

The failure of Gladue: A critical examination of Indigenous Peoples Courts in Ontario
by
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Author's Declaration

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Abstract

In 2001 the first Gladue court opened as an intensive effort to implement the Supreme Court of Canada's 1999 *Gladue* decision. This decision calls for a substantive equality approach to sentencing Indigenous people that considers the role of colonialism in their overrepresentation in the legal system. However, despite *Gladue* and the introduction of these Indigenous Peoples' Courts, the overincarceration of Indigenous people has continued to steadily increase over the last 25 years. Notably, these rising incarceration rates have a gendered dimension as the incarceration of Indigenous women is growing at triple that of Indigenous men. Indigenous women now account for over half of admissions to federal women's correctional facilities. While Gladue courts have existed for more than two decades, research on how they operate remains limited with no studies examining the role of gender within them.

This dissertation addresses this gap through a critical, intersectional feminist examination of how Gladue courts operate and are understood by their court teams. The analysis draws on courtroom observation, 20 semi-structured interviews with individuals who work in the Gladue courts, and six qualitative surveys completed by judges. The data demonstrates that the criminal legal system cannot mitigate the harm of colonialism despite its efforts. Three main findings emerge within this research. Firstly, Gladue courts have been unsuccessful at reducing the overrepresentation of Indigenous women in the Canadian criminal legal system due to their failure to consider the multiple ways in which intersecting structural oppressions render women uniquely vulnerable to criminalization. Secondly, Gladue courts fail to achieve a restorative and decolonial approach because they remain embedded in the broader criminal legal system, which is rooted in colonial logics. The transformative potential of the courts is in constant tension with the broader goals and logics of punishment, marginalization, and social control. Finally, individual discretion and close working relationships among court team members are central to achieving Gladue courts' substantive equality objectives; this often takes place informally and off-the-record through actions such as withdrawing charges. While the courts are unable to accomplish their mandate due to the inherent limitations of the criminal legal system, this failure is aggravated by the inclusion of court team members who oppose the substantive equality logics of the court and its abandonment of the foundational features of specialized courts, such as assigned court teams. This dissertation highlights several considerations for developing a decolonial approach to addressing the overincarceration of Indigenous people, including community-based Indigenous-led responses. This work contributes to ongoing sociolegal conversations about the ability of— as well as the contradictions associated with— using the criminal legal system and courts to mitigate social injustices and oppression in society. Furthermore, it contributes to broader theoretical debates on the effects of problem-solving courts on the lives of criminalized individuals located at the intersections of multiple forms of structural oppression.

Keywords: Gladue, specialized courts, gender, colonization, punishment

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Introduction

“We live in a country whose laws and institutions perpetuate violations of basic human and Indigenous rights. These violations amount to nothing less than the deliberate, often covert campaign of genocide against Indigenous women, girls, and 2SLGBTQQIA people. This is not what Canada is supposed to be about; it is not what it purports to stand for.” (The Honourable Judge Marion Buller, Chief Commissioner for the National Inquiry into Missing and Murdered Indigenous Women and Girls)

Indigenous people¹, and Indigenous women in particular, face unprecedented rates of overincarceration in Canada. This overrepresentation within the criminal legal system reflects the ongoing impacts of colonialism and systemic discrimination, which have also led to increased violence, addiction, homelessness, and child welfare involvement in Indigenous communities. The Canadian state’s ongoing colonial efforts have systematically discriminated against Indigenous communities. In response, Gladue Courts, formally known as Indigenous Peoples’ Courts, emerged to ensure judges consider the impact of colonialism when determining criminal sentences. This substantive equality approach aims to create a fairer legal process that can reduce the number of Indigenous individuals in custody by recognizing that Indigenous people require distinct measures to achieve an equal playing field in the legal system due to the ongoing impacts of colonialism. This approach is in contrast to the traditional formal equality approach which

¹ I use the term Indigenous people (singular) to refer to Indigenous individuals, while Indigenous peoples (plural) is used in this work to refer to the three distinct Indigenous groups within Canada, namely First Nations, Inuit, and Métis.

defines impartiality as treating everyone ‘the same’ in the legal system regardless of their experiences with structural oppression.

This effort to combat overincarceration in Canada has nevertheless failed and the number of Indigenous people in custody continues to increase. Indigenous individuals now comprise 32 percent of admissions to Canadian federal correctional services, despite only representing approximately four percent of the population (Office of the Correctional Investigator (OCI), 2022). Indigenous women face even higher and faster-growing incarceration rates, accounting for half of admissions to federal correctional services, with Indigenous girls accounting for 62 percent of female youth admissions (OCI, 2022; StatsCan, 2022). Indigenous men, women, and children continue to be placed in custody at exceptionally high rates. It is clear from these statistics that the Gladue courts have failed to meet their primary goal of reducing overincarceration.

I became aware of the overincarceration of Indigenous people as a Master’s student. The extreme overincarceration of Indigenous women in particular disturbed me— and it has only continued to grow. The proportion of Indigenous women in federal custody has grown by more than 31 percent since I began planning this research in 2016. I decided to pursue a PhD to explore inequitable legal responses so that my work could be used to advocate for more equitable responses to women’s criminalization. Specifically, I was interested in looking at women’s experiences with diversion programs. It became clear to me early on— as I began to think through potential research projects— that I would need to take into consideration that most of the criminalized women in Canada are Indigenous and undertake an intersectional feminist study of

the Canadian legal system. I dug deeper into the overincarceration statistics along with what restorative justice and legal system alternatives were taking place in surrounding communities and I arrived at the topic of women and Gladue courts.

Research on Gladue court processes is limited, with few studies examining their impact on Indigenous women, despite the fact that the courts have been in existence since 2001. This oversight is concerning given that critical research on problem-solving courts consistently shows that, while these initiatives are claimed to be beneficial, in practice they tend to extend the punitive reach of the criminal legal system in the lives of defendants and exacerbate their vulnerabilities to further criminalization (Singh, 2018; Quirouette et al., 2016; Moore, 2006; Hannah Moffat & Maurutto, 2012).

My dissertation is an intersectional investigation of why Gladue courts have failed to reduce overincarceration rates despite their unique substantive equality approach and explicit efforts to do so. The purpose of this dissertation is to better understand how the various agents and stakeholders in Gladue courts in Central and Southern Ontario influence and shape the court process and its cases, with particular attention to Indigenous women. This dissertation is informed by critical and feminist sociolegal theories such as Catherine MacKinnon (1983) and Carol Smart (1989), and anti-colonial and anti-carceral scholars such as Vicki Chartrand (2019) and Carmela Murdocca (2013). I contribute to broader theoretical debates on the effects of the legal system and specialized courts on the lives of defendants located at the intersections of multiple forms of structural oppression that emerge in the work of scholars such as Kimberlé Crenshaw (1991), Gillian Balfour (2008, 2021), and Rashmee Singh (2017, 2018). My analysis

in this dissertation advances and provides nuance to ongoing sociolegal conversations about the ability of— as well as the contradictions associated with— using the justice system and courts to mitigate social injustices and oppression in society, particularly in a court with a substantive equality mandate. To inform this analysis, I draw on over 60 hours of courtroom observation, 20 semi-structured interviews with individuals who worked in the Gladue courts, and six surveys completed by judges.

This research contributes a new perspective in so far that it examines how a specialized court operating with a substantive equality mandate endeavours to “help, rather than punish” criminalized individuals. The substantive equality approach used in the Gladue courts recognizes that Indigenous people require distinct measures to achieve an equal playing field within the legal system and draws on social sciences knowledges to understand how colonialism has contributed to the overrepresentation of Indigenous people within the legal system. This acknowledgement of the social and structural forces inherent in the criminalization of Indigenous people is unique when compared to the majority of specialized court models, which largely reduce the ‘root causes’ of crime to individual-level factors such as mental health and addiction and rarely consider how broader structural oppression has influenced the life of the individual before the court in a way that contributed to their criminalization. This research is also one of the only existing studies to qualitatively examine Gladue courts through courtroom observation, interviews, and qualitative surveys. Finally, this study is the first to focus on the role of gender within Gladue courts; it provides an intersectional analysis of how structural inequalities are mutually constructed within Gladue courts, and how they emerge as factors within cases.

In summary, this dissertation provides a critical analysis of Gladue courts, examining why they fail to reduce the overrepresentation of Indigenous people in the Canadian legal system. I conclude with the claim that a justice system cannot reduce the ongoing harms of colonialism by merely appropriating feminist and decolonial knowledges or by cutting corners and deviating from foundational structures of specialized courts, such as assigned court teams which appear in the courts regularly and have specialized training.

Overview of Dissertation

The purpose of this dissertation is to better understand how the various players in Gladue court influence and shape the court process and its cases, especially those involving Indigenous women, and to contribute to broader theoretical debates on the effects of problem-solving courts on the lives of criminalized Indigenous individuals. It is composed of an introduction, three chapters, and a conclusion.

The first chapter looks at gendered criminal legal responses within the Gladue courts. Specifically, I examine how Indigeneity and gender are mutually constructed and understood in the Gladue court process, and how structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases. I argue that, while Gladue courts have been unsuccessful at reducing overincarceration generally, this is even more true in the case of women due to the courts' failure to take an intersectional approach that considers the multiple ways in which structural oppressions related to gender and Indigeneity render women uniquely vulnerable to criminalization. These courts make gender invisible in the legal process because the courts are

generally either unable or unwilling to meaningfully differentiate Indigenous women's experiences with crime and criminalization from those of Indigenous men. The lack of an intersectional approach results in women being stripped of Gladue benefits that are available to men. Preventing women from accessing these benefits may contribute to the increased rates of incarcerated Indigenous women compared to men.

The second chapter examines Gladue courts in relation to the broader limitations and goals of the colonial Canadian legal system that remain embedded within the courts. The courts' transformative potential is undermined by legal goals of punishment, marginalization, and control. In this chapter, I argue that Gladue courts have been unable to achieve a restorative decolonial approach because they are ultimately still embedded in the broader colonial legal system, and as a result, these goals persist. Thus, the transformative potential of the courts is in constant tension with the underlying goals that seek to punish and control those who are criminalized. In these courts, the state appropriates anti-oppressive rhetoric to use in an equity-seeking performance that is detached from anti-oppressive goals. Instead, this rhetoric is used to expand the state's control. This chapter demonstrates that Gladue courts continue to be colonial, oppressive, and traumatic just like traditional courts.

In the third chapter, I explore the influence that the specific individuals within Gladue courts have on the courts' operations and proceedings. I argue that individual discretion and close working relationships are central to achieving Gladue courts' substantive equality objectives and that this often takes place informally and off-the-record through actions such as withdrawing charges. I show that the Gladue courts are informed by a substantive equality

approach in theory; however, in practice the courts fail to achieve this goal. This failure is due in part to the court's lack of adherence to administrative procedures, namely an assigned court team. An assigned court team is a court team that has had specialized training in the relevant subject matter, in this case the manifestations of colonialism in the lives of criminalized Indigenous individuals, and which appears regularly when the court sits as opposed to legal professionals who are rotated through randomly and unpredictably. While the courts' inability to achieve their mandate is rooted in the inherent limitations of the legal system, it is aggravated by the inclusion of the "wrong" people on the court team who oppose the intended mandate of the court and perpetuate formal equality reasoning and discrimination.

Together, these chapters provide a deeper understanding of why Gladue courts have failed to reduce overincarceration. Gladue courts fail to take an intersectional approach or advance a true substantive equality mandate in practice. Instead, they appropriate anti-oppressive knowledges and at times disregard even the foundational processes of Gladue court such as an assigned court team. This dissertation is decolonial and demonstrates the need to look beyond the colonial legal system for solutions to the colonial harm inflicted on Indigenous communities in order to achieve true reconciliation.

Understanding Gladue

In order to understand the chapters that comprise this dissertation and their central finding that Gladue courts are failing, it is essential to first understand why Gladue courts were created and the logics that inform them. These courts emerged in 2001 as an attempt to address the

eponymous 1999 Supreme Court of Canada ruling in *R. v. Gladue*. This decision ruled that all criminal courts must consider the Indigenous status of the offender in sentencing (*R. v. Gladue*, 1999). The Supreme Court then further clarified the sentencing obligations required when sentencing an Indigenous individual in the 2012 case of *R. v. Ipeelee*. Both the *Gladue* and *Ipeelee* cases involved an appeal based on section 718.2 (e) of the Canadian Criminal Code which calls for a consideration of all reasonable alternatives to incarceration with “particular attention to the circumstances of Aboriginal offenders.” In paragraph 60 of the *Ipeelee* decision, the Court sets out what this entails:

courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel (*R. v. Ipeelee*, 2012).

This list of considerations highlights the structural and systemic challenges Indigenous people face at disproportionate rates. The significance of *Gladue* and subsequent related decisions² is

² A similar rationale emerged to consider the systemic marginalization of Black Canadians in the decision in *R. v. Hamilton* (M.A).

that they explicitly call for the use of substantive equality in sentencing, which aims for equality in outcome rather than equality in process (Daum & Ishiwata, 2010). This approach seeks to mitigate the harms present in society, to actively battle oppression, and advance the position of marginalized groups rather than apply the same approach to everyone or blame individuals for their marginalization. Specifically, Gladue courts attempt to consider the structural challenges created by colonialism that marginalize Indigenous communities leading to greater contact with the criminal legal system (Rudin, 2006).

The incorporation of this substantive equality approach within the courts is central to my research focus as it is a key point of analysis throughout the chapters. This approach makes Gladue courts a unique and particularly interesting research topic as other specialized courts continue to conceptualize involvement in crime as an individual choice (Wexler, 1993). Specialized courts, also called problem-solving courts, are intended to divert from the punishment-focused traditional legal approach in favour of a more rehabilitative and therapeutic court model. Examples of specialized courts include drug courts, domestic violence courts, mental health courts, and prostitution courts. These courts aim to deal with the “root causes” of crime, calling for legal professionals to take on a role similar to social workers by relying on principles and knowledges borrowed from medicine, psychology, and social work (Wexler, 1993; Moore, 2006; Singh 2017, 2018).

Gladue courts share many similarities with other specialized courts, such as attempting to provide a therapeutic environment that aims to “help, not punish” criminalized individuals (Wexler, 1993; Moore, 2006; Singh 2017, 2018). However, I argue that other specialized courts

rely solely on individualized therapeutic interventions and knowledges (Moore, 2006; Singh 2017, 2018). Gladue courts claim to draw on social science knowledges about the marginalization of Indigenous people, stemming from the disadvantages caused by colonialism leading to their overrepresentation in the legal system, and to employ distinct measures to achieve equality before the law.

In contrast to the substantive equality approach informing Gladue courts, and the therapeutic jurisprudence approach used in most specialized courts, traditional criminal courts often operate under a formal equality framework (although this is dependent on the approach taken by any given judge). Traditional courts value impartiality, neutrality, and objectivity in sentencing, by viewing equality as something that is achieved by providing the same impartial legal process for everyone regardless of race, class, or gender (Daum & Ishiwata, 2010). Furthermore, the law is understood to operate outside of human bias in a way that is value-free. Judges are seen to apply the law in a formulaic manner to uncover the truth and deliver sentences based on the facts of the case. However, sociolegal scholarship has pointed out the issues with this perspective and has been particularly critical of formal equality's suggestion that legal processes are impartial and value-free. Research has shown that the law closely reflects the sexism and racism present in society to disadvantage marginalized groups within the courtroom (Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983). This legal objectivity literature heavily informs chapter three which highlights the influence individuals have on the courts' processes, as well as the risks of turning to an assigned court team that is not committed to the substantive equality mandate of the court.

Theoretical Foundations: Critical and Feminist Sociolegal Theory

Gladue courts do not take an intersectional or substantive equality approach. Rather, they appropriate anti-oppressive knowledges and at times disregard the foundational processes of specialized courts, such as assigned court teams. The following literature review provides a research-informed, theoretical foundation for understanding why Gladue courts have failed to reduce the overrepresentation of Indigenous people in the legal system.

Intersectionality is a foundational theory that guides the analysis in this dissertation, as an intersectional approach examines how various axes of oppression work together to generate unique experiences of oppression (Crenshaw, 1991). These axes of oppression include race, gender, sexual orientation, and class, among others. As discussed in chapter one, intersectionality suggests that the experience of Indigenous women will be different from that of Indigenous men, and furthermore that the experience of Indigenous women will be different from that of white women. When the law attempts to acknowledge the effects of oppression based on race and gender it typically only addresses one axis of oppression. Thus, the legal system fails to capture the unique experiences of racialized women. This failure indicates the need to examine gender within Gladue courts, which focus on Indigenous status, to determine if the courts also fail to capture the unique experiences of women facing multiple axes of oppression.

My research is also heavily informed by feminist sociolegal scholars such as Carol Smart (1989) who discusses how the law impacts women. She argues that the law operates from the male perspective to legitimize patriarchy, while simultaneously disqualifying feminist knowledges. That is, the law will fail to help women since it is inherently patriarchal.

Furthermore, the law may cause further harm in its efforts to advance the status of marginalized groups because of its patriarchal nature, as demonstrated in the first chapter of this dissertation. Thus, Smart (1989) introduces the term “juridogenesis” to describe the phenomena of the law aggravating the problems it seeks to solve. This concept is used throughout this dissertation to draw attention to how Gladue principles harm Indigenous people, but especially in chapter one to examine how the legal system harms women.

Chartrand’s (2019) work is a touchstone that provides a guiding theoretical understanding of the relationship between the legal system and Indigenous communities. Chartrand (2019) also argues that the legal system aggravates harm to Indigenous people. This work is especially central to chapter two which outlines the implications of Gladue courts embeddedness in the colonial legal system. Chartrand (2019) argues that legal reforms, such as Gladue measures, fail to address the harms of colonialism since the criminal legal system itself is a continuation of colonization. Imprisonment in Canada was first used primarily for white settlers but then became a key tool of colonization in place of Indigenous assimilation and segregation policies. The criminal legal system thus replaces older structures of colonization, such as residential schools and reserves, as a key tool of settler-colonialism and the ongoing displacement of Indigenous people which enable settlers to remain in control of the land.

Similar to my findings, Chartrand (2019) is critical of the substantive equality approach advanced by Gladue measures. She argues that such measures err in viewing colonialism as a historic phenomenon rather than an ongoing process enacted in Canada through the legal system. The courts play a central role in advancing settler-colonialism through their ability to remove

Indigenous people from their land by means of imprisonment. Chartrand (2019) concludes that legal reforms will be ineffective because colonialism cannot be mitigated through more colonizing; my dissertation substantiates this argument.

My conceptualization of the relationship between the legal system and criminalized Indigenous people is also rooted in Murdocca's (2013) findings. Aligned with Chartrand (2019), Murdocca claims that colonial legal systems cannot be used to address the harms of colonialism. Murdocca (2013) looks specifically at Gladue sentencing reforms and argues that, while they appear to accommodate Indigenous people, section 718.2 counterintuitively reinforces racism in the criminal legal system and increases incarceration rates, especially among Indigenous women. She suggests that section 718.2's focus on "culture differences" allows the justice system to overlook the structural factors, such as victimization, patriarchy, colonialism, and racism, which criminalize women (Murdocca, 2013). Her work examines how "Indigenous culture" serves as a generalized stereotypical construct rather than a true representation of the many complex Indigenous cultures. This conclusion is reflective of my own findings in chapter two. Indigenous peoples are harmed by this misguided construction of culture, which allows the state to continue its colonial rule unquestioned while appearing on the surface to address the issue of overincarceration (Murdocca, 2013). Both Murdocca and Chartrand contend that legal reforms such as Gladue are simply extensions of colonialism and will thus fail to address colonial oppression. This theoretical foundation guides my research and summarizes the sociolegal conversation to which my findings contribute.

Martel and Brassard (2008) as well as Hannah-Moffat (2000) further examine how concepts of “culture”, as well as the feminist idea of “women’s empowerment,” are appropriated by the Canadian legal system to promote the control and criminalization of Indigenous people. While their work does not examine Gladue specifically, it is still useful for understanding my own research because Gladue is promoted as an Indigenous cultural court. Martel and Brassard (2008) explain how the criminal legal system has created an inauthentic version of “Indigenous culture” by selecting the aspects that are most easily implemented in existing colonial legal practices. This framing resulted in the creation of an inauthentic homogenous Indigenous identity that became the basis for understanding criminalized Indigenous people across Canada, despite Indigenous communities having diverse and complex cultural practices. The government continues to operate in colonial way but adopts small changes to appear culturally responsive vis-à-vis the problem of overincarceration. This finding parallels my own about the appropriation of culture and anti-oppressive knowledges in Gladue courts in chapter two.

Hannah-Moffat (2000) looks at how the Correctional Service of Canada (CSC) uses Indigenous and feminist knowledges in women’s prisons and prison programming. Her findings inform both chapter one and chapter two. She argues that CSC appropriates feminist terms such as “women’s empowerment” and “agency,” but then uses these to encourage women to take personal responsibility for their actions. Thus, women’s empowerment is co-opted, disconnected from its significance in battling patriarchal structures, and is instead focused on individual level factors such as promoting self-esteem. Women are forced to take personal responsibility for the marginalization they are facing while CSC ignores the role of sexism, racism, and colonialism in

their criminalization. In summary, Hannah-Moffat (2000) shows that feminist concepts such as empowerment and agency have been appropriated along with Indigenous culture by CSC to reinforce and disguise the power of the state, rather than to challenge oppression. This research provides a foundation for understanding how efforts such as Gladue courts— which claim to draw on Indigenous knowledges and substantive equality— may fail to address oppression, and instead act as a continuation of colonization, control, and criminalization leading to their failure.

Balfour (2008, 2021) and Kaiser-Derrick (2019) expand this understanding even further through examining how this disconnect between legal goals and actual legal practices takes place, specifically within the application of Gladue principles in the sentencing of women. Their work is important to understanding my own research in chapter one as Gladue courts are a more intensive approach to considering the Gladue factors these scholars review. These studies demonstrate the importance of using an intersectional approach to analysing Gladue legal practice. Balfour (2021) highlights how factors such as addiction are treated differently by the court based on gender, comparing the *Moostoos* case involving a criminalized woman, and the *Ipeelee* decision involving a man. In the case of *Ipeelee*, the courts focus on addiction as a reason to consider rehabilitation. The view is that if the addiction can be dealt with, then crime will stop. However, in the case of *Moostoos*, no Gladue report was completed, and her addiction is framed as a result of bad choices that make her more morally responsible for her actions and require her incarceration.

Kaiser-Derrick (2019) delves deeper into the systemic male-centric application of Gladue legal reforms through a review of 175 sentencing decisions in cases involving Indigenous

women. She finds that judges use a “language of predictability” to describe the addiction and trauma faced by these women as taken-for-granted. Both Balfour (2008, 2021) and Kaiser-Derrick (2019) find that women’s experiences of colonialism are dismissed as not being Gladue factors, despite the high rate of sexual and domestic victimization that Indigenous women face. These experiences of victimization may lead to criminal conduct yet are not considered in sentencing. This criminalization of Indigenous women occurs despite the willingness of courts to view the perpetration of similar crimes by men as a product of colonialism. Judges acknowledge colonialism in sentencing men while ignoring how it manifests in the lives of women. This failure to consider the intersectional marginalization Indigenous women face results in Indigenous women being stripped of their right to have the impact of colonialism considered in their sentences.

This body of existing literature outlines the failures of the legal system to achieve equity for Indigenous people, and marginalized groups more generally, as well as the failure of ostensible anti-colonial measures such as Gladue legal reforms to address the harms they themselves cause. My dissertation explains how this failure happens in practice through examining the courts’ inability to take an authentically intersectional or decolonial approach to the legal process.

Finally, my research is underpinned by decolonial scholarship from Indigenous scholars such as Patricia Monture-Angus, Joyce Green, John Borrows, and Val Napoleon who provide a framework for understanding decolonization. The term decolonization is used throughout this dissertation to mean a shift in power from the colonial state to Indigenous communities. In the

words of Monture-Angus, decolonization “is a state of being free from responding to colonial forces” (1999a, p. 73). She explains this in more detail through the example of the Two Row Wampum:

It is two rows of purple shell imbedded in a sea of white. One of the two purple paths signifies the European sailing ship that came here. In that ship are all the European things - their laws, languages, institutions and forms of government. The other path is the Mohawk canoe and in it are all the Mohawk things - our laws, institutions and forms of government. For the entire length of that wampum, these two paths are separated by three white beads. Never do the two paths become one. They remain an equal distance apart. And those three white beads represent friendship, good minds, and everlasting peace, (1999b, p. 37).



(IMAGE: Bonaparte, 2005)

Monture-Angus highlights that in the Wampum, a treaty established in 1613 between the Haudenosaunee and Dutch, Indigenous and non-Indigenous communities both remain sovereign over their own affairs while maintaining a peaceful friendship.

The restoration of Indigenous law is seen as central to decolonization (Green, 2017; Borrows, 2016; Napoleon, 2013). Napoleon (2013) discusses the role of Indigenous legal orders which she defines as “law that is embedded in social, political, economic, and spiritual institutions” as opposed to Western conceptions of law which are state-centered and comprised of a separate institution governed by legal professionals. Many Indigenous legal orders are comprised of values that guide behavior in a more informal and implicit way, rather than a formal written set of rules (Napoleon, 2013). In her discussion of Indigenous legal orders, Napoleon (2013) also clarifies that while many people think this would mean “trying to return to the past” (p. 145), this is not the case. Instead, restoring Indigenous legal orders is focused on tapping into the principles and strengths Indigenous legal orders offer to create a modern approach that deals with the contemporary issues that communities are facing. An example of this is John Borrows’s (2019) application of the Anishinaabe seven grandfather teachings—*Zaagi’idiwin* (love), *Debwewin* (truth), *Zoongide’ewin* (bravery), *Dabaadendizowin* (humility), *Nibwaakaawin* (wisdom), *Gwayakwaadiziwin* (honesty), and *Manaaji’idiwin* (respect)—as tools for modern legal reasoning both within and beyond the colonial system.

However, decolonization is not as simple as just shifting power to existing Indigenous governance structures. Colonial practices such as sexism and homophobia are now deeply engrained within many Indigenous communities and governments (Green, 2017; Borrows, 2016;

Napolean, 2013). There is a need to ensure that women and other marginalized communities are empowered in the new Indigenous legal orders that emerge in place of the colonial law. Green (2017) highlights that decolonization must be guided by Indigenous feminism and an explicitly gendered analysis of social and political orders. Green (2017) concludes that without this gendered analysis decolonial movements are likely to continue to replicate male dominance and privilege. This body of decolonial literature provides a basis for beginning to think through solutions to truly addressing the overrepresentation of Indigenous individuals within the Canadian legal system by addressing colonialism itself.

Research Design and Methodology

The existing theory and empirical research provide a critical overview of Gladue courts as well as other legal reforms that attempt to mitigate marginalization through the criminal legal system. Existing sociolegal theory and research are critical of legal reforms that attempt to address structural oppression or advance the rights of marginalized groups because they continue to advance dominant oppressive ideology. Statistical research also demonstrates that Gladue courts have failed to stall increasing rates of Indigenous incarceration let alone begin to reduce them, especially among women.

However, quantitative studies cannot explain how, or why, the overincarceration of Indigenous women is growing so rapidly in comparison to the rates of incarceration of Indigenous men. This research uses a qualitative approach to examine criminal cases before Gladue courts in Southern and Central Ontario to begin to explain the role of gender within the

courts. These courts are a useful point of analysis because they are directly responsible for determining the sentences many Indigenous women face and whether these women will be incarcerated or not. While the original intention of this research was to focus entirely on gender, as my research progressed it was clear that my participants were also highlighting other topics of importance, namely the appropriation of knowledges and the role of discretion and close working relationships. I took an abductive approach, expanding my study to include and contextualize these new themes within the most appropriate literature and theory, rather than taking a deductive approach and fitting this data into a feminist theoretical frame.

This research draws on approximately 66 hours of courtroom observation, six qualitative surveys completed by judges, and 20 semi-structured interviews with individuals who worked in Gladue courts in Southern and Central Ontario. The study was reviewed and approved by the University of Waterloo's Office of Research Ethics Board.

This research is guided by the following research questions:

- How do intersecting structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases?
- How are Indigeneity and gender mutually constructed and understood in Gladue courts' processes?
- How do court professionals understand their roles in Gladue courts?
- Which knowledges are used by court professionals within Gladue courts and how do they influence their analysis and contributions within the courtroom?

- How do court professionals influence the outcomes of cases within Gladue courts?
- How do Gladue courts impact the criminal cases of Indigenous individuals?

The first method of data collection I used was courtroom observation. Courtroom observation served as a foundational understanding of how the court operates and allowed me to observe the court participants' involvement within the court rather than simply hearing about it from their perspectives. In addition to interviews, observation is a useful tool for researching human behaviour because of what Jerolmack and Khan (2014) call "attitudinal fallacy." This fallacy refers to the fact that people's account of their own behaviour often does not match the way they actually behave (Jerolmack & Khan, 2014). For example, people who participate in discriminatory or embarrassing behaviour may be unwilling to admit to their actions or may claim that they have not done so. Alternatively, people's perceptions of their behaviour may be different from reality, and they may unintentionally report events inaccurately. If a legal professional is using discriminatory logic, they may be either unaware or unwilling to admit to it.

From August 2019 until December 2019, I conducted courtroom observation during each sitting of Gladue court in one specific jurisdiction, for a total of approximately 66 hours. The specific jurisdiction will not be named to ensure anonymity for participants. At this point, the Covid-19 pandemic led to the court being moved online, as well as research restrictions being imposed by the University of Waterloo. My courtroom observation for this research was unable to continue beyond this point (aside from a few virtual drop-ins in other jurisdictions once the restrictions were lifted). Another change that resulted from the Covid-19 restrictions was that my research focus expanded from one specific jurisdiction to focusing on all of South and Central

Ontario because the switch to virtual work made it exceedingly difficult to recruit interview participants. Prior to the court moving online, I was encountering people within the court regularly and could approach them face-to-face to participate. Once the courts moved online, I was limited to searching for participants' email information online, which greatly limited my ability to recruit interviewees.

While observations can provide information about what people do, they cannot explain why people acted the way they did or how their conduct is informed by complex perspectives. In order to understand the behaviour observed and to further understand peoples' perspectives, it is necessary to talk directly to people (Jerolmack & Khan, 2014) Thus, in addition to courtroom observation, I conducted interviews with 20 legal professionals and court workers—including Crown attorneys, duty counsel, defence attorneys, and Indigenous court workers—to understand how all of the various and regular participants understand and influence the court. These interviews provided greater insight into the operation of the court and assisted with contextualizing and triangulating my own observations. To recruit participants, I made note of the individuals who were present in court and followed up with them afterward. In addition, the technique of chain-referral (or snowball) sampling, where participants recommended other potential participants to me, was also extremely valuable for recruitment. Many of my participants recommended colleagues who I could approach for interviews and provided me with their email addresses. The interviews were conducted online through Zoom video call software and lasted between one and two hours. These interviews were recorded on Zoom and transcribed using Microsoft Word, with the permission of the participants.

In order to interview Crown attorneys, the Ministry of the Attorney General required that I submit information about my research as well as my interview guide for review and approval. While this process was initially straightforward and no changes were made to my interview guide, near the end of my data collection the Ministry contacted me claiming they had only provided permission to interview two specific Crowns. I have the original email from them granting permission to conduct my interviews and although it mentioned two specific Crowns, there was no wording to indicate that these were the only two Crowns I could interview. The Ministry of the Attorney General representative requested that my supervisor, Dr. Singh, provide a phone number so they could contact her, but in the end, they did not reach out to her. There has been no further contact on this.

Finally, this research also included a qualitative survey for judges that was completed by six individuals. This survey also required approval by the provincial government and was reviewed and administered by the Ontario Office of the Chief Justice (OCJ). These questions were the same as those in the interview guide, however, the OCJ removed some of the questions before forwarding it on to the judges for completion (see appendix B & C). Any questions regarding negative experiences or drawbacks of the court were removed by the OCJ. I had originally intended to interview judges, but this request was denied, and the survey option was offered in its place. The removal of questions and denial of my interview requests is interesting because it seems the OCJ was attempting to influence the data through removing any opportunities for judges to discuss negative experiences. This lack of transparency is reflective of Hannah-Moffat's (2000) as well as Martel and Brassard's (2008) findings that while these legal

efforts appear to be progressive, they may act as more of a progressive performance than true equity seeking measures.

My data were coded and analysed thematically using NVivo 14 qualitative analysis software. Participants were assigned pseudonyms and identifying information, including information that could be used to identify the jurisdiction, was removed since there are limited jurisdictions that have Gladue courts, and these courts often have only one or two judges and Crowns that work within them. Quotations used in this dissertation that included personal identifying information were redacted to ensure the participant could not be identified.

This qualitative methodological approach allowed for an in-depth exploration of Gladue courts by including various insider perspectives, as well as my own outsider observations. Due to the sensitive nature of conversations about discrimination and systemic failure, this approach enabled me to gather data that can shed light on why and how the courts have failed to reduce overincarceration of Indigenous people in Canada, although unfortunately the OCJ prevented judges from sharing their unfiltered opinions with me.

Positionality and Ethical Considerations

As a white settler, I approached this research with a desire to learn and be an active ally. My research is informed by critical theoretical frameworks and draws on critical race theory, intersectional feminism, and anti-colonial approaches. Reconciliation is also central to my work (Hess, Leaby, & Yaiser, 2004).

One of the first ethical issues I encountered was in deciding who to interview for my

research. Ultimately, I decided to include those working in the court since this provides greater insight into the processes and power, rather than strictly the trauma that the courts inflict. While I initially wanted to interview criminalized Indigenous women, my committee quickly reminded me that these types of discussions would likely involve participants divulging deeply personal and traumatic experiences that would come at an emotional and psychological cost to the women being interviewed. Tuck and Yang (2014) highlight the importance of studying the relationships between people, institutions, and power, rather than simply people as a unit of analysis. Focusing on individuals and their stories of trauma and suffering too often overlooks the broader structures and systems that create the conditions and context that these stories are shaped by. I believe interviewing the court personnel provides a greater opportunity to understand *how* marginalization is understood and constructed within these courts, while also eliminating the potential for this research to turn into what Tuck (2009) calls “damaged-centred research”.

Damage-centred research, although well intentioned, reinforces the idea that the research subjects are “broken.” In Tuck’s words, it “reinforces and reinscribes a one-dimensional notion of these people as depleted, ruined, and hopeless” (p. 409). She highlights that even when this research is conducted to hold those in power accountable and to secure resources for marginalized communities, this type of research advances a harmful stereotypical narrative that portrays the participants as unable to move beyond their oppression. By researching court personnel and examining how the Gladue courts reproduce rather than rupture colonial logics, my analysis shows the limitations and potential dangers of criminal legal reforms that purport to be progressive rather than punitive. Furthermore, I hope that by including work such as Sarah

Deer's (2004, 2018), that I have demonstrated that Indigenous communities are not "hopeless", but rather already hold the solutions to challenges they face such as overrepresentation in the criminal legal system. Indigenous scholars and communities have highlighted the potential for reforms that go beyond colonial reparations and the provision of resources, and to move towards decolonial systemic change that returns jurisdiction of legal matters to Indigenous communities.

