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The Use of Conditional Sentencing in Manitoba: A Snapshot of Ten Aboriginal Offenders

By

Diane Parris

A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements for the degree of

Master of Social Work

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirement of the degree

Of

MASTER OF SOCIAL WORK

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Preface

Abstract

Introduction

Preface

"Some teaching is indeed painful, and some healing is much more painful than simply hiding from the truth in a jail cell."
(Ross, 1996, p. 14)

I became interested in Aboriginal teachings during the course of my career within the child welfare system. Countless children and youth have touched my life, each one with amazing strength, courage and spirit. Each one taught me more about myself and my role as a helper. I attended my first sharing circle with my colleague, Vicki Whitehead, during a turning point or crossroad in my life. What I learned from the Elder and what others shared was an empowering experience for me.

The idea of *Returning to the Teachings*, as coined by author Rupert Ross (1996), seems to me to be the solution or the place to find inspiration in so much of what we as a social work profession are doing. At the time of this writing, the Child Welfare Initiative is in full swing and Aboriginal people are looking after Aboriginal children and families. This will soon be followed by changes to the judicial system to incorporate Aboriginal jurisdiction for Aboriginal peoples as recommended by the Manitoba Aboriginal Justice Inquiry (1999). As these systems change and evolve, traditional values, traditional teachings and traditional methods of healing will become more a part of the systems delivering service.

My first exposure to diversion programs was as a voluntary member of an alternative measures youth justice committee. Later, I remember hearing of the restorative justice measures occurring in Hollow Water First Nation and was immediately interested. The more I read, the more interested I became. This strengthened my belief that restorative justice is a way of life, a way of healing and a

way of correcting the harm to both individuals and communities. I believe that non-Aboriginal systems stand to learn a lot from the principles of restorative justice and the teachings of Aboriginal Elders.

I have worked with offenders in various capacities and always within a community based setting. I completed my field work practicum working individually and with groups of offenders on probation in the community. I have worked with offenders living in the community and attending a day service treatment program. I have provided individual case management as well as co-facilitated educational groups, relapse prevention groups and problem solving groups. My experiences were positive and were ones in which the potential of individuals could be recognized. I acknowledge that a lot of offender's re-offend, that is a given. But the opportunity to provide support, resources and teachings while the individuals lived in their communities and are given the day-to-day opportunity to practice skills taught while overcoming obstacles they faced, that, I believe, is where we can decrease recidivism rates. That is where we can stop an offender, or perhaps, break a cycle.

The more I learned, the more strengthened my belief became in the principles of restorative justice and the use of community based alternatives to assist and support individuals in their healing journey and their attempts to make reparation for the harm they have done. Thus, the basis of this research project was determined.

As I explored my interest, I read. Fournier and Crey (1997) in their book *Stolen From Our Embrace* discuss the harm caused by the removal of Aboriginal people from Aboriginal communities. They speak specifically to what they see as three waves: the residential school movement, the 1960's child welfare "scoop" and most recently the justice system. The authors present how the justice system in Canada is failing Aboriginal people and is yet another governmental intervention in Aboriginal people's

lives. This, I believe, is where we need to begin the process of *Returning to the Teachings*.

And so, my interest led me into the arena of restorative justice. As I began to explore the literature this research project developed. I hope you find it as interesting as I have.

Abstract

This is a Master of Social Work thesis looking at the use of restorative justice with Aboriginal offenders. The individual offenders have been diverted from sentences of incarceration to community based conditional sentences.

The current literature on the sentencing of Aboriginal offenders indicates that Aboriginal Canadians are 8.5 times more likely than non-Aboriginal offenders to receive terms of incarceration (Daubney, 2002, p.38). In response to this, the federal government enacted Bill C-41 in 1996. This Bill introduced two pieces of "special considerations" legislation, section 718.2 and section 742.1 into the Criminal Code. This legislation was intended to address the over use of incarceration, the unique circumstances of Aboriginal offenders and to introduce a diversion sentencing option of conditional sentencing.

This thesis research is a case study analysis of ten Aboriginal offenders serving conditional sentences in the community. Readers will find that the findings present how participants felt about their different levels of 'connectedness' or distance from their Aboriginal heritage. Participants shared their thoughts on whether or not they felt that their heritage should have been considered during their sentencing process.

Readers will listen to participants' stories of their sentencing process and as they described their conditional sentences, how they felt about serving their sentence in the community, and how they felt about their conditional sentence in comparison to terms of incarceration.

The findings then allow the reader to hear how participants' felt about the principles of restorative justice. Participants also described their feelings about 'repairing the harm' and making restitution, reparation, and rehabilitation.

Discussion surrounding the participants' descriptions, perceptions, thoughts and feelings are connected to the literature in regards to the use of conditional sentencing and the use of restorative justice principles in repairing the harm. Recommendations are given for further study, and services to better address the overrepresentation of Aboriginal offenders.

Introduction

The overrepresentation of Aboriginal offenders in the Canadian Criminal Justice System is a persistent problem that has stretched over decades. It is an issue for the Canadian Criminal Justice system that has produced a decade of literature which clearly illustrates that Aboriginal offenders are disproportionately incarcerated. The statistical proof of this overrepresentation of Aboriginal offenders provides the backdrop for specific legislative reforms that the Canadian government has enacted to attempt to address the issue. The purpose of and intended use of these sentencing options under the reformed criminal code leaves room for the study of the application of these sentencing measures with individual Aboriginal offenders. This is where this research project lies.

What is happening at the sentencing stage for Manitoba's Aboriginal offenders? Are the provisions in Bill C-41 being applied? Do offenders feel that their "unique circumstances" as Aboriginal people are taken into consideration when they are sentenced?

The purpose of this research project is to examine the perceived impact that the sentencing process has had for ten individual Aboriginal offenders and to consider how legislative reforms geared at decreasing incarceration rates have been applied to ten specific cases. This qualitative study is a multiple-case study with ten Aboriginal offenders who received a conditional sentence and/or a restorative justice / community based sentence. This is an exploratory study where the primary data will be gathered from semi-structured interviews with the offenders. Secondary and supportive data will be gathered from the participants' case files, specifically their Community Based Sentence Plans.

The problem to be researched is two fold: (1) to explore the individual experiences of ten Aboriginal offenders, specifically looking at their perception of their sentencing processes and (2) to identify conditional sentences and restorative justice sentences being used in Manitoba's provincial sentencing courts, and the use of, or lack of, application of section 718.2(e) and/or special consideration to the unique circumstances of Aboriginal offenders.

The first two chapters are devoted to a review of the literature aimed at providing an overview of how the Canadian Criminal Justice system has responded to the needs of Aboriginal offenders, specifically at the sentencing stage of their involvement with the courts. Chapter one presents the statistical picture of the overrepresentation of Aboriginal offenders in the justice system and what the criminal justice system's response has been, specifically through sentencing procedures outlined in Bill C-41, and the Supreme Court of Canada's directives laid out in the three precedent setting cases of *R v. Gladue* (1999), *R v. Proulx* (2000) and *R v. Wells* (2000).

Chapter two presents the main themes and issues that have emerged since the enactment and reading by the Supreme Court of Canada. The literature focuses on the differential treatment of Aboriginal versus non-Aboriginal offenders, restorative justice issues, causal factors for the overrepresentation of Aboriginal offenders, and systemic discrimination specific to judicial decision making.

Chapter three presents the methodology for this research study, outlining the case study approach used, and the steps during the research process. A brief overview of the Restorative Resolutions program is also presented.

Chapter four then describes the study's findings, the participants' stories. The findings are first considered from within individual cases. The themes which emerged

across cases is then presented for comparison: the individual participant's identification with and their perceived influence of their Aboriginal heritage, the individual participant's perception of their sentencing process and their conditional sentence, the principles of restorative justice, how these are being incorporated in the sentencing process and how they feel they have made reparation for the crime they committed.

Finally, Chapter five is a summary and discussion of the findings and an integration with the literature that has been reviewed. Strengths and limitations of this study are presented, as well as the implications of this study to social work practice. Recommendations derived from the findings are also presented for consideration.

Chapter One:

The Overrepresentation of Aboriginal Offenders

The Overrepresentation of Aboriginal Offenders

To begin, this chapter presents the statistical information on the overrepresentation of Aboriginal offenders in the justice system in Canada, more specifically in Manitoba. Consideration will also be given to how this picture looks in comparison with other minority groups. The literature surrounding what the criminal justice system's response has been, specifically the sentencing procedures outlined in Bill C-41 and the directives given by the Supreme Court of Canada in three precedent setting cases.

The Big Picture

The statistics clearly illustrate a trend that Aboriginal offenders are incarcerated at a higher percentage than non-Aboriginal offenders. Aboriginal people comprise 2% of the Canadian adult population (Statistics Canada, 2001, p.10), but account for a disproportionate number (17%) of admissions to custody in 1998-99 (Statistics Canada, 2001, p.10). Daubney (2002) stated that "Aboriginal Canadians are incarcerated at about 8.5 times the rate of the general population" (p.38). Roberts and Melchers (2003) compiled data from 2000-2001 Adult Correctional Survey by the Canadian Centre of Justice Statistics and found that "Aboriginal offenders accounted for 19% of provincial admissions and 17% of federal admissions to custody" (p.211) but comprise only 3.3% of the general population. Saskatchewan, for example, continuously rates as one of the highest provinces; "in 1998-99 the proportion of Aboriginal persons admitted to adult provincial facilities (76%) was almost ten times that of their proportion in the provincial adult population (8%)" (Statistics Canada, 2001, p.10).

A second trend that emerges is that there is an overall consensus that as a whole, Canada over-uses incarceration. Pelletier (2001) cites incarceration rates from a 1997 report by the Federal/Provincial/Territorial Ministers Responsible for Justice where Canada had one of the highest rates of incarceration (130 inmates per 100 000 population) among industrialized democracies, second only to the United States (p.472). Daubney (2002) also makes the point that Canada overuses incarceration compared to other industrialized countries when he cites from *Gladue* (1999) that "Canada incarcerated 130 inmates per 100 000 people compared to a range in most western European countries from 51 (Holland) to 92 (United Kingdom). Our incarceration rate was exceeded only by South Africa (368), the U.S.A. (529) and Russia (558)" (p.16). Daubney concludes that if Aboriginal offenders were incarcerated at the same rate as non-Aboriginals then "Canada's overall incarceration rate would be comparable to those of most western democracies" (p.38). Canada is one of the leading countries in the use of incarceration because, some argue, the disproportionate number of Aboriginal offenders drives the total incarceration rates higher.

Manitoba's Snapshot

Provincially, the 1991 *Report of the Aboriginal Justice Inquiry of Manitoba* (hereafter referred to as the Manitoba Justice Inquiry) found similar results: Aboriginal offenders accounted for 55% of provincial corrections admissions, and 42% of Stony Mountain's admissions. The Manitoba Justice Inquiry (1991) states that "25% of Aboriginal persons received sentences that involved some degree of incarceration, compared to approximately 10% of non-Aboriginal persons, or 2.5 times more for Aboriginal persons" (p.103). Similarly, LaPrairie (2002, p.187) found that rates for

Manitoba Aboriginal inmates were seven times higher than their provincial population and noted that federal admissions in Manitoba have increased during the period of 1991-92 to 1998-99.

In 2002, Statistics Canada (2003, p.6) reported that for the fourth consecutive year, Manitoba rated second in the country for overall violent crime at a rate of 1 644 per 100 000 population. Manitoba had the highest homicide rate at 3.1 per 100 000 population, with Winnipeg tying Saskatoon for highest rates per city. Winnipeg also rated third highest for rate of sexual assaults at 104 per 100 000 population (Statistics Canada, 2003, p.7). These statistics illustrate that the issue of high crime rates and the data on overrepresentation of Aboriginal people in Manitoba leads to the conclusion that the issue is prevalent here.

Other Minority Groups

One issue emerges in the literature regarding the data on Aboriginal offenders. Stenning and Roberts (2001) assert that “other groups in society, especially Blacks, were as much or more overrepresented” (p.146) and conclude that overrepresentation “cuts across different racial minorities” (p.156), not just one historically disadvantaged group. Rudin and Roach (2002), Brodeur (2002) and Daubney (2002) all disagree with this claim and argue that the available race-based data clearly shows Aboriginal people as overrepresented. More specifically, Rudin and Roach (2002, p.7) challenge Stenning and Roberts' use of particular data and criticize them for failing to acknowledge its limitations. They go on to cite Canadian Center for Justice Statistics, Adult Correctional Services in Canada (p.9) and the Manitoba Justice Inquiry (p.13) whose data contradicts the British Columbia's study which Stenning and Roberts use. Similarly, Daubney (2002, p.40) argues that the overrepresentation of Aboriginal

people is a national phenomenon and criticizes Stenning and Roberts' use of data. Brodeur (2002, p.47) takes issue with the use of data from British Columbia and Ontario when the overrepresentation problem is most prevalent in the Prairie Provinces. Furthermore, Brodeur criticizes Stenning and Roberts for not following "the same standards of proof" which they criticize their opponents for and their use of "likely" "probably" and "some evidence" to assert their arguments and draw conclusions (p.47).

So, although Stenning and Roberts attempt to include other minority groups in the overrepresentation problem, they do not appear to provide adequate proof to back their conclusions. The data is consistent throughout the literature and the numerical data supports the claim that Aboriginal offenders are overrepresented in the Canadian prison population. It is also apparent that the issue is concentrated in the prairie regions, specifically of interest here in Manitoba.

The next logical step is to consider what the Canadian criminal justice system has done in response to the legitimate statistical picture of an overrepresentation of Aboriginal offenders being incarcerated and an overuse of incarceration by sentencing judges.

Legislative Reforms

Because of the rising incarceration rates, especially for Aboriginal offenders, the Canadian criminal justice system instilled changes in statute law through the introduction of Bill C-41 in 1996. Bill C-41 created "an express statement of the purposes and principles of sentencing, provisions for alternative measures for adult offenders and a new type of sanction, the conditional sentence of imprisonment" (*R v. Proulx,* 2000, s.14). Two pieces of "special considerations" legislation, section 718.2

and section 742.1 of the Criminal Code, were included in Bill C-41 and require examination and discussion in regards to their application to the issue of Aboriginal offender overrepresentation. The case of *R v. Gladue* is significant because it was the first time the Supreme Court had been asked to discuss and apply the provisions of section 718.2(e) of the Criminal Code. *R v. Proulx* was precedent setting because it involved the application of conditional sentencing and provided clearer guidelines for the use of conditional sentencing. The case of *R v. Wells* was precedent setting as it was the first time the Supreme Court attempted to address both section 742 and 718.2(e) specifically looking at the use of conditional sentencing for an Aboriginal offender.

Section 718.2

This first reform, section 718.2(e), states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (*R v. Gladue,* 1999, s.24). *R v. Gladue* (1999) outlines a framework for sentencing which directs judges to pay particular attention to the "circumstances of Aboriginal offenders" specifically, "the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and, the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage" (*Gladue,* 1999, s.66). The Supreme Court's analysis reads that section 718.2(e) is intended to pay special attention to systemic and background factors; how "years of dislocation and economic development have translated for many Aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation. These factors contribute to

a higher incidence of crime and incarceration" (*Gladue,* 1999, s.67). It is imperative to understand that Aboriginal people "differ from those of the majority because many Aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions" (*Gladue*, 1999, s.68).

Also of importance is that section 718 of the Criminal Code outlines the purpose of sentencing and is now focused more on restorative justice principles. It includes "(e) to provide reparations for harm done to victims or to the community, and (f) to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community" (*Gladue,* 1999, s.43). The Supreme Court of Canada's analysis of the *Gladue* case notes that these new objectives to sentencing parallel restorative justice principles; the restorative goal of repairing harm, community involvement in process, responsibility and acknowledgment on the part of the offender, and rehabilitative measures for the offender (*Gladue,* 1999, s.43).

Section 742.1

This second important reform through Bill C-41 created the new sentencing option of conditional sentencing whereby offenders can serve their sentence in the community under specified "conditions." Conditional sentencing may be used when:

> The offence is not punishable by a minimum term of incarceration; the court imposes a sentence of less than two years; and the court is satisfied that allowing the offender to serve the sentence in the community would not endanger the safety of the community and is consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2 of the Criminal Code.
> (Daubney, 2002, p.48)

This reform "makes a conditional sentence available to a subclass of non-dangerous offenders who, prior to the introduction of this new regime, would have been sentenced to a term of incarceration of less than two years for offences with no

minimum term of imprisonment" (*R v. Proulx,* 2000, s.12). The idea is that conditional sentencing is more punitive than probation and is in fact defined in the Criminal Code as a sentence of imprisonment (*R v. Proulx,* 2000, s.29). As such, conditional sentences should include "punitive conditions that are restrictive of the offender's liberty" and "aimed at offenders who would otherwise be in jail but who could be in the community under tight controls" (*R v. Proulx,* 2000, s.36). Conditional sentences, therefore, are substitutions for imprisonment. They lie on the continuum of sentencing options between incarceration and probation and can be utilized to give an offender a non-custodial sentence.

In *R v. Wells (*2000, s. 27-30), the Supreme Court provided guidance on how to use conditional sentencing and consider the unique circumstances of Aboriginal offenders. Sentencing judges are directed to first consider the appropriateness of probation or incarceration. Judges are then to consider if a conditional sentence is consistent with the purposes and principles of sentencing. Finally, if the above two conditions are met, the judge is to consider s. 718.2(e), the unique circumstances of the Aboriginal offender.

The proposed study of ten Aboriginal offenders will consider (a) sentences that were given as alternatives to incarceration, (b) any consideration given to the offender's sentences based on their Aboriginal heritage, and (c) ten Aboriginal offender's perceptions of their individual sentencing processes.

Chapter Two:

The Impact of *Gladue, Proulx* and *Wells*

The Impact of *Gladue, Proulx* and *Wells*

What has happened since the introduction of Bill C-41 and the subsequent Supreme Court rulings in *Gladue, Proulx* and *Wells*? Nine years have passed since the enactment of Bill C-41 but only six and five years for *Gladue, Proulx* and *Wells.* The literature concentrates on the interpretation of the statutes by the Supreme Court, the directions laid out for sentencing judges and the perceived implication all of this will have on Aboriginal offenders. This chapter will present the debates in the literature regarding the directions set out by the Supreme Court's rulings in *Gladue, Proulx and Wells* as well as the difficulties that have emerged putting the sentencing practices outlined in Bill C-41 into place. Consideration will also be given to specific issues facing Aboriginal offenders and the application of the Supreme Court's directions and the Bill C-41 sentencing guidelines.

Addressing the Issue of Overrepresentation

Although the legislative reforms laid out in Bill C-41 appear to be aimed at reducing incarceration rates, there appears to be some debate about how successful these reforms will be and how they will be read, understood and utilized. There seems to be inconsistent interpretation of the purpose of s. 718.2(e). Some argue it is set out to correct the problem specific to Aboriginal offenders and will not be able to do so, while others assert it is meant to address the issue of the overuse of incarceration where Aboriginal offenders are overrepresented.

