

**The Discord Between Policy and Practice:
Defence Lawyers' use of Section 718.2 (e) and *Gladue***

by

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Abstract

This study explores the differences (and similarities) between sentencing reform and the legal practices of criminal defence lawyers. This research specifically focuses on Section 718.2 (e) of the Criminal Code, which is aimed at reducing the use of imprisonment for Aboriginal offenders and the application of the section in the Supreme Court's 1999 decision *R .v. Gladue*. It investigates whether or not the section and/or *Gladue* has affected the legal practices of criminal defence lawyers and if so, how.

The practice of lawyers, in this study, is conceptualized as structured action. The agency of lawyers is thus constrained and enabled by both macro and micro processes. These include traditional legal ideology, managerial/organizational ideology, presuppositions surrounding Aboriginality as well as the broader socio-political context of neo-liberalism and neo-conservativism. How the practices of defence lawyers either reflect or contradict the section and *Gladue* is examined through the oral narratives of lawyers—obtained through in-depth semi-structured interviews with twelve defence lawyers. The findings of this analysis suggest that the vast majority of the defence lawyers interviewed for this study were not integrating the section or *Gladue* in their defence strategies.

The strategies of lawyers, at the macro level, were found to be vastly influenced by criminal justice concepts of individuality, reliant upon ideologies of “equality,” “static Indian-ness” and “race-neutral” strategies as well as other legal factors, including the seriousness of the offence, the offender's prior criminal record and the degree of responsibility. These concepts often took priority over defence lawyers' consideration of the section and *Gladue*. At the micro level, criminal justice procedures and structures, specifically plea negotiations, pre-trial custody (remand), a lack of alternatives to incarceration as well as problems related to gathering and presenting information to the court were found to negatively influence defence lawyers' ability to incorporate the section and *Gladue*.

This study concluded that the goal of section 718.2 (e), which prioritizes the use of alternatives to imprisonment specifically in relation to Aboriginal offenders, is more of an ideal than a reality according to the defence lawyers interviewed. Efforts to remedy the issue of Aboriginal over-incarceration need to be aware of the complexity of criminal justice processes, specifically the agency of lawyers. Addressing the issue of Aboriginal over-incarceration needs to include a more holistic approach, placing more focus on the broader social and political context.

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Introduction

Canada has one of the highest rates of incarceration in comparison to other Western industrialized nations. According to Jeffery Meyer and Pat O'Malley (2005: 208) the 2001 incarceration rate in Canada was 133 per 100,000 residents. These high rates of incarceration; however, are not justified by the crime rate in Canada. According to Julian Roberts and David Cole (1999), the official crime rate in Canada is notably less than in other Western industrialized nations, with the exception of the United States, indicating that Canada relies too heavily on imprisonment as a sanction.

Aboriginal peoples represent a disproportional amount of the overall incarceration rate in Canada relative to their numbers in the general population. According to Karen Beattie (2006:15), Aboriginal peoples represented 3 percent of the adult population in Canada during 2004/2005; however, Aboriginal peoples accounted for 22 percent of the admissions to provincial prisons and 17 percent of the federal admissions. The Prairie Provinces, including Manitoba, Saskatchewan and Alberta, have some of the highest rates of Aboriginal incarceration in Canada (Beattie 2006: 16). These high rates of incarceration are seen as being intertwined with particular issues of violence, recidivism and high arrest rates among Aboriginal peoples.

There are two main explanations offered for the over-incarceration of Aboriginal peoples. One of these explanations draws attention to cultural difference, focusing on how Aboriginal culture conflicts with the Canadian criminal justice system to produce discrimination and ultimately Aboriginal over-incarceration. The other explanation focuses on the economic and social position of Aboriginal peoples in Canadian society and its connections to Aboriginal over-incarceration. These explanations are not

necessarily independent of one another and are often interlinked. Influenced by these explanations, policies directed at reducing Aboriginal over-incarceration incorporate Aboriginal concepts of justice and consider the unique social and economic circumstances of Aboriginal peoples.

Governmental concerns regarding the increasing rates of incarceration in Canada, specifically in reference to Aboriginal peoples, were documented in a report published by the Canadian Sentencing Commission (1987) and were again later identified by the Daubney Committee (1988) in its report, *Taking Responsibility*. Among the recommendations of these reports was a documented need for a greater use of alternatives to incarceration. On September 3, 1996 these recommendations were realized in a sentencing reform introduced in Parliament: Bill C-41.

Bill C-41 contained three important provisions relating to the overuse of incarceration: the implementation of conditional sentencing, the addition of section 718.2 (e) to the sentencing principles outlined in the Criminal Code, as well as an addition to the traditional purposes of sentencing. Conditional sentencing marked the creation of a new sentencing option for individuals convicted of an offence that would previously merit a sentence of imprisonment of less than two years. Section 718.2 (e) made specific reference to the sentencing of Aboriginal offenders. With the implementation of section 718.2 (e), “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.” Furthermore, the principle of restorative justice, specifically, “reparation for harm done to the victims, the community, the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the

victim and to the community” was added to the traditional sentencing goals (Daubney and Parry 1999: 34).

The application of section 718.2 (e) became a focus of the Supreme Court in its 1999 decision in *R .v. Gladue*. The case involved an Aboriginal woman who pled guilty to manslaughter and was subsequently sentenced to three years imprisonment. The sentence was appealed on the grounds that the trial judge failed to give consideration to the accused’s circumstances as an Aboriginal person. Although the Court upheld the conclusions of the Court of Appeal that there was “no basis for giving special consideration to the appellant’s Aboriginal background due to the seriousness of the offence” the Court established a guide to be followed by sentencing judges (*Gladue* 1999). This guide was intended to clarify the sentencing goals of section 718 (e) of the Criminal Code while also addressing the issue of over-incarceration in relation to Aboriginal peoples. It should further be noted that while the Supreme Court of Canada had created a duty on the sentencing judge to consider *Gladue* for Aboriginal offenders in all cases, they had also created an additional responsibility on counsel, specifically defence lawyers, to provide relevant information to the court (Turpel-Lafond 1999).

The *Gladue* decision has also had many other significant impacts on legal practices, the most notable of which has been development of the *Gladue* (Aboriginal Person’s) Court in Toronto. The decision has also been cited in a number of cases throughout Canada. Within Manitoba courts, the *Gladue* decision has resulted in the development of ‘*Gladue* Reports.’ However, a review of Manitoba provincial court cases, documented on the Canadian Legal Information Institute website, uncovered a number of inconsistencies in legal practices regarding the use of these reports and in

applying the principles outlined in the *Gladue* decision. These findings were echoed by recent commentaries (see, for example: Anand 2000; Findlay 2001; Roach and Rudin 2000; Rudin 2007; Turpel-Lanfond 1999) on the *Gladue* decision that revealed an ongoing debate as to whether the Supreme Court's decision has actually had an impact on legal practices, specifically those of defence lawyers.

There have been a range of theories and studies that explore the practices of legal professionals, including defence lawyers. The two main influences in this area have come from the legal realism paradigm (also referred to as gap studies) and the post-structuralist perspective, which includes the work of feminist socio-legal scholars as well as critical race and class theorists. An integrated perspective that combines these two main influences is used to examine the use of *Gladue*. This perspective begins from the traditional perspective of gap studies, identifying discrepancies and parallels between the "law on the books" to actual legal practice, with reference to traditional ideology of law and managerial/organizational ideology and expands on it by bringing into the discussion the influence of discursive constructs of race as proposed by post-structuralist theorists.

The purpose of this study is to explore the issue of whether or not section 718.2 (e) and the *Gladue* decision have affected the legal practices of criminal defence lawyers. More specifically, this research focuses on what defence lawyers consider to be the strengths and weaknesses of the legislation and the Supreme Court decision and how they understand and apply the section and *Gladue* in their practice. In the process, the role traditional legal ideology, ideologies surrounding race and bureaucratic goals play in constraining and enabling lawyer's use of the section and *Gladue* are examined.

Chapter one lays out an overview of Aboriginal over-incarceration in Canada (and especially in Manitoba), as well as how the predominant cultural and socio-economic explanations for this phenomenon have influenced federal policy. It also outlines the resulting amendments to the Criminal Code, which are aimed at reducing the use of imprisonment for Aboriginal offenders, the most notable being the addition of section 718.2 (e). The Supreme Court's 1999 decision in *R .v. Gladue* brought to the forefront the application of the section. This decision, its key outcomes and the nature of the ongoing debate are also detailed.

Chapter two lays out the dichotomy—found in both criminological and sociological theory regarding law—between theories that focus on structural explanations (gap studies) and those which view law from a post-structuralist perspective. While each of these theoretical perspectives offers a particular interpretation of law and the practices of lawyers within the criminal justice system synthesized perspective is proposed that provides for a more complete understanding of how traditional legal ideology, managerial/organizational justice and ideological constructs of race maintain the discord and/or parallels between legal policy and the practices of defence lawyers.

Chapter three describes the qualitative methodological approach taken in this study—oral narratives. It explains how the oral narratives of lawyers—obtained through in-depth semi-structured interviews—will be used to explore the strategies of lawyers in relation to “law on the books” (Kessler 1995:771). The research process itself is then explained in detail including sampling procedures, the participants, data collection and analysis as well as ethical considerations.

Chapters four and five each begin with the oral narratives of the defence lawyers exploring why section 718.2 (e) and the *Gladue* decision have not affected the practices of criminal defence lawyers. Chapter four focuses on how lawyers' beliefs, values, perceptions and interpretations—informed by their prescribed role—have negatively influenced their integration of the section and *Gladue*. Specifically, it explores lawyers' perceptions of the criminal justice system as individualized as well as their interpretation of *Gladue* as ambiguous and sometimes contradictory. It also examines how ideologies related to equality and race have negatively influenced some lawyers' use of the section and *Gladue* and considers how lawyers' strategies, promoted by the criminal justice system's focus on individualized legal factors, override strategies which make use of the section and *Gladue*. Chapter five assesses how procedural and structural obstacles within the Canadian criminal justice system affect the lawyers' ability to incorporate the section and *Gladue*, even in situations where they considered them appropriate strategies. These obstacles are related to plea negotiations, remand (pre-trial custody) and the availability of alternatives to incarceration—the latter being situated within the broader socio-political context, as well as obstacles related to the gathering and presentation of supporting information to the court.

These findings are drawn together in the concluding chapter, where it is argued that the framework set out in *Gladue* does not adequately consider the role or the agency of defence lawyers within the criminal justice system. As demonstrated in this research, the majority of lawyers enacted their agency, influenced by the broader context of ideology and structure, in opposition to section 718.2 (e). However, two of the lawyers interviewed were able to incorporate the section and *Gladue* into their sentencing

strategies on a regular basis. The strategies applied by these two lawyers are explored and juxtaposed with the strategies used by the majority of the other lawyers interviewed. This juxtaposition revealed that the practices of these two lawyers were often critical of and in some instances challenged criminal justice ideologies, racialized constructs and structural realities, which hindered their counter parts, indicating that law can be a site of change. Using the narratives of the two lawyers in combination with relevant literature recommendations are made to improve and enhance the ability of lawyers to incorporate the section and *Gladue* into their practice to achieve their reformatory goals. This is followed by a general conclusion that Aboriginal over-incarceration is a complex social issue which requires a more comprehensive social response.

Chapter One

The History and Context of Section 718.2 (e) and the *Gladue* Decision

Aboriginal over-incarceration has been one of the central issues confronting criminologists, sociologists and policy makers. The two main explanations offered for the over-incarceration of Aboriginal peoples focus on cultural and socio-economic reasons. These explanations have influenced federal policy directed at reducing Aboriginal over-incarceration. In 1996, Bill C-41 was introduced. It contained three important provisions relating to the overuse of incarceration: the implementation of conditional sentencing, an addition to the traditional purposes of sentencing, as well as the addition of section 718.2 (e). Section 718.2 (e) made specific reference to the sentencing of Aboriginal offenders and was directed towards reducing the use of incarceration as a sanction. Its application was the central issue in the 1999 *R. v. Gladue* decision. This decision was intended to change sentencing practices by creating a format to follow when sentencing Aboriginal offenders, the goal of which was to begin address the issue of over-incarceration in relation to Aboriginal peoples. Although there have been positive outcomes attributed to the decision, such as the development of the *Gladue* (Aboriginal Persons) Court in Toronto and the implementation of ‘*Gladue* Reports’ within Manitoba courts, recent commentaries have revealed criticisms regarding the overall impact of the section and *Gladue* on legal practices, specifically those of defence lawyers. The aim of the following discussion is to map out the extent of Aboriginal over-incarceration, how it is conceptualized, the influence it has had on policy and the outcomes of that policy.

The Over-Incarceration of Aboriginal Peoples

The over-representation of Aboriginal peoples within the Canadian criminal justice system has raised numerous concerns in both Aboriginal communities and the justice system alike. These concerns have resulted in a number of major investigations, such as the Aboriginal Justice Inquiry of Manitoba [AJI] (1991) and the Royal Commission on Aboriginal Peoples [RCAP] (1996). These investigations have documented the over-representation of Aboriginal peoples relative to their numbers in the general population at all levels of the criminal justice system. However, the most shocking of these findings was the massive over-representation of Aboriginal peoples found in correctional institutions (AJI 1991 and RCAP 1996). Recent data from The Canadian Center for Justice Statistics reveal a continuation of this trend. Although Aboriginal peoples only comprised 3 percent of the adult Canadian Population in 2004/2005, they made up 22 percent of the prison population in Canada (Beattie 2006: 15). At the provincial level the results are even more dramatic.

The Prairie Provinces have shown some of the highest rates of over-incarceration in Canada. According to Beattie (2006: 16) in 2004/2005, the proportion of Aboriginal persons admitted to adult provincial correctional facilities in Saskatchewan (77 percent) and Alberta (38 percent) was almost ten times higher than their proportions in the adult population (10 percent and 4 percent) in the respective provinces. In Manitoba, Aboriginal persons comprised 11 percent of the population and made up 70 percent of the admissions to adult provincial correctional facilities (Beattie 2006: 16).

These outrageous differences are illustrative of only some of the issues confronting Aboriginal peoples. Aboriginal peoples also experience much more violence than non-Aboriginal peoples (Wood and Griffith 2000). For example, the homicide data for 2004 show that Aboriginal peoples represented 23 percent of all homicide suspects and 17 percent of all homicide victims (Brzozowski, Taylor-Butts and Johnson 2006: 8-9). These figures are particularly high given that Aboriginal peoples represented only 3 percent of the general population, indicating that Aboriginal peoples are more likely to be involved in serious offences. In Manitoba the most common Criminal Code offence category that Aboriginal peoples were charged with was crimes against the person (LaPrairie 1996: 40). Second, there is a higher rate of recidivism among Aboriginal peoples. Carol LaPrairie's (1999) evaluation of the Saskatoon Community Mediation Service illustrated this point through an examination of the prior records of Aboriginal and non-Aboriginal accused. Her study revealed that 49 percent of Aboriginal accused had a prior record, compared to 30 percent of non-Aboriginal accused, indicating a higher recidivism rate among Aboriginal accused. Third, according to Brzozowski, Taylor-Butts and Johnson (2006: 12), Aboriginal peoples are more likely to come into contact with police than non-Aboriginal people for what could be considered more serious reasons. For instance, Aboriginal peoples are more likely to be arrested than non-Aboriginal peoples (Brzozowski, Taylor-Butts and Johnson 2006: 12).

Factors Influencing the Over-Incarceration of Aboriginal Peoples

There are two main perspectives that provide explanations for the over-incarceration of Aboriginal peoples. The first of these perspectives is a cultural explanation. This

perspective focuses on discrimination resulting from cultural differences that exist between Aboriginal and non-Aboriginal cultures, specifically those relating to concepts and practices of justice. The second perspective focuses on structural factors such as the socioeconomic disparity between Aboriginal and non-Aboriginal peoples. These perspectives are not necessarily independent of one another. As LaPrairie (1994: 13) states, “cultural and socioeconomic marginality... are often interchangeable.”

The cultural explanation focuses on the conflicting values between Aboriginal and non-Aboriginal cultures and the resulting discriminatory practices that lead to Aboriginal over-incarceration. As such, this explanation looks at the differences between Aboriginal cultures and the Canadian criminal justice system and takes into consideration the conflicting conceptions of justice, differences in social interaction, language and contrasting perspectives on responses to conflict.

In the Canadian criminal justice system, emphasis is placed on the importance of the individual, whereas in many Aboriginal concepts of justice the emphasis is placed on the importance of community (Ross 1996). More specifically, the Canadian criminal justice system is based on rules and regulations designed to minimize the conflict that is inherent in an individualized, capitalist, market society. In contrast, the Aboriginal concept of justice involves “more than just rules and regulations.” It is based on notions of balance and harmony within the community (Ross 1996: 256). The contrasting Aboriginal concept of justice is; however, often ignored by the Canadian criminal justice system.

The Canadian criminal justice system also overlooks the differences associated with Aboriginal social interaction norms and language. For example, the Aboriginal

social interaction norm of non-interference in another's life and unwillingness to openly confront or contradict an accused relative or authority figure is often misinterpreted by judges and lawyers. These cultural differences are often transformed into a "problem of Aboriginal peoples" transforming their culture into the problem (Comack and Balfour 2004: 84). A difference in language also creates difficulties within the criminal justice system for Aboriginal peoples. Many Aboriginal languages do not have an exact translation of words used within the Canadian criminal justice system. For example, most Aboriginal languages have no word for 'guilt,' and 'truth' has a different meaning (Ross 1996; AJI 1991). These differences in language make it difficult for Aboriginal peoples to participate in the proceedings of the criminal justice system where the dominant language used is English (Comack and Balfour 2004).

Furthermore, the Canadian criminal justice system focuses on a reactive set of responses to offences and offenders through sentencing. These responses are referred to as sentencing objectives and include the concepts of deterrence, justice, incapacitation and rehabilitation. According to Craig Proulx (2000: 375), "sentencing was interpreted by judicial discretion based on culturally specific notions of deterrence and punishment." There are few similarities between these reactive responses and those associated with Aboriginal cultures. Many Aboriginal cultures focus on proactive measures, such as mediation and negotiation, to resolve disputes. These measures often focus broadly on all those involved in the dispute and the community; the focus is not solely on the offender but on healing and restoration (Ross 1996; Proulx 2000).