During my research design stage, I consulted with Gladue court judges and employees from an organization that advocates for criminalized Indigenous individuals within the courts. The individuals who provided me with guidance are Indigenous and hold various leadership positions in their communities. They graciously took the time to speak with me and make suggestions about my research which included highlighting topics for consideration, such as victimization and sentencing conferences which are both key components of my analysis. I met with two Indigenous judges, one over lunch and one in their chambers, to discuss my research. These conversations covered the general preliminary plans for my research project as well as what the judges' general observations have been surrounding the strengths, weaknesses, and role of gender within the courts. My research was also guided by a number of conversations with the employees from the organization that advocates for criminalized Indigenous people within the courts, one of whom is an elder. We had a number of lunches together where we discussed my research as well as what was happening within the courts more broadly. They also pointed out things they thought were important to take note of during courtroom breaks; for example, when a courtroom officer's body language was outwardly disrespectful during a sentencing conference. The employees from the organization also assisted me during sentencing conferences by

approaching criminalized individuals to ask for permission for me to sit in the gallery and observe (I am not granted access to the front of the court so I typically can't ask myself).

I intend to share my thesis with my participants once it is completed. I hope that it will be useful in informing decision-making around courtroom policies and assist with advocating for greater decolonial action.

Scholarly Contributions and Intention of Work

This research contributes to understanding the ability of—as well as the contradictions associated with—using the criminal legal system to mitigate social injustices and oppression in society, especially those harms derived from participation in the legal system. I offer new insights through an examination of Gladue courts, which are unique in that they are governed by a substantive equality mandate. Previously, specialized courts and their relevant scholarship have focused on individual-level factors. This research is also one of the only existing studies to qualitatively examine Gladue courts and is the first to focus on the role of gender.

This research provides a deeper understanding of the challenges that emerge when attempting to use the legal system to address structural oppression, even when this oppression is explicitly acknowledged as a legal truth. Ultimately, the legal system is rooted in colonial and patriarchal foundations that cannot be overcome by merely acknowledging how this oppression operates in society. To address the overincarceration of Indigenous individuals the very foundations of the legal system, and broader society, must be deconstructed and rebuilt.

The first chapter of this dissertation advances feminist sociolegal literature by demonstrating how gender remains invisible, even in courts designed to explicitly acknowledge colonialism as a “social fact” and legal truth. Gladue courts consider colonialism in men’s cases, but colonialism’s impacts are rendered invisible in women’s cases due to the male-centric view of the legal system remaining firmly in place. The court is not able to address colonialism as an intersectional phenomenon.

The second chapter contributes to critical sociolegal theory by demonstrating that even when the legal system advances the idea that it is battling inequality, it continues to perpetuate inequality instead. This aspect remains true even in settings such as Gladue courts, where the realities of structural inequalities in the lives of Indigenous people in Canada experiencing criminalization are explicitly acknowledged and attempts are made to address them. While feminist and decolonial language are appropriated, this language is disconnected from the original values and goals that call for structural-level changes.

The third chapter examines the influence of individuals working within the courtroom on the legal process. This chapter expands on foundational sociolegal theories that critique legal objectivity. I show that the incorporation of a substantive equality approach is contingent on individual discretion rather than any formal aspect of Gladue courts. The unique individuals within the courts provide some consideration of the structural oppression faced in criminal sentencing, rather than operating as a standard feature of the court itself. Individuals who believe in the courts’ mandate are able to work alone—as well as in collaboration with the court team—to provide a context where colonialism can be better understood and contextualized. However,

when the “wrong people” who lack training or passion are present then the courts offer a typical traditional court experience where the substantive equality approach is lost.

Furthermore, this work contributes to a greater understanding of how and why Gladue courts have failed to reduce the overincarceration of Indigenous individuals, and especially Indigenous women in Canada. Gladue courts can be a superior alternative to traditional courts in addressing the impacts of colonialism, but despite this, incarceration rates have risen. This finding can signal to policymakers and researchers that the overrepresentation of Indigenous people is not an issue that can be dealt with in a courtroom. My research shows that solutions beyond the court system must be pursued seriously in addition to Gladue courts. The overrepresentation of Indigenous people within the legal system must be addressed through preventative action that addresses the impacts of colonialism, such as poverty and victimization. Indigenous people must be provided with the resources they need to survive to avoid the traumatic pathways that lead them into contact with the legal system.

Chapter 1: Women and Gladue: The Invisibility of Gender in Indigenous Peoples Court

Introduction

In 1999, the *Gladue* decision at the Supreme Court of Canada called for changes to sentencing to address the crisis of the overrepresentation of Indigenous people in the legal system and, in 2001, the first Gladue court opened. There are now 13 Gladue criminal courts across Ontario (Ruigrok & Dzisiak, 2022). While Ontario has been the birthplace and leader in Gladue courts, British Columbia, Alberta, Saskatchewan, and Nova Scotia also have one or more Gladue courts in their jurisdictions (Ruigrok & Dzisiak, 2022). Despite these efforts, the overrepresentation of Indigenous people among those incarcerated has continued to steadily increase over the last 25 years (OCI, 2022; Reitano, 2016; Sitar, 2016). Criminalized Indigenous individuals make up 32 percent of admissions to Canadian federal correctional services, while representing only about 4 percent of the population (OCI, 2022). When looking specifically at Indigenous women, the overrepresentation is even more pronounced. Indigenous women now account for half of admissions to women's federal correctional services and Indigenous girls account for 62 percent of girls' youth admissions (OCI, 2022; StatsCan, 2022). Incarceration rates among Indigenous women have been increasing at approximately three times the rate of Indigenous men (Malakieh, 2019).

It is clear from this statistical research that the overincarceration of Indigenous individuals has a gendered dimension. However, past statistical methodological approaches cannot explain how, or why, the overincarceration of Indigenous women specifically is growing so rapidly. Through a qualitative approach, including courtroom observation and 20 semi-

structured interviews, this chapter examines women's criminal cases within a number of Gladue courts in Ontario in order to begin to explain this phenomenon. These courts are a useful point of analysis because specialized courts are directly responsible for determining the sentences many Indigenous women face, and as a result, if Indigenous women will be incarcerated or not.

This chapter is guided by two main research questions:

- How are Indigeneity and gender mutually constructed and understood in the Gladue court process?
- How do intersecting structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases?

I argue that, while Gladue courts have been unsuccessful at reducing overincarceration generally, this is even more true in the case of women due to the courts' failure to consider the multiple ways in which structural oppressions related to the intersection of gender and Indigeneity render women uniquely vulnerable to criminalization. Courts are generally either unable or unwilling to meaningfully differentiate Indigenous women's experiences with crime and criminalization from those of Indigenous men whose experiences are seen as non-gendered. Indigenous men provide the court with an understanding of the "standard" Indigenous experience (viewed as absent of any gendered influence). When gendered considerations do emerge, "gender" acts as a stand-in for "women" in government policy and practice. My work contributes to broader theoretical debates on the effects of the legal system and problem-solving courts on the lives of criminalized individuals located at the intersections of multiple forms of structural oppression (Crenshaw, 1991; Balfour, 2008, 2013, 2021; Singh, 2017, 2018; Moore, 2006). It further contributes to

ongoing sociolegal conversations about the ability of –as well as the contradictions associated with –using the legal system and courts to mitigate social injustices and oppression in society.

Literature Review

Introduction to Gladue

In 1999, the Supreme Court of Canada warned that the overrepresentation of Indigenous people “may fairly be termed a crisis in the Canadian criminal justice system” and ruled that all criminal courts must consider the Indigenous status of the offender at the time of sentencing (*R. v. Gladue*, 1999). This case, *R v. Gladue*, involved an appeal around section 718 of the *Criminal Code of Canada* which sets out the principles that must be considered by judges when sentencing criminalized individuals. It highlights a number of factors that must be appraised and balanced such as deterring future offences, rehabilitation, and providing reparations for the victims. More specifically, in this case, the appeal was related to section 718.2 (e) which calls for a consideration of all reasonable alternatives to incarceration with “particular attention to the circumstances of Aboriginal offenders.” The term “Gladue court” emerged from this decision. The decision in *Gladue* has been reaffirmed in a number of other cases, notably in the 2012 *R. v. Ipeelee* case where the Supreme Court further clarified the sentencing obligations required by 718.2(e). Paragraph 60 of the decision includes the explanation that

courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher

rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel (R. v. Ipeelee, 2012).

Gladue Courts, also known as Indigenous Peoples' Courts, are intended to be a more thorough attempt to consider Indigenous status and the ongoing impact of colonialism on the lives of criminalized Indigenous individuals in sentencing. The goal is to understand the person's background and how their Indigenous status and social location has influenced their life in a way that may have led to criminalization. These considerations are heard by a court where the lawyers, judges, and other employees of the court are Indigenous themselves, or have, at least in theory, had specialized training in Indigenous issues (Rudin, 2006). The courtroom and its processes are also modified in order to better reflect the cultures of Indigenous peoples' (Rudin, 2006). Each court is different. This may mean Indigenous artwork is displayed, using smudging ceremonies to open the court, having access to Indigenous court workers, having the option to choose a sentencing circle where Indigenous elders are present and play a role in discussing (but not deciding) the sentence, or it may mean their sentence includes culturally appropriate programming.

To date, there is limited academic research that looks directly at Gladue courts. Maurutto and Hannah-Moffat's (2016) Toronto-based work investigates how Gladue courts incorporate Aboriginal knowledges into the court process. They find that the incorporation of these

knowledges is improved in these courts, as workers have a background in issues impacting Indigenous communities which allows them to contextualize the information that they are receiving about structural challenges faced by the Indigenous offenders. Maurutto and Hannah-Moffat (2016) contend that this is an improvement over Gladue reports, which are written documents that outline the criminalized individual's situation as well as the structural disadvantages they have faced in their lives related to ongoing colonialism (Rudin, 2006). Gladue reports can be heard in regular courts where court personnel have not had specialized training and do not know how to interpret or contextualize the information they are given (Maurutto & Hannah-Moffat, 2016). Ultimately, this research indicates that Gladue courts can provide a context where the information in the legal cases of Indigenous individuals can be understood in the broader context of colonialism and race relations.

However, Maurutto and Hannah-Moffat (2016) caution that there could be unintended consequences of turning this personal information over to the court as it goes into a file that will follow the individual into prison, probation, treatment and so forth where Aboriginal knowledge will again be absent and fail to provide a context for interpretation. Thus, it is unclear how Gladue reports may impact offenders outside of Gladue courts. Martel and Brassard's (2008) work follows these knowledges a step further, examining how they are implemented in prison programming. Their work confirms the caution given by Maurutto and Hannah-Moffat (2016) as they find that things such as traditional spiritual teachings are often prioritized in programming over addressing the contemporary lived realities of Indigenous individuals which include struggles with colonialism, racism, and poverty.

The existing research on Gladue courts finds that it can be a better option than a traditional court for criminalized Indigenous individuals but also suggests it may not all be positive. For instance, for Indigenous individuals, turning over their personal histories may have implications when the information is taken out of the context beyond the court. Although this research is useful in understanding how the courts operate and use information related to Gladue factors, it does not provide any insight into how gender influences the courts for women, men, or those who fall somewhere else along or outside the gender binary. While this research indicates Gladue courts may be a superior option to traditional courts, the question remains: does this also stand true for women?

Women and Gladue

While the implications of gender identity in Gladue courts specifically have not been researched, some scholars have investigated the application of Gladue principles more broadly, in women's cases in traditional courts. Balfour's work (2008, 2013, 2021) examining how gender impacts the application of Gladue principles in sentencing finds that traditional Canadian courts are unlikely to consider the Indigenous status of women. This failure to consider the Indigenous status of women has been apparent since the case of Jamie Gladue as the court was unwilling to consider the role of victimization in her manslaughter charge. Balfour's (2008) earlier research examines two manslaughter convictions of Indigenous women as well as data from Statistics Canada. Her later research (Balfour, 2013) expands on this by conducting a larger quantitative analysis of all reported Indigenous sentencing decisions available in the Quicklaw database from between 1996

and 2004. Balfour finds that Indigenous men, especially those who have committed sexual assaults, are able to successfully use Gladue principles to introduce their Indigenous history and to receive a sentence that considers personal challenges related to colonialism, while Indigenous women are most often excluded from these considerations in sentencing (Balfour 2008, 2013, 2021).

Balfour (2008, 2021) and Kaiser-Derrick (2019) also find that, despite the high rate of severe sexual and domestic victimization that Indigenous women face, Canadian courts seem to view this gendered violence as a criminogenic factor rather than a mitigating factor. Violence against Indigenous women is so normalized that violent victimization is expected (Razack, 2015). Thus, despite the willingness of courts to view the perpetration of these crimes as a product of colonialism to be considered in sentencing, the gender-based victimization that leads to these crimes is constituted as beyond the scope of the Gladue. In this way, the traditional courts fail to understand intersectional oppression, focusing solely on race and culture and thus failing to properly contextualize the experiences of Indigenous women (Cameron, 2006; Balfour, 2008, 2013). When this finding is considered along with Martel and Brassard's (2008) conclusion that incorporating Indigenous knowledges into the legal system has prioritized cultural traditions over understanding contemporary lived realities, it signals a need to take a closer look at Gladue courts to understand how, and if, they are able to understand structural oppression in the lives of the criminalized individuals before them.

Balfour's (2013) later research shows a large geographic disparity in the way the legal system responds to Indigenous offenders. She found that those from more rural areas with fewer

legal and community resources were more likely to receive custodial sentences (Balfour, 2013). Women on reserves face higher rates of victimization yet have less access to resources for escaping violence such as shelters (Balfour, 2013; Kaiser-Derrick, 2019). These Indigenous women are also more likely to be counter-charged by police, meaning they charged are for assault for when they report domestic violence committed against them (Balfour, 2013; Kaiser-Derrick, 2019). This research shows that women's victimization is closely related to their Indigenous status, and their criminalization is often a direct result of their victimization as racialized women in low resource areas. Even when their criminalization is not a direct result of facing violence, it is an indirect consequence as a history of victimization often erodes social supports and increases Indigenous women's risk of contact with the justice system (Kaiser-Derrick, 2019). Gender shapes the victimization and criminalization of both Indigenous women and men in cases of gendered violence, as it determines what type of violence one will be exposed to or inflict. However Indigenous men's experiences again become the "standard" experience to be used to determine Gladue sentencing factors, while the gendered experiences of women are invisible, or worse, seen as criminogenic (Balfour, 2013; Kaiser-Derrick, 2019).

Balfour's (2013) work also highlights that for criminalized individuals to receive non-custodial sentences, which is one of the goals of the Gladue courts, there must be resources in the community that are able to provide an alternative "solution." Gladue courts alone are unable to reduce overincarceration; their success is partially tied to the availability of other actors, often non-governmental, operating in the broader community.

The existing research highlights the challenges Indigenous women face in traditional courts in having their Gladue factors recognized by the court. Despite facing trauma and violence related to their Indigenous status, courts are unwilling to consider these factors as results of colonialism or as systemic issues. While Indigenous women face disadvantages due to both colonialism and gendered oppressions simultaneously, courts do not consider how these forces intertwine (Balfour, 2013; Kaiser-Derrick, 2019). However, no prior research has examined if this pattern of failing to take an intersectional approach carries over from traditional courts into Gladue courts.

Intersectionality and the Justice System: A Theoretical Framework

In order to contextualize Gladue courts, it is helpful to examine previous research on efforts to introduce “culture” into the legal system. Murdocca’s (2013) work provides a theoretical framework for understanding the process of using “cultural difference” as a tool in the justice system. She argues that “Indigenous culture” is produced rather than represented in the legal system, and that it is constructed in a way that is ultimately quite harmful to Indigenous peoples. She argues further that focusing on “culture” overlooks the very issues that have created the present over-incarceration rates, namely colonialism and gendered racism. In this sense, the production and focus on culture which is produced in a colonial context is not just misguided, but a contributing factor to the continuing colonial rule of the state (Murdocca, 2013).

Emma Larocque (1997) and Sherene Razack (1992) share this viewpoint that the introduction of “culture” into the legal system is harmful. Larocque (1997) explains this in more

depth: “‘typologizing’ Aboriginal cultures results in gross generalizations, draws on stereotypes, reduces Aboriginal culture to a pitiable handful of ‘traits,’ and by oversimplifying, ends up infantilizing the very cultures Aboriginal peoples are trying to build in the eyes of the colonizer” (2000, p. 77). Razack’s (1992) work further explores this the use of culture in legal proceedings, claiming that it is a double-edged sword; that is, while it is important for contextualizing oppressed groups’ claims for justice and resources, it paints differences as inferiority and masks both sexism and racism. This argument is relevant to Gladue courts, as incorporating Indigenous cultures into the legal system is one of their main purposes and is often claimed by their advocates to be one of the strengths of the courts.

As an example of the harm caused by introducing colonized understanding of culture, Murdocca (2013) explores the writing of an Inuit women’s group called Pauktuutit to exemplify how the focus on a culture becomes harmful. This group discusses how the practices that the government deemed culturally appropriate, such as sentencing circles (a common feature of many Gladue courts), had no traditional or cultural relevance to the Inuit. They were borrowed from other Indigenous peoples’ traditions and then imposed upon the Inuit community which had no history of using them. This was not only culturally irrelevant but had devastating consequences for the women in the community who were exposed to increased violence as offenders were kept in the communities rather than incarcerated. Ultimately, Pauktuutit suggests that the governments’ claims to restore Aboriginal justice were a fallacy and that this was an impossible endeavour (Murdocca, 2013).

Murdocca's (2013), Razack's (1992), and Larocque's (1997) work ultimately echoes Balfour (2013) and Kaiser-Derrick's (2019) finding that while the incorporation of "culture" in the legal system, even if captured inaccurately, can have some benefits for Indigenous men in some cases, these benefits are most often not extended to Indigenous women. Importantly, Murdocca's (2013) research also adds context to Maurutto and Hannah Moffat's (2016) work which ultimately views the incorporation of Indigenous knowledges within Gladue court as preferable to traditional courts that do not incorporate this knowledge. While Maurutto and Hannah Moffat (2016) acknowledge there may be negative implications outside of the court for criminalized individuals, Murdocca's (2013) work provides a more macro-level look at the structural implications of these courts and their impact on society more broadly, namely through the reinforcement of the power of the colonial state over Indigenous communities through imprisonment, surveillance, and control.

Whether or not the justice system is a useful tool for addressing structural inequality is a fiercely debated topic among scholars interested in social justice (Smart, 1983; Mackinnon, 1989; Crenshaw, 1991; Razack, 1998, 2005; Murdocca, 2013; Chartrand, 2019). While some feminist and critical race scholars such as Kimberlé Crenshaw believe law can be a way to reduce the harms marginalized communities face, other more critical scholars do not believe that the law can ever truly help to advance the status of oppressed groups. Scholars such as Catherine MacKinnon (1983) and Carol Smart (1989) are critical feminist theorists who fall into the latter group. They believe that the law is inherently anti-feminist. The law represents the perspectives and the goals of men, declaring them as "true," while simultaneously disqualifying feminist

knowledges as false. For this reason, even when the law attempts to help women it is often misguided and results in increased harm for women. Smart (1989) introduces the term “juridogenesis” to describe this process where the law makes the problems it is seeking to solve worse. An example of this is how women are co-charged when they attempt to defend themselves from domestic violence (Smart, 1989; Balfour, 2013). Despite this policy seeking to provide protection for women, in practice it exposes them to additional harm through criminalization.

Further, legal responses often ultimately individualize the sources of criminalized acts despite the fact that crime is a social and structural phenomenon (Smart, 1983; Mackinnon, 1989). In Gladue courts, this can be seen as legal responses to colonialism address its manifestations in the legal system but cannot address the structural factors which cause the encounter with the legal system in the first place such as policing practices, victimization, substance use, and intergenerational trauma. Thus, they provide only a band-aid approach that attempts to address the aftermath of harm rather than addressing the sources of harm. Notably, the criminal justice responses also individualize the structural problems that the legal system itself is often complicit in perpetuating. The law is unable to address the harm that it itself is creating.

While individualizing these structural problems, solutions also often face barriers to success due to their failure to take an intersectional approach. Crenshaw (1991) discusses how responses to victimization commonly overlook how various aspects of a person’s social location create a unique experience of oppression. Thus, approaches that fail to recognize how race,

gender, and other factors intersect cannot properly address the needs of people who are facing multiple forms of social marginalization. Even when the law attempts to acknowledge the effects of oppression based on race and gender, it typically can only address one of these structural factors, thus failing to capture how these oppressions intersect in peoples' lives (Razack, 1998; Turnbull, 2016).

Razack's (1998) work in the Canadian context examines how the court fails to take an intersectional approach in refugee hearings related to gender-based violence. She finds that women seeking refugee status are able to fight the oppression they face as women but must in exchange play into oppressive ideas that portray their cultural and racial background as "barbaric" and "inferior," and as something they must be rescued from. These Canadian tribunals fail to see multiple axes of oppression taking place and seem to only be able to focus on gender. While refugee women act as an opportunity for Canada to take on a hero role against "other" cultures that expose women to these "foreign" types of violence (Razack, 1998), the violence Indigenous women face results from colonialism and is firmly rooted in the culture of Canada. The relationship between violence against Indigenous women and the culture of Canada is directly related to the poor treatment of Indigenous women, and perhaps the unwillingness of legal systems to acknowledge their victimization.

In her later work Razack (2015) discusses the experiences of Indigenous women specifically and argues that, in portraying Indigenous cultures as inferior, the Canadian state justifies its rule over Indigenous people and their land. By promoting the view that Indigenous women are "sick, dysfunctional, and self-destructive," the justice system justifies controlling and

incarcerating these women (Razack, 2015, p. 17). While both the cases of refugee claimants and the cases of Indigenous women seem to have differing approaches to considering the role of gender and culture, the main goal remains the same: reinforcing the superiority and force of the Canadian state. Jessica Evan's (2021) expands Razack's ideas arguing that the legal system inherently serves to "consolidate and measure 'responsible' citizenship through the cultural norms and structural privileges of whiteness" within settler colonial states (Evans, 2021, p 530). The oppression and displacement of racialized groups by the legal system works to reaffirm the superiority of the white settler culture and identities. Thus, Razack (2015) and Evan (2021) work demonstrates how "culture" works as a tool for control and oppression within the Canadian legal system.

When considering the literature that demonstrates that traditional courts fail to address gender (Kaiser-Derrick's, 2019; Balfour, 2013; Murdocca, 2013), and the literature that examines how the incorporation of culture into legal proceedings becomes a tool for control (Murdocca, 2013; Razack, 1998, 2015), it is clear that a deeper and more critical look into the interplay of culture and gender in Gladue courts is required.

Findings

In Gladue Court

During my 20 interviews and courtroom observations, many of the research participants that I spoke with initially said that the role of gender in women's cases is not something they had put much thought into. However, upon reflection, and sometimes unintentionally, many identified

the ways gendered elements emerged as a factor within the court for women. Participants shared a standard criminological discourse about women. In particular, they noted that the victimization women face is a nearly universal factor in cases, that more of an explanation is expected from women for criminalized behaviour, and a tendency for discussions around women's children even when they were not related to the case. Women's experiences with other parts of the legal system such as with police and in custodial facilities also differed from those of men, and these experiences outside of the court influenced their experiences within the Gladue courts.

I observed that the way the courts operated was heavily dependent on the unique processes of each jurisdiction, and even within jurisdictions there was a great deal of variation in day-to-day operations depending on who was present within the court on a given day. Each courtroom had a different physical layout, different expectations around whether or not judges would wear robes, when, and if, the judge would sit at the dais, whether smudging would take place, whether an opening announcement would take place, how often an elder would be present, and so forth. Despite these variations, I argue that there were still patterns that emerged in the cases of Indigenous women across jurisdictions and across justice personnel's approach to their cases.

Participants have been randomly assigned pseudonyms and jurisdictions have been redacted to protect anonymity.

Gendered Victimization

It is important to note that this research takes place in a context where the violence Indigenous women face is so severe that in 2016 the Canadian federal government launched a National Inquiry into Missing and Murdered Indigenous Women and Girls. This inquiry concluded “that persistent and deliberate human and Indigenous rights violations and abuses are the root cause behind Canada’s staggering rates of violence against Indigenous women, girls and 2SLGBTQIA people” and that this treatment amounts to genocide (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019).

Thus, the situations that typically bring Indigenous women before the court and the details of their cases are often directly reflective of the unique structural and gendered violence they face. Consequently, women’s cases are different from those of Indigenous men before they ever come before the court. Indigenous women’s crimes are often directly related to poverty, being unhoused, and substance use which is similar to the patterns with Indigenous men. The cases differ, however, in that being victimized, often criminally, plays an explicit and direct role in the situations bringing Indigenous women before the court. The role of victimization in the criminalization of Indigenous women has been documented in the past by scholars such as Balfour (2013) and Kaiser-Derrick (2019) and is a pattern that will emerge clearly in my own findings as well. This relationship between victimization and criminalization means that in order to properly craft a sentence that considers the impacts of colonialism in the cases of Indigenous women, the Gladue court would need to take an intersectional approach that acknowledges that

colonialism, intertwined with patriarchy, impacts Indigenous women in ways that are unique as compared to Indigenous men.

The way women's victimization is mentioned in court, and the role it played in the treatment and sentences of criminalized Indigenous women, varies. Some courts, primarily due to proactive and knowledgeable court workers and the positive working relationships between them, were able to acknowledge and meaningfully consider the role victimization played in the criminalization of Indigenous women. However, this was the result of the discretion of court workers, rather than from the structure of the court itself, despite its mandate. In fact, at times, a lack of understanding, and sometimes outright hostility, continued in Gladue courts in response to the victimization Indigenous women experienced.

In some of the accounts interviewees shared with me, Judges and Crowns in the Gladue court showed blatant disregard for Gladue court sentencing principles and were explicitly sexist towards the Indigenous women who shared their trauma with the court. Stephanie, a duty counsel, shared the following story:

It's quite traumatizing. She had a very traumatic backstory, and she was someone who didn't have a record or anything... And so, once that happened in her life just, I mean, it was essentially over after that, and she would get arrested for stupid things. Like she went to Bulk Barn and ate candy out of the bin and they charged her. And so, because of what happened to her, the Crowns would be really lenient because of her back story of the very, very traumatic sexual assault.... And so, I- I'll never forget this- I [said to the judge], "I don't want to go

into too much detail, but she has a very traumatic history.” And the judge said to me, “you know Miss... at some point, she’s going to have to get over it.” And I said, “oh, she’s going to have to get over it? [She was] kidnapped and tortured” and [his response] was, “you just have to get over it.”

This anecdote is an example of a time when a judge in Gladue court made no attempt to consider the impact of extreme gendered victimization on a criminalized Indigenous woman. While Balfour (2008, 2013, 2021) also found this to be true in traditional courts applying Gladue principles, it is clear this trend continues in Gladue courts. The quote also sheds light into the justification for refusing to acknowledge gendered Gladue factors. Experiences of gendered violence are understood as individual problems that women should just “get over,” despite the clear link between victimization and structural oppression via colonialism. In this case, the judge is either unaware or unwilling to consider this link.

Nick, a defence council in another jurisdiction, described how this type of disrespect towards criminalized women also happens with Crown attorneys. He shared a story about a time that a female Crown told him during a phone conversation that his client was “a fucking bitch.” He clarified that he could not recall an encounter where Crowns were so aggressively critical of his male clients despite the men typically being much more aggressive and hostile towards court staff. Later in his answer he clarified “my feeling is that there’s an expectation that females are supposed to do XY and Z, and when they’re out of line with that expectation, we’re more like critical, right?” While Nick does not go as far to call this sexism, it is clear what he is describing since he sees this hostility as being directly related to gender and expectations around gender

roles. This idea that deviating from social norms around gender is seen as a second type of deviance that results in harsher treatment for women within the legal system is reflective of what feminist criminologist Frances Heidensohn (1968) has called double deviance.

I witnessed first-hand another case of overt sexist language taking place off the record while I was attending court one day in another jurisdiction, this time directed towards the judge. The judge who was an Indigenous woman took a recess to open another courtroom for use. During the recess I overheard a senior male defence lawyer who commonly worked in Gladue court complain to his client that this break was “15 minutes of my life I’ll never get back. They’re taking a break so the ladies can use the washroom,” despite the fact that the judge explicitly explained that she was going on break to take care of another work matter. This quote suggests that the lawyer thinks that the judge is lying about what she’s doing and, likely unintentionally, he links this dishonesty back to her gender. This statement evokes sexist tropes about women being untrustworthy and irresponsible (Smart, 1989). The same tropes often used to discriminate against criminalized Indigenous women are, in this situation, turned towards the judge herself. This incident demonstrates that Indigenous women are not safe from hostility and sexism in these courts even if they are the judge presiding over them.

A young woman, Kiran, working in the court in a fifth jurisdiction shared a story about a judge initially refusing to consider Gladue factors altogether, which is not only an example of hostility, but legal error within the court. She described a day in Gladue court where the usual judge was not available, so a guest judge was presiding. When the defence council asked if the judge had read the Gladue report for the case, as it had a lot of important information about why

the sentencing recommendation was an absolute discharge, he interrupted her replying “no, you’re not getting a discharge. That’s not happening. I didn’t read this report. You want me to go stop court for two to three hours just to read a 30-page report?” He appeared to be so frustrated by this request that he then went on a recess. While he did eventually look at the Gladue report enough to understand the position, this behaviour demonstrates how even being in a Gladue court does not guarantee an understanding of the Gladue legal requirements, let alone the complex intersections of how these factors intersect with gender.

While the above examples represent some of the most explicit incidences of discrimination and legal error the participants in this study witnessed, there were also some positive cases where participants felt that the intersection of gender and Indigeneity explicitly emerged within the court. A young Indigenous court worker named Rachel explains:

One-in-five Indigenous women are at risk of being missing or murdered, and that’s something that you need to take into account... there’s so much violence against indigenous women within the community... a lot of times when judges are doing sentencing with women... they’ll address the general aspect of how this needs to be addressed and put on record in court, that you are an Indigenous woman who has directly or indirectly been affected by this colonialism and all these horrible things that not only have happened to Indigenous communities, but have been directly targeted towards women and... transgendered individuals. So, I think there is a bit more acknowledgement.

While she acknowledges that there are discussions around gendered factors, it is unclear how, or if, these discussions impact the sentences of these women. Later in our conversation, Rachel recognises that although this explicit recognition of the violence Indigenous women face does happen, “I think it also, though, depends on the judge and the Crown and everyone else there, I mean. I’ve been pretty fortunate with a lot of the people that I’ve worked with.” This quote reinforces my finding that it seems to be the discretion of the people within the court, rather than the structure or processes of the court, which enable the court to be a positive influence in the cases of some criminalized Indigenous individuals.

Conversations about victimization commonly took place behind the scenes but could nevertheless have a large impact on the outcomes of cases, sometimes even leading to withdrawal of charges. Multiple defence and duty counsel discussed how they were sometimes able to deal with situations where Indigenous women’s criminalization was very clearly a direct result of violent victimization through off-the-record discussions with Crowns. These off-the-record discussions were most common when women fought back in self-defence in cases of intimate partner violence and then received a criminal charge. However, I also heard from both duty counsel and a Crown that worked in the Gladue court regularly that they saw charges thrown out for women who had experienced extreme victimization even when the charges were offences such as property or drug offences and not directly tied to the experience of gendered victimization itself.

The following quote from a duty counsel named Stephanie describes how the traumatic nature of women's experience led to a type of "second chance" for the Indigenous women she was working with:

I've had a lot of charges withdrawn because... the women's stories are just so traumatic. And they're also very relatable and personable, and I've had a lot of charges withdrawn based on that, and a lot of good outcomes, people getting housing, things like that, but a lot of things withdrawn. Things that maybe, if they were men, they wouldn't get withdrawn just because the women's stories are just, they're just so- they're bad. What they've experienced is just so different.

Cases such as these where victimization is considered seem to only become possible when both the Crown and the duty or defence counsel were both knowledgeable and regular players in the court. Since the lawyers worked in the court regularly, they were familiar with each other, and often familiar with the criminalized individuals as well. This led to positive working relationships based in trust as, over time, both sides demonstrated honesty with each other. This trust and knowledge allowed lawyers who are typically in adversarial roles to work together to come to a decision that, in these cases, the women were unlikely to cause harm to anyone and that the risk of criminalizing her further would be harmful to her.

In these instances, parties could work together with a mutual understanding that the personal experiences of violence the Indigenous woman was facing was in fact a product of broader structural violence, colonialism, and extreme marginalization. This is reflective of research findings from Franke and Shdaimah (2022) and Castellano (2017, 2011) that highlight

teamwork among those with shared values enables court teams to best meet the needs of criminalized individuals. However, this understanding led to withdrawal of charges and removal from the court rather than impacting sentencing decisions. Rather than appearing as a typical Gladue factor, that is, as a factor influencing a personally tailored sentence, the court workers saw the best option in these cases as sparing women the criminal sentencing process. This indicates that there is an understanding among these lawyers that, despite the Gladue court being portrayed as restorative, and even therapeutic, the best option for criminalized individuals who are committing low- or no-harm crimes, such as petty property and drug offences, is not to be involved with the court at all.

While positive cases about the withdrawal of charges did happen, they were not as common as stories about women whose charges were pursued by the court, even when the charges came because of defending the safety of themselves and their children. One story that was shared with me by Rachel, an Indigenous court worker, highlights how this happens, even in situations with abundant evidence suggesting that a court participant was facing severe abuse, and that this abuse directly led to the incident that brought her before the court. In this case, Rachel describes how the woman was:

charged with assault and had her child taken away... She's very open with me. She trusts me very much. So, she sends me pictures of a lot of the things that he's done to her in her house, what he's done to her animals and her kids, where they were staying, screenshots of the things he says. Very horrible things- because she has no one else to talk to. And she's staying in a women's shelter right now

because she can't go home because of this charge. Meanwhile, the night of the charge, she was trying to escape to Cleveland to go live with her dad with her son and animals just to get away from him. And she has no previous record. So, it's a very, very sad situation.

Despite the court having access to photographs of the abuse that was taking place and the knowledge that this abuse was the reason the woman ended up before the court, they continued to pursue the charges, criminalizing her and preventing her from returning home.