To begin, the Supreme Court of Canada in *Gladue* (1999) specifically outlines that the purpose of section 718.2(e) "is to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons" (s. 93). The Attorney General of Canada, cited in Daubney (2002) states the statute is "intended to encourage the

consideration and use of alternative, culturally sensitive sanctions where appropriate, allowing for a more effective and inclusive sentencing process, which would contribute to the ultimate goal of a reduction in crime and recidivism" (p.39). Stenning & Roberts also argue that s. 718.2(e) is set up to address disparity in sentences while "the Minister who introduced the provision, the Department of Justice and the Supreme Court all believe that [it is] designed to help reduce Aboriginal overrepresentation" (cited in Rudin & Roach, 2002, p.21). Furthermore, Daubney (2002) reports that neither Minister of Justice Rock nor Attorney-General McLellan stated that the overrepresentation of Aboriginal offenders was due to discriminatory sentencing (p. 39). It is through the use of alternative sentences in lieu of incarceration that the goal of reducing incarceration rates can be accomplished.

Stenning & Roberts (2001) argue that the overrepresentation issue lies beyond sentencing and, therefore, should not be included in the solution because section 718.2(e) "runs an unacceptable risk of discrimination and disparity" (p. 156). While agreement can be reached that sentencing alone will not correct Aboriginal overrepresentation, Stenning & Roberts argue that special considerations may be discriminatory.

Rudin & Roach (2002) agree with the Supreme Court that "sentencing judges are among those decision-makers who have the power to influence the treatment of Aboriginal offenders in the justice system" (*Gladue,* 1999, s.65). They believe that it is "simply illogical to conclude that since Aboriginal overrepresentation is not caused by sentencing practices that sentencing practices cannot act to stem the flow of overrepresentation" (p.15). The literature points to the fact that the sentencing process alone will not reduce the number of Aboriginal offenders serving terms of incarceration. The directives laid out by the Supreme Court seem to be that sentencing will help

address the Aboriginal incarceration rates through the use of alternative sentences and allow for consideration of the 'uniqueness' of Aboriginal circumstance.

Defining "Unique" Circumstances

There is discussion and some disagreement in the literature regarding the Supreme Court's direction for sentencing judges to consider the "unique circumstances" of Aboriginal offenders.

To begin, Stenning & Roberts (2001) argue that the "overrepresentation problem cuts across different racial minorities and requires a response that does not focus exclusively on one group, however historically disadvantaged" (p. 156). This assertion appears to deny the uniqueness of Aboriginal circumstance and is not reflective of the majority of authors read. Daubney (2002, p.41) argues that there is "overwhelming evidence" pointing to the uniqueness of Aboriginal circumstance and lists the Royal Commission on Aboriginal Peoples Report, the impact of Residential Schools, the apprehension and adoption of Aboriginal children in the 1960's 'Sixties Scoop', the prevalence of Fetal Alcohol Spectrum Disorder, as well as all of the factors outlined in *Gladue* (1999, s. 68; listed here on p.19). The Aboriginal circumstance is unique. So is that of Black Canadians. To compare the two discredits both, and Stenning & Roberts (2001) deny the uniqueness of their circumstances by cataloguing minority groups or disadvantaged groups together. Just because they are minorities and have been oppressed does not automatically mean their experiences are the same.

While the Supreme Court's definition and description outlines several areas for sentencing judges to consider, it does neglect other areas. Pelletier (2001) criticizes the Supreme Court's analysis in *Gladue* on two major points. To begin, the Court gave a narrow view of systemic factors, relying on "legally relevant factors" (p.475), such as

prior criminal record, employment status and education level. The Supreme Court failed to include that Aboriginal offenders are disproportionately unemployed, scrutinized by police and breached, denied bail, fine default and less likely to receive probation (p.476). Similarly, relevant factors lie with police attitudes toward Aboriginal people, English as a second language for some offenders, the difference in Aboriginal world view compared to European world view and respect for Elders – admit you are wrong, do not argue. These factors, Pelletier (2001) argues, create a cyclic motion where "jails become virtually the only option for the sentencing judge regardless of the gravity of the offence" (p.476). The second point Pelletier (2001) argues is that the Supreme Court's analysis does not fully appreciate the impact of colonization. The Court places emphasis on the connection to heritage and culture but "does not appear to make room for the Aboriginal offender who has been unable to participate in his or her culture" (p.477). Because of colonization many Aboriginal people are alienated from their culture and their communities. This is a systemic factor which cannot be ignored, and "requiring a connection with the Aboriginal community before s. 718.2(e) can be considered will inhibit its application to deserving people" (Pelletier, 2001, p.477).

Pelletier's points are well taken. The Supreme Court erred in omitting, or neglecting to include what the Aboriginal offenders experience is within a non-Aboriginal justice system. Secondly, to assume that culture defines "Aboriginalism" is wrong, especially from a dominant location like that of the Supreme Court.

Shorter Sentences

The literature indicates that the general understanding is that Aboriginal offenders may receive shorter sentences than non-Aboriginal offenders for similar

offences. *Gladue* (1999) outlines the purpose of s. 718.2(e) as "the jail term for an Aboriginal offender may in some circumstances be less than the term imposed on a non-Aboriginal offender for the same offence" (s. 93). The use of s. 718.2(e) with Aboriginal offenders, and applying the principles as outlined could result in Aboriginal offenders receiving shorter sentences than non-Aboriginal offenders for similar offences.

Roberts (2002) (cited in Roberts and Melchers, 2003) found that "provincial sentences of custody and conditional sentences of imprisonment imposed on Aboriginal offenders tend to be shorter than those imposed on non-Aboriginals" (p. 218). Similarly, LaPrairie (1996) found that "despite the fact that Aboriginal offenders were disproportionately represented among those charged with both the most serious and the least serous criminal offences, Aboriginal offenders generally received shorter sentences than non-Aboriginal offenders charged with comparable offences" (p. 42). Stenning & Roberts (2001) state that "the sentencing of an Aboriginal offender is less likely to result in a term of custody and if custody is imposed, it is likely to be shorter in some cases than it would have been had the offender been non-Aboriginal" (p. 162).

Several authors have suggested that Aboriginal people should and in fact are receiving shorter sentences as directed by the Supreme Court in *Gladue.* Only one area of criticism needs to be noted. Rudin & Roach (2002) criticize Stenning & Roberts for relying on "incarceral sentence" data which has limitations affecting their conclusions. They raise two issues. Incarceral sentence data is problematic because it omits those that do not receive incarceral sentences or alternative sentences which Rudin & Roach (2002) assert results in a sample selection bias (p.12). The second problem arises in the fact that incarceral sentence data does not distinguish nor account for "dead time" spent in prison while awaiting sentencing. As a result this

omission may account for differences in sentences, depending on how "dead time" is handled at the sentencing judge's discretion (p.12). So although there seems to be data which supports the idea that Aboriginal offenders are receiving shorter sentences than non-Aboriginal offenders, there may be problems with interpretation of that data.

The second issue presented in the literature is the issue of proportionality. Anand (2000) argues that Aboriginal offenders need to be sentenced "on the same basis as non-Aboriginal offenders by resorting to the principle of proportionality" (p. 417) and if the Supreme Court had directed "to take their mandate of proportional sentencing for Aboriginal offenders seriously, more Aboriginal offenders would be given non-custodial sentences and these sentences could then be structured around restorative principles" (p.417). In other words, if the courts were to sentence based on proportionality, more Aboriginal offenders would be diverted from terms of incarceration and would receive community based sentences, with the possibility of incorporating the principles of restorative justice in their sentence requirements.

Seriousness of Offence

The general understanding is that the more serious the offence, the smaller the difference between Aboriginal and non-Aboriginal offenders' sentences. *Wells* (2000) outlines that "the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between Aboriginal and non-Aboriginal offenders" (s.42). The Supreme Court has indicated that the difference in sentence length between Aboriginal and non-Aboriginal offenders becomes increasingly smaller, or sentences become more and more similar, based on the severity of the offence. Two violent offenders should receive similar sentences, similar in length.

Stenning & Roberts (2001) criticize the Supreme Court as having "left no indication as to how a judge is to weigh the seriousness of the offence, the preferences of the community for restorative or denunciatory justice and the legitimate interests of the victim" (p. 164). They further argue that s.718.2 "displays a disconcerting disregard not only for the values of proportionality and parity in sentencing but also for the legitimate needs of sentencing judges for some clarity about how to determine appropriate sentences" (p.164). This was recognized by the judges surveyed by Roberts and LaPrairie (2000) who in the pre-*Proulx* period felt more guidance for sentencing judges was needed from their provincial Courts of Appeal (p.9). Following *R v. Proulx* (2000), it could be argued that the Supreme Court may have clarified some of these "grey" areas.

Another problem that arises is that there is no statute which categorizes "serious" offences – this is left to judicial decision making (Pelletier, 2001, p. 47). Pelletier (2001) asserts that if serious offences are excluded from s. 718.2(e)'s application then "the Court views some offences as being more serious than others, rendering Aboriginal offenders who are in the greatest need of rehabilitation unable to receive a sentence aimed at achieving this goal" (p. 479). Furthermore, Pelletier (2001) argues, "if s. 718.2(e) is meant to alleviate Aboriginal overrepresentation in prison, then limiting it to offenders that are unlikely to receive a jail term strips the provision of its remedial intent" (p.481). Interestingly, the appellate judges surveyed by Roberts and Manson (2004) supported the discretionary sentencing option of conditional sentences and voiced concern over implementing 'statutory exclusion' (section 3.1).

Restorative Justice Issues

Bill C-41 presents restorative justice options to be used as an alternative to incarceration by sentencing judges. The purpose of sentencing as outlined in section 718 (*Gladue,* 1999) focuses on "restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender and attempting to rehabilitate or heal the offender" (s. 43). Conditional sentencing as outlined in s.742-742.6 is to "serve restorative, as well as retributive goals [and] are particularly relevant to Aboriginal offenders for whom restorative considerations are said to be especially important" (Roberts & Melchers, 2003, p. 216). This, the Supreme Court has outlined, "will generally be more effective than incarceration at achieving the restorative objectives" (*Proulx,* 2000, s. 22).

Ross (1996) discusses the 1993 Position Paper on Incarceration by the Community Holistic Circle Healing Program (CHCH) at Hollow Water, Manitoba. CHCH concluded that "incarceration works against the healing process because an already unbalanced person is moved further out of balance" (p.38). Incarceration decreases the offender's feelings of responsibility and increases the silence and as such "rather than making the community a safer place, the threat of jail places the community more at risk" (p.38)

Restorative justice practices recognize the uniqueness of Aboriginal offenders and also the importance of the community based sanctions for many Aboriginal people. The goal is to use restorative retributive measures that will be more in line with Aboriginal culture and traditional approaches to justice issues.

Stenning & Roberts' (2001) critique is that "this 'Aboriginal emphasis upon healing and restoration of both the victim and the offender' (Gladue: 81) reflects a

"pan-Indian" approach that does not capture the current diversity of the Aboriginal experience in Canada" (p. 163). Rudin & Roach (2002) counter this argument with the need to recognize that all Canadian Aboriginal people "have been touched by the legacy of colonialism and that steps taken to alleviate that unjust legacy should apply, albeit in different ways, to all Aboriginal people in Canada" (p. 33). To take this one step further, the Royal Commission on Aboriginal Peoples cited in Chartrand (2001) concluded that "at the heart of a new relationship between Aboriginal and non-Aboriginal people must be recognition of Aboriginal peoples' inherent right of self-government. This right encompasses the authority to establish Aboriginal justice systems that reflect and respect Aboriginal concepts and processes of justice" (p. 463).

Restorative justice measures are only new to white people and the Canadian justice system. Aboriginal people have used restorative techniques for centuries. It is the non-Aboriginal justice system that is finally attempting to incorporate some Aboriginal ways which will hopefully assist Aboriginal people with their involvement in our system.

Problems with Application

Some practical problems occur with the application of s.718.2 (e) in regards to the amount of resources required. Roach & Rudin (2000) discuss problems of implementation in that there is a "lack of such programs in most communities in Canada and their limited [in] capacity where they exist" (p.361). Pelletier (2001) acknowledges the "lack of funding for community-based alternatives to incarceration" (p. 481) and that the more remote the Aboriginal community, the less likely there will be treatment centers, healing lodges, and alternate diversion programs. The lack of

programs can undermine the purpose in that "the unavailability of treatment and other programs may be one factor that justifies the use of incarceration in serious cases" (Rudin & Roach, 2000, p.361). Judges may be too harsh with conditional sentences and may "impose onerous conditions...and reject less intrusive alternatives on the basis that they do not have a restorative component" (Rudin & Roach, 2000, p.363). In a survey of provincial sentencing judges, the judges identified community resource issues for the conditional sentences. "Four out of five judges stated that they would be more inclined to impose conditional terms of imprisonment if they could be assured that more resources were available" (Roberts & LaPrairie, 2000, p.11). Judges may utilize conditional sentencing, but there needs to be the resources available for the realistic implementation of these conditions. Otherwise, the point is moot. If the legislation directs judges to use alternative forms of sentencing but does not provide the means to the services required or the services required are not available within the service sector, then how can conditional sentencing and restorative justice measures work? If there is a lack of service, is the system not set up to fail?

Similarly, The Restorative Justice Consultation Paper, Part II: Consultation Issues (2001) and Roach & Rudin (2000, p. 372-375) note that the implementation of restorative justice measures has several challenges: establishing a balance between government and community involvement; concern for the effects on the victim i.e. concerns of victims groups with victims feeling pressured to participate or feeling threatened; defining the appropriateness of certain offences for restorative processes i.e. sexual offence referrals; accountability issues – federal, provincial, governmental, public, taxpayer; and ensuring adequate education, training and standards of practice of community members and panels.

The second major issue with the implementation of alternative sentencing procedures like conditional sentencing is a 'net widening effect' (Pelletier, 2001). This occurs where conditional sentences "are ordered in cases where less intrusive sanctions would ordinarily been ordered" (Roach & Rudin, 2000, p. 369) or have "onerous" conditions that are not possible for the Aboriginal person to meet. Judges are directed to use reparative measures but "the conditions of poverty that the court recognizes in *Gladue* frequently afflict Aboriginal people and may affect their ability to make reparations" (Roach & Rudin, 2000, p. 372). Judges need to use discretion when handing down reparative sentences in order for them to work; judges must be cautious not to impose conditions of reparation that are not feasible for the offender to meet.

As a result, it can be argued that offenders are receiving stronger penalties than would have been handed down prior to Bill C-41. Also, it can be argued that conditional sentences "could even aggravate Aboriginal over-incarceration if, following the Supreme Court's directions in *Proulx,* 2000, [the conditional sentences] are longer than sentences of actual imprisonment and if Aboriginal offenders are imprisoned for the duration of the conditional sentence once a breach is established" (Roach & Rudin, 2000, p. 372). The term "breaching" refers to the offender not following through on the conditions of his/her order, and is in "breach" of his/her order. For a breach of a conditional sentence the offender has a good chance of being placed in custody and serving the remainder of his/her sentence incarcerated. For a breach of a probation order, on the other hand, an offender may have a subsequent charge laid against him/her i.e. failure to comply with probation order, and in most incidents will not be incarcerated. Therefore, the issue may emerge where offenders are unable to meet

the conditions laid out and actually spend more time in jail than if they had received an initial sentence of incarceration.

With change comes resistance and the legal system does not seem to be immune. A third major issue arises from the resistance of the legal system. Comack & Balfour (2004) cite a Manitoba survey that found "only 21% [of judges] believed that the legislation benefited individuals who were Aboriginal or of lower socio-economic status" (p. 104). Similarly, Roach & Rudin (2000) cite a B.C. Justice Southin who states that "section 718.2(e) does not add much at all, if anything, to what was always the concerns of the judges of this Province whatever may have been the situation in other less enlightened parts of this country" (p. 379). This could possibly be a sign of "deeper resistance to the case [Gladue] among some members of the judiciary" (Roach & Rudin, 2000, p. 379). If the legal players are having problems with the legislation or do not see it as beneficial, then it would seem that issues of discretion and implementation will arise. How can the administrators enact policies that they themselves do not see as beneficial? If legal players are resistant to the legislation then they may be less apt to use it when required.

Missed Opportunities

Gladue can also be seen as a missed opportunity. Lash (2000) argues that broader application of section 718.2(e) would have had a more beneficial interpretation for many, including Jaimie Gladue. To begin, the Supreme Court used lower court decisions to set precedence (Lash, 2000, p. 88). By so doing the Court provided "a narrow and gender neutral interpretation of section 718.2(e) and thereby missed an opportunity to break ground in fighting systemic discrimination against Aboriginal women in the Canadian justice system (Lash, 2000, p. 85). The *Gladue* decision could

have been read to include the gender differences of Aboriginal people. It did not consider the unique needs of Aboriginal women and did not consider the extent of domestic violence in the Gladue – Beaver relationship. "Excluding the issue of spousal abuse also made it possible for the Supreme Court to look at Gladue's violence in a gender-neutral way" (Lash, 2000, p. 87). Because it did not consider the history of violence in this relationship, the conclusions were drawn that Gladue was the "aggressor" and unafraid of Beaver. These presumptions could be viewed as having caused a "serious set back for abused women in light of the legitimacy of battered women syndrome and the defence of self-defence for a woman who has killed her violent partner established in *R v. Lavallee*" (Lash, 2000, p. 88).

Pelletier (2001) also acknowledges that Gladue "endured emotional and physical abuse at the hands of her partner but this was not regarded by any of the three levels of court as forming part of her circumstances as an Aboriginal offender" (p. 478). While domestic violence is an issue facing many Canadian women, for Aboriginal women it appears to be even more prevalent with statistics ranging to eighty per cent of Aboriginal women having experienced family violence. Pelletier (2001) argues that "violence and abuse directed towards Aboriginal women should be recognized as a 'unique systemic or background factor' that may serve to explain their criminality" (p. 479).

Difficulties, real, anticipated and/or speculated have arisen from the implementation of Bill C-41. The legislative changes have been implemented and redefined through precedent setting cases. The interpretations of the Supreme Court's decisions and directions are varied, and there is judicial discretion in all of the court's directives and interpretations. There seems to be a variety of difficulties in the implementation of some of the sentencing alternatives. As the process is fairly new

and in its early implementation stages, it is not clear what the end results will be. It is possible as the alternative sentencing process continues, is reviewed, amended and new programs are developed, the end result may be as intended.

Other Causal Factors

There seems to be an overall consensus that sentencing alone will not reduce the overrepresentation of Aboriginal offenders. Throughout the literature numerous other causal factors are discussed and consideration must be given to how these also contribute to the large Aboriginal prison population.

To begin, other social and economic factors may be the issue that needs to be prioritized in order to see a statistical decline in incarceration rates. Over representation of Aboriginal people within the criminal justice system relates to the degree of socio-economic disadvantage they suffer. LaPrairie (2002) states that "the more socially marginalized (you are) the higher the involvement in the criminal justice system" (p. 183) and that "registered Indians, overrepresented in Aboriginal inmate populations, are also the most marginalized of the urban Aboriginal populations" (p. 197). Furthermore, Comack & Balfour (2004) state overrepresentation is not because of sentencing but a "more deep-rooted problem of social and economic oppression" (p. 107). It is a systemic issue whereby "legal discourse and practice are infused with racist ideological representations that find their origins in the discursive fields of the wider society" (Comack & Balfour, 2004, p. 107). Therefore, Comack & Balfour (2004) conclude "section 718.2(e) does not challenge the systemic nature of the problem (especially the discursive constructions that feature in legal practice)" (p. 108). The legal system then is but another form of oppression.