Consequently, through the criminal justice system, culturally different judicial policies and practices are imposed on Aboriginal peoples (Proulx 2003). These values

and rules discriminate against Aboriginal concepts of justice. According to the cultural approach, these culturally discriminatory policies and practices can result in under-informed judicial decision-making, guilty verdicts and ultimately the over-representation and over-incarceration of Aboriginal peoples within the criminal justice system (Ross 1996; Proulx 2000).

This cultural perspective; however, fails to take into consideration the role of socioeconomic factors in Aboriginal incarceration. The structural perspective, in contrast, provides an explanation that considers the economic and social position of Aboriginal peoples in Canadian society. LaPrairie (1999) suggests that socio-economic characteristics of Aboriginal peoples are essential to any explanation of Aboriginal over-representation within the criminal justice system. In general, Aboriginal peoples are at a socio-economically disadvantaged position in comparison to non-Aboriginal peoples. For example, Aboriginal peoples in general have lower levels of education, fewer marketable skills, higher rates of unemployment and a higher rate of family instability than non-Aboriginal peoples (AJI 1991; RCAP 1996). According to LaPrairie (2004) this combination of economic and social factors suggests the causality of higher rates of crime (and victimization) among Aboriginal peoples and in turn results in their over-representation within the criminal justice system.

These socio-economic differences are particularly apparent in comparisons between Aboriginal and non-Aboriginal adults in correctional services. Data available on offenders in Nova Scotia, New Brunswick and Saskatchewan revealed that 68 percent of Aboriginal adults involved in correctional services had not completed high school or a higher level of education, compared with 30 percent of non-Aboriginal inmates (Beattie

2006: 17). In terms of employment, 64 percent of Aboriginal adults involved in correctional services were unemployed as of their most recent admission, compared to 55 percent of non-Aboriginal inmates (Beattie 2006: 17). These socio-economic differences often render Aboriginal peoples at a disadvantage when it comes to sentencing.

At sentencing, judges consider socio-economic factors when determining an appropriate sentence for an offender (Abell and Sheehy 1996; Roberts and Cole 1999). Convicted offenders possessing high levels of education, employment and family stability are less likely to be sentenced to incarceration. On the other hand, convicted offenders possessing low levels of education, unemployment and family instability were more likely to be sentenced to incarceration (RCAP 1996; AJI 1999; Roberts and Cole 1999; LaPrairie 1999). Given that Aboriginal peoples are more likely to reflect the characteristics of the latter category, it follows that they are also more likely to be incarcerated. Hence, the structural approach explains the over-incarceration of Aboriginal peoples as a result of their disadvantaged socio-economic position.

Both the cultural and structural explanations can be connected to colonialism and its effects on both Aboriginal and non-Aboriginal peoples (AJI. 1991; Alfred 1999; Monture-Angus 1999; RCAP 1993; Finkler 1992; Proulx, 2000). Colonial processes, which included removing Aboriginal peoples from their traditional lands, removing Aboriginal children from their home and placing them in residential schools, forbidding Aboriginal peoples to enter into legal contracts to sell what they produced or the resources that they owned and the suppression of traditional Aboriginal religious practices, were based upon attitudes and views of Aboriginal peoples as primitive, lazy and dependent (Alfered 1999; Monture-Angus 1999; Ponting and Kiely 1997: 164). The

long-term devaluation of Aboriginal peoples' culture and practices and denial of equal distribution of political and economic power between Aboriginal peoples and non-Aboriginal peoples are still based on these colonial/discriminatory attitudes and views of Aboriginal peoples (Alfered 1999; Monture-Angus 1999; Ponting and Kiely 1997: 164). These attitudes and views have; however, become institutionalized through a variety of mechanisms, including the law. According to Christine Stafford (1995: 236), "The law is simply the formalization of the historical status quo and its practice forms a system of control replacing the earlier more explicit form of colonial practices." Through this perspective, the criminal justice system is seen as a postcolonial institution that functions to protect the interests of the dominant and powerful segment of society by maintaining inequalities (Proux 2000; Rudin 1999; Ponting and Kiely 1997; Monture-Angus 1996).

This institutionalization of cultural discrimination creates a "chain linking oppression and self-destruction" (RCAP 1993: 53). In other words, cultural discrimination in one institutional sector, such as the law, feeds and reinforces cultural discrimination in other institutions, creating a web of institutional dependencies which regulates access to education, employment and housing for Aboriginal peoples (Ponting and Kiely 1997). Thus, cultural discrimination, which limits access to institutions, is a major factor in structural explanations of Aboriginal peoples' disadvantaged socio-economic position, indicating that both of these explanations are essential in understanding crime and the over-incarceration of Aboriginal peoples.

Moreover, understanding the over-incarceration of Aboriginal peoples through cultural and structural explanations has direct implications for criminal justice policies that focus on reducing Aboriginal over-incarceration. The main implication is the need

for a multi-dimensional criminal justice approach to policy for reducing Aboriginal over-incarceration. This multi-dimensional approach is composed of two primary components. The first component stresses the need for criminal justice policies to incorporate components of Aboriginal culture to counter the culturally discriminatory policies and practices that result in misinformed judiciary decision-making. The second component emphasizes the need for criminal justice policies to challenge and/or, at the very minimum, acknowledge the structural barriers that Aboriginal peoples face within their lives.

The most notable criminal justice policy that incorporates this multi-dimensional approach to reducing Aboriginal over-incarceration is Bill C-41. This bill attempts to blend Aboriginal concepts of restorative justice with traditional sentencing goals. It also attempts to bring into focus the unique circumstances of Aboriginal peoples.

The Implementation of Bill C-41

Bill C-41, implemented on September 3, 1996, recognized the increasing rates of incarceration and made specific reference to the disproportionate levels of Aboriginal incarceration in Canada (Daubney and Parry 1999). The bill was a result of a number of policy consultations by the federal government. These consultations revolved around the reports by the Canadian Sentencing Commission in 1987, the House of Commons Standing Committee on Justice and the Solicitor General's Daubney Committee in 1988 relating to the overuse of incarceration as a sanction.

Bill C-41 brought significant reform to the sentencing system in Canada. These reforms were intended to “a) provide a consistent framework of policy and processes in

sentencing matters b) to implement a system of sentencing policy and process approved by Parliament and c) to increase public accessibility to the law respecting sentences” (Daubney and Parry 1999: 33). Furthermore, the bill introduced conditional sentencing as a new sentencing option and made particular reference to the sentencing of Aboriginal offenders in a subsection, section 718.2 (e), of the statement of sentencing principles.

Conditional sentencing was in part a response to the overall high incarceration rate for non-violent crime in Canada (Daubney and Parry 1999). The conditional sentence is a sentence of less than two years, which the offender is allowed to serve in the community under optional and mandatory conditions. In other words, it is an intermediate sanction, designed for those who would have otherwise been incarcerated. According to Section 742.1 a conditional sentence may be imposed where:

- (a) the offence is not punishable by a minimum term of imprisonment;
- (b) the court imposes a sentence of less than two years; and
- (c) the court is satisfied that allowing the offender to serve the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing set out in section 718 to 718.2¹.

The goal of conditional sentencing was to give judges an alternative to the sanction of incarceration in order to reduce the number of individuals incarcerated in a safe and principled way (Daubney and Parry 1999; LaPrairie 1999; Reed and Roberts 1999).

¹ It should be noted that after this research was conducted Bill C-9 was introduced on May 31, 2007, amending section 742.1 of the Criminal Code. Bill C-9 amends conditional sentences of imprisonment to “provide that a person convicted of a serious personal injury offence as defined in section 752, a terrorism offence, or a criminal organization offence prosecuted by way of indictment, the maximum term of imprisonment in any of these cases being 10 years or more, is not eligible for a conditional sentence” (MacKay 2007). This amendment further restricts the range of offences that qualify for conditional sentences.

Section 718.2 (e) was also introduced as an addition to the sentencing principles to restrict the use of imprisonment especially for Aboriginal offenders (Roberts and Hirsch 1999). 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.” It signified that Parliament acknowledged the disproportional over-representation of Aboriginal peoples in the criminal justice system, specifically their disproportional sentencing to sanctions of incarceration (Daubney and Parry 1999). Furthermore, the inclusion of Section 718.2 (e) signifies an indirect acknowledgment of the existence of discrimination—both within the criminal justice system and in other institutions—against Aboriginal peoples and attempts to correct it by formally requiring judges to consider these unique circumstances of Aboriginal offenders at sentencing.

The introduction of conditional sentencing and section 718.2 (e) in Bill C-41 are associated with the fundamental purpose of sentencing. Section 718 of the Act states:

The fundamental purposes of sentencing are to contribute, along with crime prevention initiatives, respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a) to denounce unlawful conduct;
- b) to deter the offender and other persons from committing offences;
- c) to separate offenders from society, where necessary;
- d) to assist in rehabilitating offenders;
- e) to provide reparations for harm done to victims or the community; and
- f) to promote a sense of responsibility in the offenders and acknowledgment of the harm done to victims and the community

These purposes included all of the traditional purposes of sentencing, such as specific and general deterrence, denunciation, incapacitation and rehabilitation. Furthermore, Section 718 added the principle of restorative justice, specifically, “reparation for harm done to

the victims and the community and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim and to the community” (Daubney and Parry 1999: 34).

Bill C-41 did not provide sentencing guidelines for judges to follow, but basic principles and direction that must be applied during sentencing (Daubney and Parry 1999). This was based on the assumption that, “the Courts of Appeal will consider the reasons in support of sentences and their relation to the statement of principles and purposes of lower courts and that over a period of time, the development of appellate jurisprudence would provide the guidelines that were being sought by those advocating numerical sentencing guidelines” (Daubney and Parry 1999: 45). The clarification of Bill C-41, including the use of conditional sentencing and the application of section 718.2 (e) was therefore left to the responsibility of the Courts of Appeal in their decisions.

The *Gladue* Decision: The Case and The Court’s Responses

The application of section 718.2 (e) became a focus of the Supreme Court in the case of *R. v. Gladue*. Jamie Gladue, an Aboriginal woman, pled guilty to manslaughter in the death of her common law husband, Rueben Beaver. Ms. Gladue was sentenced to three years imprisonment with a ten-year weapons prohibition order. In his reasons for imposing this sentence, the judge pointed to several factors, one of which was balancing the judicial concepts of denunciation, general deterrence and rehabilitation. The judge also held that in relation to section 718.2 (e), “there were no special circumstances arising from the Aboriginal status of the accused and the victim, since both were living off-reserve and not within the Aboriginal community as such” (*Gladue* 1999: 2).

Furthermore, the judge noted that the offence was a very serious one for which a prison sentence was appropriate.

Ms. Gladue's sentence was appealed on four grounds, only one of which was considered relevant, namely, whether the trial judge failed to give appropriate consideration to the accused's circumstances as an Aboriginal offender as outlined in section 718.2 (e). The Court of Appeal concluded that the trial judge had erred and that 718.2 (e) did apply to urban Aboriginals (*Gladue* 1999:9). However, the Court of Appeal found no error in the trial judge's conclusion, "that in this case there was no basis for giving special consideration to the appellant's Aboriginal background due to the seriousness of the offence" (*Gladue* 1999: 9).

The Supreme Court of Canada heard the case in 1999. The Court's decision held that Section 718.2 (e) of the Criminal Code is remedial and not simply a codification of existing sentencing principles. The Court's decision altered the method of analysis used by sentencing judges by providing judges with a framework to follow when sentencing Aboriginal offenders. The Court outlined the sentencing objectives, recognized the over-incarceration of Aboriginal peoples, gave general direction regarding alternative sentences and the lengths of incarceration for Aboriginal peoples, provided a definition of Aboriginal peoples, instructed sentencing judges to recognize the unique circumstance of Aboriginal peoples and suggested ways of obtaining this information.

In attempting to determine a sentence that was fit for the offender and the offence, the Court restated the codification of the traditional sentencing objectives included in Part XXII of the Criminal Code: deterrence, denunciation, incapacitation and rehabilitation. The Court further stated that all of the sentencing objectives are to be considered

universal regardless of whether the people involved were Aboriginal or non-Aboriginal (*Gladue* 1999: 11). The decision also referenced the importance of restorative objectives and their use alongside or in place of traditional sentencing objectives (*Gladue* 1999: 13). The goals of restorative objectives include repairing the harms suffered by the individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgement of the causes on the part of the offender and attempting to rehabilitate and heal the offender (*Gladue* 1999: 21). According to Kent Roach and Jonathan Rudin (2000: 6), “the recognition of restorative justice is a promising sign for those who see it as a positive alternative to punitive or retributive approaches to punishment.” The inclusion of restorative objectives recognized that sentencing must take into consideration what is fit for the individual accused, the offence and the community (*Gladue* 1999). Therefore, sentencing is an individualized process that varies from case to case and offender to offender.

The *Gladue* decision also documented the overuse of incarceration as a sanction with specific regard to Aboriginal offenders. The Court recognized the generally increasing use of imprisonment as a sanction in recent years, referring to the inability of imprisonment to effectively rehabilitate and reform offenders and its ineffectiveness as a deterrent (*Gladue* 1999). The Court further recognized the increasing rates of Aboriginal over-incarceration within the last decade and its continued disproportional growth (*Gladue* 1999). The over-incarceration of Aboriginal peoples was attributed to a number of sources including, “poverty, substance abuse, lack of education and a lack of employment opportunities” (*Gladue* 1999: 19). The Court also recognized the specific role of sentencing in the over-incarceration of Aboriginal peoples. It referred to the role

of sentencing judges as decision makers, “that determine most directly whether an Aboriginal offender will go to jail” (*Gladue* 1999: 19). Although sentencing reform did not address all of the causes of Aboriginal over-incarceration, the Court held that sentencing can be used to reduce it.

Given the overuse of incarceration, especially in relation to Aboriginal peoples, the Court concluded that the purpose of section 718.2 (e) was to reduce the over-incarceration of Aboriginal peoples. The Court specifically required that sentencing judges “consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of Aboriginal offenders” (*Gladue* 1999: 12). This decision restated the need for sentencing judges to consider all sanctions before imprisonment and placed new emphasis on decreasing the use of incarceration as a sanction.

In taking this position, the Court supported alternative forms of sentencing that reflected the sentencing objectives of restorative justice, with specific reference to Aboriginal peoples. Alternative forms of sentencing give emphasis to “community-centred sanctions that promote the offenders’ acceptance of responsibility for the crime committed and takes into consideration the needs of the victim” (*Gladue* 1999: 21). Conditional sentences were also described as a sentencing alternative developed to reduce the use of incarceration. Other alternatives such as healing, Aboriginal community counsel projects and community-based sanctions also offer alternatives to incarceration as a sanction (*Gladue* 1999). The absence of these alternative sanctions does not “eliminate judges’ ability to impose a sanction that takes into consideration objectives of restorative justice and the needs of the parties involved” (*Gladue* 1999: 21). The *Gladue* decision challenged judges to create new sentencing options and adapt existing

sentencing alternatives to address the needs of Aboriginal offenders (Roach and Rudin 2000). This use of alternatives also came with a precautionary note that s.718.2 (e) should not assume these alternative sentencing options are more lenient than incarceration (*Gladue* 1999).

In situations where there are no alternatives to incarceration, the Court instructed sentencing judges to carefully consider the length of the term of incarceration of Aboriginal peoples. A precautionary note was mentioned in *Gladue* (1999: 26) regarding s.718.2 (e) that the consideration of sentence length does not directly translate into an automatic reduction of periods of incarceration for Aboriginal offenders. Moreover, the decision made special note of the sentencing of offenders convicted of serious and violent crimes. According to *Gladue* (1999: 22), “In some circumstances (even when an offence is considered serious) the length of the sentence of an Aboriginal offender may be less and in others the same as that of any other offender. Generally the more violent and serious the offence the more likely it is that the terms of imprisonment for Aboriginal and non-Aboriginal will be close to each other or the same.” Consequently, in all cases involving an Aboriginal offender, regardless of the seriousness and violence of the offence, the length of the term of imprisonment must be considered. However, this consideration may not necessarily yield differential results in terms of sentencing lengths for Aboriginal and non-Aboriginal offenders.

The definition of what constitutes an Aboriginal offender was also addressed by the Court. *Gladue* (1999) included all Aboriginal peoples who came within the scope of s.29 of the Charter and s. 35 of the Constitutional Act of 1982. This included those identified under each as Indian, registered and non-registered, Métis and Inuit. The Court

also clarified the question of whether section 718.2 (e) applied to all Aboriginal persons, including those living in an urban area. According to the decision (*Gladue* 1999: 4), “section 718.2 (e) applies to all Aboriginal persons wherever they reside, whether on-or-off reserve, in a large city or a rural area.” The decision also made special provisions for the inclusion of urban Aboriginals by acknowledging the diversity of Aboriginal ‘communities’ within urban areas (Roach and Rudin 2000). The definition of community was expanded by *Gladue* (1999) to include Aboriginal networks or supports and interaction within the urban center.

Gladue (1999) also clarified the portion of section 718.2 (e) that instructed sentencing judges to pay particular attention to the circumstances of Aboriginal offenders. In defining the circumstances of Aboriginal offenders, the judge must consider “the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts” (*Gladue* 1999: 19). Considering the ‘unique systemic or background factors’ of Aboriginal peoples requires judges to take note of the structural explanations (low income, lack of employment, low levels of education) for the over-incarceration of Aboriginal peoples. It also requires judges to consider the unique colonial experiences of Aboriginal peoples, such as dislocation, that have led to the present socio-economic position of Aboriginal peoples in Canadian society. Furthermore, it requires that judges recognize the role that systemic and direct discrimination have played in bringing the particular Aboriginal offender before the court (*Gladue* 1999).

Judges must also consider the circumstance of Aboriginal offenders in terms of “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 or connection” (*Gladue* 1999: 19). This stipulation requires judges to recognize the diversity of Aboriginal peoples and their communities. Moreover, the Court indicated that both sentencing procedures and sanctions should be reflective of this diversity.

