerational trauma caused by a host of long-standing health and social disparities facing Indigenous peoples in Canada today, the same Crown professed “seeing the same effects happening now in the white community, with the dysfunction, alcohol, drugs, abuse, violence and lack of education,” which, in turn, are “creating the same problems of criminal behaviour” as manifested in Indigenous communities, seemingly along parallel tracks of dysfunction. In similar fashion, defence counsel in the 2016 decision argued that even though Mr. Legere “had a terrible upbringing,” the Supreme Court has said that “anybody who grows up in that sort of deprivation, the court should be made aware of it.” However, this line of reasoning is contested by scholars such as Carter (2002), at least in part because of the historical fact that “No one’s history in this country compares to Aboriginal people’s” (p. 71). It is possible, in this regard, that some legal informants either do not fully
comprehend or, alternatively are dismissive of the R. v. Gladue guiding principles, which are set out as follows:

[75] Section 718.2 (e) requires that sentencing determinations take into account the unique circumstances of [A]boriginal peoples [emphasis added].

[77] The circumstances of [A]boriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors [emphasis added].”

[88] [I]t must in every case [emphasis added] be recalled that the direction to consider these unique circumstances [emphasis added] flows from the staggering injustice currently experienced by [A]boriginal peoples with the criminal justice system.

Judge 011 observed “the history of white people is not dissimilar to that of the Aboriginal people in this Province, in that there are particular families who have had particular difficulties – poverty issues, abuse issues, cycle of abuse issues; they didn’t go to residential schools, some of them ended up at the orphanage.” The same Judge further stated that over the years, courts had become very familiar with families (children, parents, grandparents) with “a history of being extremely dysfunctional,” either because of poverty, or “strict absolute neglect, where they weren’t fed properly.” Judge 011 argued that even though these same people may not necessarily have had the same “experience of losing their culture the way that Aboriginal people did, who went to the residential schools […] they’ve been marginalized” and thereby shared similar life experiences, “with respect to abuse, with respect to poverty, with respect to dysfunction, with respect to not having had good role models – those tend to be the people who are in the criminal justice system.”

Erasure, as referenced earlier, can take a myriad of forms, including failing to acknowledge the uniqueness of Indigenous lived experiences and the settler colonial
context. When the process of erasure takes place, Indigenous people are relegated, by way of the multiculturalism discourse, to simply one of many ethnic groups. Elder phrased it this way, “all these different cultures, different nationalities coming in, we’re [Indigenous peoples] starting to blend in with the rest of the people in PEI,” whereas before, “it was all Whites and Indians.” The opinions expressed by several legal informants that there is little or no discernible difference between Indigenous and non-Indigenous offenders is crucial as it ties into the significance of “equality” discourses and erasure of the distinctiveness of the colonial experience, which may, in turn, explain the apparent rejection of section 718.2 (e), R. v. Gladue and its guiding principles as non-applicable.

5.2.4. What’s this about a “get-out-of-jail-free card?”

Since the time of its conception in early September 1996, section 718.2 (e) has, on occasion, been the target of unbridled attacks from a number of different quarters, most insisting that Indigenous accused consistently receive lighter sentences, when compared to their non-Indigenous counterparts, whereas the reality playing out in courtrooms across Canada depicts a demonstrably different rendering, as delineated in R. v. Kakekagamick:

[34] The court affirmed that s. 718.2(e) imposes a duty on the sentencing judge to approach the sentencing of [A]boriginal offenders differently. That is, it is not a mitigating factor on sentencing simply to be an [A]boriginal offender […] Nor is being an [A]boriginal offender, as I have heard it referred to, a ”get out of jail free card.”

[35] Rather, s. 718.2(e) was enacted as a remedial provision, in recognition of the fact that [A]boriginal people are seriously over-represented in Canada's prison population and in recognition of the reasons for why this over-representation occurs.
Overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system – “fact” or “fiction?”

However, as referenced in *R. v. Edmonds*, 2012 ABCA 340, at paragraph 17, both *R. v. Ipeelee*, at paragraph 83, and *R. v. Brookwell*, at paragraph 7, similarly declare “there is no generalized ethnicity-based discount.”

Some legal informants expressed concern about section 718.2 (e) being perceived as a “racial discount,” specifically in terms of how the restraint provision was originally intended to function. In speaking about the different way Indigenous and non-Indigenous peoples are treated when they appear before the court, in accordance with section 718.2 (e), Judge 004 acknowledged that the application of section 718.2 (e), *R. v. Gladue* and its guiding principles constitutes “a real fine line […] technically, if you look at it that way, it’s no different than we treat everyone else, you look at their own personal circumstances and take that into account and then try and come up with an appropriate sentence.” This individualized approach to sentencing, with its emphasis on specificity, uniformity, proportionality, and applying the appropriate remedial sanction, is counterintuitive to how Indigenous peoples normally view the world: their collective lived experience *vis-à-vis* settler colonialism, sense of community and overarching importance they attribute to holistic forms of healing, including re-establishing harmony, balance and trust. Cameron (2008) argues that overall, the court “continues to take an individual, incident-based approach to sentencing, rather than the broader, systemic approach mandated by the Supreme Court of Canada in *Gladue*” (p. 179). This individualistic sentencing approach also allows non-Indigenous people to deny the existence of settler colonialism, especially if the prevailing CJS is purportedly dealing with everyone “equally.” Judge 004 suggested it had taken some time to become comfortable when dealing with Indigenous accused and admittedly, in the beginning,
“always struggled with how to deal properly with Aboriginals who came before the court – ‘it was an up-in-the-air concept.’” In time, as Judge 004 began dealing with Indigenous peoples more so through the lens of R. v. Gladue, the same judge better appreciated that the Bench was legally obligated to consider the unique circumstances of Indigenous accused, and deal with each accused accordingly, however was not always certain whether to “give them a ‘racial discount’ because of their circumstances.”

With respect to the general principles and purposes of sentencing, pursuant to section 718 of the CCC, Crown 012 argued that section 718.2 (e) was only one of a number of different subsections, “so it’s one consideration but it’s not the overriding consideration” and “you still look at risk of offending […] violence of the offence […] protection of the public.” Crown 001 argued, “I don’t think section 718.2 (e) was ever intended as a get-out-of-jail-free-card or automatic discount on an appropriate sentence.” Consequently, Crowns 012 and 001 both appear to support the contention that serious offences often require a remedial response involving custody, regardless if the accused is Indigenous or non-Indigenous. These observations are virtually diametrically opposed to what Milward (2014) proposes should constitute the more important consideration, wherein he states, “courts are placing greater priority on the avoidance of harm to the public, to the point of marginalizing meaningful consideration of the background circumstances of Aboriginal accused, and of different approaches to long-term supervision that are grounded in Aboriginal cultures and may be more cost-effective” (p. 619). Stenning and Roberts (2001) assert that on its face, section 718.2 (e) reflects the assumption that the problem of overrepresentation is (1) “at least partly a product of inappropriate sentencing of Aboriginal offenders” and further, that (2) “modifying the
sentencing methodology for Aboriginal offenders would contribute in some significant
way to alleviating that problem” (p. 142). In contrast, Carter (2002) maintains “the value
of s. 718.2 (e) of the Criminal Code is not relative to its success in solving the problem of
the disproportionate presence of Aboriginal people before the courts and in our prisons,”
because “it is not ‘fair’ to fault any particular part of an attempt to address a big problem,
for that part’s inability to solve the whole thing” (p. 64). This divergence of opinion
regarding the intent, meaning, and purpose of section 718.2 (e) reveals the level of
tension which exists within a legal profession which views the fundamental purpose of
sentencing as encompassing: (1) respect for the law, and (2) maintenance of a just,
peaceful and safe society, vis-à-vis a restraint provision (section 718.2 (e)), which is less
concerned about “denunciation” and “proportionality” as it is about “equity” and viewing
incarceration as the last remedial resort for Indigenous peoples who come in conflict with
the law.

To understand the significance of the R. v. Gladue decision, its guiding principles
and the reasoning behind section 718.2 (e), it is important to consider some of the
misconceptions and/or barriers which have surrounded its ongoing implementation for
the last two decades. For example, Defence 008 suggested, “the big battle in trying to
promote the Gladue approach is that it’s not an Aboriginal discount, it’s more so, ‘can we
find some resources that might help this person get over some of that [presenting issues
like poverty, addictions, unemployment, etc.] and get on a more solid footing?’” When
asked why some legal professionals still do not “get Gladue,” but rather continue to talk
about a get-out-of-jail-free card, Defence 008 offered, “it may be a lack of information on
their part […] it may be attitudinal […] it may be that some judges are less liberal than
some other judges [...] they may be basing their observations on bad cases, where that very thing did account for a lower sentence, an Aboriginal discount.”

Turpel-Lafond (1999) argues taking what she refers to as a “Gladue kind of approach presupposes a more nuanced interpretation of the rule of law than has historically been the case in mainstream legal discourse,” and further, that applying “the reasoning in Gladue requires a strong understanding of how structural factors impact individual cases, or how individual experiences reflect broader historical and community events” (p. 50). Even when legal professionals pledge allegiance to the rule of law as a bedrock legal principle, with its emphasis on impartiality, equality and fundamental fairness, they potentially run the risk of helping to contribute to (re)producing settler colonialism.

For those who steadfastly contend section 718.2 (e) constitutes a “racial discount,” Crown 006 recommended they review the relevant statistics over two decades (1996-2016), comparing what the landmark SCC decision in R. v. Gladue says about readily available statistics, and then come to an informed decision. Crown 006 remarked, “if it’s a get-out-of-jail-free-card, it must be for non-Aboriginals because the matter’s only been exacerbated for Aboriginals since Gladue.” Consequently, those who contend that section 718.2 (e) constitutes a racial discount are either unaware or do not appreciate that over the last three decades, there has been an increase in the federal incarceration rate for Indigenous peoples in Canada every single year.

The implementation of section 718.2 (e), R. v. Gladue and its guiding principles can sometimes constitute a legalistic conundrum when members of the judiciary must apply the general principles of sentencing, particularly the core principle of
proportionality. The problem appears to stem, in part, from the fact that even though the SCC, in *R. v. Gladue*, at paragraph 66, sets out the principles which should guide courts in the application of section 718.2 (e), a matter revisited 13 years later in *R. v. Ipeelee*, at paragraphs 56-87, there is still uncertainty among the judiciary as to what exactly these principles entail. And the tendency is for members of the judiciary to privilege proportionality in terms of “equality” rather than equality of outcome. The other consideration is that there are some, including a few legal informants, who appear to concur with the three common interrelated criticisms (particularly # three) referenced in *R. v. Ipeelee*, at paragraph 64, relating specifically to both section 718.2 (e) and *R. v. Gladue*, wherein SCC Justice LeBel, speaking on behalf of the majority, commented negatively on such misinterpretations as follows:

Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2 (e) of the *Criminal Code*.

One of the noteworthy distinctions which emerged throughout the course of this research project involved the notions of “equality in application” of the law and “equality in outcome.” I found that legal informants, for example, tend to adopt an egalitarian view, where all accused are essentially dealt with in the same manner when they appear before the court, whereas *Gladue* Writers are more inclined to articulate a view consistent with the principles proposed by the SCC. *Gladue* Writer 016 submitted, for instance, that it was “not about fairness, it’s not about equality, it’s about equity.” Stated another way, the same *Gladue* Writer declared, “we’re not bringing them [Indigenous peoples] up, we’re
bringing you [non-Indigenous people] down.” R. v. Ipeelee speaks to this matter directly, wherein the majority stated:

[79] To the extent that [R. v.] Gladue will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances […] Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). As Professor Quigley cautions, at p. 286:

Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail […] It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment.

Judges are mandated to render decisions which are not always well received by members of the public and/or individual victims who have experienced harm; simultaneously, in the case of Indigenous accused, they attempt to avoid the perception that they are utilizing a get-out-of-jail-free-card. Alternatively, crowns, in their pursuit of justice, are entrusted to prosecute cases to the fullest extent of the law, while concomitantly safeguarding the public peace. Having a “racial discount” as a sentencing principle is antithetical to how the vast majority of legal informants (especially judges and crowns) view their respective roles in the CJS, mainly because if proportionality is no longer perceived as the overarching sentencing objective/principle, they are no longer fulfilling their role and/or responsibilities. Legal informants who have the designated obligation of representing their client (crown for the state; defence for the Indigenous accused) to the best of their ability and within the law, also must advise the presiding judge of any “aggravating” or, alternatively “mitigating” circumstances. One of the most common presenting issues raised by legal informants in the interviews was the influence
of alcohol abuse in connection with Indigenous peoples engaging in more serious offending. This, in turn, feeds into the notion of pathologization.

5.2.5. Alcohol as an accelerant

As discussed earlier, according to many legal informants, overrepresentation is not necessarily a problem associated with settler colonialism and its harmful effects, but rather is more so the result of differences in offending patterns, and, in part, the consumption of alcohol. Dunbar-Ortiz and Gilio-Whitaker (2016) state “[f]ew images of Native peoples have been as intractable and damaging as the trope of the drunken Indian,” in that it has “been used to insidiously and overtly support the claims of Indian inferiority that, as we have seen, have been deployed in a host of ways that result in loss of culture, land, and sovereignty” (p. 130). The suggestion that “Indians are simply more prone to alcohol abuse than non-Natives implicitly makes assumptions about the superiority of the dominant white society and thus, the inferiority of Native peoples,” while ignoring “a complex array of variables that must be considered in assessing alcohol abuse in Indian country” (Dunbar-Ortiz & Gilio-Whitaker, 2016, p. 136).

Speaking directly to disconcerting offending patterns and its relationship to alcohol abuse, Defence 003 suggested that over the course of the last ten years, they had observed many more “sexual assault cases, the sexual abuse of women and children, violence which is extreme and capable of causing serious bodily harm, always with the fuel of intoxication.” Crown 007 indicated that “alcohol and substance abuse are definitely predominant factors in criminal behaviour – period – always has been.” Crown 002 pointed out that “we see a lot of domestic violence and its addiction-related. If the people are not abusing drugs or alcohol, they are not going to be involved [with the
court], and that goes for non-Aboriginals as well.” The same Crown further indicated, “that if we were back in prohibition times and there was no alcohol available […] the criminal justice system would grind to a halt because the underlying issue, in most cases, is alcohol in our Province.” Speaking specifically about the root causes of overrepresentation involving Indigenous peoples in Canadian prisons, Judge 004 did not necessarily perceive a substantive difference between Indigenous and non-Indigenous accused, but agreed that alcohol abuse, along with other health determinants, indisputably exacerbate the problem.

In speaking with Indigenous informants about alcohol abuse and its overall impact on Indigenous peoples, understandings of the problem and ways and means by which to deal with it stood in stark contrast with the views of legal informants. Legal informants, for instance, were inclined to speak about the linkage between alcohol abuse and the involvement of Indigenous peoples in serious criminal behaviour and recommend conventional interventions, such as (non-Indigenous) community detox centres or rehabilitation units and/or placing individual accused in custody to “dry out.” In contrast, Indigenous informants consistently linked alcohol abuse to harm caused by colonialism and spoke of how best to bring Indigenous healing practices to bear, and thereby restore a sense of balance and harmony, not only for the benefit of the individual experiencing the problem, but also Indigenous communities in which Indigenous accused reside. Tarrell Awe Agahe Portman, a member of the White River Band of the Cherokee Nation, and Michael Tlanusta Garrett, a member of the Eastern Band of the Cherokee Nation, (2006) maintain, “Native Americans believe their healing practices and traditions operate in the context of relationship to four distinct constructs namely, spirituality (Creator, Mother
Earth, Great Father); community (family, clan, tribe/nation); environment (daily life, nature, balance); and self (inner passions and peace, thoughts, and values)” (p. 453).

Indigenous informants also problematized alcohol differently than their legal counterparts. For example, Gladue Writer 016 stated, “when you connect the younger generation to their own culture, tradition, drumming and dancing, then this helps protect them from becoming caught up in drugs and alcohol because it’s against the whole spiritual piece.” Gladue Writer 017 suggested if she was informed by one of her clients that they had a problem with alcohol, then she would consider that to be worthy of note and attempt to make the link with “systemic background factors” such as the IRSS and systemic racism and go from there. Sittner (2016) indicates, “North American Indigenous communities experience disproportionately high rates of substance use, abuse, and dependence and their accompanying consequences” (p. 830), including spending time in Canada’s prisons, especially if alcohol is introduced at what Sittner (2016) refers to as an “early-onset trajectory.” Even though stereotypical linkages between Indigenous peoples and alcohol-induced social problems still abound today, rarely cited statistical analysis provides a counter-narrative. Harold R. Johnson (2016), a member of the Montreal Lake Cree Nation, for example, argues “there are more people in the Aboriginal community who are completely abstinent than in the general population” and further that “[s]tudies have shown that there are twice as many Aboriginal people who do not drink at all, compared with the rest of Canada”29 (p. 127). Monchalin (2016) similarly states,

29 One such study (First Nations Information Governance Centre, 2012), in 2010, found that more than “one-third (35.3%) of First Nations adults were abstinent from alcohol in the past 12 months” compared to less than a “quarter of adults (23.0%) in the general Canadian population”; however, “of those who do drink, almost two-thirds (63.5%) report
“research shows that fewer Indigenous peoples do drink, as compared to non-Indigenous people, yet, when Indigenous people drink, they tend to drink more heavily” (p. 156).

Johnson (2016) phrased it this way: “It seems we either drink hard or not at all” (p. 128), keeping in mind that the World Health Organization speaks to “the strong links between alcohol and violence” (Monchalin, 2016, p. 156).

Overall, I found that legal informants tended to draw on long-standing stereotypes associated with Indigenous peoples and alcohol to explain serious criminal behaviour and overrepresentation, rather than regarding settler colonialism and/or systemic racism as an explanation for both. Recognizing beforehand what they were about to say was based on one such “stereotype,” Crown 007 submitted:

My experience has been that there will always be people who cannot drink, and if they drink, they get to a point and they turn mean […] violent (irrational), you can’t talk to them and what I have found is when I’m dealing with the Aboriginal community that are involved in these all day drinking, all day fighting […] Aboriginals have a different reaction or interaction with alcohol. I don’t know if it’s genetic chemistry or not but there seems to be that an Aboriginal offender who has a drinking problem and a problem with the law […] is easily triggered into that blackout type of rage or non-responsive or irrational behaviour.

Alcohol for legal informants was normally regarded as an “aggravating” factor rather than a mitigating factor arising from colonial lived experiences. Consequently, the failure of section 718.2 (e), R. v. Gladue and its guiding principles can be justified on the basis that offending behaviour is the result of individual-level pathology. This constitutes an intriguing paradox, in that stereotypes associated with individual pathologization and denial of colonial context/experience are being applied to individuals, yet these same drinking heavily” (p. 94). Monchalin (2016) cited similar research findings, taken from the 1996 Royal Commission on Aboriginal Peoples (RCAP), wherein it argues “research has shown that abstinence was actually almost two times more frequent among Indigenous peoples than among non-Indigenous peoples in 1991” (p. 155).
stereotypes are based on the collective pathologization of Indigenous peoples. Virtually every single informant, whether Indigenous or non-Indigenous, regarded alcohol as detrimental in its overall impact on Indigenous and non-Indigenous peoples, alike. However, Indigenous informants, for example Gladue Writer 017, linked alcohol-related problems among Indigenous peoples to settler colonialism and the related systemic background factors it produced (e.g. reserve system, Indian Act, 60s Scoop, IRSS, etc.). Similarly, Gladue Writer 016 suggested one of the best solutions to these problems, as opposed to conventional forms of punishment (e.g. incarceration, isolation) was a healing process, as emphasized via section 718.2 (e), including cultural traditions like drumming and dancing, and “walking the ‘Red Road’ 30.”

Overrepresentation of Indigenous peoples in the Canadian CJS has constituted an ongoing intractable issue for decades, with comprehensive solutions remaining ever-elusive. Typically, the first step in finding a solution is identifying the problem. Despite being well documented statistically and notwithstanding the findings of numerous papers, commissions, reports and inquiries about overrepresentation, denial and ambiguity persist. The additional presenting issue is the distinct way, for the most part, Indigenous and non-Indigenous informants have come to understand overrepresentation and how to respond to the problem. In this section, I focused on whether or not informants identified

30 The Red Road or Red Path is the Native spiritual path. Walking the Red Road means living in the moment connected to all that surrounds us, respecting all “our relations” and Mother Earth and Father Sky. It means finding a balance between and attending to our four sides: spiritual, physical, mental and emotional. It means taking care and respecting ourselves and the Creator. It means being thankful for what we have, to only take what we need and to give back. To give back to those around us and to the spiritual world. And to remember where we have been, to remember and honor our ancestors. It is walking in the right path of life, where we do the right thing, even if it’s freaking hard at times…. Its opposite would be the path of self-destruction, aka the Black Road. (Anonymous, 2015, January 17). Re: Walking the Red Road [Web log comment]. Retrieved from http://traditionalnativehealing.com/walking-the-red-road
overrepresentation as (a) statistically a problem, and/or (b) distinctly grounded in settler colonialism. I found that denials and ambiguities in understanding overrepresentation were associated with misunderstandings of section 718.2 (e) and the associated principles set out in *R. v. Gladue*. In the next section, I examine the influence of these misunderstandings in how *Gladue* Reports are perceived.

5.3 Presentence Reports (PSRs) and *Gladue* Reports – a difference of “substance” or “form”

Presentence and *Gladue* Reports form a significant part of the work performed by criminal justice officials for the Canadian judiciary, in PEI since the early to mid-1970s in the case of PSRs and commencing in 2014, for *Gladue* Reports. *Gladue* Reports are relatively new to the legal realm in PEI. These Reports are not even mentioned in the defining 1999 SCC *R. v. Gladue* decision, but subsequently, are praised by SCC Justice Lebel, speaking for the majority 13 years later, in *R. v. Ipeelee*:

[60] In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of presentence report tailored to the specific circumstances of Aboriginal offenders. […] it is indispensable to a judge in fulfilling his duties under s. 718.2(e).

In *R. v. Mattson*, 2014 ABCA 178, the Court of Appeal of Alberta attempted to emphasize the importance of distinguishing between content and form when ascertaining the significance of the presence or absence of a *Gladue* Report:

[50] We find that notwithstanding that there was no formal *Gladue* report per se prepared in this case, virtually all the information that would have been contained in a *Gladue* report was before the sentencing judge in one form or another. The sentencing judge took cognizance of it; therefore, in substance a *Gladue* report was before him […] we feel that on the facts of this case, as the pertinent information was before the sentencing judge, that it would elevate form over substance [emphasis added] to allow the appeal on the basis that a formal *Gladue* report had not been tendered at the sentencing hearing.
In other words, the Court decided that as long as pertinent sentencing information was before the court, it did not matter whether or not the information was conveyed via a *Gladue* Report.

The distinction between Presentence and *Gladue* Reports, within the ranks of legal professionals who work in the CJS in PEI, is neither precise nor unequivocal. Virtually without exception, legal informants expressed a high level of satisfaction with PSRs and Canadian studies appear to support this assertion, “with an overall 80 percent concordance rate between PSR recommendations and ultimate dispositions” (Hannah-Moffat & Maurutto, 2010, p. 264). This relatively high concordance rate is based, in part, on Canada’s legal system’s familiarity and comfortability with PSRs over a longer period, compared to *Gladue* Reports. In PEI, while the three *Gladue* Writers were unanimous in their desire to have *Gladue* Reports prepared in every case involving Indigenous accused, legal informants were far less unified. This reluctance to change how things stand had at least a quarter of the legal informants openly expressing the notion that if *Gladue* Reports eventually do become a regular feature in the formal court process, they would have to be completed in the “proper” manner (Crowns 001, 002, and 012), and provide the “appropriate” information (Crown 005) to the presiding judge – in short, should closely resemble a PSR. Nonetheless, a common point of confluence appears to be that since both Presentence and *Gladue* Reports are typically prepared at the pre-sentence stage of legal proceedings and obviously have the potential to influence sentencing outcomes, *Gladue* Writers and legal informants alike expressed the desire to ensure content accuracy, reliability and validity. However, there remains a discernible lack of consensus in how these same criteria will be defined and ultimately adopted, which
stems, in part, from the direct and indirect distrust on the part of some legal informants concerning overrepresentation and how it is grounded in settler colonialism.

5.3.1. Presentence Reports (PSRs) and Gladue Reports – what purpose do they serve?

Judge 004 was one of many informants, legal and Indigenous alike, who regarded social context information as critically important, not only at the sentencing stage of legal proceedings, but across the broader CJS decision-making continuum. On one end of the continuum are legal informants who privilege PSRs, which typically deal with “facts,” capture individualized background information related specifically to the accused and circumstances surrounding the commission of the offence (Crown 002). On the other end, are Indigenous informants who privilege Gladue Reports framed in the form of a “narrative/story,” and which encapsulate contextualized, holistic, individual and systemic background information related to individual accused; as well as the importance of one’s ancestors and community, restoring harmony, healing and a sense of balance (Gladue Writers 016, 017, 018 and Elders 019, 020, 021).

Presentence and Gladue Reports are perceived by informants as different in both form and substance. Crown 002, for example, argued that “PSRs give you a good background on whom you’re dealing with, the circumstances of the individual, their level of acceptance of responsibility.” PSRs are defined in the CCC, even though they are not explicitly referenced by name:

s. 721 (1) - a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.

s. 721 (3) - unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:
s. 721 (3) (a) - the offender’s age, maturity, character, behaviour, attitude and willingness to make amends;

s. 721 (3) (c) - the history of any alternative measures used to deal with the offender, and the offender’s response to those measures.

R. v. Knockwood, 2012 ONSC 2238 (hereinafter referred to as R. v. Knockwood and retrieved from http://canlii.ca/t/fqxkx ) constitutes an “outlier” in that it is one of the few Trial Court cases to clearly and knowledgeably articulate the distinction between Presentence and Gladue Reports. Judge Hill goes into considerable detail regarding the value of Gladue Reports in connection with sentencing and begins by suggesting that:

[54] to give “substantive weight” to an offender’s Aboriginal heritage, there must be more than a mere reference to s. 718.2 (e) of the Code – It must be given substantive weight, which will often impact the length and type of sentence imposed.

Judge Hill further commented, in speaking specifically about the R. v. Knockwood decision, that while the PSR (not a Gladue Report as requested) was:

[70] filed with the court within the prescribed time, it had no Gladue content, was otherwise content-inadequate, and typed in the French language which the offender could not understand

The same judge clearly depicted his feelings about the information contained in the PSR and conveyed to the court by asserting:


Even though Kathleen Knockwood, a resident of a reserve situated on Kahnawake Mohawk Territory, situated 10 miles south of Montreal, Québec, was convicted of committing a serious offence (unlawfully importing heroin into Canada from Bogata, Columbia), and received a sentence of six years in a federal prison, Judge Hill declared:

[54] To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes […] and
of course higher levels of incarceration of Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.

The contextual framework within which Presentence and Gladue Reports are prepared essentially comes “alive” in *R. v. Knockwood*, when Judge Hill states the following:


...the objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court (*R. v. Angelillo*, [2006] 2 S.C.R. 728) at para. 22).

In summary, the *R. v. Knockwood* decision speaks unequivocally, based on section 718.2 (e), *R. v. Gladue* and its guiding principles, about judges having a duty to engage in a different method of analysis when dealing with Indigenous peoples who appear before the court, because of “unique” individual and systemic background factors.

*Gladue* Reports serve two distinct purposes: (1) highlighting the unique individual and systemic background factors which may have resulted in a certain Indigenous accused coming before the court; and (2) providing information regarding community-based rehabilitation that may or may not be deemed culturally appropriate or what Napoleon and Friedland (2014) refer to as a “pan-Indigenous ‘traditional’” (p. 10) response to crime. Quigley (2016) maintains the objective of Presentence and *Gladue* Reports is “demonstrably different in both purpose and intent,” such that, rather than “assessing future risk,” as in the case with PSRs, *Gladue* Reports seek “to examine the
past – the systemic and background factors that may have played a role in the present offender coming before the courts” (pp. 408-409). In speaking about Gladue Reports, Maurutto and Hannah-Moffat (2016) argue that “they function to undermine the illusion of objectivity and practices that reinforce abstraction and de-contextualization, thereby allowing for a more complex legal subject that can alter legal decision-making” (p. 465). Because of this, there is resistance on the part of some in the legal system to use Gladue Reports.

Maurutto and Hannah-Moffat (2016) characterize Gladue Reports as “powerful techniques used to package information, in a format that is accepted within the legal structures” and “document the linkages between individual behaviour and socio-cultural, political, historical, and economic processes, not necessarily with the goal of reducing the responsibility of the offender, but rather to understand and contextualize behaviour” (p. 465). In speaking about the critical importance of Indigenous or traditional teachings, oral histories and their capacity to impact definitive court practices, Maurutto and Hannah-Moffat (2016) use the term “contextualized Aboriginal knowledges,” which they describe as “the narratives and evidence appearing in Gladue Courts that locate individual behaviour within collective racial histories and experiences of colonialism and discrimination” (p. 452).

Mitch Walker, currently a non-Indigenous Gladue Writer and former Probation Officer in BC, in a decision involving R. v. H.G.R., 2015 BCSC 681 (hereinafter referred to as R. v. H.G.R.), provided a letter to the Honourable Mr. Justice Punnett, in support of a defence counsel application to obtain a Gladue Report, wherein the “letter lays out the substance of the defence argument” and Mr. Walker, at paragraph 10, submits,
In my experience, the Gladue Report is looking to provide the court with evidence of intergenerational trauma and tell the story of the particular individual before the court. This means researching their life history and connecting the impact of colonization, the loss of language and culture, the residential school system and any other unique contextual factors to the actions of the person before the court. […] These traumas, as established in the Gladue decision, are unique to First Nations.

In short, Gladue Reports potentially provide “context” for the offence and offender in relation to colonialism. Yet, this is often interpreted as “advocacy,” at odds with the ostensible “impartiality” of the CJS.

The conventional judicial system is foundationally situated on a model of “impartiality,” “parity,” “evidentiary proof,” “proportionality,” and “truth,” thereby resulting in opposition or tension when attempting to introduce Indigenous “storytelling” and “healing” into the adversarial legal arena. This supposed “subjective” interpretation of reality fuels a negative appraisal of “advocacy” and, by extension, makes for a challenging obstacle to overcome. Notwithstanding the fact that a relatively few (approximately 10) Gladue Reports had been prepared at the time of the informant interviews (May 6 - June 29, 2016), and PSRs had been utilized in PEI since the early 1970s, I found that informants, for the most part, had already formulated an opinion concerning the overall usefulness and purpose of Gladue Reports. For example, Crown 001 described PSRs as based on facts and emphasizing the “present day,” whereas Gladue Reports were viewed as highlighting the Indigenous accused’s “life adventure […] going back generations […] it’s that ‘historical context’ […] in ‘story format.’” Crown 002 distinguished between the two by characterizing PSRs as providing “good background information” and addressing the accused’s “level of acceptance of responsibility,” with Gladue Reports serving a similar purpose, although “in a different context.” Judge 004 indicated it was critically important to receive “credible” information
prior to sentencing, and utilized terms like “impartial, objective, factual, reliable” to
define what was meant by this value-laden term. Crown 007 echoed a similar sentiment
when discussing the same “information,” suggesting that “judges want whatever
information they can get about any offender that would be of any use to determine the
four corners of our sentencing philosophy – deterrence, denunciation, rehabilitation and
reparation.” Judge 010 suggested a collaborative approach to report writing would work
best, with a Probation Officer providing legal details such as “prior criminal record” and
“response to past community supervision – Probation”; and Gladue Writers speaking to
“information related more so to their Aboriginal background.” In contrast, the three
Gladue Writers shared similar opinions when it relates to Gladue Reports, using words
and phrases like “restoring harmony” (Gladue Writers 016, 017), “healing” (Gladue
Writers 016, 017, 018), “cathartic” (Gladue Writer 017), providing Indigenous accused
with “a voice” (Gladue Writers 016, 017), “capturing one’s story” (Gladue Writers 016,
017, 018), and “advocacy” (Gladue Writers 016, 017, 018). These perspectives are
presented in more depth in chapter seven.

Looking at the body of case-law, several decisions speak directly to the issue of
advocacy, especially in connection with information conveyed in a Gladue Report. For
example, in R. v. D.R.M.L., 2012 BCPC 184, Judge Gulbransen, in sentencing an
Indigenous offender, declared:

[8] The Gladue report that I received is particularly unsatisfactory, in
my view, at least in part, because it is, frankly, far too much of an
advocacy piece as opposed to a more objective report.

Additionally, reflecting a rejection of Gladue Reports, in a decision involving R. v.
Taylor, 2016 BCSC 1326, Justice Dley, at paragraph 47, argued that the resultant Gladue
Report “can only be viewed as advocacy designed to influence the court in setting the
sentence. That is not the purpose of a *Gladue* report.” The Justice’s comments are significant on several different levels. First and foremost, Justice Dley appears to be drawing a direct correlation between his interpretation of the term “advocacy” and the belief that *Gladue* Reports should not influence the court in rendering a judicial decision. In point of fact, this is exactly what *Gladue* Reports are supposed to do. Certainly, PSRs have long served this function, particularly when you consider the aforementioned 80 percent concordance rate between PSR recommendations and ultimate dispositions (Hannah-Moffat & Maurutto, 2010). In addition, Justice Dley is merely compounding the problem by assuming that advocacy automatically denotes “subjectivity,” rather than being objective, trustworthy, and reliable – which is similarly linked to the “equality” vis-à-vis “equity” theme. Third and arguably most disconcertingly, Justice Dley attributes “little weight” to the *Gladue* Report, not so much based on its actual content, but more so its source, and, in turn, imposes his own elucidation of objectivity, trustworthiness, and reliability.

The 2016 PECA decision in *R. v. Legere* arguably explains the matter of advocacy best, where on behalf of the Appellate Court, Justice Mitchell asserted:

[14] A report, whatever it is labeled, must be balanced and objective. It must not advocate a particular viewpoint, although it is quite proper for such a report to offer suggestions as to the potential restorative or rehabilitative programs available, particularly those pertaining to the Aboriginal offender.

Legal informants had their own impressions of advocacy, including Crown 001, who agreed with the PECA’s characterization of the *Gladue* Writer who had prepared the *Gladue* Report in the matter of *R. v. Legere* not as an advocate, but rather “an independent third party, reporting to the court.” However, Elder 021 characterized the advocacy role in preparing *Gladue* Reports as “critical,” especially when working “on the
Aboriginal person’s behalf and providing the resources necessary to make it work and make it work right.” This latter understanding reflects the concept of “equality of outcome” or equity.

In looking at the differences between Presentence and *Gladue* Reports, Crown 001 suggested, “I think it’s fair to say that the PSR is far more factually based,” whereas *Gladue* Reports tend to look at how one’s life journey, “impacted the individual, not only from the present day, which is what the PSR tends to concentrate on or who the parents are, but rather going back generations.” Crown 001 went on to say that they had never seen a PSR that “tells a story – so it’s story versus fact, the historical context of what the Aboriginal people have had to deal with on the Island through the *Gladue* Report and we don’t get that in the PSR.” Contextually, “story” speaks to circular, subjective and Indigenous customary truth, compared to “facts,” which suggest linear, objective and conventional legalistic truth. Anthropologist Edward Hall (1976) explains “context” in the area of truth-telling by characterizing it as “unspoken, unformulated, inexplicit rules governing how information is handled and how people interact and relate” (p. 112). Hall (1976) states that according “to the opinion rule, only established facts, stripped of all contextualized data [emphasis added], are admissible as evidence […] the epitome of low-context systems” (p. 107). Herein, lies a discernible amount of tension between the use of story-telling as knowledge or truth-sharing for Indigenous peoples; whereas, legal informants tend to rely more so on “verifiable factual circumstances,” facts which do not necessarily accept historical context as a form of truth, resulting in a relatively wide chasm delineating the two epistemological perspectives.
In comparing the overall purpose of Presentence and Gladue Reports, Defence 014 proposed that Gladue Reports provide “more of a history of the community and the family [...] it’s more complete [...] you get a better picture of what life was like for that person growing up [...] it brings everything together and really helps you understand why whatever is before the court happened.” Gladue Writer 016 described Gladue Reports as a “plan of action,” whereas Judge 004 found them as having “a more human face.” In R. v. Lawson, 2012 BCCA 508 (hereinafter referred to as R. v. Lawson), at paragraph 28, the Honourable Madam Justice Anne W. MacKenzie states, on behalf of the BCCA, that because they represent a type of PSR, Gladue Reports should be subject to the same general requirements of “balance and objectivity” as conventional PSRs. Justice MacKenzie further commented that the Gladue Writer should attempt to “remain detached rather than advancing personal opinions,” especially considering “the sentencing function belongs to the judge.” Judge 004 stated, when referencing Gladue Reports and the role they play, that “it’s just more information and more information is always better.” In the final analysis, judges, by way of their sentencing decisions, are not only “arbiters of truth,” but also determine the reliability and validity of the information conveyed to the court.

5.3.2. Gladue “components” or Gladue Reports – does it make a difference?

As discussed in the preceding section, both Presentence and Gladue Reports are considered important by both Indigenous and non-Indigenous informants alike, although are perceived as quite different in the overall purpose they serve. Therefore, any suggestion to substantively change not only the format but more importantly, the content in either is most likely going to be met with a certain amount of resistance. As evidenced
in the informant interviews, resistance to making the transition from Presentence to 

Gladue Reports is, in part, based on individual/personal preferences either by way of a 
reluctance to do things differently (maintaining the status quo) or, alternatively is a matter 
of power and control (determining what constitutes “relevant” information and the 
“proper” way to prepare Gladue Reports). These personal preferences are grounded in 
dominant (settler colonial) discourses and institutional norms which underlie the systemic 
and procedural barriers discussed in chapter six.

Commencing with case-law, specifically in the context of defence counsel 
arguing that Indigenous accused are entitled to a full-fledged Gladue Report, as opposed 
to a Gladue “component”31, Justice Lloyd Dean, in R. v. Doxtator, 2013 ONCJ 79, 
declared:

[37] I can find nothing in the authorities I have been provided, nor in 
Gladue itself, that suggest a full Gladue report is absolutely required or 
necessary. The emphasis is on whether or not the sentencing court has 
sufficient materials before it to meet the requirement of special attention to 
the circumstances of Aboriginals.

Further in the same ruling, Justice Dean concludes:

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31 Retired British Columbia (BC) Provincial Court Judge, Cunliff Barnett, who has a wealth of experience 
dealing with section 718.2 (e) of the Criminal Code, R. v. Gladue and its guiding principles, when asked 
about his understanding of a “Gladue component,” indicated that “even though the term enjoys a measure 
of common usage, it has thus far escaped definition.” When a court is tasked with the duty of sentencing 
someone for committing a criminal offence, section 721 (1) of the Criminal Code provides that “a 
Probation Officer shall, if required to do so by a court, prepare and file with the court a report in writing 
relating to the accused for the purpose of assisting the court in imposing a sentence or in determining 
whether the accused should be discharged under section 730.” Even though Presentence Reports are not 
referred to in this specific section of the Criminal Code, they are normally prepared by Probation Officers, 
such persons being employees of either a provincial or territorial government. Judge Barnett indicated 
“since the 1999 Supreme Court of Canada (SCC) R. v. Gladue decision, a practice has developed that when 
the subject of the Report is an Indigenous person, the Probation Officer will offer some comment 
concerning that person’s so-called ‘Gladue Factors.’” That particular section of the Report will be titled 
differently in the various provinces and territories but is commonly known as a “Gladue component” and 
typically will be “brief and superficial” (personal communication, April 30, 2018).
[41] Mr. Doxtator is not entitled as of right to a full Gladue report.  

And, as stated by Justice LaForme in *R. v. Kakekagamick*:

[45] In most cases, the information contained in a presentence report may be sufficient to meet the requirement of special attention to the circumstances of Aboriginal offenders.

Chief Judge Cozens, in *R. v. Blanchard*, 2011 YKTC 86, at paragraph 25, states that in “the absence of a true Gladue Report, it is critical that presentence reports contain some details about an offender’s [A]boriginal status and circumstances.” Justice Pomerance, in *R. v. Corbiere*, 2012 ONSC 2405 (hereinafter referred to as *R. v. Corbiere*), at paragraph 21, also expressed similar concern about the adequacy of Gladue components in a PSR, compared to “the focused and comprehensive material found in the Gladue reports,” although both the crown and defence counsel in that case argued that “the quality of information about an Aboriginal offender in a PSR should be no different than the quality of information in a Gladue Report.” Not necessarily convinced of the merit of the joint submission, although seemingly not wanting to become caught up in the ongoing debate as to which report was better, Justice Pomerance asserted:

[23] There is no magic in a label. A "Gladue Report" by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value does hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context.

Last, in terms of case-law, in *R. v. H.G.R.*, Gladue Report Writer, Mitch Walker, speaking to “the relative merits of PSRs with a Gladue component, compared to full Gladue Reports” opined:

[10] A PSR with a Gladue component […] is diametrically opposite in several ways. One, the time provided to a PO [Probation Officer] to complete the report is insufficient. […] Two, the purpose of the PSR with a Gladue component is much different than that of a Gladue Report. It is framed within the model of Risk/Needs/Receptivity, one based in the
measurement of actuarial risk […] This structure is antithetical to the principle of Gladue […] does not allow the author to engage at the level necessary to connect the legacy of intergenerational trauma with the substantive offence.

I hope to see the incorporation of the Gladue Report with much more frequency and regularity as telling the story of the relationship between the First Nations in Canada, in relation to their overrepresentation in the Criminal Justice System, which requires far more than a "component."

It is noteworthy to see in the totality of Mr. Walker’s remarks the juxtaposition between a Gladue Report’s capacity to tell a story and a PSR’s depiction of facts and calculable risk.