Dioso & Doob (2001) also argue that the overrepresentation of Aboriginal people is not a result of sentencing and that this assumption is problematic because "it does not address the problem that resulted in the case coming before the court" (p. 406).

Similarly, Chartrand (2001) argues that overrepresentation can be attributed to two factors, "the poor socio-economic circumstances of Aboriginal peoples have contributed to disproportionate criminal activity and Aboriginal peoples are subjected to the effects of systemic discrimination in the criminal justice system" (p. 455). Social and economic factors as well as issues of oppression and discrimination seem to be amongst the leading causal factors.

Following this line of thinking, another theme emerges in the literature which needs to be discussed. The issue is how the socio-economic status and the oppression of Aboriginal peoples can, could or should be compared to other minority groups, especially Black Canadians. Stenning & Roberts (2001) agree that social and economic factors are the cause of overrepresentation but that "none of the factors that the Court listed [in *Gladue*] is unique to Aboriginal offenders, either in kind or degree; nor are the factors listed relevant for all Aboriginal offenders" (p. 143). They argue that other minority groups also suffer the same systemic discrimination and that it is therefore unfair to give specific attention to Aboriginal offenders and not other similarly disadvantaged offenders (p.158). By paralleling Black Canadians to Aboriginals, Stenning & Roberts (2001) argue it is not cultural/heritage factors which should influence a sentence but "relative culpability and/or suitability for a sentence in light of the social disadvantage he/she has experienced" (p. 159).

Brodeur (2002) makes some strong arguments against this comparison and asserts that contextually the concepts of deprivation in the "Black ghetto" and "Aboriginal reservations" are very different. He asserts that

> "High unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in a similar way in bush reservations and urban ghettoes" (p. 49).

Rudin & Roach (2002) differ from Stenning & Roberts' "theory of social disadvantage" and their claim that s. 718.2(e) is under inclusive. Rudin & Roach do not believe s. 718.2(e) excludes other disadvantaged groups as it refers to "all reasonable alternatives to imprisonment applies to all offenders" (p.16) and is applicable to the overrepresentation of other groups. Rudin & Roach criticize Stenning & Roberts for not taking their social disadvantage theory further to examine how the Royal Commission on Aboriginal Peoples found "the impact of colonialism best explains the overrepresentation problem" (p. 16).

While both groups are disadvantaged and suffer social and economic oppression, their experiences are very different. This discussion further illustrates the previous argument that sentencing judges need to take into account the "unique circumstances" of Aboriginal people.

We must also consider the Aboriginal persons experience with the Canadian criminal justice system as a contributing factor. Welsh & Ogloff (2000) note that there exists a "propensity of Aboriginal accused to plead guilty more often than non-Aboriginal accused and have a lack of legal representation" (p. 471). These authors also raise the issue of "deficiencies in the availability of or awareness of the availability of legal aid, and cultural and language differences between legal representatives and Aboriginal clients" (p.471).

Bonta, LaPrairie & Wallace-Capretta (1997) compared Aboriginal and non-Aboriginal offenders risk prediction and re-offending rates. For our purposes here,

their study was relevant in that it considered other criminogenic needs of offenders and the causal relationship to offending. They argue that "the situation of the disproportionate involvement of Aboriginal people as offenders in the criminal justice system finds its antecedents in both historical and contemporary processes" (p. 131). Similarly, Bonta & Lipinski (1992) looked at the characteristics of Aboriginal offenders who recidivate. They examined thirty variables and five that had significant predictive validity: offence type, prior convictions, prior incarcerations, age at first conviction and sentence length (p.519). A surprising result they found "was with sentence length where Aboriginal inmates with shorter sentences were more likely to recidivate" (p.519).

Systemic Discrimination

A major theme which is present throughout the literature is the systemic discrimination faced by Aboriginal people at every stage of their involvement with the criminal justice system. The Aboriginal Justice Inquiry (1999) cited in Chartrand (2001, p. 464) concluded that

> the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.

Gladue (1999) states that "the fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not

unfair to non-Aboriginal people; rather, the fundamental purpose of s.718.2 (e) is to treat Aboriginal offenders fairly by taking into account their difference."

Because judges are human, they have their own perceptions, biases, stereotypes and prejudices. Although they are directed under the law on how to apply sentencing principles and maintain objectivity, they inevitably filter everything through their own subjective lenses. Quigley (1999) acknowledges that the successful application of s. 718.2 "depends in large measure on how these principles are interpreted and applied by the judiciary" (p. 135). Quigley (1999) cites Lamer C.J.C. in *R. v. Shropshire* as stating that "sentencing is an inherently individualized process" and there will be variance across communities (p. 141). It is also apparent there will be variances across judges. In *R. v. Wells* (2000) the Supreme Court states that much depends on "the good judgement and wisdom of sentencing judges" who the court acknowledges as having considerable discretion (s. 34). The decision to use a conditional sentence "depends on the sentencing judge's assessment ... including aggravating factors, the nature of the offence, the community context and the availability of conditions which have the capacity to properly reflect society's condemnation" (*Wells,* 2000, s. 34).

The judicial system may be seen as a contributing factor in more ways than one. Pelletier (2001) acknowledges that "counsel is inadequately trained in law school and bar admission courses to deal with Aboriginal issues", as well as it is questionable if judges are taught to understand the differences in cultural values and beliefs (p. 481). Welsh & Ogloff (2000) examined Aboriginal offenders and conditional release and found that "federal Aboriginal offenders are slightly less likely to receive day parole as compared to other offenders" (p. 472). The authors state several factors that could explain the difference in Aboriginal and non-Aboriginal release rates. Aboriginal

offenders do not apply; they "waive their full parole hearings at a higher rate than non-aboriginal offenders: 49% vs. 30%" (p.472). This, Welsh & Ogloff argue could be attributed to a lack of knowledge about the process, as well as lack of legal representation or legal representation that does not meet the language needs or cultural needs of Aboriginal offenders (p.471). Furthermore, Johnson (1997) cited in Welsh & Ogloff (2000) found Aboriginal inmates report a dislike and mistrust for correctional staff and as a result may be less likely to apply for conditional release (p. 473). Similarly, the case management officers may not encourage or recommend parole for Aboriginal inmates because of criminal history and/or jail behaviour (p.473). Welsh & Ogloff also cite research which suggests that "Aboriginal offenders may actually stay longer in correctional institutions because of lower full parole release rates" (p.472) and are granted parole later in their sentences, thus spending more time incarcerated. Another contributing factor is the risk assessments used by the justice system. There is a significant difference in criminal history of Aboriginal and non-Aboriginal offenders (Welsh & Ogloff, 2000, p.473). Aboriginal inmates have a higher incident of prison violence and a decreased involvement in rehabilitative programming. The programs offered "do not address the unique cultural needs of Aboriginal offenders and as a result, Aboriginal offenders often do not participate in, complete or benefit as much as non-Aboriginal offenders" (Welsh & Ogloff, 2000, p.474). Aboriginal recidivism rates are also high with a rate as high as 66% (Welsh & Ogloff, 2000, p.473). All of this compounds the high numbers of Aboriginal inmates.

Judicial Opinion

Finally, as the implementation process continues, it is important to consider the research conducted to date which reflects the perspectives of the judges imposing the

conditional sentences. There are two significant research papers which require consideration.

To begin, Roberts and LaPrairie (2000) conducted a survey two years after the implementation of Bill C-41. Of significance here, in their survey of 461 provincial judges the two most important objectives of conditional sentencing were seen to be to reduce the use of incarceration and to provide a "cost effective alternative to prison" (p.6). These judges also believed that the use of conditional sentencing was reducing the rates of terms of incarceration (p.15). Judges surveyed stated that conditional sentences were just as effective as imprisonment in regards to rehabilitation (3/4 of sample), but not deterrence and denunciation (p.8). Furthermore, 60% of the judges surveyed responded that they felt a conditional sentence did have a "different impact on the offender than a probation order with the same conditions" (p.9).

The judges were also asked about the conditions they imposed on their conditional sentences. Of particular interest here is the issue of house arrest. The sample of judges surveyed imposed treatment and no contact orders most frequently. 78% of the judges have never imposed house arrest with electronic monitoring, and only 35% reported using house arrest without electronic monitoring "often" (p.13).

The final point from this study is that the judges surveyed were asked several questions in regards to public opinion regarding conditional sentences. Judges stated the public did not understand conditional sentences, they were uninformed and that the public cannot distinguish between probation and conditional sentence (Roberts & LaPrairie, 2000, p. 16-17).

The second study requiring consideration was conducted by Roberts and Manson (2004) who conducted a panel discussion with fifteen appellate judges, from three separate provinces, Manitoba being one of them. This panel unanimously

agreed against limiting "the use of conditional sentences (e.g. to introduce a statutory exclusion for offences involving serious violence, sexual assault, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity, thefts involving breach of trust)" (section 3.1, ¶ 2). This panel of judges felt that limiting the use of conditional sentences would be against the philosophy and rationale of this sentencing option and would limit the discretionary powers of trial judges. This panel voiced support for the discretionary sentencing option of conditional sentences and voiced concern that 'statutory exclusion' would create a rigid format for sentencing which would reduce confidence in judicial decision making, and restrict conditional sentence usage (section 3.1).

Roberts and Manson (2004) concluded from their discussions with the appellate judges that the panel supported the judicial discretion afforded to sentencing judges, that there needs to be an increase in resources to ensure adequate supervision of community sentences, that the public's perception of conditional sentencing is problematic, and that there is limited data available of the breach rates on conditional sentences.

It is interesting that both studies of judicial opinions on conditional sentencing had similar conclusions. Given that there were four years between the two, both studies similarly found that resources were of a concern and/or inadequate and that public opinion is problematic. These are two identified issues to consider further.

In summation, the period following the implementation of Bill C-41 has been filled with debate and challenge. The implementation of these sentencing options is relatively new and not without criticism. The Supreme Court's rulings in *Gladue, Proulx* and *Wells* have attempted to clarify some of the misunderstandings or misinterpretations of Bill C-41, but in so doing have sparked further debate and

challenge. As this process evolves through time some of the unanswered questions will be fulfilled and the intentions and implications of Bill C-41 will be better understood.

Chapter Three:

Methodology

Methodology

This chapter will begin by defining the research question and providing the rationale for the chosen case study approach. A description of the Restorative Resolutions Program will then be presented, followed by the specific methodology employed for this study in terms of the parameters of the study, definitions and the process for sampling, the participants gathered and the interview process conducted. Final consideration will be given to the analysis of data and the methods used to organize and categorize the information collected.

The Research Question

This research study is to consider what are the sentencing experiences of Manitoba's offenders? How is Manitoba utilizing alternative sentences and restorative justice measures? The problem to be researched is two fold: (1) to explore the individual experiences of ten Aboriginal offenders, to discover their perception of their sentencing processes and (2) to identify conditional sentences and restorative justice sentences being used in Manitoba, and the use, or lack of use of section 718.2(e) and/or special consideration to the circumstances of Aboriginal offenders.

The Case Study Approach

Creswell (1998) defines a case study approach to research as "making a detailed description of the case and its setting...analyzing the multiple sources of data to determine evidence for each step or phase in the evolution of the case" (p.153). This research study is looking specifically at individual participants' stories. Following a case study approach, it is "bounded by time and place" (Croswell, 1998, p.61) because this study considers participants involved in one program, the Restorative

Resolutions Program, at the point of time of pre-sentencing and sentencing involvement with the justice system. This study is "within site" considering only participants in one diversion program. It is a collective case study because more than one case is being considered (Creswell, 1998, p.61). This research utilizes two sources of information; interview data and data from Restorative Resolutions documentation. Court transcripts were not reviewed due to the financial expense of obtaining such documents. The choice to complete interviews and review file documentation comes from the desire to have rich descriptive information regarding these individuals' experiences. It is hoped that by taking a case study approach a more detailed, richer, fuller experiential understanding may be gained (Marlow, 2001, p.210).

Creswell (1998) states "the context of the case involves situating the case within its setting, which may be a physical setting or the social, historical and/or economic setting for the case" (p.61). This case study research examines the ten participants within the context of the individual participant's sentencing experience and within the larger context of the historical issues with Aboriginal people's involvement with the justice system.

Restorative Resolutions Program

This researcher worked with offenders involved with the Restorative Resolutions Program. Restorative Resolutions is a joint project between John Howard Society of Manitoba and Manitoba Community and Youth Corrections. The program "is based upon restorative justice principles and seeks to accomplish the following goals: to hold offenders accountable for their behaviour in the community, to be sensitive to the needs and concerns of victims and to encourage members of the

community to become involved in the criminal justice process" (Maloney & Lloyd, 2000, p.1). The program expects participants to be facing a jail sentence of greater than six months, must be willing to plead guilty to the offence and must be willing to accept full responsibility for their behaviour (Maloney & Lloyd, 2000, p.2).

Once an offender has met eligibility requirements of the program, he/she is assigned a case planner where the planning process begins. Initially a Community Based Sentencing Plan is completed. This is similar to Probation Services pre-sentence report but involves the offender, the victim and the community (Maloney & Lloyd, 2000). The Community Based Sentence Plan involves a detailed social and legal history, referral to outside resources for assessments (i.e. psychological or psychiatric or addictions) and a detailed victim impact assessment – involving written victim impact statements, verbal statements to be summarized by the case planner, face-to-face meetings or a "conciliation" process between victim and offender (Maloney & Lloyd, 2000, p. 10). The report also includes "a set of recommendations with a rationale for each recommendation that seeks to hold the offender accountable for his/her behaviour in the community" (Maloney & Lloyd, 2000, p.4). Restitution and community service are among the options. This Community Based Sentencing Plan is submitted for consideration to the judge, defence attorney and prosecutor at the sentencing point of the offender's court process. If it is accepted, then Restorative Resolutions takes responsibility for supervision of the offender in the community. "Plan acceptance rate by the Court is 93%" (Maloney & Lloyd, 2000, p.4).

Prior to sentencing a judge has the discretion to order a Gladue report. This report is prepared by the offender's case manager and is a separate report detailing any impact that the offender's Aboriginal heritage might have had that the sentencing

judge needs to consider. This report allows for the 'unique circumstances' of the offender, as outlined in *Gladue,* to be brought before the courts for consideration.

Case management involves case planners carrying a caseload of approximately 35 clients. Clients remain with the same case planner throughout their involvement with the program and the Restorative Resolutions team meet regularly to review and discuss case plans (Maloney & Lloyd, 2000).

The results are positive. Four separate evaluations of the program have been conducted: all have been comparative studies with operating correctional programs. The fourth study specifically examined recidivism rates with a Probation comparison group over a period of three years. The results show a significantly lower recidivism rate than that of a probation offender – "year one 15.3 vs 37.5, year two 27.8 vs 54.4 and year three 34.7 vs 66.4" (Bonta, 1998, cited in Maloney & Lloyd, 2000, p.6).

The Restorative Resolution program appears to offer a model that works. It has a fairly high success rate and has unique characteristics to its program that allows clients to make amends to their victims and the community. It adheres to a restorative justice framework and offers offenders an alternative to incarceration. By offering this option, this program parallels the directives the Supreme Court of Canada had given with its reading of *Gladue* (1999), *Proulx* (2000) and *Wells* (2000).

Sampling

For the purpose of use in this study the operational definitions used include: Aboriginal refers to those individuals who self identified or who were identified on court documents or case files as of Aboriginal heritage; status and non-status Indian, Métis, and Inuit. A conditional sentence is defined as a non-custodial sentence of incarceration to be served supervised in the community under specified conditions.

A Restorative Justice Measure is a process whereby the offender has been diverted from the criminal justice sentencing process to an alternative justice measure, specifically a community base sentencing option.

In this study the federal prison population and/or those offenders incarcerated for sentences of two years or more were excluded. This study did not consider non-Aboriginal offender's experiences with sentencing. This study is limited to the parameters of ten case files, and findings can not be generalizable to the larger population. Individual case selection met the eligibility criteria for cases in the Restorative Resolutions program. As such, individual cases were not offenders guilty of "domestic violence, drug trafficking, sexual assaults, or active gang members and/or gang related offences" (Maloney & Lloyd, 2000, p.3). Furthermore, consideration was not given to age of offender, history, family background or any other restrictive parameters in the determination of case eligibility. The offender's Aboriginal heritage, in conjunction with the sentence received was the criterion of choice.

This study used criterion sampling to interview participants. This method of sampling came from selecting individuals from the cases available through Restorative Resolutions. Marlow (2001) defines criterion sampling as "picking all cases that meet some criterion" (p.140). For this study, a list was generated from the agency's active case files of participants involved in the Restorative Resolutions program and who were identified on their case file as of Aboriginal decent. A list of 49 persons was generated; 22 First Nations, 27 Metis. One person was eliminated as their case was in preparation stage and had not yet been sentenced. This left a criterion sample of 48 individuals.

A memo was sent to all case managers at Restorative Resolutions informing them of the general outline of the study. Case managers were encouraged to inform

their clients that they may or may not be contacted by the writer and what the reason would be.

From this identified case pool, a target sample was randomly drawn by the researcher. For each case file drawn, the researcher contacted the offender and requested to meet to discuss his/her participation in the study. The researcher explained who she was and what she was studying and asked for voluntary participation in the study. Interview times were arranged and conducted on a different floor of the building than the Restorative Resolutions offices.

From the original sample of 48 individuals this process was repeated until 10 interviews were secured. From the original sample of 48 individuals, 9 were excluded because they were missing or AWOL; 3 were incarcerated; 1 individual was in residential treatment outside of Winnipeg; 2 individuals were either at the intake stage or were a 'courtesy supervision' and did not have Restorative Resolutions Community Based Sentence Plans.

Of the 33 remaining, I began the process of randomly contacting individuals, explaining who I was and what the study was about, and requesting meeting times to discuss further and/or to be interviewed. 4 individuals were contacted and declined involvement; 1 individual did not return any of my messages; 1 individual was in residential treatment in Winnipeg but did not return my message to arrange to get on the visitation list; 5 individuals received mail-outs but did not respond; 1 individual received a mail out, scheduled an appointment and was a 'no-show'; 3 individuals had no means to contact (no address on file, or numbers on file were disconnected); 2 individuals stated they were not of Aboriginal heritage, so were not pursued further as they did not meet criteria.

I allowed individuals the grace of two 'no-show' appointments before I eliminated them – this occurred with 5 individuals. 1 individual had 1 'no-show' and I was having difficulty contacting her to reschedule.

Participants

There were 2 female and 8 male offenders who were interviewed. Their ages at the time of their offenses ranged from 20 - 52 years of age with an average or mean age of 28.7. Their ages at the time of interview ranged from 23-53 years of age with an average or mean age of 30.5.

The 10 participants had a variety of previous involvement with the justice system. For 3 individuals the current offense was their only offense; no prior convictions. One individual reported only having one prior; one individual reported two priors; and five individuals reported having three or more prior offences.

The list of offenses for which the individuals were sentenced included: Break & Enter, Theft, Care and Control of a Motor Vehicle over .08; Theft Under - Breach of trust; Theft Under; Theft Under x 11; Robbery x 4; Robbery, Theft Under, Fail to Comply x 2; Aggravated assault and assault with a weapon; Robbery; Robbery & Wear Disguise with Intent; Break Enter Theft.