The overall proceedings of the courts will be affected by the clarification of s.718.2 (e). *Gladue* (1999) made provisions for the daily functioning of the court in respect to these clarifications. Judges have the option to “take notice of the broad systemic and background factors affecting Aboriginal peoples and of the priority given in Aboriginal cultures to a restorative approach to sentencing” (*Gladue* 1999: 23). Judges are also obligated to obtain information regarding the circumstances of an Aboriginal offender as well as information on all available sentencing alternatives. If necessary, judges “should request that witnesses be called who may testify as to reasonable alternatives” (*Gladue* 1999: 23).

While the Supreme Court of Canada created a duty on the sentencing judge to consider *Gladue* for Aboriginal offenders in all cases, a sentencing judge can only effectively discharge this responsibility if counsel and the supporting agencies, such as probation services, assist the court in providing a full picture of relevant information, including the circumstances of the defendant, the offence and possible alternatives to incarceration (Turpel-Lafond 1999). In other words, this type of information should typically come from counsel on both sides and pre-sentencing reports (*Gladue* 1999). In any case, the offender may; however, waive the right to have information pertaining to their circumstances and/or information on alternatives to incarceration gathered and applied (*Gladue* 1999).

Criticisms of *Gladue*

While the recommendations in *Gladue* (1999) looked promising, recent commentaries reveal an ongoing debate as to whether the *Gladue* decision has actually had an impact on the legal practices related to cases involving Aboriginal defendants.

One of the criticisms of the *Gladue* decision relates to the ability of the formal legal system to integrate restorative justice principles of restitution and reintegration with the formal system's sentencing objectives of deterrence, justice, incapacitation and rehabilitation (Roach and Rudin 2000: 5). *Gladue* fails to provide judges with guidance regarding the order of importance when considering sentencing purposes (Roberts and Cole 1999: 12). By not addressing this issue, the implementation of these objectives is once again left up to the discretion of individual judges (Proulx 2000).

Other critics have cited the practical limitations of implementing alternative sentencing as required by *Gladue*. A lack of available sentencing alternatives is especially problematic in remote communities, inner cities and reserves (Comack and Balfour 2004). According to Renee Pelletier (2001: 481), "Many communities, particularly Aboriginal communities, do not have access to treatment centers, healing lodges and similar facilities." Given the lack of resources to facilitate conditional sentences, such as probation and other sentencing alternatives, incarceration comes to be seen as the only available option (Pelletier 2001; Roach and Rudin 2000). In these circumstances, it is therefore unlikely that *Gladue* will influence counsel to present alternative sentences for their clients. It is also unlikely that *Gladue* will persuade judges to consider alternatives to sentencing.

Criticisms have also been raised relating to the ambiguity of application of s. 718.2 (e), as interpreted through *Gladue*, to ‘serious cases.’ It has been argued that the *Gladue* decision limits the application of s. 718.2 (e) to non-serious offences (Anand 2000; Pelletier 2001). The exclusion of serious offences from consideration under 718.2 (e) could limit the remedial purpose of the section in reducing the high rates of Aboriginal incarceration (Roach and Rudin 2000). Additionally, this interpretation creates a distinction between serious and non-serious offences. This distinction is not one made in the Criminal Code; therefore, the classification of serious offences is left up to the individual discretion of sentencing judges (Pelletier 2001). The problem is that a number of offences could become categorized as ‘serious.’ This would potentially allow for the increased use of discretion by Crown attorneys and ultimately judges regarding the consideration of cases under s. 718.2 (e). Again, this could limit the ability of the section to reduce Aboriginal over-incarceration (Pelletier 2001).

The consideration of unique Aboriginal circumstances in s. 718.2 (e) interpreted through *Gladue* has also been criticized. The criticism was made as to whether the “formal legal system was able to fully incorporate a definition of Aboriginal circumstance that included a multiple Aboriginal perspective and history within its system of relevant information as set out in *Gladue*” (Findlay 2001: 233). The influence of the larger discourse surrounding what is considered ‘Aboriginal circumstance’ could affect the ability of the legal system, specifically counsel and judges, to fully consider the circumstances of Aboriginal peoples in both sentencing submissions and sentencing decisions (Findlay 2001; Pelletier 2001; Roach and Rudin 2000). More specifically, the Court’s interpretation of ‘Aboriginal circumstance’ is criticized for overlooking the

unique circumstances of Aboriginal women by dismissing an appeal made by Ms. Gladue that the trial judge failed to consider the extent to which Ms. Gladue had been abused by her partner, Ruben Beaver (Findlay 2001: 233; Lash 2000: 2).

The court originally heard evidence that Mr. Beaver had previously been convicted of domestic assault against Ms. Gladue while she was pregnant with her daughter (Findlay 2001: 233; Lash 2000: 2). The court also heard that Ms. Gladue's bruises were consistent with her being in a physical altercation the night of the murder. However, the judge concluded that she was the aggressor and not the "battered or fearful wife" because she responded to the violence with aggression and stabbed her husband twice (*Gladue* 1999: 1; Lash 2000: 2). In her appeal, Ms. Gladue applied to introduce evidence, a psychologist's report, that supported a "battered woman syndrome" defence (Lash 2001: 1). The Court; however, did not see this as a relevant ground on which to appeal (*Gladue* 1999: 9). The dismissal of this appeal by the Court has been criticized for overlooking the unique circumstances of Ms. Gladue as not just an Aboriginal person but as an Aboriginal woman. It overlooked her unique experience as an Aboriginal woman, separating her experiences of domestic violence from the historical context of institutional, legitimized violence against Aboriginal women within Aboriginal communities (Findlay 2001; Lash 2001: 1). Furthermore, by focusing on the nature of the crime rather than on Ms. Gladue, the Court contradicted its own guidelines that "sentencing of Aboriginal offenders must precede on an individual case by case basis."

Another criticism of the interpretation of s 718.2 (e) through *Gladue* is that it requires more resources than what is presently available. According to Roach and Rudin (2000: 37), "taking into consideration an Aboriginal offender's circumstances and

available sentencing alternatives, as required by *Gladue*, will place new and onerous obligations on all members of the criminal justice system.” For example, in considering the unique circumstance of Aboriginal peoples, counsel and probation officers will need to spend more time with their Aboriginal clients and judges will also have to take extra time to make specific inquiries of unrepresented Aboriginal offenders (Roach and Rudin 2000). Additionally, further education and training of members of the criminal justice system may be required to understand better the unique circumstances of Aboriginal peoples and possible alternatives to incarceration. However, critics argue that the potential problems of personal burnout, overcrowding and trial delay have been overlooked. The additional resources required to implement the changes in *Gladue*, including time, additional employees, education and finances, were not provided for by the provinces, limiting *Gladue*’s ability to change legal practices (Pelletier 2001; Roach and Rudin 2000).

The Key Outcomes of *Gladue*

One of the key outcomes of *Gladue* has been the development of the *Gladue* (Aboriginal Persons) Court in Toronto. The court was established in October 2001 in response to the concerns of judges, lawyers, probation officers, academics and community agencies surrounding the implementation of the Court’s decision in *Gladue* at the Old City Hall Courts in Toronto. The objective of the court is “to establish this criminal trial court’s response to *Gladue* and section 718.2 (e) of the Criminal Code and the consideration of the unique circumstances of Aboriginal accused and Aboriginal offenders” (Aboriginal Legal Services of Toronto 2005: 1-2). The court sits two days a week, Tuesdays and

Fridays, in a courtroom in the Old City Hall Courts. At present, the court only hears cases from Aboriginal peoples whose matters are going through the Old City Hall Courts. The court accepts guilty pleas, sentences offenders and does bail hearings. It is anticipated that the court will eventually take on trials as well. The court also created a new position within the system, *Gladue* caseworkers. These caseworkers are employees of the Aboriginal Legal Services of Toronto (ALST). Their role within the court is to provide, at the request of defence counsel, the Crown attorney, or the judge, a report on the life circumstances of an Aboriginal offender. These reports, commonly referred to as ‘*Gladue* Reports,’ also contain sentencing options linking the circumstances of the particular offender to a range of programs and services available in the community.

Participation in the *Gladue* Court is voluntary, but defence lawyers encourage their Aboriginal clients to use it because they believe their clients greatly benefit from it. Defence lawyers often report the setting within the *Gladue* Court as beneficial to their clients, in that it is often less threatening and more personal than other court settings (Ehman 2002). Aboriginal clients are also likely to benefit from the substantial information available to judges regarding alternatives to incarceration, as judges are more likely to consider the alternatives in this situation. According to Julian Roberts and Ronald Melchers (2003), “*Gladue* courts may have resulted in fewer Aboriginal admissions to custody in the Toronto area.”² As a result, Aboriginal offenders are more likely to receive the benefits of community services and programs.

While other courts have not adopted the *Gladue* court model, the *Gladue* decision itself has had other considerable effects on judicial decisions throughout Canada. A

² This reduction in Aboriginal admission to custody could have a number of other explanations. At present there has not been an evaluation of the *Gladue* court showing a definite correlation between the court and Aboriginal admissions to custody (Roberts and Melchers 2003).

review of cases available on Quick Law by Gillian Balfour (2005) revealed that between 1999 and 2003, *Gladue* had been referred to in 160 cases in the Atlantic Provinces, 213 cases in British Columbia (where the case was originally heard), 97 cases in Saskatchewan and 53 cases in Manitoba.³ These figures suggest that although the *Gladue* decision is more prominent in provinces such as British Columbia than in others (such as Manitoba) it is receiving attention in all the provinces.

There is little documentation regarding the specifics of these cases; however, there are a few examples from appeal courts referred to by Roach and Rudin (2000). Among these examples is a case heard by the Saskatchewan Court of Appeal in which the court decided to uphold a 12 month conditional sentence and 2 years of probation for trafficking in 13 tablets of a controlled substance. In arriving at this decision, the appeal court took into consideration the *Gladue* decision. The judge made specific reference to the unique circumstances of the Aboriginal offender, community alternatives, deterrence and the fact that there is no requirement to automatically reduce a sentence simply because the offender is Aboriginal (Roach and Rudin 2000). Although the deliberation of *Gladue* did not result in a lesser sentence in this case, it supported the conditional sentences previously imposed by the lower court. Furthermore, this case illustrates the recognition and consideration of *Gladue*.

While other jurisdictions have not adopted the *Gladue* court model, some have taken elements from the model and adapted them to their specific situation. For example,

³ It should be noted that these figures are subject to judicial discrepancies in reporting. According to Julian Roberts and Carol LaPrairie (2004:4) "Trial judges rarely have time to write down and explain all of the relevant factors considered at the time of sentencing." Therefore, these figures are not necessarily representative of the actual number of cases in which *Gladue* was a consideration.

'Gladue Reports' have been adopted in Manitoba courts. According to *R. v. Lamarande* (2002) "a practice has been developed in this province [Manitoba] for counsel to make a 'Gladue Report' to the court which enables the sentencing judge to consider specific evidence concerning the circumstances and background of the Aboriginal offender and to be made aware of any specific resources that might be available to assist in rehabilitation." This development suggests that legal practices within the Manitoba provincial courts have changed in light of the *Gladue* decision.

In spite of this development, a review of 237 Manitoba provincial court cases from 2000-2004 available through the Canadian Legal Information Institute demonstrated that the actual use of 'Gladue Reports' is not a frequent occurrence. In fact, only one case made reference to a 'Gladue Report.' The review of cases also revealed that out of the twenty cases involving Aboriginal defendants, only a minority of them (six) referenced *Gladue*.⁴ The six cases that referenced *Gladue* involved what judges considered serious offences and included manslaughter, sexual assault and dangerous driving causing death.

In five of these six cases, defence counsel initiated the consideration of *Gladue*. The defence in four of these cases provided the court with specific information on *Gladue* factors and the accused. This information included the unique circumstances of the Aboriginal offender (including systemic and background factors) and how they have played a role in bringing this particular accused before the courts, as well as community alternatives to imprisonment and how they would benefit the accused (*R. v. C.D.B.* 2003; *R. v. Maybee* 2002; *R. v. Hayden* 2001; *R. v. Wilson* 2001 and *R. v. Travers* 2001).

⁴ The six cases that referenced *Gladue* include the case that utilized a 'Gladue Report.'

In one of these five cases the defence counsel initiated the consideration of *Gladue* by simply asking the court to consider the *Gladue* decision during sentencing, but without providing an specific information pertaining to the decision or its relevance to the specific case (*R. v. Hayden* 2001). However, due to the serious nature of the offence, the sentencing judge felt that an in-depth inquiry into the specific circumstances of the offender and possible alternatives to incarceration, as required by *Gladue*, was inappropriate (*R. v. Hayden* 2001).

In the remaining case, *R. v. Flett* (2002), the judge, not the defence counsel, initiated the consideration of *Gladue*. The judge in this case stated “Although I canvassed this issue with his counsel [referring to the defence counsel], I was given no explanation for Mr. Flett’s violent history and numerous problems with the law. Although he is obviously an Aboriginal person, no factors relating to his Aboriginal ancestry were brought to my attention” (*R. v. Flett* 2002: 2). In this regard not only did the judge initiate the consideration of *Gladue*, the judge also asked defence counsel to provide the court with factors pertaining to the *Gladue* decision and its relevance to this specific individual and his circumstances. Despite the court’s requests, the defence counsel in *R. v. Flett* (2002) failed to provide the court with this information. As a result, the judge noted an inability to give appropriate consideration to the *Glaude* decision and its recommendations in determining the offender’s sentence (*R. v. Flett* 2002).⁵

As the majority of these cases have shown, defence lawyers play a predominant role in initiating the consideration of *Gladue*. Furthermore, defence counsel provide

⁵ The judge also noted that despite the lack of information provided by the defence pertaining to the offenders circumstance as an Aboriginal persons that “in any event the Supreme Court stated that the more violent and serious the offence the more likely that will be closer to or the same as, that given to a non-Aboriginal person” (*R. v. Flett* 2002:3)

valuable information—such as the unique circumstances of the Aboriginal offender (including systemic and background factors), how these have played a role in bringing this particular accused before the courts, community alternatives to imprisonment and how such alternatives would benefit the accused—which enable a judge to take *Gladue* into consideration at sentencing. However, the review of Manitoba provincial court cases, available through the Canadian Legal Information Institute, also uncovered some inconsistencies that exist in the defence’s application and use of *Gladue*. These findings suggest the need for further research that explores the use of *Gladue* in relation the role of defence lawyers in the criminal justice system.

Chapter Two

Legal Policy and Practice: Creating an Integrated Perspective

There are range of theories and studies that explore the practices of legal professionals, including defence lawyers. The two main influences in this area have come from the legal realism paradigm (also referred to as gap studies) and the post-structuralist perspective, which includes the work of feminist socio-legal scholars as well as critical race and class theorists. Both of these paradigms provide a unique perspective on law, lawyering and inequality. As such, their synthesis into an integrated theoretical perspective provides for a more extensive exploration of the discord and parallels between policy and practice. This chapter provides the theoretical backdrop used for the development of such an integrated perspective.

The Legal Realism Perspective

Traditionally studies focusing on the practices of lawyers emerged from the legal realism paradigm. From this perspective, “the fix between ideals expressed in the law and social practices observed in the behavior” of legal actors are explored (Silbey 1985 quoted in Kessler 1995: 771). Studies from this perspective typically outline the parallels and discrepancies between legal practice and the written law (Kessler 1995). Overall these studies typically reveal more discrepancies than parallels between written law and behaviour and therefore have been commonly referred to as “gap studies” (Uphoff 1992; Kessler 1995; Verdun-Jones and Tijrino 2004).

It should also be noted that gap studies go beyond merely identifying the gaps between policy and practice. Gap studies also consider the implication of criminal justice

ideologies in creating, maintaining and/or justifying the gaps between policy and practice. The two main ideologies referred to in these gap studies are the traditional legal ideology of due process and the adversarial system and the ideology of managerial/organizational justice.

Traditional Legal Ideology and The Role of the Defence

Traditionally the dominant ideology that shaped the justice system was based on adversarial principles and due process. Adversarial principles provided for the protection of individuals from the prosecution by an all powerful, resourceful state (Erez and Larter 1999). Due process, according to Nicola Lacey and Celia Wells (1998) is based on procedural requirements that ensure the rule of law and the presumption of innocence. They suggest that the rule of law maintains that the law itself is fair, consistent and generally applicable. It also declares equality to all who appear before it (Lacy and Wells 1998; Naffine 1990). The presumption of innocence refers to the ideal that all people accused of criminal offences should be presumed innocent until proven guilty (Lacy and Wells 1998).

Ngairé Naffine (1990) refers to these traditional ideologies as the “Official Version of Law.” She states that this “Official Version of the Law” is:

What the legal world would have us believe about itself...as an impartial, neutral and objective system for resolving social conflict. This is the dominant notion of law as an intellectually rigorous system. It is the view of law which tends to prevail among lawyers and judges. (Naffine 1990: 24)

Naffine also highlights the fact that the “Official Version of the Law” is based on the notion of equal treatment of all before the law and that its main objective is to find the absolute ‘truth,’ separating the rational from the irrational. This separation is made

through a system of formal process, methods and language concerned with regulation and policy (Naffine 1990; Smart 1989). Furthermore, Naffine points out that within this system, legal actors are required to remain autonomous and neutral, separating themselves from those who are being processed through the system. These legal actors are also expected to “refrain from expressing moral, political and/or personal views of the matter” (Naffine 1990: 35). This ideology of the “Official Version of Law” also has direct implication for the roles of the specific actors within the legal system, including defence lawyers.

Under traditional legal ideology, a primary role of the defence lawyers is to serve the interests of their clients, based on the assumption that clients are rational beings who with the assistance of legal expertise will be able to obtain the best advice possible and have their version of events represented in the court. More specifically, the role of the defence counsel is to represent the legal rights of the accused, enshrined in the *Charter of Rights and Freedoms*, at all stages of the criminal justice process, ensuring that individuals are not convicted improperly (Comack and Balfour 2004: 24).