Gladue Writer 017 proposed that a Gladue component and full Gladue Report “definitely do serve different purposes,” at least in part, because it did not make sense to her how “in just a few paragraphs [component], you could actually capture a person’s story.” However, for a few legal informants, there was no discernible difference between a full Gladue Report and Gladue component, which may be due, at least in part, to little or no exposure to Gladue Reports, as these Reports were not introduced in PEI until 2014. For legal informants, determining whether they preferred a full Gladue Report or Gladue component was based, in large part, on the rather sensitive issue as to who ultimately should complete Gladue Reports. Currently in PEI, the choice is between Probation Services, a community-based service within the Community and Correctional Services Division under the administrative umbrella of the Provincial Department of Justice and Public Safety or, MCPEI and the three Gladue Writers32 who prepared

32 As of January 24, 2019, MCPEI has five Gladue Writers in their pool of contract writers; an increase of two following the completion of my fieldwork. All five contract Gladue Writers are Indigenous and band members from one of the two First Nations in the Province of PEI.
Gladue Reports initially as part of a one year Pilot Project.\textsuperscript{33} When asked to choose between these two entities, there was unanimous agreement among Indigenous informants that Gladue Writers of Indigenous ancestry should perform this task. With respect to legal informants, well over half indicated they essentially did not care who completed them. Other legal informants preferred that Gladue Writers complete these Reports, even though they also viewed Probation Officers as quite capable of doing so.

Crown 002 agreed there would have to be an Indigenous component to any protocol involving the preparation of Gladue Reports in the future, stating: “Hopefully that’s not what they’re [Probation Services] about [...] trying to build their own separate empire,” further stating, “I don’t see that.” Crown 002 proposed Probation Officers, who are currently responsible for completing PSRs in PEI, were “simply saying we have the capacity to do this type of [Gladue] Report and I think they’re somewhat offended to be viewed as not having the ability, and that’s unfortunate.” Crown 002 also agreed PSRs could be “adapted to fit a Gladue review, but there’s probably somewhere in the middle that we can meet, and everybody can be satisfied.”

With the advent of PECA’s 2016 influential decision in \textit{R. v. Legere}, in Defence 003’s estimation, we “have an obligation to do more than us decide” what has to be done

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\textsuperscript{33} In PEI, the initial Gladue Report request was received in February 2014, and subsequently prepared by an Indigenous Gladue Writer, under the auspices of MCPEI. As of January 24, 2019, there have been a grand total of 42 Gladue Report requests, 40 prepared, or in progress, and two rejected due to MCPEI staff not being able to contact any collateral sources of information, other than the accused. There was one Gladue Report completed in 2014, two in 2015, nine in 2016, six in 2017, 16 in 2018, and none thus far in 2019. There are six Gladue Reports in progress. The one-year Pilot Project took place between July 2015-July 2016. A memorandum of understanding (MOU) between MCPEI and the Government of PEI took effect on April 1, 2018 and requires the PEI Government to cover the incurred costs of preparing Gladue Reports by qualified Gladue Report Writers, going forward. PEI is the first province/territory in Canada to enter into this type of formalized Gladue Report writing agreement.
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and how to do it, because what must happen now is that we all “get together, listen to everyone’s own story and ultimately figure it out.” However, according to Manley-Casimir (2012), figuring it out is not as easy as it sounds, with the Canadian judicial system at times being “heavily criticized for rendering judgements that maintain the status quo and serve colonial interests,” often leaving “much to be desired with respect to advancing Aboriginal rights in Canada” (p. 233). Since Gladue Writers began preparing Gladue Reports in 2014, there has been a growing tension between MCPEI and PEI’s legal system, specifically in terms of not only who prepares them and what type of information they should contain, but more strategically, which organizational structure provides administrative oversight and ongoing control. Even though there are differing opinions as to whom should take the lead role, Judge 010 proposed that a collaborative effort, which combines both Probation Officer and Gladue Writer roles, may constitute the preferred option and thus serve as a compromise.

Gladue Writer 016 indicated that it was MCPEI’s understanding that Probation Officers in PEI were including “Gladue factors” in their PSRs, “the ones they can see, that are recognizable, but in terms of really connecting that to their action […] the ‘link,’ I don’t think that’s being done.” In this regard, Gladue Writer 016 suggested it was one thing to say someone attended an Indian residential school and quite another to explain what that life experience really meant to that specific individual, because when looking at a Gladue component, “that’s what’s missing, that linkage, and that’s the purpose of a Gladue Report, to really understand” individual Indigenous accused. Crown 007 proposed that if the overriding objective is to have the Gladue component “written from the perspective of an Aboriginal person, then I guess, yes, it would have to be an
Aboriginal person who has a connection to the community”; however, if such is not the case and the overall purpose of a Gladue Report is “to address the information that we need as it relates to the individual […] it comes down to the accuracy and the substance and the content of the information, not who is preparing it.” Terms such as “accuracy,” “substance” and “content” are, once again, value-laden and tend to reflect the perspective of the legal system, rather than Indigenous accused who appear before the court. But the same question remains – “Who should prepare them?”

5.3.3. Gladue Reports – who should prepare them?

In the matter of who should prepare Gladue Reports, the same legal informants who did not have a preference as to whom should complete the Gladue Reports emphasized the importance of having them completed “properly.” The obvious question then becomes who decides and what is considered “proper?” Like several other legal informants, Crown 001 admittedly “struggled” with this question and maintained, “what you have to have is somebody with the knowledge, in terms of the content, but you also have to have somebody who is respected in the Aboriginal community, who will be able to obtain the information.” This means, according to the same Crown, finding someone “who is going to be accepted within the Aboriginal community […] to obtain the information that is necessary, in order to prepare a Gladue Report.” One’s first instinct may be that the person should be of Indigenous descent; however, Crown 001 indicated this was not always the case, mentioning one experienced non-Indigenous Probation Officer in the Province who had developed a trusting relationship with Indigenous peoples in that geographical area, was “completely accepted” and received an award for the work done within one of PEI’s Abegweit Mi’kmaw Nation three reserves. So, for Crown 001,
ancestral roots were not necessarily the determining factor. Similarly, Crown 006 made the argument that the “expertise in Probation Services that I’ve enjoyed over the years is immeasurable […] and I don’t see that being an Aboriginal is a prerequisite for preparing Gladue Reports.” Alternatively, Crown 007 stated, “I don’t think it matters, although in fairness, I would say a person who was connected to the Aboriginal community would have, I would think, better access to the information.”

With regard to the three Provincial Court Judges in PEI and the question as to who should prepare Gladue Reports, Judge 004 proposed that it really didn’t matter as long as they were “prepared well.” This, once again, sets up tension between the dominant CJS and Indigenous peoples, represented in this instance by MCPEI and Gladue Writers, as to who decides if it is prepared well. The other two Provincial Court Judges viewed the manner in which Gladue Reports are currently being prepared, with all Gladue Writers of Indigenous descent, as the preferable option, each providing specific reasons for their preference: (1) an Indigenous person “might have a better sense as to some of the subtleties of whatever situation they’re describing,” compared to someone who is non-Indigenous (Judge 010); (2) an Indigenous person is “in the best position to give in-depth insight to the court,” rather than a non-Indigenous person (Judge 010); and (3) an Indigenous person may perhaps be “better aware of what resources are in his or her own community, than someone who is from outside that same community” (Judge 011).

As someone of Mi’kmaq descent, Gladue Writer 016 spoke passionately about the need to have Indigenous peoples prepare Gladue Reports, first of all because “we come with that past, we come with that history […] it’s something we live with, we know it so well, and we want to move it forward, whereas a non-Indigenous person wouldn’t have
that history, doesn’t have that past, and doesn’t have that knowledge – they may have read about it, but we walk it.” Defence 003 had initially believed Probation Officers were better equipped and fully capable of preparing Gladue Reports, an opinion reinforced when they reviewed the “thorough” PSR prepared in the matter of R. v. Legere, at the Trial Court level, by a highly skilled and experienced Probation Officer. However, the same Defence, after observing Gladue Writer 016 interact with other Indigenous peoples, witnessed the benefit of having someone of the same ancestral heritage complete the Report. Defence 003 proposed that Indigenous clientele who sit at the defence table, for the most part, are “so happy to have an Indigenous person sit with them and there’s nothing I [as a non-Indigenous person] can do to fix or change that.” This speaks to the importance of having the right person, in the right place, at the right time.

The findings of Maurutto and Hannah-Moffat (2016) “indicate that information generated by lawyers about accused Aboriginal people may identify cultural factors that have led to discrimination; however, this information is not consistently grounded in histories of colonialism and race relations.” Conversely, “reports produced by trained Gladue Report writers result in substantially different kinds of knowledge that draw connections between an accused’s actions and specific Aboriginal histories of colonialism” (p. 455). Gladue Writer 016 stated one of the principal reasons Indigenous peoples should prepare Gladue Reports is that even if you had, for example, an Indigenous Probation Officer, who was experienced and employed by the Department of Justice and Public Safety, “they would still be perceived as a person with power”; while a Gladue Writer, under the administrative umbrella of MCPEI, “has no power […] we cannot breach anybody, we cannot place anybody in jail […] we come to the community
as a support, not as a threat […] we walk about with them in the community […] so we’ve built a relationship with the community.”

It is noteworthy that Gladue Writers do not perceive themselves as having any power, although Gladue Reports, not unlike PSRs, are requested by judges to assist them in the sentencing process. Probation Officers typically regard themselves as “officers of the court” and, based on my experience, accept this position title unreservedly, whereas Gladue Writers do appear to view themselves as rendering a service to the court, but acting more so as “advocates” in the presentation of Indigenous voices and perspectives in the legal system. It is important to note here that only a small number of legal informants described Gladue Writers as “advocates,” thereby implying bias, lack of impartiality and, by extension, inadequacy in preparing “proper” court-mandated reports.

Gladue Writer 016 listed several benefits of having Indigenous peoples prepare Gladue Reports, stating “not only is it cost-effective but also there is the restorative justice and cultural piece,” recognizing and understanding the “triggers,” and knowing “whom we need to call to come in and help and support us” in Indigenous communities. This cost-benefit analysis is an interesting counterargument to at least one of the legal informants who indicated it would be more cost-effective to prepare Gladue Reports governmentally “in-house.” Gladue Writer 017 also contended Indigenous peoples should complete Gladue Reports because “if history has shown us one thing, it’s a non-Indigenous person’s ignorance toward my culture, a culture they don’t know anything about.” The same Gladue Writer was quick to add, “I don’t say that disrespectfully, but if a person doesn’t have certain experiences, then they just don’t know.” Gladue Writer 017 provided a real-life example to prove her point – “I remember one time it was explained
to me by an Elder that if you’re attempting to explain colour to someone who is blind, there are no words, they don’t have the actual ability to be able to understand – they just can’t – the concepts are not there.” The same Gladue Writer provided additional rationale in support of having Indigenous peoples prepare Gladue Reports by stating, “why would I go and write something about somebody’s life that I know nothing about […] perhaps going in with some judgement or bias. I think what is needed is an individual who has a true connection, a love of their community, that feeling of wanting to restore harmony in the community, seeing how that can be accomplished, and understanding that the process is not going to be easy, yet being willing to position themselves as part of the Indigenous community […] and promoting the positive dialogue that is needed for the offender to heal.” Gladue Writer 017 stressed that acquiring the services of Indigenous peoples was one thing, having them properly trained another, in that “if the training you are doing only allows for so much personal engagement or investment, then you really have to ask the question: ‘What am I willing to compromise, in order to get what I want?’”

Speaking to the critical importance of building relationships and establishing trust in Indigenous communities prior to preparing a Gladue Report, Gladue Writer 017 stated, “whenever I walk into a home, and say who I am, usually I’m greeted with the response – ‘I’m so thankful it’s you writing it’” – which speaks to the importance of “knowing the traditional protocols, so that people are not accidently disrespected […] the whole spiritual realm.” In addition, the same Gladue Writer proposed, “if I’m going to take information from somebody, I’ve got to give them something, I can’t just expect to take without giving […] in recognition of who they are […] a sign of respect.” This approach is also a good way to engender “trust” and restore “harmony.” Alternatively, from my
experience, if a non-Indigenous Probation Officer was asked to prepare a PSR concerning an individual with whom she or he was familiar, outside the workplace, this could potentially become an impediment, and likely, in some instances, would result in their recusal from any further involvement in that particular case.

The *R. v. Legere* decision, at paragraph 13, states: “A report that meets the *Gladue* requirements may be prepared by a variety of people with diverse backgrounds (*R. v. Lawson*, at para. 26). No one source or agency should have a monopoly on the preparation of reports that meet the *Gladue* standard.” Several legal informants agreed with the idea tendered by Judge 010 in that *Gladue* Reports could be prepared by way of a “collaborative effort.” For example, Probation Officers could complete the legal segment, including information about the way the client responded to prior community supervision (Probation), their prior criminal record, etc., whereas *Gladue* Writers could concentrate on the relevant *Gladue* guiding principles, as well as individual and systemic community and cultural background factors. Crown 001 suggested another possible method of resolving the issue would be a “trade-off,” which would have “low-end” illegal behaviour (i.e. cases) dealt with by conventional Probation Officers, whereas “high-end” cases would rely more so on *Gladue* Writers. Judge 010 proposed that *Gladue* Writers could provide information “related more so to the Aboriginal background,” with Probation Officers “dealing with legal issues,” thereby imparting “two different perspectives on different aspects of the individual before the court” and ultimately, “taking advantage of both.”

After having had the opportunity to review several *Gladue* Reports prepared by *Gladue* Writers, Crown 002 observed, “I’m not sure that they [Probation Officers] can
access all of the information” in the case of Indigenous accused and as such, a collaborative approach “may be a solution […] it’s a question of whether the [service delivery] silos can come down and I’m not sure that’s a possibility.” According to at least one Gladue Writer, it was not clear that Probation Services would want to collaborate fully and/or relinquish their duties and responsibilities with respect to the preparation of Gladue Reports or Gladue-related “components,” going forward. Based on my experience, it is noteworthy that similar tension existed following the Young Offenders Act, R.S.C., 1985, c. Y-1 being proclaimed in force on April 2, 1984, at which time Probation Services in PEI was administratively split, with Probation Officers maintaining responsibility for serving adult offenders, whereas young offenders were supervised in the community by newly designated Youth Workers. Initially, there was a certain amount of tension between both branches of the Community Services Section, especially among the more experienced Probation Officers, who felt they were better equipped to deal with people who were placed on Probation, regardless of their chronological age. This tension eventually subsided and over time, both branches acknowledged the merit of working together for the benefit of their respective clientele. It would be my contention that a similar collaborative outcome is feasible between Gladue Writers and Probation Officers; however, the contextual significance of settler colonialism could impact the feasibility of this happening.

Defence 003 reminded me that it was “at the initiative of MCPEI that the first Gladue Report was completed in PEI” in 2014, and “the case that came along was the perfect case, since it was a serious crime – assault with a weapon; the Aboriginal accused had a serious criminal history; the incident involved a bizarre, violent and quick reaction
to a minor provocation; and it was fortunate that nobody was seriously hurt or killed.”

Defence 003 asserted “we had the cooperation, support and assistance of MCPEI, who agreed to pay for the first one [Gladue Report] and did a really good job.” Support from the Indigenous community on Lennox Island First Nation reserve, including its Chief, was considered critically important, and according to the same Defence, constituted the first time that the history of PEI’s largest reserve was captured “on paper,” including “what that community has had to deal with throughout the generations.” When the initial Gladue Report was submitted to the court, Defence 003 characterized it as “very impressive, incredibly detailed, extremely sensitive,” and was admittedly, shocked because I had known members of that family for at least two generations and I had no idea […] it was humbling […] I had no idea of the real impact of residential schools in that community […] I was seeing the cultural issues arising in the Supreme Court [Family Law Division] and essentially being ignored even though, at the time, I was trying to have somebody pay attention to that […] I saw the history that I witnessed myself but I had no idea what was underneath it or what was behind it or how it came to be so.

Defence 003 also raised the matter of “information ownership,” whereby in a recently prepared Gladue Report, “there was no input from the community whatsoever and the reason was because they didn’t want the person there, essentially wanted him gone; but that was never addressed, and it has to be, even though it’s painful – that’s a reality.” During the investigation/preparation process when completing either Presentence or Gladue Reports, it is normally necessary to speak with several different information sources, in addition to the accused, all contributing to the evolving narrative.

In Defence 003’s estimation, “that’s a big issue in terms of cultural values and who owns the information.” Based on my own experience as a Probation Officer, whenever PSRs are being prepared/investigated, and information initially gathered and/or subsequently
disseminated, Probation Officers often become immersed in ownership negotiations with their clientele, with the conversation typically involving three basic questions: (1) Who is in a position of power and control? (2) Who can be trusted? (3) Who can be harmed by me providing this information to other people, including the judge? Once this specific line of questioning had begun, I found that it was relatively easy to move away from telling one’s own story, to participating in “collateral debates.”

5.3.4. The trap of collateral debates

According to Crown 006, rather than meeting its legal obligations pursuant to section 718.2 (e) and R. v. Gladue, including providing information to the presiding judge, the legal profession has had the tendency, over the last two decades, to become actively engaged in what can be termed “collateral debates, like who should be preparing Gladue Reports, should it be First Nations people, should it be people trained in Gladue Reports, etc.?” Crown 006 argued that this form of debate, although “typical of the justice system […] and how we get lost and digress on issues of empowerment with how the system is frame-worked,” merely distracts everyone from the more consequential issues enunciated in R. v. Gladue, wherein the SCC spoke about the urgent need for “a whole different sentencing approach or analysis that doesn’t come down to one-liners” or paying what amounts to “lip-service.”

I found during the interviews that there was a preoccupation on the part of at least half of the legal informants with respect to specific policies, procedures and protocols associated with implementing R. v. Gladue generally and preparing Gladue Reports more specifically. This inclination to be preoccupied with process, rather than outcomes, has the potential to impede life-changing equity initiatives such as Gladue Reports and, in
turn, the remedial effects of both section 718.2 (e), and \textit{R. v. Gladue}. Some of these systemic and procedural barriers and tensions are discussed in chapter six.

In the final analysis, the import of a \textit{Gladue} Report is neither based upon the number of requests made, the identity of the author, nor indeed if the writer is a gifted wordsmith, but is more so the result of how proficient individual writers are in recounting the life story of Indigenous peoples who come in conflict with the law and appear before the court. Whether the collateral debates entail the coverage of costs associated with preparing \textit{Gladue} Reports, the administrative umbrella under which these Reports are to be prepared, or who prepares them; it should not be overly surprising to see organizational structures (e.g. MCPEI and Probation Services), especially in a relatively small jurisdiction like PEI, vying for the lead role. In speaking with informants, Indigenous and non-Indigenous alike, it was ascertained that the Provincial Government will ultimately, in all likelihood, be making the final decision when it comes to most, if not all, matters relating to \textit{Gladue} Reports in PEI. This is particularly the case since April 1, 2018, when a Memorandum of Understanding (hereinafter referred to as MOU) was signed between MCPEI and the PEI Government as it relates to payment for the preparation of \textit{Gladue} Reports in the Province, in the future.

Another debate which is by no means collateral in nature, but rather constituted a topic of considerable debate, is the matter of “institutional knowledge.”

5.3.5. Institutional knowledge: but I already knew that!

What is known in the legal profession as “institutional knowledge” ensues when a judicial determination is made that it is no longer necessary to hear anything more about the lived experience or story of individual Indigenous peoples; notably if it involves the
IRSS, 60s Scoop, reserve system, Indian Act, and other relevant documented colonial practices which do not relate directly to the Indigenous person before the court. Judges garner this distinct form of knowledge over the course of time. In the case of Gladue Reports, institutional knowledge enables presiding judges to become more familiar with the systemic problems and/or issues surrounding individual accused coming before the court, thereby foregoing the need to review the same amount of detail in every case, going forward. Crown 002 suggested that once judges have been “brought up to speed, they are going to be able to better understand the broader presenting issue, thereby requiring the author of the Report to more so bring into focus what’s available for that accused.” Judge 011 acknowledged the PEI Provincial Court hasn’t had an appreciable amount of experience with Gladue Reports, and that it normally receives considerable information about an Indigenous accused’s background and circumstances by way of a detailed PSR and/or submissions by crown and/or defence legal counsel. Judge 011 further stated regarding PSRs, “what I haven’t had is the history you get in the Gladue Reports concerning the residential schools and comments from [former Prime Minister] Harper apologizing […] but once you’ve read that once” that is quite sufficient.

One could reasonably infer that judges sometimes decide themselves when they have heard the full story of individual accused, rather than acknowledging that one's own story continues to unfold with the passage of time. The notion of tailored individualized sentencing should be understood from the perspective that it is either individualized by way of a single incident or offence (i.e. conventional approach to sentencing) or, alternatively by way of individual accused (i.e. Gladue approach to sentencing) – such a distinction is noteworthy. In R. v. Knockwood, at paragraph 54, the Court stated that
“individualized sentencing can be no more important than in the sentencing of an Aboriginal person,” and drew attention to the authoritative SCC decision in R. v. Ipeelee, wherein it states, at paragraph 38, that “[s]entencing judges must have sufficient maneuverability to tailor sentences to the circumstances of the particular offence and the particular offender [emphasis added].” In R. v. Knockwood, Justice Hill expands upon this notion of individualized sentencing by contending that “[c]ritical to this process is comprehension of the contextual history of Canada’s First Nations citizens including the following principles: (1) Aboriginal persons are significantly overrepresented in Canada’s prison population: [R. v.] Ipeelee/Ladue, at paras. 57-63; (2) as a remedial provision designed to alleviate this serious problem, s. 718.2 (e) of the Code was enacted but has been less than successful in achieving its objective [R. v.] (Ipeelee/Ladue, at paras. 58, 62).”

When asked if and when judges, defence and crowns had received education and/or training about colonialism and systemic background factors, and whether it would be necessary for them to hear identical or similar information, as it relates to each and every Indigenous accused, Elder 019 responded, “each person is an individual, and that that particular judge is never the same person with the next accused who appears before them, so why are judges automatically assuming that the history of this accused is going to involve the same history?” Elder 019 further proposed that the better option would be to “look at that same individual and determine what’s best to change that individual around, because if you’re going to label everybody with the same brush, what difference does it make – we’ve already had that.” When Elder 019 was asked how many times legal actors have to hear about the multitude of social problems facing Aboriginal people
on a daily basis, she responded that “they have to hear about it as many times as it takes […] how these different situations relate to that person, and can’t just say, ‘I only need to hear about it once.’” As a direct result of their research involving the legal techniques used to produce “contextualized racial knowledges,” Maurutto and Hannah-Moffat (2016) reveal that “within conventional court structures, understandings of Aboriginal histories or circumstances continue to be framed by the ‘common knowledge’ of the judiciary or defence counsel, many of whom have limited insight into the specificities of racial discrimination” (p. 459). The term “common knowledge” is borrowed from the work of Valverde (2003), who utilized the term to characterize how members of the judiciary continue to typically understand Indigenous-related issues through a white-settler judicial lens.

Overall, legal informants admittedly had limited knowledge about the settler colonial project and its ongoing detrimental impacts on Indigenous peoples in Canada, other than information garnered from either something they had read or viewed on social and/or mass media. When asked about their own level of institutional knowledge when it relates to Indigenous peoples, Judge 011 stated,

I think I know a fair amount about it. As far as general knowledge and what has occurred in this Province and how people were dealt with, I think I have a fairly good appreciation of the history that they would be subject to […] be it related to residential schools, poverty, violence, addictions, lack of structure and guidance or suitable role models […] It’s PEI, and I’d have to say my knowledge with respect to dealing with Aboriginal persons probably isn’t a lot different from my knowledge of dealing with particular families who have had a history of being before the courts for many years.
However, comparing individual and systemic backgrounds of Indigenous and non-Indigenous peoples, in this manner, does not account for settler colonialism as a distinct context.

Judge 004 submitted “they say to take judicial notice of the institutional [residential] schools, which I assume that everyone is impacted by in some way.” Although, the same Judge acknowledged that the IRSS impacts everyone either directly or indirectly, they seemingly were taking, not unlike several other legal informants, a reductionist form of analysis in reducing colonialism to the IRSS.

Lastly, Judge 010 suggested,

I would consider myself to be pretty ill-informed about the particular situation with the Mi’kmaq in the area; my knowledge would be more general, international, but not specific to different areas in the Maritimes. In terms of the Indian Residential School system, I know that there was one in Shubenacadie34 [NS]. I’m certainly aware through the [Murray] Sinclair Report [Truth and Reconciliation Commission (TRC), 2015], about the whole situation nationally, with all the publicity its gotten, but I don’t think I’ve been to any programs or conferences that would have educated me and given a great deal of information on that, but just general history – relocations, residential schools, alcohol abuse and all of the general things.

This latter observation accentuates the need for education and/or training regarding settler colonialism and its impact on Indigenous peoples in Canada, particularly in the Province of PEI. It also highlights an apparent contradiction with the other two judges, who both

34 The distance of a one-way trip from Lennox Island First Nation reserve, in PEI, to Shubenacadie, Nova Scotia (NS), is 281 kilometers. Today, total one-way driving time is three hours and nine minutes, not counting the ferry service across Northumberland Strait, between Borden, PEI and Cape Tormentine, New Brunswick (NB), which was not replaced by the Confederation Bridge until May 31, 1997. Ironically, the Confederation Bridge opened approximately one year after the last Indian Residential School, the Gordon Indian Residential School in Duck Lake, Saskatchewan, closed its doors for the last time.
seem to imply if they already have a certain level of “institutional knowledge,” there is less need for additional education and/or training, especially with respect to the IRSS.

In my own experience as a Probation Officer and based on the informant interviews, it is never time wasted when institutional knowledge is provided to the presiding judge for their consideration in every case, because as Elder 019 stated, “it’s how you’ve been educated, because Aboriginal culture and Aboriginal education and what the everyday Canadian was actually taught about Aboriginals is nowhere near the history that we’ve had – the history of colonialism, forced enculturation, across the board – has never been taught.” It was my understanding after completing the interviews that regardless of how well-informed legal informants are, there is always room for newly acquired knowledge from which to grow. When speaking with Judge 010 about what should happen to enable legal professionals to deal more consistently with Indigenous peoples who come before the court, including being better informed about the multiplicity of presenting issues, it was acknowledged that “we have a long way to go.”

5.4 Conclusion

With respect to whether the overrepresentation of Indigenous peoples in the Canadian CJS, especially its prisons, is “fact” or “fiction,” approximately two-thirds of the legal informants agreed overrepresentation was either “perhaps” or “most likely” a problem, notably in the Canadian western provinces and territories. In PEI, apart from two legal informants (one Crown and one Defence), the remainder were either unclear, did not believe, or questioned that overrepresentation constituted a problem, mainly due to the Province’s small population size and corresponding statistically skewed results. Most Indigenous informants agreed there was an overrepresentation problem in Canada, based
on systemic racism and discrimination; however, they were less clear as to whether it constituted a problem in PEI. There were several reasons identified by informants, which were consistent with the scholarly literature and relevant case-law, and help explain, in part, why Indigenous peoples continue to appear before the court in disproportionate numbers: (1) systemic racism and discriminatory practices; (2) Indigenous youth constitute the fastest growing age demographic in Canada; (3) inability or unwillingness of CJS actors to accept that Indigenous and non-Indigenous accused are different and should be treated accordingly when they appear before the court; (4) perception among CJS actors that the application of section 718.2 (e), *R. v. Gladue* and its guiding principles could be perceived by victims or members of the general public as a get-out-of-jail-free card; (5) interpretation by CJS actors of sentencing principles such as “proportionality,” “denunciation,” “equality before the law,” and the “rule of law”; and (6) Indigenous peoples engage in more (and more serious) offences. These reasons, for the most part, stem from the ongoing detrimental ramifications associated with settler colonialism, which less than half of the legal informants openly acknowledged.

Less than half of the legal informants had an appreciable understanding of the settler colonial project as an ongoing structure rather than a singular historical event. However, there were other informants, predominantly from within the legal sphere, who attributed the problem of overrepresentation in the CJS to (1) the legal obligation/mandate to place Indigenous peoples in custody when they pose a credible risk/threat to public safety, invoking sentencing principles such as proportionality, deterrence, denunciation, and equal justice for all; and (2) not applying section 718.2 (e), *R. v. Gladue* and its guiding principles, particularly in the case of violent Indigenous
offenders, thereby attempting to avoid being perceived by the public as utilizing a “racial
discount.” Although there was at least one-sixth of the legal informants who readily
accepted responsibility for their own role (implicit or explicit) in addressing
discriminatory and/or racist practices, I observed limited, if any, evidence of the
remaining majority taking individual responsibility for same – an abstraction to the whole
being but one form of denial of responsibility.

Most of the legal informants did not clearly articulate the distinction between
Indigenous and non-Indigenous accused, specifically related to a broad array of
pathologies, ranging from familial dysfunction to poverty, or lack of employment to
alcohol and/or drug addiction. The conflation of Indigenous and non-Indigenous offender
background histories and, by extension, their respective propensities to become engaged
in criminal activity ties into the significance of equality discourses and reinforces the
processes of erasure and elimination in the colonial context. This also helps perpetuate
the notion that Indigenous and non-Indigenous peoples both come from essentially the
same backgrounds and therefore should be dealt with in the same, or similar, manner
when they come in conflict with the law. In addition, this conflation (re)produces both
pathologization of individual Indigenous accused and Indigenous peoples as a collective
– systemic racism which enables the colonial system.

Rather than focusing on sentencing by way of section 718.2 (e), R. v. Gladue and
its guiding principles, there was reluctance on the part of some legal informants to do so
due to their allegiance to the rule of law, with its emphasis on sentencing principles such
as “impartiality” versus advocacy, “equality” versus equity, and “facts” versus story, and
thereby running the risk of denying the colonial material implications of the broader CJS,
which, in turn, helps (re)produce the colonial project. These denials and ambiguities in understanding overrepresentation grounded in settler colonialism are reflected in the understanding/debate concerning Gladue Reports and/or Gladue components, including their comparison to PSRs; content (i.e. institutional knowledge), intent and purpose; and debates about who should prepare them, as a concrete means of adhering to section 718.2 (e), R. v. Gladue and its guiding principles. Regardless of its name, whether it is referred to as a Gladue Report, Gladue component, or PSR and who authors it, many legal informants were decidedly more concerned about the information contained therein. I also found that depending on one’s vantage point, Gladue Reports can serve several different purposes, when compared to a PSR, whether that be in the form of contextualized advocacy for the presentation of Indigenous voices and perspectives, conveying the accused’s story in a subjective and circular manner, or, alternatively speaking to the importance of community and the need to re-establish harmony, balance and avoid additional harm. Indigenous informants, particularly Gladue Writers, strongly believe Gladue Reports should be prepared by persons of Indigenous ancestry, whereas most legal informants did not express a clear preference either way.

This chapter clearly illustrates that the overrepresentation of Indigenous peoples in the Canadian CJS, notably its prisons, remains a multidimensional problem, further complicated by expressions of denial, especially when it relates to the Province of PEI. Specific contributing factors (e.g. age demographic, commission of violent offences, sentencing principles such as proportionality and equality before the law) were examined. Presentence and Gladue Reports were scrutinized, even though there was some disagreement, from the perspective that each has its respective role to play when dealing
with Indigenous peoples who come in conflict with the law. In the next chapter, I focus on the pivotal role that *Gladue* Reports might play in the lives of Indigenous peoples who appear before the court and examine the systemic and procedural barriers and tensions which impact the implementation process of section 718.2 (e), *R. v. Gladue* and its guiding principles in PEI.
Chapter 6.
Implementation of section 718.2 (e) of the Criminal Code and
R. v. Gladue – systemic and procedural barriers and/or tensions

6.1 Introduction

The last chapter examined informants’ understandings of overrepresentation of Indigenous peoples in the Canadian CJS and its grounding in colonialism/settler colonialism. In addition, these understandings were reflected in the various debates connected to Gladue Reports (e.g. the comparison with PSRs, differences of opinion about the content, intent and purpose of Gladue Reports and who should prepare them), as well as attitudes towards section 718.2 (e), R. v. Gladue, along with its guiding principles. Key themes arising from the informant interviews and case-law include tension with the rule of law and divergent interpretations of equality. This chapter examines key implementation barriers and/or tensions in the day-to-day operations of the CJS. Drawing on critiques of dominant reconciliation discourses from Indigenous scholars such as Coulthard (2007, 2014), Alfred (2009a, 2009b) and Corntassel (2011), I assess how initiatives couched in terms of remediation, equality, and justice for all, are paid lip-service, contested, or deemed irreconcilable with the existing CJS.

While every jurisdiction has experienced implementation-related issues associated with R. v. Gladue, PEI is in the distinct position of being relatively small, which enabled me to speak with all but one legal professional in the Province, who deal with Indigenous peoples who come before the court, as well as all three Gladue Writers and three Elders. Even though the 1999 SCC decision in R. v. Gladue recognizes the unique systemic background factors of Indigenous peoples and the serious problem of overrepresentation
in Canadian prisons, implementation continues to constitute a challenge for the CJS in PEI. While most informants agree, two decades later, that progress has been made, especially in the past few years, and notably following the release of *R. v. Legere* in 2016, in implementing both section 718.2 (e), and *R. v. Gladue*, most also agree there is still work to be done.

Informant interview data discussed in this chapter will demonstrate that one key implementation barrier with which PEI continues to struggle is the “lack of will” within both the CJS and at the political level nationally. This manifests in some legal informants by maintaining the status quo or not accepting personal responsibility for the lackluster implementation process, and/or resorting to a default position of privileging judicial and prosecutorial independence, constituting a passive reproduction of the legal system. A second implementation barrier that informants identified is the lack of Aboriginal Persons/ *Gladue* Courts, which afford Indigenous accused the opportunity to appear before judges who have a better appreciation for the complex individual and systemic factors which bring Indigenous peoples before the court and provide a safe space wherein these same individuals can comfortably and securely tell their own story. A third implementation barrier is the lack of readily available holistic and culturally appropriate human and financial resources, to satisfy identified needs, such as Indigenous peoples having access to remedial options other than imprisonment. Finally, almost without exception, informants identified the lack of education and/or training, especially for legal informants, as a barrier not only in coherently implementing *R. v. Gladue* but also in better understanding the detrimental impacts on Indigenous peoples associated with settler colonialism.
Since the introduction of section 718.2 (e) in 1996, legislation “enacted specifically to oblige the judiciary to do what was within their power to reduce the overincarceration of Aboriginal people and to seek reasonable alternatives” (Milward, 2014, p. 623), *R. v. Gladue* has been decided, bringing about some progressive changes. Over the last two decades, for example, Aboriginal Persons/Gladue Courts have been established in a few Canadian jurisdictions, primarily in Ontario, at the Provincial Court level (13 Courts situated across the Province as of 2018, with six Courts located in Toronto), as well as BC – (five Courts situated across the Province as of 2018). There “are no such courts in Quebec or Manitoba, one in Saskatchewan (a Cree-speaking Circuit Court) and two in Alberta” (Rudin, 2018). In the Province of NS, the first Indigenous Wellness and Gladue Court officially opened its doors in Wagmatcook First Nation in Cape Breton Island on June 21, 2018, coinciding with National Indigenous Peoples Day.

With the exception of the Provinces of Alberta, BC, Ontario, Quebec, NS, and PEI, as well as Yukon Territory, the other provinces and territories do not have an established form of “Gladue Report writing unit, something the Supreme Court of Canada has called an ‘indispensable’ service for Indigenous offenders” (Guyot, 2018, para. 1). *Gladue* Reports have therefore been made available to members of the judiciary in several Canadian jurisdictions, with the Province of Ontario leading the way with an estimated 1000 prepared annually (Rudin, 2018, para. 14). In Ontario, for over a decade, according to Edwards (2017, p. 37), Legal Aid Ontario (LAO) funds *Gladue* Reports. Preparation of these Reports has primarily been the responsibility of ALS in Toronto. In BC, between April 1, 2016 and March 31, 2017, 79 *Gladue* Reports were prepared under
the umbrella of the Legal Services Society (hereinafter referred to as LSS) of BC.
According to Cheryl Fritz, Coordinator of Court Services with the MLSN in Truro, NS, and the person responsible for overseeing the preparation of Gladue Reports, MLSN had received a total of 92 referrals for Gladue Reports in 2017 (personal communication, June 24, 2018). In PEI, MCPEI is responsible for the preparation of Gladue Reports. Irrespective of the progress made to date, Milward and Parkes (2011) submit “the fact remains that the incarceration of Aboriginal people in grossly disproportionate numbers has become worse, not better” (p. 84).

Alternatively, according to the Department of Justice, Research and Statistics Division (2017, p. 40), several Canadian jurisdictions (Alberta, BC, Northwest Territories, NS, Nunavut, Ontario, Saskatchewan, Yukon) have created “specialized” courts35 (e.g. Drug Treatment Courts, Domestic Violence Courts, Aboriginal Family Healing Courts). The Province of New Brunswick (hereinafter referred to as NB) also opened a Healing to Wellness Court, located in the Elsipogtog First Nation, in 2012.

There has undoubtedly been some noteworthy initiatives in implementing R. v. Gladue in PEI in a number of different areas, including, but not limited to: (1) developing awareness, understanding and support for Indigenous peoples via the IJP and under the auspices of MCPEI; (2) establishing Indigenous identity at the earliest opportunity such

35 A specialized court is supported by a range of services that ensure information about an Indigenous accused/offender’s background and the kinds of non-custodial sentences available to Indigenous accused/offenders are incorporated systematically into the bail and sentencing decision-making procedures in order to allow the court to prepare decisions in keeping with the directive of the Supreme Court in Gladue. Additionally, those working in the court (e.g. defence lawyers, Crown attorneys/prosecutors and judges) are knowledgeable of the range of programs and services available to Indigenous peoples (Department of Justice, Research and Statistics Division, 2017b, pp. 40-41).
that Indigenous peoples can take advantage of *R. v. Gladue* and its guiding principles; (3) creating culturally appropriate programs, with the aim of being more inclusive and better able to meet the multifaceted needs of Indigenous offenders and their communities, principally in the area of holistic restorative justice healing; and (4) establishing indigenizing initiatives in collaboration with the conventional CJS (e.g. AM Program, sentencing circles, Aboriginal Case/Court Worker). It should also be noted, however that along with the introduction of these initiatives, there are barriers and limitations which arise from disjuncture or tensions with the existing CJS and ideals of justice. As the scholarly literature, case-law, and informant interviews indicate, and Judge 010 concluded, “we can do better.”

6.2. **Implementation of section 718.2 (e) of the Criminal Code and *R. v. Gladue* – systemic barriers and/or tensions**

The implementation of section 718.2 (e) of the Criminal Code and *R. v. Gladue* across Canada has been anything other than coherent, with some informants laying the blame squarely at the feet of the Federal Government and poorly delineated policies, procedures, and protocols. Others tend to fault the lack of culturally appropriate resources to carry out *R. v. Gladue*’s overarching remedial mandate. Many informants agreed that those who are the most egregiously impacted by a problematic implementation process are the very people whose lived experiences the Indigenous restraint provision in section 718.2 (e) was originally crafted to remediate. As Crown 006 proposed, one clear, time-tested method of measuring “how willing we [the legal system] are to do more than just lip-service to important issues like this, is demonstrated by looking at what has actually already occurred.”

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This section examines the current level of satisfaction among informants with the implementation of *R. v. Gladue* and its guiding principles in PEI, which ranges from informants being “quite satisfied” (Crown 002), to those who contend “I certainly couldn’t say I’m satisfied” (Defence 008) and those who believe “we still have a lot of work to do” (Crown 012). I then discuss some key implementation barriers (e.g. lack of will, lack of Aboriginal Persons/Gladue Courts, and lack of culturally appropriate resources), which continue to thwart the overall implementation process, and as a result, have a detrimental impact on Indigenous peoples.

6.2.1. Current level of satisfaction with implementation of *R. v. Gladue* in PEI

Not unlike many other jurisdictions across Canada, the implementation in PEI of *R. v. Gladue* and its guiding principles, along with a constantly growing case-law progeny, has certainly not always been seamless and/or coherent. However, PEI has had its individual success stories and made progress, especially over the course of the last few years. The introduction of *Gladue* Writers by way of a Pilot Project (July 2015 - July 2016), for instance, has allowed for the preparation and submission of *Gladue* Reports to PEI’s courts. Additionally, when the *R. v. Legere* decision was rendered in April 2016, this obligated legal professionals to take a fresh look at section 718.2 (e) when dealing with Indigenous accused who come before the court. Although some informants questioned whether overrepresentation constituted a problem in PEI, the vast majority of legal informants, together with *Gladue* Writers and Elders, expressed a willingness to do what they could to change things for the better in relation to implementing *R. v. Gladue* and its guiding principles in the manner envisioned by federal legislators in section 718.2 (e) and the SCC by way of *R. v. Gladue*. 
When asked about their current level of satisfaction with the ongoing implementation of R. v. Gladue, there were several informants who claimed it was going relatively well. Defence 003 echoed the sentiment of many, suggesting, “I think we are making progress but there’s lots to be done,” whereas Crown 012 indicated, “it’s a heightened awareness by all the major participants that they’re dealing with an Aboriginal offender and different rules apply.” Crown 002 stated, “I think the process that has been undertaken is working and it’s a work in progress, but to date, what I’ve seen, is positive. I think the outcomes are going to be positive.” When asked to speak about what amounts to a success story in terms of the implementation process, Crown 002 referenced Gladue Reports, which were introduced in the Province in 2014.

According to the same Crown, Gladue Reports clarify for the court “the systemic effects of residential schools; factors that relate to the losses that have taken place in this individual’s life, such as the amount of abuse – all these factors are important.” Judge 004 stated that normally what happened prior to 2014, when an Aboriginal accused appeared before the Court was “we’d look at section 718.2 (e) and say, ‘OK Aboriginal, have to take that into consideration’ […] we’d do it and I don’t know if we really did it justice.” Judge 010 asserted, “I don’t think we probably have been diligent enough to make sure the directions from Gladue have been followed and making sure that we have some of the background factors of that individual and the community before us. We probably also have been too quick to apply the same approach – it’s easy to think ‘okay, section 718.2 (e) is simple, I should consider everything but custody, now let’s move on.’” Defence 014 suggested even though the watershed R. v. Gladue decision was released in 1999, “it’s only been in the last couple of years that it’s really being brought
to the forefront” in PEI. The same Defence further indicated that there were also some good things beginning to happen, like the preparation of Gladue Reports, “but we’re 16 or 17 years late arriving here […] if we had started 15 years ago, I’m sure we would have figured out a lot of things by now.” According to Crown 005, over the last couple of years, “there has been more programming or more interest in exploring alternative avenues with MCPEI, and their Aboriginal Justice Program” and if, on a case by case basis, “it’s a viable option, I’m happy to explore it.”