While these examples highlight how much variance there is in the courts' responses to the victimization of Indigenous women, they also make clear that simply being in a Gladue court does not mean that the unique ways that Gladue factors emerge for women will be understood. It is possible that in these courts women may be heard through the efforts of knowledgeable and compassionate defence and Crown attorneys, but in their absence, the impact of victimization is generally lost. In cases where the court considered gender factors, this was typically due to the efforts of the defence or duty counsel working with the criminalized women rather than the Crowns or judges who are appointed to the court and are reported to have specialized training. Shows of compassion often result from informal discussions relying on existing trust and relationships between court personnel rather than any formal court structures. Furthermore, the criminalized women sharing their experiences may still face outright hostility, discrimination, and structural violence within Gladue court. As demonstrated in the example of the hostility towards the judge above, even the Indigenous women presiding over the court were not exempt

from hostility. In summary, I argue that what a woman will experience in these courts can come down to who is in the court on the day she walks in (Naffine 1990; Yngvesson, 1988).

Comparing Cases in One Jurisdiction

The main ways Indigenous women experience the impacts of colonialism, namely intimate partner violence and victimization, were discussed by every participant I interviewed. The presence of violence and victimization was also a pattern I observed while conducting courtroom observation; I saw how these factors shaped cases firsthand while sitting in Gladue courts. Thus, it is unsurprising that gendered violence emerged as one of the most frequently mentioned topics by my participants. In Gladue court, the gender of the criminalized individual played a clear role in the way they were treated by the judge. Women were held to a higher level of accountability and the harmful behaviour of men was, at times, treated with little concern.

In this section, I highlight and compare three cases to explore how intimate partner violence, and violence generally, is understood differently within Gladue court based on the gender of the individual committing it. The cases demonstrate Balfour's (2008, 2013, 2021) argument that failing to properly consider the role of women's experiences of colonialism is not limited to traditional courts. It stands true in Gladue courts as well; Indigenous men, especially those who have committed assaults against Indigenous women, are successfully able to use Gladue principles to introduce their Indigenous history and to receive sentences that consider personal challenges related to colonialism, while women are most often excluded from these considerations. The examples demonstrate blatant sexism and show that Gladue courts do not

provide a space that can contextualize and consider the intersectional experiences of Indigenous women, even if they may consider the experiences of Indigenous men. While these men's experiences are also gendered, they instead serve as the baseline understanding of "Indigenous" within Gladue courts.

Notably, some Gladue courts have a policy against accepting intimate partner violence cases. In practice, this policy was enforced by some judges and not others. Two of the three following cases are examples of cases that were heard in the court despite this policy. All cases discussed in this section were heard by the same Indigenous judge. Further, I note that two of the three criminalized individuals had existing relationships with one or more of the Indigenous individuals working in the court from connections in the Indigenous community. The jurisdiction is a medium size urban space with a large reserve bordering the urban area.

The first case is one of a young Indigenous man who was known to one of the court workers due to their involvement in a cultural program. His case involved assaulting and choking a former intimate partner who is a young Indigenous woman. Despite this court's policy that it would not hear intimate partner violence cases, his case was heard in the Gladue court, and a sentencing circle was held. The purpose of a circle is to get more information about the criminalized individual, their background, and the best way to address the issues that led to the criminalized act to prevent future incidents. While in the circle, the Crown highlighted the serious nature of choking – noting that it is "intended either to silence or to kill" – and the seriousness of intimate partner violence in Indigenous communities. The judge inquired about the man's eating and exercise habits and his overall health. The defence attorney noted that the

man was a first-time offender, and considering the Gladue factors, it “would not be uncommon for someone with that life history to have a three-page record by now.” The judge praised him, asking his defence counsel, “how do you get clients like this?” There was no discussion of accountability, which is not typical in a circle.

When it came time for sentencing, the judge accepted the defence’s position and granted a conditional discharge. He explained that he would not require the man to report to a parole officer, telling the man that the “community will keep an eye on you.” The judge expressed what a pleasure it was to meet him, and the man exited the court.

Similarly, the next case involved one of the court workers having a close relationship with the defendant and her family. The fact that she was familiar to one of the court workers, and that the court worker was able to vouch for her character, resulted in a very friendly demeanor from the judge. However, this case was handled in a very different manner than the above case. In this case, a young woman was charged with disturbing the peace. After a night of drinking, she was walking down the street and was hit by a vehicle. She then approached the car and hit the windows in anger. She called an ambulance for herself. When the police arrived, she assumed they were responding to her call, because she was unaware that the woman in the car had also called emergency services to report her for hitting the windows of her vehicle. The police began arresting her without checking her for injuries, and due to confusion and intoxication, she was resisting arrest and unintentionally hit a police officer in the commotion.

During her circle, the Indigenous court worker was able to paint her in a very positive light by bringing in context about her participation in programming, her talent, and her goals for

the future. She was also a first-time offender. While the impact of this on the judge was clear through his smiles and comments praising the young woman's intelligence, the circle still also addressed "accountability" where the woman had to take responsibility for her actions despite the situation having taken place after calling for help for a physical injury and what was likely an unnecessary and violent escalation by the police. Even though she had not intended to harm anyone, unlike in the first case, and no one was actually injured aside from her, she was expected to take accountability for this situation in front of the court. The judge also acknowledged the importance of the Crown's role in keeping them grounded because "it's easy to feel for the person in the circle," and to act as a reminder that we "all" need to enjoy what the creator has given us. There was no discussion about Gladue factors.

A third case with a woman that the court worker did not know highlights the difference in treatment of intimate partner violence cases between genders, as well as the role that having a personal connection to a court worker can play. In this case, a young woman retaliated after her child's father uploaded a "revenge porn" video of her to the internet. She kicked him a single time and broke his house windows.

While the judge acknowledged that he understood her anger, his words for her were much less supportive. While in the case of the young man he expressed compassion and praise, in this case he told the woman, "you took it too far" and "you got yourself into this situation." The judge asked what came of the police investigation into the revenge porn crimes and she informed him that despite finding evidence to proceed, she decided not to continue with the charges. Even though being a victim of a sex crime was what started her pathway to court, there

were no questions from the court about her health or wellbeing. There was no praise for her. She was sentenced to 12 weeks of counseling and a peace bond.

Balfour's (2008, 2013, 2021) finding that Indigenous men are able to use Gladue principles, while women are typically excluded from these considerations in sentencing, holds true in Gladue courts as well. This research also provides an in-depth look at how this happens. While the judge constructs the young man as a "good" man overcoming the negative circumstances he found himself in due to Gladue factors, women are conceptualized as simply turning to this behaviour because of "bad choices" and poor self control.

As a result, the young man who committed extreme and intentional violence received consideration of his Gladue factors which presumably mitigated his sentence since he did not even receive probation, while the Indigenous women in these cases, who caused much less serious harm, did not. Violent victimization, sexualization, and stereotypes, and the role these may have played, not only in the women's lives leading up to these incidents, but also directly in their criminal cases, were not even mentioned let alone considered. The colonial normalization of violence against Indigenous women continues in Gladue court to the extent that these factors are not seen as worthy of consideration (Razack, 2002). For example, in the case of the woman who was struck by the vehicle, the driver opted not to call an ambulance for help, but rather the police. The police, upon seeing a young intoxicated Indigenous woman, immediately turned to violent apprehension rather than ensuring she was not injured (highlighting the gendered anti-Indigenous racism in policing, as discussed by Razack (2000), Murdocca (2013), and Palmater (2016)). In the case of the woman who struck her ex-partner and damaged his property, there was

no discussion in court of how the sexualization and objectification of Indigenous women and their bodies renders them uniquely vulnerable to victimization and thus criminalization during an ongoing genocide against them.

This normalization of the gendered violence against Indigenous women by the Gladue court itself is reminiscent of the normalization of the violence against Jamie Gladue that took place in the original Gladue decision where the judiciary refused to acknowledge the experience of violent victimization— which led to her criminalization— as relevant to her case (Murdocca, 2013). Rather than understanding this violence as criminogenic and a product of colonialism, the violent victimization of Indigenous women is “characterized as a natural by-product of the space and thus of the social context in which it occurred, an event that is routine when the bodies in question are Aboriginal” (Razack, 2002, p 117). It is a vast oversight on the part of the court that, despite these manifestations of structural gendered violence being acknowledged by the federal government and Supreme Court, they do not seem to be taken into consideration explicitly in the dialogue around their sentencing, or in the terms of the sentence itself.

Culture and Gender

Even in cases where gender and Indigeneity explicitly intersect, the court does not always show an understanding of women’s experiences of Indigeneity and continues to default to using a colonial construction of Indigeneity to understand cases. For example, one Indigenous court worker named Angela describes a judge asking a woman in court what her “Indigenous clan is.” In her words,

I know that it comes from a good place of wanting to understand and wanting to be inclusive, but when people ask about what their clan is, it's kind of inappropriate because not everybody has a clan. I can tell you I don't have a clan and that has to do with... the intergenerational trauma and assimilation that has been prevalent through my family line. It has led me to be a woman who cannot pass on a clan to my children, even though their dad is Indigenous and I'm half.

Angela discusses in this quote how the lineage of Indigenous women, and even her own familial history, has been disrupted by colonialism. Her quote highlights that although judges can be well intentioned, their lack of knowledge can still be harmful to women who come before the court. This example shows a lack of understanding by the judge of how policies such as the Indian Act have worked to strip women of their status and Indigenous identity in ways that, prior to the 1980s, did not impact Indigenous men. The Act, in particular, disenfranchised women who married or had children with non-Indigenous men by stripping them of their Indigenous status (Kirby, 1985). While one of the claims of Gladue courts is that it offers a context where the legacy of colonialism can be understood because its court team has had specialized training in the issues facing Indigenous communities, it appears that their training is not thorough enough to contextualize the experiences of women.

There have been several studies demonstrating that the Canadian legal system fails when trying to introduce culturally relevant legal initiatives (Martel & Brassard, 2008; Martel et al., 2011; Murdocca, 2013; Turnbull, 2014), typically due to the “one-size-fits-all” approach which fails to recognize the vast amount of diversity between, and within, Indigenous communities in

Canada. Cultural training and initiatives often do not even acknowledge the differences between First Nations, Inuit, and Metis communities, let alone more specific aspects of culture such as gendered implications of colonialism (Murdocca, 2013). Scholars such as Murdocca (2013) and Emma Larocque (1997) have discussed how, rather than capture Indigenous cultures, the legal system produces its own version of culture that works to serve its purpose: to control Indigenous communities. Murdocca argues “government-produced programs of restorative justice tend to rely upon stereotypical notions of cultural difference, and, as a result, such restorative justice practices are part of ‘continuing colonization’” (2013, p. 31). Gladue courts, embedded within a colonial legal system, are also relying on these constructions of cultural difference. Therefore, it is not surprising that staff in Gladue courts also show a lack of depth in their conception of culture, and a lack of understanding of how intersecting marginalized identities have impacted Indigenous women.

Motherhood

There’s still this overarching idea that women are the caregivers and the people who hold the family together, which is true, of course, of our culture as well... there is a more significant focus in terms of how it may break up the family. But when you think of it in the context of when there’s a child involved in the allegations, it also works against them, right? Because... that’s the very first thing you’re going to hear if there’s a woman in front of the court. The Crown is going to say: “and their child was home,” right? And again, you don’t- you do you hear

that from the men- but it's said differently. There's just a tone that's said differently. So, it's both, we weaponize the fact that they are the mother- we weaponize that, but we also treat it as a vulnerability. - Miriam, defence counsel.

This opening quote illustrates how motherhood can work both for and against women depending on the circumstances of their case. This is significant as more than 75% of women incarcerated in provincial and federal facilities are mothers and more than two thirds were the primary caregiver of their children at the time of arrest (Kaiser-Derrick, 2019). If the children are not involved in the incident that brought the mother before the court, they are often seen as a reason to ensure women are not incarcerated or kept from their families both because there is a desire to keep the children with their caregiver and because women with children are understood as less likely to re-offend (Kaiser-Derrick, 2019). However, cultural expectations also expect women to be dedicated and fierce carers for their children, and so when they are presented as taking part in behavior that could place their children at risk, it is perceived harshly (Scott, 2019). In these cases, motherhood is weaponized as women are vilified and understood to be so out of control that they are going against what society understands to be their natural instincts. Thus, they are seen as a threat to their children and society as a whole which can result in harsher sentences (Scott, 2019). The state also often blames criminalized Indigenous mothers for the impacts of colonization that emerge within their family life, holding them personally responsible for the structural oppression their family is facing. In the words of the Canadian Association of Elizabeth Fry Societies and the Native Women's Association of Canada, "the state is looking to the mother to correct the systemic conditions of poverty and violence affecting Aboriginal

families and punishing her with the loss of her children if she fails” (CAEFS & NWAC, 2008, p 97).

The way that children and parenting emerge, or often in the case of men, do not emerge, is another way that structural oppressions related to gender emerge in Gladue court. As Nick, a defence council, put it, “it’s kind of an expectation- like, yeah, there’s going to be deadbeat dads, right? But if you’re a mother who isn’t there for your kids then [people are] even more shocked about it.” As this quote notes, there are gendered societal expectations and stereotypes about parents that influence treatment in the justice system. There is an expectation that men going through the court system will not be involved with their children. However, women are expected to always be involved with their children and if women are involved in the court system, their children will almost always emerge as a factor in their case in one way or another (Kaiser-Derrick, 2019). While motherhood created additional expectations around women’s behaviour, it also served as a tool for control. Participants discussed how parenthood impacted cases by making women governable through the implicit threat of the involvement of the Children’s Aid Society apprehending their children. The apprehension of children was a strong motivating factor for women to abide by the expectations of the court and its sentences: women whose children were with them wanted desperately to avoid losing them, and women whose children had been apprehended were motivated to get them back. While this could also be true for male parents, it was not used by courts in the same way. For example, one court worker named Colleen described how Crowns in the court would sometimes require women to do parenting programs even if the offence did not have any relation to their children or their ability to parent. She said

that she had never seen this done for men despite working in Gladue courts since their creation. This is yet another example of sexism taking place within these courts.

Surprisingly, none of my participants discussed the role of colonialism or stereotypes in shaping the experience of motherhood for Indigenous women. Factors such as residential schools, the 60s scoop, and the ongoing child welfare apprehension crisis undoubtedly play a role in both the concrete experiences of Indigenous mothers and families (Cowan, 2020), as well as how these experiences are understood in society. Racist stereotypes that portray Indigenous women as “bad women” and “bad mothers” (Scott, 2019) were one of the factors that led to children being taken from their family throughout history, from residential schools to the current extreme overrepresentation in children and family services. These efforts to break up families have caused intergenerational trauma and many Indigenous children to grow up without the presence of a parental figure which has directly caused dysfunction in many Indigenous families. Being a “bad mother” is thus another direct result of colonialism and genocide. If the courts were to take an intersectional approach, the impact of colonialism on parenting would seem like an obvious consideration so it is telling that this consideration is absent. This history and its impact are not mentioned in court. This omission is likely because parenting is seen as less important for men, and men act as the default for the approach of the court.

In addition to these impacts on how cases are understood, there are logistical challenges mothers face in the court. Being the main caregiver for children had an indirect impact on the cases of women because it meant additional challenges had to be overcome to even make it to court in the first place. One Crown attorney named Anne highlights that “when you’re talking

about women: those are women who have either young children that they don't want to bring to the courthouse because it's a dirty awful place, or [they have] young children that have to get to school, and young children that they have to feed." Consequently, there are more challenges for women in attending court, but also that there can be higher financial costs as they are required to find alternate care for their children. If they choose to bring their children with them, they are less able to concentrate on the details of their cases which reduces their ability to be fully focused on the court process.

The barriers faced by women when attending court are such a limiting obstacle that Anne felt that the virtual attendance options brought on as a result of Covid 19 were unintentionally beneficial for many women. Even though virtual attendance limits access to resources such as court workers and diversion programming, attending virtually allows women to avoid the difficult choice of bringing their children to court, or paying for expensive childcare options. It allowed them to care for their children more easily making court more accessible to them, and Anne saw this practical feature as more beneficial than the court resources in many instances. However, to gain this practical benefit, women are excluded from accessing the resources available from the court, which still may have a negative impact on their cases; indeed, the resources offered by the court are one of its main strengths. While this is not the case generally and applies more to women in the early stages of their cases, this is nonetheless a disturbing ramification of the difficulties women face in attending court.

While motherhood sometimes emerges as a type of mitigating factor in some cases in Gladue court, my participants reported that it most often emerges implicitly as a barrier

accompanied by a variety of narratives around parental expectations and racist stereotypes (Scott, 2019). It plays a large role both in shaping the understanding of women's cases and their practical ability to literally and figuratively show up for their cases. Although this issue was touched on by some participants, overall, the link between these factors and the focus of the court, namely, to recognize and address the impacts of colonialism, did not explicitly emerge in my data. Motherhood was never identified as, or linked to, Gladue factors. This finding shows the lack of an intersectional understanding and approach taken in these courts. Whether intentional or not, this lack of understanding results in motherhood being weaponized in the cases of many criminalized Indigenous women as described in the opening quotation.

The Influence of External Factors

While Gladue courts face challenges understanding gender in court proceedings, another difficulty they encounter is dealing with the marginalization that Indigenous women face outside of the court. This marginalization seeps into their cases despite the fact that recognizing the challenges associated with colonialism is one of the courts' purposes. The courts' understanding of colonialism and its impacts is reflective of the experiences of marginalization faced by Indigenous men as discussed previously (Balfour, 2008, 2013, 2021). As a result, one of the biggest concerns that defence and duty counsel had about the Gladue courts was directly related to the courts' inability to address the unique challenges that faced Indigenous women who have been criminalized for survival crimes. In particular, multiple interviewees discussed the

phenomenon of much older, often Caucasian men, coming forward as sureties for young Indigenous women and then abusing their power over them. For example, as Stephanie detailed:

You have these young- twenty [years old]-ish, indigenous women who often work as sex workers, and you would have an elderly non-indigenous man come and he'll say, "I'm a family friend", and you know he's not a family friend. He's there to bail her out so he can have control over her. I can't even tell you how many times I've spoken with women in the cells, and I would say, "you know, you don't have to leave with him." And they would say "well, I either fuck him or I stay in jail and those are my options, and I choose to not be in jail." And I think that's the situation that our court is putting them in, they either stay in jail or they get released to this man who's here. Now that changed when the Supreme Court decision *Antic* came out and they required less sureties. But I feel like we're moving back towards the surety, and we just had a situation last week where a woman was put in the same situation. She came and said, "my surety, he's doing this" and so it's still happening.

Despite the efforts of the Supreme Court of Canada's decisions in cases such as *Antic* designed to reduce the reliance on sureties, their use is still widespread. Gladue courts have not taken any formal action to prevent this trend of abuse by sureties emerging in the cases of Indigenous women. As Stephanie explained, expanding on her quote above:

It's one thing if it's their family member, but there's no way to differentiate, right? A surety is a surety, so you can't say "no shady old men," although I'd like

to. You see this guy and he'll say, "I'm a family friend." And I'm thinking, "are you? Because she's from CAS [Children's Aid Society] care and you're 30 years older. You aren't a family friend."

Because the court is unable to determine the intentions of a surety, sureties are often accepted even if it appears everything is not adding up. Nick shared the following account:

I've only been a lawyer for just over four years, but I can easily count over ten times where I've had an Indigenous female client in custody, where the crown is saying "we'll consent to their release if they have a surety." And who's the surety that always comes forward? It's always some male who is prepared to supervise them and then that male, if the crown says, "yeah, that's good, that's fine," that male now has even more power over this person and can actually manipulate them, and I've had multiple clients who are basically being manipulated. Because they're like, "well, I'm your surety. You have to do XY and Z for me. Otherwise, I'm pulling your bail."

Ironically, the manipulation enabled through bail further exposed women to abuse, including being coerced into committing actions that breached their bail conditions, which led to further criminalization. My participants discussed how women were commonly asked to participate in petty thefts and low-level street crime, as well as sexual favours, in order to avoid their surety pulling their support. Sureties therefore had a harmful impact not only on the women's autonomy and mental wellbeing, but on their criminal cases as well. The use of sureties in these cases is a clear example of what Carol Smart (1989) calls "juridogenesis"; the legal system's use of

sureties exposes women to new and additional types of harm rather than addressing the challenges they were intended to. The Gladue court plays a direct role in facilitating this additional harm to criminalized Indigenous women. Further, the court is exacerbating the very colonial harms it is intended to address by re-creating a colonial encounter where Indigenous women are placed in positions where they are under the supervision and control of non-Indigenous men.

The relationships and informal communication that takes place between defence and the Crowns—mentioned early in this chapter—can also come into play in these situations to address this gender specific challenge women are facing in Gladue courts. Defence and duty counsel were able to have informal discussions with Crowns when they became aware that sureties were abusing their clients and could sometimes have sureties removed to permit the individual to maintain her conditions free of a surety. However, it is worth noting that while it is positive that there are efforts to combat abuse when it is taking place, this reactively responds to the abuse that the court creates rather than preventing it. If the Crown has the power to release these women without a surety, then the more appropriate path forward may be to use this surety-free option. Further, considering how common this issue seems to be, it is telling that the Gladue court Crowns have not received training, and the court has not developed a formal approach to preventing and responding to surety-related abuse. The lack of formal action on this phenomenon is yet another example of the Gladue court's inability, or unwillingness, to recognize the unique experiences of Indigenous individuals who are women and how this discrimination manifests within their legal cases. The courts' male-centered approach (Smart, 1989; MacKinnon, 1983) to

understanding colonialism, and its failure to understand how patriarchy and colonialism intertwine to generate this scenario, is a cause of direct harm to criminalized Indigenous women.

Third Party Supports

I do notice that there are less resources available for Indigenous women and women in general who are accused of crimes. And I think that can affect how they're treated or what their outcome is. Especially if they're facing jail time and you're trying to convince a judge, here's all the reasons that the most appropriate sentence for this woman is not to be in jail, you need to have reasons to back that up. You need to show what resources [and] what organizations are available. And if there's essentially none for women, that makes that pitch a lot harder to a judge.

- Grace, an Indigenous defence council

Another factor external to the courts themselves that influences women's cases is whether there are resources available for women to support them in the community, such as housing and substance use services. In many jurisdictions, interviewees reported that there were fewer services and resources available for Indigenous women than for Indigenous men. Even when the court was prepared to release women, it sometimes did not happen because there is not a place for them to go aside from jail. A lack of residential services such as shelters and rehabilitation for Indigenous women is one of the biggest barriers to them returning to the community in larger urban jurisdictions. Without having a place to go to put in a release plan, it is much more difficult, if not impossible, for criminalized Indigenous women to get released. Further, due to

trauma from severe histories of gender-based violence, many Indigenous women may choose to stay in jail and avoid the presence of men rather than go to co-ed housing options. For these women, women-only jails felt safer than co-ed housing out of custody. While the court has no influence or control over these external factors, the availability of external resources to support the women upon release played a large role in determining the outcomes of these women's cases within the court. This finding highlights the limitations of the Gladue courts, but also the legal system more broadly (Feeley & Simon, 1992; Garland, 2001; Singh, 2017). The limitation of resources that is creating issues for the release of criminalized women in these urban jurisdictions is also partially responsible for why these women ended up taking part in the survival crimes that started their journey through the legal system to begin with. The lack of resources first brings women into contact with the legal system and then traps them within it (Balfour, 2013; Kaiser-Derrick, 2019).

Although some jurisdictions faced a lack of programming for women, regardless of Indigenous status, in one of the smaller jurisdictions that I visited, interviewees felt there was actually more programming available for women than men. However, despite the availability of programming for women, those in this jurisdiction still had serious concerns about the quality and focus of the programming. Here, I heard the court was including programming in sentences that was often based on stereotypical and outdated ideas about women. For example, while men had job training courses, women were made to take classes to learn parenting skills and budgeting (see section on *Motherhood* for further discussion). One Indigenous male court worker I spoke with named Scott shared:

I think there needs to be even more programs available for women, because there's still an expectation that women are weaker, women are only supposed to do certain jobs, that expectation is still out there. And I think that that needs to be broken. I think if the women had more opportunity to do all jobs there'd be less [women] involved in court.

Ultimately, this court worker felt that this lack of appropriate programming was, in a way, a stolen opportunity for Indigenous women to become prepared to sustain themselves financially in the same way that men are. The fact that they did not receive practical training, but rather stereotypical life skills training, was a lost opportunity to help them become financially stable and independent. This is yet another example of how stereotypes and gender inform how women are understood within Gladue court, and how this influences decision-making around their cases in a way that is ultimately harmful for them. These stereotypes and lack of adequate resources trap women in a cycle of criminalization rather than equip them with the resources and skills to be in a position where they no longer need to rely on criminalized acts for survival (Hannah-Moffat, 2000; Balfour, 2013; Kaiser-Derrick, 2019).

Other parts of the legal system

While external third-party resources limited the ability of the courts to provide services for criminalized Indigenous women, so did the influence and interactions with other parts of the legal system such as policing and custodial facilities. Gladue courts cannot prevent the discrimination happening outside of them; it is not part of their mandate, and it is also not

feasible. This inability to control external factors prevents the courts from having a meaningful impact even within the court because this external discrimination bleeds into the court proceedings and impacts cases both before and after they are heard in court.

Stephanie, one of the defence lawyers, shared a story of the discriminatory police interaction that brought her client, a young Indigenous woman, into Gladue court. The woman had attended the police station to report a sexual assault. Instead of simply taking her report, the police ran her name through the system and saw she had a bench warrant. This warrant had been withdrawn and should have been removed from the system but, in error, was not. The police then arrested her, and she was held in custody. A court officer realised this mistake had been made during the court lunch break and interrupted lunch to reopen court and withdraw the charge- although the impression of this lawyer was that this was more to avoid repercussions if it “ever made the news” than to expedite the release of the young woman. In reflecting on the role discrimination played in this case, the lawyer, a young white woman, told me, “if I had gone to report it... they wouldn’t search my name in the system. They would not. But when they see an Indigenous woman coming to report they say, ‘we bet you have charges.’”

In this case, Stephanie explicitly points out the multiple axes of oppression operating that led the police to respond the way that they did. The interaction her client faced was the result of racism and sexism. She also acknowledges that her experience as a white woman would not have been met with a preconceived notion that she must be a criminal. While this case ultimately resulted in the woman being released, it was police discrimination and error that brought her before the Gladue court and is a clear example of how police use racism to guide their

interactions with Indigenous women (Palmater, 2016; Flores & Román Alfaro, 2023). This discriminatory approach by police creates an environment of distrust and undoubtedly plays a role in overincarceration in a way that the court is not able to counter. Similarly to the story mentioned previously about the young woman who was arrested after being hit by a vehicle, stereotypes and discrimination operating at the policing level cause larger numbers of Indigenous women to be charged and this cannot be mitigated in a courtroom. Discriminatory policing contributes to an overrepresentation of charges for Indigenous women, not Gladue courts (Murdocca, 2013).

In addition to the police, custodial facilities also play a large role in the cases of women before Gladue courts. The treatment of the women and many of the aspects surrounding their court experience and release are determined by custodial facilities, not the Gladue courts. For example, when travelling to Gladue court for eight-hour long days, women were, up until recently, only provided with one tampon. Stephanie explains:

For a long time, we had so many women and they weren't even given two tampons. I remember I would have to talk to the [male] head of [the correctional facility] when they were brought to [court] all day. And he said "well, we only give them one" and I said "well, a lot of women are complaining because they are here for eight hours, and they only have one." I remember saying, "well, we can make donations. A lot of our office would donate" ... And he said, "you might put drugs in it." And I said, "do you know how tampons work? They're sealed." And then he covered his ears like he couldn't even hear the word tampon.

This quote details a conversation with the superintendent of a women's institution who does not understand the health needs of the women under his care and seemingly would also prefer not to even hear about them. This type of willful ignorance has a direct impact on the women's cases once they reach the courthouse since they are arriving uncomfortable and anxious. If they are not able to meet their basic health needs, it can understandably impact their ability to share and to listen attentively in court. I note that this example is also interesting because it is yet another example I encountered of the tendency for female legal professionals to be dismissed and exposed to sexism within the legal system. I argue that if female judges and lawyers are not respected, there is little hope that criminalized women will be able to successfully advocate for their own needs.

While the lack of menstrual products was a challenge that was ultimately mitigated by caring and motivated lawyers operating on their own to provide these resources to improve the conditions faced in the court (although they should not have to do this as it is the responsibility of the legal system), the women faced another large challenge in court stemming from the custodial institution's policies. The women are not allowed to bring any personal belongings to court. Consequently, if they are released from custody at the courthouse, they are released with absolutely nothing. Since the custodial facility is over an hour away by car from the Gladue court, women often do not have the means to travel back to the jail which is in a different city to retrieve their items. Stephanie outlined the nature of this problem:

They'd be released from [court] with nothing in the winter; without even a winter jacket. So, women, when they're in custody, they're stripped of their

undergarments, they can't have bras because of hanging. So, then they're released from the downtown location without a bra, without undergarments, without a coat- just released on the street corner.

Here, Stephanie describes how women are released from this Gladue court without even the basic necessities such as appropriate clothing. Releasing women in this way posed a significant challenge and had a detrimental impact because it put women in a very precarious position and set them up to immediately breach their release conditions. Being released with no belongings created a situation where women would turn to criminalized behaviour in order to survive, especially during cold winters in a Canadian city where temperatures average well below zero degrees Celsius and multiple people freeze to death yearly (Casey, 2022). Thus, this policy likely results in a net-widening effect where rather than reducing criminalization, it ironically expands it. This echoes the finding of Balfour, Hannah-Moffat, and Turnbull (2018) that criminalized individuals are released from prison "into nowhere and with nothing", and thus imprisonment itself becomes a criminogenic factor resulting in further criminalization (p. 34). While the defence and duty counsel I spoke with described their efforts to advocate around having this release policy changed, the institution has been unwilling to change it.

Overall, the broader justice system creates many challenges and barriers for women and the Gladue court is not able to overcome these. Discriminatory policing and policy within correctional institutions could not be mitigated in the court and often worked in direct opposition to the mandate of the courts, namely, to reduce the incarceration rates of criminalized Indigenous individuals. While kind and caring lawyers taking a holistic client-centred approach could

sometimes advocate for their clients to achieve some relief from barriers, ultimately, the Gladue court itself remained a place that could not overcome larger systemic issues. Gladue courts cannot provide, or force others to provide, housing supports, basic health needs, basic respect, or a space free from sexist and anti-Indigenous discrimination.

Conclusion

This chapter has explored how, and some of the reasons why, Gladue courts have been unable to address the overincarceration of Indigenous women and Indigenous people generally. These courts rely on an inflexible construction of Indigenous culture that cannot account for the challenges faced by criminalized women located at the intersections of multiple forms of structural oppression. The understanding of colonialism and its impacts that is operationalized within Gladue courts is constructed with Indigenous men in mind and gendered considerations are largely absent. When gendered considerations do appear, they are often based on sexist and racist stereotypes about Indigenous women. Knowledgeable lawyers and Crowns were sometimes able to use their discretion to work together to have a more intersectional understanding of colonialism, as was shown on occasion in cases where women had faced extreme gendered victimization or were being abused by sureties. However, in these cases gender typically emerged as an off-the-record factor through informal discussions. Further, the emergence of gender was a result of the individual discretion and personal efforts of dedicated lawyers to build trusting working relationships and advocate for clients rather than due to any formal aspect of the Gladue court itself. Put simply, good lawyers could get good results, and the court provided an avenue for this.

Many of the broader structural factors in the legal system such as sexist and racist bias continue to operate in Gladue courts emerging through stereotypes and at times outright discrimination. The discriminatory biases that exist outside of the court do not disappear within the walls of these courts. Outright discrimination continues to such an extent that it is directed not just at criminalized Indigenous women, but women serving as legal professionals as well. This discrimination impacted how women were treated in court, how their cases were understood, and ultimately the outcomes of their cases. Further, the discrimination taking place outside of the court seeped in and directly impacted the court, such as the case of women being provided with inadequate menstrual supplies by the custodial facilities for their court appearances. A lack of resources and institutional policy continue to emerge as barriers in these courts and impact cases in ways that the individual efforts of caring lawyers could not mitigate.

While specialized courts will never be able to overcome the barriers created by the legal system and structural oppression in society more broadly, it may be possible for the courts to better consider the multiple ways in which structural oppressions related to gender and Indigeneity render women uniquely vulnerable to criminalization (Balfour, 2008, 2013, 2021; Kaiser-Derrick, 2019). This knowledge could, and according to the Supreme Court of Canada, *must*, be incorporated into the sentencing process. However, this is not what is happening currently. Future solution-focused research may explore this lack of incorporation in more depth. Formal training for court personnel on how colonialism has, and does, impact women may be one option to help facilitate the introduction of this knowledge into the Gladue courts.

In concluding this chapter, I offer a final clarification: while the victimization Indigenous women face in their communities is extremely severe, this chapter should not be read as a justification for a “tough on crime” approach, or as a call for further criminalization of Indigenous men or greater policing of Indigenous communities. History and sociolegal research have demonstrated that this approach is ineffective at protecting women and often results in increased criminalization for them as well (Kaiser-Derrick, 2019; Balfour, 2013; Smart, 1989). I argue that more thorough research is needed on community-centred and Indigenous-led responses to harm that move away from courtrooms altogether (Deer, 2018; Royal Commission on Aboriginal People, 1996; Chartrand, 2019). This type of approach may be the best path forward for managing the cases of all Indigenous individuals and reducing their overrepresentation in the legal system.

Chapter 2: A Gladue Court is Still a Court

Here's the problem with Indigenous person's court: first of all, it's not named correctly because it is not an Indigenous person's court. It is a white person's court where we sentence Indigenous people. There's very little about the court that is based on Indigenous justice, Indigenous culture, [or] the Indigenous community. We drag them out of those contexts and put them into the colonial court and subject them to the colonial laws. So, what we're doing sounds a lot better than it really turns out to be...

And this court, this justice system, is presumed to be legitimate. It's presumed-that's our starting point. And from an Indigenous perspective, more and more what I'm seeing is they don't start from that presumption. They don't come from a place where they say all of those white person goals you have are legitimate, meaningful goals to us. So, when we bring them into our court, which the very premise of the court is to support and sustain the colonial structure, I'm finding it harder and harder to see the justice that is done in that court as true justice. -

Richard, defence counsel

Introduction

This chapter will discuss how many of the limitations of the broader colonial legal system continue to shape and define the Gladue court process. It will expand on existing literature about problem solving courts from scholars such as Singh (2017, 2018) and Moore (2006) to argue that

Gladue courts have been unable to achieve a restorative decolonial approach because they are ultimately still embedded in the broader colonial legal system. As the opening quote to this chapter points out, while Indigenous Peoples Court has “Indigenous” in the name, it is “not named correctly” because it is still a “white person’s court.”