Subhas Ramcharan and Chantele Ramcharan (2005) describe the role of the defence during the initial stages of the criminal justice process. They explain that defence lawyers are to examine all the evidence that will be used against the accused and assess the strengths and weaknesses of the case and explain to the accused the potential outcomes of the case if it were to proceed to trial as well as the chances of gaining a satisfactory plea negotiation so that the client can make an informed decision on how to proceed. The choice of entering into plea negotiations or proceeding to trial is ultimately the decision of the accused. Furthermore, Ramcharan and Ramcharan (2005) specify that

the role of defence lawyers is to advise the accused through the process, keeping the interest of their clients as a top priority.

If the client decides to go to trial the role of the defence is to raise ‘reasonable doubt’ in the case by challenging the credibility and reliability of the evidence and testimony being used against the accused (Ramcharan and Ramcharan 2005). This is done in an aggressive fashion in which the two parties enter a battle using the ‘facts’ as weapons. These parties must advance their own positions and try to cast doubt on their adversaries view of the ‘facts’ (Naffine 1990: 74). If the case proceeds to the sentencing stage the role of the defence is to gain the lightest possible sentence for the accused by bringing mitigating factors to the attention of the judge (Abell and Sheehy 1996).

Managerial/Organizational Ideology in Law

Increasingly, the ideology of managerial or organizational justice, which stresses speed and efficiency, has come in to conflict with the traditional goals of due process and the Official Version of the Law. Managerial ideology, within the context of the criminal justice system, emphasizes a modern business like rationale concerned with productivity and cost-effectiveness in the delivery of services (Lacy and Wells 1998). Abraham Blumberg (1967: 24) refers to this focus on production and efficiency as “assembly-line-justice.” In other words, the processing of a case within this ideological perspective is concerned with aggregates rather than rights of individual defendants as emphasized in the traditional ideologies of law (Erez and Laster 1990). As William Hurlburt (2000: 140) explains, there are a number of factors, which bear on lawyers’ practices and attitudes. Some of these factors, he notes, include values and moral duties in the traditional sense.

However, he also recognizes that lawyers are influenced by some considerations of income and status. “They are influenced by the prevailing business ethic, which does not include a significant moral or public service element unless a significant moral or public service element helps to maximize profits” (Hurlburt 2000: 140). Lawyers practice law for a living; they want to maximize their incomes and their status (Hurlburt 2000:140). The reality is that defence lawyers are not able to handle every criminal case as if they have unlimited time and resources (Emmelman 2003: 121).

According to Canadian criminal court statistic, there is an increasing pressure on lawyers to handle cases in an efficient and cost-effective manner as the amount of time to complete a case has increased as well as the complexity of the cases. In 2003/2004, the mean time for processing a case from first to last appearance in court was 220 days up from 196 days in 2002/2003 and 80 days in 1996/1997 (Thomas 2005; 2002). Cases are also becoming more complex as Mikhail Thomas (2005) noted 2003/2004 was the first time in ten years that multiple-charge cases represented the majority of cases in adult criminal court. In order to maintain an efficient justice system, certain practices such as plea negotiations, are accepted while crimes and victim input is often standardized and normalized. Examples of how defence lawyers engage in this process while attempting to maintain the traditional goals of due process can be found in both classic and contemporary gap studies.

Classic Gap Studies

One of the classic gap studies that refers to the ideologies of due process and organizational justice is “The Practice of Law as a Confidence Game” by Abraham

Blumberg (1967). In this study Blumberg (1967: 321) raises the question of “whether or not the role of the defence counsel in a criminal case is reflective of social reality of their practices.” Blumberg argues that the structure of the court as an organization, “defines the role for the defence counsel in a criminal case radically differently from the one traditionally depicted.” The traditional ideology of the defence is to represent the legal rights of the accused and ensure that they are not convicted improperly. These ideologies often run into conflict with the organizational ideologies of the court, including the need to efficiently process cases through the courts. There is a notable pressure on defence lawyers to “process a large number of cases within the context of limited resources and personnel” (Blumberg 1967: 325). However, operating within these organizational ideologies allows defence lawyers to maintain and build their practice. Thus, organizational ideologies tend to exert “higher claims” than those associated with the traditional role of the defence lawyer (Blumberg 1967: 322).

These organizational ideologies dictate the practices of defence, making their primary concern strategies that will lead to a guilty plea.⁶ Blumberg (1967) asserts that defence lawyers maintain close relations with other members of the court, including the prosecution, in order to ensure they obtain their cooperation and assistance during plea negotiations. He states that members of the court often work together to “help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty” (Blumberg 1967: 322). Blumberg also suggests that defence lawyers also employ other strategies such as courtroom performances⁷ and enlisting relatives to convince the

⁶ Obtaining a guilty plea avoids a trial saving time, money and labour. It is seen as an effective way of “disposing of what are often too large caseloads” (Blumberg, 1967: 325).

⁷ A performance according to Blumberg (1967:329) is a situation in which the defence lawyer makes a “stirring appeal” on behalf of his client. “With a show of restrained passion the lawyer will intone the

accused to plead guilty. These strategies help to maintain an outward commitment to the client's interests and needs as directed by due process ideology, while limiting the scope and duration of the case as directed by organizational ideology (Blumberg 1967).

However, Blumberg (1967) also notes that these strategies contradict the traditional adversarial definition of the relationship between members of the court, specifically, the defence and prosecution. Furthermore, these strategies are given primacy over the needs of the client. According to Blumberg (1967: 324) the client is seen as a "secondary figure in the court system," contradicting the traditional role of the defence counsel as zealous defendant of the accused. Furthermore, Blumberg (1967: 330) asserts that defence lawyers in the criminal court are seen as "double agents" adhering to organizational ideology rather than representing the client's legal rights and interests as defined by traditional ideologies.

Another classic gap study is David Sudnow's (1965) "Normal Crimes: Sociological Features of the Penal Code in the Public Defender's Office." This study also looks at plea bargaining; however, it focuses on the discord between the penal code's definitions of crimes and lawyer's concept of "normal crimes" in relation to charge bargaining.

Sudnow (1965) explains that the purpose of charge bargaining, as in any other type of plea bargaining, is to gain a guilty plea and avoid trial. Charge bargaining typically occurs between the defence lawyer and the prosecution. However, according to Sudnow (1965: 161), the defence lawyers are also required to "convince their clients that the chances of an acquittal on the original charge are not good and pleading guilty to a

virtues of the accused and recite the social deprivations which have reduced him to his present state...The ritualistic character of the total performance is underscored by a visibly impassive, almost bored reaction on the part of the judge and other members of the court retinue" (Blumberg, 1967: 329-330).

lesser offence will result in a lighter sentence.” He also expresses that both the defence lawyer and the prosecution need to agree on what is considered an acceptable lesser offence to which the original sentence should be reduced.

Sudnow (1965: 159) suggests that one way in which lawyers determine an acceptable lesser sentence is by using the legally defined notion of the “necessarily-included- lesser- offence...which is simply that where an offence cannot be committed without necessarily committing another offence, the latter is a necessarily included offence.” Sudnow demonstrates how the notion of necessary-included-lesser-offences is used in charge bargaining to reduce a robbery charge to petty theft. He further explains that defence lawyers and the prosecution have developed a formula over the course of their interactions and repeated bargaining discussions that they use during charge bargaining.

According to Sudnow (1965: 165), when deciding on an acceptable lesser sentence both the defence and the prosecution are concerned that the defendant will “receive his dues.” However, he also argues that the defence and the prosecution are also concerned that the reduction of the offence and the associated charges are “enough to convince the defendant to plead guilty” (Sudnow, 1965: 165). Using the concept of ‘normal crimes’ Sudnow illustrates how defence lawyers determine what the charge will be reduced to. He explains that defence lawyers gain knowledge of crimes and their characteristics during the routine processing of criminal cases, which extends beyond their legal definition. ‘Normal crimes’ thus refer to the “typical manner in which the offence is committed, the social characteristics of the persons who regularly commit them, the features of the settings in which they occur, the types of victims often involves

and the like” (Sudnow 1965: 162). Using this definition of normal crimes, the defence counsel does not need to go into the specifics of every case during plea negotiations. Both the defence and prosecution are aware of these ‘normal crimes’ and use them in determining an appropriate charge to which the original charge can be reduced. Sudnow (1965: 160) refers to this type of charge reduction as “situationally-included-lesser-offences.”

In describing this type of charge reduction, Sudnow (1965:616) states that a “typical or normal charge of drunkenness, which has no legally defined reduction, can be reduced to a charge of disturbing the peace because of the typical behavior of a person charged with drunkenness.” It is the common understanding of the normal crime that determines how the charge will be reduced. Although Sudnow acknowledges that there are some restrictions on this type of charge reduction, he argues that in the majority of situations the defence and the prosecution are able to employ this reduction formula.

Contemporary Gap Studies

More recent studies from this perspective continue to focus on plea negotiations but in relation to recent legal reforms such as the use of victim impact statements. These studies also tend to outline the gap between legal reform and current legal practices. A recent article by Simon Verdun-Jones and Adamira Tijerino (2004) outlined the limited effect of victim impact statements within the criminal justice system due to the unofficial and unregulated nature of plea bargaining in Canada.

Verdun-Jones and Tijerino (2004) identify that although plea bargaining has been recognized in Canada as a legitimate activity within the criminal justice system by the

Supreme Court of Canada and endorsed by Canadian courts, it lacks a formal process. They assert that in relation to victim impact statements, the “absence of a mandatory process for judicial review of plea bargaining raises questions concerning the legitimate interests of the victim in the outcome of a case that is ultimately resolved through a negotiated plea” (Verdun-Jones and Tijerino 2004: 481). In these terms, although victims now have the right to submit victim impact statements, if the charges against the accused, the appropriate sentence or the relevant facts have already been decided through plea negotiations, their statements no longer fit into the process.

In order to address this gap between policy and practice, Verdun-Jones and Tijerino (2004) argue for a formalization of the plea bargaining process and identify four possible models of victim involvement. Out of the four models identified, they ultimately recommend that model three would be best suited and accepted within the Canadian criminal justice system. Model three included provisions for the formalization of plea bargaining. More specifically, through this model Verdun-Jones and Tijerino (2004) suggest that plea negotiations must be made in an open hearing in front of a trial judge. They also made provisions for victims to be informed of their rights to participate in plea bargaining and formalized an opportunity for victims to make either an oral or a written submission to the judge regarding their views during the process.

However, by addressing the gaps between policy and practice through the formalization and regulation of existing practices such as plea bargaining, Verdun-Jones and Tijerino (2004) overlooked the underlying forces and dynamic of traditional and managerial/organizational criminal justice ideologies. These factors are brought back

into view in Edna Erez and Kathy Laster's (1999) "Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements."

Erez and Laster (1999) explore the strategies employed by legal professionals, including defence lawyers, which minimize victim impact statements and the harm experienced by victims. They found striking similarities between these strategies and Gresham M. Sykes and David Matza's (1957: 666-70) techniques of neutralization,⁸ which include "denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners and appeal to higher loyalties."

Erez and Laster (1999) found that legal professionals identify victim impact statements as something that was imposed upon them, meant as a political gesture and not to be taken as a direction in which to modify court proceedings. They also found that legal professionals often identified a lack of resources, time constraints and a lack of commitment by other criminal justice agents for the shortcomings of the victim impact statements (Erez and Laster 1999). In this sense, Erez and Laster argue that legal professionals can be seen as employing the denial of responsibility technique discussed by Sykes and Matza (1957).

In relation to Sykes and Matza's (1957) "minimization of harm and/or the denial of injury," Erez and Laster (1999) reported that legal professionals distanced themselves from the cases and those involved by claiming that reasonable harm was already built into sentencing and required no special attention from them. Victim harm is thus

⁸ Sykes and Matza's (1957) "techniques of neutralization" was originally designed to account for deviant acts, however following a suggestion by Stanley Cohen (1993) that these techniques are capable of more general application Erez and Laster (1999: 544) applied them to legal professionals, reasoning that "like delinquents legal professionals develop rationalization to protect themselves from self-blame, the blame of others and to resolve contradictory expectations of them in their various professional roles"

normalized by legal professionals to allow for cases to be processed quickly through the criminal justice system.

According to Erez and Laster (1999), legal professionals also employed techniques that allow for the denial of the victim. They noted that through the use of victim myths, which depicted victims as greedy, spiteful, vindictive, emotionally unstable or as somehow contributing to their own victimization, legal professionals were able to dismiss victims' claims and statements. Erez and Laster identified another more obvious technique used by legal professionals that also allowed for the denial of the victim. They found that the Crown often used experts and community representatives during the trial to speak on behalf of the victim. This technique denied the victims their chance to contributing to the proceedings and rendered their direct input inadequate.

In discussing "condemning the condemners" in the context of victim impact statements, Erez and Laster (1999: 546) noted, "legal professionals referred to supporters of victim impact statements as well-intentioned but lacked an understanding of the criminal justice system and its procedures." In other words, although the supporters of the victim impact statements were respected for their beliefs, they were ridiculed and their messages were condemned because of their lack of insight regarding the criminal justice system.

Lastly, Erez and Laster (1999) explained how legal professionals appeal to higher loyalties, such as the smooth operation and efficiency of the criminal justice system, in order to justify the exclusion of victim impact statements. They found that even in situations where legal professionals take victim impact statements into consideration, the information they contain is often marginalized through the routinization and objectivity

of the process. Thus, legal practitioners do not necessarily see themselves as excluding or limiting the implications of victim impact statements. Their actions are justified based on the requirements of the system.

Within the comparisons of Sykes and Matza's (1957) "techniques of neutralization," Erez and Laster (1999) also identified how the opposing ideologies of the traditional adversarial model of criminal justice and the ideology of managerial justice are invoked by lawyers to justify the under-use of victim impact statements and limit victim input. They highlight that traditionally, under the adversarial model of justice, the rights of the defendant are a main concern along with the "just deserts" model of sentencing. By including victim's rights, Erez and Laster (1999) note a concern expressed by legal professionals that these traditional principles would be undermined, resulting in a harsher punishment for the offender. They also refer to the ideology of managerial justice as supporting the minimalization of victim input. According to Erez and Laster (1999), given that the ideology of managerial justice is concerned with the efficiency in which cases are processed through the criminal justice system, the consideration of victims is seen by legal professionals as just another delay and is often given limited attention. They also argue that managerial ideology gives a common purpose to legal professionals who may have seen themselves as having opposing priorities in the traditional adversarial model. Thus, Erez and Laster (1999) assert that these two ideologies, one concerned with delays and the other focused on defendants' rights, work together within the criminal justice system creating a resistance to victim reforms.

On a whole, gap studies illustrate the discord between legal policies and practice. These studies not only describe the practices of lawyers in reference to traditional ideology of law and the more recent ideology of managerial/organizational justice but also explain how these ideologies are used to justify and maintain the discord between policy and practice. The majority of this work does more than identify gaps; it also suggests ways to close these gaps. From this perspective, legal reform will only be reflected in legal practice if the context in which the reforms are to be implemented and the dominant ideologies operating within that context are also addressed (Erez and Laster 1999). Thus, studies from this perspective, despite their criticisms of law's ability to change legal practice, see law, if designed differently, as an effective means for social change (Kessler 1995).

The Post-Structuralist Perspective

Another predominant perspective examining the practices of lawyers in the criminal justice system is the post-structuralist perspective. This perspective is influenced by the work of Michel Foucault (1977, 1979, 1984 and 1980) and associated with critical legal studies, feminist and critical race perspectives (Kessler 1995). From the post-structuralist perspective law is a discourse, a complex apparatus composed of practices, ideologies,⁹ experts and institutions. Law is a part of social life, not an entity that stands above, beyond or outside of it (Kessler 1995). Furthermore, law as a discourse creates categories through which the social world is made meaningful. The meaning of these events reflects the unequal relations of power that shape the knowledge production

⁹ According to Stuart Hall (1988 cited in Kline 1994) "discourse is the arena or medium in which ideology functions."

process (Hall 1988 cited in Kline 1994). Given this view, post-structuralists advocate for contextually situated studies that illuminate how various ideologies of gender, class and race are interpreted and employed in legal discourse by those occupying various locations in social relations (Kessler 1995).

Feminist Socio-Legal Perspectives

According to Carol Smart (1989: 4), “the term law operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge...[and to] law’s ability to impose its definition of events on everyday life.” Embedded in this statement is law’s underlying claim to ‘truth.’ Law has its own method, testing ground, specialized language and system of results; it is a specialized field of knowledge that enables it to make these claims to truth (Smart 1989). In making these claims to truth law has the ability to define what is an acceptable or an unacceptable version of ‘truth’ or as Smart (1989: 11) explains, “we can see that law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences.” Through this process of determining the ‘truth’ law is open to other dominant ideologies,¹⁰ which are in turn themselves reinforced and legitimized by their incorporation into the law (Boyd 1991).

Feminist socio-legal theorists, such as Smart (1992), address the question of how law is gendered and how law is a gendering strategy. In explaining how law is gendered Smart (1995 and 1992) is critical of the ‘law is sexist view’ but elaborates on law as a

¹⁰ Law often incorporates other discourses and ideologies extending its legitimacy. Smart (1989) gives the example of how law extended itself more and more to cover family matters, which at one time were to be considered outside the public sphere. She also uses the example of ‘psy’ disciplines as a growing accepted science whose ideologies and discourse have been incorporated into legal discourse.

gendering strategy. For example, law characterizes gender differences, those associated with masculinity and femininity, in opposition to one another (Smart 1995: 218). “Law disadvantages women by offering them fewer material resources (for example, in marriage and on divorce), or by judging them by different and inappropriate standards (for example as sexually promiscuous), or by denying them equal opportunities, or by failing to recognize the harms done to women (such as prostitution or rape laws)” (Smart 1992: 31). Furthermore, Smart (1992) explains how the law brings into being a concept of “Woman” that is in contradiction to “Man” and employs specific “types of Woman” such as the female criminal, prostitute and/or unmarried mother. This leads her to the conclusion that women are being treated wrongly in law because they are different than men, men being defined by hegemonic scripts of masculinity informed by presumptions of race, class and sexuality (Comack and Balfour 2004: 35).