Crown 001 indicated, “I think we’re in the infancy, I think the Summerside Court is well positioned, in terms of sentencing circles, but in terms of Gladue, we’re still struggling with that.” Further, the same Crown implied that the R. v. Legere decision, by itself, “may bring us very quickly to the point where we have to really assess how we’re going to approach Gladue” and, in turn, properly implement it in PEI, although the critical question remains – “Where is the training?” – “Where is the educational piece?” – because when everything is said and done, “it’s not there.” Crown 012 suggested PEI is “in a period of transition – we are figuring out what is the best way to deliver this legal requirement. I don’t think we have a smooth process yet, as far as I’m concerned, I think we are working toward one.” The same Crown also expressed the opinion that, while attending the annual fall Conference of the NS Public Prosecution Service, participants were made aware of what amounts to a step-by-step process as to how to “manage Gladue for the crowns, and it was brilliant.” Crown 012 further stated, dealing specifically with the preparation of Gladue Reports, that “we need to understand who’s doing them, who’s paying to get them done, how does the court advise the [Gladue] Writer that you need to do a Report, how does that Report Writer make sure they meet
the timelines, how does the Crown feed the information that the Gladue Writer needs – I think we still have a lot of work to do in this Province to create a smooth process.”

Even though the one-year Pilot Project (July 2015 – July 2016) has ended, Gladue Writers will continue preparing Gladue Reports in the foreseeable future. Judge 011 did not know of the Project’s existence until late April 2016, approximately two months prior to the Pilot’s scheduled conclusion. The same Judge was also informed shortly before the informant interview that protocols were in the process of being developed, which caused them concern, asserting: “Perhaps you might want to talk to somebody who’s in the court system before you start coming up with protocols as to how this is all going to work.” Judge 011 indicated, together with several other legal informants, in speaking about the preparation of Gladue Reports, that “I don’t care how you pay for it, not my issue, that’s not what I am concerned about, but, as to who contacts who, how this is done,” that constituted an entirely different matter. Judge 011 was admittedly surprised that a Pilot Project had commenced without anyone in the judicial system in PEI being notified beforehand, especially since a Gladue Report is designed specifically to assist the court in accessing information, when attempting to determine the appropriate sentence for Indigenous offenders. This lack of communication obviously places Indigenous peoples at a distinct disadvantage, with the decision-making process working best only if the relevant parties: (1) fully appreciate what is happening in their respective CJS-related roles; (2) are amenable to the diversity of persons, ideas and choices different from one’s own; and (3) fully recognize and appreciate the fundamental importance of building “relationships” of mutual trust and respect.
Crown 013 mentioned that *R. v. Legere* “has once again placed *Gladue* Reports and sentencing principles relating to Aboriginal offenders back to front of mind for both crowns and judges” and that “when anyone comes before the court who they suspect might be Aboriginal, they’re going to be asking about these *Gladue* Reports because the PEI Court of Appeal, in *Legere*, has given some clear direction in that regard.” The same Crown further noted “when the *Legere* decision came out, there was a significant amount of discussion in this office [Office of the Crown Attorney] – “What does that mean?” – “Does this mean we have to obtain a *Gladue* Report every time?” When Crown 013 was asked if the *R. v. Legere* decision could substantively change how Indigenous peoples are dealt with in the CJS in PEI, they stated: “In a small jurisdiction like PEI, when the PEI Court of Appeal rules on an issue such as this, everyone involved in the justice system certainly takes notice and makes whatever changes are necessary to ensure we are doing what we are supposed to be doing.” Judge 004 argued the PECA’s decision was “supposed to be persuasive” and that “basically they’re saying, ‘if I [as a judge] don’t follow the principles set out in [*R. v.* *Gladue*], it’s an error and such failure will result in the sentence being unfit,’” which is consistent with following the principle of proportionality, that’s Ipeelee as well.” Something mentioned by virtually every one of the legal informants was that the *R. v. Legere* decision appeared to open the door to having a *Gladue* Report requested in every single case involving an Indigenous accused; however, as Judge 004 re-joined, “realistically, it’s not going to happen.” Despite almost every legal informant maintaining that *R. v. Legere* likely mandates the preparation of *Gladue* Reports for all Indigenous accused, this most likely is not going to happen due, in large part, to the barriers and/or tensions discussed in this and the previous chapter.
In addressing the recent heightened level of awareness of *R. v. Gladue* and how its guiding principles should be implemented in PEI, notably since *R. v. Legere*, Crown 006 commented, “I’m thankful that the dialogue has been turned up, that the discussions have become more frequent, that there’s small incremental indications of change, but from a historical perspective; however, ‘you don’t make any prints until you walk,’ we’re headed in the right direction, although we should have passed this signpost 20 years ago.” The same Crown acknowledged that even though there has been limited progress made to date in PEI in relation to cogently implementing *R. v. Gladue*, the *R. v. Legere* decision could conceivably constitute a springboard with respect to future progress in the overall implementation process in the Province. Defence 008 phrased it this way: “I’m a bit embarrassed and regret that we didn’t provide an adequate response.” Judge 011 indicated that sometime in 2015 was the first time that they had requested a Gladue Report; however, PEI courts had certainly dealt with many Indigenous accused over the intervening years, legally represented by experienced defence counsel who had typically made “very capable and thorough presentations on behalf of their clients, who’ve noted ‘this person is Aboriginal,’ ‘this person is from this place,’ ‘this is the background.’”

Time will tell the full extent of the ramifications surrounding *R. v. Legere*, although at the very least, it has caught the attention of members of the legal profession across Canada, and that, in and of itself, is not devoid of significance. Several informants, including Crown 001, made the point that with the onset of *R. v. Legere*, it became conspicuously obvious that PEI was quite a distance from being able to declare that the Province was implementing *R. v. Gladue* in strict accord with section 718.2 (e), with Crown 001, as previously referenced, suggesting “I think we’re in the infancy,” and
Judge 010 proclaiming “we have a long way to go.” To provide additional context regarding R. v. Legere, Defence 008 concluded, “the handling of that matter in the Trial Court was, I gather, fairly routine and unremarkable but it fell far short of the requirements of the Supreme Court of Canada and other provincial/territorial Appellate Courts set out in Gladue and Ipeelee and all the related decisions; so hopefully now, we’ll be more conscious of that and more intentional about addressing Aboriginal factors.” Furthermore, in interviews, informants identified several systemic barriers and/or tensions in the implementation of section 718.2 (e) and R. v. Gladue in PEI, one being the lack of “will.”

6.2.2 “Doing Gladue” – the lack of “will”

The ONCA is considered by some in the legal profession, including Crown 006, to be one of the most articulate of the criminal courts of appeals in Canada, “advancing and applying the law […] and leads the way in the treatment of Gladue issues.” However, considering the landmark SCC R. v. Gladue decision was rendered in 1999, it still took another seven years before the authoritative 2006 ONCA decision, involving R. v. Kakekagamick, came to fruition. R. v. Kakekagamick reiterated the importance of strictly adhering to the guiding principles enunciated by the SCC in R. v. Gladue and clarified what Canadian courts had been legally obligated to do, by that time, for a full decade. It took almost a decade for an Appellate Court to attempt to reinforce the applicability of a SCC decision endorsing Indigenous peoples’ unique status as a result of settler colonialism. This suggests the presence of deeply ingrained barriers and/or tensions within the legal system. One of these barriers, as discussed in the previous chapter, is the lack of a comprehensive awareness among many legal actors of the enduring effects of
settler colonialism and the legal system’s continuing complicity in (re)producing and thus reinforcing the damaging effects of settler colonialism on Indigenous peoples. As discussed in the previous chapter, only a few legal informants perceived overrepresentation as a problem grounded in settler colonialism, with many questioning if such a problem even exists, specifically in PEI, or, providing a broad array of alternate explanations (e.g. nature and seriousness of the offence(s), a rapidly growing Indigenous youth demographic, etc.).

In connection with addressing the decisive role of judges in implementing *R. v. Gladue*, Manley-Casimir (2012) maintains two specific things must occur: First, judges must “acknowledge that they represent the colonial legal system and openly interrogate the way in which the law has evolved to promote colonial interests”—a form of reflexivity that “will necessarily be difficult, because judges may need to consider their own complicity with the colonial legal system.” Second, judges also might have to “open themselves up to being unsettled and uncomfortable,” a challenge which may “require judges to open themselves up to the reality that Indigenous peoples’ narratives about their stories of peoplehood disrupted are inherently and necessarily emotional, and this may require judges to experience the pain and loss conveyed by Indigenous storytellers because of their colonial experiences” (pp. 241-242). Without a clear understanding of colonial dimensions among members of the judiciary, this will most likely not happen.

Crown 006 took a forward-thinking position whereby *R. v. Legere* could potentially be considered the juridical equivalent of *R. v. Kakekagamick*. However, utilizing a sports analogy, the same Crown suggested if *R. v. Kakekagamick* was the point of departure, then PEI, up until recently, had barely left the “starting blocks.” PEI’s
discernibly anemic approach to section 718.2 (e) and the progeny of judicial-related decisions, commencing with *R. v. Gladue* in 1999, according to Crown 006, simply tells us that “there is a lack of will, there is a lack of judicial will, there is a lack of political will, and there is a lack of social will.”

In expanding upon the notion of “judicial will,” there are three different decisions which warrant one’s attention, primarily because each has had a significant impact across the Canadian legal terrain: (1) *R. v. Rowbotham*, 1988 CanLII 147 (ONCA), which supports “the rights of an accused to state-funded legal counsel”; (2) *R. v. Askov*, [1990] 2 S.C.R. 1199, which establishes the requirement of “holding a trial within a reasonable amount of time”; and (3) *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, which establishes “the crown’s obligation to make disclosure to the defence attorney.” The reason these three ground-breaking Canadian legal decisions have been so influential is because individual cases which do not strictly adhere to these explicitly defined decrees end up being “stayed” and as a direct consequence, are potentially no longer subject to criminal prosecution. Arguably, if the same degree of judicial will were present today with respect to *R. v. Gladue*, and members of the judiciary, principally at the Trial Court (Provincial or Territorial) level, were not strictly adhering to its guiding principles, then individual cases against Indigenous accused would also be “thrown out” on the grounds that trial judges were not complying with established sentencing guidelines. According to Crown 006, if charges were being stayed and/or “thrown out” because *R. v Gladue* and its guiding principles were not being properly considered, practices would most likely change rapidly and dramatically, leaving behind a more consistent and progressive *R. v. Gladue* implementation process, simply because judges do not want their decisions
thrown out or overturned. This points to the problem of accountability and oversight within the CJS generally, and the judiciary more specifically, whereby judges, especially at the Appellate Court level, seem reluctant to hold Lower/Trial Court judges accountable for failing to adhere to *R. v. Gladue* and its guiding principles. This, in turn, perpetuates settler colonial state practices that fail to address the continuing effects of colonialism.

A similar argument can be made concerning the lack of political will (e.g. former Prime Minister Stephen Harper and his “tough on crime” philosophy), or social will (e.g. federal and provincial/territorial politicians who do not view the overrepresentation of Indigenous peoples in Canadian prisons or the murder of Indigenous women and girls as social problems, but as crime-related problems). It is highly significant to note that Stephen Harper’s government (February 6, 2006 – November 4, 2015) was not demonstrably different from any other, regardless of its political stripe. The same practices continue under the present-day leadership and liberal-rights political rhetoric of Prime Minister Justin Trudeau, who came into power on November 4, 2015. These political practices are consistent with the critiques of reconciliation discourses advanced by Alfred (2009a, 2009b), Alfred and Corntassel (2011), and Coulthard (2007, 2014), among other Indigenous scholars. There have been two broad criticisms levelled at the Canadian settler state’s approach to reconciling its relationship with Indigenous peoples: first, “the state’s rigid historical temporalization of the problem in need of reconciling (colonial injustice),” which, in turn, leads to the second, “the current politics of recognition’s inability to adequately transform the structure of dispossession that continues to frame Indigenous peoples’ relationship with the state” (Coulthard, 2014, p. 120; Alfred, 2009c; Irlbacher-Fox, 2009). This lack of political will, entwined with social
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will, at both the federal and provincial levels, can, for example, translate into a lack of resources/support for education and/or training, Indigenous justice initiatives, or culturally-based resources. The lack of will in the legal system may also be associated with a lack of understanding on the part of some legal professionals regarding R. v. Gladue, as well as its guiding principles and what these principles mean in terms of their practical application. Some legal informants do not necessarily see the bigger picture concerning settler colonialism, as discussed in the previous chapter.

The lack of judicial will, coupled with privileging of judicial independence, an active form of protectionism, constitute a formidable barrier for Indigenous peoples who appear before the court. The mobilizing of judicial independence tends to maintain the status quo. For instance, over many years working as a Crown, 006 has frequently come across the invocation of judicial independence, and by way of an exemplar, offered that members of the judiciary who have the mindset that “no one is telling us how to prepare Gladue Reports or when to do them or who must do them or if we are going to have to do them in every single case […] no one’s going to tell me how to do anything.” The other consideration is the tension which exists between how legislators envisioned section 718.2 (e) and/or the SCC envisioned R. v. Gladue and its guiding principles, “in theory”; as opposed to how individual members of the judiciary choose to interpret the same statute, R. v. Gladue, along with the guiding principles, “in practice.” This form of resistance can be explained, in part, by judges not wanting to have their judicial independence circumscribed by the legislative branch of government. In Crown 006’s estimation, “you have the old colonial notion of judicial independence superimposed” over what is mandated by way of R. v. Gladue, which, in turn, provides judges with a
convenient “out,” and the capacity to carry on “business as usual.” This notion is linked to the idea of “institutional knowledge,” which was discussed in the previous chapter, whereby some members of the judiciary are reluctant to take a course of action (i.e. make a certain decision (judicial independence) or entertain the receipt of additional information (institutional knowledge) concerning an accused with whom they feel they are already well familiar) if it does not comport with their own understanding of the case.

Similarly, the Office of the Crown Attorney, according to Crown 006, is not averse to resorting to the parallel default mechanism of “prosecutorial independence” and, in effect, saying “no one’s going to tell us how to prosecute, no one’s going to tell us whom to prosecute, for what, or for what charges.” The case-law, specifically in the SCC R. v. M. (C. A.) [1996] 1 S.C.R. 500 (hereinafter referred to as R. v. M. (C. A.)) decision, at paragraph 92, accentuates the importance of judicial independence when Justice Lamer, in speaking about the role of Appellate Courts, proffered that “courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges” at the Trial Court level. When dealing with Indigenous peoples who come before the court, the assertion of judicial and/or prosecutorial independence can result in ongoing subjugation (e.g. dismissal of Gladue Reports as a form of advocacy, thereby overriding section 718.2 (e)), especially if permitted to remain unchallenged, and thereby perpetuating the status quo. The legal community has historically been impervious to change (e.g. judicial and/or prosecutorial independence) and exhibits specific power and control related issues (e.g. determining who, how and when Gladue Reports are produced) when faced with the prospect of new and innovative techniques of carrying out their respective legal system related roles.
Furthermore, Crown 012 noted, “if you’re trying to craft the best system to help [Indigenous] people, but also help Canadian society, it would have to be built from within.”

Gladue Writer 016 provided a concrete example of how government administrators can sometimes create roadblocks which seriously impede access to considerations under R. v. Gladue for Indigenous peoples, specifically with respect to interfacing with the CJS. In this instance, Gladue Writer 016 and a senior member of MCPEI had met with a member of senior management with the PEI Provincial Government. During the meeting, when the subject of Gladue Reports and which agency or group would ultimately be responsible for preparing them arose, the senior manager in question interjected and declared Provincial Government staff would be assigned this specific duty, seemingly without considering alternate points of view. Gladue Writer 016 suggested that this explicit demonstration of power and control “threw us for a loop […] left a taste in our mouth” and the distinct impression that “this [conflict over control of Gladue Reports] is not over.” Following the meeting, the same Gladue Writer reportedly felt that Indigenous peoples “are still continually having to defend ourselves.”

Nevertheless, in terms of implementing R. v. Gladue in PEI and “developing internal procedures for the Provincial Government to be utilized when courts initiate Gladue Report requests to MCPEI,” Gladue Writer 016 expressed optimism based, in part, on her communication with another senior official within PEI’s Department of Justice and Public Safety. This government official, according to Gladue Writer 016, was “very knowledgeable” and a person who “understands it, and definitely ‘gets it.’”
6.2.3. The Aboriginal Persons/Gladue Court – what’s in a name?

Aboriginal Persons/Gladue Courts sporadically dot the Canadian landscape and are most prevalent in Ontario, where there are five in the City of Toronto alone; whereas, in BC, with the opening of the Prince George Indigenous Court on March 23, 2018, this constitutes the Province’s Provincial Court’s sixth First Nations Court. The existing Gladue Courts all form part of the provincial/territorial court system and are given equal weight, respect, and enforcement powers as regular courts. The principal difference between the two courts is that in ideal form, Gladue Courts are specifically designed to resolve legal disputes in a manner that is culturally appropriate and holistic, as well as promote a communal sense of balance and healing. April and Magrinelli-Orsi, in a 2013 Report entitled Gladue Practices in the Provinces and Territories, provide a detailed synopsis of what is available, in terms of Gladue Courts, in Canada. In the Atlantic region, for example, the Province of NS has a Gladue Court which operates as a satellite of the Sydney Court; the Province of NB has established a Gladue Court in Elsipogtog First Nation (formerly Big Cove); and in the jurisdictions of Newfoundland and Labrador, as well as PEI, there are currently no Gladue Courts (April & Magrinelli-Orsi, 2013).

In speaking about the possibility of a Gladue Court being established in PEI, Crown 002 stated, “there’s not going to be a specialized court developed in PEI for Gladue,” principally because it’s simply a matter of scale and the relatively small volume of Indigenous accused coming before the court at any one time. Gladue Writer 017 agreed: “We don’t have the population here for a Gladue Court.” Judge 004 stated a Gladue Court, for all intents and purposes, already existed in one of the Provincial Courts
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(situated at the western end of the Province) in the way it currently operates and further, was at a loss as to what would be done differently if such an official designation was employed. The same Judge went on to say, it was not so much a matter of a designation, but more so the need for “the resources to do it properly.” The consensus of most legal informants was that Prince County, where the largest reserve in the Province is situated, was also the site of the most progressive Court when dealing with Indigenous accused. Provincially, Defence 003 suggested, rather than establishing a Gladue Court, “some kind of formal consultative process among the people who are actually working in the courts and the Mi’kmaq community […] establishing protocols, framework and a process by which we would be coherent in terms of what our policies are going to be,” would work best.

Most legal informants agreed with Crown 002 in that a Gladue Court was most likely not going to be established in PEI, and as a result, saw the potential for some “negative feedback” from MCPEI, which provides Indigenous peoples and their communities with a greater role and voice in the administration of justice in the Province. From this Crown’s perspective, a viewpoint shared by several colleagues, “the reality is MCPEI may be looking at an entirely separate criminal justice system for dealing with Aboriginal people, but the volume in PEI is not there.” Crown 002 concluded by proposing that “any Aboriginal justice system would have to be adapted into our [legal] system that we have now.” The tenor of this observation is compelling, in that it not only speaks to the improbability of Indigenous peoples having their own autonomous parallel justice system in PEI, but also arguably reflects an assumption that the only viable means by which to have a “justice” system which works to the benefit of Indigenous peoples is
one which has its genesis in a settler colonial formation, including *Gladue* Courts which are a specialized branch of the CJS. I found that the unlikelihood of this happening in PEI was not based on a lack of support from Indigenous peoples advocating/lobbying for a specialized court, but more so the implausibility of finding the necessary governmental and institutional support, a proposition reinforced by legal and Indigenous informants, alike. Even though *Gladue* Courts are for all practical purposes part of the conventional CJS, they can still constitute a critically important component for Indigenous accused, based principally on their core emphasis on developing innovative and culturally appropriate sentencing options.

Crown 002 raised an additional argument with respect to the introduction of *Gladue* Courts in PEI, proffering that “we’re not in a situation in this Province where we can apply the resources that are necessary and I think that’s why you haven’t seen a speciality court here because if you wanted to have a speciality court that is effective, you have to have the resources [e.g. anger management, addictions, mental health] to support it.”

6.2.4. The need for culturally appropriate resources

One of the points legal informants consistently raised was that culturally appropriate resources had to be brought to bear if the issue of overrepresentation of Indigenous peoples in Canadian prisons was ever going to be resolved; yet spoke less often of the obvious need for substantive structural changes in the existing CJS for this to occur. Crown 002 suggested the two landmark SCC decisions in “*Gladue* and *Ipeelee* were both very clear – this is not a race discount – and unless there’s some restorative justice
process [programs] that can be activated, the likelihood of achieving different, more beneficial outcomes is highly improbable.”

To date, restorative justice holistic approaches in PEI have not occurred with any degree of regularity, although according to several informants, there are some culturally appropriate resources available for Indigenous peoples in the Province (e.g. drumming, sweats, pow-wows, speaking with Elders, etc.). Crown 002 argued, “when it comes right down to it, if there isn’t a program available, from the Crown’s perspective, public safety becomes a priority and we are recommending custody, because they [Indigenous or non-Indigenous offenders] have to be separated from society.” This last comment illustrates how when Indigenous peoples become involved with the CJS, the emphasis is usually not on individual Indigenous accused – meeting their needs, improving their life circumstances, healing wounds and thereby diminishing the probability of further criminal behaviour – but rather the CJS’s response often involves spending time, energy, and financial and human resources in isolating/marginalizing the “problem,” thereby securing the public peace. This, however, eventually results in more and more Indigenous peoples spending more and more time in prison.

Ultimately, when it relates to the efficient allocation of resources, according to Crown 001, the critically important question to ask is, “do you spend your financial resources on establishing a full complement of Gladue Writers or, alternatively divert the money and provide actual treatment that can help people and prevent them from coming into the justice system in the first place?” Based on informant interviews, there was no indication whatsoever that either one of these initiatives were being fully funded by Provincial or Federal Governments, apart from the PEI government currently paying for
the preparation of *Gladue* Reports and Federal Government cost-sharing training for *Gladue* Writers in the Province. Granted, these are real life issues with which various levels of government across Canada must grapple on a regular, if not daily, basis; however, it accentuates the difference between looking at an issue from the viewpoint of dollars and cents and viewing the same issue from a completely different perspective, with the focus on restorative justice and repairing the harm as it relates to all parties concerned, including the offender. With this in mind, *Gladue* Writer 016 suggested rather than allowing monetary considerations to immobilize reflexive innovative deliberation and decision-making, why not consider the well-established determinants of health, ranging from healthy childhood development to social support networks, and attempt to “help people understand why they are doing what they’re doing, get them back on track, where they can go back to school, finish their education, become a working member of society, acquire gainful employment, get them out of the ‘system,’” and as a direct result, in the long run, be more cost effective. Crown 006 suggested the PEI Government did not regard this as the preferable option because, at least in part, it has never done it that way before.

Milward and Parkes (2011) contend “[c]onvincing evidence has accumulated demonstrating that Aboriginal people respond better to culturally appropriate rehabilitative services in comparison to mainstream rehabilitative services” (p. 89). In a similar vein, Maurutto and Hannah-Moffat (2016) assert that the “lack of resources required to prepare *Gladue* reports and adequately contextualize *Gladue* factors, along with the dearth of suitable community services, often make it difficult for defence attorneys to propose convincing submissions for non-custodial sentences” (p. 458),
thereby providing additional rationale for persistent overrepresentation. In the *R. v. Mason*, 2011 MB PC 48 decision, presiding Provincial Court Judge Sandhu speaks directly to the issue of inadequate resources and what impact this can potentially have on implementing *R. v. Gladue*, wherein he states,

[32] .... Unfortunately, the *Gladue* process outcomes in Manitoba are rendered generally weak and ineffective due to a lack of resourcing to put the *Gladue* principles into action in a manner that inspires confidence, both by the court and the public […] Without that confidence, the application of *Gladue* principles is little utilized by the courts in Manitoba and is little respected by the public.

Tuhiwai-Smith (1999) suggests that one of the principal reasons why social problems which beset Indigenous communities tend rarely, if ever, to be resolved is because “the issues have been framed in a particular way” by settler colonial state structures and social agencies, and then are placed “in ‘the [I]ndigenous problem’ basket, to be handled in the usual cynical and paternalistic manner” (p. 153). However, according to virtually every informant, the CJS, working in close partnership with Indigenous peoples, to develop and offer culturally appropriate programming, can be helpful in problem-solving and not one single informant regarded this objective as anything other than well worth the time, effort, and financial expenditure. Judge 010, in expanding upon the advantages of a collaborative effort, specifically as it relates to PEI, proposed some noteworthy “improvements have been made,” including the recruitment of an Indigenous “advocate,” who had been present in court and provided assistance to Indigenous accused in the past, whether that involved speaking with them in or outside the courtroom, or responding to specific questions from the Bench. Yet there does not appear to be compelling evidence that this type of collaborative effort is happening in a systemic manner, wherein Indigenous peoples are treated as genuine “partners.” The main problem
with this valued resource, that being an Indigenous advocate, in Judge 010’s estimation, is that it is neither “predictable,” “timely,” nor “easily accessible,” and consequently, “we have a long way to go.” Crown 001 provided an example of how beneficial this initiative can be for Indigenous peoples, referring to an individual who “was basically out-of-control,” then was matched-up with an Elder, became involved in “drumming” and “he’s now a leader in the [Indigenous] community.” The same Crown went on to say, “I don’t think anybody is going to say culturally appropriate programming isn’t worthwhile – it’s there and it works […] it can’t eliminate the generational gap in parenting, but it does take you back to the traditions and once you get there, you are halfway home.” Crown 012 framed it this way,

I think what we’re trying to do, at the end of the day, in the criminal justice system, is change people’s behaviour and I think people are more likely to change their behaviour if they are nurtured along by people whom they respect. So, to my way of thinking, if we’re going to take the segment of offenders who are overpopulating our prisons and help them to live non-criminal lifestyles, then I would think building capacity and programming within the Aboriginal communities is […] I have no statistical data to support that statement, this is just my own belief – that it would have to be Aboriginal people who are helping Aboriginal people.

In reflecting upon better ways to serve Indigenous peoples in the CJS, Crown 012 agreed “an Aboriginal Caseworker, anybody who’s going to lobby on behalf of, work with, or assist that Aboriginal offender, is going to be of assistance to the offender on the one hand, that’s the personal interest; and hopefully increase public safety on the other hand.” Gladue Writer 016, in looking at the totality of the situation from an Indigenous person’s point of view, restated the critical importance of the presiding judge considering not only available sentencing options, but also all available culturally appropriate resources, as it relates to individual Indigenous accused. Crown 013 explained that MCPEI had recently been in contact with their office, speaking about various initiatives
and the possibility of “combining resources with other provinces,” such as MLSN in NS. The same Crown suggested MCPEI was attempting to determine how best to proceed, largely with respect to the preparation of *Gladue* Reports. According to *Gladue* Writer 016, culturally appropriate resources could include “anything from a time-honored resource such as meeting with an Elder, to connecting them to their culture, participating in cultural activities,” including, albeit not limited to, sweats, smudging, pow wows, drumming, talking circles, storytelling, and healing circles. The same *Gladue* Writer proposed that the overall objective should be to utilize these same holistic methodologies “as a way of restoring harmony, not just for the victim, but the community as well, because when you’re looking at healing, you’re not just healing one person, you’re healing everyone.”

This section discussed systemic barriers and/or tensions associated with the implementation of section 718.2 (e) and *R. v. Gladue* in PEI, and widespread agreement among informants that serious issues persist, and a collaborative effort is required to address them. Nonetheless, there was a significant gap between theory (i.e. the way it should be done) and practice (i.e. the way it is actually done); and determining ways and means by which to bridge this gap constitutes a challenge, particularly when identifying the needs of Indigenous peoples who come before the court and then meeting these by the application of appropriate cultural resources. The next section examines barriers and/or tensions in the implementation process on a procedural and practical level, and “indigenizing” initiatives which can potentially represent both viable solutions (e.g. introduction of *Gladue* Reports) or further (re)produce settler colonial relations (e.g. the
CJS deciding which Indigenous accused and/or offence types are “eligible” to take part in certain programs).

6.3. Implementation of section 718.2 (e) of the Criminal Code and R. v. Gladue – procedural barriers and/or tensions

Informants spoke to several procedural barriers and/or tensions that arise when attempting to implement section 718.2 (e) and R. v. Gladue: establishing Indigeneity through (self-)identification, use of waivers, assessment of Indigenous authenticity, proof of a causal link between the criminal act and Indigenous context, preparation of Gladue Reports and accounting for the victim. Procedural barriers and/or tensions associated with these issues ostensibly provide equal protection under the law for Indigenous accused who appear before the court, although they also have the potential to further subjugate the very same people these procedures were envisioned to protect. For instance, unless Indigeneity is identified early in the process, the potential beneficial effect of section 718.2 (e), R. v. Gladue and its guiding principles can be lost. However, even if an accused (self-)identifies as Indigenous, this is sometimes subjected to legal system examination by the police, defence, crown, and/or judge, specifically in terms of assessing “authentic” identities and/or individual accused having a history of being “Indigenous enough.” As Alfred and Corntassel (2011) contend, “Indigenousness is an identity constructed, shaped and lived in the politized context of contemporary colonialism” (p. 139). Additionally, even though the SCC in R. v. Ipeelee, at paragraph 81, is clear that a causal link between individual accused’ background factors and the commission of the offence need not be made, the case-law suggests otherwise, in that judges are still not convinced. Lastly, tensions arose with the amendment to section 718.2
Implementation of section 718.2 (e) of the Criminal Code and R. v. Gladue - systemic and procedural barriers and/or tensions

(e) of the Criminal Code in 2015, which now reads: “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community [emphasis added] should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” This amendment was in response to the Canadian Victims Bill of Rights, S.C. 2015, c. 13 s. 2 (enacted and hereinafter referred to as Bill C-32\(^{36}\)). Whereas, Bill C-32 relates only to victims, changes to section 718.2 (e) introduced new legal obligations to consider the victim(s) and harm to the community, which arguably mitigates the remedial effect of the restraint provision, particularly when both the accused and the victim are of Indigenous ancestry.

By way of the informant interviews, I found that one of the key procedural barriers and/or tensions when implementing R. v. Gladue in PEI involves the issue of whether and how Indigenous peoples coming before the court (self-)identify as Indigenous.

6.3.1. To “waive” or “not to waive,” therein lies the question

Although there appears to be limited, if any, debate that an Indigenous accused has the legal right to waive certain evidence being adduced and, in turn, brought before the court, what constitutes this form of “evidence” is the more salient and challenging question. R. v. Gladue provides what appears to be a well-defined starting point, wherein SCC Justices Cory and Iacobucci assert:

\(^{36}\) On July 23, 2015, Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts came into force. Now, rather than focusing on the accused or defendant in the legal proceedings, Bill C-32 brings the victim back into focus by creating certain rights for victims. Bill C-32 was viewed by federal legislators as an approach that recognizes victims’ needs through clearly defined and enforceable rights.
[83] How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? [...] In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to [A]boriginal offenders. [...] Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an [A]boriginal offender may be waived.

Thirteen years following the SCC’s watershed decision in R. v. Gladue, the same Court, in R. v. Ipeelee, spoke directly to the identical issue, this time utilizing the term “Gladue Report” for the first time, with Justice LeBel stating:

[60] Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered.

There have been Indigenous accused who occasionally initially make it known to defence counsel that it is not their wish to seek a Gladue Report, only to subsequently change their minds and contend that this was neither their intent, nor expressed desire. This raises the question as to whether the initial waiver was proffered with the individual accused’s full understanding of what purpose a Gladue Report serves, a question connected to how to ensure Indigenous accused (self-)identify, beyond leaving pamphlets in a courtroom foyer. The factual circumstances surrounding the R. v. Legere matter is a case in point. The PECA was obviously concerned that Mr. Legere did not waive the preparation of a Gladue Report, whereby the Appellate Court pronounced:

[8] While some of the evidence sought to be adduced could have been tendered by an exercise of due diligence, it is difficult to fault Legere. His Notice of Appeal indicates that he instructed his lawyer to ask for a Gladue Report, but his lawyer declined to make the request on the basis that the Presentence Report had already been prepared and, no doubt, he believed it to be sufficient.
In coming to their final decision, the PECA in *R. v. Legere* acknowledged:

[24] The upshot of all of this is that the sentencing judge did not have the information required to sentence Legere in accordance with the *Gladue* principles. This then, constitutes a reviewable error.

The waiver itself and informed consent are, in combination, part and parcel of the same legal procedure. Once again, it appears from the attendant case-law that the option to waive the gathering of pertinent information, which could include that provided in a *Gladue* Report, is both unambiguously evidenced and fully supported, as alluded to in *R. v. Gladue*:

[93] In the usual course of events, additional case-specific information will come from counsel and from a presentence report [...] which in turn may come from representations of the relevant [A]boriginal community [...] The offender may waive the gathering of that information.

The obvious problem is that the Indigenous accused may not have been fully informed of the purpose of a *Gladue* Report and/or potential legal consequences of signing a waiver, specifically with respect to fully informed consent. The other related and relevant matter is who should be responsible for ensuring such a waiver is brought to the attention of the accused, such that, she or he can make an informed, deliberate, timely and voluntary decision. Crown 001 suggested the matter of duly informing Indigenous accused of the significance of (self-)identifying and their right to waive the gathering of information, including a *Gladue* Report, and in a timely manner, would work best if it was the delegated responsibility of the defence attorney to do so, primarily because other than the police, they are normally the initial point of contact with the formal legal system. Practically speaking, this role could be carried out by way of a signed waiver form, the same procedure utilized at the plea stage, whereby the accused could simply say, “yes, I do this voluntarily.” What is more, Crown 001 suggested the initial information-gathering
process could be as straightforward as having a checklist, whereby the Indigenous accused would provide duly informed consent to defence counsel at the earliest opportunity, which is not current practice in PEI. According to the same Crown, “defence counsel could say something to the effect that ‘my client has identified as Aboriginal and I think your Honor should make an inquiry as to whether or not a Gladue Report is appropriate in the case or a sentencing circle,’ thereby going through a form of checklist, which is eventually what’s going to happen” in the Province of PEI.

Another potential issue when dealing with this type of waiver is that the ultimate sentence in a Provincial Court in PEI for a first-time impaired driving offence normally results in one to five days in custody, irrespective of the accused’s ancestry and/or individual or systemic background factors. In this scenario, many legal informants agreed that it made more sense to sentence the Indigenous accused at the time of the initial arraignment to the standard one to five-day custodial sentence, rather than delaying sentencing for five to seven weeks, while awaiting the preparation of a Gladue Report. Having a Gladue Report completed prior to sentencing, however, may result in the Indigenous accused serving no time in custody, and therein “lies the rub.” In Crown 001’s view, “most of the Aboriginal offenders who I’ve seen stand before the court want to get it over with that same day, so they are going to agree to anything and is it wrong for them to waive if they are going to receive the minimal sentence?”

Based on the informant interviews, it seems that specific rules and procedures, such as policy directives, will have to be crafted in the near term (similar as to what ALS does in Ontario) to provide instructional signposts to legal professionals and accused alike, such that they are in a better position to obtain/provide informed consent, going
forward. Such a practice, if instituted in PEI, would provide sentencing benchmarks (i.e. a certain amount of potential time in jail for certain offences) which, in turn, must be met prior to a *Gladue* Report being requested. Even though this practice was mentioned, in a positive light, by at least one legal informant and one Gladue Writer, it raises the issue of informed consent – the right for the Indigenous accused to request a *Gladue* Report, rather than denying her or him that right because either an arbitrary legal benchmark has not been realized, or the legal system has a specific sanction and/or priority in mind. The implication is that the case would not legally “turn” on Indigeneity, especially regarding minor offences, providing another example of how potentially life-transforming decisions for Indigenous peoples are being made by the settler colonial state. The broader implication is that personnel within the Department of Justice and Public Safety – a colonial institution – once again, have the power, control and influence to devise corresponding policy directives, whereas Indigenous peoples have limited, if any, input in establishing criminal laws and procedures in general, or formulating *Gladue* Reports, sentencing guidelines, or waivers, more specifically.

Defence 008 raised the point that it is sometimes extremely difficult for an accused person to make an informed waiver, especially when “you have such an unequal set-up to begin with, with the lawyer there with his legal gown and two or three degrees in his brief case and then the poor Aboriginal accused, who might have a low level of literacy […] may not have thought about the legacy of colonialism or residential schools,” or may not “be equipped to connect the dots.” This example of power-imbalance, involving the subjugation of Indigenous peoples to a colonial legal system, allows “institutions to cultivate a culture of ‘doing the right thing,’ while avoiding
fundamental shifts in power imbalances between Indigenous and non-Indigenous peoples or the systems within which we operate” (Sarah de Leeuw, Margo Greenwood (a member of the Cree Nation), & Nicole Lindsay, 2013, p. 386).

The other issue involving (self-)identification, which is sometimes raised in courtrooms across Canada, according to Crown 006, is the problematic assumption that if the accused has never resided or does not currently reside in an “Aboriginal community, which is a reserve, their Aboriginality is seriously called into question.” Crown 006’s point regarding residency forms an integral part of the debate involving “authenticity,” which is based on long-standing stereotypes and, in turn, (re)produces colonial governance of “Indianness.”

6.3.2. What and who defines “authentic” Indigeneity?

From the first encounters with Indigenous peoples over 500 years ago, non-Indigenous settlers “have been confounded by these peoples who looked so different and lived lives that seemed not just diametrically opposed to theirs but even blasphemous” (Dunbar-Ortiz & Gilio-Whitaker, 2016). Moreover, at their core, debates about “Indianness,” according to Dunbar-Ortiz and Gilio-Whitaker (2016) are “about authenticity […] predicated upon the specific dynamics that define ‘real’ Indians […] ‘common-sense’ understandings that are built into society’s dominant narratives, where certain assumptions are held to be unquestionably true” (p. 12). Mohawk scholar, Deborah Doxtator (2018) maintains that to the settler, “Indians, real Indians, in their purest form of ‘Indianness,’ live in a world of long ago where there are no high-rises, no snowmobiles, no colour television […] live in the woods or in places that are unknown
called ‘Indian Reserves’’ and to many people, “‘Indians’ are not real any more than Bugs Bunny’ or PEI’s own “Anne of Green Gables are real to them” (p. 21).

The term “traditionalist” is sometimes used to characterize those who follow the Red Road; however, “when we use terms such as ‘traditionalist’ or ‘traditional,’ we keep Indigenous peoples frozen in time” and to the contrary, “Indigenous peoples and cultures are still here and alive. Assuming otherwise is an incorrect assumption, rooted in a Eurocentric colonial mentality” (Monchalin, 2016, p. 25). There are those non-Indigenous people, including a few of the legal informants, who problematically contend that being “traditional” is a measure of “authenticity” and that Indigenous peoples who leave the reserve or who never grew up on reserve (e.g. being removed as a child by way of adoption to a white family) forfeit their Indigenous heritage, or are considered less Indigenous. Alternatively, in the case of Indigenous peoples who were born and raised on a reserve relinquish their indigeneity upon leaving the strict confines of the reserve proper. Lawrence (2004) speaks to the hegemonic perception of “Indianness,” which involves “the immense body of stereotypes within the dominant society that link Nativeness inextricably to an on-reserve environment” (p. 206). Palmater (2013) suggests this is only one of the ways in which Canada has been and continues to be successful in dividing Indigenous peoples, “by assuming full control over who is and is not an Indian,” in that if “we accept the definition of ourselves as Indians and our territories as being limited to reserves, it is far easier for Canada to realize its legislative objective of getting rid of the ‘Indian problem’” (p. 152).

Elder 021 responded to the misguided colonial notion of those who tether Indigenous authentic histories and identities to designated reserve land by initially saying,
“these people need to be educated.” Elder 021 highlighted the Tsilhqot’in Nation v. British Columbia, [2014] 2 S.C.R. 257 decision, which recognized, for the first time in Canadian history, Indigenous title to a specific tract of land. In this ground-breaking decision, according to Elder 021, the SCC “basically said it is First Nation territory, and that they never ceded anything [...] our situation in PEI is virtually identical to what it is in BC” The same Elder, by way of a conciliatory tone, declared, “it’s not like we want to kick everyone off PEI and get it back, we just want our rightful place because we do have rights in PEI, it is Mi’kmaq territory.” Monture-Angus (1999b), in discussing the linkage of “rights of Indians to reserve residency,” contends, “we must all recognize that the reserve is a colonial construct and not an Indian one” (p. 9). Reserves as colonial constructs of immobilization, marginalization, and containment are further utilized by CJS actors to constrain who is sufficiently Indigenous to benefit from R. v. Gladue and its guiding principles.

Gladue Writer 016 made the distinction when comparing Indigenous youth to the older generation, in that Indigenous youth, for the most part, have no problem whatsoever with identifying who they are, speaking about “the songs they sing, music they listen to, food they eat, and the importance of storytelling”; although the same cannot be said to be true for the older generation, who do not (self-)identify as quickly “because of history – when you (self-)identified back then, you were discriminated against.” Gladue Writer 017 acknowledged (self-)identification could constitute a legal maneuver on the part of Indigenous accused, to procure favourable consideration by the presiding judge and as a result, receive less custodial time. However, the same Gladue Writer also stated that the prospect of (self-)identification may also result in Indigenous accused feeling “it’s not a
good idea to do so because it’s been so engrained in their minds” that bad things are going to happen if they (self-)identify.