This chapter is guided by the following research questions:

- Which knowledges are used by court professionals within Gladue courts and how do these knowledges influence their conduct and analysis within the courtroom?
- How do intersecting structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases?
- How do court professionals influence the outcomes of cases within Gladue courts?
- How do Gladue courts impact the criminal cases of Indigenous individuals?

Gladue courts are a type of specialized court. In the early 20th century, specialized courts emerged in the United States and Canada promising to offer a non-punitive and more therapeutic approach to crime control, while still ultimately serving the broader interests of the traditional justice system such as reducing recidivism (Wexler, 1993; Moore, 2006; Castellano, 2011; Singh, 2017, 2018). Rather than focusing on punishment, these courts claim to attempt to rehabilitate those who come before them by controlling their “undesirable” behaviours. However, while the intention of this control is not to cause harm, I argue that the reality is that removing agency is inherently coercive and failing to comply will result in punishment. In contrast to the traditional court system, specialized courts encourage judges and lawyers to

actively embrace and utilize principles and knowledges borrowed from medicine, psychology, and social work in an attempt to address the “root causes” of criminalized behaviours in individuals. Therapeutic knowledges which individualize criminogenic factors, rather than social science knowledges which consider broader societal factors, inform understandings of why individuals engage in crime and how they should refrain from it in the standard specialized court.

The first Gladue court opened in 2001 as an enhanced effort to reduce the overincarceration of Indigenous people in the Canadian legal system. These courts are a type of specialized court, which attempt to ensure that judges consider the role of colonialism in an Indigenous person’s life when crafting a criminal sentence. While Gladue courts share many similarities with other specialized courts, such as attempting to provide a healing environment and address the root causes of crime, other specialized courts such as drug treatment (Moore, 2006) and mental health courts (Castellano, 2011) rely solely on therapeutic interventions and knowledges. Gladue courts differ from other specialized courts because they call on judges to take a substantive equality approach and draw on social science knowledges that recognizes Indigenous people require distinct measures to achieve an equal playing field within the legal system. This approach attempts to understand the structural challenges faced by the Indigenous offenders rather than seeing these challenges as individual failures as most specialized courts do. One tool Gladue courts use to attempt this is sentencing circles, but in line with previous specialized court efforts, these circles also continue to operate under and reinforce the traditional logics of the legal system.

I argue that the transformative potential of the courts is in constant tension with the broader goals and logics of the colonial legal framework. My findings demonstrate the following:

1. A court under the jurisdiction of the state is not “Indigenous.” It is colonial. Gladue courts advance the same goals and face the same limitations as traditional colonial courts.
2. A court is not, and can never be, “anti-oppressive.” It exacerbates criminalization and marginalization by trapping individuals in the legal system.
3. A court is not “restorative.” It is traumatic, especially for Indigenous individuals. The state appropriates anti-oppressive rhetoric as an equity-seeking performance and ultimately deploys it to expand control.

My interviews with research participants indicate that the majority of individuals working within Gladue courts largely agree that achieving justice, reconciliation, and reintegration outside of the Canadian criminal legal system, and supporting Indigenous-led community-based alternatives, would be a superior restorative alternative.

This chapter draws on courtroom observation, a qualitative survey completed by six judges, and 20 semi-structured interviews with individuals who worked in the Gladue courts to contribute to broader theoretical debates on the effects of problem-solving courts on the lives of criminalized individuals located at the intersections of multiple forms of structural oppression. It further contributes to ongoing sociolegal conversations about the ability of specialized courts to provide a restorative and rehabilitative alternative to the traditional court process (Singh, 2017, 2018; Moore, 2006).

This chapter will begin with a literature review to provide a background on problem-solving courts, the appropriation of anti-oppressive knowledges by the Canadian government within corrections and the legal system, and Gladue courts themselves. It will then highlight the ways in which Gladue courts perpetuate the same limitations of traditional courts, namely colonialism, oppression, and trauma. I will then discuss the implications of these findings and conclude the chapter.

Literature Review

Problem-Solving Courts

The emergence of problem-solving courts represents a supposed theoretical shift in the way the state understands the legal process. These courts claim to provide a therapeutic approach to criminal justice which deals with the (supposed) root causes of crime. Problem-solving courts purport to focus less on punishment and retribution, and more on managing the criminogenic factors present in the criminalized individual's life (Slinger & Roesch, 2010; Wexler, 1993). Gladue courts are one type of problem-solving court. Other common examples of problem-solving courts include drug courts (Moore, 2006), domestic violence courts, mental health courts (Slinger & Roesch, 2010), and prostitution courts (Singh, 2018). While these studies have examined and critically evaluated the operation of such problem-solving courts, the research on Gladue courts is limited (but see Maurutto & Hannah-Moffat, 2016). Despite the well-intentioned nature of specialized courts, I show that Gladue courts are firmly rooted in the

traditional logics of the criminal legal system, such as coercion, punishment, and control, but in more covert ways.

Proponents of therapeutic jurisprudence (TJ) such as David Wexler (1993), who is considered to be one of the “founders” of the problem-solving court movement, firmly believe in the transformative potential of specialized courts and their capacities to rehabilitate offenders. In contrast to the traditional court system, TJ advocates for judges and lawyers to operate more like social workers rather than court officials by actively embracing and utilizing principles and knowledges borrowed from medicine, psychology, and social work. The ultimate objective, Wexler (1993) argues, is for the court to act as a therapeutic rather than punitive agent. He also contends that bringing therapeutic elements into courts can serve the typical goals of the legal system. Aspects such as giving defendants a larger role in deciding the details of their sentencing, incorporating their friends and significant others, and having them publicly commit to probation conditions, can encourage criminalized individuals to follow the conditions of their court orders.

Another way therapeutic elements are brought into specialized courts is by utilizing collaborations between legal professionals and “new” figures in court. Many specialized courts incorporate the insights of experts that fall outside of the traditional legal profession such as community justice workers, mental health professionals, and social workers. For instance, Castellano’s (2011) research examines how these workers, specifically mental health professionals, must attempt to meet the mental health needs of their clients while remaining both bound by, and responsible to, the legal system. She finds that they do this by influencing the

court to be either more “lenient” to allow their clients to meet their therapeutic goals, or by using the court’s power to punish in cases where they believe their clients will not comply with their mental health recommendations. Court workers also selectively share and restrict information with the court in order to attain the judicial decisions they desire (Castellano, 2011). For example, if they are aware of a breach of conditions, they may or may not inform the court depending on what they believe will help their client meet their mental health goals. Regardless of which decision court workers make, Castellano’s study is an example of how the state has extended the reach of the legal system to govern not just criminalized behaviour, but also mental health.

Singh’s (2017) research also examines how responsibilities that were traditionally those of lawyers are shifted to non-lawyers within early intervention domestic violence courts in Toronto. By having partner abuse response caseworkers fill out intake forms and gather information on domestic violence cases, the state incorporates these community workers into playing a role in the management and prosecution of these cases. The forms act as a type of guilty plea that is more quickly and easily obtained than a traditional guilty plea. In this sense, the form, and by proxy, the partner abuse response worker, become influential in the outcomes of these cases. This practice is a clear reflection of traditional legal logic as these guilty pleas increase the efficiency of convictions which significantly reduces the amount of court time used on the case, and thus, reduces the financial costs to the legal system (Singh, 2017). While Castellano’s (2011) work shows how non-lawyer therapeutic agents can govern and exert

influence through the power of the state, Singh's (2017) work demonstrates more so how the goals of the state are carried out through the non-lawyer actors in these courts.

In her more recent work, Singh's (2018) American focused research provides a critical look at prostitution courts. Her work illuminates the way that this court makes use of rituals that appear on the surface to promote peer encouragement and bonding, but under closer inspection, can also act as a way to leverage punishment and control over the criminalized women present in the court. Like other specialized courts, prostitution courts extend the reach of the legal system into non-legal aspects of women's lives. Women who acted in accordance with the court's goals were celebrated and encouraged, thus shaming and embarrassing those who did not. Ultimately, Singh (2018) concludes that these positive displays in the courtroom still work to coerce the behaviour of criminalized individuals just as the traditional courtroom processes do. However, instead of using incarceration, they make use of informal shame and embarrassment as "punishments" and thus remain punitive.

Similarly, Moore's (2006) research on drug courts in Vancouver and Toronto finds that the features of these courts that seem progressive actually act to increase the court's control and ability to punish. By using therapeutic knowledge and language the courts are able to justify harsher and more extensive punishments for those who are not responding to the drug "treatment" that the court prescribes for them. The state's reach is increased through "non-compliance" with treatment plans which serve as reasons for further criminalization. These courts are able to override the basic rights of the non-compliant by requiring a guilty plea, random drug tests, and waiving the right to a timely trial. As Moore (2006, p. 54) concludes,

these courts “maintain the same old practices of justice and punishment, only now they are known by different names. Detention translates into therapy, a warrant is now an incentive and appearance in a criminal court a chance to process a drug-use relapse.”

Quirouette, Hannah-Moffat, and Maurutto’s (2016) research further examines the problematic side of specialized courts. They look at four drug treatment courts and two community or wellness courts in Canada and how these courts deal with offender homelessness. Quirouette et al. (2016) found that rather than housing people, these courts instead conceptualized homelessness as a criminogenic factor, prioritized short term fixes over long term solutions, and enhanced opportunities for increased surveillance. These findings demonstrate the court’s focus on individual responsibility rather than a desire to address the structural factors that lead to, and trap people into, homelessness. Similar to Moore’s (2006) research, the authors found that when legal concerns are prioritized the potential of the court to be therapeutic is compromised. Singh (2018), Moore (2006), and Quirouette et al. (2016) highlight the importance of further examination of specialized courts and the aspects that seem to be benevolent.

Maurutto and Hannah-Moffat’s (2016) Toronto-based work also examines the problematic nature of specialized court by examining Gladue courts and how they incorporate Aboriginal knowledges into the court process. In their research, they define Aboriginal knowledges as “narratives and evidence appearing in Gladue courts that locate individual behaviour within collective racial histories and experiences of colonialism and discrimination” (Maurutto & Hannah-Moffat, 2016, p. 453). Maurutto and Hannah-Moffat (2016) find that the incorporation of knowledges focusing on social and structural factors is improved in these courts,

as workers are knowledgeable about issues impacting Indigenous communities. These knowledges allow them to contextualize the information they receive about structural challenges faced by the Indigenous offenders rather than understanding these challenges as individual failures. The authors contend that this aspect is an improvement over the use of Gladue reports which can be heard in traditional courts where court personnel have not had any specialized training and do not know how to interpret or contextualize the information they are given (Maurutto & Hannah-Moffat, 2016). Gladue courts thus provide a context where the cases of criminalized Indigenous individuals could be understood in the broader context of colonialism and race relations in Canada. This finding signals that Gladue courts may be able to mitigate some of the traditional colonial logics ingrained in the other specialized courts discussed above.

Conversely, Cameron's (2006) work provides a less optimistic look at attempts to use therapeutic jurisprudence with Indigenous communities in the legal system, by reviewing the use of sentencing circles in the courtroom in cases of intimate partner violence. It is a common practice in some Gladue courts to use circles where all the relevant parties, sometimes including the victim, are brought together into a circle to have a discussion. Cameron (2006) finds that including intimate partner violence survivors in the "restorative" method of sentencing circles can not only be unsatisfying for victims, but also very dangerous. In examining judicially operated sentencing circles used in cases of intimate violence among Indigenous couples in Canada, she found that circles often failed to protect the survivors from future violence. In many of the cases that Camerson (2006) examined, survivors were assaulted again after the sentencing, despite the threat of legal repercussions. Furthermore, she points out that sentencing circles and

specialized court approaches may even increase the victim's exposure to violence by encouraging non-custodial sentences which keep the perpetrator in the community rather than incarcerated away from the victim.

Cameron (2006) questions whether these circles can truly be considered a restorative justice method if they do not consider the victim and their healing, one of the key tenants of the approach. This concern also applied to the practice of sentencing circles themselves; that is, survivors were coerced to participate, most often not mentioned in the judicial reports, and were seen as a mechanism for the healing of the criminalized individual. The survivors were not considered or supported in the circles. Cameron (2006) describes how "the gender-neutral nature of most sentencing circle discourse and its consistent use of impoverished notions of culture obscure the gendered nature of intimate violence" (p.489). While the circles can link the incarceration of men to colonialism (as discussed in chapter 1), sentencing circles continue to appropriate Indigenous knowledges and reinforce an individualized legal process that fails to consider the broader intersectional, structural, and community implications of criminalized behaviour.

The Appropriation of Anti-Oppressive Rhetoric

The inability of the legal system to address the social and structural factors at play in criminalization has not stopped the courts from appropriating anti-oppressive knowledges advocating for structural change and social justice practices. The language and goals of decolonial and feminist advocates are appropriated by the legal system and integrated into the

narrative of the state's legal responses and used in a way that disregards the true intentions and meaning of the groups they have appropriated this language from. Hannah-Moffat's (2000) and Monture-Angus's (199) work examine how Indigenous and feminist knowledges are used by the Correctional Service of Canada (CSC) to structure women's prisons and incorporate gender-responsive justice programming for criminalized women. Feminist ideas about women's empowerment and agency are embraced and touted by the criminal legal system; however, rather than being used to combat structural disadvantages as feminist activists intended, these knowledges are deployed to encourage individuals to "work on themselves" and take personal responsibility for their actions. Individual level factors such as self-esteem become the focus of CSC to determine and promote women's "empowerment" in prisons.

The appropriation of feminist practices of empowerment ultimately works against those who are the most structurally disadvantaged and instead places the onus on women to control their behavior and make "better choices." The result of this is that marginalized groups such as Indigenous women, who comprise over 50% of the population in federal women's prisons (OCI, 2022), are expected to take part in their own reformation and governance. If women do not become "empowered," they are then blamed and punished for "their failure." Thus, the feminist concept of women's empowerment has been appropriated by CSC in order to reinforce and disguise the power of the state, rather than to challenge it.

Similar to Hannah-Moffat (2000), McKim (2017) and Shaylor (2009) examine the performative and ultimately harmful nature of gender responsive programming in the United States. Shaylor's (2009) chapter appropriately titled "Neither Kind nor Gentle" highlights that

despite gender responsive programming seeming kind and gentle on the surface, in practice it is often sexist and racist. The programming leads to extreme suffering through things like isolation from family and coerced sterilization, and even death. She concludes that truly gender responsive programming would

meet the needs of prison decimated communities... Rather than building newer, nicer cages that increase the capacity [for incarceration], true gender justice requires arguments for the release of 4500 women... True gender justice would allow those newly free people to live with their families and would reallocate resources dedicated to building new [incarceration] facilities to supporting those individuals (Shaylor, 2009, p. 157).

Shaylor highlights that gender responsive programming has become another tool to of the prison industrial complex that turns to unjust and harmful incarceration rather than truly addressing the conditions that lead to criminalization in the first place.

McKim's (2017) analysis of gender responsive drug treatment for both criminalized and non-criminalized women draws attention to how treatment centers and criminal legal officials deploy feminist languages of empowerment for punitive purposes in a court mandated addiction treatment program in the United States. This treatment program conceptualizes addiction as a personal failure that emerged due to low self-esteem and dependence on interpersonal relationships. The approach to treatment is to "recreate" women as empowered and responsible by improving everything from her clothing choices to her parenting approach. The focus on improving the self and avoiding reliance on relationships results in women being coerced by the

legal system into avoiding their families, as well as social situations such as workplaces, and education during treatment. This treatment facility also relies on racist and sexist stereotypes to understand addiction, such as those portraying Black women as irresponsible mothers. While structural oppressions, such as sexism, racism, and classism, are acknowledged, they are conceptualized as forces that can be overcome through bootstrapping and hard work. Treatment curriculums and counselors ultimately blame women for the structural oppression they face, as every challenge is attributed back to personal failures. In McKim's words, this approach to addiction services leaves women "with little but introspection, consumption, and makeovers to build a new self" despite their intention to "empower" (2017, p. 97). Through using the language of feminist empowerment, women in this program were instead held personally responsible for their oppression.

McKim's (2017) work, a comparative ethnography, also provides a glimpse into how services can be run differently if the women seeking treatment are outside of the direct control of the legal system. Along with examining treatment providers enlisted with delivering counselling for court-mandated women, McKim also examines how treatment unfurls in a privately operated centre that women struggling with chemical dependencies choose to attend. Here, addiction was not viewed as an individual fault, but rather as something clients need help to overcome so they can return to their lives. This treatment centre was also able to recognize how sexism operates as a form of structural oppression within women's lives that often impacted their additions. This response directly contrasts with McKim's (2017) findings of how treatment unfolds for court mandated individuals where women are blamed for their own oppression. While this treatment

centre continued to rely on racist stereotypes, it was able to provide a better alternative for the primarily middle class, white women who could afford to take part. Importantly, this finding shows how privilege and power can work to afford some women with compassion and understanding while also working to exclude women who are marginalized due to class or race.

Martel and Brassard (2008) and Turnbull (2014) observed a similar process when examining how Indigenous knowledges are incorporated into the Canadian legal system. This research is particularly relevant as incorporating these knowledges into the legal process is one of the main intentions of Gladue courts. Martel and Brassard's (2008) and Turnbull's (2014) analyses suggests that the criminal legal system has ultimately created their own version of what it means to be Indigenous by picking and choosing aspects that are the most easily incorporated into the existing colonial system. The result has been the creation of an inauthentic oversimplified Indigenous identity that is applied across the board with no regard for the complexity or diversity of Indigenous cultures (Martel and Brassard, 2008; Turnbull, 2014).

Martel et al. (2011) found that these constructed knowledges are then used in programming within the legal system that is typically administered by white program leaders. Turnbull's (2014) work looks at parole hearings assisted by Indigenous elders but found similarly that in these hearings the elder's input was confined to cultural and spiritual matters. The decision-making power remained entirely with the parole board. Furthermore, Turnbull (2014) found that this focus on "culture" could steer the discussions in these hearings away from structural oppression and how colonialism played a role in the matters before the board. Martel et al. (2011) and Turnbull (2014) found that participating in these programs/ processes could result

in a perceived reduced risk level for Indigenous people in the legal system. However, when individuals do not participate in these “cultural programs,” it results in the individuals continuing to be identified by the legal system as a high risk for reoffending. Notably Indigenous women tended to be classified as more “high risk” than white women (Martel et al. 2011).

Martel et al. (2011) also explore how the Indigenous community is given responsibility by the legal system for “healing offenders” with little consideration for the underfunded and marginalized reality of reserves. The responsibility for healing criminalized individuals also includes the responsibility for their failure if the individual continues to participate in criminalized behaviour. Furthermore, this responsibilization of Indigenous communities creates concerns about the appropriation of Indigenous leaders themselves, as they may be seen as cooperating with the colonial state (Martel et al., 2011). In Martel et al.’s words, “some suggest that, in correctional settings, such initiatives have absorbed Indigenous communities into conventional correctional practices that involve Aboriginals in the discriminatory praxis of risk-based management” (2011, p. 249). This absorption is yet another example of how, despite using the language of “Indigenous knowledges,” the government continues to operate based on the same old colonial logics and processes.

Ultimately, despite the appropriation of decolonial and feminist languages, the legal system continues to conceptualize criminalization as an individual rather than social process and rely on “rehabilitative practices” that emphasize an individual’s responsibility for oneself and one’s actions. This focus on individual responsibility works to delegitimize the role that structural factors such as systemic discrimination and poverty play in criminalized behaviour. In

order to justify punishment, or in the case of specialized courts, coercion, it is essential that the individual being subjected to the force of the state is seen as responsible for their crimes (Zedner, 2016). Further, Brown (2009) argues that punishment is understood to be a reminder of the rhetoric that individuals always have a “choice,” and that there is a right and a wrong choice. The state’s infliction of “pain” through punishment by forcing individuals into imprisonment or coerced treatment is usually viewed as unacceptable by society but becomes permitted and often even celebrated in these instances where individuals have chosen crime. Punishment and coercion are used in these cases to reinforce ideas about responsibility and the need to regulate oneself in a morally correct way to avoid pain (Brown, 2009). While it could be viewed as wrong for the state to exercise force over an individual who makes “good choices,” forcing “irresponsible” individuals into making good choices is celebrated. Racist, sexist, and classist ideologies play a key role in who is seen as “irresponsible” and deserving of punishment with poor racialized women more often being seen as “deserving” of retribution (Razack, 2015; Evan, 2021; Bumiller, 2008). This understanding of personal responsibility is so central in the legal system that it is applied not only to criminalized individuals, but also to victims (Razack, 2015; Bumiller, 2008; Kaiser-Derrick, 2019; Balfour, 2008, 2021). This is a long-standing point made by intersectional feminist scholars. For example, Bumiller (2008) discusses how not all victims are able to have their victimization recognized in this criminal legal framework. She discusses the concept of the “ideal victim,” one who is seen to be responsible and who has done everything possible to protect herself from crime. In her discussion of sexual violence, she describes how white middle-class women, who are sexually chaste, fit with this cultural

understanding of victimhood and evoke sympathy, while racialized women who are stereotyped as irresponsible and promiscuous, are often excluded. This understanding of victimization is especially relevant in the present study: recall the discussion in chapter one how Indigenous women face extremely high rates of victimization which is often directly responsible for their criminalization. If structural factors are to be considered, as required by decolonial and feminist approaches, it would displace some of the responsibility from criminalized individuals and bring into question the appropriateness of the states' use of force. Thus, this appropriated anti-oppressive rhetoric, in its true form, is in direct tension with the broader goals of the colonial legal system.

In summary, past research has found that while specialized courts appear to provide a “rehabilitative” and “therapeutic” court approach and while this seems positive, they often fail to achieve their potential. Instead, these courts extend the reach of the justice system, expand criminalization, and hold individuals responsible for the oppression they face. Existing research has also demonstrated how the legal system can appropriate the languages of feminists and Indigenous communities to appear to be taking a gender-based and culturally relevant approach in what can become a type of performance of equity. This appropriation has been done in drug treatment programming (e.g., McKim, 2017) and prison programming (e.g., Martel et al., 2011; Hannah-Moffat, 2000). However, these programs have detached these languages and knowledges from their original goals and the roots and processes of the traditional legal system remain firmly entrenched.

This literature provides a foundation for understanding the present study on Gladue courts. While most specialized courts focus on individual therapeutic factors, Gladue courts differ in that they attempt to consider social science knowledges and structural factors as well. They do this by considering the impact of colonialism on criminalization, and by providing a more “culturally appropriate” venue. The following analysis examines the attempt by Gladue courts to consider structural oppression and culture to mitigate the challenges faced by other specialized courts and legal programs. Ultimately, I find that the barriers faced by the broader legal system continue to arise in all of its programs and institutions, including Gladue courts.

What is a Gladue court?

Gladue courts are one type of specialized court that requires further investigation, especially given that the critical research on problem-solving courts consistently shows that these courts serve the same colonial goals as traditional courts. This section provides the background information needed to understand what Gladue courts are and how they operate. These courts appear to be beneficial, but continue to survey, coerce, and attempt to “fix the broken Indian” (as discussed on page 133). When examined through qualitative research, it becomes clear that specialized courts extend the coercive reach of the criminal justice system into the lives of criminalized individuals and their communities, and exacerbate their vulnerabilities to further criminalization (Singh, 2018; Quirouette et al., 2016; Moore, 2006; Hannah Moffat & Maurutto, 2012). In brief, Gladue courts claim to offer a specially trained court team equipped to understand the impact of colonialism, and a less formal atmosphere for Indigenous individuals to

submit a guilty plea to their criminal charges. While they can offer a superior alternative to traditional courts, Gladue courts are neither restorative nor decolonial.

The first Gladue court opened in downtown Toronto in 2001, and several more have opened across Canada (Ruigrok & Dzisiak, 2022). The main purpose of Gladue courts is to reduce the overincarceration of Indigenous people in the Canadian criminal legal system. The Supreme Court of Canada explicitly calls on judges to take a substantive equality approach that recognizes Indigenous people require different measures to achieve an equal playing field within the legal system. The courts attempt to do this by considering the role of colonialism in the life of the criminalized individual, providing a more “culturally appropriate” courtroom, and by focusing on sentences that are non-custodial. While *R.v.Gladue*, the Supreme Court decision that led to the creation of these courts, requires all judges to turn to non-custodial sentences first and to consider the role of colonialism in Indigenous individuals’ cases, Gladue courts are an enhanced effort to ensure this happens in practice.

Gladue courts are distinct from previous specialized courts in that they claim to rely on social science knowledges and substantive equality logics, rather than therapeutic individualizing knowledges. The requirement for judges and Crowns to consider the impact of colonialism in particular is an important departure from the usual rhetoric of the legal system and other specialized courts. Rather than focusing solely on “treating” factors such as addiction and mental health, as most specialized courts do, they attempt to address structural oppression, namely, how colonialism has manifested within Indigenous people’s lives. The legal system, through the Gladue sentencing principles, calls on legal professionals to recognize the impact of colonialism

is a recognition of substantive equality and acknowledges that factors beyond individual decision-making influence criminalized behaviour. The courtroom personnel in Gladue courts are mandated to consider structural level factors, such as poverty and systemic discrimination, rather than focusing on choice and agency alone. This mandate inherently conflicts with traditional approaches of the criminal justice system and specialized courts, which place blame on individuals for their behaviour and ignore structural factors (Bumiller, 2008; Brown, 2009; Zedner, 2016). Thus, while the Gladue court's mandate requires the consideration of structural factors, how this happens in practice and whether it can be accomplished requires examination.

Gladue courts consider structural factors through a variety of methods. First, they attempt to consider colonialism's impact by utilizing a court team that has had specialized training on issues impacting Indigenous communities (Rudin, 2006). This knowledge is intended to ensure that court personnel understand colonization and its ongoing impacts. These courts also typically bring in a variety of service providers from the community to support criminalized individuals. While many specialized courts utilize community experts, the employees in Gladue courts are intended to have had training on the structural oppression impacting Indigenous peoples rather than solely therapeutic topics, such as mental health and addiction. Turning to community groups, most often funded by the government but operated by non-government leadership, allows the state to bring in specialized resources for Indigenous individuals.

In addition to claiming to offer access to a specially trained court team, most Gladue courts offer some type of aesthetic and spatial modification within the courtroom. While the way each Gladue court operates varies greatly by jurisdiction, some Gladue courts take place in

courtrooms specifically designed to be exclusively used by Gladue courts. These courtrooms often include a circle table that the court would meet at (rather than a dais and two sides) and include Indigenous artwork. Some had a screen that would come down from the ceiling to cover the dais altogether. Other Gladue courts took place within traditional courtrooms, and aside from one or two pieces of art, could, and are, easily mistaken for traditional court. In some courts, the judges wear robes, in other courts, they wear plain clothes. The appearance and layout of Gladue courts ultimately depends on the individual court, but visual clues, albeit sometimes subtle, exist in all the courts I viewed.

An additional way that Gladue courts can differ from traditional courts is in their approach; they most commonly provide a much more laid-back and relaxed courtroom environment. Several participants discussed that the court is much less formal and provides individuals a chance to be heard “where they are at” without judgement around things like informal clothing or language. There is leniency for those who show up late. The judge and Crown are also typically willing to take significantly more time with each individual to hear their history and what criminogenic factors they are facing. This consideration sometimes includes the use of sentencing circles where everyone in the courtroom sits in a circle and discusses the case. While this practice creates a preferable atmosphere for criminalized individuals, it also serves the goals of the traditional legal system by creating a more personally tailored legal plan and by increasing the individual’s involvement in their cases which reduces the likelihood of recidivism. Ultimately, this change in the team members, the courtroom, and the atmosphere leads to even those who were most critical of the court seeing it as beneficial compared to traditional courts.

Every person that I spoke with, even those who were ultimately very critical of Gladue courts, felt that they provide a better option than the traditional court model. More specifically, they felt Gladue courts are more patient and less formal, and that court staff are better able to understand issues and work together towards finding the best outcomes for criminalized individuals. No one I spoke with expressed a preference for traditional courts. Despite acknowledging the shortcomings and issues with the court, the people I spoke with generally viewed the court in a positive manner. For instance, in the words of Miriam, a defence lawyer:

I think this is the model that most courts should be following, even if [the court isn't for] Indigenous people. If there are any drawbacks that I haven't already mentioned... I think that they would be outweighed by the benefits.

Although these courts offer a better option than traditional courts, the following discussion will focus on how they continue to face many of the same shortcomings as traditional courts, and how at times, Indigenous people cannot tell the difference between the two.

“Is this Gladue Court?”: The Court is Colonial

I think the purpose of the court is to provide Indigenous people with a space, but I don't always think the purpose is to provide a culturally aware space. I believe that with the long history of Indigenous people being attacked and purposefully targeted by laws and lawmakers, it's almost like a Band-Aid solution to this massive, cracked windshield. It does help. It helps people to get connected to other agencies that are really here to try and navigate this system that is so

foundational to Canadian society. We're trying our best to make the best of a terrible situation, but in terms of policymakers and judges sometimes, not all judges, but I think they often think the purpose is to just have a separate room, just with Indigenous people. It's funny to see how it's supposed to be a culturally relevant room, but they just take the picture of the Queen down and put a feather up. It's very, very surface level. -Rachel, Court worker

While all of my interview participants preferred Gladue courts to traditional courts, the majority felt that their impact was limited when it came to addressing the overincarceration of Indigenous people and instances of harm in Indigenous communities. In the opening quote, Rachel discusses that Gladue court can be useful for connecting people to supports, but ultimately the changes to the courts themselves are as surface level as removing the picture of the queen and replacing it with a feather. Overall, participants cited various barriers that the Gladue courts faced. Like traditional courts, Gladue courts continue to face a lack of resources that prevent them from providing enough dedicated court time and the community programming that people need to overcome their challenges. These courts continue to be bound by the law in terms of sentencing options which restricts judges in Gladue court from being able to provide personally tailored sentences that fully consider the individual's social location and the most appropriate rehabilitative path forward. Finally, Gladue courts continue to be a colonial structure that does not hold meaning for many Indigenous people who do not identify with the individualistic, punitive culture that the Western legal system is rooted in. While Gladue courts were able to

mitigate some of the harm of traditional courts, they did not decolonize the court experience by shifting decision making power or provide a culturally relevant space.

Many participants acknowledged these limitations by mentioning their uncertainty about how the success of the court should be measured. They expressed a need for managing expectations about what the Gladue court is capable of, and many doubted its ability to address the impacts of colonization. The overrepresentation of Indigenous people is only partly caused by courts and sentencing practices, so the problem cannot only be addressed by these aspects of the criminal legal system alone. I argue that factors such as poverty, addiction, a lack of mental health resources, and the victimization that lead people to courts in the first place must be the priority if overrepresentation is to be addressed (Kaiser-Derrick, 2019, MacIntosh & Jones, 2024). Participants acknowledged courts cannot fix the structural issues that bring people to them in the first place and so participants noted that it was not surprising that the court had not reduced the overrepresentation of Indigenous people in the Canadian legal system.

While specialized courts generally do not try to address these structural issues (as Gladue courts claim do), they do attempt to address what they deem the “root causes” of criminalization. The result of this is an approach where the courts individualize these structural issues and hold the person responsible for their marginalization, portraying it as their own fault (Bumiller, 2018; Zedner, 2016; Brown, 2009; Hannah-Moffat, 2000; McKim, 2017). While Gladue courts are mandated to contextualize lived experiences within the broader impact of colonialism, the available remedies are still ultimately focused on individuals as the legal system is an innately individualizing process. The courts continue to rely on sentences that include required

programming such as mainstream educational programming, addiction treatment, and life-skills programming (such as parenting classes). This process is a colonial approach that is not reflective of Indigenous approaches to understanding criminalization. Many participants noted that the legal process was not an authentic Indigenous approach to problem solving, but rather a Western approach with a few Indigenous features mixed in when convenient for the court. As one of the judges who participated in the survey portion of this research put it, “we are still a white man’s court. We are not the whole solution.” While this approach may represent a “success” from a Western perspective, it fails to reflect and reinforce decolonial principles. Richard, a defence counsel, highlights how the court’s approach is reflective of a colonial mindset which wants to “fix” individuals rather than generate improvement for the person or their community:

I’m glad we’re doing something. I don’t want to say I’m not glad we’re doing something. But I don’t think we’re doing the right thing... Nowhere built into this is “what can we do to reduce the overall level of trauma that you’ve experienced and make you better and make the community better.” That doesn’t operate very much. But it does boil down to an attitude of ‘how are you broken and what can we do to fix it?’ And I think that’s dehumanizing on some level. It’s problematic on some level and it’s still that colonial mindset which the court is built on.

This colonial approach of focusing on the individual, often in a way that is dehumanizing, is at odds with the more collective and community focused approach that many Indigenous communities may prefer. A court truly reflective of Indigenous knowledges or culture would

reflect a greater care for the dignity and healing of the individual, as well as the community at large (Deer, 2018; Cameron, 2006). As Richard states in the opening quote to this chapter, a large challenge with these courts is that they are not based in Indigenous practices and ways of knowing at all. Rather, it is a colonial court that has appropriated culture for colonial purposes, namely, to sentence Indigenous people. Richard describes what he defines as the colonial mindset in more detail in the following quote:

The economy and really the culture of Western Europeans is this extraction-based economy. The environment is a resource, and the focus is on what we can extract from it and use for ourselves. And our justice system is very much sort of based on that extraction kind of mindset. How can I maximize my own well-being? What can I take from the community? There is a little bit of 'what can I give back' in there but not much. You take somebody who doesn't start from that mindset, and you bring them into a court system that's based on that mindset.

In Richard's view, a colonial mindset comes from a selfish perspective that seeks to maximize gain without considering responsibilities or contribution to community. Describing how Gladue courts continue to pursue the goals of the colonial state, Richard reflects on how the legal system is used to disrupt and criminalize Indigenous land defenders:

When [colonizers] got here... our goal was to separate Indigenous people from the land so we could use it for what we wanted to use it for... The fact that it's still happening in [this jurisdiction] today is problematic... here we are [today],

and our goal has not changed. It's getting Indigenous people out of the way so we can do white person stuff.

Richard describes how the goal of the settler colonial state is to separate Indigenous people from the land and provides an example of the legal system being used to remove land defenders from the land. He describes a situation where the legal system is being used for the purpose of “white person stuff”: quite literally acquiring land. This extraction-based mindset also extends into concepts such as efficiency and minimizing the use of resources within the Gladue courts. The restorative potential comes second to the court's allegiance to its traditional goals. Further, it enforces colonial concepts of land, ownership, and economy that view economic growth as a priority over social good. Rachel, a court worker, echoed this critique of the role of the colonial mindset that the court is rooted in, but instead highlights the court's inability to go beyond the traditional limitations of the legal system:

Due to the constraints of the justice system... this is where I think [Gladue court] falters and the purpose of it then gets lost in translation with, almost the mode of production of the justice system, just to get people through quicker. So, it's a double-edged sword in a sense, with the purpose of it. It's to help, but it also makes it a lot easier for this revolving door of the system to keep going.