Naffine (1990) also makes this connection by referring to the ‘ideal man of law.’ This ‘ideal man of law’ encompasses specific characteristics: he is, male, white and wealthy. On a broader level these characteristics include a “forceful, confident, articulated, assertive, able bodied, autonomous, rational, educated, competitive and essentially self-interested male” (Naffine 1990: 52). According to Naffine, these ideals compose the universal standards by which every individual is to be judged. For Naffine, the main criticism of this ideal is that most people do not fit the assumptions associated with the ‘ideal man of law.’ In reality, people are differently advantaged with different concerns and priorities. There are problems of gender, class and racial biases within the concept of the ‘idealized individual of law,’ as well as the exclusion of power and cultural differences (Naffine 1990). Treating all alike, using this ideal man of law, does

not amount to equality of results and inevitably leads to discrimination against women within law (Smart 1992: Naffine 1990).

Hence, law can be seen as a gendering strategy in that it invokes the idea of ‘Women’ in contradistinction to ‘Man.’ As Smart (1992) suggests, law can also be seen as a gendering strategy in that it discursively constructs a type of Woman. Using the example of the bad mother and the prostitute, she explains how women’s identities are defined by dominant discourses of femininity. These categories are; however, dependent on time and social situations. For example, Smart (1992) explores how the definition of a bad mother changed and began to incorporate more and more women over time, limiting the women who are defined as good mothers. These dominant discourses categorize Women in a dualism of both “kind and killing, active and aggressive, virtuous and evil, cherishable and abominable” (Smart 1992: 36). Using the example of the bad mother Smart explains how these dualisms apply:

The unmarried mother obviously served (and still serves) to reinforce our cultural understanding of what ‘proper’ motherhood means. In this sense she is a type of woman rather than Woman. Yet she simultaneously operates in the discourse as Woman because she always invokes the proper place of Man. She is the problem (supposedly) because she does not have a man. Therefore Man is the solution, he signifies the stability, legitimacy and mastery with is not only absent in her but inverted. The unmarried mother is therefore also quintessential Woman because she represents all those values which invert the desirable characteristics of Man. (Smart, 1992:39)

Critical Race Perspective on Law

While Smart focuses on law as a gendering strategy, Marlee Kline (1994) focuses on law as a racializing strategy. According to Kline (1994: 425) “Law provides one of the discourses in which racism is constructed, reproduced and reinforced.” She begins by

identifying three ideological representations of 'Indianness' that have historical roots in the colonial oppression of First Nations peoples in Canada. She then illustrates how racialized ideologies of 'Indianness' are embedded and expressed through judicial reasoning and discourse using Aboriginal rights cases, child welfare cases and other areas of particular importance to First Nations peoples in Canada. In these terms, racism flows from the ideological form of law rather than the isolated acts of individual judges and lawyers (Comack and Balfour 2004)

As Smart (1992) and Naffine, (1990) focus on gender, identifying 'Man' and/or the 'ideal man of law' as the basis of law and the norm by which all are compared, Kline (1994) focuses on race, identifying Euro-Canadian ways as the norm to which all others should be compared. In this sense 'Indianness' encompasses all that was not Euro-Canadian. However, there was more to this constructed definition of difference; there was also an associated definition of inferiority, which Kline (1994) referred to as the 'devaluative ideology of Indianness.' This definition negatively defined characteristics associated with First Nations because they were non Euro-Canadian.

There were many examples given by Kline (1994) that showed how these ideologies were used in legal discourse. In relation to land claims, Aboriginal groups and their beliefs were often referred to as "uncivilized, savages... so low in the scale of social organization that their usages and conception of rights and duties were not to be reconciled with the institutions or the legal ideals of civilized society" (Kline 1994:458-459). Kline found that this devaluative ideology was also present in discourses related to child welfare cases. She described how universal standards of living and childcare were often defined within these cases in terms of the dominant society's values and practices,

stressing material conditions. Factors such as maintaining the Aboriginal child's identity and culture are often devalued. In both of these examples, the discourse used in the courts reinforces and reflects the 'devaluated ideology of Indianness.'

Kline (1994) also identified the ideology of 'static Indianness' disseminating through the discourse of law. The ideology of 'static Indianness' is again based on a comparison to 'white' society. 'White' society and culture is categorized as civilized, progressive and technologically advanced. The ideology of 'static Indianness,' in contrast, is comprised of the representation of Aboriginal peoples as non-adaptive, historically frozen, traditional, primitive and unable to meet the demands of contemporary society. This definition is also tied to the colonial goal of assimilation. Through colonialization the 'Indian' was to become integrated into 'white' society and become civilized. Thus the 'Indian' society and culture would no longer exist. There was no middle ground upon which 'Indian' society could integrate part of 'white' society and still maintain its identity given its categorization of non-adaptive. Thus, according to this ideology, the only way First Nations people can exist today is if they remain 'static,' anything else is not 'Indian' (Kline 1994).

The ideology of 'static Indianness' is illustrated through the judicial discourse associated with land claims. According to Kline (1994), Aboriginal land claims have often been rejected on the grounds that the claimants are no longer 'real Indians,' having adopted certain practices of the dominant society. Furthermore, she noted that Aboriginal title to land has often been absolved when it is no longer used in the traditional manner. In child welfare cases, Kline found the ideology of 'static Indianness' in discourses related to areas of residence. For example, "there is a tendency to assume that

Aboriginals living in an urban environment are not ‘real Indians’ and thus are unable to impart Aboriginal culture and identity to their children, this in turn, is used to support the removal and placement of children” (Kline 1994: 466).

Kline (1994) also refers to the ideology of ‘homogeneous Indianness,’ which represents all Aboriginals as a unity and ignores variation and diversity of Aboriginal culture. This unity of Aboriginal identity allowed for easy generalizations to be made and contrasted with the ‘white’ identity. In these terms, the ideologies of ‘static Indianness’ and ‘devaluative ideology of Indianness’ are often developed based on the ideology that Aboriginal peoples are a unified group.

Through her examples, Kline (1994) highlights how the ideology of ‘homogeneous Indianness’ is evident in child welfare cases. In cases relating to child care arrangements judicial discourse often ignores the child’s particular Aboriginal culture and community and instead focuses on the child’s Aboriginal culture and community in general terms. Kline noted that discourses including ‘Native heritage,’ ‘Indian parenting’ and ‘Native blood’ were common in these cases demonstrating the continued ideology of ‘homogeneous Indianness’ within courts.

Yasmin Jiwani (2002) expands upon Kline’s (1994) concept of ‘homogeneous Indianness’ by bringing class into the discussion. Jiwani (2002: 79) refers to “law’s inability to take into consideration class differences and the hierarchical nature by which different groups are stratified in Canadian society as the discourse of categorization.” In other words, the law categorizes individuals based upon the ideological construct of the ‘ideal man of law.’ Individuals who fall within this categorization are seen as similar. Individuals who do not fit this construct are also categorized (based upon their

differences) and ascribed similar social characteristics. “Thus, all people of colour are alike, all women are alike and so forth” (Jiwani 2002: 79).

Although law and legal discourse often employ racist ideological representations of Aboriginal peoples to explain and justify its decisions, Kline (1994) also found that in some cases legal discourse challenged each of these representations. In summarizing her findings she stated that legal discourse “is a site of ideological contestation” (Kline 1994: 468). She goes on to suggest that it is the very ideology of the law itself as a neutralizing and legitimizing power within society that needs to be challenged.

The ideology of law as a neutralizing power can also be seen in relation to how law erases and trivializes race and racism. Jiwani (2002) outlines how law, through the ideology of equality, blindness, impartiality and the reasonable person, is able to justify its ignorance of factors such as race, class and gender within its discourse. Jiwani (2002) explains how the concepts of race and racism are often left out of judicial discourse and when they are brought in they are minimized, ignoring their importance in establishing the social context of a case and those involved. Jiwani (2002: 80) for instance, notes that “the representation of culture within the context of violence clearly inferiorizes the culture of ‘others’, rendering them more primitive and backward.” Therefore under the law, Aboriginal peoples are also culturalized. These insights share similarities to those of Kline (1994) in her discussion of ‘devaluating ideologies of Indianness.’

In Sherene Razack’s (2000) analysis of cases involving violence against Aboriginal women and women of colour, she explains how cultural ideologies are used in judicial discourse to excuse and condone male violence against Aboriginal women and affirm the ideological concept of the superior ‘man of law.’ In examining the case

surrounding the murder of Pamela George, an Aboriginal woman who worked as a prostitute and was brutally murdered, Razack (2000) highlights how the culturalization of Aboriginal people is transformed into discourses within the court. She explains how the discourse pertaining to Pamela George was restricted to negative ideological representations of “[A]boriginal women as promiscuous and open to enticement through alcohol or violence...[T]hroughout the trial, Pamela George remained simply the ‘prostitute’ or the ‘Indian’ ” (Razack 2000: 105 and 117). Pamela George’s own individual attributes and the context of her life remained invisible in the legal discourse.

Razack (2000) also examined how spaces became racialized in this trial. Discourses about the stroll, the murder scene and Aboriginal bodies implied that these are degenerate spaces of violence. These discourses served to minimize the acts of violence against Pamela George as something that “just happens.” In contrast, discourses surrounding the university and white suburbs implied that these are spaces of civility. This discourse was expanded to include the accused (two white, middle class, male, university student athletes) since they predominately inhabit these spaces. Thus throughout the trial the accused remained “boys who did pretty darn stupid things” (Razack 2000: 117). In summation, Razack’s (2000: 129) spacialized view of justice revealed how race, gender and class “shapes the law by informing notions of what is just and who is entitled to justice.”

Kathleen Daly (1994), borrowing from the typology used in Smart’s (1992) feminist analysis of gender and the law, develops a way to conceptualize how race operates within the criminal justice system. Daly refers to law’s ideological claims to equality and neutrality as a focal point of her argument. These ideological claims often

mask how the justice system operates as a racializing discourse. More specifically, Daly (1994) highlights how justice system practices are racist, white and racialized.

In identifying the justice system as racist, Daly (1994) refers to the differentiation of people according to race and ethnicity within the justice system and how this differentiation is then concealed by law's ideology of equality and neutrality. She illustrates this by noting that, "we learn that racial discrimination can be achieved in at least two ways: the older form, by overt racist practices and the newer form, by practices that are ostensibly race-neutral...[T]hese so called race-neutral or race blind approaches promote new forms of racial oppression" (Daly 1994: 450). In these terms, both ideologies of race and class are brought in and minimized through legal discourses of equality. Daly (1994: 450) refers to this process as "the denial of difference."

In her explanation of the justice system as 'white,' Daly (1994: 451) notes that "white has both class and cultural dimensions" which are inevitably brought into judicial discourse, constructing the concept of the 'other.' This concept of 'other' is once more defined in contrast to the ideological construct of the 'ideal man' upon which the criminal justice system is based.¹¹ This concept of other is used to "separate those that enforce the law, or those also referred to as the producers of knowledge about crime and the justice system from those who are its subjects" (Daly, 1994: 451). Again, Daly is emphasizing the fact that the law, despite its claims to neutrality and equality, has a point of view. This point of view is essentially a white male perspective based on the 'ideal man.'

¹¹ It should also be noted that Daly (1994:454) recognizes that "to say that justice systems are 'white' does not imply that there is a coherent or unified 'black' or 'multi-ethnic' justice waiting in the wings."

In asserting that the justice system is racialized, Daly (1994) is interested in how race is socially constructed within and from law and justice practices. “Race is not simply attached to people’s bodies as a natural or stable characteristic. There are other factors such as the terms of the dispute...which provide insights into how practices are racialized in routine ways” (Daly 1994: 461-462). Daly further comments that identifying the justice system as radicalized does not necessarily condemn its existence; it does; however, necessitate an approach which includes a focus on how to challenge the existing forms of racialized practices and ideologies.

Toward an Integrated Perspective

Both the legal realism perspective (also referred to as gap studies) and the post-structuralist perspective provide unique and valuable explorations of law and the practices of lawyers within the criminal justice system. However, these perspectives are typically employed separately in socio-legal theories and criminologies, as illustrated earlier in this chapter, resulting in a divide between research conducted from the micro and macro level. For example, studies from the legal realism perspective address the practices of lawyers from a micro perspective. From this perspective legal policies and the practices of lawyers are examined within the framework of traditional legal ideology and managerial/organizational justice. Research from this perspective has not attended to the role ideologies of race, class and gender play in relation to practices of lawyers and legislative reforms. On the other hand, the post-structuralist perspective takes a macro level approach attending to ideologies of race, class and gender in relation to law. This perspective can be criticized for a lack of theorizing relating directly to the practices of

lawyers and even less regarding the practice of lawyers in relation to legislative reform. Furthermore, this perspective overlooks the micro aspects of legal policy and practice. In other words, post-structuralism has been relatively silent on the issue of how ideologies works within the everyday practice of law. Reflecting on the legal realism and the post-structuralist perspective there is one additional area that is overlooked by both perspectives, the socio-political context that shapes the practice of law.

In order to address these criticisms a theory is required which is capable of linking the perspectives and explaining how the practices of lawyers are conditioned by wider socio-political forces. A starting point for such a theory can be found in the work of Maureen Cain (1994), Christine Harrington (1994) and Elizabeth Comack and Gillian Balfour (2004).

Cain (1994) and Harrington (1994) focus specifically on how the practices of lawyers are racialized as well as how the work of lawyers is influenced by ideologies of class and gender. They go on to state that the role of lawyers in the development of criminal law and criminal legal discourse and ideology has been understudied within the realm of criminology. Cain (1994: 20) refers to the role of lawyers as “symbol traders” stating that, “lawyers know they create laws and are organized to police effectively the discursive mode of this creativity.” In these terms, lawyers are aware of the power they have to shape the ideological form that criminal law takes; this power is however, restricted and monitored through social mechanisms such as local bar associations.

Cain (1994) also refers to lawyers as “conceptive ideologists” whose work includes the construction of discourse. Harrington (1994: 64) adds to this by explaining how “focusing on the discourse of legal work is one way of building an interpretative

framework for studying the meaning and content of law.” Lawyers exercise agency in their work and are thus a central component to the criminal justice system and criminal law. Lawyering and the associated discourse, provides a means for studying how ideologies are translated through law.

Comack and Balfour (2004) also focus on lawyers and legal practice. Borrowing from feminist, critical-race and post-structuralist theories—while using Messerschmidt’s (1997) theory of structured action as an analytical framework for situating gender, race and class within the nexus of individual agency and social structure—their approach situates law as structured action. In defining law as structured action they identify “criminalization as one site of structured action in which lawyers participate in the making of gender, race and class under the social-structural constraints that prevail at given historical points in time” (Comack and Balfour 2004: 21). They also incorporate the traditional principles of justice into this theoretical perspective, identifying how they are employed within the practices of lawyers.

Comack and Balfour (2004) explored how legislative reforms, such as those associated with sexual assault legislation and domestic violence, can be ineffective in producing social change. Similar to the argument made by Erez and Laster (1999) that lawyers often view reforms to the legal system as political measures not intended to affect process, Comack and Balfour highlight the point that:

In the interest of defending their clients, lawyers can strategically subvert and sabotage the intention of law reforms which they believe to be politically motivated. The irony is that while lawyers may resist efforts to use law to realize significant change in the area of women’s inequality, lawyer’s strategies are themselves imbedded with gendered, racialized and class-based stereotypes. (Comack and Balfour 2004: 18)

In these terms, legal reforms do not necessarily equate to changes in the practice of lawyers, rendering the reforms ineffective. Within the criminal justice system lawyers operate within the broader context of ideologies, including those associated with the ‘official version of law’ and those associated with race, class and gender. They also integrate the socio-political context, particularly how ideologies of neo-liberal and neo-conservatism have altered the practice of law in recent times (Comack and Balfour 2004: 22). These ideologies often run in contradiction to legislative reforms. Lawyers—through their agency—are then able to translate these contradictions into “strategies that contest and undermine legal reforms” (Comack and Balfour 2004: 177).

By proposing an integrated perspective that begins by situating lawyering as structured action and encompasses a theoretical premise integrating the legal realism and the post-structuralist perspectives with the addition of the socio-political context as a frame which influences the strategies of lawyers, we can create a more inclusive perspective which captures the micro and macro process that inform the practices of defence lawyers. More specifically, the integrated perspective proposed is comprised of four main dimensions based upon the work of the authors reviewed in this chapter, including the ideas of Blumberg (1967), Sudnow (1965), Verdun-Jones and Tijerino (2004) and Erez and Laster (1999), with the post-structuralist perspective, including the work of Smart (1989, 1992), Naffine (1990), Kline (1994), Jiwani (2002), Razack (2000), Daly (1994), Cain (1994), Harrington (1994) and Comack and Balfour (2004).

The first dimension is based upon the legal realism perspective, focusing upon the parallels and discrepancies between legal practice and the ideals found in written law. This dimension embodies the role of the defence lawyer as defined by traditional legal

ideology—including adversarial principles, due process, the rule of law, the Official Version of Law and professional codes of conduct—and managerial/organizational ideology—stressing speed, efficiency and cost-effective services—as elements that enable (and to a lesser extent constrain) the gaps between policy and practice.

The second dimension incorporates discursive nature of legal practice informed by the post-structuralist perspective. In other words, the way in which the strategies of lawyers are influenced by cultural constructs of race, class and gender. By encompassing the role of ideological constructs such as masculinity, femininity, Indianness and racial neutrality the way these various ideologies are constructed, reproduced and reinforced to justify and maintain the discord and/or parallels between legal policy and the practices of lawyers can be considered.

The third dimension advocates for contextually situated studies examining the broader socio-political context and its subsequent influence on law and the practice of lawyers. This dimension will focus on how neo-liberalism and neo-conservatism have influenced legal policies and altered the practice of law in recent times. Specifically the influence these policies have had on the strategies of lawyers will be examined.

The fourth and final dimension of the theoretical model is the agency of lawyers. Lawyering is one site of structured action where all of the previous dimensions come together capturing the micro and macro process that inform discord and/or parallels between legal policy and the practices.

Concluding Remarks

In order to understand how law works—specifically in relation to the practices of defence lawyers—the divide between the two predominate influences legal realism paradigm (also referred to as gap studies) and the post-structuralist perspective, as well as their omission of the socio-political context, need to be addressed.