At least one informant (Defence 008), who was familiar with the historic SCC decision in *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99 (hereinafter referred to as *Daniels v. Canada*), spoke about the significance of the case, specifically as it pertains to (self-)identification, wherein Métis and off-reserve, non-status Indians are now considered ‘Indians,’ within the meaning and intent of s. 91(24) of the *Constitution Act, 1867*. In the *Daniels v. Canada* decision, at paragraph 1, it states “as the curtain opens wider and wider on the history of Canada’s relationship with its Indigenous peoples, inequities are increasingly revealed, and remedies urgently sought […] this case represents another chapter in the pursuit of reconciliation and redress in that relationship.” Defence 008 maintained that with respect to the presenting issue of Indigenous (self-)identification, *Daniels v. Canada* merely exacerbates the problem, by further expanding the administrative umbrella as to whom is “deemed” Indigenous in Canada. However, this perception (viewing the *Daniels v. Canada* decision as exacerbating the problem) belies the fact that Métis and off-reserve, non-status Indians share a colonial experience with other Indigenous peoples.

The preoccupation with authenticity reflects the power dynamics of “recognition” which, over the last four decades, according to Coulthard (2014), has dominated “the self-determination efforts and objectives of Indigenous peoples in Canada” (p. 1). Monture-Angus (1995) speaks about the pivotal importance of achieving Indigenous self-determination or autonomy by stating “I wait to re-claim that word, Indian, once forced upon us and make it feel mine” (p. 2). Monture-Angus was an Indigenous professor,
lawyer, educator, activist and author who worked assiduously to help proclaim an authentic identity for Indigenous peoples and was quoted by Csillag (2010) as declaring that Indigenous peoples themselves are responsible for self-determination, and that “has to come from within. It’s ours. The government can’t do it. It’s an act of imposition and oppression even if it’s a really good idea. Because it’s not ours. We have to do it” (para. 34).

Based on the 1952 formative work by Frantz Fanon, *Black Skin, White Masks*, Coulthard (2014) asserts, “in situations where colonial rule does not depend solely on the exercise of state violence, its reproduction instead rests on the ability to entice Indigenous peoples to *identify* [emphasis in original], either implicitly or explicitly, with the profoundly *asymmetrical* [emphasis in original] and *nonreciprocal* [emphasis in original] forms of recognition either imposed on or granted to them by the settler state and society” (p. 25). Coulthard (2014), also based on Fanon’s work, contends “recognition is not posited as a source of freedom and dignity for the colonized, *but rather as the field of power through which colonial relations are produced and maintained* [emphasis in original]” (p. 17). The power dynamic Coulthard (2014) critiques encompasses the power imbued in the capacity of CJS actors to decide whether a certain person is sufficiently Indigenous.

Ironically, Coulthard (2007) notes that the “‘politics of recognition’ promises to (re)produce the very configurations of colonial power that Indigenous peoples’ demands for recognition have historically sought to transcend” (p. 439). Veracini (2015) spoke about the same notion by comparing aggressive vis-à-vis passive-aggressive behaviours comprising “outright disposessory and assimilationist policies”; and “a settler-
Implementation of section 718.2 (e) of the Criminal Code and R. v. Gladue - systemic and procedural barriers and/or tensions
determined approach to the ‘politics of recognition’ that fails to address substantial inequalities, while enabling the settler polity to manage contradictions and acquire some degree of legitimacy” (p. 31). Monchalin (2016) reminds us that it “is well to remember that definitions of identity based on appearance or blood heritage are often more about gaining power and maintaining control than about actual genetics” (p. 13).

The main problem with restricting the benchmark for authentic Indigeneity to only those Indigenous peoples relegated to marginal tracts of Mi’kmaq territory (reserves) in PEI, for instance, reinforces the erasure of Indigenous peoples by way of the processes of containment and displacement. This line of reasoning constitutes an example of settler colonial logic, particularly when you consider all of what is now Canada was/is Indigenous territory, and as such, all Indigenous peoples who appear before the court should automatically have R. v. Gladue and its guiding principles applied. However, this has not been the case, at least, in part, because expropriation, dispossession, and various laws have already and continue to deprive Indigenous peoples (men, women, and children alike) of their Indigeneity and thereby being recognized as “real.”

The R. v. Laboucane, 2016 ABCA 176 decision speaks to the same issue. On behalf of the Court of Appeal of Alberta, Justice Jack Watson, at paragraph 40, endorsed a Trial Court finding that Indigenous offender, Jody Wade Laboucane, who was adopted into a non-Indigenous home as a young child and did not know about his Indigenous ancestry until he was a teenager, be sentenced to two years imprisonment. The appeal was initiated, in part, on the ground that “[t]he sentencing judge erred in not giving proper consideration to the appellant’s Gladue report” (para. 14). The sentencing judge had the advantage of having access to a 30-page Gladue Report and two PSRs prior to
rendering the sentence. However, Justice Watson, at paragraph 40, indicated the Gladue Report revealed that Laboucane had “experienced a ‘good and normal’ childhood […] his family followed ‘mainstream practices’ and his father (the only [I]ndigenous parent) was not raised in the Métis culture.” The appeal was dismissed. Dover (2017) critiques this characterization, suggesting, “[i]his ‘weathered and feathered’ Gladue stereotype is born from the practice of identifying criminogenic factors and alternatives to incarceration (i.e. Gladue methodology) and trying to connect them to some aspect of the offender’s life that is materially connected to their status as an Indigenous person” (p. 8).

*R. v. Legere* reminds us what it says in *R. v. Gladue*, at paragraph 93, about the “community” and its breadth and scope, as it pertains to Indigenous peoples, wherein it states:

> [16] Section 718.2 (e) applies to all [A]boriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant [A]boriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre.

In speaking to comments made at the Trial Court level, and referenced in *R. v. Gladue*, SCC Justices Cory and Iacobucci maintain,

> [18] The trial judge noted that both the appellant and the deceased were [A]boriginal but stated that they were living in an urban area off-reserve and not “within the [A]boriginal community as such.”

In the matter of *R. v. Gladue*, 1997, Madam Justice Rowles, at the BC Appellate Court level, stated, at paragraph 69, “[n]othing in the legislation suggests that the application of s. 718.2(e) is limited to [A]boriginal people living on reserves” and further, at paragraph 70, “the fact that the appellant was not living on reserve did not alter her [A]boriginal heritage or her cultural ties.”
When speaking with Elder 021 about the notion that once an Indigenous person leaves or, alternatively neither was born, nor ever lived on a reserve, they relinquish their Indigenous heritage, he suggested that this type of mentality constituted “a very narrow focus, from the Bench, to look at it in that way, so they [judges] need to evolve with the times, they need to become educated and that Gladue and things like that are really what it’s going to take.” The same Elder further stated that “the judge has to properly understand where this person has been,” principally because there are “so many circumstances to take into consideration when someone from our community is going to be sentenced, as opposed to someone in a non-Aboriginal community.” Elder 019 emphasized that Indigenous peoples who leave the reserve, to reside elsewhere, do not break ranks with their Indigenous ancestry, because “it’s still embedded within you, no matter where you travel.”

Elder 019 reminded me that the Mi’kmaq peoples in PEI all originally came from the Lennox Island First Nation reserve and further suggested, “we’re so interconnected.” Defence 014 maintained that up until six or seven years ago, all that was done when an Indigenous accused appeared before the court “was to tell the judge that this was an Aboriginal offender who grew up on a reserve, and we wouldn’t go much further than that.” Elder 020 stated that Indigenous communities were not restricted to clearly demarcated physical boundary markers, but rather connote “family, even if they don’t live on reserve.” There are those who still believe the false premise that Indigenous lineage is inextricably linked to residing on a reserve. Monchalin (2016) articulates it this way,

[i]f we invoke only colonialism as the standpoint from which to frame Indigenous people’s existence in Canada, we are privileging the
perspective of the assimilators [emphasis added], as doing so legitimizes their discourse, which claims to have overcome and overtaken Indigenous peoples. This is not the reality […] Indigenous peoples have their own unique histories and cultures, their own narratives and worldviews, which continue to exist (p. 73).

Expanding on the notion of “privileging” the colonial perspective and dismissing the misnomer of the so-called “real Indian,” Francis (2011b) proposes that the term “Indian is the invention of the European,” a creation which began “as a White man’s mistake and became a White man’s fantasy” (p. 20).

Another procedural tension in implementing section 718.2 (e) and R. v. Gladue, along with its guiding principles, is the significance of establishing a “causal link.”

6.3.3. What’s this about a “causal link?”

The scholarly literature and case-law, for the most part, are consistent in that a “causal link” does not have to be established between the individual Indigenous accused’s background factors and the commission of the offence(s) currently before the court. However, the manner in which this was perceived by legal informants was by no means universal, with some suggesting that a causal link was an essential element to any “cause of action” (e.g. aggravated assault), whereas others did not see the need for such a linkage. While this point of view might be attributable to a lack of familiarity with relevant case-law, perfunctory resistance, or a combination of both, this viewpoint is problematic in that the influential AJI of Manitoba emphasizes that determining the specific interconnections which must come into play in bringing about a causal link is extremely complex:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government’s treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a
simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated (Aboriginal Justice Implementation Commission, 1999, p. 86).

Stenning and Roberts, in speaking of the Manitoba Inquiry, express the opinion that “offenders should be able to point to a causal chain that relates their Aboriginal status to the offence. To suggest such factors must automatically be considered if the offender happens to be Aboriginal but not otherwise, as the Supreme Court interprets paragraph section 718.2 (e) to require, – is inherently unfair” (as cited in Carter, 2002, p. 73). For a view which resonates with the corresponding case-law and official inquiries, Lorne Gunter (2014, para. 2), provides a distinctly different characterization of section 718.2 (e), whereby he argues that the “leniency of the so-called Gladue principle is granted simply in recognition of ‘the harmful effects of colonialism, displacement and the residential school system on [A]boriginal communities.’”

In terms of case-law, the R. v. Ipeelee decision states:

[81] Some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge.

Justice Pomerance, in R. v. Corbiere, supports a similar view:

[48] No direct causal link need be shown between background factors and the offences before the court. It would be difficult for an offender to demonstrate such a link. The process is more broadly concerned with the intergenerational effects of the collective experiences of Aboriginal peoples.

In addition, in R. v. Collins, 2011 ONCA 182, Justice Rosenberg expresses this opinion:

[32] There is nothing in the governing authorities that places the burden of persuasion on an [A]boriginal accused to establish a causal link between the systemic and background factors and commission of the offence. Further, s. 718.2(e) and the Gladue approach to sentencing [A]boriginal offenders is not about shifting blame or failing to take
responsibility; it is recognition of the devastating impact that Canada's
treatment of its [A]boriginal population has wreaked on the members of
that society.

With respect to a causal link, Judge 004 acknowledged, “that’s one I always have
problems with as there are some cases where case-law has courts say ‘you have to draw a
causal link between the offence and where they came from’; although, one’s history
cannot be changed – “you are who you are.” Crown 007 echoed a similar sentiment,
asserting, “as we get farther and farther from the Indian Residential School system, I
think it becomes a little more difficult for an Aboriginal person in the court now, a
younger Aboriginal person, to actually have a specific connection back to a residential
school type of situation, not talking about the overall systemic issues that face
Aboriginals in any event, but specifically the Indian Residential School system.” A few
legal informants appeared to restrict their understanding of the legacy of colonialism to
the IRSS and seemingly did not understand the full extent of intergenerational trauma
arising out of a complex array of what Justice Murray Sinclair, a member of the Ojibwa
Nation, and his fellow commissioners in the TRC (2015) globally referred to as “cultural
suicide.” Amy Bombay, a member of the Ojibway Nation, Kim Matheson, and Hymie
Anisman (2009) phrase it this way, “the shared collective experiences of trauma
experienced by First Nations peoples, coupled with related collective memories, and
persistent sociocultural disadvantages, have acted to increase vulnerability to the
transmission and expression of intergenerational trauma effects” (p. 6), collective
experiences by no means restricted to the IRSS.

The key issue for Crown 007 was “addressing how that systemic situation
impacted this accused” due to the fact that the same Crown had “recently heard of one
person, now (self-)identifying as Aboriginal,” although “he was not raised Aboriginal, he
was never in the Aboriginal community, never identified as Aboriginal and his response is ‘I guess I can get some money out of this now.’” Crown 007 expressed the opinion that there had “to be something more to the meaning” of the term – Aboriginal – recognizing “there’s the legal definition of who is Aboriginal – who is not Aboriginal – but when it comes to how Canada’s policies have impacted upon and led to this accused to be where he is, in front of this court, that’s the key.” Intersecting with earlier discussions regarding racial discount, (self-)identification and authenticity, this perspective tends to diminish the relevance and/or importance of section 718.2 (e), as well as the potential remedial effect of R. v. Gladue.

In the ongoing implementation of section 718.2 (e) and R. v. Gladue in PEI, the preparation of Gladue Reports constitutes a procedural tension, specifically in terms of a (power) struggle over whom and how Gladue Reports are prepared.

6.3.4. The preparation of Gladue Reports

One of the main questions arising out of the R. v. Legere decision revolves around the best person to prepare Gladue Reports. This decision, according to Crown 002, essentially “opens the window, in that it does not necessarily have to be any particular source,” such as a Probation Officer or, alternatively a Gladue Writer; or, for that matter, a person of Indigenous ancestry. Crown 002 went on to say “the real problem, as I see it, is a Gladue Report can’t be window dressing, you can’t put in two pages saying ‘okay these are the circumstances that arise out of Lennox Island and think that that’s going to be suitable because you have to go into the community and speak with the people.’” With respect to R. v. Legere, Crown 006 stated, “to Justice Mitchell’s credit, he went far enough to say ‘look, there’s nobody who has a premium on how the information flows or
who owns it or who’s qualified or who’s not qualified,’ and that, I believe, is correct reasoning.”

Crown 002 indicated the ongoing debate concerning who is best able to prepare Gladue Reports is tightly interwoven with readily available financial resources, and if the PEI Provincial Government has the appetite to continue funding the effort beyond the 2015-2016 budgetary timeframe. Crown 005 proposed that regardless of who ultimately ends up paying the incurred costs associated with having Gladue Reports prepared in PEI, the “Crown or Government has an obligation under the Criminal Code to provide courts with the appropriate information, so, if funding is cut, the obligation remains, regardless of the funding source.” This speaks directly to the issue of “power and control” not, as before, in terms of how to prepare Gladue Reports “properly,” but more so with respect to the allocation of resources to community-level control (e.g. Probation Services), which is dependent on Provincial Government funds to operate/function. Although, for Crown 002 the more important question seems to be – “should it continue to be only Aboriginal Gladue Writers who actually prepare them [Gladue Reports]?”

If, as it seems to say in R. v. Legere, that a Gladue Report is to be prepared for every Indigenous accused who appears before the court, regardless of the nature or seriousness of the offence(s), Crown 001 suggested, “from a cost benefit analysis, I think what you could have happen is government [PEI Provincial] looking at the issue and saying, ‘we can pay thousands and thousands of dollars on contract, or we can hire an Aboriginal Probation Officer, level 1, who knows the Aboriginal community,’” thereby saving monies and essentially keeping the position “in-house.” With this alternative in mind, according to the same Crown, “you could say ‘sorry’ to the Indigenous Justice
Program [Gladue Writers], ‘you are no longer preparing [Gladue] Reports, we have our own person.’” Crown 001 characterized this course of action as having the potential to beg problematic, especially if an Indigenous Probation Officer is “not accepted by part of that Aboriginal community, and not respected; then you’ll have a person who is not going to be able to gather very much information, even though they are of Aboriginal ancestry.” Crown 012 proposed a similar alternative when it was observed that “you can pay a salary of $70,000.00 per year and keep one person within government trained or you can pay a lot more than that to an outside agency, what’s the better choice?” And further, “knowing that none of our [governmental] services are ‘Cadillacs’ – if we’re going to be a Province, we have to deliver the services that the Criminal Code says we have to deliver, to meet our administration of justice function.” The same Crown went on to say, “I would like to see in-house capacity created,” and by doing so, “you’re guaranteeing the taxpayer, the public at large, is going to have the benefit” of this initiative. Based on this form of evaluation, the crux of the matter appears to centre around the CJS being answerable to PEI taxpayers, a cost-benefit analysis centred on in-house capacity and dollars and cents, rather than what makes the most sense for Indigenous peoples who come in conflict with the law and, in turn, meeting their needs.

As Crown 002 sees it, there is eventually going to be a court challenge which deals specifically with whom should prepare Gladue Reports and “it’s coming sooner than later,” possibly in the form of a section 7 Charter argument. This provision specifically states: “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 principles of fundamental justice” (Constitution Act, 1982). The challenge could potentially be
grounded on the fact that Indigenous peoples in Canada have the right, by way of both legal statute (section 718.2 (e)) and legal precedent (R. v. Gladue; R. v. Ipeelee; R. v. Legere) to have their individual and systemic background factors considered by the presiding judge, which, although clearly stated in law, is arguably currently not the case in practice. Crown 002 sees this matter eventually reaching “the point where we go all the way to the Supreme Court of Canada,” whereas currently, Canada’s final court of appeal is essentially saying “administratively, work it out.” Crown 002 stated that he is “afraid that eventually it’s going to end up back in their bailiwick, where they’re [SCC] going to have to make decisions and they [people on the ground level] may not be happy about that; but the reality is, if the provinces/territories can’t come to terms with it, it remains very much a ‘live issue.’”

6.3.5. The challenge of ascertaining and/or asserting Indigeneity (self-)
identification in a court of law

(Self-)identification as Indigenous and “authenticity” are two interconnected but distinct issues. There are many reasons why Indigenous peoples may fail or hesitate to (self-)identify (e.g. shame deriving from colonial derogation, concern that it will lead to negative interactions with settler colonial systems/authorities). This poses tension with respect to the preparation of Gladue Reports and, in turn, the application of section 718.2 (e), R. v. Gladue and its guiding principles. But even when Indigenous peoples do (self-)identify, this identity can be questioned according to whether it fits settler colonial perceptions of what constitutes “authentic” Indigeneity. Several informants identified two core issues related to the matter of (self-)identification: first, the unwillingness of Indigenous accused to (self-)identify; and second, the requisite attributes an Indigenous
person must possess to be considered “authentic.” Noteworthy is the fact that authenticity is not a legal requirement when applying *Gladue* guiding principles.

Being Indigenous, according to Indigenous political theorists Taiaiake Alfred and Jeff Corntassel, means “living a ‘place-based, oppositional’ identity, rooted in defending relationships to particular places against colonial imposition” (Battell-Lowman and Barker, 2015, p. 51). Monchalin (2016) speaks to the connection of shame and derogation to (self-)identification in this way, “[t]he shame society has associated with being an ‘Indian,’ or what was derogatively termed a ‘half-breed,’ has no doubt kept many from (self-)identifying as ‘Aboriginal’” (p. 11). I found, especially with Indigenous informants, that one of the biggest challenges for Indigenous accused arises when they appear before the court and do not have a clear sense as to how CJS personnel are going to react to them once they (self-)identify as Indigenous. Bell (2014), in characterizing the colonial imposition of “Indian” and how Indigenous peoples’ assertions are a form of self-determination, notes that “settler propensities to define and delimit [I]ndigenous identities are crucial signs of the ongoing existence of colonial relationships” (p. 4). Historically, with the multiplicity of racist, discriminatory and destructive practices, specifically surrounding Indigenous (self-)identification, including such constructions as the *Indian Act*, blood quantum, IRSS, reserves, 60s and 80s Scoops, Crown 001 openly questioned “as to whether or not it was, and still is, any wonder that Aboriginal accused often can be somewhat apprehensive about the prospect of (self-)identification, especially considering how horribly they have been treated in the past for doing so.”

Unless and until Indigenous peoples (self-)identify, it creates a challenge for the CJS. As Crown 002 explained, “the problem we have is that we really don’t know their
true identity until they identify themselves as Aboriginal.” This can potentially result in a serious procedural barrier in a court of law, unless the accused is identified as having Indigenous ancestry, and thereby having recourse to the remedial effect of section 718.2(e), *R. v. Gladue* and attendant guiding principles. This type of oversight has resulted in what is commonly referred to as “reversible error” typically at the Appellate Court level. Defence 008 proposed the benchmark *R. v. Legere* decision spoke to the issue of (self-) identification and as a direct consequence, Legal Aid staff lawyers, going forward, “are to be alert to whether a person might be Aboriginal, so that we don’t fall into the same pitfall that led to the appeal in that case [*R. v. Legere*].” Defence 003 indicated they had been speaking with less experienced staff in recent months and encouraging them to be proactive, rather than reactive, in ascertaining if the accused is of Indigenous descent, at the earliest opportunity, to take full advantage of *R. v. Gladue* and its guiding principles. When dealing with Indigenous peoples who come before the court, (self-) identification is a sensitive issue on many different procedural fronts for members of the legal profession. Crown 001, for instance, maintained steps had already been taken to identify Indigenous peoples at the earliest opportunity, including the passive strategy of placing relevant reading material in the foyer, located immediately outside one of PEI’s Provincial Court courtrooms. Additionally, police officers serving the Prince County Court, according to *Gladue* Writer 016, attempt to establish the accused’s Indigenous identity, with the goal of providing identification material to the presiding judge, who, in turn, utilizes the same information in her or his judicial decision-making process. In Crown 001’s estimation, “if you educate your defence counsel, I think that takes you a long way; if you have an Aboriginal Case Worker, that takes you farther, but what
happens if you have a ‘self-rep,’ this can constitute a legitimate problem – fluctuating between ‘maybe he is, maybe he isn’t’ and how do you approach that?”

Crown 001 provided multiple reasons why Indigenous peoples who come before the court may be hesitant to (self-)identify, even to the point of denying their own Indigeneity and attempting to pass as non-Indigenous. For example, the same Crown asserted, “considering all the systemic factors that are against them; to come forward with a ‘flag,’ saying ‘yes, I am Aboriginal,’ because they justifiably believe, based upon past experiences, that really bad things are going to happen if they identify themselves as Aboriginal,” including spending more time in jail. Crown 001 also reinforced the notion that “everybody’s tip-toeing around the central issue of identification, because once you have been identified, then the judge can run with it.”

Gladue Writer 016 suggested reluctance on the part of some Indigenous peoples to (self-)identify is rooted in Canada’s colonial history, wherein Indigenous peoples have been discriminated against whenever they were identified. Proulx (2003) states, “wherein the colonized internalize the negative images of the colonizers, about the colonizers leading them into self-hatred, is one of the most difficult to overcome” (p. 65). In fact, this may not only be about self-hatred, but how this form of internalization negatively impacts interactions with settler colonial institutions, and as Gladue Writer 016 implied, may also be a survival strategy. Alfred (2009b) further argues that the “psychological landscape of contemporary colonialism is defined by extremes of self-hatred, fear and co-optation of the mind,” resulting in the “creation of a reality and culture in which people are unable to recognize, much less realize, their value as human beings” (p. 53), which is one more reason why Indigenous peoples do not self-identify and accordingly, constitutes a means of survival.
When any society has had “many of its cultural instruments” stripped away, especially “cultural transmission, social order, and governance, the shred of identity that is left (which is its continuing self-recognition as a special and distinct community) must inevitably be expressed through emphatic rejection of the instruments and values of that society that has all but taken it over” (Whyte, 2008b, p. 110). Pamela Palmater (2013), a Mi’kmaq scholar from the Eel River Bar First Nation, asserts that the identity of Indigenous peoples in Canada is about “so much more than the chronically underfunded federal programs for federally-recognized ‘Indians,’” like education (Barbara Morin, 2017), but is based “on our unique ties to our traditional territories and the fact that we are the First Peoples of this land who had (and still have) our own laws, governments, political alliances, economies and trading networks” (p. 151).

Indigenous peoples in Canada have historically found themselves again and again having to reassert their Indigeneity and resist what Lawrence (2004) refers to as the long-term “discursive power” of the Indian Act legislation and its capacity to, as Proulx (2006) contends, “exclude Aboriginal peoples, not meeting its legislated identity criteria as a central force in shaping Aboriginal identification in both reserve and urban contexts” (p. 408). Lawrence (2004) proffers, by way of an example, a non-Indigenous discourse about what “Nativeness is or is not,” in that, “‘real’ Indians have vanished (or that the few that exist must manifest absolute authenticity [emphasis added] – on white terms – to be believable) functions as a constant discipline on urban mixed-bloods, continuously proclaiming to them that urban mixed-blood Indigeneity is meaningless and that the [I]ndianness of their families have been irrevocably lost” (p. 135). Palmater (2013) contends “being Mi’kmaw is not an identity one can have as an individual separate and
apart from the collective identity of the Nation, its history, territories and all the rights and obligations which flow from that identity [...] which means that we have the strength of history and the power of resistance on our side” (p. 149). Similarly, when discussing the many obstacles Indigenous peoples in Canada have already had to overcome and continue to struggle with today, principally around self-determination and decidedly with respect to the CJS, Elder 019 characterized Indigenous peoples as possessing extraordinary “resiliency,” and that “despite everything else, we’re still here; despite colonialism, despite residential schools, despite the 60s Scoop, despite the legal system and the way it is,” and then finished by unequivocally declaring: “We’re still here.”

Throughout the interviews, informants identified a host of reasons why Indigenous accused are sometimes resistant to (self-)identify when appearing before the court, the principal reason based, in large part, on how badly they have been treated in the past.

6.3.6. What about the victim?

Victim impact related legislation has also had an influence on the ongoing R. v. Gladue implementation process. Federal legislation first appeared in the CCC in 1989 and subsequently was captured in 1996, at least in part, under section 722 (1), by way of what is commonly referred to as a Victim Impact Statement (hereinafter referred to as VIS). A VIS describes the physical or emotional harm, property damage or economic loss experienced by individual victims because of the commission of an offence.

Simultaneously with the introduction of the Bill C-32 on July 23, 2015, section 718.2 (e) was modified. It now requires judges to craft sentences “with particular attention to the circumstances of Aboriginal offenders, consistent with the harm done to victims or to the
community [emphasis added].” Since this piece of federal legislation came into full force and effect, opinions have varied appreciably as to its overall merit, applicability and coherency, as it relates to Indigenous peoples who find themselves in conflict with the law.

There are those who perceive the addition of “victims” to section 718.2 (e) as a progressive step forward in broadening the provision’s remedial reach, whereas others regard the amendment as confusing and potentially diminishing its overall benefit when it relates specifically to Indigenous peoples who appear before the court. According to Crown 001, for example, “the amendments in 2015 that brought in victims and community as major considerations, I think were a ‘push back’ [against R. v. Gladue] by the Feds, in terms of serious crimes still having to be treated seriously.” The cynicism of some can, at least in part, be understood in the wake of two full decades of the yet unfulfilled promise of section 718.2 (e). Yet, there are those in whom hope springs eternal and whereby the newly revised section 718.2 (e) offers the window of opportunity to not only do things better but what I would proffer – “do better things.” Jonathan Rudin, the Program Director of ALS in Ontario, proposes “I would not be at all surprised if it was the Government of the day’s intention to try to water down the provision, although the addition of ‘victims’ to section 718.2 (e) in the case of creative legal counsel, could actually be helpful, where for example, the community takes part in a sentencing circle and eventually recommends no jail time, as I think this provision gives greater weight to that recommendation than before” (personal communication, October 2016).

Although it is sometimes difficult, if not impossible, to discern the Canadian Government’s original intent when drafting legislative amendments, Bill C-32 formed
part of former Prime Minister Stephen Harper’s Conservative Government’s “law and order” agenda. The Prime Minister stated, at the time, that “justice is not only for the accused. It is also for the victims” (Denette, 2014, para. 4). Crown 002 maintained that Bill C-32 “creates a conundrum for the Crown because now we have to weigh victims’ concerns, along with Aboriginal status.” The other reality, according to the same Crown, was that a number of these same victims, irrespective of gender, are also of Indigenous ancestry, which undeniably compounds the problem. Crown 006 expressed belief in the notion that the amendment to section 718.2 (e) “had more to do with gratifying a number of different masters […] has very little legislative teeth” and was more than likely passed “to make the statute conform” with the overarching political position: “Let’s show the country that we’re victim sensitive.” The inclusion of a different category of victims within the restraint provision (section 718.2 (e)) constitutes a form of “erasure,” whereby Indigenous accused now must compete for “space” (i.e. particularly when both the accused and victim are Indigenous) when appearing before the court, in an already foreign and oftentimes hostile environment. The Native Women’s Association of Canada brought attention to this fact during the Hearings before the Standing Committee on Justice and Legal Affairs on Bill C-41 and argued that the proposed legislation “would be likely to result in less protection for Aboriginal women in their communities, as perpetrators of sexual violence could receive non-carceral sentences” (as cited in Balfour, 2012, p. 95).

The Community Impact Statement (hereinafter referred to as CIS) has been in existence in Canadian courts for some time, and was initially approved for use, specifically in fraud-related offences, in 2011. When Bill C-32 came into effect in 2015,
Implementation of section 718.2 (e) of the Criminal Code and R. v. Gladue - systemic and procedural barriers and/or tensions

It broadened the scope of section 722.2 (1) by allowing a wide array of “communities” to prepare “impact statements,” regardless of the nature of the offence(s), wherein it states:

**722.2 (1)** When determining the sentence to be imposed on an offender [...] the court shall consider any statement made by an individual on a community’s behalf [...] describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

In the case of *R. v. Denny*, 2016 NSSC 76, circumstances surrounding the commission of the offence speak directly to the addition of “victims” by way of section 722.2 (1). During the early morning hours of April 17, 2012, Andre Noel Denny, a 32-year-old Mi’kmaw and member of the Membertou First Nation Reserve, near Sydney, NS, unlawfully caused the death of Raymond Taavel, a prominent gay rights activist in the lesbian, gay, bisexual, transgender/transsexual and intersex (hereinafter referred to as LGBTI) community in Halifax, NS. In his written judgement, Justice Rosinski speaks about how the LGBTI community had expressed its “collective loss” via several different variations of a CIS, declaring, at paragraph 122, “[m]ost significant is, not the content thereof, but the mere fact of their creation and the collaboration required to give that community its public voice regarding their loss.” Justice Rosinski summarizes his remarks, at paragraph 123, by stating, “I think it is important to state that the Victim and Community Impact Statements are meaningful in relation to sentences that courts impose because courts are required to consider the principle of ‘retribution,’ [...] a concept that is based on an offender’s moral blameworthiness or culpability, and the seriousness of the offence and its circumstances.” This stands in stark contrast to the more holistic, healing, and harmony enhancing restorative justice approaches spoken to in the guiding principles associated with *R. v. Gladue*. The tension between VISs/CISs and *R. v. Gladue*, on the one hand, presents an opportunity to have a more holistic approach to justice; on the other
hand, it intensifies an antagonism between victim and offender when their “interests” are opposed.

6.4. Conclusion

The implementation of *R. v. Gladue* in PEI, not unlike other Canadian jurisdictions, has been affected by systemic and procedural barriers and/or tensions which have made progress challenging at best. These challenges include everything from a lack of judicial and/or prosecutorial “will,” to the need for additional culturally appropriate resources. Other barriers and/or tensions include the apparent need for both legal (i.e. colonial authority) and Indigenous (i.e. self-determination) peoples alike to protect their own “turf” despite the long-standing power-imbalance between Indigenous peoples and the dominant CJS. With respect to the barrier associated with Indigenous (self-)identification, certain steps are currently being taken in PEI to determine ways and means to address this barrier, with Indigenous Case/Court Workers constituting one such example. It is also critically important to understand that these same barriers and/or tensions have been created and maintained, in large part, by different forms of colonial governance such as assumptions of control over what constitutes “authentic” Indigeneity.

The majority of legal informants and at least one Indigenous informant did not regard Aboriginal Persons/Gladue Courts as feasible in PEI, if for no other reason than a matter of scale. As I discuss further in the next chapter, Indigenous informants spoke of the many benefits of having a Gladue Court, including its capacity to “heal.” However, in applying this potential remedial provision within the prevailing conventional adversarial CJS, systemic discriminatory practices remain: First, there is a tension between the holistic restorative justice approach underlying *R. v. Gladue* with the individualized,
incident-based and sanction-driven approach to sentencing. Second, there is a preoccupation by the conventional legal system, particularly in the courtroom setting, with what amounts to “credible proof” of authentic histories and identities (i.e. the “real Indian”). Third, there is the privileging of the dominant CJS and resultant power-imbalance with Indigenous peoples who come before the court. Lastly, there is a lack of clarity pertaining to whom and what constitutes a “real” victim, a subtle settler colonial means of “erasure.” These factors reflect and contribute to (re)producing broader colonial relations in CJS practices.

There continues to be considerable debate concerning procedural practices around (self-)identification, waivers, authentic histories and identities, accounting for the victim(s), and causal link, which has the effect of (re)producing the CJS status quo. Meanwhile, tangible incremental steps are being taken to “indigenize” the process, whether this entails the introduction of Indigenous *Gladue* Writers and *Gladue* Reports, establishment of sentencing circles, or adapting the Department of Justice and Public Safety AM Program to meet the needs of Indigenous accused at the front-end of the formal CJS. Even though these and other well-intentioned initiatives constitute practical examples of how the CJS and Indigenous communities can work together to resolve real problems, these efforts also reveal the huge chasm between Indigenous justice and a settler colonial state which still, in so many ways (e.g. deciding which Indigenous accused and/or offence types are “eligible” to take part in certain programs, the whole matter of enforcement, sentencing practices, etc.) control the ongoing *R. v. Gladue* implementation process.
The importance of education and/or training with respect to section 718.2 (e), *R. v. Gladue* and its guiding principles, as well as recognizing the impacts of settler colonialism on Indigenous peoples, forms an integral and necessary implementation component, not only in relation to the informants, but a wide array of agencies, groups and organizations (e.g. MCPEI, Indigenous communities, Department of Justice and Public Safety, Mental Health Services, Addiction Services, Department of Education, Child and Family Services, Employment Services, etc.), without whose valuable assistance and input the implementation process would be demonstrably less successful. To reiterate, several legal informants openly expressed a similar sentiment in that, “we cannot do this alone.” For example, Defence 003 opined, “it’s law-centric to think that the law has the capacity to solve the problem, it doesn’t.” However, the pertinent question remains: Is the CJS amenable to the notion of making “space” for not only individual Indigenous accused who have come in conflict with the law but also Indigenous communities, agencies, groups and organizations, especially considering the tensions concerning *Gladue* Reports in PEI. It is important to note, as referenced by the TRC (2015), that even if “excellent *Gladue* reports were prepared from coast to coast, they would still fail to make a difference in the amount of Aboriginal overrepresentation in the prison system without the addition of realistic alternatives to imprisonment, including adequate resources for intensive community programs that can respond to the conditions that caused Aboriginal offending” (p. 173) in the first instance.

Since the release of the *R. v. Legere* decision in 2016, legal informants predominantly have had to view section 718.2 (e), *R. v. Gladue* and its guiding principles anew, with a heightened sense of awareness as to how Indigenous peoples in PEI are
dealt with when they come before the court. Granted, R. v. Legere is not a panacea for the multi-layered barriers and/or tensions which continue to face Indigenous peoples Canada-wide; however, many do regard it as a good place to start.
Chapter 7.
The Canadian criminal justice (legal) system & healing – are they mutually exclusive?

7.1. Introduction

“What happened, am I going home?” Peter Todd Legere did indeed go home after court that day. However, these six simple words, spoken in not much more than a whisper by Legere to his legal counsel at the end of his PECA appearance on April 19, 2016, epitomize the Herculean struggle Indigenous peoples often face when they appear before Canadian courts in an adversarial CJS with which they have or share very little, if anything, in common. This brief, but powerful moment captures the deep divide and fundamental tensions associated with attempting to include understandings of settler colonialism and Indigenous justice within or alongside the conventional CJS. These words also provide insight and a way of grounding the analysis concerning continuities between the IRSS and Canadian CJS. This struggle is especially evident in terms of mass imprisonment as a form of colonial governance, and in limited access to alternative Indigenous restorative justice programs (e.g. healing circles, sweats, meeting with Elders, etc.) that could play a more prominent role in the all-important healing process.

This chapter juxtaposes legal and Indigenous informant voices, with the perspectives of Indigenous Gladue Writers and Elders, providing counterarguments to those raised by non-Indigenous legal informants in chapters five and six. These narratives express alternative viewpoints and life “stories.” Settler colonialism was referenced only tangentially by most non-Indigenous informants, compared to their Indigenous counterparts. Nonetheless, there were a few legal informants who expressed an
appreciable understanding of Indigenous history and settler colonialism. This chapter focuses on the notion of “healing,” which was emphasised by Indigenous informants, and how this might take place within the criminal justice vis-à-vis Indigenous justice paradigms. Informants described the potentially transformative power of *Gladue* Reports.

This chapter also builds upon themes from the previous chapter in terms of Indigenous self-determination, and the multi-layered notion of Indigenous identity. It further speaks to the critical importance of relationship-building between colonial state actors and both individual Indigenous peoples and communities.

A few months following the release of the *R. v. Gladue* decision, Turpel-Lafond (1999) characterized healing as an Indigenous justice principle “which is slowly being merged into Canadian criminal law” (p. 35). Turpel-Lafond (1999) further argues that the *Gladue* decision “has brought the notion of healing into the mainstream as a principle that a judge *must* [emphasis in the original] weigh in every case involving an Aboriginal person in order to build a bridge between their unique personal and community background experiences and criminal justice” (p. 35). However, two decades later, the bridge is far from complete, even though section 718.2 (e) provided the legislative authority and the SCC, by way of *R. v. Gladue*, “clearly endorsed the notion of restorative justice and a sentencing regime which is to pay fidelity to “healing” as a normative value” (Turpel-Lafond, 1999, p. 35). There was broad agreement, particularly among Indigenous informants, concerning the potential remedial impact of the healing process for Indigenous accused who come before the court; however, when and how this healing, in practice, ultimately takes place within the conventional adversarial CJS constitutes an entirely different matter.
7.2 The collision between settler colonial and Indigenous justice paradigms

One of the most significant themes emerging from the perspective of Indigenous informants was the view that Gladue Reports can and do form an essential part of the healing process, by enabling Indigenous peoples to regain a deeper sense of one’s own background, and in due course, making it part of an individual’s sense of identity and overall lived experience. This differs profoundly from how the non-Indigenous CJS achieves “healing,” which I also address in this chapter. Indigenous informants described “justice” in a vastly dissimilar manner from their non-Indigenous counterparts. In examining the Indigenous justice paradigm, Indigenous informants used terms such as holistic, contextualized, restorative, reparative, reconciliatory, equity, balance, harmony and healing, specifically as it pertains to individual Indigenous accused as well as Indigenous communities. Whereas non-Indigenous informants, in describing the conventional CJS, used terms such as adversarial, individualized, sanction-based, proportionality, deterrence, impartiality, parity and equality. Hewitt (2016) advises caution when equating restorative and CJS approaches with achieving justice, particularly when it relates to “holistic change,” in that “reinvention” cannot be accomplished “through the parameters of the criminal justice system by relying on theories of retribution and proportionality any more than non-Indigenous actors may legitimately create an Indigenous-based restorative justice model (p. 334). Cunneen (2011) argues Indigenous intervention programs with respect to criminal behaviour begin with gaining an understanding of the collective harms and outcomes of colonialization and “are unique because they seek individual change within a collective context […] and this explains why Indigenous peoples prioritize the concept of healing: healing is quintessentially and
simultaneously an individual and collective experience” (p. 262), whereas non-Indigenous programs emphasize individualized, single incident-based interventions.

Even though, in practice, “Indigenous labour was indispensable to Europeans, settler colonialism is at base a winner-take-all project whose dominant feature is not exploitation but replacement” (Wolfe, 1999, p. 163). In the settler colonial formation, colonizers seek to eliminate the Indigenous population, not necessarily by resorting to outright physical extermination, but more typically, as was and is still the case in Canada, via assimilatory objectives. The CJS constitutes a key institution which is continually engaged in (re)producing settler colonialism by means of elimination, erasure, dispossession, exclusion and assimilation. Palmater (2013) maintains that the Canadian settler colonial state continues to foster its policy of assimilation “by taking our children from us on many different levels […] physically through child welfare agencies, overrepresentation in prisons” (p. 155). The belief that colonialism is long since past is a form of “erasure” constituting a significant element of the broader colonial discourse; however, as Wolfe (2006) asserts, settler colonialism, including the firmly entrenched CJS, has remained “impervious to regime change” (p. 402). Moreover, as referenced in the preceding chapter, ideologies of settler colonialism reinforce the “lack of will” on the part of political and legislative systems, as well as the CJS, to do things differently. Settler colonialism constitutes an ongoing heterogeneous process, which continues to impact the daily lives of Indigenous peoples in Canada in an untold number of debilitating ways, including widespread systemic prejudice, discrimination and racism. The formative RCAP is one of multiple inquiries and commissions which arrives at a similar conclusion regarding the adverse encounters between Indigenous peoples and the
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Canadian CJS. Blackburn (1993), one of the participants at the National Round Table on Aboriginal Justice Issues, which was affiliated with the RCAP, contends,

All the inquiries concur that Aboriginal people who encounter the justice system are confronted with both overt and systemic discrimination and that this discrimination is one reason why many Aboriginal people have not received due justice (p. 16).

With the “unabated increase in the number of Indigenous people behind bars, a rate now surpassing 25% of the total federal incarcerated population” (The Office of Correctional Investigator Canada, 2016, p. 3), Elder likened it to the IRSS and 60s Scoop “all over again.” The same Elder suggested, “in the government’s eyes, we never grow up anyway because we’re wards of the government […] legally, we never come of age,” and that the IRSS had essentially “sucked the life out of not only the one who was ‘put away,’ but the mother and father and grandfather and grandmother, it sucked the life out of the community, it took our children away.” He then paused briefly before barely whispering, “it’s hard!” Nielsen and Robyn (2003, p. 39) refer to this philosophy as “paternalism,” which is “woven into all the other colonization processes,” and views Indigenous peoples as “minors or wards who must be protected by the parent-like Europeans,” whether this involves removing them from their homes as children by way of the IRSS or, alternatively placing them in prison as adults, both colonial projects constituting distinct forms of displacement, elimination, and erasure.