Interviews

I chose to use a semi-structured interview format in considering the experiences of the participants. Marlow (2001) asserts that in this type of interview "the interviewer has more freedom to pursue hunches and can improvise with the questions" (p. 158). This format allows for a general standard of questions to be asked but allows for the interviewer to ask additional questions or inquire about issues or

topics that arise during the interview that are of interest but not necessarily a part of the question set. The research project and interview questions underwent ethical review by the University of Manitoba Psychology/Sociology Research Ethics Board.

I conducted my initial interview as a 'pilot' in order to test out the questions I had developed and to see where I might need to change, alter or expand my questioning. I interviewed one individual and modified my questions only slightly.

Upon meeting with participants I chose to verbally review the informed consent with the individual. This was done because literacy issues were unknown. Each participant was then asked to sign two informed consent forms (Appendix 1); for participation in the research process by (a) interview and (b) access to their Restorative Resolutions case file to specifically review their Community Based Sentence Plan. Each participant was given a copy of the informed consent form and a list of support services available to them. Participants understood that their involvement in the study was voluntary and they could withdraw at any time without prejudice. They were also made aware that the writer was a student and had no affiliation or influence with the justice system or Restorative Resolutions, or their case management outcome.

Participants' privacy and confidentiality was protected in that only initials of names were used in the researcher's data collection. Participants were informed that if the researcher were to quote them in her writings and research findings then no name would be given. For example, "One participant stated that…" Participants were also made aware that an informed reader, like their Restorative Resolutions case planner may be able to identify them based on their words, situations described, or the manner in which they speak.

All research information was kept at the researcher's home in a secure place separate from office material and computer software. All information regarding this study and the audio tapes will be destroyed upon completion and approval of the research project.

Participants were given the opportunity to receive a summary of the researcher's findings, which would be surface mailed approximately 6-8 weeks after completion of the interview process.

Data Analysis

The case study data analysis involves an "embedded analysis of a specific aspect of the case" (Yin, 1989 cited in Creswell, 1998, p.63). For this study's ten participants, the specific issue to be analyzed was the use of conditional sentencing with Aboriginal offenders in Manitoba's courts. The sources of information, interview data and documentation data, are used to construct the case study analysis.

Interview Data

During the interview process, there were gaps in time between interviews which allowed for the beginning of the case study construction. Using Patton's (1990) three steps to constructing a case study (cited in Marlow, 2001, p.211) the compilation of information becomes the assembly of raw data. The researcher conducted all interviews which were audio tape recorded and later transcribed. The transcription process was time consuming but was extremely beneficial as it allowed for me to absorb myself in the participant's words and experiences. By the tenth interview transcription I was starting to hear different categories of information and themes that were emerging for later analysis.

The second step using Patton's (1990) case study method involves case records construction. This involves data organization and categorization. Padgett (1998) states that "in the spirit of inductive inquiry, the researcher begins at the most basic level – reading and rereading every line of text in search for meaning units" (p. 76). Morse (1991) cited in Stoesz (1996) states that "identifying recurring words and phrases and marking portions of the text that repeatedly stand out" (p. 69). I did just that. I read and reread each interview before noting anything. In the process, categories or themes emerged that needed attention.

I began to reread the interviews one question at a time and categorize the data that emerged in the participants' responses to each individual question. Padgett (1998) states that coding in qualitative research involves "identifying bits and pieces of information (meaning units) and linking these to concepts and themes around which the final report is organized" (p.76). At this stage in my reading I used 'open coding' to begin to categorize meaning units that emerged.

I then reviewed all of the codes I had created and created larger headings and sub-headings. Three specific headings emerged; each with a set of subheadings to explore. I went through each transcription specifically looking for previous coding that could be incorporated under each heading. I underlined any sections of interviews I thought would be beneficial for later "quotation" to illustrate particular points.

Community Based Sentence Plan Data

The case file information was specific to the Community Based Sentence Plans. I reviewed each plan after the completion of all ten interviews looking for (a) supportive data to verify information provided by the participants, (b) data which incorporated the participant's heritage, and (c) data which reflected the principles of restorative justice.

To begin, I read each participant's Community Based Sentence Plan looking for support and consistency between the interview data provided by the offender and sentencing data provided in the case file. I documented verbatim what the offence listed on the Community Based Sentence Plan was.

The second set of data I was looking for was information in the Community Based Sentencing Plans that illustrated consideration given to the offender's Aboriginal heritage at the pre-sentence stage of involvement in the court process. This plan is completed by Restorative Resolution's case managers during the offender's referral and assessment period prior to court sentencing. The data I sought would answer the question: Is there documentation specific to the offender's Aboriginal heritage and "the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts" (*Gladue,* 1999, p. 66)? I took notes, specifically direct quotations from the Plans, of any notation regarding the offender's Aboriginal heritage.

The third set of data collected occurred when I read each Community Based Sentence Plan specifically looking for the application of Restorative Justice Principles, however they were incorporated. Data specifically stated as restorative justice and data indicating the goals of reparation, restitution, responsibility and rehabilitation were documented.

Case Study Construction

Data was organized into a chart of case study themes (see Appendix 3). The themes which emerged during the interview analysis process, as well as the supportive Community Based Sentence Plan data became the categories of information for the comparative chart. Creswell (1998) describes this final step in case study analysis as "creating a visual image of the information" (p. 145) allowing for the

comparison of individual participants to one another as well as drawing information together within each participant's story. The third and final step to Patton's (1990) case study method involves the case study narrative: a thematic narrative on the information gathered. This is the exciting part. The next chapter outlines the narrative of the information uncovered.

Chapter Four:

Findings – Participants' Stories

Findings - Participants' Stories

This chapter considers the findings of the research study. "When multiple cases are chosen a typical format is to provide a detailed description of each case and themes within the case, called a within-case analysis, followed by a thematic analysis across the cases, called a cross-case analysis" (Creswell, 1998, p.63). Following this format, this chapter begins with the individual within-case analysis where data is connected for individual participants. The second analysis presented is the cross-case analysis of the major themes, Aboriginal Heritage, Conditional Sentencing and Restorative Justice, for all of the study's participants. For the purpose of recovering data from interview transcriptions, participant's words are cited or identified by a letter.

Within Individual Cases

Participant "D" expressed no connection and identification with his/her Aboriginal heritage. The Community Based Sentence Plan (CBSP) reflected his/her "Metis status on his/her reserve, but limited involvement or interest in culture and heritage." This individual did not feel his/her heritage influenced sentencing and the CBSP referred to the individual as Aboriginal but no further reference to heritage was presented for consideration by the sentencing judge. This participant did feel the conditional sentence was better than jail, although harder than jail, attributed to the length of time for the conditional sentence and the conditions for treatment and the restrictions of a conditional sentence. This individual felt restorative justice was met through his/her restitution.

Participant "J" expressed no connection and identification with heritage but acknowledged parental involvement in culture. This individual stated that his/her Metis status was identification on application forms or for use when applying for post-

secondary education but did reflect on the shame s/he felt as a child with the colour of his/her skin. No effect of heritage on sentencing was acknowledged by this individual and the CBSP for this individual did not make mention of heritage as a factor for consideration at sentencing. This participant felt no "prejudice" during the court process and did not feel s/he was in "another class" because s/he was Metis. This participant felt a conditional sentence was better than jail and felt "petrified" of jail. This individual reflected on the bitterness s/he felt toward the conditional sentence specifically in regards to the media presentation of others. For this individual the conditional sentence allowed for a reflection of self, and the ability to move forward and rehabilitate. This participant felt his/her letter of apology and restitution made reparation and felt the community service performed was a valuable experience. This individual also felt that s/he was able to learn and feel better about him/herself.

Participant "A" expressed no connection or knowledge of culture and did not see culture as having an effect on sentencing, other than this individual thought Restorative Resolutions was a specific program for Aboriginal people and felt his/her heritage allowed for participation in the program. This individual's Community Based Sentence Plan had no information regarding heritage, neither demographically or as a factor to be considered under recommendations. This participant felt the conditional sentence was better than jail but not harder because s/he was scared of the jail environment. This individual acknowledged that the conditions of a conditional sentence were difficult and stated feelings of resentment because of the media presentation of conditional sentencing and serious offenders. This individual stated that no contact with his/her victim, restitution paid and a letter of apology were made to repair the harm. This participant acknowledged that the conditional sentence was "healing for me" and an opportunity to deal with issues.

Participant "G" acknowledged being Aboriginal but not "into" the culture. Similarly the CBSP did not provide any information in regards to heritage, only referring to this individual as Metis on one occasion. This participant felt heritage did not influence sentencing and stated that s/he felt the courts did not make those "discriminations." This participant felt the conditional sentence was better than jail primarily due to the "psychological impact" of jail in that an individual becomes a "hardened criminal" or "worse person" because of jail. This individual saw the conditional sentence as a "second chance" with opportunities to change and "get your life back in order." The conditional sentence is harder than jail because there are more choices, rules and the opportunities for temptations in the community whereas jail "you are in a cage". This participant felt s/he made reparation through the victim awareness group s/he attended and felt remorseful to how people are affected by crime. This individual felt that jail does not fix the harm, jail "turns a blind eye" and felt that conditional sentences provide more opportunity for rehabilitation and the system needs more alternative options to jail.

Participant "B" made no identification as Aboriginal but acknowledged childhood participation in culture. This individual expressed how s/he felt identification "divides people" and the Aboriginal culture does not fit with his/her Christian beliefs. Acknowledgement of Aboriginal heritage was incorporated in the CBSP only under education. No heritage was listed in the CBSP recommendations to the court. This individual felt the conditional sentence was better than jail because of the counselling and treatment resources available, with this also being why the conditional sentence is harder than jail, as well as seeing jail as "hard core". This individual expressed resentment with his/her sentence but saw it as rehabilitative, and allowing for reflection on self. This participant felt s/he made reparation through victim impact work, stated

feeling remorse for what s/he did and that rehabilitative counselling allowed for him/her to deal with family and childhood issues.

Participant "F" stated not being "into Native culture" but does participate in ceremonies with his/her father. This individual did not provide any further perceptions on the influence of heritage on him/herself or on his/her sentencing. This individual's CBSP acknowledged Aboriginal heritage under five categories; family background, education, financial situation, response to previous correctional services and personal and social factors. Furthermore, in addressing the courts the CBSP recommends "counselling at Pritchard House [an Aboriginal addictions treatment resource] to decrease the risk or use, which would decrease the risk of criminal behaviour". This participant felt the conditional sentence was better than jail because it was safer and being at home was better than "wasting time" in jail. The rehabilitation made conditional sentence harder than jail. This participant could not recall any ways of repairing the harm but stated s/he thought about what /he did and had to deal with issues which were "healing for me".

Participant "E" identified as First Nations, involved in traditions and culture and reflected on the multi-generational history of Aboriginal people. This individual's CBSP provided information under family background specific to demographics, the foster care Christian values not allowing for Aboriginal practice and under employment, involvement in an Aboriginal youth program. This individual did not see heritage as influential in sentencing and felt s/he did not experience racism, but "kindness of judgement" by the courts. In addressing the courts, the CBSP recommendations stated for consideration that the individual was Aboriginal and involved in a leadership program. This individual felt the conditional sentence was helpful and better than jail because it allowed chances for treatment not available in jail, while acknowledging that

the conditional sentence is harder because there are "no people around" and there are "tests". This participant felt s/he repaired the harm by completing community service hours, programs and sharing circles. This individual reflected further on giving back to the community with art, showing "them I'm a positive person" and stated feeling supported by the community.

Participant "C" acknowledged Aboriginal heritage, participation in ceremonies and having a "close family". The CBSP acknowledged Aboriginal heritage in four categories: family background, education, employment and financial situation. This individual expressed having felt prejudiced against because of his/her Aboriginal heritage. No consideration of heritage was recalled, more that this individual felt the courts did not "give two shits" about this as s/he tried to "use heritage" as a youth but felt it did not help. The CBSP recommendations requested that allowances be given for travel to the individual's home community. This individual did not view the conditional sentence as better than jail and would not take a conditional sentence again, primarily citing time served in relation to jail. This individual breached his/her conditional sentence and served the remainder of the sentence incarcerated and felt s/he did more time as a result. This individual felt the conditions of a conditional sentence are harder than jail, found the sentence stressful, was angry with his/her probation officer and felt the sentence was a "sucker's deal". This participant felt volunteering repaired the harm and that s/he gained experience from that.

Participant "H" identified as First Nations and reflected on feeling pride and shame with being Aboriginal. The CBSP makes reference to Aboriginal heritage under the relationships category only. This participant did not feel heritage was influential in sentencing and felt heritage cannot be used as an "escape or excuse"; the courts must be equal for all races. The CBSP recommendations do not list any factors for

consideration. This participant felt the conditional sentence is better than jail because it allows for the opportunity to change and continue with life. It is harder than jail because "you have to face your mistakes". This individual reflected further on him/herself, not feeling good about him/herself and how rehabilitation is paying for crimes. This individual felt s/he repaired the harm by paying back through restitution and gaining a better feeling about his/herself.

Participant "I" identified as "Status Indian" but lacking knowledge of culture. This individual discussed the oppression of his/her Native language by his/her non-Aboriginal parent. The CBSP acknowledged Aboriginal heritage under family background; the oppression of language and involvement in culture by the participant's child. This individual did not feel heritage influenced sentencing and heritage was not listed on the CBSP. This participant felt the conditional sentence was better than jail as s/he had previously been incarcerated and felt "jail did squat", jail is "rough". This individual felt that the conditional sentence was rehabilitative and helped him/her strive to be a better person. This participant felt s/he repaired the harm be writing an apology letter, the probation officer speaking to the victims, and making a donation instead of community service hours. S/he reflected on feeling "really good" about receiving a thank you for the donation, and spoke of spraying off graffiti in his/her neighbourhood on his/her own accord.

Thematic Analysis

To begin, the findings reflect the participants' perceptions of how they identify and connect with their Aboriginal heritage and in relation to how heritage did or did not influence their sentencing process. The findings presented are a combination of

information provided through the interview process and information gathered from a review of how the Community Based Sentence Plan recorded their Aboriginal heritage.

The next section presents the findings in relation to how participants felt about their conditional sentence, specifically the use of a conditional sentence as an alternative to incarceration and the participant's thoughts and feelings about their conditional sentencing process.

The final section explores the use of the principles of restorative justice. To begin, the use of restorative justice in the Community Based Sentence Plans will be presented. The second theme involves the participants' understanding of the principles of restorative justice; how individual participants internalized these principles, how they feel they have repaired the harm and how they feel about serving their sentences in the community for this purpose.

Personal Reflections on Heritage

There were varying degrees of expressed connection and identification with heritage. Each participant was asked how they identify with their Aboriginal heritage. Within the ten participants, there were First Nations people, Metis people, treaty and non-treaty. There seems to be a continuum in how participant's identified themselves with their heritage. At one end of the spectrum, some participants identified with their Aboriginal heritage and explained how they participate in or are actively involved with their culture.

> "I don't mind being Aboriginal, I love having a status card [laughs] its all good, and I don't know, I get along fine with other Aboriginals"(C)

> "I'm Cree from up north. And I identify myself as a Cree artist…I'm into my tradition and I do go to ceremonies, pow wow gatherings and drum singings and stuff like that. The only way these things can really happen is that to make sure that I'm ready to step in that circle, so, I do have a traditional side and I do

> have a society side, so these two differences I gotta pick a side, so I mean there's only one side that I'm adapted to, the traditions, so" (E)

Others describe how they have identified with their heritage and have participated in cultural activities and gatherings in the past but have chosen to not be actively involved in cultural activities. These individuals verbalize identification with being Aboriginal/Metis but do not participate in cultural activities, ceremonies or heritage.

> "I didn't really identify with either Aboriginal or Métis, like at one time I did, went to all the cultural kind of things…I just see it as not a label but like something to celebrate and to be proud of but when it comes to how it divides people, I think that's where I got out, when I became Christian. The spiritual side did not hook up with what I believe. I don't deny the cultural, the history, but as far as spiritual side, it did not work for me, I tried" (B).

> "I'm not into my Native culture. I go to ceremonies with my dad but I'm not really into that, I'm not into the Indian culture" (F)

On the other end of the spectrum, others explained how they feel little to no connection with their Aboriginal roots, whether they acknowledge their heritage or not.

> "I know my dad was Métis, and when they ask me I just said I was Métis…I don't know much about my Aboriginal Heritage" (A)

> "Well its hard to say cause my grandfather's side came from the white side, my grandmothers are from the Native part, my dad came from Scotland and my granny was Métis, so I don't know, I guess I'm 25% of all of them [laughs]" (F)

> "My mom's Métis and my dad's French. I'm not really even half and half. I acknowledge that I'm part Aboriginal but I'm not I'm not deep into the culture" (G)

> "I'm half white, half Indian…I'm status Indian. But I don't know anything about the culture or anything" (I)

One individual explains how s/he "checks off the box" but has little to no involvement with the culture.

> "I can't say I am a practicing Métis, my parents are more Métis than I was. They believe in the, they don't practice it…its something that I check off on an

> application really, and going back to university it would be something I would use to pay my last year of education" (J)

One participant reflected on how s/he was adopted and raised in a non-Aboriginal home with non-Aboriginal beliefs and practices.

> "I've been raised pretty much like as a white person…never lived on a reserve, always in the city, always in a good home and I was adopted to" (D)

While there were some participants who connected with the Aboriginal way of life, there were others who acknowledged their heritage but voiced varying degrees of connection.

Several participants reflected further on being Aboriginal and shared their thoughts and feelings about what that means for them. One individual reflected on the multi-generational impact history has had on Aboriginal people.

> "What keeps you going, its pretty much what I believe in and I believe I'm a native from the past history you know, but really I'm growing up in this generation, now this generation we've learnt what these generations passed on to this generation, that generation, and so on and so on, I don't know, it scares you"(E)

One individual spoke to the oppression of his/her Aboriginal language by his/her non-Aboriginal father.

> "My dad was white. I have four sisters, two brothers. The only one that speaks native is the one, my oldest sister, lives on the reserve…cause my dad never let my mother teach us, so I never really go into that" (I)

Two individuals reflected on the shame they attributed to being Aboriginal.

> "My grandparents especially, were more into sweat camps but I was never, it was never something that we ever spoke about because growing up, I grew up in a white society and I was always being made fun of because my skin, it's not all that dark, but it's darker than others. It was always something that you hid. It was not something you could be proud of." (J)

> "I think a lot of people say oh they're looking down is because they don't feel good about themselves. They feel bad. Maybe they're ashamed of being native, so they figure other people look at it that way."(H)

This individual also reflected on the shame and pride within his/her family.

> "I'm native. I guess I've always been proud of it, that I'm native. I've never tried to hide the fact or not like my sisters they were ashamed that they were native until they could get their treaty card. Me I was native, I looked native and my mom was native, my grandparents, I wasn't ashamed of it. I can honestly say I'm proud to be a native." (H)

One individual spoke about prejudice against Aboriginal people.

> "I identify myself as being Aboriginal but sometimes, you know, some people have prejudice against me, some people think I'm bad" (C)

The personal reflections of the participants echo what the literature tells us about the impact of colonization for Aboriginal people, the racism against Aboriginal people and the shame Aboriginal people carry for themselves, and their people.