A conceptual model based upon the work of Cain (1994), Harrington (1994), Comack and Balfour (2004) is used to develop a integrated perspective that not only encompasses the legal realism paradigm and the post-structuralist perspective but also includes the socio-political context. This synthesis provides a frame for capturing the relationship between multiple ideologies as well as the micro and macro process that influence the agency of lawyers. With this integrated perspective we can begin to explore how and why legislative reforms have or have not affected the practices of defence lawyers.

Chapter Three

Methodology

Current research on the *Gladue* decision has been based exclusively on the analysis of case law (see, for example, Roach and Rudin 2000). This analysis of case law typically focuses on *Gladue* in terms of the sentencing decisions of judges (Roberts et al. 2000; Roach and Rudin 2000). There is little criminological research that addresses the issue of legal practices from the perspective of defence counsel (Roberts et al. 2000; Roberts 1999b). Moreover, the analysis of case law referencing *Gladue* has yielded mixed results about the effects of the decision on legal practices and left unanswered questions as to “how *Gladue* will be implemented in criminal courts across Canada ... and how *Gladue* will be received in the criminal courts” (Roach and Rudin 2000: 383).

The purpose of this study, therefore, is to explore the issue of whether or not the *Gladue* decision has affected the legal practices of criminal defence lawyers. What do defence lawyers consider to be the strengths and weaknesses of the *Gladue* decision? How do defence lawyers understand the *Gladue* decision as it applies in their legal practices with specific reference to the areas of plea negotiations and sentencing submissions? Are the practices of defence lawyers reflective of their responsibilities according to *Gladue*? To what extent are criminal defence lawyers’ usage/or non-usage of *Gladue* affected by traditional legal ideology, bureaucratic goals and ideologies of race, class and gender?

Narratives as a Methodological Approach

One way of exploring the relationship between written law and legal practice has emerged from legal realism. This methodology requires that the “law on the books” be compared to “law in action” (Kessler 1995: 771). It seeks to describe “the fit between the ideals expressed in the law and social practices observed in behavior” (Silbey 1985 cited in Kessler 1995: 771). Studies of lawyers from this perspective describe how the law works on a day-to-day basis, noting the role of discretion in the application or non-application of the law (Vago 2003). The works of Blumberg (1967), Sudnow (1968), Verdun-Jones and Tijerino (2004) and Erez and Laster (1999) employ this approach by describing lawyers’ activities in relation to specific aspects of the criminal justice process and comparing them to their roles as prescribed by the Criminal Code and other pertinent codes of conduct and legislation.

Another methodological approach that has been used in socio-legal research, developed through post-structuralist theories, critical legal studies, feminism and critical race work focuses on law as ideology. Through this perspective, law is seen as part of social life operating within society, not as having an impact upon society (Kessler 1995: 772). Lawyers are seen as participating in the production of ideology and using ideology in their practice (Harrington 1994). Narratives and storytelling are among the major research practices employed through this perspective. They provide a “contextually situated view that illuminates how various legal ideologies are interpreted and employed by those occupying varying locations in social relations, such as those associated with subject positions of class, race, gender, religion, ethnicity and sexual orientation” (Kessler 1995: 772).

Narratives are among the most common form of method employed to examine legal ideology and law in everyday life (Seron and Munger 1996: 195). They are spoken or written accounts of events that are guided by social and institutional norms and situated within particular cultural and institutional dimensions (Sarat and Felstiner 1995). Narratives have been used to demonstrate that power is contingent constructed around rules, expectations and dimensions of social interactions.

Carrol Seron and Fran Munger (1996:196) give an example of a narrative, written by Lucie White (1991), which shows that expected hierarchies of wealth, race, or professional status can be subverted. White (1991 cited in Seron and Munger 1996:196) writes the narrative of an African-American welfare mother who speaks up at a welfare hearing, contrary to her attorney's advice, showing the possibility of autonomous action in spite of the repressive power of the context and the woman's own attorney.

To this extent, narratives permit the reader to live in the writer's world as she thinks about identity, law and action (Williams 1991, Engel, 1991, Ewick and Silbey 1995). As Patricia Ewick and Susan Silbey (1995: 209) note:

As members of an audience we purposefully participate in the production of stories, requesting certain details and ignoring others, validating or rejecting plot, characterization or ending. The strategic use of narrative is nowhere more developed than in legal settings where lawyers, litigators, judges and juries all participate in the telling of tales.

In sum, narratives offer a more than unique individualized accounts. They offer an understanding of the asymmetry, paradoxes and contradictory relations of once familiar experiences across a range of social institutions including the legal system (Seron and Munger 1996: 197). They can capture variations, improvisation and resistance. Furthermore, they are expressions that reflect the dominant culture meaning and power relations embedded in time and place.

Oral narratives were chosen as a research tool for this study as they are able to reveal not only how traditional legal ideology, bureaucratic goals and ideologies of race, class and gender inform lawyers' strategies but also the extent to which lawyers are able to negotiate their roles and strategies within the structural context of the criminal justice system and the broader socio-political context. As such, oral narratives of lawyers—obtained through in-depth semi-structured interviews—are used to explore how the strategies of lawyers either reflect or contradict “law on the books” (Kessler 1995: 771). This methodological approach provides the present study with a way to investigate the role of criminal defence lawyers in light of section 718.2 (e) and *Gladue*.

The Research Process

Data collection mainly consisted of semi-structured interviews with participants. These interviews were then reviewed and analysed according to presupposed and emergent themes. The interview data are then compared to relevant available literature by themes.

Sampling Procedure

Participants were recruited from criminal defence lawyers practicing in Winnipeg, Manitoba (and a few in the area surrounding Winnipeg). Winnipeg provided an important site for conducting this research. Given the large number of cases involving Aboriginal accused entering Manitoba courts, defence counsel in Winnipeg (and in the surrounding areas) have an increased chance of handling cases involving Aboriginal accused, which in turn raises their potential knowledge of and experience with *Gladue*.

To recruit participants, non-probability and snowball sampling was used. Contact information for defence lawyers in and around Winnipeg was obtained through the *Manitoba Directory of Legal Services* (CLEA 2005) and through personal networks. Twenty defence lawyers were initially contacted by letter. These letters outlined the nature of the research and requested the participation of those that were interested (see Appendix A). Follow-up telephone calls were made to defence lawyers a week following the initial mailing of the letters. These phone calls were intended to determine if the defence lawyers had time to read the letter, if they had any questions regarding the research and if they were interested in participating and to establish a time and location for the interview (see Appendix B).

Out of this twenty, twelve defence lawyers agreed to an interview and were interviewed. This sample represents 40 percent of all lawyers in the city of Winnipeg and the surrounding area who primarily practice criminal defence law (30 in total).¹² This number is considered sufficient given a number of factors including the difficulty in finding defence lawyers willing to participate,¹³ the exploratory nature of the research and given that relative saturation was reached.

Relative saturation occurs when “the number of new issues arising has diminished to the point where little new information is gathered” (Babbie and Benaquisto 2002: 336). When the interviewer was able to anticipate, with some degree of accuracy, the issues and viewpoints of the next participant to be interviewed and when the interviews were

¹² The total number of lawyers in the city of Winnipeg and the surrounding area whose primarily practice consists of criminal defence law was calculated by combining the information available in the 2005 *Manitoba Legal Services Directory* with information available from the 2005 *Manitoba White and Yellow Pages*.

¹³ It should also be noted that time, efficiency, research capacity and cost have also played a role in the determination of the sample size.

not yielding any new information, then it was determined that a sufficient number of participants had been interviewed.

Participants

The majority of the twelve participants were male and Caucasian; however, the sample included a limited number of women and Aboriginal peoples. All of the lawyers interviewed practiced criminal law, six practiced strictly criminal—dealing only with criminal law and only those charged with a criminal offence—while the remaining participants practiced primarily in the area of criminal law—occasionally dealing with cases involving other legal matters. Three of the participants were legal aid lawyers, two full-time and one part-time. The remaining nine defence lawyers were private bar lawyers, all of which provided formal representation for legal aid clients.

The length of time the lawyers had been practicing criminal defence ranged from three years to forty-three years, with the mean or average length being twenty-one years. Comparing the length of time that defence lawyers have been practicing with the date section 718.2(e) was codified and the following decision in *R. v. Gladue* reveals that eight of the defence lawyers were practicing before and after section 718.2(e) and *Gladue* while the remaining four defence lawyers have only practiced post section 718.2(e) and *Gladue*. It is also interesting to note that out of the twelve defence lawyers, ten finished their law degree prior to 1996, excluding section 718.2 (e) and/or the *Gladue* decision from their formal legal education at law school. However, the remaining two defence lawyers obtained accreditation after 1996 increasing their potential to be exposed to the section and *Gladue* in a formalized legal educational setting.

Many of the participants had experience with circuit courts in a variety of jurisdictions within Manitoba at some point in their careers, with the exception of three lawyers. All of the lawyers regularly dealt with criminal cases at the Provincial Court level. Many of them had also been involved with cases heard at the Court of Queens Bench (11 lawyers in total) and the Manitoba Court of Appeals (8 lawyers in total). Three of the participants also had experience with cases heard at the Supreme Court of Canada.

An integral part of defence lawyers' practice is their clients. In selecting potential respondents, there was a specific focus on criminal lawyers that deal primarily with adults, based on the distinction in Canadian criminal law between youth (age 12-17) and adults in both criminal legal policy (the YCJA) and proceedings (youth court). Nine of the twelve defence lawyers dealt with both young offenders and adults; however, the majority of their practice was comprised of adults. The other three defence lawyers worked only with adults charged with criminal offences. Eight of the defence lawyers' practices were comprised of mostly male clients, while the remaining four included nearly equal proportions of both male and female clients.

Given that the *Gladue* decision is based on an Aboriginal offender and that it is a benchmark case setting out a distinct consideration for Aboriginal people at sentencing it is important to note what portion of the participants' clients are Aboriginal. All of the participants had Aboriginal clients. Six lawyers estimated that Aboriginal peoples comprised over half of their clients. Additionally, three defence lawyers speculated that between twenty to thirty percent of their clients were Aboriginal.

Data Collection/Interview process

Once a participant had expressed interest in becoming involved in the research, an appointment was set up for the researcher to meet with the participant and conduct an in-person interview. The interviews were conducted over an eight month period initiating in February 2006 and ending in September 2006. The interviews were conducted in the participant's office given defence lawyers' busy schedules. At the beginning of each interview, the participants were informed of the nature of the study, issues of confidentiality and anonymity were addressed and a thank you was extended to the participants for agreeing to the interview. The participants were then presented with the consent form (See Appendix C) and asked to read it over and sign it, once they agreed to its contents and the voluntary nature of their participation. The participants were presented with a copy of the consent form for their records, which contained the contact information of the research/interviewer and other relevant contact information.

The interview consisted of semi-structured questions categorized into various themes (See Appendix D). First, defence lawyers were asked general socio-demographic questions and to describe the nature of their practice. Following this, defence lawyers were then asked some general questions about the *Gladue* decision plus questions regarding their use of the *Gladue* decision during plea negotiations and sentencing submissions. This was followed by specific questions designed to elicit detailed information from defence lawyers who have had some experience with the decision. The interview was concluded with additional questions about defence lawyers' opinions about what they perceive to be the positive and negative outcomes of the *Gladue* decision.

A tape recorder was used to record the participant's responses throughout the interview process. Once the interview was complete, the researcher thanked the participants for their participation and insight. At this point, the researcher also reiterated that the results would be available to the participants at their request if they chose to indicate so on the consent form. Requests could also be made directly to the researcher either by phone or through e-mail.

Data Analysis

Analysis of the interviews began once all the interviews were completed and transcribed. The process of conducting the analysis involved reading and coding the data several times. The data were first categorized according to the main themes regarding defence lawyers and the nature of their practice, their comments on the *Gladue* decision and their use or non-use of the *Gladue* decision in their strategies and approach to plea negotiations and sentencing submissions, specific details of their experiences with the *Gladue* decision and their opinions on the positive and negative outcomes of the *Gladue* decision. Within these categories the data collected from each of the participants were compared and the predominate themes, commonalties and differences began to emerge.

These findings were then analyzed with regards to how traditional legal ideology, managerial/organizational justice and ideological constructs of race, class and gender were used to justify and maintain the discord and/or parallels between the *Gladue* decision and the practices of defence lawyers. These data were then compared to related literature and case.

Ethical Considerations

An Ethics Protocol package for the Psychology/Sociology Research Board (REB) was prepared before the data collection phase. Included in the protocol package was a submission form, a study information sheet and a consent form (see Appendix C). The Psychology/Sociology Research Board (REB) approved the research in January 2006.

Given that the topic and the subjects were not considered sensitive, there was no inherent safety risks that needed to be addressed. However, confidentiality and anonymity were important ethical considerations. In interviewing defence lawyers these considerations were extended to include professional codes of conduct relating to client-lawyer confidentiality. As such, defence lawyers were not asked any questions that pertained to specific cases or clients. Instead, defence lawyers were only asked questions that related to their practice in general.

In order to protect and respect the privacy of the participants when citing them in the presentation of the findings any and all identifying characteristics were changed or omitted. For example, the sex of the lawyers is not revealed when discussing their responses and all participants are referred to using male pronouns. To further ensure the anonymity of the participants, each lawyer was assigned a random numerical representation for the transcription and presentation of responses in the findings sections (ie. D1 - D12).

Concluding Remarks

This exploratory study provides new insight into the practices of defence lawyers with a specific focus on the effects of the *Gladue* decision. It also provides a forum in which defence lawyers can express their opinions about the *Gladue* decision and make suggestions for improvements within the criminal justice system. Furthermore, this research contributes towards unraveling how traditional legal ideology, structural constraints of bureaucratic organizations, predominant ideological constructs of race and socio-political context influence the practice and strategies of lawyers.

Chapter Four

Defence Lawyers' Conceptualization of Legal issues and the Role of Ideology and Legal Factors

Despite the fact that section 718.2 (e) has been part of the Criminal Code since 1996 and that the Supreme Court, in the case of *R. v. Gladue* (1999), affirmed its remedial nature, the vast majority of the defence lawyers interviewed for this study were not using it. Two of the twelve defence lawyers state that they have never referred to the section and/or *Gladue* in their practice. Eight indicate utilizing the section and/or *Gladue* only minimally. Only two of the lawyers interviewed state that they refer to section 718.2 (e) and/or *Gladue* on a regular basis. This chapter focuses on those defence lawyers who do not refer to the section 718.2 (e) and/or *Gladue* on a regular basis and explores how lawyers' beliefs, values, perceptions and interpretations, informed by their role, have negatively influenced their integration of the section and *Gladue*.

The majority of the defence lawyers noted that the main objective of section 718.2 (e), to reduce Aboriginal over-incarceration through sentencing legislation—although well intentioned—overlooks the influence of other larger social factors. For some, perceptions of the criminal justice system as individualized—and therefore unable to address these larger societal factors—is offered as reasoning for why their sentencing practices did not change as a result of the legislation. Other lawyers explained that the obligation placed upon them by the Supreme Court in *Gladue*—to assist the court in providing a full picture of the case—is not only ambiguous but can, in some situations, contradict their role as advocates for their clients.

Furthermore, the comments of some defence lawyers revealed that ideologies related to equality and race negatively influence their use of the section and *Gladue*. Other defence lawyers dismissed the need to refer to the section in their cases by interpreting *Gladue* (1999) as a restatement of preexisting law. However, most defence lawyers noted that the priority given to individualized legal factors within the criminal justice system—including the seriousness of the offence, the offender’s prior criminal record and a lack of remorse—overrides their consideration of the section and *Gladue*.

Aboriginal Over-Incarceration: A Social Issue, Not a Legal Issue

The defence lawyers’ interpretations of section 718.2 (e) and *Gladue* provide insight into why these sentencing initiatives have not become a major part of their practice. The majority of defence lawyers (ten out of the twelve) identified that the main objective of *Gladue* was to reduce or at least recognize the disproportionate number of Aboriginal peoples in Canadian prisons. D1 explained that the main objective of *Gladue* was to “decriminalize” Aboriginal people, noting that one way in which this can occur is through the decreased use of incarceration. D7 noted that the main objective was “flexibility,” referring to sentencing and alternatives to incarceration as a means to reduce Aboriginal over-incarceration. D3 and D5 saw the main objective as tied to the recognition of the over-representation of Aboriginal people in Canadian prisons, whereas the remaining six defence lawyers specifically referred to the main objective in terms of responding to Aboriginal over-incarceration.

However, comments made by defence lawyers also revealed their skepticism and concerns in addressing the issue of Aboriginal over-incarceration through the criminal

justice system, especially at the sentencing stage. Primarily, Aboriginal over-incarceration was understood as a very complex social issue that cannot be fixed exclusively within the criminal justice system:

We want an easy fix because it is easy. People don't want to think there are multiple issues and levels that we have to address. You know it would be easy to say that this is where it should be addressed [but] the reality is that that is a really complex thing. The issues facing Aboriginal people need to be addressed on a larger scale outside the criminal justice system—Aboriginal people living in a non-traditional yet non-modern society, poverty, alcoholism, violence, drug abuse and residential schools. *Gladue* is a good place to start but it hasn't fixed the issue of Aboriginal over-incarceration. (D12)

Well it's good that the issue of Aboriginal over- incarceration is being addressed at sentencing [but] more needs to be done. We need to look beyond sentencing. (D1)

I think that it is a good start. Yeah, I think that is one of the areas you start with but there are others, like education. (D2)

Well, the criminal justice system is one area, but obviously it doesn't simply have to be within the criminal justice system. It can also be addressed elsewhere through the development of programs that help eliminate or decrease the problems facing Aboriginal people. (D9)

Comments by other lawyers reflected similar sentiments and concerns. Although in *Gladue* the Court recognizes social issues such as “poverty, substance abuse, lack of education and a lack of employment opportunities” as contributing factors to the over-incarceration of Aboriginal peoples, it also specifically focuses on sentencing as a means to reduce it (*Gladue* 1999: 19). It is this last point, the specific focus on sentencing, which was a concern for these defence lawyers.