Similarly to Richard, Rachel highlights the colonial nature of the court which often focuses on efficiency in order to get criminalized individuals through the “revolving door of the system” more quickly which reduces the use of resources such as court time and staffing costs.

One of the main benefits of Gladue courts is that court officials engage in a far more in-depth look at cases than in traditional courts. However, Gladue courts still reduce the use of court resources overall, given that they operate as plea courts rather than trial courts. As is typically the case in specialized courts, Gladue courts incentivize pleading guilty by offering the opportunity for a reduced sentence and quicker resolution than the individual will receive if they choose to go to trial. The court thus requires an admission of guilt, meaning that those who wished to avoid a guilty plea and go to trial would no longer have access to the process and resources provided by the Gladue courts and would need to go back to a traditional court. This aspect demonstrates that the priority of the court continues to be efficiency over well-being and provides further evidence that traditional legal logics continue to be prioritized over attempts to be restorative.

A lack of resources was a barrier to the court that almost every participant raised. Participants also commonly discussed limitations around over-burdened caseloads, access to court space, hiring full time elders, having full time Gladue dedicated legal professionals, under-funded community supports, and a lack of resources to refer criminalized individuals to which did not have months-long wait lists. This lack of resources is also reflective of the traditional limitations operating in the background of the court that work to shape both the court and the context it exists in as adequate funding is not provided (Feeley & Simon, 1992; Garland, 2001; Singh, 2017).

Perhaps one of the strongest examples of how the Gladue courts fail to meet their objective of providing a culturally relevant space is in their resemblance to the traditional courts. Many Indigenous individuals feel there is nothing about the court that distinguishes it from a

traditional court such as visual or procedural cues. Anne, a Crown, describes how criminalized people in Gladue court are regularly unable to tell if they are in the correct courtroom because it is so similar that they cannot distinguish it from the traditional courts. While in the past judges used to begin court with a land acknowledgement, in Anne's jurisdiction, they seem to have gradually stopped the practice.

They never really reference [the land acknowledgement] anymore and that disappoints me. There has to be some discussion that this is a different court. I think the judges take more time with people, but they never really ever say anything, and a lot of times the people that are on the phone right at 10am, when the judge gets started. The first thing that people say is, "is this Gladue court? Is this [the right courtroom]?" And the judges never pick up on that. Maybe they have to say something, if it's not a land acknowledgement, but something else, that sort of separates us. Maybe we do need to be in a grander place so that we get back to that... It seems to me that we have to come up with something that at least separates us out from the other courtrooms.

Whether the similarity between the courts is due to administrative oversight or a lack of resources, Anne believes that more needs to be done to signify, either verbally or spatially, that the court, even if simply in appearance, is the Gladue court. In the opening quote for this section, Rachel, who works in another jurisdiction, describes how similar Gladue courts are to traditional courts in her own view as well. In her words, the differences are "surface level" and they "*just take the picture of the Queen down and put a feather up.*" I argue that if it is these small changes

such as feathers and land acknowledgements that are the only noticeable differences for criminalized individuals in Gladue court, it is no surprise that the roots in colonial frameworks and traditional limitations within the court remain strong (Turnbull, 2014).

Gladue courts remain unable to overcome the barriers that exist with the traditional courts due to continued constraints on time and resources, and the colonial roots remaining firmly entrenched in the environment and processes. While Gladue courts often offer a superior alternative to traditional courts and can mitigate some of the harm they cause on an individual level, these courts do not offer a decolonial or culturally relevant process. Gladue courts are not an avenue for the healing or empowerment of Indigenous communities. The next section will discuss how these courts may actually cause further harm on a structural level, ironically increasing rather than decreasing the overrepresentation of Indigenous people within the criminal legal system in Canada.

Net-widening in Gladue Court: Extending Court Proceedings and Expanding Criminal Charges:

The main goal of Gladue courts is to reduce the overrepresentation of Indigenous people in the legal system, but after more than 20 years they have not been successful, and the overrepresentation has continued to steadily increase (OCI, 2022; StatsCan, 2022). The courts are not only failing to achieve their goals but are likely actively increasing this overrepresentation by extending the length of time these individuals are involved with the legal system. This contribution to overincarceration is due to the generally lengthier nature of specialized court processes, but it is also reflective of a broader limitation of the legal system: once you are in, release conditions can make it exceedingly difficult to avoid facing further

charges for breaching them. The tendency for initial involvement with the legal system to lead to extended and expanded involvement is known as “net-widening.”

One key operational feature of the Gladue court, and specialized courts more generally, is the requirement of a guilty plea. As noted earlier, in order to proceed through the court, individuals must plead guilty or at the very least take accountability for the crime they have been accused of. While the rationale for the adoption of a plea court model is that it is in line with the restorative justice principle of offender accountability, sentences rarely include a restorative justice component. If Indigenous people do not want to plead guilty, they cannot be sentenced in a Gladue court. They must return to a traditional court for trial and sentencing. The implication of the plea court model is that, in order to have access to these courts and their benefits for sentencing, individuals must agree to waive their basic legal right to a trial and accept a guilty plea and the consequences that accompany it, which typically include a set of conditions the individual must abide by (or else face further criminal charges).

One of the benefits participants discussed is that the court puts more effort into understanding the criminalized individuals’ background, social location, and history. However, this process still typically takes less time and requires fewer resources than facilitating a trial had the individual chosen to fight their charges and plead “not guilty.” One Crown highlighted that trials are especially expensive when the criminalized individual is not represented by a lawyer since this impacts the efficiency of the process. A lack of legal representation is a growing problem with ongoing cuts and restrictions to Legal Aid that, she joked, costs “gazillions of dollars.” The largest of these cuts was in 2019 and eliminated nearly thirty percent of the Ontario

Legal Aid budget (McLachlin, 2019). Thus, while offering individuals the opportunity for Gladue court's potentially "fairer" sentences, the state also benefits by incentivizing guilty pleas, avoiding costly and resource-intensive trials, and maintaining their ability to control and survey Indigenous individuals who are kept within the reach of the legal system through probation services.

There are some cases where a formal guilty plea is not required in Gladue courts. An option often offered by Gladue courts is diversion. In diversion programming, the case is stayed within the legal system until the diversion program is complete and then withdrawn, or the charge is just withdrawn from the beginning of the program. While a formal guilty plea is not necessary for diversion, the person must still "take accountability" for the crime they are accused of in order to have access to the programming. While this diversion process appears as a withdrawn charge on their criminal record, and in theory should not be used against them in the future, defence and duty counsel felt that since Crowns still have access to the information, it will likely continue to influence them on some level if that individual comes before the court again in the future. When Crowns can see a list of charges, even withdrawn charges, it may influence them to be more punitive as they can see this is not the individual's first encounter with the legal system. Furthermore, from a Crown perspective, these charges may indicate that the individual has already been given leniency and has failed to change their behaviour in the past.

Defence council Dianne who worked with youth in a specialized Indigenous court describes why requiring individuals to take accountability may not be the best approach, even in cases of diversion where there is no formal guilty plea entered:

I think the almost implied requirement to plead guilty without having to plead guilty is a huge barrier. It's hard because... part of resolving is taking accountability in the courts. Whereas I think taking accountability in that way, it just doesn't connect to all the nuances and all the reasons we know why people end up in these circumstances. I think that element needs to be gone... In my opinion a true resolution is that my client's charges are dropped, and they don't have a criminal record or youth record when they walk away at the end of the day.

Dianne points out that the logic behind the guilty plea is to "take accountability" and acknowledges that this logic fails to consider the structural factors that lead these individuals into criminalized actions. Even if the individual committed a theft to survive because they are homeless, they are expected to take accountability for their "crime." While Gladue courts are intended to draw on social science knowledges that acknowledge structural oppression, this use of knowledge does not materialize in the way the courts operate in practice. The court continues the same individualizing logics of traditional courts: the person is irresponsible, made the wrong choice, deserves punishment, and must now repent. Whether that punishment is coerced drug treatment, or a prison sentence, does not change the central logic that it is now seen as acceptable for the state to step in and forcefully intervene to attempt to change the individual's behaviour (Zedner, 2016; Brown, 2009).

Dianne also points to the negative implications of having a criminal record echoing Moore's (2006) findings in her research examining specialized drug courts. Moore discusses the rights implications of the specialized court process. For instance, having a lengthy court process

that requires guilty pleas also requires individuals to give up their basic legal rights to the assumption of innocence and a timely trial. Furthermore, Moore (2006) finds that the drug courts she studied increase criminalization and the severity of punishment, as courts punish those who breach conditions such as avoiding drugs, avoiding specific individuals, being at a fixed address, and so on.

For those individuals whose sentence includes noncustodial supervision and a series of conditions they need to abide by, these conditions can be a large barrier to ever exiting the surveillance of the legal system. During my interviews, I heard frequently about how common it was for individuals to receive new charges for breaching their conditions, which in turn would lengthen their criminal records and further trap them in the system. For example, homeless individuals would frequently end up outside of the address they gave on their release when it was time for parole check-in and then be charged for breaching their conditions. The result of this was that, in an attempt to be less punitive, individuals are ironically further criminalized. Anne, a Crown explains:

The idea was for people not to be overrepresented in the criminal justice system and that also means court appearances that go on and on and on and on. It doesn't help them to be involved in the justice system. People are going through a lot of things. And sometimes you have really serious cases that you know, you received a Gladue report on and it took some time to prepare, and they come for sentencing and they're doing well. And then I'll see the name six months later with very minor charges.

The result of these breaches is that the court often keeps people in the justice system, ironically increasing overrepresentation rather than addressing it. While the state can claim it is taking action, in practice no progress is being made, and the status quo is maintained. This concern was also expressed by Dianne, a defence counsel in the youth court:

[My client] was probably before the courts for about a year and a half which is typical, unfortunately, of AYC [Aboriginal Youth Court]. It's similar to a lot of the specialized mental health courts in the fact that they want to keep youth before the courts for a little bit longer. And I think that's twofold. They believe that they want to see the youth complete rehabilitative programming, and the 2nd is in fact just like a surveillance mechanism. But then as we know, the problem with that is the longer you keep kids before courts- the longer kids are on bail, the more likely it is that they're going to breach and be recharged and remain in the system even longer.

She describes above how being involved with the justice system for a long time tends to result in people being brought back before the court on new minor charges. Lengthy legal proceedings became such an issue that some clients would move back into traditional court so that their cases would be heard sooner in hopes that their cases could be dealt with, and their time being surveilled by the legal system would be over.

Dianne also explicitly touches on another aspect of the lengthy involvement in the legal system: that it acts as an opportunity for surveillance. Lengthy cases allow the legal system to monitor the criminalized individual and their community (Feely & Simon, 1992). Lengthy times

before the legal system also created additional challenges to exiting the surveillance of the legal system, especially for those living in poverty (Opsal, 2009; Feely & Simon, 1992). Similar to Gross's (2010) work, participants discussed how poverty created practical barriers to attending court. In many jurisdictions transportation was a barrier as public transportation was complex or non-existent. The court was often located far distances from where the individuals were residing, especially for Indigenous individuals living on-reserve or outside of urban centres.

Consequently, to get to court, many individuals had to rely on someone else for a ride or use costly taxis. Even for those with access to public transportation, the cost of transit could be prohibitively high, and some participants mentioned providing reimbursements for bus tokens to encourage attendance at court.

While many of the individuals that I interviewed expressed concerns about lengthy legal processes, not all shared the perspective that removing individuals from the reach of the legal system was the best option. Some participants' opinions on the pros and cons of the legal system maintaining supervision of criminalized individuals varied. Paul, a Crown, expressed a view more in line with the traditional therapeutic jurisprudence view; he felt that requiring people to attend court on an ongoing basis was an opportunity to check up on them and for them to show their commitment to their rehabilitation. In Paul's words,

The willingness of accused persons to regularly attend court from my view as a prosecutor mitigates their resulting sentence. If they are someone that's regularly showing up to court, they're willing to take responsibility for their actions.

They're going to receive a lower sentence. That's definitely a benefit to them being there.

This quote makes the traditional logics working behind the scenes in court, including Gladue courts, explicit: The individual must be “willing to take responsibility for their actions” in order to get a shorter sentence. This issue is particularly interesting because keeping people before the court to ensure they are meeting the milestones by the court often ends up having a criminalizing rather than healing effect as intended. However, Paul expresses that it is a way for them to ultimately receive a less punitive sentence. If people take responsibility and behave in accordance with the conditions prescribed by the legal system, they will see a benefit. However, if individuals stray from the “therapeutic” interventions mandated by the court, they will be punished even more harshly and consistently. Despite the mandate of the court including the consideration of colonialism, there is no consideration of how related factors such as victimization, poverty, or addiction may play central roles in the criminalized acts that brought the individual before the court, or the breaches that keep them there. I argue that the individual ultimately continues to be held solely responsible for their actions, even if they are a direct result of colonial oppression (Balfour, 2008, 2013, 2021; Kaiser-Derrick, 2019; CAEFS & NWAC, 2008).

Therapeutic Jurisprudence in Gladue court

One of the defining features of specialized courts is that they seek to act as a healing force for those who come before them. However, courtrooms are innately traumatizing places that are not conducive to healing. The courts are even more traumatic (and less restorative) for Indigenous

people because the approach of the courts, even specialized courts, is often in direct opposition to the more collective and healing focused logics rooted in many Indigenous cultures. Despite claiming to be a culturally relevant approach, Gladue courts remain firmly rooted in Western legal traditions that individualize, coerce, and traumatize (see also Maurutto & Hannah-Moffat, 2016).

With the Gladue court's attempt to be restorative, legal professionals and court workers are expected to take on the role of mental health professionals. While Crowns also play a part in this role, the majority of responsibility for this approach falls on court workers and defence lawyers. The court workers and lawyers described to me how they are required, at times explicitly by judges, to take on a role that resembles that of a social worker. More specifically, there is an expectation that court personnel will assist with connecting clients with community services, and that their clients participating in these services plays a role in the legal outcome of the cases. Thus, this expectation is placed on court personnel not just because they are expected to take on this therapeutic role, but also because getting their clients connected with services has legal implications as well. Grace, a defence council, explains:

In Gladue court, it can bleed a little bit more into almost like a social worker aspect as well. So not only am I advocating for them in court or speaking on their behalf to update the Court on what's going on, but I'm connecting them with different Indigenous organizations... I'm making those connections and making sure they can get to their meetings on time.

While it was clear to me these lawyers cared deeply for their clients and wanted to help them, the lawyers expressed hesitancy about taking on such an important role that not only is outside their job description but for which they had received no training. Dianne, a defence lawyer who works with youth, summed up this mismatch between training and expectations:

I think it's just really concerning, in a lot of ways, mostly because that's not our jobs. And I'm not saying "it's not our jobs" from a "I shouldn't have to do that" perspective. I'm not a therapist. I'm not a social worker. I don't have the skills and the capacity to provide adequate services to my client in that way.

As Dianne indicated, the issue is not that lawyers do not want to provide that support, but that this is a specialized field which they have not been trained in.

Mental health professionals who receive extensive training are governed by professional bodies that ensure they are providing counselling in ethical and appropriate ways. Taking on the role of counsellor, while also being bound by the obligations of a legal professional, is a tension that must also be considered. The goals and responsibilities of a legal professional may conflict with the treatment interests of the criminalized individual. For example, the lawyers may have no choice but to accept the individual needs to serve a custodial sentence in the cases where their charges have a mandatory minimum sentence because it is legally required, even if it is not in the best therapeutic interest of their client.

A story that makes clear the extent to which lawyers and judges can be unequipped to deal with individuals who need mental health support, rather than legal support, was shared with me by Grace, a defence lawyer. She describes a young woman coming into Gladue court crying

and discussing the ongoing abuse she was facing. The judge and Crown appeared not to know how to respond to the situation and did not say or do anything, which led to the situation being, in Grace's view, "awkward." Eventually one of the court workers stood up to take the woman aside to smudge. Despite the expectation that the court will be therapeutic, this story is a clear example of the inability of the judges and lawyers to respond to individuals seeking mental health support.

Reflecting on this situation, Grace echoed Dianne's concerns about the expectation that lawyers would take on the role of trained mental health professionals:

Judges and lawyers- we're not social workers. We're not trained to deal with this kind of trauma. But I think to some degree being in these specialized courts, there needs to be some kind of training and some kind of awareness of what to do in these situations. And I think the courts need to employ more like Gladue court workers or counsellors that are specific to Indigenous people or even hire Indigenous counsellors, because you're going to constantly run into those scenarios, and they need to have those kinds of supports available to them.

Grace also highlights that legal professionals have not had training in how to support people who are experiencing or reliving trauma. Despite the lack of training, these situations "constantly" occur. She suggests that a superior option would be to introduce Indigenous counsellors to the court who could provide this type of specialized support.

One judge shared a slightly different perspective. While this judge ultimately supports using a TJ approach within the courts, they highlight an important point, namely that this approach requires additional training for all involved, including judges:

This is not a court for persons who are not yet ready to deal with the underlying traumas that have caused them to come into conflict with the justice system.

Defence counsel need to make sure their clients are ready for this court, and they also need to be sensitive to their clients' needs. Again, I can't say enough about check listing a person's traumas as though they are nothing. They might be nothing to the lawyer, but I can assure you they are everything to the person who is before the court. There needs to be better access to training for all justice system participants - judge's included.

This judge highlights how legal professionals can approach a person's traumas as though "they are nothing." This focus on traditional legal goals rather than demonstrating sensitivity and compassion is dehumanizing for their client, especially considering defence counsel is intended to act as that person's advocate. However, this lack of a trauma-informed approach is also reflective of the training the legal professionals have received, which is legal rather than mental health related.

In these courts, legal professionals are expected to think and act like mental health professionals but do not receive any specialized training. The training they have received is legal training. Grace points out that it would be beneficial to include trained mental health professionals to instead take on these roles. The process of separating expert knowledges from

the experts who hold them, in this case the knowledge of mental health professionals, is what Moore (2006) calls “uncoupling.” Legal professionals are expected to act like counsellors but are also expected to continue to follow the expectations that exist for them as legal professionals. Ultimately, the best people to act as mental health professionals are trained mental health professionals. I would argue that in this case, the knowledges and language of mental health professionals are another type of anti-oppressive language that is appropriated within these courts and then used to advance the colonial agenda. The individualizing and punitive goals of the legal system are still firmly entrenched in this “therapeutic” approach that holds individuals personally accountable for colonisation.

Some of the people I spoke with seemed to share this opinion and went further than simply criticizing the intended therapeutic aspects of the courts. For example, Richard, a defence counsel, questions the appropriateness and effectiveness of therapeutic jurisprudence and restorative justice within a courtroom altogether:

You can’t go through the court as an accused from any cultural background and not experience it as a trauma. That’s what the whole thing is designed for. You’re an accused person and the only question is ‘are we going to send you to jail and for how long?’ We have mental health courts, we have addiction courts, we have domestic violence courts. It’s slightly more nuanced, but it’s the same question: What is the appropriate punishment? That is the structure of the court. Our court system is built on the idea that individuals are rational economic actors. And it’s

not true... we're not rational... Our happiness is not always defined in the way that's rational.

But then you take someone from a different cultural background who just doesn't see the world in that sort of way... How can it possibly be anything but traumatizing? It's just confusing and it doesn't make any sense. And at the end of it is going to this place that is just designed to inflict trauma.

In this quote, Richard highlights how the legal process is, by design, a traumatic experience. In his view, even if trained mental health professionals were integrated into the court, it would not make the court a restorative entity because it is inherently anti-restorative. While he acknowledges that specialized courts are slightly more nuanced than traditional courts, he asserts that the ultimate colonial goals remain the same: to determine what punishment the individual will receive. Richard then goes a step further by discussing how this is an even more extreme trauma when the clientele of the court are Indigenous individuals who do not share the Western understanding of justice and come into court with a different worldview. The logics that the courts are rooted in become even more traumatic (and less restorative) for these individuals because they are often in direct opposition to the more collective and healing focused logics rooted in many Indigenous cultures.

Ultimately, despite the courts' attempts to introduce restorative elements to the court process by having lawyers take on some of the responsibilities of mental health professionals, many felt the courts attempts to be a venue for healing were limited by a lack of training and the inherently traumatic nature of the court process. The Gladue court claims to be focused on

restorative justice, but ultimately just appropriates the language of healing and continues to be governed by the same ideologies as traditional courts rather than prioritizing the wellbeing of the individual.

Sentencing Circles

The sentencing circle, or sentencing conference, is a feature of Gladue courts that attempts to introduce both an Indigenous cultural aspect and restorative element into court. In practice, however, they are appropriated to serve the legal purpose of extracting information that can be used for sentencing. Despite these circles offering some benefits such as the opportunity to humanize the criminalized individual, the circles ultimately serve to advance the colonial goals of the legal system by prioritizing the control of the individual over the healing of the victim or community and focusing on reducing recidivism. This finding is in line with Cameron's (2006) finding that these circles often do not even acknowledge the victim, let alone support them. The circles highlight the complexity of mitigating harms within the existing framework of the legal system, where some advances can be made, but ultimately are limited in their decolonial and restorative potential by the system they exist within.

The use of circles varies greatly by jurisdiction with some courts using a circle nearly every day the court sat and other courts using them only a few times a year. The use of circles depends heavily on the availability of an Indigenous elder to assist with guiding the circle, as well as the size of the caseload before the court. Gladue courts that are less overwhelmed by the number of cases have a greater ability to take time, often upwards of an hour, to hold a circle.

The circles received very positive feedback in my interviews. In some jurisdictions, sentencing circles emerged as one of the defining positive features of these courts for those I spoke with.

In one jurisdiction, I was able to observe a number of these circles from the gallery. Before the circle starts, those in the gallery are asked to consider leaving so the circle can be conducted with more privacy and the courtroom is rearranged so that all participants are sitting in a chair forming a circle.³ In this specific court, the judge sits at a dais; conducting the circle requires the judge to come down and form a circle with the rest of the court staff, aside from the notetaker and the clerk who remained in their original places. Circles usually consist of the judge, the Crown, the criminalized individual, their lawyer or duty counsel if they chose to use one, any of their close friends or family, an Indigenous court worker, and an elder. In this jurisdiction, the elder position in the court was funded as a temporary pilot project during the time I was observing the court. During this pilot project there was an elder present during every session of Gladue court which also ensured that sentencing circles could be done every session of court in this jurisdiction.

Once everyone was sitting in a circle, everyone (including me in the gallery, the staff, and the court police officers) introduced themselves, and then the sharing began. An eagle feather was passed around the circle to signal who has speaking privileges at any given time. The elder opened and closed the circle with a thanksgiving address or prayer. The judge then introduced

³ While they were reorganizing the courtroom, I typically had one of the court workers introduce me as a student and request permission from the individual whose circle it was for me to remain in the gallery. There was only one circle where the person was not comfortable with me remaining.

the intention of the circle from a legal perspective which had three rounds of discussion: the first aimed to understand why the criminalized act took place, the second provided an opportunity for the criminalized individual to take accountability, and the third enabled those in the circle to figure out what resources or actions were needed to ensure the offending behaviour did not happen again. The participants took turns going around the circle sharing their thoughts or insights regarding these topics. Ultimately however, the sentence itself is not discussed within the circle as the sentencing decision remains in the hands of the judge.

While this process allowed the Gladue courts to bring in a feature used by some Indigenous cultures, it also served a legal purpose as it provided an opportunity for judges and Crowns to gather more information about the life stories and character of those they were sentencing. It allowed for a more in-depth discussion of the Gladue factors identified in a Gladue report or letter as well as what services needed to be accessed to help the individual. Sarah, a Crown, described the circles as:

Extremely beneficial. Not only beneficial for the individual accused person, but also beneficial for anyone else that's willing to participate. For example, I had one sentencing circle that I had asked a few police officers to attend. I think there were like 8 or 9 different cases. I invited all of them and two showed up and one of the officers that showed up had charged him with breaching his probation or something. A very, very minimal offense. And he came in and he's [saying] "this guy, blah blah blah." And then he participated in the sentencing circle and he himself, the officer, was in tears during the sentencing circle. People get so

seasoned in the role that they're in and thinking a certain way about the justice system and about crime and punishment, that it's hard to reflect and appreciate all of the different individual circumstances that someone can be dealing with. And so that was extremely helpful to him to hear all of the different people from the elder's perspective, the accused, the accused mother who was not happy with the accused because that's not the way he was raised. Just to hear all of those different perspectives and reflection of the accused about how he ended up there and now this officer, every time I see him, he's like "I keep telling all of my colleagues go to a sentencing circle, go to a sentencing circle. It's just going to broaden where you come from."

This quote demonstrates how circles were a way to humanize criminalized individuals, and while police were not involved in the sentencing process, viewing the circle allowed them to gain compassion for individuals who they may view negatively. However, while in this case, including the officers appeared beneficial to the Crown, there did not seem to be any consideration of the impact of police participation on the criminalized individual. The presence of the officer who arrested them, and entered the court speaking negatively about them, likely had a negative impact on the criminalized individual and made them feel less safe in the proceedings. Based on this retelling, it also seems that the police officer watched voyeuristically rather than making any effort to interact with the individual directly or engage in a dialogue that would help repair the harm faced by the community at the hands of police officers. This example demonstrates how, despite Gladue courts claiming that they are focused on restorative and

decolonial values, they instead appropriate these knowledges to prioritize the goals of state actors. Additionally, the fact the elder position was only funded temporarily, only existed in certain courts, and now no longer exists, speaks to the lack of government commitment to make these courts an “Indigenous” safe space.

While these circles are a way that people, including friends and family, can gain a better understanding of the criminalized individual and the support resources available to them, again the court personnel are required to take on the role of a quasi-mental health professionals which the courtroom personnel have not been trained for. Richard also points out that these benefits are beyond the scope of what the legal system is designed for, insinuating that another venue may be better equipped to host these types of meetings. As Richard explains:

The worst case is the judge, Crown, and the defense playing a game of “fix the broken Indian.” And I think it can be just as equally dehumanizing and probably traumatizing for an Indigenous accused to go to a circle like that. So, I think if it’s thoughtfully done, and you get the right people to participate in the circle, I think they can be something very positive.

In this quote, Richard highlights how the circles can sometimes be beneficial, although not in a legal sense, if you get the right people sitting in on them. However, on the other hand, the circles can be appropriated to further the colonial project of “fix[ing] the broken Indian.” Like so many factors of this court, Richard believes the success, or failure, of circles can depend on which legal professionals are present. Compassionate and knowledgeable court personnel who were willing to be creative and take a non-adversarial approach were able to have a positive influence

on the individual cases in these courts (see chapter 3 for a full discussion). However, Richard also cautions that when the “wrong people” (i.e., those who have a formal equality approach, invoke stereotypes, have not had proper training about the impacts of colonialism) are present, circles have the potential to turn into explicitly colonial tools to govern Indigenous individuals in ways that are dehumanizing. The circles in these cases become mechanisms for the legal system to gain access and govern the most personal and traumatic aspects of the individual’s life.

Colleen, a court worker, echoes Richard’s concerns that courts may not be the best venue for the traumatic discussions taking place within:

I do have a concern about [the sentencing circles], just in that if we’re going to be tearing a lot of scabs off of people and then just throwing them back out in the street, I’m concerned about that. [An Indigenous service provider] always had an elder present for our circles. I guess that mitigates it somewhat. But I do still have that concern about just throwing somebody raw back out the doors of the courthouse... We also always have a Gladue caseworker present for sentencing circles so that person is assigned to the client and does any follow up with them. Our services are very wrap-around so I’m just concerned about that situation in other places, not necessarily in [our jurisdiction].

Here, Colleen describes the potential for harm when discussing traumatic events with no aftercare. While the jurisdiction she works in offers the support of a Gladue caseworker, these are also court workers who are presumably not trained in trauma care. However, offering these caseworkers is still a better method than the jurisdictions where the approach includes “tearing

scabs off,” and then “throwing somebody raw back out the doors.” This participant’s quote highlights the importance of culturally appropriate and trauma informed mental health supports being available during, and after, the discussions taking place in these circles. Although there are sometimes some supports available such as the case workers, I did not see any trained mental health professionals present in any Gladue court who were assigned to provide mental health support during or after court.

While Colleen focuses on the limitations of the circle on account of the resources available, Paul, a Crown, highlights another limitation attempting to use this legal proceeding as a restorative intervention: the individuals before the court often do not trust all of the legal professionals. After years of discrimination and mistreatment at the hands of the colonial legal system, many Indigenous individuals do not trust the system nor the individuals who work within it. Gladue courts have been working to create better relationships between legal professionals and criminalized individuals, but there is still a great deal of work to be done. Crown attorney Paul explains this distrust:

When I say, “I’m the crown or I work for the Crown,” [Indigenous clients] don’t see that in the way that I see that. I see it as I’m a lawyer employed as the Crown attorney. They see it as I’m part of the whole Crown system and they see my role as much more connected and involved than it really is. And I’ve had conversations and sat in circles with accused who really distrust the criminal justice system.

Paul highlights the distrust that at times exists within circles between the criminalized individual and the state. This distrust is antithetical to the Indigenous logics of the circles, as well as another large barrier in the ability of courts to act as a restorative agent, especially in the case of Indigenous individuals. A truly restorative relationship cannot be fostered if the individual does not trust the quasi-therapists. This lack of trust emerged and at times the court personnel actively created a distrustful environment within the circles. In at least one case that I observed, the criminalized individual was forced by the police to participate in the circle with hand and ankle cuffs despite the lawyers asking for the shackles to be removed. Having an individual participate in what is intended to be a healing process while quite literally in chains again highlights the colonial logics that are being prioritized in the courtroom. Punishment and control continue to trump the attempts of the Gladue courts to act as a decolonial or a restorative force.

When the courts fail to be an environment of trust and healing, as Richard points out previously, the circles can become something quite sinister. However, even in situations where legal professionals are creating a space built on trust and healing, some of the legal professionals I spoke with described a covert legal process taking place. Within circles, sharing painful and traumatic stories becomes a type of currency for leveraging a more lenient sentence. Defence counsel Julie describes how this happens in her jurisdiction:

I think that the sentencing circles are very, very good and I would say almost 100 percent of the time, to be honest, I get the disposition I'm looking for because we go that route. But it's very, very hard on the clients. It's very traumatic. Sitting with your family and confronting things- it is difficult. But in terms of long-term

effect on what the goal is, and they know that up front, because sometimes they don't want to do [the circle], I just want it. But you give them the option, and you have to explain: you're going to be traumatized and go through all of [your] background and history and whatnot. That's going to come out, and we're going up to talk about it and to paint a picture of who you are and what you've experienced and how that's led you to commit this crime.

Despite the traumatic nature of circles, Julie highlights that they are a way to encourage the judge to choose the sentencing outcome that the defence is looking for almost every single time. Julie tells her clients upfront that the circles will be traumatic and difficult, but that this approach will very likely lead to a more favourable legal outcome for their case. By humanizing the individual, they tap into the compassion and discretion afforded to the judge. Suffering is traded for leniency. On the other hand, this approach means that if individuals are unwilling to share their colonial trauma in this colonial courtroom, they may not be granted access to a lighter sentence.

This example highlights how, even within circles which are claimed to be an Indigenous practice, traditional colonial logics can infiltrate the process. Those who are willing to share their stories and repent are granted leniency for granting the legal system access to their most personal information, while those who do not are viewed as unwilling to participate in the process and thus face greater punishment at the hands of the court; this aligns with the findings of Martel and Brassard (2008) and Turnbull (2014) who found that a willingness to participate in cultural programming resulted in a perceived reduced level of risk for criminalized Indigenous

individuals. The fact that some individuals feel traumatized in the setting of a courtroom to begin with is not considered in this process. Furthermore, the fact that they may not feel comfortable discussing trauma with people who do not have trauma-informed training, let alone training in the advanced mental health expertise required to guide individuals in talking through trauma, is also not considered.

These circles offer some benefits, primarily shorter sentences, and a chance for meaningful sharing, but they are also often retraumatizing for those who take part in them. The circles offer the state a glimpse into the most traumatic instances of an individual's life in exchange for lower sentences. Furthermore, the benefits offered in Gladue courts are often available only to Indigenous men while Indigenous women are excluded (see chapter 1 for a full discussion).

While the circles' ultimate goal is to provide an understanding of the Gladue factors involved in the case which can have the impact of humanizing the criminalized individual, circles are appropriated to still be heavily focused on trauma, individual accountability, and individual solutions. They are not reflective of Indigenous or decolonial knowledges. Colonial logics continue to be prioritized over individual well-being, even in the circles in Gladue courts.

Moving beyond the Canadian Legal System

Community-based Indigenous-led legal programming is one way to achieve the restorative and transformative potential that Gladue courts claim to offer. Women who require an intersectional trauma-informed approach to healing would especially benefit from a community-led approach

to justice since this is not offered in courts. However, these community programs require financial and human resources. If these community programs are not provided proper resources and fail to provide healing, the state may displace the blame for the failed rehabilitation of individuals onto these communities. These programs would create a decolonial response to harm as Indigenous communities would have control over their own local legal processes (Deer, 2018; Royal Commission on Aboriginal People, 1996; Chartrand, 2019). However, the option must remain for Indigenous communities to refer individuals to the traditional system if they choose as they may believe criminalized individuals who have committed serious harm within the community need to be removed from it. An in-depth community-led approach offers a superior alternative to the one used by Gladue courts within the colonial legal system. Ultimately, even as community-led responses to crime are a better option, these will not reduce the overrepresentation of Indigenous people within the legal system. Once individuals have committed harm, it is too late to prevent that harm from taking place. Therefore, approaches focused on providing resources to address factors such as poverty and violence that lead to Indigenous individuals being criminalized in the first place are the only solutions that can truly prevent initial contact with the legal system.

The vast majority of participants discussed the strengths of moving the cases of Indigenous people out of the jurisdiction of the Canadian legal system through diversion programming or alternative methods of case management. Many of the individuals I spoke with expressed frustration that some of these cases were coming through the courts and using court resources instead of being withdrawn. Multiple participants expressed that it would be a better

use of resources, as well as much less traumatic for criminalized individuals, for these cases to be diverted before they ever came before a court. Diversion could be done by police or through the creation of a pre-screening mechanism.

Participants had a variety of ideas about what court alternatives may look like, with many focusing on Indigenous-led community-based approaches. In some jurisdictions, these approaches are already being explored. There were Indigenous-led community-based diversion programs in many of the jurisdictions I looked at. However, these programs were limited by what types of charges they could handle and, in some cases, by the lack of resources that were available to the organizations carrying out the programs. An additional limitation is that the formal justice system still had control over making decisions about which cases were eligible to be diverted to these programs.