Impact or Effect of Heritage on Sentencing

Contrary to what was anticipated, not one participant recalled that the fact that they were an Aboriginal person was discussed at all during the court process. No participants could recall being asked about the influence of their heritage at all during the pre-sentence report preparation or during the actual court proceedings. One individual did reflect that s/he felt that being Metis helped as a criterion to be involved in the Restorative Resolutions program, believing the program was for Aboriginal and Metis people.

Several participants felt that their Aboriginal heritage had no impact on their sentencing process.

> "I don't think it had anything to do with the outcome of my sentence" (A)

> "They don't give two shits about that half the time…I tried to use that before as a youth, that didn't make no, didn't help at all"(C)

In fact, several participants reflected on their view of discrimination within the courts and reflected on whether or not they felt they were discriminated against because of their Aboriginal heritage.

> "I didn't have racism against anything" (E)

> "Maybe somebody might've said are you Métis and click [motions check marking motion with hand] and it was done. I don't think somebody said Oh you're Métis you're in another class."(J)

> "I guess [it] didn't have too much affect on the people who were pretty much trying to work out their kindness of judgment and helping me out...a lot of us native people go, come in and out of that place, we, with beliefs, sometimes lack of beliefs" (E)

> "For me nothing of that was brought up about being Aboriginal. I think a lot of people try to use that as an escape to say; oh they're looking down at me. I think when you go to court they don't even bring that up. All that was a human being and that's how it was...so being Aboriginal I don't think has anything to do with anything" (H)

Two individuals reflected on how they felt that the courts did not discriminate, but treated all individuals equally.

> "You can't use your, oh I'm Aboriginal they're picking on me, that's not it, they don't look at it that way. You did something wrong you gotta face up to it. You can't use your race as oh because I'm native, it doesn't work that way. Other people might look at it as oh they did it to me because I'm native. No, they do it to everybody...white, colors, everybody gets they do a crime they gotta pay for it. They can't just look at because I'm Aboriginal. I don't look at being Aboriginal as the reason I done it" (H)

> "Hopefully they don't make those kinds of discriminations cause I don't think it matters whether you're white or black or native. It shouldn't make a difference. Well you know, he's white so give him a conditional sentence, but it's sad that usually that's the way it works. I thought it woulda been someone who looked minority or Aboriginal probably would have had a better chance...I don't think it was a big issue or make a big deal out of it" (G)

Overall, the participants all felt that their Aboriginal heritage was not considered, nor made an impact on their conditional sentencing. Several participants stated they did not experience racism. In fact several participants felt that having their Aboriginal heritage considered would in fact be discriminatory and unfair. These

participants voiced that they felt all individuals should be treated equally with no consideration given to heritage.

The Community Based Sentence Plans similarly reflect minimal input on the influence of the heritage for these ten Aboriginal people. The Plans have specific categories of information presented to the court in replacement of traditional pre-sentence reports. The review of these plans resulted in three sub categories of information: plans with no information regarding heritage, plans with minimal (1-2 sentences) information, and plans that had information regarding heritage under more than one Community Based Sentence Plan heading.

Of the ten Community Based Sentence Plans reviewed, two participants' reports had absolutely no mention of their Aboriginal Heritage. Both of these individuals were of Métis decent.

Three plans that were reviewed had minimal information on the individual's Aboriginal heritage. The first plan under the category of education made reference to training the offender had taken at the Aboriginal Training Center. This individual self-identified with his/her Aboriginal culture. The second plan, under financial situation makes reference to application for student aid through a Métis Federation Bursary. This individual identified as Métis but not as active within the culture. The third report only makes mention of the offender and his/her spouse as members of the board of a local Aboriginal community center. This individual identified with and stated s/he was active in his/her Aboriginal heritage.

The remaining five case plans provided more information on the individual's heritage, albeit factual in nature. The first plan describes the individual's family background by stating that his/her mother is of Aboriginal descent and tells of the individual's childhood relocation to his/her reserve and the employment s/he secured

there. This individual's employment by the Band office, and sponsorship and funding from his/her band were outlined. The Proposed Plan also requests that should the judge consider court imposed curfew that allowances be made for the individual to travel to his/her reserve.

The second plan mentions that the individual originated from a Manitoban reserve. Again, under education, reference is made to training the individual has taken at the Aboriginal Training Center. The financial situation heading presents the individual's assistance payment from his/her band and describes how this will become an issue if s/he no longer resides there. There is reference to Band sponsorship and that this individual has attended a workshop on "Aboriginal History". This individual's plan also outlines his/her involvement with Aboriginal agencies such as Pritchard House and the Native Addiction Council of Manitoba.

The third plan provides information about the individual's heritage solely under the family background category. Regarding the individual's childhood, the report states the "client remembers visiting family on the reserve." Demographics are listed; father Métis, mother First Nations status, and that the client has Métis status with his/her reserve. This report states that the client has limited involvement with his/her culture and has no interest in pursuing same.

The fourth plan is again descriptive of the individual's family background. The report indicates which reserve the client was born and that s/he entered the foster care system. The plan states that s/he "resented having Christian values imposed on him/her and not being able to practice his/her traditional Aboriginal beliefs." The report continues to describe the individual's involvement in an Aboriginal Youth Program.

The fifth report outlines under family background how this individual "stated his/her father was white and that s/he forbade mom to teach their children her native

language." The reports only other reference to Aboriginal heritage is that the individual's child is involved in Native Dance classes.

It becomes apparent that individual participants did not feel they were given special consideration based on their Aboriginal heritage and the Community Based Sentence Plans presented to the judge at sentencing similarly reflect minimal notation of heritage. No Plans discussed heritage as influential in the individual's position in life, as a causal factor in the crime committed or as a factor which the judge needed to consider. The Plans appear to incorporate more the influential nature of Restorative Justice Principles for consideration for the offender to make reparation, restitution, take responsibility and attain some degree of rehabilitation.

Conditional Sentences versus Jail

As the literature indicates, conditional sentences are often longer in duration and carry more conditions for discharge or completion than terms of incarceration. Of the ten participants interviewed, nine had terms of absolute curfew, or "house arrest" ranging from a term of six months to a term of two years. Upon completion of their absolute curfews, all ten participants had terms of probation of up to two years. There were numerous conditions participants reported as placed on their conditional sentences. The most common recalled were: 7 participants had a condition to abstain from alcohol and non-prescription drugs; 7 participants had report to their probation officer; 4 participants had community service hours; 4 recalled that they were not to carry weapons for ten years; 2 stated they had to give their DNA; 6 recalled that they were ordered to attend NA or AFM or some other form of addictions counselling; 3 stated they were ordered to complete victim awareness or some form of a 'group'; 2 made reference to fines or repaying the money they stole and individual participants

recalled other conditions like no contact with co-accused, no contact with victim, write a letter of apology, police checks and working.

When considering the use of conditional sentencing as an alternative to jail, it was logical to request the participants to reflect on their conditional sentence in relation to jail time; specifically their perceptions of conditional sentences verses jail: is it better? Is it harder? Would they want to do it again? Overall, nine of the ten participants thought a conditional sentence was better than jail.

> "Yah…being at home is way better than being locked up. For myself I think it was better, because I think I was already going on a good road and I think maybe if I woulda been incarcerated it would've just set me on a wrong path" (A)

> "Definitely better, I mean, for myself personally, if I were incarcerated everything would've stopped. As much as I think I suffered and went through, being incarcerated I have no idea how I would've dealt with that…whoever does get a conditional sentence versus jail time, its, you can't even compare." (J)

> "In my case it was better because if I went into jail for a couple of months, I would've come out feeling angry at everybody I think, but the sentence made me feel good about myself cause I still got to continue with my life and supporting my family, so I think in my case it was alright."(H)

Several participants reflected how they felt their conditional sentences were better because they perceived jail as 'bad', negative and/or non-rehabilitative.

> "Definitely. Cause like I said I've been in jail before. Unless you know people in there you're just, its just rough…I never found any good out of it. Like I've only been in there a month and a half but still I could tell it's terrible you know…I'd rather do the eighteen months outside instead of going there and try and get nine months you know. What if somebody didn't like me in there and I start getting into fights in there, then I could get more time added on to my time, so just makes more sense to me to do it on the outside"(I)

> "In my opinion jail doesn't do anything good for you, so basically you get a second chance. There's a lot of restrictions and everything but if you're serious about staying out of trouble and getting your life in order I think it's a good, it's a better thing than sending people to jail. Cause sending people to jail basically is just a pretend sentence I think. Cause you don't learn anything there, all you do is come out as, like a worse person, hardened criminal, I don't believe there is any rehabilitation in jail."(G)

> "Yah its better. I can do my time at home [laughs]. I can do things at home, instead of being in jail, wasting time…Safer…safer for me to do my time at home, its better, yeah."(F)

A number of participants discussed how they felt conditional sentences were better because of the treatment and therapy options available to them in the community.

> "I do believe it is considering the circumstances surrounding it. Like I know there are in the institutions counselling for alcohol, counselling for other things, but the elements surrounding you, the other people, like, I can say it, hard core criminals. Its kind of difficult…I do have a better chance outside of being incarcerated to work on these things, because there are a lot more avenues I can check out, a lot more resources…It is a better alternative depending on the person. If you look at a person holistically as opposed to just looking at the crime, like it is a better alternative, absolutely I think."(B)

> "Well I find it better cause I see it better for myself, that there are chances out there that I've been looking for…I mean, if I was incarcerated, what chances would we have, you know. The only chances that we have is to be able to use our gifts…Chance to think over my mistakes, and when I'm out here in the society now, in this community sentence, I think of my chances that I've had that could've changed back then, what I know now."(E)

Only one individual stated that s/he did not feel conditional sentencing was better than incarceration for him/herself.

> "I don't, I don't. Whatever works for people based on their lifestyle. For me it kinda worked out from the start, when I was on the conditional, but then I started thinking about it and having regrets about, you know I should have just took jail time, cause after being out I got breached and I had to sit up in remand for two months and then I had to do another five months, that kinda sucked."(C)

Having given consideration to whether or not conditional sentence is better than incarceration, and given the numerous conditions they were required to adhere to, participants were asked if they perceived their conditional sentences to be *harder* than incarceration. Two individuals viewed jail as more difficult stating,

> "For me I don't think so, because when you're incarcerated, like I've never been to jail you just see jail on TV and that's not something I don't think I

would, just not been comfortable there at all. I'm such a huge shy, quiet and I would've been scared, like you don't know how those people are gonna be...when you're in your own home there's nobody to piss off or whatever the case is...Like if when you're in jail it seems like harsher"(A)

"I'm petrified of jail. I've never been in it and of course you see what see on TV and what you hear. There's no way I would ever want to be there, no."(J)

Both of these individuals stated feelings of fear and "terror" about jail and recognized that part of this fear stemmed from their lack of exposure and/or experience with being incarcerated.

The other participants agreed that conditional sentences were harder. Three individuals reflected on how time in jail does not have any conditions or requirements for treatment or counselling.

"My lawyer had mentioned that, like that alternative, this is what we're asking for a conditional sentence, and this is what the jail time would come to, but you would only do, you know...I pushed and asked for the conditional sentence, because I don't believe it would've helped me, I don't think I would have sought the help that I did" (B)

"Well in jail its a waste of time, you don't do nothing, all you either do is eat, sleep, shit, just kidding, 'scuse my language, cause I went and I had to, I went to jail for the crime I did, I was in jail for eight weeks. It was hard for me to get bail. The only way I got bail is I had to declare rehab center then I went to a rehab center for nine months" (F)

"Oh yah it's harder. Because I guess you get a year on the inside, you only have to do two thirds of your time and when you get a community base, you gotta do every single day, so yah it's harder.... [in jail] you don't have to [take counselling] they are offered to you, you can go to get this and this but you don't have to" (D)

Another way it was considered was how difficult conditional sentences were because of the terms and conditions required of them.

"It's actually tough. You always have to watch your back and stuff cause I would go to jail in seconds if I was caught, whatever" (A)

"Personally what I think about it now, well back then I was thinking oh I'd do anything to avoid jail, and now, I got it all over and done with I was thinking I

> should've just taken jail time and got all that stuff out of the way, all cause you know, these conditions and everything, they were just stressing me out...It was a little bit harder for me, because based on my lifestyle, I was pretty busy and I had, my girlfriend just getting pregnant again"(C)

One individual felt that conditional sentences force individuals to face their mistakes.

> "Because when you're in jail you can just relax, your food is there, but on the conditional sentence you gotta still provide for your family...when you got a conditional sentence it is better because you realize you've lost a lot of your privileges, where being in jail its, you're being waited on so... because you're there, you're seeing your family everyday, whereas when you're in jail you only see them on visiting day, so I think its harder to face them everyday, to be in jail you oh, oh its visiting, okay, so I think that conditional sentence is a lot harder on a person."(H)

Other individuals reflected how conditional sentences test the individual's compliance to their conditions and is more difficult because they are forced to face temptations in the community.

> "Jail, I mean, you're there, you're locked up, so I mean you have to be good. You don't really have many choices everyday to make or it's not much of a, there's no hardships. Sure it's a tough place to be but it's not like a conditional sentence where you have certain rules where it's like you gotta stay in, when there's always that opportunity, well I could go out, could drink, could do drugs, when you're not supposed to. Yah it's hard, I think harder cause there's more of that temptation to break the rules a little bit."(G)

> "It all matters about what kind of life you have as an individual. You could be a person with, you know needs to be around people, you could be a person that's used to being alone, used to having it quiet, quiet space. I guess for me its, I need people around me. When I was on my conditional sentence, I went through some tests, but I mainly thought positive about it, and yes it was hard, but it all came together after you know, I knew where I was going in life, knew where I wanted to be."(E)

The final category of information is the reflection of whether or not the individual would want a conditional sentence again – in hindsight, and knowing now what they know about following the conditions of a conditional sentence would they want another. One individual clearly stated that s/he would choose jail:

> "Yes, I would take the jail time. It would be done sooner, you know, usually the time that they ask for a conditional sentence is usually twice as long as the sentence for jail sentence...somehow they try and make, they prolong it when you're on a conditional sentence and it doesn't make any sense. And then to top it off, when you do breach a conditional sentence, you have to do the rest of that time in jail, so it makes no sense if you would have took jail time from the start you would have been done it. Like me, they were asking eight months, eight to nine months and it took eighteen months. I did eleven months and they didn't even care about that and then they just sent me back to jail for five months, that's like me doing eight months....It's a sucker's deal man."(C)

Another individual reflected on how s/he would reconsider serving a jail sentence.

> "I don't know what incarceration would have been like, three months jail, four months, you know, it's hard to say, a year stuck at home or do your six months and be done with it." (A)

Both of these individuals reflected on the amount of time to complete jail time versus a conditional sentence as the reason they would reconsider serving a conditional sentence over a term of incarceration.

The remaining participants all agreed that they would want another conditional sentence.

> "Definitely, yah...Not at the time I didn't want it, but now in hindsight its either incarceration or conditional sentence I would take conditional sentence, yes."(J)

> "I don't ever want to do it over again. But if something happened I would hope for a conditional sentence, but I hope I don't ever have to do it again [laughs]" (H)

> "Yeah, a conditional sentence yeah, if I had to go back and re-do everything, yeah" (F)

Two individuals agreed that they would want another conditional sentence because of the psychological impact jail has on an individual.

> "Yah, it's a straight answer. I could have got four years and been out in two and a half or whatever but in that two and a half years what would I have turned into. Mentally or just psychologically even. Jail really messes with your head I think. It really turns you into somebody else that you may turn out to be and may never change after that. Whereas when you're on the outside, it's much different."(G)

> "Absolutely, because I think it has done me a lot better. A lot of people if they had the option, I'm sure they probably would choose the conditional sentence. The alternative just seemed, for me I don't think it would have been good, you know I woulda did the time and been out and not have considered it because of certain role you gotta play in there. There's all other kinds of things you can get into and I hear its a lot harder to avoid that kind of thing, like the drugs, alcohol, violence, whatever it is."(B)

The remaining participant reflected on how they feel their conditional sentence has helped them.

> "Being where I'm at, of how far I've made it and looking back on it, I probably would if there was something to it, if there was something for it, like if it was to help out people. Where I'm at right now, its my journey, I gotta keep going, so once I look back, and I'm gone forward, I'm going straight, I'd have to say probably I'm gonna keep walking"(E)

Overall, the ten participants reflected on the use of the conditional sentence as an alternative to incarceration. Nine of them felt that conditional sentences were better than jail because they felt jail was negative, non-rehabilitative and for some, terrifying. One individual did feel that jail would have been better as s/he felt s/he ended up doing more 'time' by breaching his/her conditional sentence and returning to jail to serve the remaining sentence time. Similarly, two participants would re-think the option of conditional sentence based on the shorter incarceration sentence.

All of the participants spoke to the rehabilitative opportunities presented by a conditional sentence. They spoke of continuing on with their daily lives, supporting children and family, receiving counseling and services that they felt would not have been feasible if they had been sent to jail.

Perceptions of the Conditional Sentence Process

The participants reflected on the conditional sentence process – how they felt about their experiences. Basically three main themes emerged: feelings of anger and

resentment, reflections on self-esteem, and the conditional sentence as a rehabilitative process.

Several individuals stated that during the process of completing their conditional sentences, primarily their absolute curfews, they experienced anger and resentment. One individual seemed to be angry with the process and angry with how s/he perceived s/he was treated by his/her case planner.

> "[my case planner] was getting a little bit of background on me and then s/he kinda tricked me a little bit, cause s/he said, uh fucking, s/he kinda twisted a little bit of words up and said s/he's lying and then when I got sentenced this was brought up in court...the PO's tend to be more of, I don't know a little bit more assholes when you're on the conditional. When you're off it, on probation basically they're not"(C)

Three individuals spoke specifically about feeling resentment regarding the conditions imposed on them by the courts.

> "that was tough [house arrest] and at first there was a little resentment, why, why this, why that, but then again I came to the acceptance that you know this is better than being in jail."(B)

Two of these individuals more specifically discussed how they experienced feelings of resentment when they compared their circumstances to those of others and reflected on the presentation of conditional sentencing in the media.

> "I mean there's a lot of people on conditionals sentences for crazy stuff, like they have these 8 ball awards now in the paper [laughs] and there's some stuff that they're giving conditional sentences to that makes absolutely no sense, I think just for certain cases. I've read a lot in the paper and you hear a lot of people like breaching their conditional sentences, or you know so, I think its certain cases, a conditional sentence is great but I find that a lot of them shouldn't be given conditional sentences"(A)

> "But of course reading in the newspapers, seeing that, you know, people are on manslaughter and were, you know let go, like you just see all the other sides and I felt a little bitter being stuck at home and then of course other people are saying well its just house arrest, but its not just that when you're at home for six months and you're house bound when you're so used to having your freedom...and of course I was bitter, thinking, you know, I just...I wasn't minimizing what I did, or what I have done, it was just, yes I stole money, I didn't harm anyone, I didn't physically murder anyone, I didn't there's so many

> other things or assault or yes these people, but they got their money back. Nobody suffered because of it or anything, but and then I had to be at home for six months. Like what is that?"(J)

Through the process of serving their absolute curfews, these two individuals felt resentment and anger toward others for whom they felt conditional sentences were not appropriate.