Criminologists and sociologists have expressed similar concerns, cautioning against addressing Aboriginal over-incarceration exclusively through sentencing reform within the criminal justice system. They draw attention to the limited effect these reforms have in dealing with the underlying causes of Aboriginal offending (LaPrairie

1995; Stenning and Roberts 2001; Haslip 2000). Phillip Stenning and Julian Roberts (2001: 144) explain that research clearly recognizes that other factors come into play, “particularly factors outside the criminal justice system such as poverty, unemployment, higher proportion of youth, alcohol abuse, etc.” These factors are considered as “key factors leading to Aboriginal over-incarceration.”

All of the lawyers who noted concerns in addressing the issue of Aboriginal over-incarceration through the criminal justice system also mentioned a greater need for mechanisms outside the criminal justice system that address these underlying social factors. In their view, crime prevention plays an essential role. D3’s comments illustrated this point:

In relation to over-incarceration and *Gladue*’s focus on the sentencing stage, there should be more of a focus on preventing involvement in criminal activity. (D3)

These lawyers explained that crime prevention lies outside the criminal justice system and requires government to focus on and financially invest in a variety of social programs and policies directed at improving the lives of Aboriginal peoples and their communities (for instance, through education, health care, housing, community development, drug, alcohol and abuse counseling and recreation programming for youth). Their statements support arguments made by Susan Haslip (2000: 4), who maintained that although “sentencing plays an integral role in remedying the injustice that has been and continues to be, wrought against Canada’s Aboriginal peoples, it cannot remove the causes of Aboriginal offending and the greater problem of Aboriginal alienation from the criminal justice system.”

Two of the lawyers (D8 and D4) expressed a concern that by focusing on the sentencing stage, attention is directed away from the underlying social factors that lead to Aboriginal people becoming involved with the criminal justice system, thereby leaving these factors unaddressed:

People think that if the judge gives the right sentence the problems of society are solved. The thing is, it is too late by that point, the crime has already happened, it's over. What you do at the sentencing stage will not affect crime. ... Obviously they need to look at what people are doing here and why they are getting in trouble in the first place and help them—help them get better counseling, better education, better everything. A lot less would be in the system and you could cut down on incarceration that way. The Canadian criminal justice system is not here to resolve society's problems. It deals with problems once they happen. By eradicating those issues early on with proper counseling, education, better health care and all of those things will put them [Aboriginal peoples] in a better position. (D8)

You can't rectify the issue of Aboriginal over-incarceration and all of its social causes through sentencing. If those issues are so recognizable that we are prepared to put that section into the Criminal Code, why are we not putting them into the social milieu and out of the Criminal Code? If they are saying that those systems are so bad that they generate a special kind of offender that should be given a special kind of consideration, why are they not being addressed? Justice is just a dumping ground for all of society's problems. It overlooks the factors that lead to Aboriginal over-incarceration. (D4)

D8's commented that "the Canadian criminal justice system is not here to resolve society's problems" and D4's comment regarding the criminal justice system as a "dumping ground" were in stark contrast to Haslip's (2000: 4) position that sentencing can play an "integral role" in remedying injustice against Aboriginal peoples. These defence lawyers' reservations can be connected to the stated purposes and objectives of sentencing within the criminal justice system.

Sentencing is one of the final steps in the criminal justice system. It is defined as "the judicial determination of a legal sanction to be imposed on a person found guilty of an offence" (Canadian Sentencing Commission 1987: 153). Section 718 states that the

“fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing sanctions that have one or more of the following objectives.” These objectives represent the interest of the state and include separation, deterrence and denunciation as well as rehabilitation, which represent the interest of the individual offender. According to Roberts and Hirsch (1999: 52-3) there is an inherent contradiction between these objectives. Is sentencing to be concerned with crime prevention, looking ahead to crimes that might be prevented, or imposing proportionate punishments, looking back at the seriousness of the crimes already committed? The defence lawyers’ comments on crime prevention as a function beyond that of sentencing and those expressing a view regarding the inability of sentencing to remedy injustice reflect a focus on the latter.

Restorative justice—in terms of providing reparations for harm done to victims or to the community and promoting a sense of responsibility in the offender as to the harms done to victims and the community—was added to these principles in 1996. Nevertheless, D1 maintained that this “restorative approach to sentencing has not been fully realized,” and states that he would “like to see a more holistic view of justice, one which includes the offender, the victim and the community as opposed to what currently exists, “a concept of sentencing that focuses on the individual accused.” D7’s comments also highlighted the individualized nature of the criminal justice system.

The criminal justice system is an individual process that centers on the individual. Someone once said something to the effect that “the criminal law is a very blunt instrument to be doing delicate societal surgery with” and it is. Criminal law is not about society in general except to help society function. The criminal law is basically about the accused and what we do to keep him or her from doing it again. And it’s not, nor should it be, about all those other things. [I’m] not

saying that the situation of Aboriginal peoples is not important. It is important but there are other ways of dealing with it. (D7)

D7's comments reflected a perception of the criminal justice system as a separate entity from society based on legally-defined, individualized factors. His comments parallel what Smart (1989: 10-11) refers to as the "ideal of law" in which the law acts outside of societal boundaries and imposes itself upon the individuals within. It is "a thing apart that can reflect upon a world from which it is divorced" (Smart 1989: 11). The law, according to this ideal, is abstracted from the society in which it operates. Furthermore, this ideal is also designed to protect individual rights. These rights are based on individual material and social success, not group dependency and benefit (Naffine 1990). D11 explained that "for most defences you are dealing with issues that are related to the offender as a person. Once someone commits a crime it is not unusual that it is considered a personal matter as opposed to an Aboriginal community matter." Such comments suggest that this separate, individualized legal system is an inappropriate mechanism with which to address the larger social issues that affect the lives of Aboriginal peoples. For D10, this has resulted in an interpretation of the section offered in *Gladue* that is nothing more than an ivory tower decision:

It is all about politics. Section 718.2 (e) creates the illusion that Parliament cares about the plight of Aboriginal people. It is really not a change in the law. In terms of the Supreme Court's goal, if I am correct in analyzing what the goal is—to provide guidelines—it has been partially met in that there is some guidance. But the decision is very general in nature and it doesn't really, you know, flush out in a practical, real-world way what things are going to happen. It doesn't do that in a detailed way. There are still a lot of unresolved issues from what the decision says. (D10)

Section 718.2 (e) was understood by D10 as only a symbolic political gesture, as *Gladue* only provides minimal guidance. He noted that this is not enough to affect legal

procedures and practice. Similarly, research on zero-tolerance domestic violence policies by Comack and Balfour (2004) and victim impact statements by Erez and Laster (1999) also revealed that lawyers view reforms to the legal system as political measures not intended to affect the process.

Other defence lawyers perceived the section and subsequently *Gladue* in a similar manner noting that they are not creating any changes on the ground level. D3, D5, D7, D8 and D9 all note that the introduction of the section and the Court's decision in *Gladue* really did not add anything new to the actual practice of sentencing. For example, D7 and D8 explained that *Gladue* is nothing more than a restatement of pre-existing sentencing considerations:

In my own opinion, the things that it [*Gladue*] talks about are there for people to argue anyhow. For every criminal case, when you are talking about sentencing you are talking about individuals, not about (pause). I mean, yes, there are issues of general deterrence—to the public—and denunciation, but you are dealing with each individual accused person with their own history, their own background and their own circumstances. So I take the view that what is said in *Gladue* was always there in its own way. (D7)

I really don't know if it adds anything or I wonder if it changes anything in particular. In my view justice is very individualized anyway. So whoever the accused was—his background, what he went through, the opportunities he had, why he got to this place and everything else—is always taken into consideration when trying to figure out the proper punishment. (D8)

As Haslip notes (2000: 4) “sentencing remains an individual process and at sentencing a court is required to strive for an appropriate sentence for the particular accused and the particular offence committed.” These defence lawyers were using this individualized notion of sentencing to justifying why sentencing practices did not change as a result of the section and/or *Gladue*. Furthermore, the lawyers were supporting the

position expressed by Stenning and Roberts (2001: 166-67) that “those last nine words in paragraph 718.2 (e) and the Supreme Court’s effort to interpret and apply them to the sentencing of Aboriginal offenders, can rightly be seen as offering little more than an empty promise to Aboriginal people.”

Defence lawyers’ perception of section 718.2 (e) and *Gladue* as a social and political issue, not as a legal issue affecting their practice, is not surprising given their views on the role of defence lawyers within the criminal justice system. Through the interviews, it becomes apparent that most defence lawyers did not see their role as that of a “crime fighter,” “social worker” or “sociologist.” As D3 noted, “preventing the involvement in criminal activity is for sociologists not lawyers.” Their role is not to tackle the underlying causes of crime that factor into the over-incarceration of Aboriginal peoples. D2 noted that defence lawyers are to “zealously advocate” for their client’s position. At sentencing, this entails obtaining the lightest sentence possible for the offender. How does this role fit with the responsibility placed on defence lawyers by the section and *Gladue*?

According to the Supreme Court’s interpretation of section 718.2 (e) in *Gladue*, defence lawyers are obligated to present relevant information about their client to the court. More specifically, this obligation requires defence lawyers to assist the court in providing a full picture of the case, including the circumstances of the defendant and the offence as well as possible alternatives to incarceration (Turpel-Lafond 1999). However, most defence lawyers, with the exception of two, did not see this as an obligation but an opportunity. As one lawyer explained:

It arms defence lawyers with an opportunity to bring in practical evidence that would otherwise be impractical. At least we have, you know, an argument with more submitability. (D10)

D10 goes on to explain that there is still some confusion related to what is considered practical and impractical evidence:

However, it doesn't say exactly what you have to do and what you don't. *Gladue* doesn't spell out, okay, these are the types of things you have to consider, here is the line determining what you can and can't ask the judge to take judicial notice of. (D10)

In terms of this notion that the section and *Gladue* provide an opportunity, seven of the defence lawyers noted that they will bring in the section and/or *Gladue* only in instances where they believe that it is appropriate and beneficial to their client in a particular case.

For example D12 noted that:

Generally, you are going to ask for these considerations where it is beneficial to your client. That is your job as a defence lawyer, to help these people as much as you can. (D12)

Another defence lawyer expanded on when it would be beneficial to bring in the section and *Gladue*, stating that, "a good lawyer would bring them in because they are trying to avoid jail" (D8). Similarly, D4 noted: "*Gladue* can be used as a tool in a situation where it will help you better represent your client."

In *Gladue* (1999), the Court specifically requires that in sentencing an Aboriginal offender, considerations should be made for sanctions other than imprisonment. According to Roberts (2001: 1167), a central focus of sentencing submissions—from the defence perspective—"is on the question of whether a conditional sentence is appropriate and if so, the nature of the optional conditions that should be imposed on the offender." In making this determination, defence lawyers are required to do more than merely refer to precedents and make superficial speeches. Defence lawyers must be aware of the

programs available and the likelihood that their clients will comply with the conditions of their sentence, as well as how a conditional sentence will fit with the requirements of the purpose and principles of sentencing (Roberts 2001: 1167). However, the lawyers interviewed indicated that a myriad of factors, including legal ideology as well as procedural and structural features of the criminal justice system, influence this determination.

The Role of Ideology:

Equality, Neutrality and Particular Constructs of 'Indian-ness'

Defence lawyers work within a criminal justice system that is based on traditional legal ideology. According to Lacey and Wells (1998) the rule of law maintains that the law itself is fair, consistent and generally applicable. Law also declares equality for all who appear before it (Lacey and Wells 1998; Naffine 1990). Naffine (1990) refers to this traditional ideology as the "Official Version of Law."

Equality and Claims of Reverse Discrimination

Section 718.2 (e) and *Gladue*, in making specific reference to consideration of the unique circumstances of Aboriginal offenders, was seen by some defence lawyers as a contradiction to this traditional legal ideology and its emphasis on impartiality and equality. This contradiction was interpreted by these lawyers as a form of reverse discrimination that goes against the traditional legal ideology of equality. In other words, some defence lawyers believed that by giving Aboriginal offenders special consideration at sentencing, the government is essentially imposing inequality in a system where none

previously existed. D4's comments regarding the implication of section 718.2 (e) and *Gladue* illustrate this point:

There is an imbalance of justice. I mean, I am not so sure that I agree with the section or ever have. I mean, I understand the reasons behind it but when you look at it, is it fair to my client who is non-Aboriginal to face the judge with me as counsel and not have that protection or that advantage allotted to my Aboriginal clients, who would perhaps have their sentences reduced as a result? Basically, are we saying that this person should be treated differently under this section because he is Aboriginal? Well I don't know the answer to that (pause) I mean, was that the purpose of the section? To stand up and say, sentence my client more leniently because he is Aboriginal? (D4)

D4 draws comparisons between section 718.2 (e), *Gladue* and other government equity programs and policies with regard to the issue of reverse discrimination.

[*Gladue*] is almost like your employment equity programs designed to give 'special consideration' to handicaps, minorities and other special interest groups. You get 25 marks on the score sheet for being a certain type of individual. Isn't that reverse discrimination? Whatever happened to the best person for the job? I've never used this section. I would never see the benefit in it and I have represented all classes and races of people. (D4)

Locating D4's interpretation of section 718.2 (e) and *Gladue* as reverse discrimination within the context of the traditional legal ideology of law allows us to better understand the context in which defence lawyers dismiss the legitimacy of section 718 .2 (e) and *Gladue* within the criminal justice system and its relevance for their practice. D8 and D10 also maintained that section 718.2 (e) and *Gladue* have the effect of promoting inequality. D8 discussed this issue in relation to when the section was first introduced:

I remember when that particular subsection 2(e) came out. None of us could really understand it. We were just blown away. We just sat around thinking that it was really more of an insult to Aboriginal peoples in a way. What does this mean? That Aboriginal persons should, in the very same case, get less than someone else? Is this the right message to be sending out there, you guys should

always get less? You have to really sort of look at this. Nobody could really understand it.

I remember that it was actually hard to go to court and say that this guy who killed his wife of three years, isn't white and lives over there and everything, should get less. I don't know. I just have trouble arguing it. It was very controversial at the time. (D8)

D10's comments emphasized the difficulty in not only understanding section 718.2 (e) and *Gladue* but also applying it within the context of a criminal justice system based on equality:

It can be seen as saying I'm more equal than others. While John Smith should maybe get a year in jail for this, I'm Aboriginal, I'm more equal than John Smith, so I should get six months instead. It is very tricky to argue that your client is more equal than others or that they should get a break just because they belong to that class of persons. (D10)

These lawyers maintained that the section and *Gladue* do not fit with the criminal justice system's ideology of "equality." By making specific reference to the unique circumstances of Aboriginal peoples, some defence lawyers claimed section 718.2 (e) and *Gladue* amount to a form of reverse discrimination—declaring Aboriginal offenders as more equal than other offenders. These defence lawyers' views can be seen as resting upon law's Official Version as an impartial system which declares equality to all who appear before it. From this perspective, the section and *Gladue* are an imposition upon the criminal justice system; in essence, creating inequality in a system where none previously existed.

Stenning and Roberts (2001: 161) note that *Gladue* was in fact not persuasive in arguing against claims of discrimination in favour of Aboriginal offenders and, therefore, against non-Aboriginal offenders. The inability of *Gladue* to persuade defence lawyers that the section does not mandate better treatment for Aboriginal offenders is clearly

demonstrated by their comments. As shown, these lawyers were not recognizing or accepting that the objective of the section and *Gladue* is to treat Aboriginal offenders fairly by taking into account their differences and that true equality cannot always be achieved by similar treatment or an equality of sameness. This makes arguments for either the section or *Gladue* problematic, resulting in their limited use. Nevertheless, the practices of defence lawyers were not only framed by notions of equality and impartiality and corresponding claims of reverse discrimination but also by particular presumptions about Aboriginal peoples.

Particular Constructs of 'Indian-ness' (Rural vs. Urban)

Gladue defines Aboriginal peoples in a very inclusive manner, emphasizing that section 718.2 (e) applies to all Aboriginal persons, including those living in an urban area. However, particular constructs of urban and rural Aboriginal peoples continue to prevail within the criminal justice system, limiting the use of section 718.2 (e) and *Gladue* by some defence lawyers. As D12 remarked:

There is also bias, whether it is right or wrong. Judges, Crowns and even defence lawyers tend to clue into *Gladue* more if the accused is from a rural Aboriginal area more so than if the accused is an urban Aboriginal. Is that right or wrong? I don't know. I think *Gladue* is meant to apply to all Aboriginals when you read it but for some reason some people seem to clue into it more if they are from a reserve or if they are really into their Aboriginal culture. Aboriginal people living in urban areas have assimilated in many ways and therefore *Gladue* is not as applicable. Where the Aboriginal person grew up is always a consideration. If it was in an Aboriginal community you have a strong *Gladue* case. If not your case is not as strong. (D12)

According to Haslip (2000: 15), "Bias exists among the judiciary and other members of the legal community and society at large, that Aboriginal peoples living off reserve are

not connected to their Aboriginal communities and so do not deserve recognition as Aboriginal peoples. This position; however, is largely owing to not the fault of their own, but rather is attributed to the federal government's historic and ongoing interference in the lives of Canada's Aboriginal Peoples.”

In some instances, defence lawyers stated that *Gladue* is easier to argue for Aboriginal people living on a reserve as they are perceived to maintain more of their culture and it is easier to show that they are in fact Aboriginal.

If you have an Aboriginal who was born in the heart of the city like the rest of us and didn't really experience all of those things, it is pretty hard to argue that he should qualify. If they are born on a reserve and have gone through the typical cultural experience, it would be a classic example where *Gladue* would apply more. I don't think it is enough just that they are Aboriginal. I think that you have to show a specific type of background, you know. Although, if you look at the case it says that you don't necessarily have to have been on a reserve, it's possible to have this experience elsewhere too. I don't think a judge would distinguish for an Aboriginal who grew up just like the rest of us. (D8)

D11 gave an example of a case in which the court had suggested a *Gladue* report be prepared. He explained that he went along with the court's suggestion in hopes that this report would be of benefit to his client. However, given that his client had moved into the city at a very young age and had maintained no real connection with his home reserve or his Aboriginal background, there was nothing to advise the court on. D5 also noted that *Gladue* doesn't apply to a lot of his clients based on the fact that a number of his Aboriginal clients have been “urbanized for a long period of time and they are not interested in or involved in their culture/heritage.” According to D5, “using *Gladue* would not be successful in these situations.”