Despite these limitations, Anne, a Crown attorney, felt that it would be beneficial for both criminalized individuals and the legal system to increase the use of community-led programming. She encouraged other Crowns to become comfortable handing over more cases to the community program by withdrawing formal criminal charges. Furthermore, she felt that withdrawing charges should take place earlier on in the legal process than it typically happens with most Crowns. Her reasoning is as follows:

We have a [community-led program] that's very active. If we can get people to our court and then [divert] them into the [community-led program] without a lot of intervention by the criminal justice system, that's the best model. I felt in the early days people were uncomfortable diverting matters... so it was a lot of

babysitting and hand holding to the point that a charge could be withdrawn in the criminal justice system, but “no, we’ll divert it.” So, what has happened? Right, so it’s learning to let the [community-led program] take it at its outset- let’s not duplicate services. Let’s not babysit people, but to allow the community to heal better by having them be dealt with in their own community.

Here, Anne points out that many cases can be diverted to community-led programming and require little intervention from the criminal justice system. She is critical of the tendency for Crowns to hesitate to divert charges, waiting so long that the cases have progressed to a point where the charge could be withdrawn (which would eliminate the formal legal proceedings altogether). While diverting charges allows the Crown and court to retain control over the case, it also creates a duplication of services that takes away from the already scarce availability of resources.

One judge in particular was extremely passionate about this topic. They echoed Anne’s comments, explaining that removing the process from the legal system is especially important for first time offenders:

I think that there needs to be more upfront community-based services that are directed at first time offenders. I cannot tell you how often I see a person’s criminal record start with some low-end charge that could have been diverted out of the justice by the police, the Crown and/or the defence lawyer but everyone is too scared to make the call so the offender pleads guilty, gets put on probation,

then starts accumulating a record for breaches and starts riding that revolving door in and out of custody.

Early intervention programs that address trauma and addictions, and not criminalizing minor criminal mistakes is the best way to reduce crime, help people, and allow the Indigenous communities to decide on the appropriate sanctions based on their values and beliefs.

If we are really interested in truth and reconciliation, then I say we stop paying lip-service to those words and farm out the divertible cases to Indigenous communities to deal with in their own way. I think that this needs to be a Court/Judge led-initiative because even though I know there are community based programs and diversion programs, they are under-utilized by the police, the Crown, and defence who are often too scared and/or lazy to make the call because it might involve them calling a victim to say "Hey, what about this?" or "Hey, this is what we are going to do with the charge." Anyways, I have a million ideas about how this would work. I could talk for hours about it.

This judge explicitly recognizes that a turn to these community-led programs would work against the “revolving door in and out of custody” that results from breaches which are a large factor in the overrepresentation of Indigenous people in the legal system. They then provide a scathing critique of the legal professionals who under-utilize these programs due to being “scared and/or lazy,” since this inaction inadvertently works against the mandate of Gladue courts.

Anne and the judge both acknowledge in their quotes that turning jurisdiction back to the community is an approach that also allows for some healing and reconciliation at the community level as well. By involving and prioritizing the healing of the community, as well as the individual, this approach would be more in line with a true restorative approach. The community, with the presence of trained mental health professionals, would also provide a much more appropriate setting for healing as opposed to an innately traumatizing courtroom. Thus, this setting would move the process closer to realizing the restorative and decolonial potential of responses to harm that can happen in the community when the power and coercion of the state are removed.

Defence counsel Grace expressed that moving the process outside of the legal system in order to prevent additional harm to criminalized individuals is especially important in the cases of Indigenous women. In Grace's words:

I think a lot of it does need to be dealt with outside of the court because, specifically for Indigenous women, you have such severe and a lot more complicated risk factors or systemic factors that are in the background. It's very common.

Grace highlights how common it is for Indigenous women in the justice system to come in with existing histories of severe trauma. While Indigenous men also experience high rates of trauma, women face higher rates of victimization through factors such as sexual abuse and human trafficking. In order to take a truly restorative approach, the process used must be aware and accommodating of gendered differences. Grace's point stresses the importance of an

intersectional approach to responding to harm. The complexity of Indigenous women's lives and their criminal cases in the legal system (addressed in depth in chapter 1) must be considered to provide a truly decolonial and restorative response to criminalized behaviour.

Although nearly every participant expressed support for moving the response to the criminalized behaviour of Indigenous individuals outside the reach of the Canadian legal system, they also acknowledged that it was not likely to be as simple as the legal system just washing their hands of these individuals. Many participants also discussed the limitations and challenges that could arise in turning over all or partial jurisdiction over criminalized individuals' cases to their communities. Many of the limitations the courts face, such as a lack of resources, may also impact community-led programming. Chris, a Crown attorney, shared the following words of cautious support:

I actually would be supportive of [moving cases out of the justice system] and I don't think I've been shy about that. I like the idea of moving it into the community as long as there's the resources in place in the community. Depending on which Indigenous community, some come to decisions [more easily] than others. Sometimes there's a lot of disagreement within the community. I like the idea of it very much. I think the community is better equipped to deal with some cases than we are.

Chris highlights that some of the largest challenges to moving to community-led programming would likely be funding and capacity. It would require a lot of resources. Furthermore, participants discussed that many communities may not feel they have the human resources,

namely trained professionals to carry out the work, or may not want the responsibility of dealing with those committing harm, especially when that harm was severe and took place within the community. These limitations were also discussed in Kaiser-Derrick's (2019) work.

Chris also acknowledges the diversity of opinions within Indigenous communities. Each community would need to hold discussions in order to determine what the new Indigenous legal order would look like, and it may look and function very differently in each specific community. These concerns about capacity were also expressed by Martel et al. (2011) in their work which found that Indigenous communities in Canada are essentially set up to take the blame for the failed rehabilitation of their community members. The community is given the responsibility for rehabilitation but given no resources from the government to facilitate this work.

In addition to the challenges that arise from a lack of resources, participants also expressed that community-led programming was not always appropriate for individuals with no ability or no interest in making changes to avoid future criminalized behaviours. This concern has also been expressed by Indigenous women's groups such as Pauktuutit who have accused diversion programming of keeping abusers in the community with their victims (Murdocca, 2013). Participants recognized that there may be some cases where individuals need to be forcefully kept away from others so as to prevent more harm from taking place. Nick, a defence council, shared his concerns, specifically around individuals who had long histories of criminalization:

The [community-led program] is good. I had a client; she just finished last week.

She did a 12-week counseling program, and she thought it was great. And she's

stayed out of trouble. It's been good for her. But I find some of the older populations just don't care. They're like, "whatever." And that's the thing, you can pull the charges and if it's a theft under you say, "OK dude, you got [community-led program], their meetings in four weeks." And then it turns out, six months later, I'm talking to the [An Indigenous service provider] court worker, and they still have this outstanding diversion, and they just never showed up to. But I think that there could be more cases that are diverted... there's, I think, divertible cases and they don't happen.

Nick describes how this community-based program can work very well for some people, but for those who are not invested in the process, it can be a waste of time and resources since they will not attend willingly. In these cases, the individuals may continue to cause harm, and their community may face the blame for this. As such, accountability and responsibility, which emerge as key factors in Gladue courts, may also need to be key factors in community programming for it to achieve its goal of reducing recidivism. However, while accountability functions to assign blame and justify punishment within Gladue courts under the guise of restorative justice, in the community they may serve their true restorative function of enabling healing.

Some of the concerns mentioned by participants in this research have been addressed by Sarah Deer, a scholar from Muscogee (Creek) Nation of Oklahoma. Her work has explored the topic of restoring jurisdiction over some legal issues to Indigenous nations in the United States. Deer's (2018) work explores legal responses to gendered violence that may come about as a

result of recent federal changes that would turn the jurisdiction of prosecuting some gender-based crimes over to tribal governments. She questions what changes should be made, how these changes will be funded, and if it is possible to operate within the federal system independently without being assimilated into a punitive colonial justice system.

Ultimately, Deer (2018) concludes that the recognition of Indigenous sovereignty taking place in the United States is conditional. In order to take jurisdiction, certain conditions must be met such as honouring the colonial state's constitutional rights. This approach raises two issues. First, the colonial state is allowed to reaffirm its rule over the tribal governments, as it continues to retain control by setting the conditions that need to be met. The recognition of sovereignty under this model can be restricted by the state just as quickly as it is granted. Second, maintaining the conditions set by the colonial government is expensive and complex. Many bands cannot afford to provide funding for things like lawyers, jury trials, etc. without financial support from the federal government. Accepting support and the conditions of the government is in and of itself a dilemma because, in Deer's (2018, p. 99) words, turning to the "Great White Father" for assistance can be experienced as demeaning and internally inconsistent." It is not a truly decolonial approach since it continues to give the state control over Indigenous communities.

Thus, while there are undoubtedly challenges that will need to be overcome and community discussions that will need to take place, this model still holds the potential to be transformative. Deer (2018) discusses how Indigenous community-led models provide the potential to move away from punishment altogether and focus instead on healing, which would

take place not only in response to harm, but in the way harm itself is defined. The colonial logics embedded in the colonial legal structures could be combated in this approach. For example, Deer (2004) discusses how the law itself devalues women by viewing rape similarly to a property crime. This understanding differs from how “Indigenous theory transcends the limitations of the non-Indigenous theories by conceiving of rape as an unlawful "invasion" of the body, mind, and spirit. This theory allows the resulting legal system to address the crime of sexual violence holistically” (Deer, 2004, p. 137) allowing the logics that act in opposition to individual and community wellbeing to be removed from the legal process at the outset.

While Gladue courts put a Band-Aid over a colonial wound that can offer some relief and protection in some individual cases, Indigenous-led community-based solutions would work to begin healing the wound. Gladue courts attempt to address colonialism and its role in the gross overincarceration of Indigenous people, but after more than two decades of Gladue courts, the overincarceration of Indigenous individuals has increased rather than decreased. These courts have not been able to achieve this main goal due to the inherent limitations of the legal system and its innately colonial, traumatizing, and individualizing nature. The harms of colonialism cannot be healed with more colonialism. To act as a healing force capable of considering the damage caused by colonialism, the process must be moved out of the colonial legal system and into the control of Indigenous communities. Furthermore, these community-led programs must be adequately funded and supported so that their healing potential is not limited by resource constraints.

Disembedding legal responses from the colonial structure may be one way to begin to address overincarceration. However, true solutions to overincarceration must also look to prevent the conditions that lead to the criminalization of Indigenous people in the first place. A focus on preventing discrimination, poverty, substance use, and victimization is the strongest approach to reducing the overincarceration of Indigenous individuals. Removing the process from the Canadian legal system would provide a better opportunity for communities to utilize an approach that has true restorative potential, but ultimately overincarceration is an issue that begins outside of the legal realm and therefore must be solved outside of the legal realm.

Community-based Indigenous-led legal programming can provide an opportunity for restoration and healing, as well as providing the state an opportunity to save resources. This model could be especially beneficial in the cases of Indigenous women who require an intersectional trauma-informed approach to healing that the traditional legal system is unable to offer. However, these community programs require financial and human resources in order to be able to carry out this programming, or they risk facing the blame for the failed rehabilitation of individuals. Turning to these programs would also help to decolonize the legal responses as Indigenous communities would have control over their own legal processes and could tailor it to their own local needs. Finally, participants shared that it must be recognized that, in some cases, communities may choose to opt out of dealing with criminalized individuals who have committed serious harm within the community and who they believe needs to be separated from others (Kaiser-Derrick, 2019). This in-depth approach by communities offers a superior alternative to the one used by Gladue courts within the colonial legal system. While community-

led responses to crime are a better option, even these will not reduce the overrepresentation of Indigenous people within the legal system. Preventative approaches must be the focus.

Conclusion

Ultimately, a specialized court is still a court, and courts cannot be transformative. Gladue courts, and specialized courts generally, have been unable to achieve a restorative decolonial approach because they are ultimately still embedded in the broader colonial legal system and remain bound by its processes and rules.

A Canadian courtroom can also not be Indigenous or decolonial. Introducing elements such as Indigenous artwork, smudging, and elders into a court process is not enough to change the foundational logics of a colonial court governed by a colonial state. In Gladue courts, aspects of Indigenous cultures that work well with the court process are detached from their original purpose of restoration within the community and appropriated to further the colonial project of, in the words of one participant, “fix[ing] the broken Indian.”

Furthermore, a court cannot be anti-oppressive because the legal process exacerbates criminalization and marginalization. Courts often keep people trapped in the legal system through lengthy processes and unreasonable release conditions, ironically increasing overrepresentation rather than addressing it. Rather than reducing overincarceration, Gladue courts increase and extend Indigenous peoples’ contact with the legal system.

Finally, a court is not a restorative environment for anybody, especially for Indigenous people. Even when attempts are made to introduce healing elements such as sentencing circles, attending court is still ultimately an experience of further trauma enacted on Indigenous people by the state. Gladue courts continue to prioritize the focus on “fixing” the behaviour of the individual, over true healing, or the victim or community.

In sum, then, Gladue courts will continue to expand criminalization and the reach of the state into marginalized communities just as traditional courts do. While courts can appropriate feminist and decolonial knowledge and terminology in a type of equity-seeking performance, their incorporation into the legal system does not reflect the true values or goals of these anti-oppressive movements which challenge structural oppression. Achieving justice, reconciliation, and reintegration outside of the Canadian criminal legal system, and supporting Indigenous-led community-based alternatives, will help move us towards a restorative and decolonial alternative. Ultimately, however, the overrepresentation of Indigenous people within the legal system must be addressed through preventative action to address impacts of colonialism such as poverty and victimization that provide Indigenous people with the resources they need to avoid the traumatic pathways that lead them into contact with the system.

Chapter 3: Colonialism as a Legal Truth: The Influence of Individual Discretion in Indigenous Peoples Court

Introduction

Liberal legalism assumes that criminal law is an objective truth finder and neutral in its determinations of guilt (Smart, 1989; Naffine, 1990; Calavita, 2016). However, legal reasoning is influenced and shaped heavily by judges, lawyers, and non-lawyer actors (Moore, 1973; Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983; Naffine, 1990; Calavita, 2016) who ultimately construct rather than discover “objective truth” (Scheppelle, 1992). Specialized courts represent a shift from this traditional commitment to neutrality and instead encourage the use of discretion to craft individually tailored sentences that address the “root causes” of criminalized behaviour such as substance use or trauma. While Gladue courts also aim to address root causes, they differ from the standard specialized court for their incorporation of a substantive equality approach that recognizes the marginalization resulting from colonialism as a legal truth to be considered as evidence.

This chapter explores the influence of individual discretion on case outcomes and the prosecution process within Gladue courts in Ontario. It draws on courtroom observation, six qualitative surveys completed by judges, and 20 semi-structured interviews with individuals who worked in Gladue courts. I argue that individual legal discretion and close working relationships, rather than “objectivity” and “neutrality,” are central to achieving Gladue courts’ substantive equality objectives. However, I show that although the Gladue courts are informed by a

substantive equality approach, in practice the courts fail to achieve this goal. I attribute the court's failure to its lack of adherence to administrative procedures, namely an assigned court team. While the court's inability to achieve a substantive equality mandate is rooted in the inherent limitations of the legal system, it is aggravated by the inclusion of the "wrong" people on the court team.

This chapter is guided by the following research questions:

- How do court professionals understand their roles in the Gladue court?
- Which knowledges are used by court professionals within the Gladue court and how do these knowledges influence their conduct and analysis of cases within the courtroom?
- How do court professionals influence the outcomes of cases within Gladue court?

The ability of Gladue courts to meet the goals of reducing Indigenous overincarceration and providing a context where the ongoing impact of colonialism is understood as a legal truth is contingent on the specific legal professionals and court workers within the court. When court workers and legal professionals who are the "wrong" people for the court are present, they advance a traditional legal formalism which undermines the substantive equality mandate of the courts. For instance, one judge reported seeking out a position in the court to oppose the court's substantive equality mandate, or in their own words, to stop the "get out of jail free card." This research demonstrates the importance of having well-trained, caring, and compassionate legal professionals and court workers within Gladue courts. Along with their embrace of "neutrality" and "objectivity," these "wrong people" also bring in a lack of commitment, an unfriendly

demeanor, and discriminatory beliefs. However, when the court team has the “right people” present, these individuals can use their discretion to influence cases in ways that can benefit those before the court. The legal professionals and court workers who are a good fit are committed to furthering the substantive equality mandate of the court and are compassionate, knowledgeable, and educated. These qualities, along with their consistent involvement in the court process, enables the court team to conceptualize mitigating factors as resulting from colonialism and advocate for the individual’s best interests (Franke & Shdaimah, 2022; Castellano, 2011,2017).

Collaborative relationships amongst court workers allow for open and honest discussions about the needs of individuals being sentenced. Yet, a rotational approach to court staffing that circulates legal professionals through the court prevents these relationships from forming. The rotational approach is not a problem from the formal equality perspective since all legal professionals are viewed as equally impartial and objective. However, this approach is antithetical to the foundational logic of the Gladue courts that rely on a specialized court team with the knowledge necessary to apply a substantive equality approach. Forming these relationships is contingent on consistently spending time in the court to develop trust between each other and demonstrate a commitment to the substantive equality approach mandated; working relationships do not happen when courts use a rotational model that alternates legal professionals through the court periodically and indiscriminately. These collaborative relationships can form between Crown and defence counsel who typically have adversarial roles, as well as between all individuals present in the court including court workers, judges, and

special constables. These relationships allow for the best interests and rehabilitation of the person before the court to be prioritized, rather than traditional adversarial legal goals such as winning. This shift from a focus on winning means that the various parties can trust each other to work together to achieve a legal outcome that considers the role of colonialism in the individual's life.

The court team working in Gladue court, if composed of the “right” people, can provide a context where Indigenous individuals can see the substantive equality logics of the court realised and the impact of colonialism on their lives recognized, which are considerations not offered in a traditional formal equality approach. While previous sociolegal scholarship has made clear that the presence of individual discretion and influence in the courtroom can harm marginalized communities (Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983), the current study suggests that individual discretion in the legal process also has the potential to enable a substantive equality approach where an analysis of structural oppression is incorporated into cases, even if this takes place informally and off-the-record. Thus, the influence of individual discretion within a court depends on who those individuals are. Individuals can promote oppression, but they can also attempt to resist it.

This chapter will begin with a literature review to lay out the theoretical foundations of this work, including foundational theory, and an explanation of specialized courts, and substantive and formal equality. It will then move to a discussion of the “wrong people” outlining the characteristics that make them a bad fit for Gladue court. During this discussion I will also highlight the drawbacks of a rotational model that often introduces these “wrong people” into the court. Then, I will discuss the type of person that is the “right” fit for this court,

as well as how the inclusion of these individuals fosters collaboration, which is also an important factor contributing to the ability of the Gladue courts to have a positive impact on criminalized individuals. Finally, I will discuss the implications of these findings and conclude the chapter.

Literature Review

Theoretical foundations

Despite the law's efforts to portray its decision making as separate from broader social, cultural, and political narratives, the reality is that law and society are closely integrated, and this integration plays an important role in shaping legal processes and decisions. The close relationship between law and society has been well documented in past sociolegal theory and research (Moore, 1973; Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983; Naffine, 1990; Calavita, 2016; Adébí sí, 2023). Scholars such as MacKinnon (1983), Smart (1989), and Naffine (1990) question the law's claims to neutrality and objectivity and argue that the law is both influenced by broader society and critical to maintaining the status quo. In the view of these scholars, the law works to advance the perspectives and goals of men at the expense of women, while claiming neutrality. Adébí sí (2023) adds nuance to this argument, highlighting that it is specifically the perspective of white men advanced by this understanding law.

Smart (1989) and MacKinnon (1983) believe that sexist biases are deeply ingrained in the legal process, although they theorize the sources of patriarchal influences differently. The legal system is seen as androcentric, namely a male creation which reflects masculine viewpoints and values. It assumes and reinforces the view that men are superior, and women are inferior,

dishonest, and emotional. Smart believes that this not only prevents justice but leads to the legal system being “juridogenic” (1989, p. 12), meaning that legal solutions can often make the problems they were designed to resolve worse. This analysis starkly contrasts with the “value-free” way the law sees itself. Western legal reasoning seeks to appear as neutral, impartial, rational, and value-free in its determinations of “truth,” similar to the field of science (Smart, 1989; Naffine, 1990; Adébisi, 2023). In doing so, the law strives to separate itself from factors such as culture, politics, emotion, or any type of subjective discretion.

In the law’s own view, legal reasoning is a way of knowing that can be applied by any trained legal professional to arrive at the “truth.” Calavita (2016) calls this version of law “The Law—with a capital L,” adding that this is also how most people in society see the law. When the average person has an experience that would create doubt about the law’s neutrality, the incident is written off as an anomaly (Calavita, 2016, p3). However, the way the law and the majority of society view the legal process is inaccurate. Firstly, the goal of a traditional legal proceeding is not to establish the “truth” of what happened, but for two adversarial sides to persuade a judge or jury that their portrayal of events is the correct version (Naffine, 1990). What is actually “true” becomes unimportant as the process is a competition between two parties each seeking to “win.”

Rather than focusing on “truth,” the judge will interpret the stories told by the two sides of a legal dispute based on the ability of the lawyers to persuade as well as on the judges’ own perceptions of reality. To illustrate this point further, Naffine (1990) introduces the work of Thomas Kuhn who describes how even the natural science fields are not free of individual and

societal influence; the researcher will always interpret their research based on their own perspective. This is not to say that scientists or legal professionals are dishonest in claiming to be neutral, but rather mistaken about the potential of individuals to truly separate themselves from the society and culture they exist in. As scholars such as Smart (1989) and Yngvesson (1988) discuss, judges and courts continue to be guided by their own discretion, experiences, and beliefs. Scheppele's (1992) work is a clear demonstration of how misogynistic ideas and stereotypes inform judges' understanding of truth, women, and sexual assault in rape trials in ways that overrides the truth of sexual assault victims. No one is truly impartial, but rather they influence the court process in line with their individual unconscious beliefs, even if they are unaware they are doing so.

While the previous work has provided a theoretical foundation for understanding how individuals and society shape the legal system, the following studies provide examples of how this operates in practice. Examining research by Engel (1984), Yngvesson (1988), and Greenhouse (1980) sheds additional light on how individual and cultural factors play into legal decision-making by examining how law operates in three different towns. Each of these scholars finds that the beliefs of the local communities are reflected in the way their local courts operate. Engel (1984) finds that personal injury claims are used by long-term residents as an excuse to stigmatize new (primarily racialized and poor) members of the community who are seen as greedy, despite the actual number of personal injury suits being exceptionally low compared to the national average. Similarly, Greenhouse's (1988) study finds that the community's biases about new members of the community, and about women as peacemakers, are also reflected in

the approach of the court personnel. While the individuals in the towns in both Engel's (1984) and Greenhouse's (1988) studies claim that their opinions of the newcomers are based on their lived experience of their tendency to turn to the law, this perception is unfounded.

Instead, their perception works to create stereotypes, which manifest and are reinforced within the legal process. Specifically, "their ideology works the other way around... the nature of ideology, at least a successful ideology, is to be self-fulfilling" (Greenhouse, 1988, p. 690).

These studies suggest that the law can be a powerful tool for manifesting the preconceived beliefs of the more powerful and established members of these communities into an empirical reality, at the cost of the already marginalized newcomers. The law in these examples not only reflects the beliefs of the community but makes this marginalization a reality.

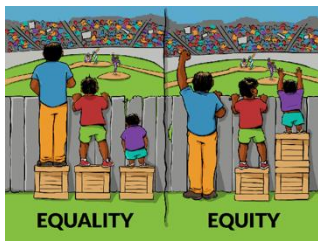
The role and significance of racist, classist, and sexist community perceptions in the legal system becomes even clearer in Yngvesson's (1988) examination of the process that claims must go through to be approved as criminal matters in a community. She finds that court clerks make decisions about what is and what is not a legal matter by invoking commonly held stereotypical ideas about race, class, and gender. For example, fighting between racialized people in poorer neighbourhoods was seen to be non-legal, and was only seen as a legal matter when it threatened the well-being of middle-class whites. Despite assault being a clear legal violation, it was viewed as a product of the poor morality of poor people rather than as a legal matter by the legal professionals using their discretion to decide which cases would be heard by the court. The court also invoked sexist ideas about women when cases involved teenage mothers. These ideas included seeing women as physically weaker and refusing to see women assaulting men as a

serious legal matter (Yngvesson, 1988). In this community, legal gatekeepers used biases to disqualify certain experiences, and certain individuals and groups, from the legal realm altogether, preventing people who were already marginalized and disadvantaged from being able to access the law, and perpetuating stereotypes and ideas about these groups.

This body of work makes clear that the individual and the broader community have a significant impact on local legal processes. Engel (1984), Yngvesson (1988), and Greenhouse (1980) demonstrate how individuals bring ideas from the community, particularly classist, racist, and sexist biases, into legal proceedings. In Yngvesson's (1988) scholarship, discriminatory biases worked not only to influence the legal process but also to determine which individuals have access to a legal process. The present study on Gladue court expands on this body of literature by examining how acknowledging the presence of structural oppression influences the incorporation of individual discretion and cultural factors within the courtroom. In Gladue courts, the substantive equality approach enables colonialism to be understood as a legal truth that is considered in criminal sentencing, rather than a factor operating outside the legal realm. The following section provides an in-depth discussion of substantive and formal equality.

Substantive Equality

Gladue courts are informed by a substantive equality approach while traditional courts are informed by a formal equality approach. These two approaches are the main theories of equality that inform legal decision making. Formal equality advocates believe that everyone should receive the same treatment and that “historical” forms of state violence like slavery or colonialism should not be considered in contemporary law (Daum & Ishiwata, 2010). They



contend that the law has achieved racial equality through the granting of legal protection and equal rights, and thus any socio-economic inequality remaining cannot be due to racism. Consequently, ideas

about racial inferiority in popular consciousness are replaced with ideas about cultural inferiority (although both work to oppress racialized groups) (Crenshaw, 1988). In contrast, substantive equality advocates believe that structural oppression and discrimination continue to have an impact, and that law should explicitly attempt to “level the playing field” by aiming for equality in outcomes rather than treatment (Daum & Ishiwata, 2010). A substantive equality approach enables social science knowledge about structural oppression, such as the ongoing impacts of colonialism, to be brought into the courtroom as legal “evidence.”

Crenshaw’s (1988) work examines the impact of conservative legal activists advocating for formal equality and their objections to policies rooted in substantive equality. She explains how this form of reasoning, which is premised on the assumption that society operates as a meritocracy, leads to “colorblind” racism. Formal equality advocates still believe in discrimination but believe that it is no longer systemic. Structural discrimination is no longer

seen to exist and so its implications are then viewed by society, as an appropriate response to stereotypical traits like “laziness” or a “lack of motivation.” If one group falls behind, their inferior position is perceived as fair and natural because the law is seen to have provided them with an equal opportunity to succeed. Thus, it is possible that Gladue courts may increase the opportunity for harm. If the Gladue court is intended to address oppression, society will assume the court is a discrimination-free space. This assumption results in discrimination introduced in this legal process becoming harder to detect, and thus, makes any resulting inequality stemming from the court seem fair and neutral. While Crenshaw observed formal equality and the colorblind approach to equality, Gladue courts are different because they represent a substantive equality approach. Thus, this research extends Crenshaw’s (1988) work by examining how approaches explicitly intending to address discrimination, like formal equality, can enable and disguise discrimination.

By making discrimination individualized, the failure of courts to reduce overincarceration can be attributed to the personal failures of Indigenous individuals rather than discrimination by the court or society. When considering Crenshaw’s (1988) work in combination with the above sociolegal literature, the potential for legal processes designed to empower marginalized groups becoming juridogenic becomes clear. If the main purpose of Gladue courts is to provide a legal avenue that mitigates discrimination and provides a culturally appropriate alternative to traditional courts, then failure to achieve the desired outcome in these courts will be seen to result from personal attributes rather than the presence of discrimination against Indigenous individuals.

In conclusion, the law traditionally claims neutrality and impartiality which does not align with the reality that courts and the legal process are heavily influenced by individual discretion. Sociolegal literature has demonstrated that courts are in fact dependent on the beliefs of those who operate them, and the communities that they exist in (Moore, 1973; Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983; Naffine, 1990; Calavita, 2016; Scheppele, 1992). These beliefs most commonly work within courts to disadvantage marginalized communities. However, there have been some attempts to battle marginalization through law, such as Gladue courts which attempt to introduce substantive equality reasoning into the legal process. The following section examines specialized courts which are a more focused attempt to use the courtroom as a tool to combat marginalization.

Specialized courts: A shift in thinking about the legal process

Gladue and other specialized courts are an attempt to use the legal system to improve the lives of Indigenous individuals experiencing criminalization (Rudin, 2006; Wexler, 1993). These initiatives represent the potential for a shift from the traditional colonial understanding of the criminal legal process and its claims of objectivity and neutrality (Smart, 1989; Naffine, 1990; Adébí sí, 2023). Specialized courts are less focused on these aspects because their goal of determining truth and guilt has, in theory, been replaced with the goals of therapeutic jurisprudence which moves away from the adversarial process and towards addressing the supposed “root causes” of crime (Wexler, 1993; Castellano, 2017). One of the main goals of specialized courts is to improve the lives of the individuals who come before them by offering

resources such as therapy, substance-use counselling, housing supports, and in the case of Gladue courts, cultural supports. While therapeutic focus does not technically compromise the basic tenet of due process, as legal professionals are still bound by the same rules as in traditional court, it does allow them to explicitly use more subjective discretion when approaching cases to attempt to craft a more individually tailored response to the individual's "root causes" of crime (Castellano, 2017).

A specialized court approach encourages direct conversation and an understanding of the criminalized individual to better understand them and their experiences. This approach differs from traditional courts that aim to limit the interactions between the judge, the other legal professionals, and most of all, between the judge and the defendants (Castellano, 2017). In these non-traditional courts, the goal becomes focused on the individuals who have been charged and achieving the best outcome for them. This increased interaction and shift in focus changes expectations around the role that legal professionals play and the personal factors that make them the "right" people for the court. This change in expectations is discussed in Nolan's (2001) book examining drug courts. Nolan identifies four characteristics that distinguish effective drug court judges from traditional court judges: judicial expediency, enthusiasm, activism, and compassion. These four characteristics enable judges in these courts to better be able to form relationships with the criminalized individual and court team allowing them to identify, and attempt to address, the criminogenic "root causes." Castellano's (2017) work expands on Nolan's by examining other important qualities that specialized court judges should have to be successful in their role. Castellano (2017, p. 419) highlights that judges should have:

[r]eflexivity... Judges should ask themselves: Am I presenting myself as fair, consistent, caring, and competent? Am I fostering trust and respect with both clients and team members? These are core aspects of judges' craft and should be substantively evaluated. Otherwise, justices and magistrates may cause undue harm to participants.

The characteristics identified above by Nolan (2001) and Castellano (2017) exemplify the shift in thinking about what qualities make for effective legal decision making in specialized courts such as drug courts. Rather than qualities traditionally valued in law, such as neutrality and impartiality, legal professionals in these courts and the other legal professionals on the courtroom "team" are expected to be invested in the well-being of the individuals before them.

Castellano's earlier work (2011) examines this teamwork aspect in more detail by focusing on how mental health courts attempt to use collaborations between legal professional and clinical mental health professions in the court. In these specialized courts, the mental health workers must attempt to meet the mental health needs of their clients while remaining bound by and responsible to the legal system. She finds that they attempt to meet these needs by influencing the legal professionals to be either more lenient to allow their clients to meet their therapeutic goals, or by using the court's power to punish in cases where they believe their clients will not comply with their mental health recommendations. The mental health workers influence legal professionals by selectively sharing and restricting the information with the courtroom to attain their desired judicial decisions (Castellano, 2011). For example, if mental

health workers are aware of a breach of conditions, they may keep this from the court if they believe it will help their client meet their mental health goals.

In conclusion, specialized courts require that legal professionals move away from the traditional understanding of law as neutral and objective. Instead, legal professionals in these courts attempt to take a unique pathway to sentencing dependent on individual circumstances, or in the case of Gladue courts, a substantive equality approach. Those who are fair, consistent, caring, and competent (Castellano, 2017), and demonstrate judicial expediency, enthusiasm, activism, and compassion (Nolan, 2001) are seen as a good fit for creating positive change through specialized courts. In contrast, those who lacked these characteristics and utilized a traditional formal equality approach had the potential to create harm. The following data contributes to this literature and expands on it by exploring how individuals in Gladue courts use their discretion to advance or hinder the courts' substantive equality mandate.

Findings

The creation of Gladue courts represents an acknowledgment by Canadian legal professionals that “the social” can and should be incorporated into the legal process, as the main purpose of these courts is to recognize and attempt to address the connections between the overrepresentation of Indigenous individuals in the legal system and colonialism. By acknowledging that structural oppression and “historical” forms of state violence play a role in the sentences Indigenous individuals face, the legal system has acknowledged that the court process is not neutral and impartial but rather operates based on the same oppressive beliefs that

exist in broader society. This substantive equality approach mandated by Gladue courts, however, only becomes possible through having the “right” individuals working within the court.

The individuals in the court and their beliefs exert significant impacts on the processes and sentences that courts adopt. It is essential to have the “right people” with the “right” knowledge, training, and compassionate approach. Adhering to the substantive equality logic of the court requires both knowledge and desire to provide a more equitable legal process for Indigenous individuals. The presence of the “wrong people” will continue to advance a tradition of formal legal equality. These individuals are unfamiliar with Gladue principles, lack an understanding of the structural oppressions Indigenous peoples experience, are discriminatory, unfriendly, or adversarial.

I argue the relationship building and trust between the individuals working in the court plays a key role in enabling a substantive equality approach. Research participants explained that the court’s rejection of an adversarial model and consideration of systemic oppressions are the main benefits of the Gladue courts. The use of informal meetings and frank and open discussions of cases, without fear of the information being used to penalize individuals appearing before the courts, allows for Crowns and defence counsel to take a collaborative approach.

The way the Gladue courts operate is heavily dependent on the unique processes of each jurisdiction, and even within jurisdictions, there is a great deal of variation in day-to-day operations depending on who is present within the court on a given day. Each courtroom has a different physical layout, different expectations around whether judges will wear robes, when, and if, the judge will sit at the dais, whether smudging will take place, whether an opening

announcement will take place, or whether an elder will be present. There is, however, a clear pattern of influence by individuals and their relationships. Individual discretion shapes the Gladue courts' processes and plays a strong role in determining whether a substantive equality approach will inform legal decision making. When the "right" people are present, they are able to mobilize the court's substantive equality mandate, but when the "wrong" people are present, the court remains firmly rooted in formal equality, with the latter serving as a barrier to the realization of Gladue court benefits. The following section will explain the impact of the "wrong people" in greater detail.