The second feeling reflected during discussion on the conditional sentencing process was how some of the participants felt about themselves and their self esteem in relation to why they committed the crime and how they felt about themselves afterward.

> "Why I did it, I don't know. Maybe it was cause I was feeling hurt and sorry for myself, but I don't feel that way no more. I'm upset I lost a good job, but I see you learn from your mistakes...I'm not gonna let it get me down. I've been down too long, feeling, like [my case planner] had me thinking a lot, had to do with something about I guess not feeling loved by my parents or something, I don't know, maybe it was true. Maybe I didn't care or love myself, but now I care for myself and what other people think of me is their problem, not mine."(H)

> "and it's so much easier to explain to society Oh you're an alcoholic, you were a drunk and that would be easy. But I wasn't. Or oh you're a drug addict. It seems like if I would have had those excuses then society would go Oh okay, well now there's a program for you. Okay, but I screwed up. There's nothing there for that. There's nothing implemented for that of I can help you out, what made you do this, or how can you feel better about yourself."(J)

> "I think it was a good thing, it was a good experience and maybe it really was a life saver for me, I mean cause you know I made some bad decisions when I was younger and I was fortunate to get the opportunity to recover from that. So, straighten out and put that in the past from there, instead of dwelling, saying, well this is something that's gonna ruin my life forever, doing something about it. This gave me the opportunity to do something about it, the problems that I had."(B)

For these three participants there appeared to be a connection to how they felt about themselves in relation to the crime they committed or the situation they found themselves to be in.

The final theme which emerged was how individuals perceived their conditional sentencing process as a chance for rehabilitation or as an opportunity to make changes in their lives. When reflecting on their conditional sentencing experience, these individuals felt that the community sentence allowed for them to seek opportunities for rehabilitation that would not have been necessarily available in jail.

> "Cause it was my background, how I grew up when I was younger, I really talked positive about my background and what I really wanted to change. And what efforts I've had in changing. How my addictions, which is one of my main points in being part of this incarceration and not being incarcerated. That's the reason why I'm on this one, because of my addiction, cause its, how it all became, it started from that...this opportunity that I have in the community now is, things are falling in place now, of what I wanted and its not only about me, its about my will power and change that I wanted, to reaching out and using my resources and using a lot of mainly belief and faith have kept me strong" (E)

> "What I think is that people should be...interviewed I would say a couple of times and so you can see, trying to look inside them, behind the face, you know, inside you know, to see what kind of person they are...I recommend the conditional sentence. But the guy has to do something, he can't just be lying around, he's gotta work and stuff."(D)

> "I think they gave me initiative, to look at my life and consider how wrong it was, and where it was leading, and to being thankful for being given a chance, I guess as opposed to going to jail, or trying to change my life here on the outside...There's more opportunities, like jail, there's no opportunities in there. At least outside you can go to school, you can work, cause there's much more opportunities with the conditional sentences and I think that's why it's a good thing. If you want to straighten out you can serve your sentence in the community and work, further your education, or whatever" (B)

> "It is better because it gives you a chance to still live in society and try and go about your normal life as much as you can."(J)

> "My understanding is that you can't do a crime and expect not to serve any time and that really you gotta expect that if you're gonna do something wrong, you gotta pay for it. It may not be right away but it catches up and [its] an eye opener, it learns you, no matter how old you are, kid, teen, adult, you still gotta pay for it...I think sentences like that is okay for some people but I think some people just look at it as a joke and say heh, I got off easy. I may have got off easy but it was scaring and terrifying for me too."(H)

Two individuals reflected more specifically on how they perceived the judges to be involved in providing the opportunities for self improvement through the use of the

conditional sentence.

> "I guess I like, kind of, trying to improve myself...I think I was in a good position when I went and the judge, maybe I lucked out...maybe he had some compassion for me...You know I had to pay, do the time for the crime I did, but, for me it worked out better because I had my little guy and you know, it gave me the opportunity to spend a year with him at home."(A)

> "But he saw [the judge] the change, good opportunity for me or a good chance. I guess he said…I still had potential, to straighten out…they just basically saw a chance for I guess, kind of rehabilitation, maybe on the outside, they saw that I had potential, you know, to work, and stay out of trouble, they really thought I was serious about it"(G)

These participants voiced appreciation and insight into the opportunities that serving their sentence in the community allowed for them. Some individuals had children and reflected on the continuation of family life and child-rearing, while others spoke to the opportunities to work and or go to school. All of the participants felt the community based sentence was rehabilitative.

Finally, some individuals reflected on what, during their experience, they felt helped them and/or what they felt was rehabilitative or therapeutic for them.

> "and if anything that's what helped me [training for community service hour site] learn about myself. Is, don't judge yourself; you're always your hardest critic. You know, you could hate yourself forever but what is that gonna do. Start working on what you've done and go beyond."(J)

> "I guess it just made sense to everybody to keep me out of jail, still like contributing to society and everything, trying to make good on what I did... just makes me strive even more to be a decent person cause if I screw up or anything I'm gonna go straight to jail, then what would happen to my daughter, you know what I mean... like we talk about everything you know, like [my case planner] has helped me through a lot of stuff, so like I wasn't getting any treatment like that in jail...it helped me a lot I think instead of going to jail."(I)

Similarly, two individuals reflected on their rehabilitative journey specifically discussed how helpful the Restorative Resolutions program and case planners were.

> "My case worker was amazing I have to say. These people, I couldn't imagine doing their job, dealing with people and always having that under their belt and

that pressure. RR is a great program, it is, Its there and there are many other things that will help you out with your conditional sentence, place to meet, place to talk to somebody. It's more than just a caseworker I think that they are. They're more of a counsellor slash police officer slash parent slash, yah its to look out for you. They also do a huge background check. They like my caseworker spoke to my parents and my [spouse] and met with them, my sister, just to see what kind of background. So they don't just deal with you, they deal with all of you and everyone that's around you and your support system. Just to make sure that you have one I guess" (J)

"coming here and that made me feel better for myself. Like now I don't feel angry, I don't get mad as fast, I don't know, it made me feel better for myself, I don't know how, how else to put it. Like talking to [my case planner] and that really helped me so...I'm seeing a marriage counsellor, if it works in my life it works, if it doesn't, it doesn't. But I'm not gonna let it get me down, and make me feel sorry for myself because life's too short for that."(H)

In summary, the conditional sentencing experiences of these ten participants was seen as rehabilitative and providing opportunities to them that they felt they would not have received in jail. While a couple of individuals felt they may consider incarceration over a conditional sentence in the future, they voiced feeling this way because of the length of time it took for them to complete their conditional sentence in comparison to jail and because of the perceived difficulty of the conditions placed on them. They did also voice how the sentence provided opportunities for them. Even the individuals who initially felt anger or resentment at receiving a conditional sentence felt that the sentence provided a chance for them to improve their lives and change their futures.

Restorative Justice in Community Based Sentence Plans

The Community Based Sentence Plans are presented to the court prior to the offender's sentencing. These plans are based on the principles of restorative justice. The ten plans that were reviewed had similar writing, or wording, that illustrated these principles. All ten included the following terminology:

> "The plan submitted encompasses the philosophy of Restorative Justice in that it attempts to address the needs of the victims, will symbolically make reparation to the community and will restore the offender to being a productive member of society."

All ten plans address the court requesting a community based sentence with "It is respectfully recommended that Your Honour consider a community-based sentence, with the following conditions to be supervised by Restorative Resolutions as a designate of the Court." Recommendations for conditions for the conditional sentence are given.

All ten Community Based Sentence Plans provide a rationale for the community based sentence as an alternative to incarceration. These rationales focus on the offense and the offender's ownership of responsibility; the individual's risk to re-offend as scored by Manitoba Justice and Primary Risk Assessment, listing the risk factors, Secondary Risk Assessment for General Assaults. The rationale focuses on supervision, monitoring, programming, addictions assessment and programming rationale.

All ten Community Based Sentence Plans have an element of community service work and provide the rationale that it

> "is recommended as a symbolic measure of giving back to the community. Subject shows an awareness of how the community is affected as a whole whenever a crime is committed and agrees to complete any hours as ordered by the Court"

> "as a symbolic measure of repairing the damage to the community, which is ultimately harmed whenever a crime is committed, it is recommended that subject complete a community service order"

> "Community service work is being recommended as a symbolic measure of giving back to the community. Additionally, it will allow the offender to regain his sense of value as a contributing member of the community, which is important to the restorative process."

> "The broader community which has been impacted by subject's actions is significant, and it is hoped that community service work will provide an opportunity for subject to symbolically make reparation to that community"

Restitution is a principle component of restorative justice. The Community Based Sentence Plans presented to the court reflect how the individual will make reparation:

> "Restitution is an integral part of Restorative Resolutions as it represents financial reparation to the victims."
> "An integral component of Restorative Resolutions is that of repairing the harm that is caused as a result of offending behavior. To repair financial damage..."

The Community Based Sentence Plans also speak to the offender's responsibility in the crimes for which s/he is charged.

> "Recognizing the serious nature of the offense for which subject has admitted guilt; it is felt that the proposed plan offers a viable alternative to incarceration."

Finally, the Community Based Sentence Plans provide the restorative justice principle of rehabilitation and how the proposed sentence would help the individual attain some level of change. This speaks specifically to the use of a community based sentence as an alternative to incarceration and how this would be beneficial to the offender.

> "In summary, in recognition of the severity of the charges for which subject faces the court, should he chose to accept the community supports available to assist him with rehabilitative measures and personal development issues, it is felt that a community based sentence could help to minimize his risks for future involvement"

> "Recognizing that re-involvement is a possibility, it is felt that the proposed plan has a better chance of effecting a long-term change than that of a period of incarceration"

> "Recognizing that a relapse is a possibility, it is felt that the proposed plan has a better chance of effecting a long-term change than that of a period of incarceration"

> "It is this writer's opinion that this Community Based Plan provides this court with a viable alternative to incarceration and encompasses the philosophy of

> Restorative Justice and as well provides the supports that will assist subject to lead a crime free lifestyle"

It becomes apparent that the Community Based Sentence Plans are presented to the courts incorporating the restorative justice principles of making reparation to the community, making restitution, taking responsibility with the goal of rehabilitation. The individual participants, similarly, are able to reflect on how their sentences included conditions to make reparation to the community and/or the victim.

Participants' Perceptions of Restorative Justice Principles

Individuals reflected on what conditions they were given that they perceived were geared at restorative justice. Several spoke about community or how their sentence had them community based or giving back to the community.

> "Well I paid back what I took...I went to AA to see if I was alcoholic, but I realize I'm not. So whatever they asked me to do I did and I think it helped" (H)

> "I stay out of trouble you know, I try do stuff for the community. I did do a lot of volunteering when, before I got sentenced, when I was on bail"(C)

> "I did community hours, or community hours I did a lot. Just mainly put myself in programs, and you know that's about it. Just went to programs and went to meetings and sharing circles, a lot of these things and to keep myself out of trouble, keep myself busy. I kept going out and seeing my probation officer for what they're there for, and I talked to them" (E)

> "I had to pay a thousand dollars, and their deductible, pretty much because it was ten grand damage, ten percent I guess, I don't know how they operate there, the judge said just pay the deductible...I mean the report from the RR was really good too, so you could be bad, but I also know right and wrong"(D)

Several participants explained specifically how their sentences required they meet with their victims or write letters of apology.

> "I was supposed to but the victim, I guess declined, they couldn't get a hold of him, we were supposed to actually, I think that was part of my sentence, not my sentence, but what they do here I guess, but you're supposed to sit down with the victim and you have a talk and they never, they didn't want to participate or nothing" (G)

> "I'm still repaying it [money]. I have like 800 bucks left but, every month I pay so I mean that's not an issue but I guess just them being put in that position, you know I don't think I would've been impressed either...I can't apologize to their faces or whatever but I know I did write an apology letter at one point. So I've done the best I think I can do."(A)

> "It made me write them an apology letter and to apologize and to also to learn a bit more about myself." (J)

> "I wrote an apology letter to the owners of the store and everything. [My case planner] went and talked to them and I wanted to meet them myself but that didn't happen so, and I was supposed to do a hundred community hours but I was putting too many hours in at work so I went to the courts there to get my conditional sentence changed to a donation. I donated a thousand dollars to the humane society instead of doing my community hours. They sent me a nice letter, a thank you card in the mail. It felt really good."(I)

Two individuals reflected on their victim awareness, victim impact conditions and how they felt remorse.

> "Victim impact statement and to acknowledge what I had done and to apologize and to I guess, voice the remorse that I had and how it must of felt for them."(B)

> "Well it made you, like the course I took, the victims awareness, it helped me realize like how much these people are affected by it, how crimes, whatever crime you did, how it affected the victim and you know I had mine was robbery, so like the places that I robbed and how it affects everything...it teaches you at the same time still makes you remorseful...but in the end when you really think about it, its better, there's much, much more opportunity."(G)

One individual couldn't recall how his/her sentence repaired the harm. This individual stated s/he didn't recall having to write an apology letter or attending any groups of that nature.

A theme that became evident when participants discussed restorative justice was how individuals internalized the principles, how individuals self-reflected on "repairing the harm" they had caused. Individuals reflected on how they felt serving their sentence in the community, how they felt they gave back to the community and how they feel they made things right again. These individuals stated their thoughts and ideas about repairing the harm they caused.

One individual reflected at length about the support of the community towards him/her as well as the feelings s/he had about the community, and how the two have made amends with what s/he had done.

> "I thank them greatly for that and you know without these kind of people out there who look at their community members, their community citizens, you know, as positive people figuring you know that we'll make it somewhere, and we'll look back at them and say hey, you know, these people actually look at me as a positive person, and I like to show them that I am a positive person, so in that way, you know, probably somewhere in, I use it I combine it together, you know, I'm still using it to this day"(E)

> "I did give back to the community, personally I did. I gave back a lot of art, a lot of art; I put a lot of my time in it and didn't expect anything back in return. I give you know, just give more, and help people spiritually and knowledgeably you know. I'm used to giving, you know, I'm used to giving, that's where I come from, just giving a lot and when I do give a lot it, I know I'm giving something back to the community"(E)

Two individuals reflected on the benefits they got from doing community service work, specifically what they, as individuals, gained from the experience, and how it benefited them as individuals.

> "I learnt that community service is great. I got to go to a great, great program...great training."(J)

> "I'd do these like volunteering around and they didn't give two shits about that in court either, so I don't really care it was just for my benefit, for my personal [benefit]...I tried to repair, repay this, help out the community, volunteering before I got sentenced. I was hoping that would add up to something you know, with my credentials, when I brought them to court, it didn't work though. I volunteered for a year and half straight, I mean every day after school, an hour every day, it didn't work out though you know. So I kinda thought I didn't think it was a waste cause I got the experience and I had a good time too"(C)

Several participants reflected on how they felt about making reparation to the victim. Two individuals spoke specifically about how they felt it might have been for their victims.

> "I never, ever had any contact with them, I never met them, so, for them, like it was like more like a healing for me because I got to deal with all my issues and then with the Restorative Resolutions, I like I took those group things they had and for me it was great cause like I got to deal with my issues and then deal

> with it all at home too, so for me it was good. It got my head on the right path or whatever, but for the victims I mean they probably weren't too impressed I don't think, that I got a conditional sentence" (A)

> "when initially when I first heard what I had done, I really felt for the victims in that case, like this was something totally out of character for me. I took into consideration what had happened to somebody I knew, or for myself, and how that would feel, I felt for them…I guess talking to [my case planner] helped a lot, having to, going over my past, through the counselling with the pastor I me, I guess my prior counselling before that, with these issues, like dealing with childhood issues, issues with my relationships, and that's a lot of the soul searching and the church helped a lot, very much so..and family was supportive. Like you never really know, who really cares until something you know, something happens, then they rally around, with supports."(B)

Another approach that was taken was how the opportunities to repair the harm or make reparation are not available to an individual if s/he is incarcerated.

> "I think it really made me realize what I did was wrong and I don't think it gives you any more harm, like how does jail fix the harm done. It doesn't. Its just a nice way of you know, that, ah turn a blind eye and say, well throw him in there and he'll just come out and usually do it again. So I mean that all they do in jail anyway is talk about what they're gonna do when they get out right. And jails supposed to help. There should be more programs, like for more alternatives instead of jail, I think. Instead of building more jails they should be given other options, I think. It's not working."(G)

The participants in this study were able to recite the conditions of their sentences that were intended to have them "repair the harm". As participants in the Restorative Resolutions program, they were required to take full responsibility for their actions and be willing to make reparation to the community and the victim. For some of the participants there was some indication of victim empathy, or consideration to the experiences of the victim and possibly the community as a result of their actions.

In summation, the participants' identification and connection to heritage sought to discover how participants felt about their heritage and being Aboriginal. This uncovered how participants perceived their heritage in relation to their sentencing stage of the court process. Did their heritage play a role in their sentencing?

The literature has pointed to the use of conditional sentences to decrease the rates of incarceration. As an extension of incarceration it was important to discover how participants felt about serving a conditional sentence. Was it perceived as punitive? How did participants feel about it in comparison to jail? What did they get out of it?

Finally, conditional sentences are community sentences and are intended to be restorative justice. It was important to consider if participants could make this connection. Could participants incorporate the principles of restorative justice in their sentences? How did participants feel they made reparation, restitution, took responsibility and rehabilitated?

Chapter Five:

Summary and Discussion

Summary and Discussion

What does all of this mean? How does it all pull together? Several areas of interest emerge from the data collected in relation to the literature presented. Reflections on heritage, the impact of heritage, conditional sentencing as an alternative to incarceration and what that looks like, and some of the perceptions of what it is like to serve a conditional sentence will be presented. Final consideration will be given to the connection between the individuals and the aim and/or purpose of restorative justice.

Heritage

The research findings indicate that the individuals in this study did not believe their status as an Aboriginal person was considered during their sentencing process. Furthermore, several individuals felt that this would be inappropriate, or that the justice system should not make differentiations between individuals based on the color of their skin or their heritage. Several individuals stated how they felt it would be discriminatory or unfair if their Aboriginal heritage had been considered during their sentencing process. One participant, who identified as First Nations, stated how s/he felt Aboriginal people cannot use their heritage as an excuse for their behaviour.

It is possible that for these ten individuals their life experience has been non-discriminatory. It is possible they have not felt or perceived any impact as a result of their Aboriginal heritage. It is possible a connection has not been recognized. No connection to the history of Aboriginal people was discussed. This does not mean that individuals could not make the connection or did not believe there was an impact of factors such as colonization.

I believe that for these ten individuals heritage was not a factor in their receiving a conditional sentence. The use of conditional sentences for these ten offenders was not a result of their heritage. They were diverted from incarceration based on the sentencing guidelines outlined in section 742.1. Furthermore, there are only a proportion of clients in the Restorative Resolutions program who are identified as Aboriginal people (49) where the overall client caseload sits at approximately 180 individuals. It would appear as though conditional sentences and restorative justice is at work, but not predominantly with Aboriginal people.