7.2.1. Returning to our “roots”

Informants emphasized the importance of “roots” as a basis of justice and healing, which both have been disrupted by displacement, dispossession, expropriation, and impaired cultural transmission in the settler colonial state and speaks to how these same practices continue to negatively impact the lives of Indigenous peoples across Canada to the
present day, including with respect to and because of overrepresentation. Settler colonialism is, according to Wrightson (2017, p. 36), “rooted in the dispossession of Indigenous peoples from their lands and the remaking of these lands into settled spaces” (Alfred & Corntassel, 2011; Coulthard, 2014; Vermette, 2011; Wolfe, 2006). The critical importance of maintaining ties to community and the land has often proven to be extremely challenging for Indigenous peoples who have had to spend disproportionate amounts of time in custodial facilities, which, as Nichols (2018) argues, (re)produces dispossession and removes people from their home communities and the land. Elder 019, for instance, insisted an Indigenous person leaving their home community and spending time in custody “is going to be twice as impacted,” compared to their non-Indigenous counterparts, and that when everything has been considered, “it comes back to who we are, it comes back to our culture, it comes back to how we can get this person back into the fold, and how we can support that person, so that they’re not out there on their own.” Elder 020 shared the harrowing account of a young boy (seven or eight years of age), “a little older than me,” from the Lennox Island First Nation reserve who “ran away” from the Indian residential school in Shubenacadie, NS, in the mid-1950s, with the intention of “coming home,” in the middle of an Atlantic Canada winter. He made the arduous 281-kilometer trip by hitchhiking and shortly after “he came home, he just got home, got to his mother’s, and an Indian Agent, or whoever it was, took him back, but he lost both feet” because of severe frostbite.”

An important issue raised by several Indigenous informants involved the need for cultural education for Indigenous peoples, which included the interaction between Elders and young people. Based on her extensive involvement with Indigenous young people
over the years, Elder 019 indicated that she had always attempted to “instill good morals, things I’ve been taught by my parents and my community, by other Elders.” The same Elder stated, “I try not to point any fingers at anyone, I try not to be judgemental, because I find if someone is judgemental of me, it just backs me into a corner, and I wouldn’t want to do that with any of our youth.” Elder 019 further commented that “the colonial system didn’t work because it was always confrontational, and it still doesn’t work because it’s still confrontational.” The growth in the Indigenous youth demographic and corresponding increase in incarceration rates constitutes another reason why Gladue-type sentencing is even more necessary to prevent Indigenous youth from becoming immersed in the “revolving door” incarceration cycle as adults.

Some Indigenous informants spoke about what Gladue Writer 016 characterized as a generational shift, wherein the older generation “are so much wanting to hold onto the old past,” are still in the process of “healing,” and “there’s still hurt and pain because the people who abused them were never brought to justice and they’re still walking around today in the community, so there’s no closure.” Sandwiched somewhere in between the older and younger generations is the “middle” (i.e. children of those who attended the IRSS) generation, which, according to the same Gladue Writer, “is the piece where we are struggling; they are still trying to find where they fit in, they are the piece with the lost identity, asking questions like ‘Who am I?’” Judge Heemi Taumaunu helped develop the first Rangatahi Court for the Māori Nation in New Zealand in 2008 and made a strikingly similar remark at a conference held in BC in 2014: “When you lose your language, inevitably the culture follows. When you lose your culture, you then ask this question – ‘Who am I?’” (International Indigenous Therapeutic Jurisprudence +, 2014).
In comparison, the younger generation, according to Gladue Writer 016, “is embracing change [...] exploring and eager to look toward the future,” and exuding a healthy sense of pride in who they are, where they come from, and what their future holds in store. The same Gladue Writer mentioned that when the younger generation is involved in drumming and ceremonial dancing, this not only helps them “connect to their culture and traditions,” but also protects them from becoming “caught up in drugs and alcohol,” because the latter would violate the critically important spiritual element of their culture, whereby “you cannot be around sacred things when you’re using drugs or alcohol – it’s walking that Red Road.” For someone to walk the Red Road, according to Monchalin (2016), “all is interconnected and one thing is not more important than another [...] all beings are acknowledged as part of the circle of life and are referred to as ‘all my relations’ [...] humans are a sum total of their relationships [...] everything coexists equally” (p. 24).

As a member of the Mi’kmaq Nation, Gladue Writer 017 indicated it was extremely important for Indigenous peoples to be “able to maintain a connection to their culture” and that sometimes this “gets lost in the shuffle.” The same Gladue Writer acknowledged that learning about one’s own culture can often help Indigenous peoples better “understand themselves,” and, in turn, reap the benefits of a rekindled sense of self. The timing of this form of cultural reawakening can sometimes be called into question by some members of the legal system (e.g. judge, crown), especially if the individual is seeking out their ancestral roots, while simultaneously interacting with the adversarial CJS. Gladue Writer 017 did not dispute the fact that this could reasonably constitute a strategic legal maneuver on the part of the Indigenous accused, however was equally
resolute in the knowledge that “after so much has been stripped away over the years, through different government policies and laws, part of the reason why somebody doesn’t feel comfortable learning about their culture,” or, even (self-)identifying as Indigenous, is “because it’s been so engrained in their mind that maybe it’s not a good idea to do so, or maybe it will be regarded as a get-out-of-jail-free-card ruse, as far as they’re concerned.” This speaks to the disconnect which exists between a few legal informants who view the attempt to make, maintain, renew and/or strengthen an ancestral link as a form of manipulation, to ultimately avoid a harsher sentence; while Indigenous informants tend to regard the same tactic more so from the perspective of reaching out to family and community members alike, and thereby seeking the support, balance, and healing they need to move forward. Healing from an Indigenous perspective runs counter to some of the ideas spoken to in the previous two chapters, including waivers, (self-)identification, equal protection before the law, racial-discount, authenticity, pathologization, and individualized sentencing.

7.2.2. The colonial project: will it never end?

As discussed in chapter six, some legal informants had difficulty comprehending the broad array of intergenerational effects of the IRS. Gladue Writer 018 told the story of attending a presentation where one of the guest speakers was talking about “intergenerational trauma,” with origins in the IRSS, 60s Scoop, reserve system, or foster care, who characterized it as “black energy.” When dealing with intergenerational trauma, most people who are not familiar with its debilitating effects believe that with the arrival of each new generation, the corresponding impairment incrementally diminishes;
however, according to the guest speaker, paraphrased by the same Gladue Writer, the black energy merely expands and,

if it’s never dealt with, it just continues to grow and create its own black energy, which flows into you and finally, if you have one generation that can step up and deal with it, overcome it, work through it and move on, that’s when the healing will start and that next generation won’t be as impacted. Then it will start to disappear. You can see it in the communities, where people don’t talk about it, people don’t acknowledge it, or people don’t even know about it.

The 60s Scoop, a term first coined by Patrick Johnston, the author of the 1983 report entitled Native Children and the Child Welfare System, refers to the mass removal (scooping up) of Indigenous children from their families into the child welfare system, that began in the 1960s and continued until the late 1980s. However, according to Sinclair (2007), “the involvement of the child welfare system is no less prolific in the current era […] that given current child welfare statistics, the Sixties Scoop has merely evolved into the Millennium Scoop and Aboriginal social workers […] operating under the umbrella of Indian Child and Family Services, are now the ones doing the ‘scooping’” (p. 67). Not unlike the genocidal IRSS, this is yet another example of institutional practice to be found along the colonial governance continuum. Sinclair (2007) further states that during the 60s Scoop, “[d]espite literature that indicates adoption break-down rates of 85-95%, recent research with adults adopted as children indicates that some adoptees have found solace through re-acculturating to their birth culture and contextualizing their adoptions within colonial history” (p. 65). Even though he was a young boy at the beginning of the 60s Scoop, Elder 020 said, “I’m reminded almost every day of the hurt we still carry, that I still carry, children too, so why do we revolt? We get to a point where we are quiet so long and then you end up in the prison
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system, angry, suppressed anger that’s been in there all the time,” a depiction which reinforces the importance of healing.

In speaking about the significance of Indigenous peoples remembering the past, having a better sense of the present, and cultivating hope and dreams concerning the future, Gladue Writer 017 stated, “when you’re a community member, you’re on the inside, you know what’s going on can be horrific, including our history specific to PEI, even if nobody really wants to talk about it because it’s so horrible.” The denial of oppression by the CJS, by not acknowledging intergenerational trauma and the systemic effects of colonialism, merely extends/reproduces this form of elimination. Gladue Writer 017 alluded to things that had happened to Indigenous peoples in PEI, “things done by non-Aboriginal people, coming in to ‘help,’ or ‘work’; these same people came in and used their role in the community to do horrific things.” The same Gladue Writer further suggested members of Indigenous communities historically have not necessarily said anything, keeping these things to themselves “because they knew better, they knew they would not be believed, they knew they would get in trouble, so they lived with the agony from the abuse,” and that same fear “passed down through the generations, to the point where you don’t trust non-Aboriginal people.”

The ongoing tension/conflict with the conventional CJS has resulted in a myriad of harmful life-changing repercussions for Indigenous peoples in Canada, including, not uncommonly, pleading “guilty as charged,” without having first committed the alleged offence.
7.2.3. Guilty as charged

In attempting to provide a foundational basis for the view that Indigenous peoples who appear before the court have a tendency to be more honest, when compared to their non-Indigenous counterparts, Elder 021 provided this explanation: “Because our people, generally speaking, are quiet and reserved, we tend to say, ‘yes, I did it,’ rather than fight it and say, ‘no I didn’t really do it’; they tend to let it go, for whatever reason, maybe it’s years of being put down, not only as a person or family, but as a community, since you come out of that community and you’re fighting this massive system – it’s easier to just say, ‘yes’ and get it over with, whereas a non-Indigenous person says, ‘yes, I’m going to fight it.’” Elder 019 agreed with her fellow Elder, asserting Indigenous peoples “tend to tell the truth when they are before the court, even though what she termed “a ‘white lie’ could allow them to get away with a number of things […] whether you mistake what they’re saying or they’re admitting to it because they just can’t be bothered, they’re banging their head against the wall, it’s their fifteenth offence, or they’re getting blamed for it anyway, so they just automatically give up and say they did it […] that’s very much a cultural thing.” The same Elder proposed one of the principal reasons why Indigenous peoples plead guilty at the earliest opportunity, typically at arraignment (i.e. the formal reading of a criminal charging document in the presence of the defendant, to inform the defendant of the charges against them) is because “Mi’kmaq do not create waves, we’re not supposed to be confrontational, it’s changing, but traditionally, we’re non-confrontational […] we have the ideology of non-interference, which means ‘I don’t tell you how to run your life’ […] a lot of it is that they have lost faith in the system, in the systems, and they just say, ‘okay, yes, whatever, because no matter what I tell you,
you’re still going to think I’m guilty and I’m still going to receive a sentence.’’ This raises, from a policy and procedures perspective, something that was referenced in the previous chapter, specifically regarding (self-)identification and waivers, and the importance of Indigenous accused having all the relevant information (i.e. the potential remedial effect of section 718.2 (e) and *R. v. Gladue*) at the earliest opportunity, such that, informed decisions (e.g. whether or not to request a *Gladue* Report) can be made.

Furthermore, Indigenous peoples are more likely to plead guilty, rather than challenge the charges brought against them (Ross, 2006b), because as Sinclair (1994) explains, “[p]leading is another area where the mechanics of the Canadian justice system conflict with Aboriginal cultural values. Aboriginal individuals who have committed the deed with which they are charged are often reluctant or unable to plead ‘not guilty’ because that plea is, to them, a denial of the truth, and contrary to a basic tenet of their philosophy” (p. 183). This perspective refutes assumptions made in the previous two chapters, wherein some legal informants questioned the very existence of an overrepresentation problem, especially in PEI and/or argued that overrepresentation reflects disproportionate offending, or Indigenous peoples engaging in more serious criminal activity.

A non-confrontational mind-set can lead to overrepresentation of Indigenous peoples in the Canadian CJS, particularly its prisons, in at least a couple of different ways. First, if an Indigenous accused is more likely to admit committing offence(s) at the earliest opportunity, whether or not they actually committed the offence(s), principally in
order to “get it over with,” or alternatively, become involved more often in administration-of-justice offences\textsuperscript{37} or technical breaches of court orders (e.g. Probation Orders)—thereby accruing a longer criminal record—the probability is that the same accused will serve more time in custody than the non-Indigenous accused who accepts a plea bargain or decides to fight the outstanding charge(s) in a court of law. Justice McCawley, in \textit{R. v. Knott}, 2012 MBQB 105, speaks directly to this issue, at paragraph 9, asserting, “what is significant about Mr. Knott’s dealings with the police is that he was \\textit{surprisingly honest and forthcoming with them at the time, and later with his probation officer} [emphasis added],” including going so far as to contradict his Probation Officer and legal counsel, who had already mistakenly informed the court that the accused had no criminal record. Moreover, Mr. Knott “\textit{volunteered} [emphasis added] that he had one youth conviction which occurred when he was 13 and that he had failed to comply with a condition” contained in a Probation Order, which constituted an administrative offence. Second, if the Indigenous accused has had a dysfunctional familial background and does not want to implicate, out of loyalty or fear, other family members who may have been contributory to this dysfunction and, in turn, her or his involvement in criminal behaviour, they sometimes will not provide the whole story and/or sufficient information for the presiding judge to render a duly informed ruling; or, they might just plead guilty

\textsuperscript{37} An administration-of-justice offence takes place when a specific provision contained in a Probation Order, Undertaking, or Recognition is not complied with or violated. Failure to comply with a Court Order and breach of Probation are the two most common “criminal offences” in Canada and make up approximately 20 per cent of all criminal matters. A related problem is if the person under a Court Order breaches/violates provision(s) in the Order, it is not uncommon practice for the court to render a decision that increases the amount of imprisonment for the second and subsequent “offences,” thereby exacerbating the problem.
to avoid a trial and/or waive the *Gladue* Report. Crown 001 provided an example of the media gaining access to information contained in a *Gladue* Report, and “all of a sudden, this material gets into the community, […] there has already been one case which exploded because it was exposed – are the people [in that community] going to be willing to come forward, to tear down their family?” This can be especially true in close-knit or, what Elder 019 characterized as “closed” Indigenous communities, wherein the accused is not always regarded in a positive light.

Elder 020 told the story of when he, as a 17 or 18-year-old youth, and an Elder were stopped by the RCMP for impaired driving in the 1960s, while en route to go fishing. Elder 020 knew he was not guilty as he had only consumed one bottle of beer, but apparently felt “it’s easier just to say, ‘I’m guilty.’” The RCMP then searched them both, as “there was a robbery and we resembled the description given of the robbers.” As it turned out, a robbery had not taken place, and according to Elder 020, the RCMP “just came and rubbed me up, then I was angry for a long time, not so much about what happened to me, but to ‘my Elder.’” The RCMP asked them both to place their hands on the car’s engine bonnet and then “kicked our legs apart and it came to the point where it hurt. They did the same thing to my Elder – ‘we were guilty, we were already guilty.’ When they were done, they just walked away, they laughed and walked away.” Elder 020 indicated he had trusted the RCMP unreservedly before this incident happened, in part, because his father had been a police officer, although since that day, over 50 years ago, “I lost respect for police officers.” When he eventually appeared before the court on the impaired driving charge, even though he knew he was not guilty, Elder 020 pleaded guilty and consequently, received a short period in custody. The same Elder explained
why he had pled guilty by saying: “I didn’t want a lawyer, I didn’t want to talk, at that
time there was a language barrier, we spoke Indian.” This story stands in stark
juxtaposition to the perception of some legal informants, referenced in chapter five, in
that Indigenous peoples tend to commit more serious offences compared to their non-
Indigenous counterparts. Discriminatory or over policing practices, and a different type
of engagement with adversarial justice systems would also appear to explain much of the
overrepresentation in the Canadian CJS. The above-noted account speaks first to the
significance of being able to tell one’s own story, by way of a Gladue Report, as a means
of achieving justice. Second, it speaks to the practice of Indigenous peoples pleading
guilty to false charges, often to avoid further contact with a colonial CJS.

7.2.4. How well do you really know me?

The previous two chapters focussed on the substantive difference between an
individualized, sanction-centred approach to sentencing and so called “institutional
knowledge” on the one hand, and the contextualized reality of individual Indigenous
accused and the potential transformative power of telling one’s story by way of Gladue
Reports, on the other. This section expands upon the understanding of Gladue Reports as
more than providing context or information to the presiding judge but rather as forming
an integral part of the healing process.

Most informants, especially within the Elder and Gladue Writer informant cluster,
spoke at some length about the importance for people who are employed in the CJS to be
educated as to how and why Indigenous peoples continue to experience challenges and
barriers when they encounter the settler colonial state and its individualized, adversarial,
sanction-based CJS. Gladue Writer 016, for instance, stated that there was “a lack of
knowledge and understanding of Indigenous history within the criminal justice system and it’s an ongoing systemic issue.” The same Gladue Writer reiterated that “in terms of education, I think the justice system definitely has to be educated [...] about what went on and what we, as a community, can do to address some of these issues.” Elder 019 considered the importance of information being conveyed to everyone involved in the CJS, principally judges, concerning Indigenous peoples in PEI, from a purely historical perspective, and perceived it as decisively important, because, in its written form, “we’re looking at the conquerors’ way of history” and have to honestly ask ourselves the question “was that actually all that happened during that history?” She further stated “if we look at our history books, when we went to high school, what was in there – all the conquering things, it didn’t talk about how they conquered, it didn’t talk about degrading and demeaning them [Indigenous peoples] and parceling off our people and…”

Ross (2006a, p. 267) speaks about how Indigenous peoples tend not to see the CJS through the same lens as non-Indigenous people, primarily because, as one Ojibway Elder once adroitly phrased it, “How can we negotiate justice with the people who brought us the injustice [emphasis in original]?!” Moreover, Ross (2006a) states “Western justice professionals seem, perhaps because of their unique training, to be incapable [emphasis in original] of grasping the concepts of justice the Elders wish to see restored to their people.” Or, as a Cree Elder once quipped, “We know you have a legal [emphasis in original] system; we’re just not sure it’s a justice [emphasis in original] system” (as cited in Ross, 2006a, p. 266).

For the three Provincial Court Judges in PEI to be more aware of the importance of the involvement of Indigenous communities in the healing process, Elder 021
suggested, “I would ask them this question, ‘how many of them have been to a First
Nation?’ They sentence our people, but do they really know where we come from? Have
they gone to the community and talked with people? Did they go to the ceremonies or
pow wows?” When asked how meaningful it would be for everybody involved in the
CJS, especially judges, to have a better understanding as to what Indigenous peoples have
already and are continuing to endure in PEI, Elder 021 responded by saying, “it’s
extremely important because that requires a whole different perspective” and unless and
until non-Indigenous people in the CJS have a better understanding, then “how can they
make the proper decisions if they don’t have the proper background information.” The
term “proper,” used in this context, speaks to the existing tension, expressly as it relates
to the preparation of Gladue Reports and conflicting/competing conceptions of the
“truth.” When asked a similar question, this time more so related to their general
knowledge about colonialism and its enduring impact on Indigenous peoples, Defence
008 openly acknowledged “regrettably very little, not enough for sure.” The same
Defence further stated that this type of information would assist them in their current
role, “if it’s objectively presented,” and further, “somebody’s opinion is fine if it’s an
informed opinion, an analytical opinion, based on factual situations.” Here, yet once
again, I found that some legal informants privileged certain terms (e.g. facts), while
others (e.g. advocacy) were relegated to a subordinate role, the result being, in part, that
Gladue Writers have had to comply with legalistic policies, procedures and/or protocols,
particularly when it involves the preparation of Gladue Reports. If not in compliance,
they risk the possibility of having to answer to the presiding judge. As evidenced in
chapter five, there were a few legal informants who openly cast doubt on having Gladue
Writers be responsible for the preparation of *Gladue* Reports in the Province unless and until they learn the “proper” method of preparing and presenting these same legal manuscripts in a court of law, in ways and means that closely resemble PSRs.

For *Gladue* Writer 016, when key determinants of health are considered, including, but not limited to, income, social status, culture, education and literacy, people “must understand the real history of what happened to Indigenous peoples, to understand why they’re in the ‘mess’ they’re in, why they’re dealing with what they’re dealing with,” rather than relying on history books often written by non-Indigenous people who are looking through a settler colonial lens. The same *Gladue* Writer further observed that history books “do not paint a true picture of what really happened to Indigenous peoples.” As a direct result of having one’s history actively dismissed by an adversarial colonial CJS, which appears to be more so concerned about proportionality and keeping the public peace than achieving a sense of balance and healing, it is difficult, if not impossible, to fully comprehend and appreciate someone’s lived experience. It was evident from the informant interviews that Indigenous peoples do attempt to tell their own story, for example through *Gladue* Reports, and therein assert their all-important personal and collective histories; however, they often find themselves in what the legal profession would characterize as a reverse onus situation, wherein the burden of proof is on the Indigenous accused, rather than the Crown, to prove that they either fit or do not fit a certain description of indigeneity, one rarely, if ever, of their own choosing.

In Canada, over the course of the last decade, much has been made of initiatives introduced for the “benefit” of Indigenous peoples in the CJS, including Aboriginal Persons/*Gladue* Courts, *Gladue* Writers, *Gladue* Reports, sentencing and healing circles,
and Indigenous Case/Court Workers. According to Monture (2014), “[a]ll of these programs are mere ‘add-ons’ to the mainstream justice system,” and “are really based on the notion of Aboriginal inferiority, and if we Aboriginal people just become more knowledgeable about the Canadian system, the problem is solved [emphasis added]” (p. 72). This view emerged throughout the interviews when comments were made by a few legal informants which placed the burden squarely on Indigenous peoples (both Indigenous accused and Gladue Writers) to become more familiarized with the legal system and how to do things “properly.” At the same time, implementation barriers and/or tensions such as institutional knowledge, (self-)identification, authentic histories, and waivers, make it challenging for Indigenous peoples to benefit fully from the remedial effect of section 718.2 (e), as well as R. v. Gladue and its guiding principles. Ross (2006b) reminds us that it was non-Indigenous rather than Indigenous peoples who constructed institutions to reflect “our different cultural imperatives,” including courts “dedicated to adversarial fact finding, the public allocation of blame, and the imposition of consequences, including punishment” (p. 17).

The court is sometimes looked upon as one source of the problem as it relates to overrepresentation, in that it abides by, according to Tony Williams (2008), a member of the Darug Tribe in Australia, “a simple narrative that constructs Aboriginal families as incubators of risk, Aboriginal communities as containers of risk and the prison as a potential source of healing” (p. 95). This paternalistic notion is problematical on several different levels, including the argument expressed by at least half of the legal informants who suggested custody was sometimes the only way to keep Indigenous accused and the community at large safe from additional harm. Gladue Writer 016 reminded me, as a
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non-Indigenous researcher, that the CJS “was built by non-Indigenous people, for
Indigenous peoples,” and that non-Indigenous people working within that same system
don’t necessarily understand “community healing” and what this concept entails.
Additionally, according to the same Gladue Writer, when the judge says, “‘we are going
to use this to make an example of you,’ that’s not healing, but that’s what certain people
want to hear.” Gladue Writer 016 further argued that this strategy “doesn’t work for
Indigenous peoples at least partially because judges don’t live in our world, they live in a
world made for non-Indigenous people.”

While modes of justice are different, it does not mean that Indigenous peoples
who come in conflict with the law are not “familiar” with the CJS and all its component
parts. Paradoxically, the colonial justice model, although foreign with respect to many
aspects of Indigenous culture, is all too familiar to Indigenous peoples considering the
time and effort they have spent learning about it, navigating their way through it, and
challenging it when circumstances warrant.

7.2.5. The impact of telling one’s own “story”

Cherokee Nation scholar Thomas King (2003) once said: “The truth about stories is that’s
all we are” (p. 2). When asked about the significance of an Indigenous accused being able
to tell their own unique story when they come in conflict with the law, Elder 021
regarded it as “extremely important,” especially when it is “told before sentencing.”
Likewise, supporting this perspective, Gladue Writer 017 suggested, “I think that’s
probably the most important thing.” The same Gladue Writer also stressed the
importance of Indigenous accused being able to tell their story (Gladue Writers 016 and
018; Crown 001), to have the judge “see their side […] witness them accepting
responsibility for what they’ve done and that ownership,” a solid foundation from which
to begin the crucial healing process. Gladue Writer 017 proposed judges, as well as
others in the CJS, must ask themselves, “how does this person go on” considering what
has already transpired in their life and summarized her feelings about the issue by stating,
“it’s also important for judges to be able to see what individual accused look like,
stripped of everything – it’s a very vulnerable place to be, telling your story and for the
judge to see what that looks like.”

The case of Peter Todd Legere constitutes an example of the transformational
power of telling one’s story. Mr. Legere appeared before the PECA in the spring 2016,
his sole ground for appeal being that “he was sentenced without the benefit of a
specialized pre-sentence report known as a Gladue Report” (R. v. Legere, para. 1). Justice
Mitchell, in reviewing Legere’s background, observed that “[t]he Gladue Report delves
deeply into the unique systemic and background factors that played a role in bringing this
offender to this point in his life. The Gladue Report canvasses the harm done to Legere’s
mother by residential schools and the Government policy of forcefully integrating
Aboriginals into white society. It speaks of the effects of inter-generational and multi-
generational trauma”; children “like Legere’s mother, removed from their parents and
culture, abused and belittled, often turn to substances like alcohol to dull the pain.”
Justice Mitchell proposed, “[t]he pain and suffering that Legere suffered was a direct
result of that system” (para. 22). In his written reasons, Justice Mitchell provided
additional details about Legere’s life’s story:

[29] The Gladue Report paints a picture of a 44-year-old man who has
suffered horrific emotional, physical, and sexual abuse as a child and has
been struggling his entire life to cope with the fallout from his
childhood. He was abused emotionally, physically and/or sexually by
virtually every person in his life in whom his care was entrusted: his father, his mother, his step-mother, his paternal grandmother, the homes and hospitals into which the Child Protection agencies placed him.

Reviewing Legere’s rather lengthy criminal record (including four findings of guilt as a young person and 14 convictions as an adult), Justice Mitchell remarks:

[30] Given the circumstances into which he was born and the unspeakable conditions in which he grew up, it is hardly surprising he has been before the courts so frequently. The only real surprise is that he has not been before the courts for more serious offences, and society should be thankful that the anger which this man understandably feels has not given expression to violent crime.

Not wanting to end this “story” on a pessimistic note, Gladue Writer 016 indicated the IJP was asked by Aboriginal Justice Strategy (hereinafter referred to as AJS) federal partners to provide a “good news” success story, primarily for AJS funding renewal purposes, which reads, in part:

The MCPEI Aboriginal Justice Program received a request to write a Gladue Report for [Peter Todd Legere] […] who had suffered horrific emotional, physical and sexual abuse as a child … […] We continued to meet with him […] to help him understand how the past had influenced some of the decisions he’d made in his life […] to let him know that we haven’t forgotten him (Gladue Writer, 2016).

While Gladue Reports have potential positive effects in enabling the telling of one’s story, Defence 003 spoke about one of the potential disadvantages, from the perspective of Legal Aid clientele, in that some “are really afraid of stirring up really bad things that they won’t be able to cope with, or that the community won’t be able to cope with, so there’s always that reluctance.” The same Defence elaborated by relating what happened with one client, whom when asked to speak about his problematic past, responded by saying, “I don’t want to talk to anybody, I don’t want to go there, I spend every waking minute trying not to.” When this happens, Defence 003 suggested, “it’s an accumulation of things: it’s shame and hurt and anger, it’s all that stuff, they’re scared if
they stir it up, something bad’s going to happen.” Telling one’s story can therefore constitute a double-edged sword – the experience can either be traumatizing and have harmful repercussions, or, if “waived,” then the accused does not gain the potential remedial effects of section 718.2 (e) and R. v. Gladue. Alternatively, as was the case with Peter Todd Legere, it has the potential to help bring about transformational change.

When asked about the importance of having an Indigenous accused tell their story, Judge 004 initially responded “the more information the better.” The same Judge further mentioned that it was important to understand when Indigenous peoples are afforded the opportunity to tell their story, “some of them don’t know their story” or, alternatively “don’t want to tell their own story.” Judge 004 proposed some Indigenous peoples “don’t want to get into that, it’s just too painful,” although “just the fact of hearing some of this information or telling some of this to someone else, can be therapeutic in itself and quite powerful for some of them – it just depends on the individual.” The same judge further claimed that “some of them just have no idea why they are the way they are and when they hear the full story and understand that’s what happened to them, and this is why they may act out in certain ways, say ‘well okay, now I know what happened.’”

One of the more injurious effects of settler colonialism is the impact it has had and continues to have on the Indigenous family unit, manifesting in a multitude of different ways, including inordinate amounts of time family members spend away from home and confined in Canadian prisons. Expanding on the notion of “family” in the broader context of storytelling, Crown 007 maintained that “the Aboriginal community never really had a strong written historical record-keeping system, and that’s what you do
see when you read some of these Gladue Reports [...] that the offender will know who their mother is, but will never have met their father [...] there will be gaps in where their siblings are [...] they have been displaced, are in foster homes and that’s not even mentioning the [Indian] Residential School system [...] so their own ability to be a reliable narrator of their own lives has been impacted,” albeit through no fault of their own. Judge 010 agreed this was a legitimate concern, particularly with respect to the court garnering sufficient information to render informed decisions. The same Judge further stated, “it would be very good if they themselves could express their own story” and went on to explain that “one of the advantages we have here is the time we have, we have no distances to travel [...] perhaps we don’t have the same workload, so you don’t necessarily need to have eight people lined up to be sentenced on the same day, and therefore you can take the extra time required to allow the story to be told [...] the time to try and do it right, do it better, compared to the ‘assembly line’ process you’re going to have in Toronto, by necessity.” And yet, the informant interviews have not necessarily borne it out that this is happening consistently in PEI.

When Judge 011 was asked how important it is, as a judge, for Indigenous peoples to be able to tell their story, the response was “I think it relates to everybody,” further contending that “there are people who are hesitant to talk and therefore they’re always happy to have their lawyer speak on their behalf [...] that’s certainly where the PSR or Gladue Report is a very important tool,” especially when you consider that the courtroom can be viewed, particularly by Indigenous accused, as a threatening environment in which to speak openly about one’s past. However, Defence 003 stated it may be relatively more challenging in the case of Indigenous peoples, in that typically
when representing an Indigenous accused, “I notice that the person is so upset that they
don’t hear a thing, they don’t know what’s going on. When I speak with them afterward
and say, ‘do you know what just happened’ and they don’t – that’s a normal Mi’kmaw
response to being in court.” Judge 011 stressed the importance of the court understanding
“who they are, where they’re from, where they’re headed, and why this happened,” and
thereby, telling one’s story. Gladue Writer 017 mentioned that once a Gladue Report had
been prepared and prior to the sentencing Hearing taking place, Indigenous clientele can
listen to what the Gladue Report says when the Gladue Writer reads it out loud in their
presence, because she or he “needs to hear their own words, how their own words sound
in the bigger picture.” This technique, according to the same Gladue Writer, can be quite
cathartic, in the sense that their story takes on its own texture and meaning when read
aloud, whereby “the person comes to an ‘oh, my gosh’ moment and cries when I read it
to them, it’s really highly emotional.” Gladue Writer 017 maintained that during the past
year there may have been one person she interviewed who did not cry upon hearing their
Gladue Report being read out loud. In contrast, in my 30 years’ experience as a Probation
Officer, and having had prepared hundreds of PSRs, I cannot recall even one client
exhibiting a similar emotional response. This observation is informative in that even
though the individual and systemic background factors comprising the Indigenous
client’s “story” may ostensibly be quite similar to their non-Indigenous counterparts, it
appears that due to the substance and form of a Gladue Report, in comparison to a PSR,
the former provides a more conducive environment in which to tap into deep-rooted
emotions.
Manley-Casmir (2012) suggests by being “open to Indigenous stories, judges may struggle against the human urge to withdraw and separate their emotional selves from the professional, judging selves” (p. 243). This emotional withdrawal is what Woolford (2005) terms a “bifurcation of consciousness” (p. 130). Manley-Casmir (2012) goes on to say, “[by] separating their emotional selves from their professional duties, compassionate people can blame the system for causing the pain rather than recognizing their own complicity in that system” (p. 243). Furthermore, this bifurcation process “has the unfortunate effect of silencing Indigenous peoples by failing to recognize the relevance of their pain to the issues in dispute, reinforcing unequal power relations, and preventing non-Indigenous people, including judges, from engaging in creative acts that are deeply transformative” (Manley-Casmir, 2012, p. 243). In the case of legal informants, I found, for the most part, that “facts” were more utilitarian than “emotion” and this form of bifurcation was evident and constituted a serious barrier in the implementation of both section 718.2 (e) and R. v. Gladue. For instance, Judge 010 in speaking about how best to serve Indigenous peoples who come before the court with respect to the judicial role stated, “I’ve often thought, we’re the least important cog in the wheel, as far as rehabilitation or fixing the problem.” In the context of my conversation with Judge 010, I did not perceive this comment as an attempt to minimize the significance or importance of either section 718.2 (e) or R. v. Gladue in rendering sentencing decisions, although it could be reasonably interpreted as an example of “passing-the-buck.” Granted, most legal informants expressed empathy for Indigenous accused who come from tumultuous familial backgrounds, although several also spoke about a legal system mandated by way of certain sentencing principles (e.g. proportionality), and thereby “tying their hands”
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when it comes to strictly adhering to the legislative obligations set out in section 718.2 (e) and guiding principles associated with R. v. Gladue. Based on my experience and the informant interviews, judges can only do so much by themselves in relation to dealing with Indigenous peoples who come before the court, although judges are ultimately the ones who apply section 718.2 (e). It is also equally clear that the “work of counsel is axiomatic for the practical implementation of Gladue” (Turpel-Lafond, 1999, p. 39).

One concrete step which could prove beneficial in ensuring that legislative and legal obligations to Indigenous accused are met, going forward, involves the creation of space in the CJS for Indigenous peoples to convey their stories in a safe and emotionally comfortable space. Manley-Casmir (2012) contends “[c]reating space for Indigenous storytelling may be important to ensure that Indigenous Elders are respected and to recognize the holistic worldviews of Indigenous peoples, which may be best reflected in a narrative style of testimony” (p. 243). In speaking specifically about the critical importance of creating space for Indigenous storytelling in the courts, Manley-Casimir (2012) asserts: “The disruption of a people’s story is one of the central effects of colonization” (p. 239). Ergo, if space is made available for Indigenous storytelling, this could potentially provide at least a partial means of decolonization, thereby augmenting the healing process and ultimately having a remedial effect on the problem of overrepresentation. The informant interviews confirmed a fairly well-established belief in Western legal systems (whether common or civil law) that the written word is much preferred to the art of storytelling in a court of law, particularly by the trier of fact. This also supports the contention of at least a few legal informants who viewed Gladue Reports as meaningful if they were prepared by the “right” people, included the “proper”
information, dealt with the “appropriate” subject material, and contained recommendations that were within the Gladue Writer’s “legitimate” sphere of influence and expertise.

Gladue Writer 016 described her principal role as “being able to capture the story of the individual, it’s being able to be their voice,” and when asked why this role was considered essential, she declared, “it’s important because in mainstream justice, when an Indigenous person goes into court, they don’t have a voice, their lawyers have the voice.” Something the same Gladue Writer spoke about, which rarely, if ever, occurs in the legal sphere (e.g. Probation Services), involves Gladue Writers in PEI telling their own stories to their clientele, while simultaneously hearing the story of the Indigenous accused. Gladue Writer 016 reasoned that the process of storytelling is organic in nature and similar to a “dance,” wherein “you start with throwing out names, making a connection, and from that connection, grow from there and respect starts coming into it.” The same Gladue Writer further commented that “I don’t think there has ever been a time when they haven’t heard my story, because for me to obtain the information I need, I have to be prepared to share my story.” For a similar dance to occur within Probation Services, where preliminary information is being gathered in preparing a PSR, it would be considered highly unusual, based on my experience, for a Probation Officer to share their own story in this manner.

To clarify the potential ramifications of having access to and reading one’s story, as told through the pages of a Gladue Report, in addition to Peter Todd Legere, I sought
the story of someone else who had experienced this transformational healing process.

Retired BC Provincial Court Judge, Cunliff Barnett\(^38\) suggested, after receiving consent from Tracy Dawn Smith, that I contact Ms. Smith about her “story.” Judge Barnett provided me with contact details for Ms. Smith, a (self-)identified and registered member of the Métis Nation of Greater Victoria in BC, who subsequently gave her express permission to share part of her story by way of this research project. On July 1, 2011, Ms. Smith was driving her motor vehicle, while under the influence of alcohol and crack cocaine, crossed the centre line of the highway, resulting in a head-on collision, causing the death of 47-year-old motorcyclist, Jana Mahenthiran. She pleaded guilty to impaired driving causing death and a *Gladue* Report was requested, which, according to Judge Barnett, was “ignored.” The Crown applied for leave to appeal the original sentence of one day in jail, as well as a three-year period of Probation and as a result, the one-day custodial sentence was later deemed unfit and a sentence of two years less one day was substituted. One of the problems with the Appellate Court’s decision, according to Judge Barnett, was that the Court failed to demand that the *Gladue* Report be prepared or, alternatively have legal counsel address the *R. v. Gladue* guiding principles. Subsequently, an application for leave to appeal was filed in the SCC and a *Gladue* Report was prepared. Leave was not granted and consequently, the *Gladue* Report was

\(^38\) Retired British Columbia (BC) Provincial Court Judge, Cunliff Barnett, served on the BC Bench between 1973-2006, and is an advocate for Indigenous peoples across Canada who come before the court. Judge Barnett has had considerable experience with challenges/barriers with respect to the implementation of section 718.2 (e) of the *Criminal Code*, as well as the 1999 Supreme Court of Canada (SCC) decision in *R. v. Gladue* and its guiding principles.
never considered by the SCC. Nevertheless, the same *Gladue* Report has reportedly since served a meaningful purpose in the life of Ms. Smith.

In reading the *Gladue* Report concerning Tracy Smith, it quickly became apparent that Ms. Smith had a dysfunctional childhood, along with a personal history beset by dislocation, poverty, self-harm, and abuse. One of the many provocative comments found in the *Gladue* Report was:

The intergenerational impacts of colonization in respect to Tracy’s personal circumstances commenced on the day of her birth […] cycles of substance abuse and exploitation appear to go back to Tracy’s great-great grandmother […] self-harming behaviour […] appear consistent with information received regarding the broad impacts of colonial intervention.

Tracy Smith indicated it was cathartic to realize that after everything she had done, she still had the support of many people, including the victim’s mother, who spoke with Ms. Smith’s mother in court, and stated, “she [Tracy] has had a hard life” (personal communication, May 30, 2017). This unsolicited observation by a grieving mother seemingly has had a huge impact on Ms. Smith, kick-starting “the process of forgiveness,” whereby eventually, “I can forgive myself.” She also mentioned that receiving support without a concomitant amount of “judgement” provided her with a renewed sense of “trust” and that this new “[a]wareness actually makes you question the negative, it moves you into this new feeling of acceptance and love,” to a place where she feels as if she truly belongs. Elders have taught Ms. Smith to “keep hope and continue with courage” and she has since learned that “acceptance lets go of the tight grip of fear and feelings of worthlessness,” along with seriously questioning her long-standing belief that “[e]veryone else was normal and that made me different” (personal communication, May 30, 2017). Ms. Smith suggested it was critically important for her to understand that “others have gone through similar experiences,” which in and of itself, “removes the
isolation that is there when you think that you are the only one.” She mentioned one of her favourite life-quotes, now that she was beginning to move on with her life: “Letting go isn’t giving up, it’s learning you love yourself a little more than yesterday.” Ms. Smith also stated that in her newly established emotional core strength, it was important for her to “be able to help someone else have hope” and “see the spark in someone’s eyes, after they only have seen darkness” (personal communication, May 30, 2017).

Tracy Smith’s experience illustrates the transformational healing potential to be found in a Gladue Report. As she herself concedes, prior to the preparation of the Gladue Report, her heartfelt belief was that “no one cared or even liked me.” However, since its preparation and having had the opportunity to read about what had happened to her over the course of a troubled lifetime, Ms. Smith has a renewed sense of hope for a brighter future and is appreciative of the fact that now she is accepted and loved for who she is – all this and so much more happening because of hearing one’s own “story.”

7.2.6. Gladue Reports – a catalyst for healing/transformational change

In the adversarial CJS, healing has historically formed an integral component of the overall rehabilitation process, intended more so for the victim than the offender and typically taking place after the sentence has been rendered. In contrast, the Indigenous justice paradigm, according to Ada Pecos Melton, a member of the Pueblo Jemez Tribe (1995), is based on a holistic philosophy, guided by “concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature”; also involving “deliberate acts by the offender to regain dignity and trust, and to return to a healthy physical, emotional, mental, and spiritual state” (pp. 126-127). In this regard, a critically important theme emerged when speaking with informants about
Gladue Reports and their healing potential for Indigenous peoples, notably at the presentence stage of legal proceedings.

Gladue Writer 017 indicated that when she is preparing a Gladue Report, she attempts to establish an “understanding of the context and what happened […] link the person’s experience to systemic background factors.” The same Gladue Writer characterized the Gladue Report’s overall purpose as “so much more” than merely providing basic background information on individual accused. Following the court process, Gladue Writer 016 suggested Gladue Reports further assist in providing guidance in follow-up meetings, “connecting them with people,” and continuing “to support them with their healing.” The Honourable Madam Justice MacKenzie, in her written reasons in R. v. Lawson, reiterates, at paragraph 18, the importance of the “remarkable healing journey,” which was described in R. v. Gladue, at paragraph 43, as one of the fundamental purposes of sentencing.

Gladue Writer 016 told the story of a young man, 23 or 24 years of age, who had been on Probation for four years, during which time there was never any indication of Indigenous ancestry, until “all of a sudden, he requested a Gladue Report.” As it turned out, both his father and grandfather were Indigenous. He apparently had been informed of his Indigenous roots when he was fishing with his father one day more than a decade before, when he had asked his father, “why are we out fishing and nobody else is?” His father replied, “because we have an Indian card, so we’re allowed to fish.” Accordingly, when he was on remand, awaiting sentence, the same youth happened to overhear another Indigenous inmate speaking about a Gladue Report and what it involved. Following an explanation being provided by the same inmate, he returned to his legal counsel and
declared, “I want one done, too.” When asked why he hadn’t previously informed anyone within the CJS that he was Indigenous, the young man responded, “I never said anything because it didn’t mean anything to me, and what would be the difference,” since in the Province in which he was raised, “their culture and traditions aren’t passed down like ours are here [PEI], so it wasn’t meaningful.” Although his grandfather attended a residential school, for the grandson “it didn’t mean anything to (self-)identify.”