The Wrong People: Barriers in Gladue Court

It depends on who the other players are, how well [Gladue court] goes. If a Crown isn't particularly interested in helping Indigenous people, it becomes very difficult. Especially if that Crown is assigned to the Gladue court. And having a judge who also is not terribly interested or bought in. - Colleen, court worker

Legal professionals who are unfamiliar with the history and contemporary reality of colonialism are unable to consider its impacts on the lives of those involved in the courts. This lack of knowledge sometimes leads to outright discrimination. Those who have an unfriendly demeanor and/or are stuck in the traditional of formal equality legal reasoning also work against the purpose of the Gladue court and bring the same process and atmosphere of traditional courts. Their approach to legal reasoning prevents them from recognizing that substantive equality requires them to understand the criminalization and disenfranchisement of Indigenous Canadians

as a continuation of colonialism. The opening quote from Colleen highlights that she encounters the presence of Crowns and judges who are not interested in helping Indigenous people and that this becomes very difficult to help people within Gladue court when these types of legal professionals are present. In fact, when the “wrong” people are working in the court, it is potentially even worse than a traditional court (Castellano, 2017). These “wrong people,” often randomly assigned to the court, lack the passion, interest, and commitment that the others who work in the court typically have.

Discrimination in Gladue Court

A key issue in Gladue courts is the presence of legal professionals who lack knowledge about how the courts are supposed to operate, as well as the historic and present reality of colonization within Canada. These professionals are a poor fit and are often rotated into the court without prior experience or interest. Lack of knowledge prevents the legal professionals from being able to take an approach rooted in substantive equality and, at times, manifests in outright discrimination. Other times, it hinders the legal professionals’ abilities to perform their duties effectively and in respect of the court’s mandate, creating a hostile environment that is not conducive to teamwork between the defence, Crown, and judge, and preventing access to the resources such as Gladue reports.

Chapter one provides an in-depth discussion of instances of disrespect and outright racist and sexist discrimination that Indigenous women face in Gladue courts. Recall Kiran, a court worker, sharing the story about her experience with a judge who was not familiar with how the

courts are supposed to operate and initially refused to read a Gladue report because it would take too much time. While the law mandates that all courts must consider the impacts of colonialism when sentencing Indigenous individuals, Gladue courts aim to provide a better avenue for understanding and contextualizing these impacts. This story demonstrates how court processes are contingent on who is present, even when procedures dictate legal requirements such as considering Gladue reports. This finding is consistent with Yngvesson's (1988) research which demonstrates that legal professionals' discriminatory beliefs work to exclude marginalized groups from formal legal protections. While the judge in the Kiran's scenario did eventually agree to read the Gladue report, after a heated exchange with the defence lawyer, harm had already been caused to the relationships and court atmosphere due to this judge's ignorance and hostility. While this is one of the worst experiences Kiran had in Gladue court, and this type of behaviour is rare, multiple participants discussed encountering disrespect and explicit discrimination from legal professionals in court.

Kiran attributes this behaviour to the judge being a poor fit for the court. In these incidents, the introduction of bias into the legal process were extremely clear. While the discretion of educated individuals can have beneficial consequences, the discretionary decision making of others can be harmful (as demonstrated in Smart, 1989; MacKinnon, 1983; Naffine, 1990; Calavita, 2016). The individual judge's beliefs and (mis)understandings shaped the experience of those before them. The influence of this bias is also exemplified by another story from the previous chapter where the judge told defence counsel, Stephanie, that her client would *"just have to get over it"* regarding facing a violent and lifechanging sexual assault. In this case,

the judge relied on explicit sexism and stereotypes about women veiled by formal equality reasoning and a colour-blind— and in this case *gender-blind*— approach to legal decision-making. This perspective negatively impacted the experience of not only the woman but of counsel as well. This incident also upset and disturbed Stephanie, seeing this blatant discrimination in a legal space that is intended to enhance fairness and support for Indigenous individuals.

The impact of outright discrimination is that criminalized individuals, their court workers, and defence council, feel disrespected and unsafe within the courtroom. This lack of respect and safety creates additional trauma for those before the court and creates an atmosphere where the adversarial nature of traditional courts continues. Having racist and sexist judges is not only harmful to the individuals before the court, but also to the broader mandate and purpose of the court. While the negative impact of these incidents is clear, what is also clear is that if another judge had been sitting these days, it is likely that the case and courtroom experience would have played out in a vastly different manner.

Ignorance: “They need to be educated about Indigenous people and their histories”

While the above scenarios of hostility and discrimination represent some of the worst examples that were shared, a more common factor that makes legal professionals the “wrong” people for Gladue court is a lack of knowledge or interest in the histories and contemporary lived realities of Indigenous peoples. This lack of knowledge works against the substantive equality approach of the court. Joanne, a court worker, describes this in detail:

If they're culturally weakened by things, we have to acknowledge that and say "Maybe this will help you. Here's a resource that could help you." Meet them where they are and ... the court needs to educate themselves if they don't know. Say, a new Crown comes in and is going to work in Indigenous people's court. They need to know. They need to be educated about Indigenous people and their histories. They can't just come in there and start doing things the way Crowns normally do things because it's not a place to do that. We're trying to change Indigenous people's experiences in a court system and in order to do that you need to bring in educated people so that we're not starting from zero.

Here, Joanne points out the importance of having people who are trained and educated specifically for Gladue court. While the traditional view of law is that any individual with legal training is suitable for the prosecution process, the individuals working in this court make clear that this is not the case. In Gladue courts, there is an expectation that more of this historical and social knowledge is required, in addition to legal training, to perform successfully as a legal professional in a court taking a substantive equality approach. While Legal Aid has an internal requirement that their lawyers complete training to represent clients in Gladue court, there are no formal requirements for Crowns, judges, or private defence counsel to have training before working in the court.

Kira, a defence council, shared the following concerns about the lack of knowledge judges sometimes have about the lived reality of criminalized individuals. When I asked her what makes a good Gladue court judge, she responded:

Patience. Patience, compassion, and a practical understanding of what our clients deal with. Because a lot of judges- there's a lot of Crowns that become judges... but by the time you get to be a judge, you can be very far removed from the realities of the street, so to speak. And you know, that's the problem with Crowns too. Crowns who haven't practiced defense ever, just have no understanding of what our clients deal with and the obstacles they face. Never mind the court system, but even just their daily lives and survival efforts. So, I think the best judges are the ones who listen and who try to sort of grapple with the realities of anything from being homeless to being at the whims of a substance use disorder.

Kira describes how, by the time lawyers become judges, they have either forgotten or never understood what the day-to-day realities are for individuals trying to survive structural disadvantages and criminalization. This lack of understanding makes it difficult for the judges to respond compassionately towards these individuals and makes the judges less capable of crafting creative sentences that address these challenges. If judges are unfamiliar with the lived realities of criminalized people, they are unable to determine what realistic solutions will be (Rudin, 2006; Maurutto & Hannah-Moffat, 2016). I followed up by asking Kira if this ignorance was her experience with most judges and she shared the following:

I think it really varies. I think it used to be that the judges that were presiding in specialty courts were the ones that were drawn to that for a reason. They didn't just get randomly assigned. And the specialty courts when they started were started by judges that are now retired.

Judges' familiarity with the lived realities of those they are sentencing varies which is especially concerning given that this was the main factor that set these courts apart from traditional courts for Maurutto and Hannah-Moffat (2016) in their research on Gladue courts. Kira expands on her observation by emphasizing the importance of those working in the court to have a passion and an interest in the subject matter rather than being randomly assigned. Those working in Gladue court must be interested in the contemporary issues faced by Indigenous people as well as committed to working towards creating a fairer legal process for them. They must be willing to adopt a substantive rather than formal equality approach to legal reasoning to be a fit for this court process. This finding is in line with what scholars such as Nolan (2001) and Castellano (2017) have identified, namely, that those working in the court, especially judges, must have qualities such as an interest in activism, patience, and caring to be well suited to specialized courts that require having an advanced understanding of the "root causes" of criminalized acts. Judges who are not interested, or do not care, will fail to advance the mandate of the court, and may cause harm to those before it.

According to the individuals I interviewed, the presence of disinterested and uneducated legal professionals within Gladue court has been increasing in post-covid 19 times. This increase is because changes in some jurisdictions have led to the adoption of a rotational model where legal professionals such as Crowns, duty counsel, and even judges rotate through the Gladue court rather than be assigned to appear regularly. Typically, passionate advocates would be drawn to this court, but in this new model, anyone can be randomly assigned to cycle through. This model is extremely unpopular and caused significant concern for the individuals that I

spoke with who have been working in the court consistently. This issue will be discussed further in the following section.

Having individuals who are not committed to the substantive equality logic of the Gladue court interferes with the ability of the court to meet its mandate. Beyond the explicit discrimination discussed at the beginning of this section, Kiran shared the following about how these judges who are assigned and do not want to be there are disrespectful and ignorant in court:

In regard to the judges specifically, it really varies. Some people are invested and have greater knowledge and training on how Indigenous peoples court works, and so some of them will actually take a seat lower [than the dais]. But oftentimes this just seems like a traditional court... I would say like 95% of the time [the judges] do care. It's just unfortunate, I think sometimes, judges are assigned to [Indigenous Peoples Court] that don't necessarily want to be there, and so sometimes the ignorance comes out. And comments are made which are, to be frank, disrespectful. On the record, but disrespectful.

Kiran highlights how judges behaving in harmful ways often are assigned to the Gladue courts without any training or interest in the courts and that they make the court feel no different than a traditional court. This quote highlights yet another example of the powerful impact individuals can have on the Gladue court when they do not adopt a substantive equality approach.

The rotational model was not always how judges opposed to the mandate of the court ended up presiding over it. One judge answered in a survey response that they actively sought out a position in the Gladue court to "make sure the Court [does] not succumb to the pressure of

becoming a “get out of jail free card.” Here, they are referring to the myth, informed by formal equality reasoning, that the court, in considering structural disadvantages through a substantive equality approach, results in unjustly lenient sentences due solely to the fact that the individuals are Indigenous. This formal equality reasoning fails to grasp that the substantive equality mandated by the court is informed by a legacy of an uneven playing field created by colonialism that leaves Indigenous individuals uniquely vulnerable to criminalization. Formal equality reasoning is not only not in line with the mandate of the Gladue court but is in direct conflict with it. Thus, the presence of this type of reasoning within the court, especially when held by the judge, would undoubtedly create barriers to the success of the court.

Demeanor as a downfall

In addition to being ignorant or discriminatory, another characteristic that acts as a barrier is an unfriendly or uncaring attitude. Grace, a defence and duty counsel, describes this:

I have noticed sometimes going in, there’s Crowns or judges who aren’t... as welcoming as all our judges. They’re a little bit more standoffish and take more of that traditional judge [approach]...

I have heard colleagues talking about Crowns who don’t properly apply Gladue or don’t take their Gladue obligations seriously. And I think that goes with anything. You’re always going to have colleagues you have to work with that are like that, but in Gladue court it’s meant to be very informal. It’s meant to be a lot more welcoming. And it’s very odd, we’re all seeing the odd Crown or the judge who,

and maybe they don't regularly sit in there and they're just rotating or something, but they're not as welcoming. It makes the environment a little bit more hostile and a little bit more uncomfortable because the purpose of Gladue court is to try and break down the barrier between the criminal justice system, the actors within it, and Indigenous people.

Grace notes how she has come across Crowns and judges who are unfamiliar with, or uncaring about, Gladue principles, and who enter the court with an unfriendly attitude. Such individuals create an unwelcoming atmosphere which results in the people before the court being intimidated and uncomfortable rather than being able to work together towards the interests of the criminalized individual, as is intended in specialized Gladue courts. Grace explains how these individuals reinforce the poor relationship that Indigenous people have with the legal system and acknowledges that this works against the purpose of the court.

In Aboriginal Youth Court (AYC), defence counsel Dianne described how the biggest obstacle is not the Crown or judge, but lack of commitment and turnover among court workers. For Dianne, this is one of the defining barriers to AYC. She shared the following story when asked what changes needed to be made to the court:

The first thing that I would change... if I don't get to change anything else, would be the consistency and longevity of court support workers. A lot of the youth that I saw in the Court and their stories that I heard had just so much instability in their lives. A lot of distrust of adults, especially adults in positions of authority, so it was often really challenging to build any sort of meaningful connections with a

lot of the kids. And it was even more challenging watching my client build a meaningful connection with the youth worker to just have them straight up disappear and ghost us and never come back leaving this kid who had spent 8 months working and developing this almost parental relationship with this man for him to just leave.

And it happened all the time with court workers, there was so much turnover in AYC that you didn't see in the youth Mental Health Court and you didn't see in the regular courts... it would kind of, for lack of a better word, screw the kids over because they would develop these relationships and make these connections and they would be making this positive progress. To have their worker disappear or... just straight up not do their job.

The lack of commitment and care from the court workers is devastating for these youth on an emotional level, as the youth are developing close trusting relationships with an adult, sometimes for the first time, only to have that adult disappear with no contact. But the impacts are not just emotional; the court workers being unreachable or leaving their roles with no follow-up also has negative implications for the outcomes of the youths' cases since it prevents them from completing what is expected by the judge (such as being connected with programming).

The issue of court workers leaving, or not doing their jobs, became such a barrier that a Crown attorney in the court recommended that Dianne move her client out AYC and into

Community Youth Court (CYC) as they were unable to complete the conditions to move the case forward. Dianne continued to explain that

There would be times where your matter [was adjourned] for three weeks and in those three weeks you'd have an AYC worker who was supposed to do X, Y, and Z. And they just wouldn't... They wouldn't follow up; they wouldn't contact the kids. So, then the kids can't do what they have to do to resolve their charges because the adults and the workers are failing them. And the judges can't make the workers do their jobs. And the judges can't necessarily, in their opinions, resolve charges where kids have done no upfront work, so then they just have to stay in the system even longer. And then we're circling back to getting more charges and being on bail and it was just really disheartening to see.

Rather than offering specialized support, the court workers in AYC became a barrier to the youths' cases moving forward to completion. Dianne contrasts this issue of disappearing court workers in AYC with the approach taken by court workers in CYC, the traditional court, to highlight the stark difference in support offered by the court workers:

CYC court has dedicated workers. They're always around. They've been at the courthouse for years. They really cared about these kids. Their investment was very different [than the court workers in AYC] ... It was almost like everybody in the room knew that it wasn't working and knew that there were specific people not doing their jobs, but there was nothing we could do about it which was frustrating.

Dianne's explanation demonstrates the impact that the presence or absence of specific individuals can have on the courtroom and its legal proceedings. One individual can stall a case altogether, and other legal professionals can do little about it. Even the judge was unable to provide a solution.

Having court workers who prevent cases from moving forward to the extent that Crowns recommend moving youth out of AYC and into the mainstream youth court demonstrates that this issue is resulting in AYC offering an inferior legal process. Thus, while this court is supposed to offer a better option for Indigenous youth, it can create additional emotional and legal challenges for them if the wrong individuals are working in the court, leaving them worse off than if they had remained in traditional court. This finding is reflective of Smart's (1989) point that legal solutions often make conditions worse for the individuals they are seeking to help.

In sum, the participants I spoke with claimed that some legal professionals and court workers are "wrong" for the court, due to a lack of commitment, an unfriendly demeanor, or a formal equality approach to understanding legal cases. Creating a less hostile atmosphere and approaching cases with compassion and creativity are seen as essential to the Gladue court offering a better option for Indigenous individuals. Whether or not a substantive equality approach is taken depends heavily on the individuals in the court and whether they act as a supportive force or as a barrier. Recall the judges who were explicitly discriminatory, hostile, or refused to read Gladue reports and the negative implications of this for the courtroom atmosphere and legal process. These characteristics are especially challenging when present in

judges. When the judge, the person with the most power, is uncaring, culturally insensitive, or actively invokes stereotypes, then the focus on achieving an outcome rooted in substantive equality for the client understandably becomes exceedingly difficult for the other legal professionals to achieve. However, Crowns, defence, and court workers can also have a negative impact on the court. These “bad fit” individuals are commonly rotated into the court due to the rotational model.

The Rotational model: formal equality procedures in a substantive equality court

As mentioned previously, the Gladue courts have been moving away from the model specialized courts are intended to have, which is a specialized court team of legal professionals and court workers who are trained and appear consistently within the court. This abandonment of a specialized court team is one of the most pressing concerns the individuals I spoke with shared with me regarding the limitations of Gladue courts. As one judge put it, “there must be a dedicated Crown and a dedicated judge... Frankly, if there is not a dedicated Crown, you will not be able to have an Indigenous Peoples Court.” Legal professionals stressed the importance of having these trained and committed individuals present in the court on a regular basis, as well the barriers that emerge when untrained and uncommitted individuals are rotated into the court. If the legal professionals are not aware or interested in the structural barriers faced by Indigenous individuals, they will not consider them in their legal reasoning as required by a substantive equality approach. While a formal equality approach would align with this rotational approach

since all legal professionals would be seen as equally capable of objectively applying the law, the rotational model is a clear barrier to the substantive equality mandate in Gladue courts.

Nick, a defence council, echoes this judge's sentiment pointing out that turning away from assigned legal professionals is antithetical to the foundational logic of the Gladue courts:

I'm sure that if you Googled the Gladue courts... it would talk about how the people that are in those courts are "specialized." There's special training they do, and they would say something to that effect, I'm sure. Why have we gone away from that process, right? And even criminal defense lawyers. If you're not on the Gladue panel, you don't work with Indigenous clients, why would you then all of a sudden, with no familiarity with everything - unless you want to learn, you want to get into it- but you... wouldn't just shove yourself in there. It's just kind of odd.

Nick highlights that having a specialized legal team that is trained and committed to the mandate of the court is one of Gladue court's defining features. A simple Google search confirms Nick's point as the official narrative from the Government of Canada (Department of Justice, 2017) (and Ontario). Specialized training and a specialized court team are a defining and foundational feature of Gladue courts as well as specialized courts more broadly (Department of Justice, 2017; Castellano, 2011, Rudin, 2006).

Specialized training is the reason the Gladue courts were started in the first place. This is confirmed by Jonathan Rudin (2006), a founder of the first Gladue court, as well as a report from the Department of Justice confirms that:

[i]n the wake of the Gladue decision, there was concern among judges that criminal justice system actors did not have the resources to pay adequate attention to the background and systemic factors of Indigenous accused and offenders, particularly in urban areas. In Toronto, a group of judges, academics, and community organizations met for a year to discuss their concern. Their efforts culminated in the creation of the Gladue Court at Old City Hall ...Personnel at the court including judges, Crown and duty counsel all receive Gladue-related training (2017, p. 41).

Because many legal professionals do not receive training on the challenges faced by Indigenous communities (it's only mandatory for Legal Aid), and most judges are non-Indigenous, training and resources are needed to ensure that these individuals have access to the knowledge and information to make informed and educated legal decisions in the cases of criminalized Indigenous people. If legal professionals are not aware of the historic and contemporary realities of colonialism, they are not able to consider its impacts as required by the court's mandate. Nick expanded on his concerns about the lack of assigned legal professionals in the court and the difficulties this is causing:

I think at the end of the day there are some Crowns who are more experienced. They've been in the Gladue court for longer periods of time. They know when to pull cases, they know when to divert things, and now the problem is that there are technically no Gladue Crowns anymore... So I have a bunch of files now where I have Crowns that are... three months out of the bar who have never been in

Gladue court who are taking position and screening files and I'm supposed to talk to about my clients ongoing issues and it's just like they're treating it with the same brush, basically. And that's actually a significant issue right now.

These new inexperienced Crowns are taking on files in Gladue court with little understanding of the background, the court, or the individuals before it. Nick contrasts his interactions with these inexperienced Crowns with his interactions with the assigned Crowns working in the courts:

In every other court we used to have, I could know [the Crown]. She was the Gladue Crown. She's one of the nicest people ever, super sympathetic, and goes above and beyond for all the clients. And she's done so many good things for clients and we have that. But now I have multiple clients, Indigenous clients, in [her jurisdiction] and they're like, "well, no, you've got to go to the assigned Crown now." And the assigned Crown is someone who I had literally never seen in Gladue court before.

So, we've got this Gladue court and now we're just relying on Crowns that are- I'm sure most, if not all Crowns are familiar with Gladue principles, etcetera- but it's kind of frustrating from my perspective to work with someone that's never been in a Gladue court. And that's how it is.

Nick observes that there are both practical and relational problems that arise when consistent actors are not in place in the court. The first is the lack of training and experience, which results in new Crowns not knowing how to deal with cases appropriately and efficiently. Another Crown also disclosed that junior Crowns who felt unsure how to approach cases adjourned them

so other Crowns could proceed with them instead. The second point Nick raises is that, in working with someone regularly, trusting working relationships are established. Crowns are not able to build relationships with the other legal professionals when they are not appearing regularly. The way that he describes this Crown in such a positive light shows that they had achieved a truly collaborative working relationship and had successfully moved away from the adversarial model as intended by Gladue courts.

The lack of consistency among court legal professionals is a serious concern mentioned frequently by my interview participants in jurisdictions where no judges, Crowns, or duty council are regularly assigned. In fact, Kiran, a court worker, cited as the biggest drawback of the court:

I think specifically for [this jurisdiction] it would be the inconsistency. I think that's the biggest drawback. Having more consistent key players such as the judges or an assigned Crown would be amazing with proper training done. That's the biggest drawback that I can think of.

Having assigned legal professionals is seen as one of the courts biggest strengths. Having a court team that is consistent and appears regularly is highly valued by the individuals I spoke with.

Colleen, a court worker in a jurisdiction with assigned legal professionals, brought up the importance of having the same court team there regularly. Colleen provided the following answer when asked to identify the most pressing change required to improve the courts:

There are some courthouses where it is not an assigned crown or an assigned duty counsel. Some courthouses rotate duty counsel through, so they'll be the same

duty counsel lawyer in Gladue court for one month at a time. And I think that's difficult because generally, when people are adjourned multiple times, they don't encounter the same duty counsel every time. I think that's difficult for clients because they feel like they have to explain their story over and over and over again. When they're adjourned three times, they'll come into contact with three different duty counsel lawyers and that's difficult. And when it wasn't assigned crown, it would just be whoever is vetting bails that day in one particular courthouse. And that's also difficult because I have to explain over and over and over again about the diversion program or just what I [as a court worker] do, even.

Colleen points to the practical concern with the rotational model, namely, that individuals need to re-explain their entire case to the new duty council or Crown, which is emotionally taxing and wastes a great deal of court resources. Furthermore, she again points out the unfamiliarity and lack of training of the legal professionals rotated into these courts, such as those who do not understand the role of an Indigenous court worker. Crown attorney Sarah echoes these concerns as well:

The fact that we've lost a dedicated duty counsel and having that same person there every week, I think that's a really big loss for that court. And [former duty counsel] is not happy about it. It was helpful to have someone like her in court because she's able to say 'I spoke with this person. I'm aware of their background and personal situations. They were going through this on the last occasion they

told me this. They've been regularly appearing in court.' They had that personal institutional knowledge of the individual that allowed a more compassionate approach to be taken if someone didn't show up for court.

Beyond familiarity with cases, familiarity with the individuals before the court also allows legal professionals to make more informed decisions if a person is absent from court. Having dedicated court employees appearing regularly has several benefits for Gladue courts as it allows them to utilize their knowledge and discretion more effectively to influence the court.

As I have shown, there are individuals whose presence in the court works against the courts' mandate. These "wrong" individuals act as a barrier to the courts' ability to provide a culturally relevant space and substantive equality reasoning. Instead, they create a space that causes harm to the Indigenous people. One legal professional can hinder the entire court process through their ignorance, discrimination, and unfriendliness. Turning to a rotational model has led to more of these individuals who are a bad fit ending up in the court. Regular appearance in the court is seen as essential to building relationships with the court team and the individuals before the court, as well as acquiring the knowledge to make informed decisions about cases. The rotational model hinders the formation of the trusting collaborative relationships that are essential to enabling the benefits Gladue courts can offer. Turning away from assigned Gladue court legal professionals is antithetical to the foundational logic of the Gladue courts and leads to their deterioration. Ultimately, those who are a bad fit for the court, and the rotational model of legal professionals, create a situation where the individuals present in the court can decrease its potential to meet its substantive equality mandate.

The right people: Individuals as advocates

Having the “wrong” people working within the court is a major barrier and negatively impacts the court proceedings, whereas having the “right” people enables Gladue courts to provide a context where the substantive equality of the court can be partially realised. Having legal professionals in the Gladue court with the appropriate knowledge and training is seen as essential to these courts operating in a way that the interviewees feel is beneficial to criminalized indigenous individuals. The presence of legal professionals who are familiar with Gladue principles and Indigenous peoples and who are willing to work creatively and collaboratively across the table can influence the court process to be a more individually tailored experience that considers how colonialism manifests in the lives of those before the court. These legal professionals and court workers are able to work, largely outside the structures and processes of the courtroom itself, to achieve positive outcomes for those before the court such as withdrawn charges, diversion, or access to basic resources.

Creativity in sentencing

Legal professionals who have a deeper understanding of the issues faced by those in the legal system are also seen as better able to do their work because they can predict what would and would not be appropriate sentences for people facing common issues such as substance use and homelessness. Additionally, being familiar with the individuals who are before the court allows the Crowns and judges to learn and appreciate the specifics of an individual’s life, enabling even

more personalized decisions about cases. Being familiar with the court, the colonial context of broader society, and the individuals regularly appearing before the court are seen as crucial factors for the legal professionals and court workers because it allows for well-informed creativity in sentencing. For example, some senior Crowns and judges create a loophole by simply withdrawing the charge altogether rather than allowing charges with mandatory minimums or questionable charges to move forward. This practice avoids what would, from their perspective, cause further harm to those before the court. Crown attorney Anne shared the following story about a criminalized woman she worked with in the Gladue court:

One little mistake: she came back at some point and got charged with a ridiculous theft, and I withdrew it immediately because I knew she wasn't living here, that this was something, probably that just happened. It was a theft from the store.

And people sometimes steal because they need money, or food or things like that.

So, I just withdrew that so she could get back to where she is. So, it helps to have the same person because I know where she's living and what's going on and that she was probably just back to see her mother and then couldn't afford to get back to where she was. But I don't have to wait to hear that. I just withdraw the

charges, right? The world is not going to end by withdrawing a theft under [\$500].

Anne discusses how the woman had likely fallen on hard times and made "one little mistake" that jeopardized her path to stability. She decided that the best thing for the woman and community was to withdraw the charge altogether. Anne additionally identifies how structural barriers make it difficult for individuals in the court to transition to a life free of criminalized

behavior. While the legal system does not technically allow Anne the freedom to account for these structural barriers in a meaningful way, this understanding of substantive equality along with her creativity allow her to provide a solution in this case that does account for these barriers, namely, removing the case from the legal system altogether.

Defence and duty counsel Stephanie describes another case where a Crown used their creativity to simply withdraw the charges for a young woman who had been in child welfare care and was now facing several charges for breaching her conditions:

We have certain Crowns that are just so amazing. And I remember this. [My client] was only 19 and she was from CAS [Children's Aid Society] in Sudbury and she was down here like so many clients because of COVID... she had so many breaches, I want to say like 10 or 12, and she was in custody and no organization would work with her because she just had failed so many times to work with them. I just went to the Crown, and I said, "she's 19" and the Crown went "Oh my God, I'm withdrawing everything" ... She just said, "This is all bullshit. Why has no one looked at this before? None of these charges mean anything", and then I got to go and I called [my client] back at the police division and I got to say "You're getting out and, and you're going to have everything withdrawn" then we almost started crying together because she was just so relieved that someone actually looked at these bullshit charges and withdrew everything.

In this case, the criminalized woman was facing a manifestation of colonialism, namely child apprehensions (Blackstock, 2007; Kaiser-Derrick, 2019). Furthermore, she was young and so the impact of these breaches would have an impact on the outcome of her life. This example illustrates how impactful Crowns can be when they are knowledgeable and creative in terms of how they make decisions in cases.

I heard several stories from Crowns, court workers, and defence lawyers about how Crown creativity provides an opportunity to circumvent the typical confines of the legal system and address cases in ways that are more beneficial to the individual and community. In many cases, the Crown can withdraw charges to spare people the trauma and impact of criminal charges. Crowns withdraw charges to produce a loophole to avoid restrictions around eligibility for diversion, since diversion is not an option for some types of criminal charges. Rather than using formal diversion processes, Crowns use their discretion to remove these charges when they believe criminalized individuals are already accessing appropriate services. Court worker Rachel, for instance, shared a story about a young woman who received criminal harassment charges. Although the Crown was originally unable to approve her for diversion because of the type of charges, they agreed to meet with the young woman outside of the courthouse for a cigarette to chat. The Crown then fully withdrew the charges after chatting and learning more about the woman and how these charges were hindering her ability to move forward with life. The Crown, who otherwise would have been required to force the woman to face a plea and sentencing, avoided this option by simply using their discretion to remove the charges. To make this decision, the Crown had to rely on their understanding of manifestations of colonialism as well

as the challenges faced by those living in poverty. A less experienced or knowledgeable Crown would not have responded to these structural barriers with the same creativity, which could result in the prosecution and further criminalization of a marginalized individual.

Compassion: “I would withdraw the charge if they took her to a doctor”

While the ability to take these creative approaches to cases requires familiarity and experience, it also requires the desire to be kind and compassionate. Many participants explicitly mentioned that the friendly and informal atmosphere of the Gladue court is one of its most defining and positive features given that it fosters a space where individuals can build relationships with the court staff. This approach is different from the cold, formal nature of traditional courts. Sarah, a Crown, states that Gladue courts:

Provide an opportunity to access resources in a friendlier manner. There used to be, for example, at the Gladue court in [one location], a dedicated duty counsel. That same duty counsel person would be present in that court every week. And it allowed Indigenous offenders who may be standoffish, or worried, or feel threatened, or confused about the legal process to have that dedicated person there every single time they’re coming to court as a support in court. And there’s a short roster of judges that regularly sit in that court. Of course, all judges are trained, but I think the familiarity for Indigenous people and ones who may have had negative experiences with the criminal justice system in the past, I really

think that the continuity of those same people all of the time really assists and gives them more trust in this system.

Sarah points out the friendlier atmosphere of these courts, describing how this atmosphere is partially created through ongoing relationships with legal professionals within the court. Through multiple supportive encounters with these people, a slightly less traumatic atmosphere is created (Castellano, 2017, 2011).

Notably, it is not just defence and duty counsel creating relationships with criminalized individuals. Crown attorney Anne describes how changes in Legal Aid have resulted in her choosing to take a more collaborative approach, taking on duties typically held by defence. She shared the following information about her observations in both traditional and Gladue courts:

I would say today about 30% of the people have their own lawyers and their matters are proceeding either to trial or through resolution. There's a number of people that are unrepresented and they aren't represented by the duty council the way they were even four or five years ago. The way that Legal Aid is now restricting the duty counsel, there's some people [who] are unrepresented, which is really difficult in the process. So, then it has to be for me, more collegial. I have to help them because it's just not a fair system.

It is not the Crown's job to assist those facing criminal charges, but rather to prosecute them.

Yet, Anne takes on an assistive role because she believes it is the right thing to do in response to the problematic resource constraints that prevent individuals from having their own lawyers.

While this is concerning on a systemic level from the perspective of due process because it

signals a violation of criminalized individuals' right to legal representation, it is an example of a Crown working within the confines of a flawed system to try to achieve the best outcome for those before the court. Unsurprisingly, Anne is one of the Crowns who other participants identified when discussing the characteristics of a good Crown. Her commitment to fairness, and her desire to assist those before the court, make her respected among her peers who praised her in their interviews.

There were many stories shared with me during my interviews about legal professionals going beyond their professional expectations, demonstrating the compassionate and caring nature of some of the people that work within Gladue court. A judge relayed the following story about when they worked as a Crown in the Gladue court when I asked what their most positive experience was in the court:

There was an Indigenous woman before the Court who was charged with assaulting police. Her family was very traditional and anti-police/government. She drove the family truck across a country road to fetch water for the cows. The police saw her and tried to pull her over. She drove back up her family driveway because she was taught to never talk to and/or trust the police... Eventually the police broke a window and hauled her out of the truck. She fought with them and was charged. When she came to Court, she had a huge infection/abscess on her cheek below her eye. It... looked very painful. The woman was developmentally delayed, and her parents refused to take her to a doctor because they did not believe in Western medicine.... Both the defence counsel and myself were scared

that the women would go blind and infection would go into her brain because the abscess was the size of a grapefruit.

I met the parents outside of court and explained to them my concerns. I told them a story about [me being injured as a child] ... My parents who also did not believe in Western medicine refused to take me to the doctor [and this had lifelong implications for me]. I told them that I would withdraw the assault police charge against their daughter if they took her to a doctor because their oregano treatment was not working. The parents agreed. The case was adjourned for six months. The woman's face healed. She was happy and pain free and would come to court smiling and more trusting of the court process.

We also had her do some counselling through CMHA [Canadian Mental Health Association]... The counseling was specifically directed at dealing with this very significant and underlying trauma which caused the woman to engage in self-harm. This woman has never been back to the Court.

In this story, the former Crown (now judge) demonstrates compassion and care by sharing their own personal life story with the family to help them understand the danger of not seeking medical care and encourages them to seek care for their daughter in exchange for withdrawing the criminal charges. This caring approach works with the judge's personal experience as an Indigenous person to enable them to craft a well-informed decision around this case that considers the unique challenges that this Indigenous family was facing. Having genuine care for these individuals was enabled by a substantive equality approach. It motivated the judge to delve

deeper into the case to address the root causes of the incident and the challenges the individual was facing. The judge shows that helping people is the highlight of their work, rather than meeting other traditional legal goals such as successful convictions.

Another story discussed in detail in chapter one demonstrates how the care and compassion of informed legal professionals working in Gladue court can at times cushion the blow of the marginalization women face in the legal system. This story involves two defence counsel taking on the warden of a custodial institution to change policies that only allowed women one tampon for their full day at Gladue court. Since those in power at the custodial institution refused to listen, the defence counsel took it into their own hands and began providing menstrual products within the court. Miriam, a defence lawyer, purchased a cart with her own funds to hold donated period products that can be given out for free within the court to anyone, no questions asked. In addition to period products, the cart also provides free drinks and snacks. Miriam told me that there is such a serious need for these products in the community that people who are not in custody come in on days they are not even scheduled before the court because they know it is a place where they can access these resources. These lawyers were not professionally obligated to take this responsibility on but chose to use their own personal time and resources to address this gender-based inequity that their clients were facing at the hands of the legal system.