The literature also points to the challenge of defining "unique" circumstances of Aboriginal people. Pelletier (2001) criticizes the Supreme Court's analysis in *Gladue* for its emphasis on the offender's connection to heritage and culture and does not fully appreciate the impact of colonization. The Court places emphasis on the connection to heritage and culture but "does not appear to make room for the Aboriginal offender who has been unable to participate in his or her culture" (p.477). Because of colonization many Aboriginal people are alienated from their culture and their communities. This is a systemic factor which cannot be ignored, and "requiring a connection with the Aboriginal community before s. 718.2(e) can be considered will inhibit its application to deserving people" (Pelletier, 2001, p.477). We also cannot have a 'blanket' statement that connection to culture defines "Aboriginalism" nor can the Supreme Court adequately define who is or is not Aboriginal or the degree to which someone is connected to their culture as defining them as Aboriginal or not.

Several of the participants echoed this issue in their statements concerning their connection to their culture. While all ten participants were in some form classified as Aboriginal, several of them stated they were not connected.

"I don't know much about my Aboriginal Heritage"

"I'm not deep into the culture"

"I don't deny the cultural, the history, but as far as spiritual side, it did not work for me, I tried"

Does this mean they are less Aboriginal? Does this mean that their circumstances, because they are not stating a connection, are not 'unique' as per Supreme Court standards? The impact of colonization is wide and varied, and it is possible that the lack of connection stated by some of the participants is in fact due to the impact of colonization. There are numerous reasons why individuals are not connected to their culture. Participants in this study discussed shame, Christianity, and oppression as reasons why they felt they were not connected to their Aboriginal heritage.

> "I've been raised pretty much like as a white person" (D)
>
> "cause my dad never let my mother teach us, so I never really go into [his/her language]" (I)
>
> "it was never something that we ever spoke about because growing up, I grew up in a white society and I was always being made fun of because my skin, it's not all that dark, but it's darker than others. It was always something that you hid. It was not something you could be proud of." (J)
>
> "I think a lot of people say oh they're looking down is because they don't feel good about themselves. They feel bad. Maybe they're ashamed of being native, so they figure other people look at it that way."(H)
>
> "but when [being Aboriginal] comes to how it divides people, I think that's where I got out, when I became Christian. The spiritual side did not hook up with what I believe. I don't deny the cultural, the history, but as far as spiritual side, it did not work for me, I tried" (B).

The participants in this study voiced several ways in which they felt disconnected from their Aboriginal heritage. One can also interpret some of these reasons as a result of the direct or indirect impact of colonization. It is these very reasons, Pelletier (2001) argues, that requiring a connection with heritage before section 718.2(e) could be applied will mean a large number of Aboriginal people will be omitted. Because there

are so many systemic factors and reasons why individuals may not be connected to their culture, this would seem to be discriminatory.

The participants in this study varied in the degree to which they identified with their Aboriginal heritage. A couple of individuals reflected on how, for example, "generations passed on to this generation" which can be interpreted as the generational legacy passed on in Aboriginal culture. The implications for Aboriginal people since European contact are enormous. The introduction of European culture, the attempted genocide of Aboriginal culture through residential schools and 'reservations', and the European judicial system have had a profound affect on Aboriginal people. For individuals in this study, the increased connection to his/her culture may bring about a heightened insightfulness into the impact of colonization. This would definitely increase the applicability of s.718.2 (e).

Conditional Sentencing

The case of *R v. Proulx* (2000) outlines how the use of conditional sentences is meant to include "punitive conditions that are restrictive of the offender's liberty" and "aimed at offenders who would otherwise be in jail but who could be in the community under tight controls" (p.36). Nine of the ten participants in this study received absolute curfew or "house arrest" involving numerous conditions and requirements. Participants reflected on the difficulty adhering to these conditions and how they felt their 'freedom' was lost. Participants reflected how they felt they 'suffered' and were 'punished' for their offences.

When we consider the 'net widening effect' discussed in the literature, there were several individuals who made reference to the fact that their sentence would have been shorter if they had gone to jail. The 'net widening effect' occurs when the

longer conditional sentence is breached, and the individual actually ends up serving a longer sentence in total. One participant discussed this, and acknowledged that the amount of time s/he spent serving his/her conditional sentence and then jail time due to breech was longer than if s/he had taken a jail term to begin with. This individual felt this was a "sucker's deal".

When we consider the goal of reducing the number of Aboriginal offenders receiving terms of incarceration, conditional sentences are a viable option. These ten participants all felt they were facing terms of incarceration. Participants reflected on how their involvement with Restorative Resolutions was a contributing factor in their receiving a community based sentence.

> "I was doing interviews with [my case planner] there and s/he made a report to the courts and what the agreements were to get this opportunity to go into RR and so I told them how I felt and how the victims felt. S/he talked to all the victims, s/he talked to all the people that know me and see what kind of person I actually am. Like no one could believe I actually did this and I can't believe I did it myself to tell you the truth, you know, I was on hard times at the time and then, so s/he did a report on me and presented it to the judge and I got the conditional sentence"(I)

The study illustrates how restorative justice programs are successful in diverting individuals from terms of incarceration. Through the pre-sentence process and the report prepared for the courts prior to sentencing, recommendations for community based sentences can be made.

Roberts and LaPrairie (2000) found that the judges they surveyed felt that conditional sentencing was in fact reducing the number of offenders (p.15). The authors further conclude that the re-offending rates were low for the two year period studied (p.34)

Roberts and Manson's (2004) panel of appellate judges unanimously agreed against limiting "the use of conditional sentences (e.g. to introduce a statutory

exclusion for offences involving serious violence, sexual assault, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity, thefts involving breach of trust)" (section 3.1, ¶ 2). It is important to relay that the implementation of the proposed amendments to conditional sentencing would have restricted several of the participants of this study. There were participants in this study who had assault charges, and thefts involving breach of trust. If the use of conditional sentences were restricted by statutory exclusion of the above named offences, then at least three of the study's participants would have been sentenced to terms of incarceration. These three individuals all stated they found the conditional sentence to be an opportunity for rehabilitation and change. One individual presented how s/he felt the conditional sentence helped build his/her self-esteem, and was thankful to not have received a term of incarceration.

Although the literature is non-conclusive on the effects of conditional sentencing in reducing incarceration rates, there seems to be positive results thus far. As further research studies are conducted I am sure the picture will become clearer on how effective conditional sentences are on reducing incarceration rates. For the ten participants in this study, the use of conditional sentences was seen overall as a positive experience, one that was rehabilitative and for some, therapeutic.

Restorative Justice

The literature indicates that restorative justice is about repairing the harm, about making the connection between offender and community and if possible, the victim. The sense of community is imperative to restorative justice.

> Currently the criminal law focuses on the actions and mental state of the offender. Its aim is to determine guilt and to assess punishment. The actual harm that the offender caused is considered only as evidence of

> the seriousness of the offence or when determining the sentence. Restorative justice shifts the attention towards redressing the harm that was done by the act and making reparations. (Cooley, 2002, p.6)

As previously stated, section 718 of the Criminal Code now clearly outlines how the purpose of sentencing follows restorative justice principles. It clearly states that sentencing is "to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community" (*Gladue,* 1999, p.43).

For the participants in this study, responsibility for their offence was a requirement for their involvement in the Restorative Resolutions program. They were required to make reparation to their communities and in varying degrees to their victims. All of the participants were able to reiterate conditions of their sentence that were meant to 'repair the harm'. Following restorative justice principles, "restoration is the process of 'righting wrongs' or healing wounds…the offender repairs the damage caused by the act" (Cooley, 2002, p.6). All participants were required to participate in different forms of reparation.

More importantly what came out of their discussions was how they internalized the effect that restorative justice and community sentencing had on them. They were able to express remorse, empathy and feelings of giving back to the community, 'making it right'. Participants stated,

> It helped me realize like how much these people are affected by it, how crimes, whatever crime you did, how it affected the victim and you know I had mine was robbery, so like the places that I robbed and how it affects everything…it teaches you at the same time still makes you remorseful."(G)

> "When initially when I first heard what I had done, I really felt for the victims in that case, like this was something totally out of character for me. I took into consideration what had happened to somebody I knew, or for myself, and how that would feel, I felt for them."(B)

> "I think it really made me realize what I did was wrong" (G)

Participants were able process their actions, explore empathy and gain some insight into themselves. They were able to see the rehabilitative opportunities that a community based sentence afforded them.

The individuals in this study also expressed how it felt to be facing a term of incarceration and be diverted to a community sentence. While most were appreciative, and some even thankful, some individuals were able to reflect upon the anger and resentment of "why this, why that" or in relation to what they have read in the media in regards to conditional sentences for "murderers". It was interesting how some of the participants were able to internalize the process even further and reflect on the impact this experience has had on their self-esteem. Still further, several individuals discussed how they have become more self-aware, have sought some insight into their backgrounds and the impact of their family life, and in the true meaning of "rehabilitation" began the journey to improve themselves as individuals. All ten participants spoke positively about restorative justice, regardless of whether or not they expressed identification and connection to their Aboriginal heritage.

I believe that what these ten participants have shared tells us that the use of conditional sentencing is successful in allowing individuals to serve community based sentences, make reparation and restitution, take responsibility for what they've done, and the opportunity for rehabilitation. The use of restorative justice allows for justice to be served.

True Justice

After all is said and done, the overrepresentation of Aboriginal offenders in our justice system has maintained stability. Roberts & Melchers (2003) found that even

after the legislative attempts to change sentencing, even after our seemingly enlightened knowledge of the extent of the problem, "the post C-41 period reveals an increase in the volume of Aboriginal admissions to custody of 3% while non-Aboriginal admissions declined by fully 22%" (p. 226).

It is safe to say that Bill C-41 does not seem to have had the impact we could have hoped for. Incarceration rates appear to be declining but not for Aboriginal offenders. The provisions in Bill C-41 may well be addressing the overuse of incarceration in Canada, but is not even putting a dent in the number of Aboriginal people in prison. Why is that?

First, the larger picture that has emerged is that there are many more factors that need to be addressed. Some of the historical issues like the impact of colonization will take decades to heal. The oppression of Aboriginal people is also here today. Systemic discrimination is found throughout the criminal justice system. One only needs to read the Manitoba Justice Inquiry's findings to get a clear picture of that. But, the issue of the sentencing stage of the criminal justice process is but one small piece of a very large puzzle.

The second even larger picture that has emerged is the issue of true justice for Aboriginal people. The system needs to change. If all other causal factors were remedied, healed and corrected, the Aboriginal offender would still face a non-Aboriginal system. It is a system that is non-Aboriginal – from the predominantly white faces which defend, prosecute and judge, to the European laws, in European language instilling European values. Chartrand (2001) summates that s. 718.2(e) "recognizes the fact that the Canadian criminal justice system is an imposed system inconsistent with and foreign to Aboriginal traditions of resolving disputes in the community. It also recognizes that Aboriginal involvement in crime is part of a

complex social system whereby the negative effects of colonialism, characteristic of the historical relationship between the Aboriginal community and the Canadian government, is just as responsible for Aboriginal crime as are the individual decisions of each offender" (p. 462).

Monture-Angus (1995) asserts that "the suggestion that alternative dispute resolution practices mirror Aboriginal reality is not a truth. Alternatives are merely that; small add-ons to the existing system which stands ready with the full force of its adversarial and punishment-orientated values if the "nice" solution does not work" (p. 255). I think this is applicable to the initiatives that our justice system is putting forth. Conditional sentencing, for example, is an alternative but as Monture-Angus points out the "existing system" stands ready with the punishment – incarceration. Let's face it – our system has failed to meet the needs of Aboriginal people. White, European, capitalist, patriarchy continues to dominate Canadian society, and yes, unfortunately, the Canadian Legal system. As the search for justice continues the "Canadian criminal justice system has so clearly failed to provide justice to Aboriginal Peoples that it is hard to imagine a situation where Aboriginal justice systems would not be an overall improvement" (Monture-Angus, 1995, p. 253). It is here I believe more answers lie. As we are beginning to learn, Aboriginal justice involves Aboriginal solutions. Successful programs, like Hollow Water, MB, utilize Aboriginal approaches to healing. Utilizing approaches, like enforced sentencing circles, allow for offenders, victims and communities to achieve justice. True restorative justice might best be found with Elders in an Aboriginal justice system. It is time we should "*return to the teachings.*"

Where does that leave us? This literature search has churned many unanswered questions. The one area which stands out significantly is what happens in Manitoba courts with the sentencing of Aboriginal offenders? Are the sentencing

options available being utilized by Manitoba's sentencing judges? More specifically, what are the sentencing experiences of Manitoba's offenders? How is Manitoba utilizing alternative sentences and restorative justice measures?

Relevance and Importance to Social Work Practice

From a structural approach to social work practice, this study illustrates how social work practice works with individuals and with systems. At a micro level, case managers and probations officers need to ensure they educate themselves on the complexities of how the justice system relates to Aboriginal peoples. Social workers need to ensure their understanding of the heritage of Aboriginal people; how issues, such as colonization, have had a multi-generational impact. Case managers and probation officers need to ask.

On a larger systemic level, social workers need to advocate for Aboriginal people's rights to self-government and for systemic changes to reduce the amount of discrimination faced by Aboriginal people.

Strengths of the Study

The strengths of this research lie in the experiential nature of the data collected. This is about people. The information comes from individuals who have been through the court process, who have faced jail time and been diverted to a community sentence. These individuals have shared their knowledge about their experience and reflected on their feelings about their process. The data was also collected from ten very diverse individuals – randomly interviewed – but who had very diverse background. There were first time offenders and repeat offenders, men and women, Metis and First Nations, young and old. The diversity allowed for the

experiences of different individuals from different locations in life, but reflection on the same experiences.

This study's strength also lies in its chosen methodology. As a case study analysis this study puts together case file information and participants' perceptions. As a result there is a triangulation of data sources.

Limitations of the Study

The limitations to the study are basically the opposite of its strengths. It is restricted to the experiences of ten individuals. It is restricted to individuals who were serving community sentences and therefore did not take into consideration the experiences of individuals who during the court and/or sentencing process received jail time instead of conditional sentences. While there was diversity amongst the group interviewed, these factors were not controlled for: there was not a balance in gender, age, background, education, offence type.

There was diversity in the degree to which individuals identified with their Aboriginal heritage. The limitations of the study, the questions asked, the impersonal nature of the interview itself may have contributed to the lack of 'sharing' or historical reflection that may have elicited more information on how individuals perceived this as an influential factor in their lives. It is also possible that the participants echoed what Stennings and Roberts (2001) asserted that "the factors listed [in *Gladue*] are not unique to Aboriginal offenders either in kind or degree nor are the factors listed relevant for all Aboriginal offenders" (p.143). It is possible that the participants in this study did not feel that their heritage has contributed to their life circumstances and/or the reasons they committed the offences they did. I tend to believe that the design of the study failed to draw out this information. In reconsideration of the questions asked

and in reflection on the information gathered there are several areas where further exploration with the participants would have been beneficial and could have gotten more information. For example, the study neglected to ask the participants directly if they felt their heritage was influential in any way, or if they thought their Aboriginal heritage needed to be considered during their sentencing process.

Due to the financial expense of obtaining court transcripts, this source of data was not presented. The court transcripts would have presented the actual court process and could have provided the sentencing judge's comments to the offender and rationale for the sentence received. The court transcripts might have presented information on the offender's Aboriginal heritage that s/he could not recall and/or was not evident in the Community Based Sentence Plan.

Reflection on the Research Question

The literature left many unanswered questions. This research study considered what was happening with ten Aboriginal offenders in Manitoba. More specifically, what are the sentencing experiences of Manitoba's offenders? How is Manitoba utilizing alternative sentences and restorative justice measures? This research fills in some gaps in the current literature on the use of conditional sentences with Aboriginal offenders.

The problem to be researched was two fold: (1) to explore the individual experiences of ten Aboriginal offenders, to discover their perception of their sentencing process and (2) to identify conditional sentences and restorative justice sentences being used in Manitoba, and the use, or lack of use of section 718.2(e) and/or special consideration to the circumstances of Aboriginal offenders.

I believe the experiences of ten offenders have been heard. I believe all ten offenders reflected on their sentencing experiences, and were able to voice their thoughts and ideas about their judicial process and what it is like to serve their sentence in the community.

It has become apparent, through the research completed, that conditional sentences are being used to divert offenders from terms of incarceration. It is evident that the individuals involved with the Restorative Resolutions program have Community Based Sentence Plans that incorporate principles of restorative justice. For the ten participants in this study, the conditions intended to 'repair the harm' were completed, but more importantly, for some, a more internalized, deeper understanding of reparation may have been gained.

It was evident that section 718.2(e) and the "unique circumstances" of Aboriginal offenders were not used in any of these ten cases. No "Gladue" reports were completed on any of the ten individuals. It would appear that for the ten individuals interviewed for this study, little consideration was to their heritage; none of the participants shared that their heritage was a factor in their criminal activity and/or the reasons they committed the offences they did.

Recommendations

It became apparent that the study, at times, generated more questions than answers. One area that stands out for me is the degree to which individuals identified with their Aboriginal heritage. Given that a couple of the participants stated none, I wonder what the findings would have shown if all of the participants were First Nations and identified strongly with their heritage. I wonder if the issues regarding systemic discrimination and the impact of colonization, for example, would have been more

strongly voiced. Following this line of thinking, I recognize that I neglected to ask participants directly if *they* felt their heritage should have been considered, or how *they* think their life experiences might have contributed to where they are today. This would be an area worthy of further exploration.

During the selection of participants for the interview process there were several individuals who were incarcerated, in treatment facilities or whose whereabouts were unknown. Further study of offenders whose conditional sentences did not work would provide significant data that seems to be missing in the literature.

This study illustrates the systemic issues for Aboriginal people at the sentencing stage of their involvement with the courts. There needs to be a *Gladue* section to pre-sentencing, a mandatory question to determine if further information about the impact of the offender's heritage is required. It seems important that individual offenders be asked if they feel their heritage or life experience requires consideration by the sentencing judge. This study also leads to the need for further education of probation officers, judges and counsel regarding the impact of heritage and the impact of the "worldview" of Aboriginal people. Aboriginal peoples view of the world needs to be understood from the location of Aboriginal people in context with history, politics, and society as a whole.

Programs like Restorative Resolutions seem to be working. The program's statistics support its continuation, and the participants in the study (except for one individual) spoke highly of the program and how they felt it had positively influenced their lives. More programs such as this are required. The research has indicated that there are difficulties with the implementation of restorative justice principles because the limited programs do not provide enough resources for judges to consider. Therefore there needs to be an increase in the number of diversion programs

available. These programs need to be different from probation, as conditional sentencing is a different form of sentencing, requiring a different form of supervision. Diversion programs require more intensive case management than probation, in order for rehabilitation, retribution and reparation to be achieved.

Increasing the number of sentencing options and diversion programs will not decrease the incarceration rates. It is clear that these are only small pieces to a much larger issue. Programs and finances funnelled into prevention programs and alleviating some of the real causes of crime for Aboriginal people needs to be increased. Issues like poverty, unemployment, education and housing are contributing factors to criminal behaviour. These cannot be ignored.

Furthermore, consideration of culture and heritage for the Aboriginal person facing a non-Aboriginal justice system is paramount. The use of conditional sentences for Aboriginal offenders may break the cycle of incarceration and aid in addressing the causes of overrepresentation of Aboriginal offenders in the Canadian criminal justice system.