Subsequently, he wanted to connect with Indigenous communities in PEI, and after reading his own Gladue Report, according to Gladue Writer 016, said “wow, I didn’t know things like this were happening.” The same Gladue Writer perceived this as an excellent example of how to coherently implement R. v. Gladue. As took place in this instance, a Gladue Report can serve as a form of healing, in part by having Indigenous peoples reconnect with their own heritage. This example, as well as the stories of healing proffered in the lives of Tracy Dawn Smith and Peter Todd Legere, help challenge the proposition that Indigenous peoples who engage in criminal activity attempt to take advantage of their ancestry when they appear before the court, by playing the get-out-of-jail free card. It also challenges the tendency of a few non-Indigenous informants to constrict criteria of “authenticity.”

In speaking about the matter of R. v. Legere, Gladue Writer 016 stated, “just telling his story meant a lot to him, to be able to finally hear his own story […] he now understands what happened” and rather than constantly being negative, and exhibiting a woe is me attitude, “he is now talking about the future” and taking steps to improve his overall life circumstances. The same Gladue Writer also stated that this transformational process on the part of Mr. Legere resulted, at least in part, from the preparation of the
Gladue Report, which in and of itself, “wasn’t just about telling his story, it was about healing, about him understanding what happened in his life journey, and for him, that’s the start of the healing process.” The Gladue Report, according to Chad Kicknosway (2015), a member of the Ojibway Nation and a Gladue Caseworker, “is not a sentencing report. It serves as a holistic approach that often begins the first step in an Aboriginal offender’s healing journey” (para. 16). Gladue Writer 016 suggested that when compared to the adversarial CJS, Indigenous justice is not about keeping people apart, it is about “healing, healing the community and mending relationships – it’s not about separating people, it’s about fixing things.” In speaking about the matter involving Peter Todd Legere, Defence 008 suggested that although it was somewhat problematic “to form observations on the basis of one case, it appeared in this case that just being involved in the process had a very remedial impact on Legere, it gave him a new sense of identity and purpose and all that came from the process” of preparing the Gladue Report. Through the same process, according to Defence 008, Mr. Legere had to deal with having “had a terrible upbringing […] his mother being from one of the Province’s four reserves and the impact of that now […] sold drugs …” with the Gladue Report addressing the question as to why Mr. Legere’s dreadful upbringing should “call for any different sentence than a person who had no Aboriginal blood, who grew up in the same terrible circumstances?”

Informants’ views varied concerning the meaning of healing, especially within the context of Gladue Report preparation. Many legal informants regarded the Gladue Report as simply a vehicle by which information can be conveyed to the judge, and that it didn’t actually matter who prepared the document. Conversely, a few legal informants and all the Elders and Gladue Writers viewed the preparation of a Gladue Report as a crucial
part of the healing process. This perspective differed somewhat from most legal informants, who viewed the healing process as typically taking place after the sentence had already been rendered, and the Indigenous accused commenced their community (e.g. Probation) or institutional (Provincial/Territorial or Federal)- based sentence, rather than at the pre-sentence stage of legal proceedings.

In addition to healing, another element of the Indigenous justice paradigm is the importance of relationships, and how these empower Indigenous peoples to gain greater control over justice.

### 7.3. *R. v. Gladue – the importance of relationships*

A common theme emerging from the informant interviews was the fundamental importance of developing “relationships.” *Gladue* Writer 017, for instance, spoke about the importance of her relationship with the CJS, especially the court, and stated, “I have the highest respect for the court […] as for my relationship, I really do see that there’s a strong connection between the First Nations and the court. I know within my community there is a lack of trust with the justice system in general, whether it be the courts or RCMP, but I don’t feel that same lack of trust. I feel that it’s a really important role for me to try to bridge that gap, to try to build that relationship and I really do find that it’s working.” Crown 006 echoed a similar sentiment, stating, “it’s all about communication and building relationships, it truly is.” Being small in both geographical and populace size has its fair share of challenges, although also affords PEI the capacity to quickly adapt to the ebb and flow of the constantly shifting legal landscape, an impression captured adroitly by Defence 003:

> The strength of PEI is that we’re small enough that we can build relationships of trust with people […] based on shared values and
shared goals. We have the capacity to do that with Aboriginal communities as well, because we’re small enough. And, essentially, there’s no reason why we can’t routinely collaborate, cooperate, share and do better. And a lot of that is about listening to what Aboriginal people say they want and maybe it is those people who should be saying what is needed.

This does not mean that relationship building is easy, but rather speaks to the importance of acknowledging the deep-rooted systemic tensions which persist between the CJS and Indigenous peoples and then working together to achieve mutually agreeable solutions.

7.3.1. It’s all about building relationships

One of the fundamental areas of tension in this research project centred around the relationship between settler colonial state institutions and Indigenous peoples in Canada, generally, and the CJS and Indigenous peoples in PEI, more specifically. Relationship building with the colonial state for Indigenous peoples has rarely come easy. Moreover, Alfred (2009a) argues that it is not possible to achieve “harmony, balance, and peaceful co-existence […] in the context of Western institutions at all, because those institutions were designed within the framework of a very different belief system, to achieve different objectives” (p. 65) – the CJS no exception to the rule.

In terms of the level of engagement between Indigenous communities and CJS professionals in PEI, Crown 001 proposed that “there has to be more interaction between the two communities” and if such were to be the case, especially in joint programming, this, in turn, “may develop stronger relationships.” Crown 001 further suggested for this to happen, “there has to be a coming together by way of County [Prince, Queens, and Kings] as opposed to the whole Island, because what works in Scotchfort reserve [Abegweit Mi’kmaw Nation in Queens County] may not necessarily work on Lennox Island reserve (Lennox Island First Nation in Prince County] since you have to be
mindful of individual differences.” Elder 021 indicated that “it’s about building that level of respect and rapport and keeping the communication lines open.” In providing a specific example of what this might entail, Elder 021 indicated the Indigenous community of Scotchfort had entered into a tripartite agreement with the RCMP in the Province of PEI, and that it had “made it very clear to the Commanding Officer (CO) of the RCMP that if we [Indigenous peoples in the community of Scotchfort] have someone who the community senses that doesn’t want to be here, he’s or she’s gone, and we want to try someone else.” The same Elder perceived this provision as non-negotiable, in the sense that “the only way it will work is they’ll [RCMP] have to be here 100%” and the RCMP “agreed to it.” In addition, according to Elder 021, “the only way that we would have an RCMP person come into our community was if we were involved in the hiring process; the CO agreed […] and we said, ‘only send us those who want to be here, men, women, doesn’t make a difference, we want the person who wants to be here, and help our community.’” Elder 019 acknowledged relationship building goes “far in putting out the little fires in the community and it is constant work to do that, but it pays off in the end.”

In speaking about the importance of the CJS working together in partnership with Indigenous communities, Judge 004 maintained that this form of collaboration served two distinct purposes: (1) “your presence in the community” effectively saves Indigenous peoples from “coming to you,” since, most of the time, getting there (e.g. keeping appointments) constitutes “part of the problem”; and (2) “it’s a good thing that you’re there,” which speaks directly to the value of the “community policing model.” Several legal and most Indigenous informants spoke about the importance of the CJS maintaining
a strong and healthy relationship with Indigenous communities, Elders and MCPEI, without whose close collaboration, any progress would be seriously compromised. Defence 003 indicated in order to have this system called “justice” actually work, it was imperative to recognize that it is not only about two or three different players (e.g. judge, crown and defence), especially when dealing with Indigenous accused. The same Defence suggested it is more than that – “it’s the level of engagement, empathy, and shared values – it turns into a really collaborative practice.” Defence 003 further stated, “when you share the same interests in justice and fairness, then you’ll always have something with which to connect, because even when you disagree, you’re trying to get to the same place.” Nevertheless, reality on the ground appears to suggest that the objective of having a mutually satisfactory collaborative effort, specifically when it involves Indigenous accused, is not always achieved.

Speaking to the importance of building relationships at the micro-level, Gladue Writer 017 acknowledged it was not uncommon for her clients to initially provide a myriad of reasons or excuses to explain their involvement in illegal behaviour and “the best advice I can give is ‘you can’t look backwards, you have to look forward, it’s the relationships you establish from here on in that will make all the difference, because it’s all about relationships.’” For some non-Indigenous people, the introduction of the Final Report of the TRC in 2015 constituted their first real glimpse of the often-turbulent interrelationship between the rich cultural legacy of Indigenous peoples and “the culture of the legally dominant Euro-Christian Canadian society” (TRC, 2015, p. v). However, the TRC is only one of the more recent in a series of different commissions, inquiries, and standing committees which have taken place over the last five decades, commencing
with the 1969 White Paper (formally known as the *Statement of the Government of Canada on Indian Policy*). One of the TRC’s official mandates was to “foster healing and reconciliation within Canada,” although not unlike a myriad of other reports generated over the past 50 years, the burden has been placed on Indigenous peoples to negotiate the parameters of “healing and reconciliation” with a dominant colonial state. This relationship is still very much exemplified by a zero-sum game, and evident, for example, in the power imbalance between the CJS and MCPEI, with respect to how and when Gladue Reports are prepared.

7.3.2. **The importance of reaching an “understanding”**

When one looks at any given Indigenous accused who appears before the court, the fundamental starting point, according to Crown 006, must be in reaching an “understanding.” The same Crown further suggested “if we don’t get to the understanding of how they got to where they are, their background, what compelled them to do this or that,” the possibility of making a positive difference in this Indigenous accused’s life’s story is greatly diminished. Crown 006 asserted that the colonial system in Canada was very much alive and well, even though many within the dominant “white culture” still find it extremely challenging to accept this proposition. The same Crown submitted that “what we always have to guard against, as ‘perceivers,’ is that we’re not taking a lot of our garbage, biases and prejudices and then superimposing them on Indigenous peoples, as opposed to gaining a true understanding, being open-minded and listening – we have to start going about it in a different way.” Crown 006 further stated that what needs to happen with institutions such as the CJS, is that unless and until we start acknowledging, “I’m the judge, but I’m only one part of this important piece here”
and that by way of this acknowledgement, it does not diminish “my judicial independence,” or detract from having a final say, “nothing will likely ever change.”

Defence 003 asserted, “I think it’s a common thing with any culture, for people to be essentially consciously unaware of the impact of their own culture on how they think and what they believe.” Further, according to the same Defence, “it is almost as if they truly believe that what they do and how they view the world around them is normal, human, the same, universal and that other people should just get in line,” but, in actuality, “you have to go outside of your own culture to look back at it.” Defence 003 also suggested, “unless you have a consciousness of that fact, proof that it is a truth, then you’re not going to be educated, you’re not going to be open to understanding what you don’t know.” This conspicuous lack of understanding of one’s positionality in the world presents itself as at least part of the problem with the ongoing colonial dominant-subordinate dichotomy between non-Indigenous and Indigenous peoples in Canada.

Elder 019, in speaking about Indigenous peoples who have had to withstand an unrelenting salvo of Canada’s version of colonialism and settler colonialism for centuries, explained this apparent lack of understanding this way,

it’s because it doesn’t meet their ideals of what an American Indian is, they don’t see the people who they stepped on […] I’m talking about the dominant culture […] even today, things are changing tremendously but the preceding culture was always ‘we own it, we take it, we walk in and we take it, we do what we want with it and basically quash whoever is in our way to do it.’

The same Elder also stated that “in our justice system, as it is, Canadians seem to think that we get off scot-free, which is totally wrong, but then we have Indigenous peoples who don’t understand the legal system,” which merely compounds the overrepresentation problem. I found it paradoxical that there appeared to be an unequivocal expectation on
the part of some legal informants that Indigenous peoples appearing before the court should appreciate the inner workings of the CJS, yet there did not appear to be an analogous expectation by these same informants to respond, in kind, as it pertains to the Indigenous justice paradigm and its underlying philosophy.

The way forward, in terms of coherently implementing *R. v. Gladue* in PEI, will require a well-planned, concerted and highly collaborative effort by CJS professionals, in partnership with key members of Indigenous communities; otherwise, future generations will be attempting to come to grips with the identical multifarious, problematic issues associated with the lack of understanding which faces today’s generation of Indigenous and non-Indigenous people, alike. It is important to keep in mind that in the interviews, there was near unanimity amongst informants when it relates to the need for collaboration and culturally appropriate resources, the importance of relevant information and relationships, and even to a certain extent, the potential for transformative change by way of section 718.2 (e), *R. v. Gladue* and *Gladue* Reports. However, with respect to translating words into action, the promise of most of these same laudable objectives remains elusive, notably when it relates to engaging Indigenous communities.

7.3.3. **Indigenous communities – what place do they hold in the whole scheme of things?**

Indigenous communities and the Canadian settler colonial state have held conflicting views, in terms of what “justice” signifies, for centuries. From the perspective of the
existing CJS, Ross\(^{39}\) (2006a) identifies two viable options which could help address this conflict. With the first option, Indigenous communities, generally, “can negotiate transfers of jurisdiction over justice with Federal and Provincial Governments and then develop formal justice institutions, like tribal or community courts based primarily on Western notions of adversarial proof and the passing of a criminal sentence.” The second option is where these same communities “can focus their time, energy and resources in the way that Hollow Water\(^{40}\) did, building healing capacities that operate separate from, but perhaps linked to, the outside courts” (p. 208). Rupert Ross (2006a) perceives two problems with these Community Courts. First, if an Indigenous community wants to deal with indictable, more serious charges, in addition to imposing Western penalties, they will have to provide “Western-trained lawyers and judges”; however, when this happens, “the whole notion of community courts goes up in smoke” (p. 209). A prime example of this was when a few legal informants suggested that the only way Gladue Reports would serve their intended purpose in a court of law was to adhere to specific rules, procedures

\(^{39}\) Rupert Ross is a retired Assistant Crown Attorney for the District of Kenora, Ontario. Commencing in 1985, he conducted criminal prosecutions in over 20 remote, fly-in Cree and Ojibway communities in Northwestern Ontario. His first book, Dancing with a Ghost, started his exploration of Indigenous visions of existence. His second book, Returning to the Teachings, examined the Indigenous preference for "peacemaker justice" which he had observed during a three-year secondment with Justice Canada. Following his retirement, Ross was awarded the prestigious 2011 National Prosecution Award for Humanitarianism, and the Ontario Crown Attorneys Association has created an award named after him.

\(^{40}\) Hollow Water First Nation is an Anishinaabe (Ojibway) community situated on the Eastern shore of Lake Winnipeg, Manitoba, and 190 kilometers north of Winnipeg. The Hollow Water ‘healing movement’ has its roots in the Province of British Columbia and commencing in 1988, members of the Ojibway reserve set out to take justice into their own hands. Hollow Water is home to 450 people – many of them victims of sexual abuse. The offenders have left a legacy of pain and denial, addiction and suicide. By law, they were the responsibility of the Manitoba justice system. But jail had not stopped offenders in the past. "Punishing people and telling them they needed to heal, didn't make sense," says one community counsellor. Instead, Hollow Water chose to bring the offenders home to face justice in a community healing and sentencing circle. Based on traditional practices, this unique model is reunifying families and healing both victims and their offenders. This is a powerful tribute to one community's ability to heal and change (MacDonald & Dickie, 2000).
and protocols formulated, for the most part, by non-Indigenous people currently employed in the adversarial CJS. Second, many Indigenous peoples tend to oppose Community Courts if they are going to be used “to deal out punishment instead of healing” (Ross, 2006a, p. 210), and as Elder 019 opined, “we’ve already had that” and it did not before and still does not work now overly well.

The picture Ross conveys closely mirrors the present-day options available to any Indigenous community when faced with how to deal with the criminal behaviour of its own members. It also raises the important issue of community engagement and the willingness of that same community to bring the human and capital resources to bear on the issue(s) at hand. However, even if there is engagement and a willingness on behalf of Indigenous communities, perhaps the bigger issue is the need to have culturally appropriate resources, supported by governments at both the federal and provincial/territorial levels. Gladue Writer 017 stated, in speaking about Indigenous accused, “I think the community piece is huge” because if they plan to return to their home community after they have completed their time in custody, this can sometimes be extremely challenging. The same Gladue Writer further explained that upon Indigenous accused returning home, some people “might be really upset with them, very angry and hurt,” a negative response not unique to Indigenous communities. In this regard, Indigenous communities can play an important role in terms of healing, including by way of what Braithwaite (1989) characterizes as “re-integrative shaming,” a restorative justice process involving “expressions of community disapproval […] followed by gestures of reacceptance into the community of law-abiding citizens” (p. 55). Although shaming can constitute a powerful form of re-integrative healing, it can also be counterproductive
when it is disintegrative and constitutes a form of stigmatization. Disintegrative shaming 
“divides the community by creating a class of outcasts” (Braithwaite, 1989, p. 55). The 
CJS, from my experience and what I have gleaned in the informant interviews and case-
law (document analysis), is not predisposed to engage in re-integrative shaming, but rather, in the case of Indigenous peoples, relies heavily on a variety of different forms of 
marginalization, ranging from isolation (i.e. custodial sentence) to banishment, the latter 
normally by way of a Probation Order or, alternatively the expressed wishes of the 
Indigenous offender’s home community.

It is imperative to situate any discussion of Indigenous communities and control over justice in terms of self-determination and jurisdictional authority. Inuvialuit/Inupiat scholar, Gordon Christie (2007) states that self-determination is sometimes viewed by non-Indigenous people and governments as a form of threat, principally as it relates to “territoriality and Crown sovereignty”; however, for Indigenous peoples, it “points to the immense efforts that must be made to work against the effects of colonialism, to regain collective control over matters that are essential to the continuation of ways of life tied to people’s ancestors” (p. 20). To understand the true meaning of something, it is often necessary to look at its opposite, and in this instance, Whyte (2008a) contends the “opposites of self-determination and respect are subjugation and exclusion, and the resultant loss of social capacity, dignity, purpose, identity, and self-respect” (p. 13). Whyte (2008b) further argues the “destruction brought by colonialism to all elements of Aboriginal society produced a degradation of spirit and identity,” and “the underlying condition of social failure has been the systemic dismantling of self-determining communities” (p. 111).
Alfred (2009a) indicates, “Governance in an [I]ndigenous sense can be practiced only in a decentralized, small-scale environment among people who share a culture. It centres on the achievement of consensus and the creation of collective power” (pp. 50-51). Milward (2012) argues that Canadian authorities, including the CJS, can impose their will “due to judicial deference that promotes state sovereignty at the expense of self-determination” (p. 45). The “indigenization” of CJS processes is sometimes viewed as a viable solution to the problem of overrepresentation, although Nielsen and Robyn (2003) argue, “[i]ndigenization of programs and staff continues colonialism […] is image politics and is a way of avoiding empowerment or self-determination” (p. 40). In looking at the Canadian experience with indigenization, specifically in the Northwest Territories, in Dené and Inuit communities, Jackson (1988) considers it problematic in that “the designation of an individual with unilateral powers of decision-making over others runs counter to deeply held concepts of egalitarianism and social structures which are built upon complex diffusion rather than concentration of authority” (p. 41). Others, like Palys (1993), question the wisdom of greater “indigenization” of the CJS, suggesting that the only thing you accomplish by having more Indigenous police officers, judges, and probation officers, is that Indigenous peoples will then “be arresting and convicting and imprisoning their own” (p. 3) and the corresponding overrepresentation problem will likely continue unabated.

The tension between judicial deference/independence and Indigenous self-determination has been the subject of debate throughout the preceding two chapters, highlighted by several different factors: maintenance of the status quo or payment of lip-service, denial of colonialism as a distinct context, erasure, institutional knowledge,
Indigenous (self-)identification and imposed criteria for authentic histories. Indigenous communities’ control over justice continues to represent a struggle for Indigenous peoples in Canada. However, as evidenced in the informant interviews, if culturally-appropriate community-based resources can be readily accessed and Indigenous peoples have a meaningful role in how *Gladue* Reports are prepared and subsequently presented before the court, this could go a long way in ultimately realizing this important objective.

7.3.4. **Who and what defines an Indigenous “community?”**

Defining the term Indigenous “community” is consequential, principally because it often represents such a central element in the lives of individual members of these same communities, both in terms of capacity-building and the healing process. When asked to characterize this nebulous concept, Elder 021 explained it this way, “PEI is one big Mi’kmaq community because we never ceded any land through treaties” and further, that the Mi’kmaq peoples in PEI “can trace our roots back 10,000 years, so it would be hard for someone to say, ‘you don’t have any rights in the Province, even though you’ve been here for 10,000 years.’”

Historically, up until April 1972, Lennox Island First Nation was the only reserve in PEI. Subsequently, Abegweit Mi’kmaw Nation was formed, with its three reserves, situated in Morell, Scotchfort, and Rocky Point (Crossley, 1995, p. 32). *Gladue* Writer 018 indicated Indigenous communities in PEI were relatively small and stated, “if you look at our ancestors (grandparents and most of our parents), we all came from Lennox Island […] ‘we’re all connected, we’re all family.’” Based on different conceptions of family, Defence 003 raised the point that Indigenous and non-Indigenous peoples can sometimes be strikingly different, in terms of how they respond to criminal behaviour in
their home communities. According to the same Defence, “you could be given a file, where someone is charged with an offence involving a break and enter into a private residence, which, as far as the criminal justice system and Criminal Code are concerned, constitutes a serious charge.” However, on Lennox Island, Defence 003 proposed “people come and go, doors aren’t locked, people wander in and out, all the time” – exhibiting an unscripted “what’s mine is yours and what’s yours is mine” attitude. The same Defence conceded that this constituted a “small example,” although juxtaposed it to non-Indigenous people, who “are so individualistic” and place such credence in the maxim, “my home is my castle.” Elder 020 spoke about the notion that Indigenous communities are not restricted to clearly delineated reserves and proposed an Indigenous person’s sense of community also involved participating in pow wows and social gatherings and “that’s the connection we still have.”

Looking at it from the perspective of a non-Indigenous informant, Crown 001, for one, characterized the act of reconnecting oneself to “the Aboriginal community and their heritage as crucial, in terms of members of that same community not going back before the court.” The same Crown stated that for Indigenous peoples, “it’s all about community, whereas, if you read all the literature on sentencing, it’s an ‘individualized’ process.” Several different legal informants, including Defence 003, expressed the opinion that MCPEI, in recent years, has been responsible for “bringing together Elders with other people in the community, who have the capacity to contribute and make these connections – that’s made a big difference.” Crown 002 regarded MCPEI as a vital part of Mi’kmaq communities in the Province, in that it had developed several different initiatives/programs over the last 15 years, including the creation of the IJP in 2003, with
its primary mission to develop and maintain a sustainable justice support system for all
Indigenous peoples involved in the PEI CJS. The same Crown perceived MCPEI as
“working in concert with our own [CJS] system and it’s showing benefits,” including the
formal introduction of Gladue Reports in the Province in 2014 and hiring Gladue Writers
around the same time. Judge 004 acknowledged that Indigenous communities “can be
very important,” especially if the court deems it appropriate to utilize healing and/or
sentencing circles, which often involve Elders, because “that’s the community right
there.” I found that MCPEI could reasonably be considered one mode by which to move
toward Indigenous self-determination on multiple fronts, including, albeit not limited to,
the IJP; introduction of Indigenous Gladue Writers and Caseworkers; and the preparation
of Gladue Reports.

Gladue Writer 016 proposed “community means something different to
Indigenous peoples than it does to the mainstream criminal justice system, so helping
them understand community, and why we do the things we do, is so important.” Several
informants spoke about the importance of Gladue Reports in conveying the “history of
family and community” of Indigenous peoples when they appear before the court. So, it
is essential for CJS actors to understand that (1) Indigenous communities are a vitally
important factor to consider in judicial deliberations; and (2) these same communities can
play a prominent role in the success or failure of ensuing remedial intervention
methodologies. In contrast, for the judicial arm of the CJS, sentencing, according to
Justice Lamer of the SCC in R. v. M. (C. A.), at paragraph 92, “is an inherently
individualized process, and the search for a single appropriate sentence for a similar
offender and a similar crime will frequently be a fruitless exercise of academic
abstraction.” This well-defined distinction in sentencing approaches is the source of some disjuncture for the CJS. Contextualization of the collective experience is contrary to the CJS’s historical emphasis on an individualized, sanction-based sentencing approach, wherein the court is afforded an appreciable amount of discretion to fashion a sentence which is proportionate to the seriousness of individual offences and the conduct of individual offenders. This forms one of the foundational building blocks on which the CJS is structured.

When asked about the part Indigenous communities typically play in the administration of justice, Judge 011 proposed “it should play a very significant part, I’m not sure that it always does.” The same Judge qualified these remarks by stating the same would hold true in non-Indigenous home communities, in that “if the community takes ownership of that person, wants to assist them, work with them and provide resources to them, we’ll have a great deal more success than if they simply just indicate, ‘it’s not my problem and I don’t want to work with them,’ so, it’s the same for any offender.” Judge 011 further suggested, “it’s a question of what kind of resources are available and what level of involvement does the community have in taking an interest in that specific offender; or are they ostracized – run out of town?” Gladue Writer 016 indicated Indigenous communities have a pivotal role to play in the healing process, “helping the individual repair the harm caused by the offence, regardless if it’s on-reserve, or, off-reserve; facilitating their access to services like mental health, addictions, and assisting the accused to heal.” The same Gladue Writer further suggested what happens in Indigenous communities is not necessarily what takes place in non-Indigenous communities, because when Indigenous peoples gather together and talk, they “want to
help each other, it’s a natural thing to help.” In addition, according to Gladue Writer 016, “storytelling is something that has always taken place in Indigenous communities, so it’s not unnatural for Indigenous people to be sitting down all day and telling stories, that’s not abnormal, that’s something they do anyways, it’s part of who they are,” along with it being an integral part of the healing process.

Over the generations, the imposition of colonial legal formations and administrative structures has continued to be the source of considerable tension, with respect to a broad array of community-based Indigenous justice traditions, like healing circles. These same traditions sometimes appear, from a legalistic perspective, to focus too much on advocacy, healing, dispute resolution, reparation of harm, peacemaking and restoration of community trust, social harmony, and balance; and not enough on foundational legal principles such as proportionality, deterrence and virtually sacrosanct “equality before the law.” Palys (1993) contends the Federal Government thus far has been receptive to Indigenous justice initiatives, which “take the dominant Euro-Canadian system as its departure point but appear unwilling and bureaucratically unable to respond to initiatives which attempt to incorporate justice into broader self-determinative strategies of responsibility and governance” (p. 1). This does not necessarily imply that these traditions have been vanquished or simply no longer exist, but “means that colonialism has had, and continues to have, a negative impact on the ability of Aboriginal people to maintain peaceful and orderly communities” (Monture-Angus, 1999a, p. 25).

In summary, both Indigenous and non-Indigenous informants alike viewed Indigenous communities as constituting an indispensable component of not only capacity-building, providing ongoing support and culturally appropriate resources, but
also playing a crucial role in the art of storytelling and ongoing healing process. As referenced earlier in this chapter, reaching a consensus on a specific plan of action (e.g. adhering to section 718.2 (e), \textit{R. v. Gladue} and its guiding principles) is not the same as implementing \textit{R. v. Gladue}, as initially envisioned by federal legislators and the SCC. Consequently, good intentions often do not manifest as intended, and in this instance, state institutions and settler colonial ideologies (e.g. discourses of denial) consistently thwart forward momentum. Another important aspect of community which permeates the scholarly literature and any serious discussion about overrepresentation and its impact on Indigenous peoples, is the role of Elders.

7.3.5. Elder – knowledge keeper, beacon of hope

Elders, according to Johnson (2014), are “the embodiment of Indigenous law,” their knowledge arising from “diverse Indigenous peace-keeping processes that were in effect for millennia prior to the imposition of Euro-Canadian legal systems […] colonization ruptured these Indigenous systems but failed to extinguish them” (p. 1). In this section, I discuss what it means to be an Elder and highlight the invaluable role Elders play in having Indigenous peoples who come in conflict with the law achieve a sense of peace, balance, harmony, and healing. In addition, I examine the significance of the Elder’s role in Indigenous oral traditions, the power of storytelling in connection with the healing process, along with the tension that exists between the spoken and written word, particularly when it involves Canada’s CJS. I end this section by discussing the decisive role of Elders with respect to Indigenous youth.

When asked what it means to be an Elder, Elder 021 acknowledged “it’s an honor that other people bestow upon the person; it’s a sign of respect and based on how they’re
viewed in their community and how they’ve contributed to their community.” Elder 019 noted that being an Elder does not have anything to do with chronological age, and when Elder 020 was asked what it means to him, he stated, “I’m not the perfect Elder, I’m still a human being, I never changed who I was, I never tried to impress people because I’m the holy guy, I’m the good guy, no.” For Elder 019, even though at times she finds it difficult to accept the mantle of Elder, made this observation:

I’ve been given that title because I have a lot of knowledge about various issues, including Aboriginal traditions. I’m constantly learning about the importance of ceremonies, the way we used to do things, and what I was taught by my family. I will have slightly different teachings than other people. I don’t necessarily follow one way. I’ve lived in various areas all over Canada and Europe, so, I’m not a typical person who just lives on the reserve, at home, I have a varied life experience, so I think it makes a difference in how I view a lot of things.

Elder 019 stated Two-Eyed Seeing41 was something that had been an essential part of her personhood for most of her life, and is a concept where you take the positive aspects “of your own culture but also take a view of the dominant, outside culture so that you make the best of the teachings you have, as it relates to both cultures.” In this regard, Harold Cardinal (1999), a member of the Sucker Creek Cree First Nation, suggests that it “is only when men are able to accept their differences as well as their similarities and still relate to each other with respect and dignity that a healthy society exists” (p. 22).

41 Two-Eyed Seeing is a concept first developed by Mi’kmaw Elder, Albert Marshall, from Eskasoni First Nation in Cape Breton Island, Nova Scotia (NS). The Elder uses the phrase as a guiding principle for collaboration between mainstream, Western scientific and Indigenous knowledge and ways of knowing. Elder Marshall emphasizes that we need to learn to see with one eye the strengths (or best) in the Indigenous knowledge and ways of knowing and with the other eye, learn to see the strengths (or best) in the mainstream knowledge and ways of knowing. Most importantly, we need to learn to see through both eyes at the same time, mindfully bringing the strengths of both together, drawing from the deep understanding that they both represent the strengths of each, to work together on this planet, for the benefit of all peoples on Mother Earth. [Bartlett, Cheryl]. (2012, November 8). Two-eyed seeing. [Video File]. Retrieved from https://www.youtube.com/watch?v=CY-iGduw5c
In speaking with the three *Gladue* Writer informants specifically about the importance of Elders and the healing process, *Gladue* Writer 016 used an ostensibly simple idiom – “connect them to an Elder” – a similar expression used by over half of the legal informants. *Gladue* Writer 016 explained when legal professionals hear this phrase, by way of a *Gladue* Report recommendation, the judge, for instance, may be thinking that the Indigenous accused will be ultimately connected “to a senior person, and why would you connect them to a senior person?” The same *Gladue* Writer proposed for non-Indigenous people in the CJS, it is “going to look different than it does for us, ‘to connect to an Elder,’ because the worldviews are different.” *Gladue* Writer 016 further stated, “when we talk with an Elder, Elders are our teachers, they’re storytelling and through their teachings, we learn respect, we learn trust and the seven sacred teachings (love, respect, courage, honesty, wisdom, humility, and truth) come through storytelling.”

*Gladue* Writer 018 spoke about the importance of being “connected” when explaining what being an Elder meant to her, including the “sense of history, capacity to evoke pride, so that indifference doesn’t quite sting as much.”

*Gladue* Writer 017 indicated she had a great deal of respect for Elders and what they represent, particularly in terms of what they can provide to Indigenous accused “either by way of teaching them about their culture or connecting them with drumming.” Crowns 001 and 002 echoed a similar sentiment by maintaining that Indigenous communities have a vitally important role to play in bringing Indigenous peoples who break the law back into the proverbial fold, “connect them with culturally appropriate programming, and more importantly, connect them with an Elder.” Crown 001 stated that “if the same person can be connected with an Elder, that can turn the individual around,
because the Elder can convince them why they should have respect for who he is” and potentially provide him with “a seed of wisdom,” from which to grow. Judge 004 perceived Elders as especially helpful with respect to sentencing circles. Once again, it is one thing for legal informants to speak about how invaluable Elders are in terms of imparting what Crown 001 referred to as “a seed of wisdom,” it is quite another for non-Indigenous people to “recognize the ways in which colonialism has disrupted Indigenous stories” and consequently, “facilitate the creation of space in which Indigenous peoples can re-story their histories” (Manley-Casimir, 2012, pp. 239-240). Manley-Casimir (2012) expanded on this notion by stating that courts should enable Indigenous storytellers, including Elders, to tell their stories, not merely by providing space within colonial state institutions like Canadian courtrooms, “but also to acknowledge the importance and validity of oral-history evidence” (p. 240), which has thus far proven not to be the case, a view expressed by at least a couple of legal informants, all three Gladue Writers, and one Elder.

Lynda Gray (2011), a member of the Tsimshian Nation, spoke about the central role often played by Elders, stating “[t]he foundation of First Nations culture is our oral traditions,” but “[w]hile our Elders and history keepers are able to articulately recount our histories in their traditional territories, their recollections are usually not believed or accepted as proof of what we claim is true” (p. 170). This was especially evident in tension between the three Gladue Writer informants and some legal informants, regarding the weight assigned to oral traditions, as opposed to legalese and/or the written word. Defence 003 argued this tension could at least partially be explained in cultural terms, where for non-Indigenous people “it’s our elevation of the intellect that is the most
important thing in the world – that’s a Western idea, with rational thought way up there, and emotional and spiritual ideas suppressed.” Historically in Canada, according to Maurutto and Hannah-Moffat (2016), “Aboriginal knowledges, particularly in criminal cases, have been entirely excluded or positioned as relatively inferior to legal knowledges” (p. 454). Indigenous peoples value oral traditions, although the same historically cannot be said for Canadian governments and/or some members of the judiciary. A case in point is Delgamuukw v. The Queen, 1987 2980 (BCSC), wherein the late Chief Justice Allan McEachern provided some insight into his overall approach to the admissibility of evidence, regardless of its construction or manner of conveyance, wherein he stated, “[W]e legal people have our own discipline and I think we must stick with it” (para. 17). Gray (2011) addresses the underlying discipline of the broader CJS, generally, and legal system more specifically, with respect to implicitly trusting the written word over the oral tradition of passing down knowledge through the generations and remarked, by way of an example, if a piece of history “were written down on a leaf from 400 years ago, we might have a better chance of having our recounting believed” (p. 170). By way of another example, Palys (1993) speaks about the elusive term “justice,” arguing that “[a]lthough justice in Euro-Canadian nomenclature may be a meaningful concept (although too infrequently achieved), Aboriginal languages have no similar concept that can be disentangled from the broader concept of ‘the way we live’” (p. 1).

_Gladue Writer_ 016 perceived Elders as knowledge keepers, especially in helping Indigenous youth understand their own history. The same _Gladue Writer_ suggested if youth began to understand their past and “share their stories […] to say what they have gone through […] understand that they are not alone because someone else has done the
same thing,” this can have a transformational effect not only on individual Indigenous youths, but also Indigenous communities. Crown 002 indicated the involvement of Elders in “turning around” Indigenous youths in PEI was certainly a viable possibility, and further expressed the need for “an educational program, where the opportunities are being provided to the young people.” Achieving this objective will require a concerted effort on the part of Elders and Indigenous youth alike. In clarifying the issue, Crown 002 stated, “it’s a lack of hope and that’s the positive aspect Elders provide, they bring back hope.” The sting of indifference is something Cardinal (1999) speaks about when he proposes that the “history of Canada’s Indians is a shameful chronicle of the white man’s disinterest, his deliberate trampling of Indian rights and his repeated betrayal of our trust. Generations of Indians have grown up behind the buckskin curtain of indifference, ignorance and, all too often, plain bigotry” (p. 1). The resiliency of Indigenous peoples is clearly evidenced by their ongoing resistance against the settler colonial state. Elders continue to play an indispensably important role in the transformational healing process, whereby traditional Indigenous knowledge continues to be culturally transmitted and they persevere as “beacons of hope” for future generations of Indigenous peoples.

7.4. Indigenous perspectives on overrepresentation

In this section, I discuss Indigenous informants’ understandings of the overrepresentation problem which centre around the settler colonial experience, whereas non-Indigenous explanations tend to begin with the individual accused, nature of the offence, and have proportionality as the paramount sentencing principle.

Most informants agreed that moving forward in implementing R. v. Gladue and, by extension, alleviating the overrepresentation problem, will require working
collaboratively with Indigenous communities, especially in the areas of healing, peacemaking and restorative justice. Reconciliation between the CJS and Indigenous peoples in Canada is undoubtedly both challenging and complex; however, the terms of reconciliation cannot be unilateral in their application or have the colonial state exercise power and control over the entire process. Or, as Monture-Okanee and Turpel (1992) argue, “[m]ere tinkering with criminal statutes, in a unilateral way by government, is antithetical to the movement for self-determination and contrary to the legitimacy it has gained in many circles, including those of government” (p. 267). There is a deep-rooted tension between reformist “indigenized” measures intended to improve the lives of Indigenous peoples in the present (e.g. Aboriginal Persons/Gladue Courts, Gladue Reports, Indigenous Gladue Writers and Caseworkers) and the corresponding need to continue the pursuit of transformational change towards self-determination. When speaking about self-determination, Monture-Angus (1999b) states it has “never been and cannot be extinguished, that is to say that the right to self-determination is inherent” (p. 30). Monture-Angus (1999b) also contends “[t]he Canadian legal process is a process of fragmentation […] contrary to Aboriginal intellectual traditions (including Aboriginal legal processes) as it removes the stories from individuals, families, communities and nations […] which operates to disrupt Aboriginal traditions, beliefs and values […] not only a significant structural obstacle but it is also a colonial edifice” (p. 90).

Indigenous peoples have always had their own dispute resolution approaches, including, as we have seen, an Indigenous justice paradigm. Although, unless and until the settler colonial state is willing to acknowledge both the Indigenous peoples’ right to self-determination and that the adversarial CJS is not the only alternative, any legitimate
attempt to remediate overrepresentation and the “revolving door” in Canada’s CJS, especially its prison system, is unlikely.

7.4.1. The revolving door

Johnson and Millar (2016) argue that “as a result of colonization, Aboriginal peoples continue to be victims of the Canadian justice system, contributing to a revolving door phenomenon and resulting in an increase in incarcerations of Aboriginal and other minority offenders” (p. 27; Adjin-Tettey, 2007). When asked about the reason(s) why so many Indigenous peoples end up in prison, often by way of a “revolving door,” Elder 021 was somewhat at a loss to explain why such was the case, acknowledging “that’s a tough one, there are probably all kinds of reasons, you can look at everything from colonization, on through – it starts right there, actually […] there is the whole reserve system, 60s Scoop, residential schools […] I don’t think they have been effectively addressed yet.” Gray (2011) maintains overrepresentation can take on a broad range of configurations and is certainly not limited to imprisonment, with Indigenous peoples disproportionately represented “in all aspects of the justice system including stops by police, arrests, charges, remand, incarceration, women in solitary confinement, deaths in custody, federal sentences, and a lack of access to parole or early release” (p. 186).

Former SCC Chief Justice, Beverley McLachlin, in delivering the Annual Pluralism Lecture in May 2015, declared “the most glaring blemish on the Canadian historic record relates to our treatment of First Nations that lived here at the time of colonization […] ‘Indianness’ was not to be tolerated, rather it must be eliminated, in the buzz word of the day, ‘assimilation,’ in the language of the 21st Century, ‘cultural genocide.’” Elder 021 echoed a similar sentiment, stating “when you take children from
the community as babies, you take them from their parents, who have already had issues, so they resort to alcohol, these babies come back as adults, they don’t know how to care and nurture and love, all those basic necessities in life and they have children, they’ve been abused where they’ve come from, by people who are in positions of support, they come back, they have children, and then the cycle repeats itself.” Crown 002 viewed the matter of the revolving door as “coming down to addictions and mental health, because if we’re not providing a system that’s going to work with these individuals, we’re going to see them over and over again.” And further, Crown 001 proposed, “once they hit the justice system doors, it’s too late because then they are starting to accumulate a criminal record that will eventually lead to ‘bad things.’”

Ross (2014) tells the story of an Indigenous man comparing his experience in the IRSS with spending time in prison:

When I look back, I guess probably the worst thing that happened to me was the residential school system. It actually acclimatized myself for the penal institution. I actually felt that the penal institutions were treating me a lot better than the residential school because they let you make choices and whatever I performed was rewarded and when I was bad … there were consequences, but in my mind, it was fair (p. 157).

Ross (2014) asks whoever hears this story to “[i]magine suggesting that your experience of jail was preferable to your experience, as a child, at school” (p. 157). Regrettably, this story is not all that extraordinary when dealing with Indigenous peoples across Canada and their ongoing confrontation with an oftentimes menacing, adversarial-structured CJS.

Crown 001 argued one way to counter the revolving door syndrome was to view the CJS as the “last resort,” as opposed to other sectors (e.g. addiction, mental health, or social services); rather than the CJS coming into play when some other form of intervention is deemed appropriate, with addictions staff, for example, proclaiming, “it’s
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a justice issue, you guys solve the problem.” Additionally, in my own experience as a non-Indigenous Probation Officer, placing someone on community-based Probation often constituted the best preventative intervention methodology, albeit for Indigenous peoples, it represents one more example of an adversarial-based corrective apparatus, which often leads to administrative breach violations (offences) and consequently, more and more time in custody. Elder 020 phrased it this way, after having worked in the Canadian federal prison system for several years: “That’s why a Native offender in the prison system keeps going back, breach, breach, breach, and before you know it, they’re doing 10 years for a four-year sentence.”