Legal professionals demonstrate compassion and care in Gladue court through their efforts that go above and beyond their job requirements to advocate for those before the court, including withdrawing charges, sharing personal stories, and ensuring access to necessities such

as feminine hygiene products. These caring and motivated individuals operate on their own commitment to kindness and social justice through substantive equality approaches to improve the conditions faced in the Gladue court (although at times they should not have to do this because providing hygiene products is the responsibility of the legal system). This example clearly shows how individuals enable a better alternative to traditional courts, rather than the legal process itself. There is no formal requirement that those working within the court must be kind and knowledgeable people, but the fact that these individuals are drawn to the Gladue court allows them to ensure it operates as a less disenfranchising alternative to traditional courts. Legal professionals and court workers can have a positive influence on the court and those who come before it, although the courts themselves are often ultimately very similar to traditional courts (see chapter 2 for a full discussion). Ultimately, they are often able to succeed in creating a kinder, less formal, and more creative environment while advancing the substantive equality mandate of the court.

The Court Team: the importance of working relationships

It should be a court about relationships... People need to have a different approach in Gladue court... There needs to be that level of discussion where we trust each other enough that I'm not going to tell somebody "Listen, my client relapsed 2 days ago." And they're going to say... "Oh well, where did your client get the drugs? Maybe we'll have the officer look into it and charge them"... There also has to be that trust that we can tell them things that they're not then going to

use against our client. So, it's about relationships. That's really what makes the difference between Gladue court and the rest of the courts. - Miriam, defence counsel

One of the key benefits of having the “right people” working in the Gladue courts is that they can form important working relationships with each other. While lone individuals can impact the court process, their influence is increased even more when they are working towards the same goal as the other members of the court team. Rather than operating from the traditional court model where the Crown and defence compete to “win” by achieving their own desired outcomes (at the expense of the failure of the other side), the Crown and defence come together to work towards the same goal, namely understanding and addressing the criminalized individual's case. As Miriam describes in the opening quote for this section, having a patient, open, and creative group of people working in the court allows for them to build trusting relationships where they can be honest about the reality of the criminalized individuals' cases. When those in the court know and trust each other, they can work towards addressing some of the root causes of the criminalized individual's challenges rather than only selectively disclosing information because they are afraid it will negatively impact the legal outcome of the cases. Miriam concludes this quote by saying that, for her, these relationships are the most crucial factor of Gladue courts that allows them to operate differently than other courts.

Several participants shared the importance of those in the court being able to work collaboratively, especially in the larger urban jurisdictions. The following story from Crown attorney Paul reveals how impactful these close working relationships are:

I would have an 8:00 AM conversation with the same lawyer every single week... he and I have become quite close in terms of making those connections and it really makes a difference because these are lawyers that deal with Indigenous offenders all the time. They know the law and they also know me. And so, in forming those relationships, there's a certain amount of trust that is built, and trust is built only with time and with action. And I think one thing that's very important is that when we trust one another.

When [a lawyer I know well] will tell me, "these are the circumstances that my client finds himself in," I wouldn't think of second guessing it. Or "he's really saying that he did not do this," I would take that very seriously in coming to a resolution.

Paul discusses how through repeated meetings and ongoing interaction with certain legal professionals, much of which occurred outside of the court, he was able to develop a trusting relationship where both parties could share their expertise and knowledge without worrying about the adversarial competition that takes place in many traditional court environments. This approach works to benefit both the Crown and defence who can approach cases with all the information on the table before them to craft the sentence best suited to the individual. Paul explains:

Sometimes trust doesn't necessarily accrue to the client's benefit. If... he's not in a position to proactively address the matter and proactively kind of deal with his underlying issues or he's struggling with these respects. And I don't mean like

that works to their detriment; I just mean that having those honest conversations about where an accused is at lets me better assess their risk to public safety and the viability of rehabilitation programs were appropriate. That only comes with experienced counsel who know their client and know the crown and are able to liaise in a very open fashion about what the issues are in the case, and then we're able to resolve them. Once we narrow those issues, we're able to be more focused on how we address the matter.

Paul points out that having access to all the information does not always result in more leniency for criminalized individuals in terms of case outcomes. However, it allows for the Crown and defence to craft a more realistic and informed sentence which enables the client to avoid facing additional charges if they are not able to follow conditions, which still ultimately works to the client's benefit. This type of discussion can only take place with knowledgeable legal professionals who trust each other and care enough about the people they are working with that they are willing to take the time to understand the nuance of the cases before them. Paul summarized his thoughts in the following statement:

I would definitely say that those 8 AM calls with counsel were imperative because I would quote end quote "get the goods" on what's going on in the background and then I can better assess what would be a positive Crown approach to a given situation. I would also frequently look at the bail list to see who was arrested to see if I could offer any proactive input to my colleagues who might be in bail court that day about how to address this sort of matter and that also only

comes with having continued to be in the courtroom and working with these people.

Here, Paul describes his close relationship with a particular defence counsel, describing their weekly meetings as “imperative” to his ability to be well informed as the crown in Gladue court. These meetings allowed defence to share information with him about clients but also allowed Paul to inform defence council about what might be new or coming next for their clients from the Crown side. Through this exchange, both parties were better able to complete their roles with access to additional information and without fear of the other taking advantage of this knowledge.

Paul points out that “trust is built only with time and with action.” These relationships do not form automatically simply because both parties are working in Gladue court. Relationships must be developed through each party demonstrating their honesty and commitment to the clients consistently over time. The time and familiarity required to form relationships highlights another major challenge of using a rotational model that does not use the same personnel in the court consistently. Without court personnel having the time to consistently work together and form these relationships, the key benefit of these close relationships in the court is lost.

My participants also discussed the challenges of this lack of consistent personnel and the strain it puts on the court. One defence council described how when people are not regulars in the court, they are not familiar with the Gladue court including the processes, the support available, or the creativity that can be utilized. I heard stories about clients being given incorrect information by those working in the court, in particular about what charges were eligible for

diversion. This error causes a great deal of tension as other individuals working in the court then must give the correct information, contradicting the other individuals in the court. If the correct information is not as favourable for clients, such as that the individual is not eligible for diversion, clients often become upset with the person giving them the correct information. In one jurisdiction, this situation is happening so frequently that some legal professionals report that they have cut off coordination with the other court personnel altogether and are even considering no longer working in the Gladue court. This finding demonstrates how serious the consequences of poor coordination and working relationships can be: knowledgeable and dedicated professionals may feel they are not able to help their clients under these conditions and may feel the potential of the Gladue court is hindered to the extent that it is no longer worth working in.

My research shows that investing in building trusting relationships allows legal professionals to better handle cases in Gladue court. It enables a substantive equality approach by allowing open and honest discussions about the facts of case. When relationships do not develop, information sharing is much less efficient and at times emerges as a barrier.

Discussion

These findings provide important insight into the consequences of deviating from substantive equality and using assigned court teams in the Gladue courts. Currently, funding claw backs are leading to a lack of assigned judges, crowns, and duty counsel within Gladue courts. As my participants pointed out, the new rotational model, where legal professionals are rotated through the courts, diminishes the quality of the courts. I argue that formal equality advocates do not

view this rotational model as an issue since they view all legal professionals as equally capable of objectively and neutrally applying the law (Daum & Ishiwata, 2010). However, this approach is antithetical to the foundational logic of the Gladue courts that rely on a specialized court team with the knowledge necessary to apply a substantive equality approach. When those who are not a good fit for the court are rotated in, the substantive equality mandate of the court can be lost and harms such as discrimination, ignorance, and a poor atmosphere follow. In at least one instance, a judge and advocate for formal equality actively sought to ensure the substantive equality mandate of the court did not operate as a “get out of jail free card.” This research demonstrates the importance of having well-trained, caring, and compassionate legal professionals and court workers within Gladue courts.

Furthermore, a lack of consistent and trusting relationships among legal professionals, and between legal professionals and those before the Gladue court, will undoubtedly have a devastating impact. A rotating legal team erodes the positive changes that committed individuals (who have sought out the positions in the court) are able to offer in a specialized court. Abandoning the foundation of the specialized court team will generate further harm for the Indigenous people in the legal system and will eliminate the opportunity for individuals to enact positive changes. While Gladue courts are not a transformative, restorative, or decolonial process, when the specialized court model is followed properly, they are able to offer an option that better understands and contextualizes the experiences of criminalized Indigenous individuals. The above discussion sheds some light on the benefits that are at stake if a rotational model is adopted within Gladue courts.

This work provides insight into the risk Indigenous people may face if Gladue courts fail. The introduction of formal equality legal approaches—namely judges seeking out the court to end the “get-out-of-jail-free-card” as well as the rotational court model—prohibit the court from functioning and causing harm to Indigenous individuals by perpetuating an inequitable legal process. This finding expands on Crenshaw’s (1988) and Smart’s (1989) work about the potential for legal processes designed to empower marginalized groups to be juridogenic. Gladue courts may make discrimination harder to detect, which harms Indigenous communities. If the courts fail to reduce the overincarceration of Indigenous individuals, formal equality advocates can frame this failure as a result of individual attributes rather than the presence of structures of discrimination. The failure of these courts to reduce overincarceration can be attributed to the personal failures of Indigenous individuals rather than systemic discrimination by the court and society. This placement of blame is reflective of what Crenshaw (1988) calls “colorblind racism”: rather than discrimination due purely to racial differences, racism can now be blamed on inherent cultural and individual failures.

Traditionally, the law was able to displace the blame for inequitable outcomes through a formal equality approach, which claims complete legal objectivity and neutrality (Smart, 1989; Naffine, 1990; Calavita, 2016). An objective law cannot discriminate. Conversely, Gladue courts adopt substantive equality and discretion to actively address inequality (discussed in depth chapter 2). This active approach to addressing discrimination may result in the courts offsetting blame for continued overincarceration of Indigenous individuals in Canada through this colour-

blind formal equality reasoning that blames individual faults rather than structural oppression for unequal outcomes (Crenshaw, 1988).

Chartrand (2019) points out a further consideration: that the substantive equality approach put forward by the Gladue decision and courts often portrays colonialism as a historical harm that has had lasting impacts rather than a continuing project taking place now in settler-colonial Canada. She discusses how imprisonment has replaced residential schools and reserves as the primary structure that Canada uses to continue its colonial rule and to reinforce the inferiority of Indigenous people. As a result, the courts are doomed to fail firstly because they have a false understanding of colonialism as a historical phenomenon, and secondly because, ironically, the courts are the primary structure that continues to enforce a harmful colonial relationship. It is unsurprising that the courts have failed to reduce overincarceration because these courts perpetuate the exact harmful relationship they claim to be seeking to address. In Chartrand's words, "without changing the underlying colonial relationship, we not only ignore the ways that colonialism continues to exist today; we also continue to offer colonizing arrangements as part of the remedy" (Chartrand, 2019, p. 79). In order to address the impacts of colonialism such as overincarceration, colonization itself must be challenged rather than reinforced.

Conclusion

The ability of the Gladue courts to understand colonisation as a legal truth is contingent on the discretion of the "right" lawyers, judges, and court workers within the court. When the "wrong"

people are present, they advance a traditional formal legal approach which undermines the substantive equality mandate of the courts. These “wrong people” bring in a lack of commitment, an unfriendly demeanor, and discriminatory beliefs. The harmful influence of these “wrong people” is shown in cases where judges make statements about women needing to “get over it” (i.e., sexual assault), as well as judges who refused to read Gladue reports. However, when the court team has the “right people” present, these individuals can use their discretion to influence cases in ways that can attempt to understand the oppression those before the court face. The legal professionals and court workers who are a good fit are committed to furthering the substantive equality mandate of the court, and are compassionate, and have a deep understanding of the marginalization faced by criminalized Indigenous individuals. These qualities, and appearing consistently, enables the court team to understand the role of colonialism in the lives of those before the court and advocate for them. In many instances, this includes those in the court going beyond the confines of the legal system by withdrawing charges altogether, so the individual can deal with their struggles outside of a legal setting. In other cases, it involves legal professionals providing period products in the court when the legal system refused to.

Having the “right people” is especially impactful when these individuals develop collaborative relationships that allow for honest discussions about the needs and limitations of the person being sentenced, rather than reverting to the traditional adversarial model where they both work to “win.” Some legal professionals, such as the Crown and defence counsel discussed above, go as far as to have weekly meetings before the workday starts to ensure they are sharing all the information they have with each other so they can approach the work week fully informed

about what is going on with the cases and individuals coming through the court. Forming these types of relationships requires both parties to have consistent involvement in the Gladue court and by spending enough time together to trust that the other is committed to achieving the best outcome for those before the court. The rotational model prevents these relationships from happening.

Court team members can provide a context where some Indigenous individuals can see substantive equality manifest in their legal proceedings. While previous sociolegal scholarship has made clear that the presence of individual discretion and influence in the courtroom can harm marginalized communities research (Moore, 1973; Engel, 1984; Yngvesson, 1988; Greenhouse, 1988; Smart, 1989; MacKinnon, 1983; Naffine, 1990; Calavita, 2016), the current study suggests that the ability of individuals to influence the legal process also has the potential to create a context where an analysis of colonial oppression is incorporated into the sentencing process, even if this takes place informally outside the confines of the legal system itself. In conclusion, the substantive equality potential of Gladue courts depends on the individual discretion and close working relationships of the individuals involved, as they can either promote oppression or provide resistance to it.

Conclusion

The proportion of Indigenous women in custody has grown by more than 31 percent since I began planning this research in 2016. This alarming increase is not a coincidence, but rather a direct result of the ongoing genocide perpetuated by the Canadian government.

Overincarceration takes place within a broader colonial context where Indigenous communities endure human rights abuses that lead to elevated rates of violence, premature death, addictions, child welfare involvement, and homelessness. These interconnected injustices create a pathway to incarceration that disproportionately affects Indigenous communities, and especially Indigenous women.

Gladue courts are intensive efforts to reduce overincarceration by considering the unique systemic factors affecting Indigenous people. The courts consider things such as poverty, substance use, personal or familial attendance of residential schools or child welfare, as well as disconnections from identity and culture. Gladue courts take a substantive equality approach that recognizes that Indigenous people in Canada are systematically targeted and disadvantaged by colonialism, and that these factors must be explicitly considered to achieve equality in the legal system. The first Gladue court opened in 2001 following the Supreme Court of Canada's assertion that the overrepresentation of Indigenous people is "a crisis in the Canadian criminal justice system" (*R. v. Gladue*, 1999, paragraph 64). Yet, more than 25 years later, it is clear that Gladue courts have not succeeded in reducing the overincarceration of Indigenous people in Canada. Instead, the crisis continues to worsen, demonstrating the limitations of "solutions" embedded within the colonial legal system.

This research is among the first empirical studies to examine the everyday operation of Gladue courts. I used a critical and intersectional approach to understand how Gladue courts operate and how they are understood by the court teams that work within them. I paid particular attention to how gender did—or did not—emerge in women’s cases. The goals of this research have been to better understand how the various players in the court influence and shape the court process and its cases, especially those cases involving Indigenous women. This research has contributed to broader theoretical debates on the effects of specialized courts on the lives of defendants located at the intersections of multiple forms of structural oppression. In summary, I conducted a qualitative critical review of Gladue courts, highlighting why they have failed to reduce overincarceration of Indigenous people in Canada. I argue that the colonial legal system cannot mitigate the harm of colonialism by appropriating feminist and decolonial knowledges or abandoning foundational features of specialized courts.

This dissertation is a collection of three interrelated chapters that critically analyse Gladue courts in Southern and Central Ontario. Below is a breakdown of the three substantive chapters including the main research questions, key arguments, and key findings.

Chapter 1, *Women and Gladue: The Invisibility of Gender in Indigenous Peoples Court*, provides an intersectional feminist examination of the role and influence of gender within Gladue courts.

This chapter is guided by two main research questions:

- How are Indigeneity and gender mutually constructed and understood in the Gladue court process?

- How do intersecting structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases?

I argue that Gladue courts have been unsuccessful at reducing overincarceration, especially among women, due to the courts' failure to consider the multiple ways in which structural oppressions related to gender and Indigeneity render women uniquely vulnerable to criminalization. These courts do not meaningfully differentiate Indigenous women's experiences with crime and criminalization from those of Indigenous men. These courts rely on an inflexible construction of Indigenous culture that cannot account for the challenges faced by criminalized women who are located at the intersections of structural oppression. The male-centric understanding of colonialism and its impacts operationalized within Gladue courts is constructed based on the experiences of Indigenous men, and gendered considerations are largely absent. When gendered considerations do appear, they are often based on sexist and racist stereotypes about Indigenous women that understand their victimization and substance use as a given rather than a product of colonial trauma.

Gladue courts are juridogenic (Smart, 1989). Many of the broader structural factors in the legal system, such as sexist and racist bias, continue to operate emerging through stereotypes and at times, outright discrimination. The discriminatory biases that exist outside of the court do not disappear within the walls of these courts. Outright discrimination continues to such an extent that it is directed not just at criminalized women, but at women serving as legal professionals as well, impacting how women were treated in court, how their cases were understood, and ultimately the outcomes of their cases.

Chapter 2, *A Gladue Court is Still a Court*, is a critical sociolegal examination of Gladue courts in relation to the broader limitations and goals of the legal system. It is guided by the following research questions:

- Which knowledges are used by court professionals within Gladue courts and how do these knowledges influence their conduct and analysis within the courtroom?
- How do intersecting structural inequalities related to colonialism, racism, class, and gender emerge as factors in cases?
- How do Gladue courts impact the criminal cases of Indigenous individuals?

I argue that Gladue courts have been unable to achieve a restorative decolonial approach because they are ultimately embedded in the broader colonial legal system. Within this colonial legal framework, the transformative potential of the courts is in constant tension with the broader goals and logics of the dominant oppressive system, namely punishment, marginalization, and control. I highlight three main findings within this chapter:

1. A court under the jurisdiction of the state is not “Indigenous.” It is colonial. Gladue courts advance the same goals and face the same limitations as traditional colonial courts.
2. A court is not, and can never be, “anti-oppressive.” It exacerbates criminalization and marginalization by trapping individuals in the legal system.
3. A court is not “restorative.” It is traumatic, especially for Indigenous individuals. The state appropriates anti-oppressive rhetoric as an equity-seeking performance and ultimately deploys it to expand its control.

This chapter demonstrates that Gladue courts continue to be colonial, oppressive, and traumatic just like traditional courts. Ultimately even those who spoke positively about the courts felt that moving to an Indigenous-led community-based model would be a superior alternative for reducing the overrepresentation of Indigenous individuals within the legal system.

Chapter 3, Colonialism as a Legal Truth: The Influence of Individual Discretion in Gladue Court, explores the influence of individuals on the implementation of a substantive equality approach within the courts. It is guided by these research questions:

- How do court professionals understand their roles in Gladue courts?
- Which knowledges are used by court professionals within Gladue courts and how do these knowledges influence their conduct and analysis of cases within the courtroom?
- How do court professionals influence the outcomes of cases within Gladue courts?

I argue that individual discretion and close working relationships are central to achieving Gladue courts' substantive equality objectives. The "right" people for this court are those who appear in the court consistently, are committed to furthering the substantive equality mandate of the court, and are compassionate, knowledgeable, and educated. These qualities enable the court team members to understand the role of colonialism in the lives of those before the court and advocate for a more substantive approach to cases. However, this often takes place informally and off-the-record through actions such as withdrawing charges.

Gladue courts are informed by a substantive equality approach, which recognizes the impact of colonialism as a legal truth. In practice, however, I show that the courts fail to achieve

this goal due, in part, to the court's abandonment of select administrative procedures, such as specialized assigned court teams. Many courts are now using a model that rotates legal professionals in and out of the Gladue court rather than having them work there consistently. This model is extremely detrimental to the court, as it introduced the "wrong people" who are unfamiliar, ignorant, and not committed to its mandate. While the court's inability to achieve a substantive equality mandate is ultimately rooted in the inherent limitations of the legal system, it is aggravated by the inclusion of the "wrong" people on the court team who perpetuate formal legal reasoning, discrimination, and impartiality.

Synthesis of arguments

While this dissertation is composed of three unique chapters, they are interrelated through their critical examination of Gladue courts in Southern and Central Ontario. All three chapters work together to advance the overall argument that Gladue courts, as part of the colonial legal system, are not effective tools for addressing colonial oppression. Ultimately, Gladue courts fail to take an intersectional approach or advance a true substantive equality mandate. Instead, they appropriate anti-oppressive knowledges and at times disregard even the foundational processes of Gladue court such as an assigned court team.

This project makes several important contributions to understanding the ability of—and the contradictions associated with—using the justice system to mitigate social injustices and oppression in society. This research has contributed to a greater understanding of how and why Gladue courts have failed to reduce the overincarceration of Indigenous individuals, and

especially women, by expanding the findings of past literature (e.g., Balfour, 2008, 2013, 2021; Kaiser-Derrick, 2019). The male-centric understanding of Gladue factors excludes women from having these factors considered in criminal sentencing within the courts, while men can see some benefit.

Furthermore, this work contributes a new perspective by examining how a substantive equality mandate impacts a specialized court. Gladue courts differ from other specialized courts in that they are informed by a substantive equality mandate that seeks to incorporate social science knowledge to contextualize colonialism as a legal truth. Previously specialized courts have focused on individual-level factors. Ultimately, while Gladue courts claim to offer a substantive approach in theory, they fail to provide it in practice. Some members of the court work together to advance this substantive equality approach through their individual efforts, discretion, and close working relationships, but there is nothing inherent about the court or its processes that advance this approach. The ability of some individuals to enact a substantive equality approach in their legal decision-making allowed Gladue courts to sometimes offer a superior alternative to traditional courts. The fact that some people could do this, but not others, demonstrates the importance of the specific individuals present in court and the relationships formed between them. Individual discretion and close working relationships were central to the vision of the court being at least partially realized.

A final and important contribution of this research emerges from the finding that Gladue courts have not reduced incarceration rates due to their lack of intersectional approach, colonial nature, and abandonment of the foundational principles of the court. This finding should signal to

the policymakers and researchers that the overrepresentation of Indigenous people is not an issue that can be dealt with in a courtroom. Solutions beyond the court system must be pursued seriously in addition to these courts. The overrepresentation of Indigenous people within the legal system must be addressed through preventative action to address the impacts of colonialism. Solutions must address factors such as homelessness, poverty, and violent victimization and provide Indigenous people with the resources they need to avoid the traumatic pathways that lead them into contact with the legal system.

Limitations and Directions for Future Research

One limitation of my research arises from the fact that my study took place during a transitional period within the courts. It began before the Covid-19 courtroom closures, then progressed through these closures during strictly virtual Zoom courtrooms and concluded long after the courtroom closures ended. This data collection timeframe resulted in a number of changes taking place during my study that influenced how the courts were operating. To this day, Gladue courts remain in a hybrid model that allows the court team and criminalized individuals to appear virtually. This model creates a limitation because the present study does not fully capture the impact of these changes and how my prior observations and discussions may be different if they were to take place in the new hybrid virtual courtroom model.

Another limitation of this research is that I did not receive permission from the Chief Justice's Office (CJO) to interview judges. When my research began, this permission was not required; however, during the study this research approval process was introduced. While I was

able to get data from judges through a survey, these data were only for the approved questions and the answers were reviewed by the CJO before being sent back to me. As a result, questions about the limitations of the court and any negative experiences within it were removed. It is possible that the judges did not provide their true thoughts since they knew their answers would be reviewed by their employer. Furthermore, it is possible that the CJO removed parts of the judges' answers before forwarding them to me if they did not approve of them. While the court seeks to appear progressive, it lacks transparency, which brings into question the legitimacy of the claims that the court is an equity-seeking mechanism.

This research also does not thoroughly investigate the spectrum of gender beyond the binary. I did ask participants about gender diversity, trans, 2-spirit, and non-binary clients, but these issues were not explored in-depth, primarily due to participants having a lack of information about these clients. While these individuals seem not to appear in these courts, it seems more probable that these individuals keep their marginalized gender identities private in the legal realm.

Further research could expand the scope of this analysis by including Northern Ontario courts, as well as Gladue courts across Canada to see if the present findings are consistent across the country. The geographic area I examined, South and Central Ontario, has many large urban centers, which typically means that there are more resources available in the surrounding community enhancing the operation of Gladue courts. Areas that are less populous and have fewer resources may offer fewer services and diversion options than the courts I have looked at.

Future research should work with Indigenous organizations and communities to develop and implement Indigenous-led solutions to harmful conduct committed by and against Indigenous individuals. This process must exist outside the jurisdiction of the colonial government to truly be a decolonial approach.

Finally, in closing, I want to once again reiterate that crime is not prevented by the legal system. Crime is prevented by holistic prevention models that address the social and structural conditions that lead to criminalized behavior in the first place such as poverty, trauma, and a lack of supportive resources. Holistic preventative efforts must be the focus to reduce the overrepresentation of Indigenous individuals in the legal system.

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Appendix A: Interview Guide

Semi-Structured Interview Guide – Legal Professionals in the Indigenous Peoples’ Court

Interview #:

Date of Interview:

Start:

End:

Duration:

Section 1. Background Information

1. What is the name of the organization you work with?
2. Do you identify as an Indigenous person?
3. What is your role within the Indigenous Peoples’ court?
4. How long have you worked in this type of position?
5. How long have you worked in this position within the IPC?
6. Did you receive any type of training in issues impacting Indigenous communities?
7. What made you interested in working with this court?

Section 2, IPC

Let’s talk more about your experience working in the IPC.

8. What is the purpose of the IPC?
9. After your time working in this court, how do you feel about the process?
10. How does this court compare to the other courts you’ve worked in?
11. If there was one thing you could change about the IPC, what would it be?

Section 3, Gender

12. Do you work with many women in the IPC?
13. Are there any differences that you’ve noticed in how the process works for men vs. women?
14. When it comes to working with Indigenous women in these courts, can you describe one of your most positive experiences and one of your most negative experiences?
15. Is there anything we haven’t discussed yet that you want to talk about in relation to the IPC?

Appendix B: Survey Guide for Judges

*Note this survey guide was amended to meet the requirements of the Ontario Chief Justice's Office

QUESTIONS

Section 1.

1. What is the name of the organization you work with?
2. Do you identify as an Indigenous person?
3. What is your role within the Indigenous Peoples' court?
4. How long have you worked in this type of position?
5. How long have you worked in this position within the IPC?
6. How did you get involved in this court?
7. What made you interested in working with this court?
8. Did you receive any type of training in issues impacting Indigenous communities?

Section 2

1. What is the purpose of the IPC in your understanding?
2. Can you describe what a typical day in this court is like?
3. How does this court compare to the other courts you've worked in?
4. What do you see as the benefits of the court compared to the traditional court model? What do you see as the challenges of the court?
5. When it comes to working with Indigenous women in these courts, can you describe one of your most positive experiences?
6. Is there anything we haven't discussed yet that you think I should know or that you want to talk about in relation to the IPC?

Appendix C: Information letter

Email Recruitment Script for Indigenous Peoples' Court Employees

Project Title: Gender and Gladue: Decision making in Indigenous Peoples' Court

Hello [Name of Participant],

I am a doctoral student in the Department of Sociology and Legal Studies at the University of Waterloo, under the supervision of Dr. Rashmee Singh. As part of the requirements for my dissertation, I am conducting research about the practices and influence of court officials in Indigenous Peoples' Courts. This project will undertake virtual courtroom observation and interviews to explore how community and criminal justice stakeholders understand and influence their local Indigenous Peoples' Court in cases involving women offenders. I am conducting interviews with individuals who have worked or volunteered in an Indigenous Peoples' Court at least 4 times in the past two years, and am currently seeking volunteers to participate in my study.

Participation in this study will involve an interview over videocall or over the phone. The interview will last about one hour and would be arranged for a time that is convenient for you. Interview questions will focus on your understanding of how the court operates, your role in the court, and your experience with women processed through the Indigenous Peoples' Court. Involvement in this interview is entirely voluntary. All identifying information you provide will be considered confidential and stored separately from your interview transcript. In addition, your data will be de-identified by removing all identifying information from your interview transcript. While I will do my best to ensure confidentiality, please note that due to a small population of individuals working in the Indigenous Peoples' Court, total anonymity is difficult to guarantee. If this is a concern, I will also use a pseudonym for both the county and/or city to conceal the location in which the court operates.

This study has been reviewed and received ethics clearance through a University of Waterloo Research Ethics Committee (ORE#42818).

Please read the attached Information Letter for more details about what participation will involve. If you would like to participate or you require additional information to assist you in making a decision, please contact me through this email address.

I look forward to hearing from you,

Ellora Jones

PhD Candidate, Department of Sociology and Legal Studies
University of Waterloo

Appendix D: Information and Consent Form

Information and Consent Form

Title of the study: Gender and Gladue: Decision Making in Indigenous Peoples' Court

Principal Investigator: Ellora Jones, PhD Candidate,
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Supervisor: Dr. Rashmee Singh
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Information Form

To help you make an informed decision regarding your participation, this letter will explain what the study is about, the possible risks and benefits, and your rights as a research participant. If you do not understand something in the letter, please ask prior to consenting to the study.

Invitation to participation

You are invited to participate in a research study about cases involving women defendants in Indigenous Peoples' Court. Research has shown that the number of Indigenous women coming into contact with the justice system is increasing at a rate that is higher than any other group. This research will examine how their cases are dealt with within the Indigenous Peoples' Court. This research is being completed as my dissertation research to meet the requirements for a Doctor of Philosophy in Sociology at the University of Waterloo.

I. Your responsibilities as a participant

What does participation involve?

Participation in the study will consist of a virtual interview over videocall or over the phone, at a time of your choice. The interview will involve questions about your role in and experience with Indigenous Peoples' Court (e.g. "How does this court compare to the other courts you've worked in?", "When it comes to working with Indigenous women in these courts, can you describe one of your most positive experiences and one of your most negative experience?"). You will also be asked for some demographic information such as occupation, gender, Indigenous status, and education.

Interviews should last approximately 60 minutes. With your permission, the interview will be audiotaped, and notes will be taken during the interview. This recording will be done to accurately record the information you provide and will be used for transcription purposes only. If you choose not to be audiotaped, notes will be taken instead. If you agree to being audiotaped but feel uncomfortable at any time during the interview, the recorder can be turned off at your request. If at any time you do not wish to continue, you can also stop the interview. I only expect to do one interview with you; however, a follow-up may be needed for additional clarification. In that case, with your permission, you will be contacted by phone or email to request a follow up interview. Any follow-ups to the interview will be done within 2 months of the initial interview and will include questions to clarify initial responses.

Who may participate in the study?

Participation in the study will consist of any individuals that have worked or volunteered in an Indigenous Peoples' court on more than four occasions in the past two years.

II. Your rights as a participant

Is participation in the study voluntary?

Your participation in this study is voluntary. You may decide to leave the study at any time by communicating your wish to end your participation to me. You may also decline to have your interview audio recorded. You may also decline to answer specific questions by indicating you prefer not to answer and asking to skip forward to the next question. After you have completed your interview, you may request to have your data removed up until September 2021. After this point your data will be included in the study as it is not possible to withdraw your data once papers and publications have been submitted to publishers. Choosing not to participate, declining to answer a question, or any other refusal to participate will have no penalty to you.

What are the possible benefits of the study?

Participation in this study may not provide any direct personal benefit to you. It will however contribute to our knowledge of how specialized courts operate and women's experiences in them. Since the rate of women coming in contact with the justice system is increasing so rapidly, this knowledge has great benefits for society as a whole. I will make a summary of my research findings and any publications available upon request.

What are the risks associated with the study?

The interview will be conducted over your choice of video call software such as Skype or Zoom. When information is transmitted over the internet privacy cannot be guaranteed. There is always a risk your responses may be intercepted by a third party (e.g., government agencies, hackers). University of Waterloo researchers will not collect or use internet protocol (IP) addresses or other information which could link your participation to your computer or electronic

device without first informing you. Apart from this, there are no other known or anticipated risks in participating in this study.

If you prefer not to participate using this online method, please contact the researcher so you can participate using an alternative method such as a telephone call. The alternate method may decrease anonymity, but confidentiality will be maintained.

Privacy, Data Storage and Retention

Your participation will be considered confidential and identifying information will be removed from the interview transcript and notes and stored separately. Your name will not appear in any paper or publication resulting from the study; however, with your permission quotations may be used with a pseudonym in place of your real name alongside a general reference to your employment category (e.g., 'court official' or 'Aboriginal Legal Services employee').

Collected data will be securely stored on a password protected computer for a minimum of 5 years and may be used in further academic work on this topic. While I will do my best to ensure confidentiality, please note that due to the small number of individuals working in the Indigenous Peoples' Court, it may still be possible for others to identify your involvement in the study even with the use of pseudonyms (e.g., by recognizing comments made by you in study results). Since this may be a concern, I will also use a pseudonym for the court's location and the town.

III. Questions, comments, or concerns

Has the study received ethics clearance?

This study has been reviewed and received ethics clearance through a University of Waterloo Research Ethics Committee (ORE #42818). If you have questions for the Committee, contact the Office of Research Ethics, at (519) 888-4567 (ext. 36005) or by email at ore-ceo@uwaterloo.ca. Who should I contact if I have questions regarding my participation in the study? If you have any questions regarding this study or would like additional information to assist you in reaching a decision about participation, please contact Ellora Jones at eejones@uwaterloo.ca or Dr. Rashmee Singh at (519) 888-4567 (ext. 33020) or by email at r78singh@uwaterloo.ca.

Consent Form

By providing your consent, you are not waiving your legal rights or releasing the investigators or involved institution from their legal and professional responsibilities.

Title of the study: Gender and Gladue: Women in Indigenous Peoples' Court

I have read the information presented in the information letter about a study conducted by Ellora Jones under the supervision of Dr. Rashmee Singh with the department of Sociology and Legal

Studies at the University of Waterloo. I have had the opportunity to ask questions related to the study and have received satisfactory answers to my questions and any additional details.

I was informed that participation in the study is voluntary and that I can withdraw this consent by informing the researcher. This study has been reviewed and received ethics clearance through a University of Waterloo Research Ethics Committee (ORE#42818). If you have questions for the Committee, contact the Office of Research Ethics, at 1-519-888-4567 ext. 36005 or ore-ceo@uwaterloo.ca.

For all other questions contact Ellora Jones by email at eejones@uwaterloo.ca.

Email Consent Form

With full knowledge of all foregoing, I agree, of my own free will, to participate in this study.

☐ YES ☐ NO

I agree to my interview being audio recorded to ensure accurate transcription and analysis.

☐ YES ☐ NO

I agree to the use of quotations in any paper or publication resulting from this study with the understanding that a pseudonym will be used in place of my real name with a general reference to my employment category (e.g., 'court official' or 'Aboriginal Legal Services employee').

☐ YES ☐ NO

I agree to be contacted for a follow up interview.

☐ YES ☐ NO

To indicate your agreement to participate in this study you can sign below and send an electronic copy to eejones@uwaterloo.ca Alternatively, you can indicate your consent verbally over Skype or over the phone.

Participant's name: _____

[] Verbal consent was obtained

Participant's signature: _____

Researcher's signature: _____

Date: _____