This study illustrates how statutory exclusion of serious offences would eliminate some offenders from rehabilitation. It would be irresponsible to assert that all serious offenders should be eligible for conditional sentences, but if there were programs available to meet the needs of the offender, then judicial discretion should suffice. Eight of the ten participants interviewed stated they would serve a conditional sentence again and stressed the benefits gained from their involvement with Restorative Resolutions.

Conditional sentencing gets a bad 'rap'. I am often frustrated when I read or hear in the media how conditional sentences are perceived and presented by the media and the general public. The lack of knowledge and ignorance of media

reporters generates the false perception that conditional sentences are an extension of probation that they are not punitive and that offenders are "getting off". The experience of these ten individuals shows how restrictive conditional sentences are. It becomes evident as you listen to what they were required to do, it is far from being "let off" or not being held responsible or accountable for what they have done. It was for most of these participants, an opportunity to change the course of their lives, to make amends for the damage they caused, to receive guidance and assistance in dealing with the issues in their lives.

Bibliography

Anand, S. (2000). The sentencing of aboriginal offenders, continued confusion and persisting problems: A comment on the decision in *R. v. Gladue. Canadian Journal of Criminology, 42*(3), 412-420.

Becker, H. S. (1986). *Writing for social scientists: How to start and finish your thesis, book or article.* Chicago: University of Chicago Press.

Bonta, J., LaPrairie, C., & Wallace-Capretta, S. (1997). Risk predicting and reoffending: Aboriginal and non-aboriginal offenders. *Canadian Journal of Criminology, 39*(2), 127-144.

Bonta, J., & Lipinski, S. (1992). The characteristics of aboriginal recidivists. *Canadian Journal of Criminology, 34*(3/4), 517-523.

Brodeur, J. (2002). On the sentencing of aboriginal offenders: a response to Stenning and Roberts. *Saskatchewan Law Review, 65*(1), 45-52.

Canadian Centre for Justice Statistics Profile Series. (2002). *Highlights of the conditional sentencing special study.* (Report No. 85F0027XIE). Ottawa, ON: Statistics Canada.

Canadian Center for Justice Statistics Profile Series. (2001). *Aboriginal Peoples in Canada.* (Report No. 85F0033M1E). Ottawa, ON: Federal Policy Research Initiative, Statistics Canada.

Chartrand, L. (2001). Aboriginal peoples and mandatory sentencing. *Osgoode Hall Law Journal, 39*(1), 449-467.

Comack, E. & Balfour, G. (2004). *The power to criminalize: Violence, inequality and the law.* Halifax: Fernwood.

Cooley, D. (2002). *Restorative justice in Canada: Lessons learned.* Ottawa, ON: Law Commission of Canada.

Creswell, J. W. (1998). *Qualitative inquiry and research design: Choosing among the five traditions.* Thousand Oaks, CA: Sage Publications.

Daubney, D. (2002). Nine words: a response to "empty promises: Parliament, the Supreme court and the sentencing of aboriginal offenders." *Saskatchewan Law Review, 65*(1),35-44.

Department of Justice, Canada. (2000). *Restorative justice in Canada: A consultation Paper.* Retrieved October 7, 2003 from http://canada.justice.gc.ca/en/ps/voc/rjpap.html

Dioso, R. & Doob, A. N. (2001). An analysis of public support for special consideration of aboriginal offenders at sentencing. *Canadian Journal of*

Criminology, 43(3), 405-412.

Fournier, S. & Crey, E. (1997). *Stolen from our embrace: the abduction of First Nations children and the restoration of Aboriginal communities.* Vancouver: Douglas & McIntyre Ltd.

Government of Canada. (1999). *Aboriginal justice inquiry.* Retrieved June 2, 2004 From http://www.ajic.mb.ca/volume.html

Lash, J. (2000). Case comment: R v Gladue. *Canadian Woman Studies,* 20(3), 85-92.

LaPrairie, C. (1990). The role of sentencing in the overrepresentation of aboriginal people in correctional institutions. *Canadian Journal of Criminology, 32*(3), 429-440.

LaPrairie, C. (1996). *Examining aboriginal corrections in Canada.* (Report No. JS5-1/14-1996E). Ottawa, ON: Aboriginal Corrections Policy Unit of the Solicitor General of Canada.

LaPrairie, C. (1999). The impact of Aboriginal justice research on policy: A marginal past and an even more uncertain future. *Canadian Journal of Criminology,* 249-260.

La Prairie, C. (2002). Aboriginal over-representation in the criminal justice system – A tale of nine cities. *Canadian Journal of Criminology,* April 2002, 181-208.

Maloney, L. & Lloyd, W. (2000). *Restorative resolutions; a community based sentencing alternative.* Restorative Resolutions Internal Overview of Service document.

Marlow, C. (2001) *Research methods for generalist social work.* (3rd ed.). Belmont, CA: Brooks/Cole.

Monture-Angus, P. (1999). Myths and revolution: Thoughts on moving justice forward In Aboriginal communities. In *Thunder in my soul: A Mohawk woman speaks.* (pp.249-64). Halifax: Fernwood.

Nuffield, J. (1998). *Issues in urban corrections for aboriginal people.* (Report No. JS5-1/17-1998). Ottawa, ON: Aboriginal Corrections Policy Unit of the Solicitor General of Canada.

Padgett, D. K. (1998). *Qualitative methods in social work research: challenges and rewards.* Thousand Oaks, CA: Sage.

Pelletier, R. (2001). The nullification of section 718.2(e): aggravating aboriginal over-representation in Canadian prisons. *Osgoode Hall Law Journal, 39*(2-3), 469-489.

Quigley, T. (2000). Are we doing anything about the disproportionate jailing of Aboriginal people? *Criminal Law Quarterly, 42*(1), 129-160.

R v Gladue (1999). 1S.C.R. 688.

R v. Proulx (2000). 1S.C.R. 61.

R v Wells (2000). 1S.C.R. 207.

Roach, K. & Rudin, J. (2000). Gladue: The judicial and political reception of a promising decision. *Canadian Journal of Criminology,* 43(3), 355-388.

Roberts, J & LaPrairie, C. (2000). *Conditional sentencing in Canada: An overview of research findings.* (Report No. RR2000-6e). Ottawa, ON: Research and Statistics Division, Department of Justice, Canada.

Roberts, J. & Manson, A. (2004). *The future of conditional sentencing: perspectives of appellate judges.* Ottawa, ON: Department of Justice, Canada.

Roberts, J. & Melchers, R. (2003). The incarceration of Aboriginal offenders: Trends from 1978 – 2001. *Canadian Journal of Criminology and Criminal Justice,* April 2003, 211-242.

Roberts, J., & Stenning, P. (2002). The sentencing of aboriginal offenders in Canada: A rejoinder. *Saskatchewan Law Review, 65*(1), 75-96.

Ross, R. (1996). *Returning to the teachings: Exploring Aboriginal justice.* Toronto: Penguin Books.

Rudin, J., & Roach, K. (2002). Broken promises: a response to Stenning and Roberts' "empty promises." *Saskatchewan Law Review, 65*(1), 75-96.

Stenning, P., & Roberts, J. (2001). Empty promises: Parliament, the Supreme Court and the sentencing of aboriginal offenders. *Saskatchewan Law Review, 64*(1), 137-168.

Stoesz, Y. (1996). Master of Social Work Thesis. University of Manitoba.

Wallace, M. (2003). *Crime statistics in Canada, 2002.* (Report No. 85-002-XPE, Vol.23, no.5). Ottawa, ON: Juristat Canadian Centre for Justice Statistics.

Wesh, A. & Ogloff, J. R. P. (2000). Full parole and the aboriginal experience: Accounting for the racial discrepancies in release rates. *Canadian Journal of Criminology,* 469-491.

Appendix 1

Informed Consent *Letter A*

RESEARCH PROJECT TITLE: Use of Sentencing Options in Manitoba:
A Snapshot of Ten Aboriginal Offenders

RESEARCHER: Diane Parris

This consent form, a copy of which will be left with you for your records and reference, is only part of the process of informed consent. It should give you the basic idea of what the research is about and what your participation would involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask. Please take the time to read this carefully and to understand any accompanying information.

This research is a thesis research project. It is a required part of the researcher's Master of Social Work degree with the University of Manitoba. The researcher is not employed by nor affiliated with any part of the Department of Justice or Restorative Resolutions.

The purpose of this research is to explore the sentencing experiences of ten Aboriginal people who received either conditional sentences or restorative justice measures. This research will identify if or when section 718.2(e) of the Criminal Code was applied – giving special consideration to the unique circumstances of Aboriginal offenders. This research is intended to explore your perception of your sentencing process and how your circumstances as an Aboriginal offender was or was not considered during your court sentencing process.

The procedures will involve you agreeing to be interviewed by the researcher on one occasion – which would last about one hour. The researcher would also access your case file at Restorative Resolutions to review if and/or how your status as an Aboriginal person was considered on your Community Based Sentence Plan.

The interview would be audio taped for later transcription. The researcher will regard all information gathered from you and from your case file in strictest confidence. All information generated for this thesis project will use non-identifying information. Interview excerpts and report quotations may be used in the thesis report. Therefore, there is a risk that an informed reader may be able to ascertain the identity of the participants in the study. Complete protection of your identity cannot be guaranteed.

Your case worker, Restorative Resolutions and the Department of Justice, will not be aware of your involvement in this study. The researcher randomly selected 10 case files from a number of identified cases that meet the criteria of having (a) an Aboriginal offender, and (b) a conditional sentence or restorative measure / community sentence.

By participating in this research, your sentence, your status with the courts and the Justice system, your file, your involvement with Restorative Resolutions, your case planning, etc., will not be impacted, changed or altered in any way. Your involvement and participation in this research project is voluntary and you may withdraw from the process at any time without consequence.

Feedback regarding this research and its findings will be made available to you. Once complete, the researcher will contact you to see if you want to meet regarding the research findings. If you choose (indicate at end of this document), a summary of the results will be surface mailed to you approximately 4-6 weeks after the interviews are completed. Similarly, a copy of the research will be left at Restorative Resolutions.

The researcher will have bus tickets available for you to cover transportation costs to and from interview meetings.

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the researchers, sponsors or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time and / or refrain from answering any questions you prefer to omit, without prejudice or consequence. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation.
Diane Parris, researcher, (204) 470-0352
Denis Bracken, supervisor, University of Manitoba, (204)474-9264
Lana Maloney, Director, Restorative Resolutions, (204)945-3045

This research has been approved by the Psychology/Sociology REB (PSREB). If you have any concerns or complaints about this project you may contact any of the above-named persons or the Human Ethics Secretariat at 474-7122, or e-mail

margaret_bowman@umanitoba.ca. A copy of this consent form has been given to you to keep for your records and reference.

_______________________________ _______________________________

Participant's Signature Date

_______________________________ _______________________________

Researcher or Delegate's Signature Date

Summary of Results:

☐ I would like a summary of the results surface mailed to me approximately 6-8 weeks after the interviews are completed.

Informed Consent Letter B

RESEARCH PROJECT TITLE: Use of Sentencing Options in Manitoba:
A Snapshot of Ten Aboriginal Offenders

RESEARCHER: Diane Parris

This consent form, a copy of which will be left with you for your records and reference, is only part of the process of informed consent. It should give you the basic idea of what the research is about and what your participation would involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask. Please take the time to read this carefully and to understand any accompanying information.

This research is a thesis research project. It is a required part of the researcher's Master of Social Work degree with the University of Manitoba. The researcher is not employed by nor affiliated with any part of the Department of Justice or Restorative Resolutions.

The purpose of this research is to explore the sentencing experiences of ten Aboriginal people who received either conditional sentences or restorative justice measures. This research will identify if or when section 718.2(e) of the Criminal Code was applied – giving special consideration to the unique circumstances of Aboriginal offenders. This research is intended to explore your perception of your sentencing process and how your circumstances as an Aboriginal offender was or was not considered during your court sentencing process.

The procedure to this point has involved you agreeing to and being involved in an interview – which lasted about one hour. The researcher would now like your consent to access your case file at Restorative Resolutions. Specifically the researcher will look to see how your Aboriginal heritage was included or considered on your Community Based Sentence Plan. The researcher will look to see if the provisions in Bill C-41 were incorporated into your plan.

By participating in this research, your sentence, your status with the courts and the Justice system, your file, your involvement with Restorative Resolutions, your case planning, etc., will not be impacted, changed or altered in any way. Your involvement

and participation in this research project is voluntary and you may withdraw from the process at any time without consequence.

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the researchers, sponsors or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time and / or refrain from answering any questions you prefer to omit, without prejudice or consequence. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation.

Diane Parris, researcher, (204) 470-0352

Denis Bracken, supervisor, University of Manitoba, (204)474-9264

Lana Maloney, Director, Restorative Resolutions, (204)945-3045

This research has been approved by the Psychology/Sociology REB (PSREB). If you have any concerns or complaints about this project you may contact any of the above-named persons or the Human Ethics Secretariat at 474-7122, or e-mail margaret_bowman@umanitoba.ca. A copy of this consent form has been given to you to keep for your records and reference.

________________________ ________________________

Participant's Signature Date

________________________ ________________________

Researcher or Delegate's Signature Date

Appendix 2

Interview Questions

History:

1. What has been your history of involvement with the justice system?
2. What kind of sentences have you served?
3. What was your present offence?
4. What sentence did you receive?

   - What were the conditions (of a conditional sentence)?

Sentencing:

5. What is your understanding of your sentence?
6. Tell me about your sentencing proceedings at court. What happened?

Influence of Aboriginal Heritage:

7. How do you identify with your Aboriginal culture and heritage?
8. Was your status as an Aboriginal person considered in your sentencing outcome or brought up during court proceedings? Explain.
9. How was your status as an Aboriginal person considered in your sentencing?
10. Did your lawyer, the prosecution and/or the judge request that your heritage be considered in your sentencing?

    - RR case planner, P.O.?

Conditional Sentences:

11. Do you think this sentence is better than incarceration? Why or Why not?
12. How do you feel about serving your sentence in the community instead of jail?
13. If you had it to do over, would you want a conditional sentence?

Restorative Justice:

14. Tell me how your sentence helped you 'repair the harm'?

Appendix 3

CASE STUDY PATTERNS

HERITAGE:	D	J	A	G	E
Connection and Identification	NONE: Raised white, lived urban, adopted	NONE: Parents do, check off on applications	NONE: No connection, no knowledge of culture	Acknowledge part Ab. But not into culture	Aboriginal: Identifies as First Nation and 'into' tradition/culture
Perceptions		Shame at colour of skin			Multi-generational history of Aboriginal people
CBSP	Family Background -visiting reserve, demographics, Métis status limited involvement in culture and no interest in pursuing	Financial Situation -bursary/student aid			Family Background -demographics -foster care Christian values, no Ab practice Employment -Ab yth program
EFFECT OF HERITAGE ON SENTENCING:	NONE	NONE -might have checked a box	NONE - thought RR was program for Aboriginal people	NONE	NONE -0 affect
Perceptions		- no prejudice - no "Métis you're in another class"	- no influence on outcome of sentence	- courts don't make those "discriminations"	- no racism - "kindness of judgement"
CBSP	"24 y.o. Aboriginal male"	-0-	-0-	"20 y.o. Métis first time offender"	"20 y.o. Aboriginal male" "Aboriginal leadership program"

CONDITIONAL SENTENCE VS JAIL:	YES – cs again	YES – cs again	Reconsider cs again	YES – cs again due to psych. impact of jail	YES – cs again ++ helpful
CS better than jail	YES - being at home - kids, family	YES - live in community, lead a normal life	YES - "good road" - child	YES ++opportunities on cs - 2nd chance -getting your life in order -jail come out a hardened criminal /worse person b/c of impact of jail	YES - Chances for treatment, not in jail
CS harder than jail	YES - jail 2/3 of the time, cs every day - conditions for treatment, don't have to do in jail - more restrictions	NO - "petrified" of jail – never been – TV only	NO - scared of jail environment, saw on TV - cs difficult b/c of conditions	YES - more choices, rules - cs = opportunities /temptations vs jail in a cage	YES - 0 ppl around - some tests
Perceptions	++RR report - recommends cs - rehab: "look inside"	++RR - "Bitter": media presentation - reflection on self: "I screwed up,can't dwell" - rehab: normal life	- resentment: - media presentation = 0 sense - judges – "compassion"	"judge saw opportunity for change"	Rehab: opportunity to change
RESTORATIVE JUSTICE:					
Repairing the harm conditions recalled	- restitution	- letter of apology - restitution	- no contact with victims - restitution - letter of apology	- victim awareness, victim declined mtg.	- community hrs - programs - sharing circles
Perceptions		- learn about self - feel better about self - community service is great	- "healing for me", deal with issues	- how does jail fix the harm – turns a blind eye - remorseful: how ppl affected by crime - rehab: opportunity, instead of more jails, they need more alt. options	- gave back with art - show them I'm a positive person - felt supported by the community

CASE STUDY PATTERNS

HERITAGE:	C	B	F	H	I
Connection and Identification	Aboriginal: Close family, participates in ceremonies	No identification, did as a child Christian beliefs now	Not into Native culture, go to ceremonies with dad	Aboriginal: Identifies as First Nation	"Status Indian": Doesn't know about culture
Perceptions	Prejudice	Divides people		Pride Shame	Oppression of language by non-Aboriginal parent
CBSP	Family Background Education Employment Financial Situation	Education	Family Background Education Financial Situation Response to Prev. Correctional Services Personal & Social Factors	Relationships - sits on board of community center	Family Background -language - dance classes for daughter
EFFECT OF HERITAGE ON SENTENCING:	NONE	NONE	NONE	NONE	NONE
Perceptions	- don't give "2 shits" about it, tried to use heritage as a yth, didn't help			- can't use heritage as an escape/excuse - equal for all races	
CBSP	"if curfew imposed, allowances for travel to reserve"	-0-	"counselling at Pritchard house would decrease risk of use = decrease risk of criminal behaviour"	-0-	-0-"

CONDITIONAL SENTENCE VS JAIL:	NO – b/c of time served	YES – cs again due to psych. impact of jail	YES - cs again	YES – cs again	YES – cs again
CS better than jail	NO - breached, remand - takes more time than jail	YES - counselling, treatment - jail = hard core - better chance - more resources	YES - at home vs wasting time in jail - safer	YES - opportunities for change - anger if jailed - continue with life	YES - prev. jail did "squat", jail is rough
CS harder than jail	YES - g/f pregnant - conditions	YES - tough - treatment	YES - rehab	YES - have to face your mistakes	No comment
Perceptions	- stressful - anger at PO - "sucker's deal"	- Resentment - Rehab: counselling, jail seen as bad - Reflection on self		++RR - Reflection on self: not feeling good about self - Rehab: gotta pay	- Rehab: "helped me" - Strive to be a better person
RESTORATIVE JUSTICE:					
Repairing the harm conditions recalled	- volunteering	- victim impact	- think about what I did - could not recall any letters of apology, required groups	-restitution	- RR talked to victims - apology letter - Donation instead of community hrs.
Perceptions	- for my benefit, I got the experience	- remorse - counselling – family and childhood issues	- "healing for me", deal with issues	- feel better about myself	- "felt really good" receiving thank you for donation - spoke of spraying off graffiti of own accord