Elder 021’s response as to why some Indigenous peoples continue to engage in criminal behaviour, only to spend more and more time in custody, included the suggestion that “it is just because of where we’ve been and what we’ve been through, that revolving door is going to continue for a little while.” The same Elder went on to say that it was important “to have the judicial system look at it from a different perspective that suits where we’ve been, where we are as a people now, accept it, and find ways to work with that,” although at the same time, “it’s incumbent upon our people to help make the change too; we need to know where to draw the line.” Speaking to the enduring problem of overrepresentation of Indigenous peoples in Canadian prisons, Elder 019 reiterated, “if we have one, it’s one too many.” The same Elder asked the question: “How do we effectively help this person or bring these persons back, so that they’re not offenders, so that they can help others in their community; that comes back to who we are as a people, it comes back to our culture, it comes back to how can we get this person back into the fold, how can we support this person, so that they’re not out there on their own?”
There are informants from within both the CJS and Indigenous communities who proffer a better way to “do Gladue.”

7.4.2. There may be a better way to “do Gladue”

In discussing ways and means by which to move forward with the implementation of section 718.2 (e), as well as \textit{R. v. Gladue} and its guiding principles, Elder 021 maintained the key in reaching a mutually satisfactory solution to the ongoing overrepresentation of Indigenous peoples is that the judicial system has to recognize it’s not all about “here’s how it has to be, here’s the law of the land and that’s how we’re going to do it”; but rather look at it from the perspective that the process “has to be a little more open and that there’s a different way of doing things, like the restorative justice process.” Over the years, the restorative justice approach to problem-solving within the CJS has been conspicuously absent in PEI. In speaking to the Province’s overall lack of engagement in this one form of Indigenous problem-solving over the course of the previous 15 years, Crown 007 suggested, “I don’t think I’ve seen anything change dramatically in terms of how Aboriginals are treated differently,” although further stated that additional resources, typically by way of short-term pilot projects (e.g. Community Justice Forums 42, RCMP First Nations Community Policing Service, Indigenous \textit{Gladue} Writers and Case Workers), have occasionally “popped up,” only to “disappear” a short time later, when

\begin{footnotes}
42 Restorative justice programs have proliferated in Canada over the past three decades. During the 1990s, the emphasis and development of restorative justice perhaps reached its summit when both the Federal Government and the RCMP outwardly problematized conventional justice on the one hand, while they "championed" restorative justice on the other. At the time, the RCMP emphasized the national development of Family Group Conferences or Community Justice Forums. Since 2002, both the RCMP and Federal Government have quieted their promotion (Deukmedjian, 2008, p. 118).
\end{footnotes}
the allotment of monies had run out, thereby leaving the potential beneficiaries of these same culturally appropriate resources/programs at a distinct disadvantage.

When asked about the level of satisfaction with the implementation of *R. v. Gladue* in PEI, *Gladue Writer* 016 commented, “money is a factor for them [Provincial Government]; I would have loved for them to say, ‘you know what, this is not an issue because it’s not about the money, it’s about healing’ and I think once we can get through that, it’s going to be okay.” Elder 019 argued that “not everybody is educated to do it [*R. v. Gladue*], the judges are supposed to do this, they are supposed to have training on why it’s there, they’re not following through, the legal system is not following through with what the Government of Canada – what the law of the land has dictated, so, who’s hurting, it’s the Aboriginal people, hence we’re still being overrepresented.” Whereas, *Gladue Writer* 017 stated “from my point of view, I think that it’s incredible, I think the judges are incredible, the lawyers who I’ve talked to and worked with are great to get information [circumstances surrounding commission of offence(s), criminal record, contact details] from.” For Elder 20, however “the [Indigenous] community doesn’t know about [*R. v.*] *Gladue*, the inmate doesn’t know about *Gladue*, it’s still so well hidden […] we don’t have the information on *Gladue*, if you ask any community member what *Gladue* is, they don’t know.” Based on the interviews, there were varying views among Indigenous informants in terms of their level of satisfaction with the implementation process and issues upon which to focus. Furthermore, the implication is that the CJS could do better in ensuring individual Indigenous accused, Indigenous communities and members of the public alike are educated when it relates to section 718.2 (e), *R. v. Gladue* and its guiding principles, as well as the purpose of *Gladue* Reports.
Gladue Writer 016 indicated that since the time of the R. v. Legere appeal in mid-April 2016, she had witnessed the CJS being more open to dealing with Indigenous issues and doing things differently. Although, she also cautioned, “I hope they [judges] don’t see it [the appeal] as a slap on the wrist, or a threat, if they don’t do it […] I don’t want them to look at Gladue Reports as we have no choice […] I want them to say, ‘this is something that we must do, it’s an obligation, and the Indigenous person has a right to have this.’” Gladue Writer 016 further reinforced that the IJP “is evolving […] to me, it’s all about my community and healing.”

There were a few Crowns who brought attention to the untenable supposition that the CJS is somehow designed first and foremost for rehabilitation and providing culturally appropriate resources to Indigenous peoples who come in conflict with the law. According to these same Crowns, everyone, including Indigenous peoples, must fully understand that the CJS is not designed solely, or even principally, for rehabilitation purposes, especially when you consider how engrained this understanding is in the collective psyche of a significant number of highly skilled legal professionals employed therein. For some legal informants, with this understanding in mind, the transformational path toward a more holistic, healing-focused approach to R. v. Gladue and its guiding principles will be a challenging one. However, unless and until this mindset shifts substantively in that direction, the relatively high level of tension between what is legally mandated by way of R. v. Gladue and what currently happens, in its practical application, will endure.

Crown 001 suggested a better way of implementing section 718.2 (e), R. v. Gladue and optimizing the accompanying human and financial resources, which are not
readily available to Indigenous peoples in PEI, was to “fundamentally sit down and go back to the basics, try to establish where the [Indigenous] population is, the size of that population, and what programs can realistically be offered within the Aboriginal community, by themselves, and what programs with which they may need help from other federal or provincial/territorial agencies – then, maybe, we’ll have a better handle on these issues.” This type of approach, on its face, (1) involves a state apparatus, which is in full and complete control of both human and economic resources; and (2) determines the legitimacy of both existing and newly developed initiatives, which, in turn, (re)produce and reinforce the authority of the settler colonial state. Elder 019 looked at the issue more so from the perspective of healing, in dealing with individual Indigenous peoples who come in conflict with the law and having the Indigenous “culture help heal that person.” In this regard, Defence 003 stated PEI already had the capacity to employ, via the IJP, a number of different initiatives, including healing circles, sentencing circles, early intervention circles, conflict-resolution circles, reintegration circles, spending time with an Elder, drumming and sweats. The same Defence further indicated “there’s no formal process to incorporate these into the [formal CJS] system and essentially that could be very useful in making _R. v. Gladue_ real.” The problem with this mind-set, even though the argument by Defence 003 appears well-intentioned, is the underlying premise that if restorative justice initiatives are going to be meaningful in the case of Indigenous peoples who are involved in the CJS, the only way this will happen is if these same initiatives form part of the overarching settler colonial state “system.”

From the outset, the TRC (2015) “emphasized that reconciliation is not a one-time event; it is a multi-generational journey that involves all Canadians” (p. 209). In this
regard, McGonegal (2009) contends “[d]iscourses of forgiveness and reconciliation have emerged in the past decade as among the most powerful scripts for interracial negotiations in states struggling with the legacies of colonialism” (p. 3). Incontrovertibly, such negotiations are invaluable in reaching mutually agreeable solutions, although if history has taught us anything, it is that non-Indigenous and Indigenous peoples do not come to the alternate dispute resolution table on equal footing, with the power imbalance virtually almost always skewed decisively in the settler colonial state’s favour. Coulthard (2014) argues that “[o]ver the last three decades, a global industry has emerged promoting the issuing of official apologies advocating ‘forgiveness’ and ‘reconciliation’ as an important precondition for resolving the damaging social impacts of intra-state violence, mass atrocity, and historical injustice” (p. 106).

Resistance and resurgence movements such as Idle No More have arisen “refusing to let the ‘gift’ of colonial redress restrict their demands related to territory, rights and culture” principally because “[i]n an ongoing settler colonial context, the ‘gift’ of reconciliation appears quite hollow to many [I]ndigenous scholars and activists,” who view the Canadian government “with one hand offer reconciliation and reparation, while with the other it violates historic and contemporary treaty and Aboriginal rights, […]

43 On June 11, 2008, former Conservative Prime Minister of Canada, Stephen J. Harper [2006-2015], issued an official apology on behalf of the Canadian state to Indigenous survivors of the IRSS. Subsequently, on September 29, 2009, Prime Minister Harper addressed a gathering of the G20 in Pittsburgh, Pennsylvania, where he made the claim that “Canadians had no history of colonialism,” and further that Canadians “have all the great things that many people admire about great powers but none of the things that threaten or bother them.” On October 1, 2009, former National Chief of the Assembly of First Nations (AFN), Shawn Atleo [2009-2014], responded to the Prime Minister’s claim: “The Prime Minister’s statement speaks to the need for greater public education about First Nations and Canadian history […] The future cannot be built without due regard to the past, without reconciling the incredible harm and injustice with a genuine commitment to move forward in truth and respect” (as cited in Coulthard, 2014, pp. 105-106).
ignores the plight of missing and murdered [I]ndigenous women, creates minimum sentencing laws that are only likely to increase [I]ndigenous overincarceration” (Woolford & Benvenuto, 2015, p. 382). It is based on these and other reasons that prominent Indigenous scholars such as Taiaiake Alfred, Glen Coulthard and Jeff Corntassel have critiqued “the liberal notion of reconciliation as yet another weapon in the Canadian assimilative arsenal” (Woolford and Benvenuto, 2015, p. 381). With the introduction of section 718.2 (e) federal legislation in 1996, its judicial construction three years later in the 1999 ground-breaking SCC decision in *R. v. Gladue*, and “indigenizing” initiatives of more recent vintage in the form of Aboriginal Persons/*Gladue* Courts and Gladue Reports, these could all reasonably be viewed as “weapons” in the same arsenal.

Speaking to the potency of true reconciliation, Corntassel argues, “reconciliation talk that is not followed by meaningful action simply reinscribes the status quo without holding anyone responsible or liable for continuing injustices” (as cited in Monchalin, 2016, p. 296). Or as Justice Murray Sinclair, Chair of Canada’s IRSS TRC [2008-2015], said in a speech in November 2015, “[i]f you thought getting to the truth was hard, getting to reconciliation is going to be really hard.” Expanding upon the same notion, according to the TRC (2015), “[r]econciliation will be difficult to achieve until Indigenous peoples’ own traditions for uncovering truth and enhancing reconciliation are embraced as an essential part of the ongoing process of truth determination, dispute resolution, and reconciliation” (p. 203). It became increasingly evident during the course of my research that it will be a formidable task to have the CJS and Indigenous peoples come to a mutual understanding as to what constitutes the best method by which to
resolve the problem of overrepresentation of Indigenous peoples in Canadian prisons, especially when everyone is not convinced such a problem even exists, especially in PEI.

7.5. Conclusion

The depth, breadth and scope of the problem of overrepresentation in the CJS is epitomized by the fact that some Indigenous peoples view Canadian prisons as the new IRSS, wherein they, once again, become wards of the settler colonial state. For Indigenous peoples, dispossession can manifest in different forms, including moving to urban centres and thereby weakening their connection to Indigenous communities. This, in turn, works against Indigenous peoples in that they are not perceived as “real Indians,” thereby not having recourse to section 718.2 (e), or R. v. Gladue and its guiding principles. According to several informants, particularly from within the Elder and Gladue Writer cluster, there are glimmers of hope among the younger generation of Indigenous peoples, wherein cultural education and oral traditions play a pivotal role in strengthening linkages within their home communities, and, in so doing, laying the foundation for cultural transmission. Elders continue to be regarded as knowledge-keepers in Indigenous communities and healing plays a pivotal role in the daily lived experience of individual Indigenous peoples.

Non-Indigenous people, often with good intentions, continue to assist in the development of specific ways and means by which to “indigenize” R. v. Gladue and its overall implementation process (e.g. Aboriginal Persons/Gladue Courts, Gladue Reports, Gladue Writers and Case Workers). Indigenization is carried out in a variety of different forms in PEI, including through the introduction of Gladue Reports and Indigenous Gladue Writers. Further, I found that for any of these new initiatives to become best
practice in PEI, non-Indigenous legal informants, who because of the position they occupy and/or power they possess, have a significant role to play in not only initially endorsing the initiative, but also in establishing corresponding policy and procedures, as well as protocols, in terms of how these same initiatives are ultimately operationalized. Indigenous peoples remain both resilient in spirit and resolute in their ongoing struggle for self-determination, even though the settler colonial state continues to stifle Indigenous resistance and attempts to define Indigeneity on their own terms. There are those informants who contend the Canadian CJS, particularly its prisons, has replaced the IRSS as a bastion of settler colonial domination, dispossession, marginalization and punitive authority, although there are also a comparable number who offered their own reasons for the overrepresentation problem, predominantly as it relates to proportionality and protection of the public peace.

The impact of telling one’s story, by way of a *Gladue* Report, was viewed by virtually every Indigenous informant and several legal informants as therapeutic and an essential part of the transformational healing process, which uncharacteristically (compared to the adversarial CJS) begins prior to sentencing. For example, in the CJS, the healing process typically does not take place until much later in the legal proceedings, normally following intervention methodologies (e.g. addictions treatment, mental health counselling, etc.) having been applied. Indigenous communities were viewed as having the potential to play a key role in the healing process by being supportive in capacity-building and/or playing a restorative justice role. However, as referenced in the previous chapter, these same opportunities are often constrained by a settler colonial state which is not always receptive to change within what it regards its own domain – the CJS,
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generally, and legal system, more specifically. Nevertheless, optimism was expressed by several legal informants in that there would be little, if any, resistance on the part of the PEI judiciary to consider innovative curative sentencing alternatives if culturally appropriate resources (e.g. meeting with an Elder, sweats, healing or sentencing circles) had been identified beforehand and made readily available/accessible thereafter. However, utilizing the lack of culturally appropriate resources as a rationale for not adhering to section 718.2 (e) and guiding principles outlined in *R. v. Gladue* can constitute another example of passing-the-buck. This, in turn, affords the CJS the opportunity to pivot to its default position, whereby if the culturally appropriate resources are not readily available, then the only viable option remaining is to maintain the status quo, not be in the position to fulfill its mandate with respect to *R. v. Gladue* and its guiding principles and consequently, have Indigenous peoples spend more and more time in Canadian prisons.

Observations made over two decades ago by Turpel-Lafond (1994) still bear repeating:

> We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream system. This is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can better be described as getting away from the colonialism and domination of the Canadian criminal justice system. Resisting colonialism means a reclaiming by Aboriginal people of control over the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages with the existing criminal justice system and perhaps phased assumption of jurisdiction (p. 215).

This quote by a renowned Indigenous Canadian judge, lawyer, advocate for children and Indigenous restorative justice, professor with the Peter A. Allard School of Law and inaugural director of the Indian Residential School History and Dialogue Centre at the
University of British Columbia, even though spoken five years before the release of the SCC *R. v. Gladue* decision, addresses the complexity of the problem of overrepresentation in the Canadian CJS, particularly its prisons.
Chapter 8.
Conclusion

8.1 Introduction

When the R. v. Legere decision was rendered in 2016, both legal and Indigenous informants viewed it as significant in bringing about a heightened awareness of section 718.2 (e) and R. v. Gladue to the foreground in PEI; however, the 2018 R. v. McInnis decision, referred to in chapter one, brought this awareness into question. The joint sentencing submission (recommending that McInnis not receive a custodial sentence) at the Trial Court level, by crown and defence is evidence of an “understanding” of the intent of section 718.2 (e) and R. v. Gladue; however, its subsequent rejection by the presiding judge appears to be representative of the enduring sources of tension identified in this research project. The McInnis case exemplifies the problem that my main research question seeks to explain: why overrepresentation of Indigenous peoples in the Canadian CJS, especially its prisons, continues to rise despite specific legislative (section 718.2 (e)) and judicial (R. v. Gladue) remedial measures aimed at reducing the problem. This case also embodies the complexities of implementing section 718.2 (e) and R. v. Gladue.

This chapter highlights the key themes and findings from the preceding chapters. I then discuss contributions and limitations; identify recommendations and avenues for possible future research stemming from this dissertation, particularly with respect to how the CJS in PEI can deal with systemic and procedural barriers and tensions in implementing section 718.2 (e), R.v Gladue along with its guiding principles.
8.2 Key themes and findings

In Canada, notably since the end of World War II, there has been considerable debate concerning the nature, breadth and scope, as well as causes, of the problem of overrepresentation of Indigenous peoples in the CJS, particularly its prisons. Despite reconciliatory discourses, numerous papers, inquiries and commissions (e.g. White Paper, AJI of Manitoba, RCAP) and the introduction over two decades ago of specific legislative (section 718.2 (e) in 1996) and judicial (R. v. Gladue in 1999) remedial measures aimed at reducing the problem, overrepresentation continues to worsen.

In this research project, I examined the problem of overrepresentation from a historical perspective and how settler colonial relations are (re)produced in the way the Canadian CJS operates, more generally, and in PEI, specifically. I provided context for the enactment of the “restraint” provision (section 718.2 (e)) and seminal SCC decision in R. v. Gladue three years later. The four research questions which guided my overall analysis were highlighted.

I adopted a theoretical framework grounded in the analysis of settler colonialism and drew on the contributions of Wolfe (2006), Veracini (2010) and the growing field of settler colonial studies, as well as contributions of Indigenous scholars such as Monture (2014), Turpel-Lafond (1994), and Borrows (2010). I utilized the concept of settler colonialism in this research project to represent the complex “formation” we refer to as Canadian society, which is comprised of an amalgam of historical, political, economic, social, cultural processes, belief systems and European-in-origin practices. The core concept of “eliminatory logic” underpins the theorizing of settler colonialism and manifests through six key processes: essentialism, erasure, dispossession,
pathologization, exclusion, and lawfare. These processes are interconnected, can and do change over time and space in distinct and concrete ways, as well as contribute to (re)producing settler colonialism in the combined space of the Canadian criminal justice and legal systems, as well as the broader settler colonial formation.

I utilized a two-pronged qualitative methodological approach, involving semi-structured informant interviews and case-law (document) analysis. I carried out my research by examining micro (individual), meso (institutional or formal organization), and macro (societal) levels of analysis. The key informants comprised two distinct clusters: the first, legal professionals (judges, crowns, and defence) employed in the PEI CJS; and second, Indigenous Gladue Writers employed with MCPEI, and Elders who represented Mi’kmaq communities in PEI. This inclusive methodological approach facilitated a comprehensive analysis of how the 1999 SCC decision in *R. v. Gladue*, along with its guiding principles, have been articulated, understood and implemented in PEI’s CJS.

In the scholarly and policy literatures, two dominant explanatory frameworks (socio-economic disadvantage and culture clash) for the problem of overrepresentation were found to have considerable resonance and closely coincide with the dominant settler colonial discourse. However, critical scholars argue that overrepresentation and factors such as social-economic disadvantage and culture clash cannot be fully understood unless and until they are situated in the unique Indigenous lived experience of Canadian settler colonialism. Therefore, these explanations remain tenuous, and emphasize the importance of settler colonial studies and Indigenous perspectives as a foundational explanatory framework.
Terminology continues to be a source of considerable debate, particularly as it relates to the distinction between “overrepresentation” and “overincarceration.” Most scholars and many informants acknowledged that the number of Indigenous peoples spending time in custody in Canada is disproportionate to their representation in the general population, although there was less consensus when posing the same question with respect to “overincarceration.” Many informants (especially legal informants) agreed that there was regional disparity when it comes to overrepresentation, especially in western Canada, although were less clear or questioned if it was a problem elsewhere in Canada, particularly in PEI. The significance of this finding is that there is still ambiguity in how some legal informants view or understand the problem of overrepresentation, therefore if decision-makers are not necessarily convinced that such a problem even exists, then it impedes change.

There were several different factors identified by interview informants and in the case-law to explain why Indigenous peoples continue to enter Canadian prisons in disproportionate numbers. First, I found that some legal informants drew on long-standing stereotypes associated with Indigenous peoples and alcohol abuse to explain overrepresentation, rather than settler colonialism and/or systemic racism. Additionally, the conflation of Indigenous and non-Indigenous offender background histories (re)produces pathologization of individual Indigenous accused and systemic racism of Indigenous peoples as a collective. These types of explanations (re)produce systemic racism and can contribute to discriminatory practices. A second explanation offered by informants was that Indigenous youth are a growing demographic in Canada. I found that not only are Indigenous youth the fastest growing demographic, they are
disproportionately overrepresented in both custody (provincial/territorial and federal correctional institutions) and community correctional supervision (probation and parole). While statistically supported, attributing overrepresentation to a specific age cohort diverts attention from the reasons Indigenous youth are offending (e.g. historic social and cultural factors produced by settler colonization) in the first place and, in turn, crafting distinct culturally-appropriate remedies. A third explanation was the perception that the application of section 718.2 (e), *R. v. Gladue* and its guiding principles constitutes a “get-out-of-jail-free card.” Several legal informants asserted that neither federal legislators (by way of section 718.2 (e)), nor the SCC (by way of *R. v. Gladue*) ever intended there to be a “get-out-of-jail-free card” or “racial/Indigenous discount,” implying all accused should be treated equally and in accordance with the rule of law. For some of these legal informants, their concern related not so much to the rule of law but rather to an unease associated with even the “perception” of conferring preferential treatment. A fourth explanation offered by some legal informants was that Indigenous peoples engage in more (and more serious) offences. In doing so, these legal informants privileged proportionality and parity when it relates to sentencing, and perceived Indigenous peoples as committing more serious criminal acts compared to their non-Indigenous counterparts. This appears to provide support for why Indigenous peoples spend inordinate amounts of time in Canadian prisons, in disproportionate numbers, rather than considering discriminatory settler colonial state legal practices. In applying section 718.2 (e), *R. v. Gladue* and its guiding principles in PEI, some legal informants were either resistant to changing the status-quo (i.e. proportionality), or alternatively not strictly adhering to the
legal obligation/mandate to place Indigenous peoples in custody when there is a credible risk/threat to public safety.

Even though Gladue Reports were introduced in PEI courts in 2014, informants identified the need to further develop best practice, including protocols and policy directives regarding how Gladue Reports are “appropriately” prepared and subsequently “properly” brought before the court. This objective was perceived as requiring a collaborative effort on the part of Indigenous and non-Indigenous actors, which would most likely enhance the flow of critical information to the presiding judge. Furthermore, most informants expressed the belief that the task of gathering and tendering background (individual and systemic) information, pertaining to Indigenous peoples who appear before the court, should involve several different people (e.g. defence, crown, Gladue writer, investigating police, etc.) rather than be the sole responsibility of any one individual or group. Consequently, emphasis on the flow of information, rather than who prepared it, or the vehicle/mechanism (Gladue Report or PSR) by which it was conveyed, constituted the all-important focal point for many legal informants. The broader implication of these type of perceptions is that it counters the argument by Indigenous informants that (a) Gladue Reports are distinct from PSRs in that they are better able to capture Indigenous life stories; and (b) Gladue Reports should be completed by people of Indigenous ancestry and/or through MCPEI.

I scrutinized Presentence and Gladue Reports, not solely by way of a comparative analysis, but also from the perspective that each has its respective role to play when dealing with Indigenous peoples who come in conflict with the law and wish to tell their “story.” The weight attributed to telling one’s story, in the courtroom setting, appeared to
demonstrably shift depending on one’s perspective. In comparison to Indigenous informants, most legal informants expressed allegiance to “proportionality” and the “rule of law,” with emphasis placed on sentencing principles such as “impartiality” versus advocacy, “equality in application” versus equality in outcome, and “facts” versus story. However, this point of view runs the risk of refuting the colonial material implications of the broader CJS, which, in turn, helps to (re)produce the settler colonial project. Notwithstanding the many institutional and ideological barriers and tensions noted throughout the dissertation, making “space” within the CJS for storytelling was considered by some informants, especially Indigenous, to be both emancipatory and healing.

Less than half of the legal informants expressed an appreciable understanding of settler colonialism as an ongoing structure or process rather than a singular historical event. This lack of understanding helps reinforce the prevailing individualistic, incident, and sanction-based approach of the CJS; and the tendency to pathologize Indigenous peoples, thereby reducing them to just another ethnic group, which, in and of itself, denies the specificity of settler colonialism. For example, many legal informants did not clearly articulate a distinction between the background of Indigenous and non-Indigenous accused, specifically as it relates to a broad array of factors, ranging from familial dysfunction to poverty, or the lack of employment to alcohol and/or drug addiction. The conflation of Indigenous and non-Indigenous offender background histories also reinforces the processes of “erasure” and “elimination” in the colonial context.

The data revealed that the implementation of *R. v. Gladue* in PEI, not unlike other Canadian jurisdictions, has been affected by systemic and procedural barriers and
tensions which have made progress challenging. These challenges range from a lack of judicial, prosecutorial, and/or political “will,” to the need for adequate culturally appropriate resources. Even though initiatives aimed at remedying overincarceration (e.g. introduction of *Gladue* Reports, *Gladue* Writers, MCPEI and its outreach to Indigenous communities) constitute practical examples of how the CJS and Indigenous communities can work together, these efforts also reveal the gap between Indigenous justice and the Canadian settler colonial state. For example, the CJS ultimately controls the ongoing *R. v. Gladue* implementation process (e.g. deciding which Indigenous accused and/or offence types are “eligible” to take part in certain programs), with limited input and/or prior consultation with Indigenous peoples. This control imbalance is best illustrated when members of the judiciary determine whether an Indigenous accused is Indigenous “enough” for section 718.2 (e) and *R. v. Gladue* and its guiding principles to apply.

In examining an Indigenous justice paradigm, Indigenous informants used descriptors such as holistic, contextualized, restorative, reparative, reconciliatory, equity, balance, harmony and healing. Whereas non-Indigenous informants, in describing the settler colonial justice paradigm, used terms such as adversarial, individualized, sanction-based, proportionality, deterrence, impartiality, parity and equality. Considering these differences, relationship building between colonial state actors and both individual Indigenous peoples and communities is of critical importance. All the Indigenous and a few legal informants stressed the notion of “healing,” the potentially transformative power of *Gladue* Reports, Indigenous self-determination, and the multi-layered notion of Indigenous identity and authenticity. There was discernible tension when it comes to conventional CJS actors wanting *Gladue* Reports to provide “proper” information for
sentencing, not appreciably dissimilar to PSRs, rather than constitute a distinct form of “advocacy” and/or “healing.”

The role of people working within the multidimensional and complex CJS, particularly with respect to Indigenous peoples who come before the court in PEI, was essential in terms of my overall analysis, as the decisions, actions or inactions of individual CJS actors, as a whole, form the inner-workings of this system. Discourses of denial, dismissal, or diminishment and continuing complicity on the part of some legal system actors are significant in reinforcing the effects of colonialism on Indigenous peoples and (re)producing settler colonial relations. This complicity appears to be largely unintentional and/or unconscious and associated, in part, with a lack of understanding of the continuing effects of settler colonialism. Supporting this assessment, legal informants expressed the need for additional education and/or training pertaining to colonialism and settler colonialism. However, there is tension between “intent” and the expressed desire for education vis-à-vis the practicality of doing things differently in a fundamental way.

Regarding the implementation of section 718.2 (e), R. v. Gladue and its guiding principles in PEI, many informants noted “we have a long way to go.” Nonetheless, there have been a number of positive initiatives undertaken over the last few years with respect to Indigenous peoples who appear before PEI courts: (1) introduction of Gladue Reports, Gladue Writers and Case-workers; (2) MCPEI’s movement toward self-determination via its various outreach programs (e.g. IJP); (3) creation of resources such as Bringing Balance to the Scales of Justice: Fulfilling Our Responsibility to Indigenous People Involved in the Justice System (2018), authored by an Indigenous person; (4) signing of a MOU on April 1, 2018 between MCPEI and the PEI Government as it relates to the
preparation of *Gladue* Reports (the only MOU of its kind in Canada); and (5) openness on the part of informants to work collaboratively toward the realization of innovative sentencing alternatives not involving incarceration (e.g. meeting with Elders, sweats, healing and sentencing circles, etc.).

The exceptional level of participation in this research project and recognition of its potential value, on the part of both legal and Indigenous informants alike, is noteworthy. With respect to the Province’s legal system (Provincial Court Judges, Crown and Legal Aid/Defence Attorneys), virtually everyone participated, with the prior approval and support of the Deputy Minister of the Department of Justice and Public Safety at the time.

Despite the aforementioned initiatives and level of participation in this research project in PEI, there are systemic and procedural implementation barriers and tensions which still need to be addressed to capture the original intent of section 718.2 (e) and *R. v. Gladue*. Unless and until CJS actors accept the initial premise that there is overrepresentation of Indigenous peoples within the CJS (especially its prisons) in Canada, including PEI, and its relationship to settler colonialism, implementation of section 718.2 (e) and *R. v. Gladue* will be tenuous, at best.

### 8.3 Contributions and limitations

This research project makes a unique contribution to the scholarly fields of law and society and settler colonial studies as an empirical qualitative study involving virtually the entire complement of CJS legal actors in one jurisdiction in Canada and the inclusion of Indigenous (Elders and *Gladue* Writers) perspectives. Having adopted a theoretical framework that understands settler colonialism as a distinct formation underpinning the CJS in PEI, my findings have relevance in other jurisdictions. While PEI’s CJS has
specific historical-social context, it is organized by and (re)produces the same settler colonial criminal justice (legal) system (with some differences in Quebec), and therefore, the broader analysis is still significant elsewhere in Canada. Albeit not one of my research objectives, generalizability could be considered a potential limitation, in part because of PEI’s relatively small size and limited number of informants, particularly when it comes to specific legal personnel (e.g. judges, crowns, defence attorneys) employed within the Province of PEI.

This represented the first research project of its kind in Canada, whereby legal and Indigenous informants have had the opportunity to share their ideas, insights, and impressions about the ongoing implementation of section 718.2 (e) and *R. v. Gladue* in their home Province and how to enhance the effort, moving forward. It also resulted in rich data, from which decision-makers in the legal system and Indigenous communities can glean new insights into systemic and procedural implementation barriers and tensions and potentially develop innovative policies and procedures, as well as protocols, from which best practice can emanate.

This research project contributes to our understanding of settler colonialism by examining concrete CJS practices at the micro, meso and macro levels in PEI. This provides a greater understanding of how settler colonial relations are (re)produced through the day-to-day operations of the CJS (despite reconciliatory discourses) and, at the same time, highlights points of tension and procedural or institutional barriers which can be viewed as sites for potential intervention. The research findings also have the potential to be a catalyst for change, specifically with respect to how Indigenous peoples are dealt with by legal actors when they appear before the court. As a researcher, one of
my primary goals was to inform change in the CJS generally and PEI more specifically (i.e. decolonialization) in how things work (in practice), not simply to describe them (in theory).

In carrying out my research, I was cognizant of my positionality as a non-Indigenous researcher and someone who was closely affiliated with the CJS in PEI for over three decades, which included working closely with Indigenous communities and some of the Indigenous informants. With the majority of legal and several Indigenous informants, I shared a long-standing professional working relationship, and with some, a friendship. Although, this likely facilitated my access to informants, I had to remind informants that I was engaging them as a researcher and not a colleague. This sometimes made for contrasting interview dynamics: with those I knew well, it was more of a casual conversation; whereas, with others, with whom I did not share a working relationship, the interview process tended to be more structured and formal. I also had to be mindful of my own biases (for and against) regarding both Indigenous peoples and the CJS in PEI.

The scope of this research project encompassed, in part, the views of informants from within the legal system (judge, crown, defence) in PEI, concerning overrepresentation and the implementation of section 718.2 (e) and *R. v. Gladue*. Even though this research project focused primarily on the “courtroom setting,” as section 718.2 (e) and *R. v. Gladue* are considered sentencing principles, these principles can also be applied in other settings within the broader CJS: police services, community-based corrections (e.g. probation and parole), as well as provincial/territorial and federal correctional institutions. Although Indigenous peoples are overrepresented in Canadian prisons, they are also disproportionately represented in the broader CJS (e.g. stops by
police, charges, remand, administrative offences, solitary confinement, lack of access to parole or early release, etc.). Therefore, it may have been beneficial to expand the number of informant clusters to capture the front end (e.g. police) and back-end (e.g. probation, parole, correctional institutions) of the CJS and thereby ascertain how and why Indigenous peoples are discriminated against within a broad array of institutional settings, whether it be at the “front-end” or “back-end” of the system. These additional clusters would include: (1) members of both the municipal and RCMP forces in PEI, comprising the front-end of the CJS; (2) probation and parole officers who work with adult Indigenous offenders in the community; and (3) correctional officers in the two-adult correctional institutions in PEI, the latter two clusters comprising the back-end of the same system.

8.4 Recommendations

There are numerous systemic (e.g. lack of will, lack of readily available holistic, culturally appropriate human and financial resources) and procedural (e.g. determining Indigenous authenticity or how Gladue Reports are prepared) barriers and/or tensions which need to be addressed in the day-to-day operations of the CJS, specifically in terms of the implementation of section 718.2 (e) and R. v. Gladue.

Nearly all of the informants identified the lack of education and/or training as a barrier not only in terms of section 718.2 (e) and implementing R. v. Gladue but also in better understanding settler colonialism and its persistent multidimensional effects on Indigenous peoples in Canada, particularly in PEI. Many informants agreed education and/or training would also form an integral and necessary requirement for a wide array of agencies, groups, and organizations (e.g. MCPEI, Indigenous communities, Department
The relatively small size of PEI should make it easier for education, networking and facilitating innovative practices with respect to the implementation of section 718.2 (e) and \textit{R. v. Gladue}, specifically; and developing and delivering reconciliatory and restorative justice initiatives, more generally.

Most informants expressed the need to have readily available holistic and culturally appropriate human and financial resources which are more inclusive in nature and better able to meet the multifaceted needs of Indigenous offenders and their communities, principally in the area of restorative justice healing. Some informants, both Indigenous and legal alike, proposed that these resources be administered “in-house” by Indigenous communities (e.g. MCPEI), which is currently the case in the preparation of \textit{Gladue} Reports by persons of Indigenous ancestry.

Another related issue regarding available resources is who controls the money for these resources. A few informants, more Indigenous than legal, suggested that funding should be controlled by Indigenous communities, which, in turn, performs an integral role in moving toward Indigenous autonomy and self-determination on multiple fronts. These would include, albeit not limited to, the IJP, introduction of Indigenous \textit{Gladue} Writers and Caseworkers, and preparation of \textit{Gladue} Reports. While reform is needed to improve the lives of Indigenous peoples in the present, there also needs to be the continuing pursuit of transformation towards autonomy and self-determination in the future.

The ongoing implementation of \textit{R. v. Gladue} in PEI requires a well-coordinated, concerted and highly collaborative effort on the part of justice system professionals, in
partnership with key members of Indigenous communities. There was near unanimity amongst all informants relating to the need for enhanced collaboration and strengthened relationships with respect to dealing with Indigenous peoples who come in conflict with the law, more generally, and in the preparation of Gladue Reports, more specifically.

The creation of space for Indigenous peoples to relay their stories in a courtroom setting would recognize and show respect for Elders and the holistic worldviews of Indigenous peoples, thereby augmenting the healing process. Since the disruption of Indigenous storytelling remains one of the fundamental effects of settler colonialism, the creation of such space could also potentially contribute to decolonization. Presently, PEI’s Gladue Report writing program is fully funded by the Provincial Government, under the administration of MCPEI, which is clearly a step in the right direction. However, any future changes or modifications to this program should be made in consultation with MCPEI and Indigenous communities.

Informants identified the need for a mechanism or protocol to clearly delineate, at the earliest opportunity, whether the accused identifies as Indigenous, to ensure informed consent, and determine if the Indigenous accused wishes to proceed by way of R. v. Gladue and its guiding principles, while cognizant of the multifaceted reasons why Indigenous peoples might not self-identify.

Informants identified that it would be beneficial, with respect to the preparation of Gladue Reports for members of PEI’s judiciary, to create a step-by-step process or protocol by which to more efficiently manage this critically important initiative – a protocol like the one already in place in the Province of NS. Indigenous peoples, including Elders, MCPEI, and other key Indigenous communities, as well as legal
professionals from within the CJS, should be represented and work collaboratively to achieve this objective.

8.5 Future research directions

Whereas this research project utilized qualitative methods, qualitative longitudinal research could facilitate a more nuanced understanding of how the problem of overrepresentation changes, or remains the same, over time, at the micro, meso, and macro levels of analysis. Such a study could, for example, monitor the ongoing effects of *Gladue* Reports; impact of such PEI cases as *R. v. Legere*, and *R. v. McInnis*; the MOU between MCPEI and the PEI Government with respect to *Gladue* Reports; and any educational initiatives involving section 718.2 (e), *R. v. Gladue*, and settler colonialism.

The inclusion of additional informant clusters (e.g. police officers, probation and parole officers, and correctional officers) would expand the scope and comprehensiveness of inquiry to include professionals within the broader CJS. Considering *R. v. Gladue*’s reach and impact is not restricted to the courtroom setting, including these informant clusters could provide further insights and potential avenues by which to address the overrepresentation problem.

This research project was purposely limited to the adult CJS. Future research is needed to examine the historic social and cultural factors created by settler colonialism that have contributed to the overrepresentation and (over)incarceration of Indigenous youth. A research project involving Indigenous youth would be an important research area, especially considering the inexcusably high rate of overrepresentation and overincarceration of Indigenous youth in Canadian prisons, and particularly in light of my findings regarding some legal actors’ tensions and/or hesitation in viewing section
718.2 (e) and *R. v. Gladue* as applicable to the younger generation, who find themselves further and further away from the detrimental impacts of settler state structures like the IRSS, 60s Scoop, etc. This perception of wanting to establish a “causal link” could potentially result in Indigenous youth being less likely to have the enduring impacts of these and other settler state structures considered and, in turn, section 718.2 (e) and *R. v. Gladue* applied.

### 8.6 Final remarks

Since the landmark SCC *R. v. Gladue* decision was rendered in 1999, academic scholars and practitioners in the field of criminal justice alike suggest its overall implementation, largely by way of its guiding principles, has been fragmented at best. The remedial promise of section 718.2 (e) and *R. v. Gladue* remains demonstrably unfulfilled in virtually every jurisdiction across Canada, with provincial/territorial jurisdictions, including PEI, continuing to experience systemic and procedural barriers, which thwart forward progress.

The quest of Indigenous peoples in Canada to assert self-determination reverberated throughout this research project. Hamilton and Sinclair (1991) suggest that “[w]ith greater self-determination in their own territories, Aboriginal people can begin to feel they are being dealt with fairly” (p. 674). Specifically, as it pertains to the CJS in PEI, Indigenous peoples can only become rightful partners in any effort to fundamentally transform the settler colonial justice paradigm by having a more substantive collaborative role in the creation, implementation and ongoing enforcement of Indigenous-related legislation (e.g. section 718.2 (e)), and strictly adhering to the legal mandate of seminal SCC judicial determinations (e.g. *R. v. Gladue*). The establishment of MCPEI and its
outreach to Indigenous peoples who find themselves in conflict with the law, introduction of Indigenous *Gladue* Writers and *Gladue* Reports, and willingness of legal actors to come alongside their Indigenous counterparts, offer tangible positive steps in the right direction.

The promise of *R. v. Gladue* still holds true in theory, although its practical application across Canada continues to experience systemic and procedural challenges. The way forward, at times, appears to lack a well-defined sense of design and/or purpose, particularly in addressing procedural tensions and barriers. However, as was clearly evidenced in the scholarly literature, case-law, and informant interviews, change is possible only if Indigenous and non-Indigenous actors confront the problem of overrepresentation in the Canadian CJS, particularly its prisons, and work collaboratively to break the deleterious cycle of incarceration, which has continued to persist for Indigenous peoples for well over seven decades.
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Appendix A:
Initial e-mail invitation to key informant


Student Researcher: Frank T. Lavandier, Candidate for the Degree of Doctorate of Philosophy in Sociology, University of New Brunswick (UNB).

Faculty Supervisor: Dr. Tia Dafnos, PhD, Sociology, University of New Brunswick (UNB).

Dear [NAME]:

My name is Frank T. Lavandier. I am a graduate student at the University of New Brunswick (UNB). I would like to hereby invite you to participate in my research project involving the Supreme Court of Canada (SCC) decision in R. v. Gladue, [1999] 1 S.C.R. 688, 1999 CanLII 679 (SCC) and how this particular case and its guiding principles have impacted Indigenous peoples in the Province of Prince Edward Island (PEI) who have come in conflict with the law.

I was employed with the Department of Justice & Public Safety in PEI, primarily within Probation Services, for three decades, retiring in 2010. In addition to being a full-time PhD student in the Sociology Program at UNB, I am currently employed, on a part-time basis, as a Sessional Instructor with the Sociology Department, at the University of Prince Edward Island (UPEI), teaching courses in Victimology, Criminology, Deviance & Social Control, and Sociology of Law.

In order to ensure no unforeseen implications flow from your eventual decision to either agree or not agree to participate in my research project, I have already taken, and will take additional, steps to ensure identifying information (about individual key informants) will be shared with (or accessible to) only those persons directly affiliated with the research project (e.g. myself, and Faculty Supervisor, Dr. Tia Dafnos). **All identifiers (personal and/or professional) will be removed from retained data prior to completion and dissemination of the research project. For additional information, please refer to subsequent e-mails, explaining the purpose and intent of the face-to-face interview.**

Research Project Overview

The purpose of this research project is to explore how R. v. Gladue sentencing principles are being applied, ‘law-in-practice’, in PEI, compared to ‘law-in-principle’, as mandated
by federal legislation, particularly section 718.2 (e) of the Criminal Code, and corresponding Appellate case-law. In addition to its evaluation component, in this project I will be seeking input from key informants like yourself, who are in the best position to inform me of current practice, issues of concern, and ways and means to move forward. Research project findings, after identifiers have been removed, will be shared with all key informants, thus providing potential foundational material upon which additional research/work could emanate.

This research project includes a face-to-face interview, in which you are hereby invited to participate. My sincere hope is that you will choose to participate in this project, as your input would provide invaluable information as to how Indigenous peoples in PEI, who become involved in criminal activity, are ultimately dealt with according to law, and, in turn, are impacted, particularly as it relates to section 718.2 (e) of the Criminal Code and the SCC decision involving R. v. Gladue.

During the course of the interview, you will be asked questions regarding your knowledge, experiences and opinions, specifically concerning section 718.2 (e), as well as R. v. Gladue and its guiding principles, what these specifically involve, how they are employed in PEI, challenges with adhering to these same principles, etc. The interview will last 60 to 90 minutes and be arranged at a location, date and time convenient to you.

You will not be asked any questions about individual cases, and should you mention particulars of an individual case during the interview, information that could identify the participants in a legal case (other than publicly available information in published case reports) will be removed.

If you are interested in participating in this component of the research project, please reply to this e-mail, confirming your interest, within two weeks from today’s date (specify date by which response is to be received). Upon receipt of your return e-mail, I will send you follow-up email on face-to-face interview, along with a participant consent form, with particulars regarding the specific steps I have already taken, and will additionally take, to help ensure confidentiality and anonymity.

Upon completion of the research project, an electronic copy of my final dissertation (with identifiers removed) will be provided to every key informant who has been invited to take part in this research project.

Contact Information

If you have any questions regarding this research project, or would like to receive additional information about participation therein, please contact me by telephone or e-mail:

Frank T. Lavandier, PhDc
Telephone: (902) 888-3079
E-mail: flavandier@unb.ca or flavandier@upei.ca
If you would prefer, you can also contact my Faculty Supervisor, Dr. Tia Dafnos, by telephone or e-mail:

Dr. Tia Dafnos  
Telephone: (506) 447-3393  
E-mail: tdafnos@unb.ca  

If you would prefer to communicate with a UNB representative, who is not directly affiliated with this research project, please contact:

Dr. Nancy Nason-Clark  
Telephone: (506) 453-5177  
E-mail: nasoncla@unb.ca  

This project has been reviewed and approved by the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) Ethics Review Committee; and also reviewed by the Research Ethics Board (REB) of the University of New Brunswick (UNB) and is on file as REB 2016-049.

Thank-you in advance for your interest in and assistance with this research project.

Yours sincerely,

Frank T. Lavandier, PhDc
Appendix B:
Follow-up e-mail on face-to-face interview


Student Researcher: Frank T. Lavandier, Candidate for the Degree of Doctorate of Philosophy in Sociology, University of New Brunswick (UNB).

Faculty Supervisor: Dr. Tia Dafnos, PhD, Sociology, University of New Brunswick (UNB).

Dear [NAME]:

I would like to initially express my genuine appreciation for your interest in participating in a face-to-face interview, scheduled to take place on [date], between [time], and at [location], Prince Edward Island (PEI). This interview is one of the components in my research project involving the Supreme Court of Canada (SCC) decision in R. v. Gladue, and how this particular case and its guiding principles have impacted Indigenous peoples in PEI, who have come in conflict with the law. The interview will last 60 to 90 minutes, and, with your permission, be voice-recorded. In addition, during the interview, I would like, once again with your permission, to take notes.

I have attached a Participant Consent Form, which sets out specific details regarding the interview, as well as informed consent, and also provides a partial list of likely topics/themes to be discussed during the interview. When we do meet, and prior to beginning the interview, I intend to review this Form, respond to any questions you may have, and then, if you agree to do so, the Form can be duly signed.

If you have any questions regarding this research project, or would like to receive additional information and/or clarification about your participation therein, please contact me at (902) 888-3079 or by e-mail at flavandier@unb.ca or flavandier@upei.ca

I look forward to speaking with you again soon.

Yours sincerely,

Frank T. Lavandier, PhDc
Appendix C:

Participant consent form


Student Researcher: Frank T. Lavandier, Candidate for the Degree of Doctorate of Philosophy in Sociology, University of New Brunswick (UNB).

Faculty Supervisor: Dr. Tia Dafnos, PhD, Sociology, University of New Brunswick (UNB).

Please read this entire document carefully and complete it prior to participating in this research project. (The researcher will review this Participant Consent Form with each and every key informant prior to the beginning of each and every face-to-face interview)

Purpose of the research project: Explore how the Supreme Court of Canada (SCC) decision in R. v. Gladue and corresponding sentencing principles are being applied, ‘law-in-practice’, in the Province of Prince Edward Island (PEI), compared to ‘law-in-principle’, as mandated by federal legislation, section 718.2 (e) of the Criminal Code, and corresponding Appellate case-law.

What are the expectations associated with participation in this research project: If you agree to participate in this research project, I will conduct a face-to-face interview with you at a date, time, and location of your own choosing. The interview will involve questions about your knowledge, experiences, and opinions regarding the R. v. Gladue decision, its guiding principles and how it has impacted/influenced Indigenous peoples in PEI who have come in conflict with the law. The interview will last 60 to 90 minutes. With your prior permission, I will voice-record and take notes during the interview. The voice-recording and note-taking are meant to more accurately record the information you provide during the interview and will be used for transcription purposes only. If you choose not to be voice-recorded, I will take notes only if, once again, you agree with me doing so. If you do agree to the voice-recording, the recording can be stopped at any time, upon request, during the course of the interview, either temporarily or for the remainder of the interview. In addition, if at any time during the interview you feel uncomfortable with certain questions(s) and want to interrupt or end the interview, upon making said request, the interview will either be temporarily interrupted or terminated accordingly. Following the interview, I will be removing identifying information during the transcription process and subsequently, once transcription has finished, destroy the corresponding voice-recording. Rest assured you will be afforded the opportunity to review the transcript prior to dissemination of the final dissertation, with the intended
purpose of ensuring its accuracy and that all identifying information has been removed. In addition, I will store raw data by way of an assigned code, rather than by the actual name of individual key informants.

Risks, discomfort and/or potential harm associated with participation in the research project: As a researcher, I fully acknowledge the potential risk, discomfort and/or harm associated with certain key informants, particularly Elders, in agreeing to participate in the research project. The potential for more than minimal risk of harm, specifically as it pertains to Elders, is based, in part, upon several different factors: (1) the possibility of a perceived or real power-imbalance between the researcher and key informant; (2) the nature of the questions asked during the course of the face-to-face interviews; and/or (3) Elders being asked to share their feelings about a sensitive subject area (e.g. the overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system and means of resolving this chronic problem in PEI) may potentially cause discomfort or harm, especially if someone they know and care about has experienced a negative relationship with the criminal justice (legal) system beforehand. In this regard, the researcher has already taken and is ready and willing to take additional steps to mitigate against this potential harm, including; albeit, not limited to: (1) prior to spending time with an Elder, by way of a face-to-face interview, ask if she or he would prefer to have a ‘support person’ present during the interview; (2) ensure the Elder clearly understands the overarching purpose of the research project and the pivotally important role she or he will play, if and when they agree to participate; (3) confirm her or his participation in the project is completely voluntary and that she or he can withdraw from the research project at any time; (4) offer a gift of tobacco in recognition of the wisdom the ‘knowledge keeper/holder’ is about to share and also signify respect; (5) recognize the fundamental importance of the researcher always showing the utmost of respect and humility when in the presence of and/or speaking with an Elder; (6) being readily available if the Elder requires additional clarification, wants to discuss or express concerns about any facet of the research project; and (7) do everything reasonably possible to ensure confidentiality is maintained throughout the entire research effort.

In addition to Elders, some members of the legal community in PEI (Provincial Court Judges, Crown Attorneys, Defence/Legal Aid Attorneys) may experience potential discomfort as a result of having to respond to specific questions in a formal interview setting, responses to which may possibly be perceived as not necessarily carrying out their assigned duties and responsibilities in strict accordance with the legislative ‘ideals’ associated with section 718.2 (e) of the Criminal Code, and/or ‘guiding principles’ associated with the 1999 SCC decision in R. v. Gladue. The researcher will attempt to mitigate against this potential harm by: (1) initially asking open-ended questions, which do not place key informants in such a compromised position; and (2) informing key informants, prior to the interview taking place, that if they do not feel comfortable responding to a certain line of questioning, to inform me of this fact, and the appropriate steps can and will be taken, in order to deal with the situation at hand (e.g. clarifying the question(s), moving on to the next question, or terminating the interview altogether), if need be.
Why participate in this research project: Individuals involved in the delivery of services to, or are in association with Indigenous peoples who find themselves in conflict with the law, are in a unique position to offer valuable insight into the strengths and weaknesses of best practice, implementation related issues, and ways and means to improve the existing adult criminal justice (legal) system, if need be, specifically as it relates to how *R. v. Gladue* sentencing principles are being applied, in practice, in PEI.

Who is conducting the research project: Frank T. Lavandier (Candidate for the Degree of Doctorate of Philosophy in Sociology), under the direct supervision of Dr. Tia Dafnos, PhD, Department of Sociology, University of New Brunswick (UNB).

In addition to being in the process of completing the course requirements for my Doctorate in Philosophy in Sociology at UNB, I was employed for slightly over 30 years with the PEI Department of Justice and Public Safety, in community-based corrections and primarily with Probation Services, retiring in 2010. I am currently employed, on a part-time basis, as a Sessional Instructor with the Sociology and Anthropology Department at the University of Prince Edward Island (UPEI), teaching courses in Introductory Sociology, Victimology, Criminology, Deviance & Social Control, Social Research Methods, and Sociology of Law. Information collected by way of the face-to-face interviews will be shared with (or accessible to) only those persons directly affiliated with the research project, i.e. myself and my Faculty Supervisor, Dr. Tia Dafnos.

Voluntary participation in the research project: Participation in the research project is completely voluntary.

Withdrawal from the research project: If at any time during the course of the research project, you want to withdraw, you are free to do so, up until the time when you have both reviewed and approved the transcript resulting from your own face-to-face interview. You can also choose not to respond to specific question(s), yet still continue with the interview, if it is your desire to do so.

Confidentiality: Admittedly, based upon its relatively small geographic, population, and legal community size, it will be extremely challenging to guarantee key informant anonymity; however, deliberate steps will be taken to help ameliorate the problem, including utilizing relatively brief direct quotations when presenting my research findings or, alternatively, paraphrasing; altering specific identifier details such as dates or locales; removing specific identifying details about individual Indigenous offenders and/or victims, which might be inadvertently disclosed, and, in turn, rather easily linked back to specific key informants; and relying upon generic position titles, e.g. crown attorney, rather than utilizing specific names, unless the latter option is your expressed wish. Please note none of the information you provide to me, during the course of the entire research project, will be linked/connected (by name) to you personally, unless, as already noted, that is your expressed wish. However, once again, considering the relatively small geographic size of PEI and correspondingly small number of persons from the legal community working with Indigenous peoples who come in conflict with the law in this Province, anonymity particularly cannot and therefore is not guaranteed.
My Faculty Supervisor, Dr. Tia Dafnos; Brittany Jakubiec, the person who will be completing the interview transcripts; and I will be the only persons with access to the voice-recording resulting from your own face-to-face interview, after which it will be securely stored (password protected) on my personal laptop computer until it has been transcribed. Once the voice-recording has been transcribed, it will be destroyed. During the transcription process, all identifying information will be removed, with any information which could potentially identify you as a key informant omitted or concealed. Following transcription, you will be afforded the opportunity to review your own interview transcript, in its entirety, in order to ensure its overall accuracy and also identify any additional identifiers you feel should be removed. Information related to your interview will be stored, by means of a specific code, which will subsequently enable me to keep track of your individual interview responses and, in turn, link/connect it with the resultant raw data. Upon completion of the research project, all the information related to your own face-to-face interview, including the corresponding code, will be destroyed. In addition, research project findings, without the inclusion of identifying information, may be published.

**Ethics approval:** This project has been reviewed and approved by the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) Ethics Review Committee; and also reviewed by the Research Ethics Board (REB) of the University of New Brunswick (UNB) and is on file as REB 2016-049.

**Dissemination of research project findings:** An electronic copy of the final dissertation, after identifiers have been removed, will be shared with each and every person who received a request to participate in the research project, thus providing a form of evaluation, as well as potential foundational material upon which additional research/work could emanate, principally for those persons in the best position to make the necessary systemic adjustments or changes, if deemed appropriate.

If you agree to participate in the face-to-face interview, please sign below. Thank-you.
Agreement

I, ___________________________ (print name)

a) understand the nature of this research project and hereby express my voluntary agreement to participate.
b) voluntarily agree to participate in the face-to-face interview.
c) voluntarily agree to have the entire face-to-face interview voice-recorded.
d) can request the voice-recording be interrupted or terminated at any time during the course of the entire face-to-face interview.
e) voluntarily agree to permit notes be taken during the course of the entire face-to-face interview.

My signature below verifies my consent.

Signature: ___________________________  (Research Project Participant)

Date: _____________

If you have any questions regarding this research project, or would like to receive additional information and/or clarification about participation therein, please contact me by telephone or e-mail:

Frank T. Lavandier, PhDc
Telephone: (902) 888-3079
E-mail: f.lavandier@unb.ca or flavandier@upei.ca

If you would prefer, you can also contact my Faculty Supervisor, Dr. Tia Dafnos:

Dr. Tia Dafnos
Telephone: (506) 447-3393
E-mail: tdafnos@unb.ca

If you would prefer to communicate with a UNB representative, who is not directly affiliated with this research project, please contact:

Dr. Nancy Nason-Clark
Telephone: (506) 453-5177
E-mail: nasoncla@unb.ca

Please submit a signed copy of this Participant Consent Form to me, in person, immediately prior to your face-to-face interview taking place, or, alternatively, beforehand by e-mail, at f.lavandier@unb.ca or flavandier@upei.ca
Appendix D:
Overview of topics/themes to be covered in face-to-face interview

1. What are some of the root causes of the chronic overrepresentation in the rate of Indigenous peoples in the Canadian adult criminal justice (legal) system, including prisons?

2. What has been the impact of section 718.2 (e) of the *Criminal Code* and three years later, the seminal 1999 Supreme Court of Canada (SCC) decision in *R. v. Gladue*, on the Canadian adult criminal justice (legal) system, more generally; and Indigenous peoples who find themselves in conflict with the law in the Province of Prince Edward Island (PEI), more specifically?

3. What is the main objective, or purpose, behind section 718.2 (e) and *R. v. Gladue*?

4. What change(s), if any, has/have taken place in the manner in which Indigenous peoples are dealt with when they appear before the court in PEI since the introduction of section 718.2 (e) and *R. v. Gladue*?

5. How would you compare the subject material contained/covered in a Pre-sentence Report (PSR) and that contained in a Gladue Report, the latter designed specifically for Indigenous accused in PEI?

6. What are some of the major advantages and disadvantages of PSRs, in their present form, in meeting the needs of the adult criminal justice (legal) system, more generally, and Indigenous peoples coming before the court in PEI, specifically?

7. What do you see as the main difference(s) between a PSR and a Gladue Report?

8. Who should complete Gladue Reports and what are some of the corresponding potential resource implications for PEI, going forward?

9. How important is it for the presiding Judge to know about the potential rehabilitative and/or treatment-related resources available in the Indigenous accused’s home community, whether it be on or off-reserve, particularly prior to sentencing?

10. How important is recognizing the ‘social context’ of Indigenous peoples when they appear before the court, particularly in properly implementing *R. v. Gladue*?

11. What part should Indigenous communities play in the administration of justice in the case of Indigenous peoples who come in conflict with the law?
12. Who has the responsibility to bring individual and systemic-based information before the court, in order to properly comply with section 718.2 (e) and *R. v. Gladue*, particularly when dealing with Indigenous peoples coming before the court in PEI?

13. What part should risk assessments play in dealing with Indigenous peoples who come before the court in PEI, particularly at sentencing?

14. How important is it for you to know about the history of Indigenous peoples in PEI (e.g. colonialism, IRSS, *Indian Act*, Reserve System, 60s Scoop, etc.), particularly when dealing with Indigenous peoples who appear before the court?

15. In order for section 718.2 (e) to achieve its overall legislative mandate, whereby the overrepresentation of Indigenous peoples in the Canadian adult criminal justice (legal) system, including prisons, is ameliorated, what needs to happen in PEI?

16. Is the establishment of a formal Gladue Program a viable possibility in PEI?

17. If a formal Gladue Program were to be established in PEI, what should it include or look like?

18. Would having access to a formal Gladue Program in PEI enable the Province to deal more effectively with Indigenous offenders, going forward, and why?
Appendix E: Crown Attorney Interview Guide

Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)

Crown Attorney Interview Guide

University of New Brunswick (Fredericton) PhD Program - Sociology

Contact Information

Frank T. Lavandier, PhDc
230 Marine Avenue
Summerside, PEI
C1N 6N9

Identifying Information

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Interviewer:
1. How many years of experience have you had as a crown attorney? __________
    (date/year)

2. When you attended law school, what, if any, courses did you take which specifically addressed Aboriginal-related issues and do you remember anything about the subject material or content?
    (Please elaborate)

3. What percentage of your caseload - approximately - is made up of Indigenous accused? ________% 

4. The literature clearly indicates since Bill C-41 received royal assent in 1996, and particularly with the introduction of section 718.2 (e) of the Criminal Code, the rate of imprisonment for Indigenous peoples in Canada has continued to rise; whereas, for non-Indigenous offenders, it has remained the same or, alternatively, decreased. In your current role as a crown attorney, what do you see as the root causes for this ongoing overrepresentation?
    (Please elaborate)

5. In your current role, what change, if any, has taken place in the manner in which Indigenous peoples are dealt with when they appear before the court in PEI, since the introduction of section 718.2 (e), and R. v. Gladue decision?
    (Please elaborate)

6. How much do you know about the colonial history and its ongoing impact on Indigenous peoples in Canada, generally speaking, and here in PEI, more specifically?
    (Please elaborate)

7. What part does the community play in the administration of justice in the case of Indigenous peoples who come before the court in PEI?
    (Please elaborate)
8. How important is recognizing the ‘social context’ of Indigenous peoples when they appear before the court, particularly in properly implementing *R. v. Gladue*?
   
   *(Please elaborate)*

9. How important is it for the presiding Judge to know about the potential rehabilitative and/or treatment-related resources available for Indigenous peoples who are living on and off-reserve, prior to sentencing and why?
   
   *(Please elaborate)*

10. As a crown attorney, for which type of offences do you find Indigenous peoples typically appear before the court?
    
    *(Please elaborate)*

11. In order for section 718.2 (e) to achieve its overall legislative mandate, whereby the overrepresentation of Indigenous peoples in Canadian prisons and the broader criminal justice (legal) system, is ameliorated, what needs to happen here in PEI?
    
    *(Please elaborate)*

12. What is your level of satisfaction with respect to the manner in which section 718.2 (e), as well as *R. v. Gladue*, are currently being employed/implemented here in PEI, particularly in cases involving Indigenous peoples?
    
    *(Please elaborate)*

13. Based upon your own experience, along with the three Gladue Reports I provided to you for purposes of this research project, how would you compare Gladue Reports and Pre-sentence Reports (PSRs)?
    
    *(Please elaborate)*
14. Does a PSR, which contains a so called Gladue component/section, meet your needs as a crown attorney, when Indigenous peoples come before the court and why or why not?
(Please elaborate)

15. If Gladue Reports were to be used more often in PEI in cases involving Indigenous Peoples, what do you see as their potential usefulness?
(Please elaborate)

16. Do you see any disadvantages in using Gladue Reports?
(Please elaborate)

17. Who do you think should prepare Gladue Reports and why?
(Please elaborate)

18. The Province of PEI (Department of Justice and Public Safety) commenced a one-year pilot project with the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) during the summer 2015, in order to complete Gladue Reports. In this regard, what do you see as the potential resource implications, going forward?
(Please elaborate)

19. What part should risk/need assessments play in dealing with Indigenous peoples who come before the court in PEI, particularly at sentencing?
(Please elaborate)
Over the last 15 years, there have been a number of specialized *Gladue* Courts established in Canada, particularly in the Province of Ontario. Indigenous case workers assigned to these same Courts have been hired and prepare what have since become known as Gladue Reports. In addition, across the country, there are a number of jurisdictions which have developed their own individualized Gladue Program design, which include: a full-fledged Aboriginal Persons/*Gladue* Court, with Indigenous Court-workers assigned to the Court; Gladue writers who prepare Gladue Reports (which is the case here in PEI); Probation Officers, who provide the Court with PSRs, which contain a Gladue *component/section*, which sometimes happens here in PEI; etc.

With this in mind, I would now like to ask a few related questions.

20. If a formal *Gladue* Court model or program were to be established in PEI, what do you think it should include or look like?

*(Please elaborate)*

21. If you are not in favour of establishing a formal *Gladue* Court model or program, could you explain why you don’t think it would work here in PEI?

*(Please elaborate)*

22. If such a model were to be established in PEI, what do you see as some of the potential benefits, particularly as it relates to Indigenous offenders?

*(Please elaborate)*

23. If such a model were to be established in PEI, what do you see as some of the potential challenges?

*(Please elaborate)*

24. Are there any other issues or points of discussion concerning section 718.2 (e) of the *Criminal Code* and/or the SCC *R. v. Gladue* decision you would like to raise, which we have not already discussed?

*(Please elaborate)*
25. Do you have any additional suggestions for me, or thoughts about anything we have not covered?

(Please elaborate)

The interview is now complete.

I want to thank you for your time.

I would like to remind you that as a key informant, identifiers other than your name will be utilized, unless prior permission to use your name has been granted beforehand.

Are there any comments or observations you would like to share at this time?

Once again, thank you for participating.
Appendix F: Elder Interview Guide

Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)

Elder Interview Guide

University of New Brunswick (Fredericton) PhD Program - Sociology

Contact Information

Frank T. Lavandier, PhDc
230 Marine Avenue
Summerside, PEI
C1N 6N9

Identifying Information

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Gender: □ Male □ Female
For the purpose of this interview, what would you prefer I refer to you as:
___________________________ (first name, surname, etc.)

1. A number of questions in this interview will deal with Indigenous peoples who have come in conflict with the law here in PEI. As you well know, there are a number of different terms used to describe Indigenous peoples - which term would you prefer I use? ________________________ (Aboriginal, First Nations, Indigenous, Mi’kmaq)

2. What does being an Elder mean to you?
(Please elaborate)

3. What are some of the key or pressing issues facing Indigenous communities here in PEI?
(Please elaborate)

4. As an Elder, how important do you think it is for the presiding Judge to hear the Indigenous offender’s ‘life-story’, including information about her or his ancestral history, prior to rendering a sentence and why?
(Please elaborate)

5. As an Elder, what are your thoughts about sentencing circles and how they impact or are influenced by Indigenous communities?
(Please elaborate)

6. The literature clearly indicates the rate of imprisonment for Indigenous peoples in Canada has continued to rise over the last several decades, when compared to non-Indigenous offenders, for whom the rate has essentially remained the same or, alternatively decreased. As an Elder, what do you see as some of the root causes for this overrepresentation?
(Please elaborate)
7. In 1996, the Canadian government passed legislation, by way of section 718.2 (e) of the Criminal Code, to help alleviate this overrepresentation problem, particularly as it relates to Indigenous peoples who find themselves in conflict with the law. Section 718.2 (e) specifically states, “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” Three years later, in 1999, the Supreme Court of Canada (SCC) decision in R. v. Gladue, constituted the first case to challenge section 718.2 (e) and its intended purpose to alleviate the ongoing problem of overrepresentation in Canada. R. v. Gladue, involved a 19-year-old Métis woman who had been charged with second-degree murder after fatally stabbing her common-law husband and for the first-time obligated Judges to consider all reasonable alternatives to placing Indigenous offenders in custody. However, over the course of the last 17 years, the number of Indigenous peoples in Canadian prisons continues to increase. Why do you think this is the case?

(Please elaborate)

8. How important is it for the presiding Judge to know about the potential rehabilitative and/or treatment-related resources available for Indigenous offenders living on or off-reserve, prior to sentencing and why?

(Please elaborate)

9. As an Elder, how important is it for everyone involved in the criminal justice (legal) system, particularly the Judge, to know about the history of Indigenous peoples in PEI?

(Please elaborate)

10. In order to resolve the problem of overrepresentation of Indigenous peoples in Canadian prisons, what needs to happen here in PEI?

(Please elaborate)
Over the last 15 years, there have been a number of specialized Gladue Courts established in Canada, particularly in the Province of Ontario, which deal exclusively with Indigenous peoples who have come in conflict with the law. Indigenous case workers assigned to these same Courts have been hired and prepare what have since become known as Gladue Reports. These Reports are used primarily for sentencing purposes, attempt to tell the Indigenous person’s ‘life story’; provide the presiding Judge with important individual background and systemic information, which may help explain why this particular Indigenous accused finds herself or himself in this situation, if not, in fact, providing a causal link between individual background and systemic factors and the criminal behaviour which has brought her or him to the attention of the Court. Some of these background factors can include; although, are certainly not limited to: the ongoing impact of colonialism; IRSS, intergenerational trauma and family dysfunction; 60s Scoop; Indian Act; Reserve System; racial discrimination; etc. In addition, across the country, there are a number of jurisdictions which have developed their own individualized Gladue Program design, which include: a full-fledged Aboriginal Persons/Gladue Court, with Indigenous Court-workers assigned to the Court; Gladue writers who prepare Gladue Reports (which is the case here in PEI); Probation Officers, who provide the Court with Presentence Reports, which are typically requested by the Court for sentencing purposes, may contain a brief Gladue component/section, which sometimes happens here in PEI; etc.

With this in mind, I would now like to ask a few related questions.

11. Based upon your own experience as an Elder, how do you think having access to a formal Gladue model or program in PEI would change how the Province deals with Indigenous peoples coming before the court in PEI, going forward?

(Please elaborate)

12. If established, what do you see as some of the potential challenges?

(Please elaborate)

13. Are there any other issues or points of discussion concerning section 718.2 (e) of the Criminal Code and/or the SCC R. v. Gladue decision you would like to raise, which we have not already discussed?

(Please elaborate)
14. Do you have any additional suggestions for me, or thoughts about anything we have not covered?

(Please elaborate)

The interview is now complete.

I want to thank you for your time.

I would like to remind you that as a key informant, identifiers other than your name will be utilized, unless prior permission to use your name has been granted beforehand.

Are there any comments or observations you would like to share at this time?

Once again, thank you for participating.
Appendix G: Gladue Writer Interview Guide

Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)

Gladue Writer Interview Guide

University of New Brunswick (Fredericton) PhD Program - Sociology

Contact Information

Frank T. Lavandier, PhDc
230 Marine Avenue
Summerside, PEI
C1N 6N9

Identifying Information

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| Gender: | |
|---------||
| □ Male | □ Female |
1. How many years of experience have you had as a Gladue writer? ____________
   (date/year)

2. A number of questions in this interview will deal with Indigenous peoples who have come in conflict with the law here in PEI. As you well know, there are a number of different terms used to describe Indigenous peoples - which term would you prefer I use? __________________________ (Aboriginal, First Nations, Indigenous, Mi’kmaq)

3. What motivated you to first become a Gladue writer?
   (Please elaborate)

4. What do you see as the primary role of the Gladue writer?
   (Please elaborate)

5. The literature clearly indicates since Bill C-41 received royal assent in 1996, and particularly with the introduction of section 718.2 (e) of the Criminal Code, the rate of imprisonment for Indigenous peoples in Canada has continued to rise; whereas, for non-Indigenous offenders, it has remained the same or, alternatively decreased. In your current role as a Gladue writer, what do you see as the root causes for this ongoing overrepresentation?
   (Please elaborate)

6. How much do you know about the colonial history and its ongoing impact on Indigenous peoples in Canada, generally speaking, and Indigenous here in PEI, more specifically?
   (Please elaborate)

7. What part does the community play in the administration of justice in the case of Indigenous peoples who come before the court in PEI?
   (Please elaborate)
8. How important is recognizing the ‘social context’ of Indigenous peoples when they appear before the court, particularly in properly implementing R. v. Gladue?
(Please elaborate)

9. How important is it for the presiding Judge to know about the potential rehabilitative and/or treatment-related resources available for Indigenous peoples who are living on and off-reserve, prior to sentencing and why?
(Please elaborate)

10. In order for section 718.2 (e) to achieve its overall legislative mandate, whereby the overrepresentation of Indigenous peoples in Canadian prisons and the broader criminal justice (legal) system, is ameliorated, what needs to happen here in PEI?
(Please elaborate)

11. What is your level of satisfaction with respect to the manner in which section 718.2 (e), as well as R. v. Gladue, are currently being employed/implemented here in PEI, particularly in cases involving Indigenous peoples?
(Please elaborate)

12. Based upon your own experience as a Gladue Writer, how would you compare Gladue Reports and Presentence Reports (PSRs)?
(Please elaborate)

13. Does a PSR, which contains a so called Gladue component/section, meet your needs as a Gladue Writer, when Indigenous peoples come before the court and why?
(Please elaborate)
14. If Gladue Reports were to be used more often in PEI in cases involving Indigenous peoples, what do you see as their potential usefulness?

(Please elaborate)

15. Do you see any disadvantages in using Gladue Reports?

(Please elaborate)

16. The Province of PEI (Department of Justice and Public Safety) commenced a one-year pilot project with the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) during the summer 2015, in order to complete Gladue Reports. In this regard, what do you see as the potential resource implications, going forward?

(Please elaborate)

17. What part should risk/need assessments play in dealing with Indigenous peoples who come before the court in PEI, particularly at sentencing?

(Please elaborate)

18. Who do you think should complete Gladue Reports and why?

(Please elaborate)

Over the last 15 years, there have been a number of specialized Gladue Courts established in Canada, particularly in the Province of Ontario. Indigenous case workers assigned to these same Courts have been hired and prepare what have since become known as Gladue Reports. In addition, across the country, there are a number of jurisdictions which have developed their own individualized Gladue Program design, which include: a full-fledged Aboriginal Persons/Gladue Court, with Indigenous Court-workers assigned to the Court; Gladue writers who prepare Gladue Reports (which is the case here in PEI); Probation Officers, who provide the Court with Pre-sentence Reports (PSRs), which contain a Gladue component/section, which sometimes happens here in PEI; etc.

With this in mind, I would now like to ask a few related questions.
19. If a formal *Gladue* Court model or program were to be established in PEI, what do you think it should include or look like?

*(Please elaborate)*

---

20. If you are not in favour of establishing a formal *Gladue* Court model or program, could you explain why you don’t think it would work here in PEI?

*(Please elaborate)*

---

21. If such a model were to be established in PEI, what do you see as some of the potential benefits, particularly as it relates to Indigenous offenders?

*(Please elaborate)*

---

22. If such a model were to be established in PEI, what do you see as some of the potential challenges?

*(Please elaborate)*

---

23. Are there any other issues or points of discussion concerning section 718.2 (e) of the *Criminal Code* and/or the SCC *R. v. Gladue* decision you would like to raise, which we have not already discussed?

*(Please elaborate)*

---

24. Do you have any additional suggestions for me, or thoughts about anything we have not covered?

*(Please elaborate)*

---
The interview is now complete.
I want to thank you for your time.

I would like to remind you that as a key informant, identifiers other than your name will be utilized, unless prior permission to use your name has been granted beforehand.

Are there any comments or observations you would like to share at this time?

Once again, thank you for participating.
Appendix H: Defence/Legal Aid Attorney Interview Guide

Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)

Defence/Legal Aid Attorney Interview Guide

University of New Brunswick (Fredericton)
PhD Program - Sociology

Contact Information
Frank T. Lavandier, PhDc
230 Marine Avenue
Summerside, PEI
C1N 6N9

Identifying Information

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Interviewer:
1. How many years of experience have you had as a Defence attorney? _________
   (date/year)

2. When you attended law school, what, if any, courses did you take which specifically addressed Indigenous peoples-related issues and do you remember anything about the subject material or content?
   (Please elaborate)

3. What percentage of your caseload - approximately - is made up of Indigenous accused? _________ %

4. The literature clearly indicates since Bill C-41 received royal assent in 1996, and particularly with the introduction of section 718.2 (e) of the Criminal Code, the rate of imprisonment for Indigenous peoples in Canada has continued to rise; whereas, for non-Indigenous offenders, it has remained the same or, alternatively decreased. In your current role as a Defence attorney, what do you see as the root causes for this ongoing overrepresentation?
   (Please elaborate)

5. In your current role, what change, if any, has taken place in the manner in which Indigenous peoples are dealt with when they appear before the court in PEI, since the introduction of section 718.2 (e), and subsequent R. v. Gladue decision?
   (Please elaborate)

6. How much do you know about the colonial history and its ongoing impact on Indigenous peoples in Canada, generally, and here in PEI, more specifically?
   (Please elaborate)

7. What part does the community play in the administration of justice in the case of Indigenous peoples who come before the court in PEI?
   (Please elaborate)
8. How important is recognizing the ‘social context’ of Indigenous peoples when they appear before the court in PEI?
(Please elaborate)

9. How important is it for the presiding Judge to know about the potential rehabilitative and/or treatment-related resources available for Indigenous offenders who are living on and off-reserve, prior to sentencing and why?
(Please elaborate)

10. As a Defence attorney, for which type of offences do you find Indigenous peoples typically appear before the court?
(Please elaborate)

11. In order for section 718.2 (e) to achieve its overall legislative mandate, whereby the overrepresentation of Indigenous peoples in Canadian prisons and the broader criminal justice (legal) system, is ameliorated, what needs to happen here in PEI?
(Please elaborate)

12. What is your level of satisfaction with respect to the manner in which section 718.2 (e), as well as R. v. Gladue, are currently being employed/implemented here in PEI, particularly in cases involving Indigenous peoples?
(Please elaborate)

13. Based upon your own experience, along with the 3 Gladue Reports I provided to you for purposes of this research project, how would you compare Gladue Reports and Pre-sentence Reports (PSRs)?
(Please elaborate)
14. Does a PSR, which contains a so called Gladue component/section, meet your needs as a Defence attorney, when Indigenous peoples come before the court and why?  
(Please elaborate)

15. If Gladue Reports were to be used more often in PEI in cases involving Indigenous peoples, what do you see as their potential usefulness?  
(Please elaborate)

16. Do you see any disadvantages in using Gladue Reports?  
(Please elaborate)

17. Who do you think should prepare Gladue Reports and why?  
(Please elaborate)

18. The Province of PEI (Department of Justice and Public Safety) commenced a one-year pilot project with the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) during the summer 2015, in order to complete Gladue Reports. In this regard, what do you see as the potential resource implications, going forward?  
(Please elaborate)

19. What part do risk/need assessments play in dealing with Indigenous peoples who come before the court in PEI, particularly at sentencing?  
(Please elaborate)
Over the last 15 years, there have been a number of specialized Gladue Courts established in Canada, particularly in the Province of Ontario. Indigenous case workers assigned to these same Courts have been hired and prepare what have since become known as Gladue Reports. In addition, across the country, there are a number of jurisdictions which have developed their own individualized Gladue Program design, which include: a full-fledged Aboriginal Persons/Gladue Court, with Indigenous Court-workers assigned to the Court; Gladue writers who prepare Gladue Reports (which is the case here in PEI); Probation Officers, who provide the Court with PSRs, which contain a Gladue component/section, which sometimes happens here in PEI; etc.

With this in mind, I would now like to ask a few related questions.

20. If a formal Gladue Court model or program were to be established in PEI, what do you think it should include or look like?

(Please elaborate)

21. If you are not in favour of establishing a formal Gladue Court model or program, could you explain why you don’t think it would work here in PEI?

(Please elaborate)

22. If such a model were to be established in PEI, what do you see as some of the potential benefits, particularly as it relates to Indigenous offenders?

(Please elaborate)

23. If such a model is established in PEI, what do you see as some of the potential challenges?

(Please elaborate)

24. Are there any other issues or points of discussion concerning section 718.2 (e) of the Criminal Code and/or the SCC R. v. Gladue decision you would like to raise, which we have not already discussed?

(Please elaborate)
25. Do you have any additional suggestions for me, or thoughts about anything we have not covered?

(Please elaborate)

The interview is now complete.

I want to thank you for your time.

I would like to remind you that as a key informant, identifiers other than your name will be utilized, unless prior permission to use your name has been granted beforehand.

Are there any comments or observations you would like to share at this time?

Once again, thank you for participating.
Appendix I: Judge Interview Guide

Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)

Judge Interview Guide

University of New Brunswick (Fredericton)
PhD Program - Sociology

Contact Information

Frank T. Lavandier, PhDc
230 Marine Avenue
Summerside, PEI
C1N 6N9

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1. How many years of experience have you had as a Provincial Court Judge? ____
   (date/year)

2. When you attended law school, what, if any, courses did you take which specifically addressed Indigenous-related issues and do you remember anything about the subject material or content?
   (Please elaborate)

3. What percentage - approximately - of the accused persons who appear before you, in Court, are Indigenous? ______ %

4. The literature clearly indicates since Bill C-41 received royal assent in 1996, and particularly with the introduction of section 718.2 (e) of the Criminal Code, the rate of imprisonment for Indigenous peoples in Canada has continued to rise; whereas, for non-Indigenous offenders, it has remained the same or, alternatively decreased. In your current role as a Provincial Court Judge, what do you see as the root causes for this ongoing overrepresentation?
   (Please elaborate)

5. In your current role, what change, if any, has taken place in the manner in which Indigenous peoples are dealt with when they appear before the court in PEI, since the introduction of section 718.2 (e), and subsequent R. v. Gladue decision?
   (Please elaborate)

6. How much do you know about the colonial history and its ongoing impact on Indigenous peoples in Canada, generally, and here in PEI, more specifically?
   (Please elaborate)

7. What part does the community play in the administration of justice in the case of Indigenous peoples who come before the court in PEI?
   (Please elaborate)
8. How important is recognizing the ‘social context’ of Indigenous peoples when they appear before the court, particularly in properly implementing R. v. Gladue?
   (Please elaborate)

9. How important is it for you, as the presiding Judge, to know about the potential rehabilitative and/or treatment-related resources available for Indigenous offenders who are living on and off-reserve, prior to sentencing and why?
   (Please elaborate)

10. As a Judge, for which type of offense do you find Indigenous peoples typically appear before the court?
    (Please elaborate)

11. As a Judge, what things do you consider when sentencing Indigenous accused persons, when compared to non-Indigenous accused persons?
    (Please elaborate)

12. As a Judge, how important is information-sharing in properly applying section 718.2 (e) and R. v. Gladue, particularly when dealing with Indigenous peoples who appear before the court?
    (Please elaborate)

13. In order for section 718.2 (e) to achieve its overall legislative mandate, whereby the overrepresentation of Indigenous peoples in Canadian prisons and the broader criminal justice (legal) system, is ameliorated, what needs to happen here in PEI?
    (Please elaborate)
14. What is your level of satisfaction with respect to the manner in which section 718.2 (e), as well as *R. v. Gladue*, are currently being employed/implemented here in PEI, particularly in cases involving Indigenous peoples?  
(Please elaborate)

15. Based upon your own experience, along with the three Gladue Reports I provided to you for purposes of this research project, how would you compare Gladue Reports and Pre-sentence Reports (PSRs)?  
(Please elaborate)

16. Does a PSR, which contains a so called *Gladue component/section*, meet your needs as a Judge, when Indigenous peoples come before the court and why?  
(Please elaborate)

17. If *Gladue* Reports were to be used more often in PEI in cases involving Indigenous peoples, what do you see as their potential usefulness?  
(Please elaborate)

18. Do you see any disadvantages in using *Gladue* Reports?  
(Please elaborate)

19. Who do you think should prepare *Gladue* Reports and why?  
(Please elaborate)
20. The Province of PEI (Department of Justice and Public Safety) commenced a one-year pilot project with the Mi’kmaq Confederacy of Prince Edward Island (MCPEI) during the summer 2015, in order to complete Gladue Reports. In this regard, what do you see as the potential resource implications, going forward? (Please elaborate)

21. What part do risk/need assessments play in dealing with Indigenous peoples who come before the court in PEI, particularly at sentencing? (Please elaborate)

Over the last 15 years, there have been a number of specialized Gladue Courts established in Canada, particularly in the Province of Ontario. Indigenous case workers assigned to these same Courts have been hired and prepare what have since become known as Gladue Reports. In addition, across the country, there are a number of jurisdictions which have developed their own individualized Gladue Program design, which include: a full-fledged Aboriginal Persons/Gladue Court, with Indigenous Court-workers assigned to the Court; Gladue writers who prepare Gladue Reports (which is the case here in PEI); Probation Officers, who provide the Court with PSRs, which contain a Gladue component/section, which sometimes happens here in PEI; etc.

With this in mind, I would now like to ask a few related questions.

22. If a formal Gladue Court model or program were to be established in PEI, what do you think it should include or look like? (Please elaborate)

23. If you are not in favour of establishing a formal Gladue Court model or program, could you explain why you don’t think it would work here in PEI? (Please elaborate)
24. If such a model were to be established in PEI, what do you see as some of the potential benefits, particularly as it relates to Indigenous peoples?

(Please elaborate)

25. If such a model is established in PEI, what do you see as some of the potential challenges?

(Please elaborate)

26. Are there any other issues or points of discussion concerning section 718.2 (e) of the Criminal Code and/or the SCC R. v. Gladue decision you would like to raise, which we have not already discussed?

(Please elaborate)

27. Do you have any additional suggestions for me, or thoughts about anything we have not covered?

(Please elaborate)

The interview is now complete.

I want to thank you for your time.

I would like to remind you that as a key informant, identifiers other than your name will be utilized, unless prior permission to use your name has been granted beforehand.

Are there any comments or observations you would like to share at this time?

Once again, thank you for participating.
Appendix J: Mi’kmaq Reserves of PEI

![Map of Mi'kmaq Reserves of PEI]

Legend:
- Reserve
- City
- Road
- Coastline & Rivers

- Abegweit Mi’kmaq First Nation Population: 270
- Lennox Island First Nation Population: 325

Stats Canada 2016 Census
Curriculum Vitae

Candidate’s full name
Francis Thomas Lavandier

Universities attended
University of Saskatchewan (Saskatoon), 1983, Master in Sociology
University of Prince Edward Island, 1976, Master in Sociology

Publications

Conference Presentations

Scholarly Awards
2010 & 2011 Nominee for the University of Prince Edward Island Merit Award for excellence in teaching
2015 Nominee for the University of Prince Edward Island Student Union Staff/Faculty of the Year Award.
2016-17 Peter McGahan Graduate Scholarship in Sociology (UNB)