Kline (1994) found similar racialized ideologies of what she referred to as “static Indian-ness” in her examination of child welfare and land rights cases. “There is a

tendency to assume that Aboriginals living in an urban environment are not “real Indians” and thus are unable to impart Aboriginal culture and identity to their children, this in turn, is used to support the removal and placement of children” (Kline 1994: 466). In a similar manner, these defence lawyers dismissed the validity of *Gladue* and section 718.2 (e) on the basis that many of their clients do not fit the racialized ideologies of “static Indian-ness” adopted by the criminal justice system. As D9 noted:

There are obviously the ideal situations where you want to make sure the court is aware of every nuance, every specific detail, in terms of that particular offender, their background, their reserve, because it can only help in advancing your position. However, these situations are few and far between based on my own personal practice. (D9)

Other defence lawyers also referred to this “ideal situation”—or what one lawyer (D8) referred to as the “classic *Gladue* example”—in which cases involving rural Aboriginal people were considered as more suitable for raising consideration under section 718.2 (e). They too noted that these are rare cases within their practice. This is not unexpected given that the Solicitor General of Canada (quoted in Hallett 2006: 52) estimates that “70% of all Aboriginal peoples sentenced to penitentiaries are either residents of urban (non-reserve) communities, or committed their offences off reserve.” It is; however, concerning that by adhering to this racialized notion of “static Indian-ness,” the section and *Gladue* are limited to only 30 percent of all Aboriginal offenders.

The ‘Erasure of Race’ in Legal Practice

The majority of defence lawyers (eight of the twelve) indicated that they adopted a race-neutral approach to their clients and their cases, maintaining that within the criminal

justice system all clients should be treated equally regardless of race, ethnicity and class.

As D4 noted:

[B]asically there are cases where I don't know whether people are Aboriginal or not and I don't ask them. It is no concern of mine. Whoever comes through the door, you act for them. I don't really ask. (D4)

As a result, these lawyers did not see their client's Aboriginality as a main consideration or focus in a case, despite section 718.2 (e) and *Gladue* claims for this recognition.

In *Gladue*, the Court made specific reference to the unique circumstances of Aboriginal offenders by referring to the significant percentage of Aboriginal peoples affected by low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation, as well as, substance abuse in the community, poverty, overt racism and family/community breakdown. However, comments by several of the defence lawyers' illustrated that they believed these circumstances to be a consideration for everyone at sentencing and are in fact not unique to Aboriginal offenders:

The consideration must continue to be a fit sentence for this accused, this offence and this community—community meaning personal background, community and family. I really believe that every sentence is decided based upon its own individual facts and background. I think that is true whether you are Native or not. (D7)

The section is there but I think that if my client is going to get a break, he is going to get a break whether he is Aboriginal or not. For example, I had a drunk driving causing bodily harm case where the accused was an Aboriginal. He attended a program and completed it. That was a great benefit for him in court when I spoke to sentence but it would be a benefit for anyone, Aboriginal or non-Aboriginal. (D5)

It's not just *Gladue*, 718.2 (e) and the Aboriginals. Any criminal, any background, is always taken into account. (D3)

What difference would that make if an offender was Aboriginal or non-Aboriginal? If mitigating circumstances exist they are presented at sentencing. (D4)

I see Aboriginal people sometimes being treated more lenient because they are disadvantaged. But then I see other people who are not Aboriginal sometimes being treated more lenient because they are disadvantaged. In this sense I just don't see *Gladue* having much of an impact. (D11)

This *Gladue* stuff is not anything new and you don't have to be Aboriginal or an Aboriginal community to be able to have a say. The courts have always taken into consideration the views and values of the community whether the offender was Aboriginal or non-Aboriginal. (D10)

In my view justice is very individualized anyway. So whoever the accused was, his background, what he went through, the opportunities he had and everything else is used to determine a proper punishment. Mitigating factors are a consideration for anyone, white or otherwise. (D8)

In support of this claim that these circumstances are considered for all offenders, defence lawyers referred to the court's pre-existing recognition of mitigating factors at sentencing. Under section 726 of the Criminal Code defence lawyers are allowed to bring mitigating factors to the attention of the judge through sentencing submissions or through a "speak to sentence." The purpose of bringing in these factors, from the perspective of the defence, is to obtain the least punitive sentence for the offender. According to Jennie Abell and Elizabeth Sheehy (1996: 138), mitigating factors include:

the nature of the offence, the harm caused by the offence, any mitigating circumstances surrounding the offence (for example intoxication, the influence of other people or stresses and the motivation of the accused), the accused's attitude towards the offence and/or victim (have any efforts at reparation been made?), the prospect of rehabilitation (past record of the accused, employment, education, family situation), the need for specific or general deterrence, the impact of the offence on the victim, the legislative range of sentences and judicial patterns of sentencing for similar offences.

These mitigating factors; however, are devoid of any specific acknowledgment of racial and ethnic context. By relying upon them, as opposed to *Gladue's* claims for the

recognition of particular systemic and background factors of Aboriginal people in general, defence lawyers dismissed their client's Aboriginality as a factor, thereby maintaining a "race neutral" approach to their cases at sentencing.

Defence lawyers' ability to maintain a "race neutral" approach is supported by the role of the defence lawyer as enshrined in the *Charter of Rights and Freedoms*. According to the Charter, the defence lawyer is to represent the legal rights of the accused at all stages of the criminal justice process, ensuring that individuals are not convicted improperly (Comack and Balfour 2004). Furthermore, according to section 15.1 of the Charter, "every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, mental or physical disability." These rights extend to and include the representation of accused persons by defence lawyers.

Consider the following statement: "Perception of discrimination and other forms of unfairness—however unintended—are simply incompatible with the justice system's notion of integrity" (Commission on Systemic Racism in the Ontario Criminal Justice System 1998: 185). Maintaining confidence in this ideology of equality and neutrality is essential to the maintenance and integrity of the criminal justice system itself (Commission on Systemic Racism in the Ontario Criminal Justice System 1998). Defence lawyers, as members of the criminal justice system, have a strong interest in upholding this ideology as it is strongly connected to their professional interests, which they are defined by and identify with. In adopting strategies which focus on the circumstances of their clients in a neutral manner, absent of recognition for the unique

circumstances of Aboriginal offenders, defence lawyers avoid perceptions of discrimination and again support the criminal justice system's ideology of equality and neutrality.

Jiwani (2002) outlines how law, through the traditional ideology of equality, blindness, impartiality and the reasonable person, is able to justify its neglect of factors such as race, class and gender within its discourse. According to Jiwani, the concepts of race and racism are often left out of judicial discourse and when they are brought in they are minimized, ignoring their importance in establishing the social context of a case and those involved. Furthermore, Daly (2004: 450) notes that this ignorance of race or the adoption of "race-neutrality" can promote new forms of racial oppression. The concern is that by adopting "race neutral" strategies, defence lawyers are dismissing the relevance of the unique and different circumstances of Aboriginal offenders as per *Gladue*. The adoption of a "race neutral" approach renders the section and *Gladue* as irrelevant as they go against legal ideologies of equality and neutrality.

The Focus on Legal Factors

At sentencing, the criminal justice system prioritizes the Criminal Code offence the offender is charged with and the offender's prior record, along with other mitigating and/or aggravating circumstances found in a case. Defence lawyers' comments indicated that the priority given to these individualized legal factors within the criminal justice system also had implications for their use of the section and *Gladue*.

The problem is that sentencing is based on the offence and the person's background i.e. their prior criminal record. If they have an extensive criminal record and you are dealing with a serious offence, a lawyer standing up and saying there are too many Aboriginals in incarceration is not going to get the

lawyer anywhere. It still boils down to, whether Aboriginal or non-Aboriginal, it really depends on the background of the offender individual, the circumstances of the offender and the circumstances of the offence. (D5)

Seriousness of the Offence

Given the criminal justice system's emphasis on the seriousness of the offence as one of the primary factors in determining a fit sentence, it is not surprising that defence lawyers debate how *Gladue* defines section 718.2 (e) in relation to serious and non-serious offences. According to *Gladue* (1999: 22), "In some circumstances (even when an offence is considered serious) the length of the sentence of an Aboriginal offender may be less and in others the same as that of any other offender. Generally the more violent and serious the offence the more likely it is that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same." D9 explained his interpretation of section 718.2 (e) through *Gladue* and his courtroom experience:

It doesn't automatically suggest that because the person is Aboriginal that the sentence is going to be reduced by this amount of time. It doesn't work in that fashion. It depends on the seriousness of the case. The more serious and the more violent the offence, the more likely that the sentence for an Aboriginal and non-Aboriginal will be the same. I believe that that is specifically enunciated in the *Gladue* decision. (D9)

Following these same lines, other defence lawyers explained that 718.2 (e) and *Gladue* are not beneficial arguments to make in cases involving serious offences.

In terms of Aboriginal offenders and non-Aboriginal offenders when it comes to serious offences there is no distinction anyway so *Gladue* is not even a factor. (D5)

D2 and D4 gave examples of an Aboriginal person charged with murder to further illustrate the point. D2 explained that although the judge is obligated to take into consideration section 718.2 (e) and *Gladue*, it is very unlikely that bringing them in at

sentencing in a murder case will result in a reduced sentence due to the serious nature of the offence. D4 noted that when it comes to a violent crime such as first-degree murder, the offence is the most important factor in determining your sentence: “Aboriginal or not, I don’t care who you are—it’s an automatic 25 years without parole. There is no distinction.” D8 also noted that the section and *Gladue* are more for less serious offences, stating that when it comes to cases involving charges of murder or manslaughter it is really not a consideration. Only two defence lawyers noted that section 718.2 (e) and *Gladue* are valid arguments to make in cases that are deemed serious, despite the limited effect it may have on the outcome of the offender’s sentence.

I’d rather devote my time to people who are charged with major crimes which require that sort of input, to sort of present a composite picture to the court. Well, that is my philosophy. A lot of lawyers don’t give the court enough information. Although *Gladue* demonstrates is that it is not a get-out-of-jail-free card with violent crimes, be that as it may, I have still used it in violent crimes. I mean, even *Gladue* addresses that issue, stating that there is not going to be that much of a difference. Still, it’s something that should be taken into account. More information needs to be gathered in more serious offences because the consequences are worse for the defendant. (D1)

I have used it in what is considered a violent crime, impaired driving causing bodily harm. However, in those cases the judge did not see it as a factor he would take into account in sentencing. (D6)

Although there is not a complete agreement among the lawyers as to when *Gladue* and the section should be argued, the majority do not argue for the application of section 718.2 (e) and *Gladue* in cases where the offences are deemed serious.

These findings support the argument that the *Gladue* decision limits the application of section 718.2 (e) to non-serious offences (Anand 2000; Pelletier 2001). Recent decisions such as *R. v. Flett* (2005) and the Saskatchewan Court of Appeal in *R. v. Cappo* (2005) also state that for serious offences, the sentence will not vary between an

Aboriginal and a non-Aboriginal offender. Furthermore, these decisions reiterate the message in *R. v. Wells* (2000), where the court noted that “the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ.” The exclusion of serious offences from consideration under 718.2 (e) could limit the remedial purpose of the section in reducing the high rates of Aboriginal incarceration (Roach and Rudin 2000; Pelletier 2001: 480).

It therefore becomes important for defence lawyers to make a distinction between serious and non-serious offences in order to determine which of their cases would benefit from section 718.2 (e). D12 explained that *Gladue* provides an unclear definition of these offences:

The *Gladue* decision makes a differentiation between serious and non-serious offences but sometimes it’s kind of difficult to tell what a serious offence is and what a non-serious offence is. Where do you draw that line and how do you draw that line? I will give you an example. I had a case where there was this young lady who had a drinking and driving charge where she had injured three other people in the other car and the Crown was arguing for penitentiary time. So the outcome is pretty serious, but is the charge serious? In this case I requested a *Gladue* report and the judge agreed to have a *Gladue* report prepared, indicating that this was not a ‘serious offence’ in the view of the court. (D12)

The distinction between a serious and non-serious offence is not one made in the Criminal Code; therefore, the classification of serious offences is left up to the individual defence lawyers and ultimately the discretion of sentencing judge (Pelletier 2001). For D12 this created confusion in determining which offences section 718.2 (e) applies to. Furthermore, this confusion limited his ability to confidently apply and argue the section and *Gladue* at sentencing.

Five other defence lawyers; however, made a distinction between a serious and a non-serious offence not on the basis of their legal classification but on a more general

classification of violent and non-violent used by Statistics Canada in the collection and reporting of crime statistics. According to Gannon (2005: 5), violent crimes involve violence or the threat of violence and include homicide, murder, attempted murder, assault, sexual assault, other assaults, other sexual offences, abduction and robbery. Traffic incidents that result in death or bodily harm are also included as a violent crime.

Nevertheless, a comparison of cases involving traffic incidents that resulted in bodily harm given as examples by D6 and D12 revealed that the definition of violent and non-violent crimes used by most defence lawyers does not always match the court's definition of serious and non-serious offences. In the case explained by D6, the classification of traffic incidents that resulted in bodily harm as a violent crime matches with the court's definition of a serious offence. Conversely, in the example given by D12, the court did not view the same violent crime as a serious offence. This inconsistency exemplifies the confusion expressed by D12 in determining which offences section 718.2 (e) applies to. It also creates uncertainty in the other five defence lawyers' use of violent and non-violent crimes as the equivalent of serious and non-serious offences as per *Gladue*. By using the definition of violent and non-violent offences, these defence lawyers could be overestimating the types of offences the court will consider to be serious. For the majority of defence lawyers—those who only argue for the use of section 718.2 (e) and *Gladue* in cases where the offences are deemed to be serious—this could partially explain their limited use of *Gladue*.

Prior Record

Another factor that the criminal justice system prioritizes in determining an appropriate sentence is the offender's prior criminal record. Six of the defence lawyers noted that an offender's prior record influenced their use of the section and *Gladue*. When representing offenders with a prior criminal record, D8 noted that his ability to make a concrete argument for the consideration of section 718.2 (e) and *Gladue* at sentencing is restricted:

If you want to get a conditional sentence for someone under that section [718.2 (e)] you want to make sure that the person is not a danger to the community so they will be allowed to do their sentence in the community. How are you going to establish that? Well, if the guy does not have a record there is a lot better chance of getting a conditional sentence. (D8)

Jack Gemmell (1999: 72) notes that in the leading case, *R. v. Wismayer* (1997), the principal factor in deciding to grant a conditional sentence was “whether permitting the offender to serve the sentence in the community under a conditional sentence order would endanger the safety of the community because of the risk that the offender will re-offend.” Within the criminal justice system, the probability of offenders re-offending is often dependent upon their past criminal records (Roberts and Cole 1999). Those offenders with a past criminal record are considered a high risk for re-offending. Another defence lawyer explained this in relation to Aboriginal offenders:

The problem with this [718.2 (e) and *Gladue*] and even with the conditional sentencing thing, is that because Aboriginals are usually the ones who are in the system and have been in the system and they have a record, they are not likely to be eligible for a conditional sentence. Frankly, I haven't noticed that big of a change in the incarceration rates of Aboriginal accused. (D11)

A number of studies refer to the fact that Aboriginal offenders have a higher rate of prior criminal records and are thus a higher risk for re-offending in comparison to non-

Aboriginal offenders (Brzozowski et al. 2006; Finn et al. 1999; LaPrairie 1999 and 1995). D5 noted that, “if the offender has an extensive criminal record you are not going to bring in *Gladue*, it will not benefit your case”. D9 described how his decision to argue for the consideration of the section was positively influenced by the fact that the offender has no prior record. D12 explained that although it is not common to refer to *Gladue* in a case where the offender has a prior record there were exceptions: “It is possible to refer to *Gladue* in a case where the offender has a prior record but only if the record is dated and is unrelated to the current charges” (D12). D7 made a similar reference, giving an example of a recent case in which he used *Gladue* in his sentencing submission. He noted that *Gladue* was a consideration he made in this particular case based on a number of factors, including his client’s limited and unrelated prior record.

These examples illustrate how a lack of a prior record or the lack of an extensive, recent and related prior record can positively influence defence lawyers’ use of the section and *Gladue*. They also show how the existence of such a criminal record can negatively influence their decision to bring in the section and *Gladue* at sentencing. For these lawyers, their application of the section and *Gladue* is thus limited to offenders with no prior record. Although some defence lawyers did note an exception for those offenders who have a minimal, unrelated and dated record, this finding is none the less concerning given that “82% of Aboriginal persons accused of homicide have a previous criminal record and that the most common type of previous offences were violent in nature” (Brzozowski et al. 2006: 9). This is also distressing given that lawyers noted that they would not apply *Gladue* in homicide cases.

Mitigating/Aggravating Circumstances

As previously discussed, defence lawyers' noted that other factors (apart from the seriousness of the offence and prior record) regarding the individual circumstances of the offender and the offence are also important in determining the sentence of an offender. The lawyers explained that these individual circumstances—often referred to as mitigating and/or aggravating factors related to the individuals' background or personal circumstances—are variables that are considered by the criminal justice system in sentencing regardless of section 718.2 (e) and *Gladue*. However, section 718.2 (e) and its clarification through *Gladue* attempted to expand the previously existing individualized perspective of the offender to include the larger social context of the unique systemic or background factors of Aboriginal peoples. As stated by Haslip (2000: 13) “the court is permitted to also consider the circumstances of Aboriginal peoples as a GROUP, this is a critical factor, for it is here that over-incarceration factors in.” Stenning and Roberts (2001: 165-166) explain that:

.... by simply claiming membership in some disadvantaged group or population would be insufficient, just as, for example, asserting a lack of employment is, by itself, insufficient to justify mitigation of punishment in a case of domestic violence. The plea for social/cultural disadvantage relating to the circumstances of Aboriginal offenders would need to establish some discernible element of causality.

D10's statements illustrated how the criminal justice system's consideration of individualized responsibility as a mitigating/aggravating factor in sentencing creates a barrier to the incorporation of the overall social context of Aboriginal offenders as per *Gladue*:

It could hinder them in many ways. Because if you look at the factors that a court looks at in sentencing there are a number of important considerations made such as: remorse, acceptance of responsibility for a person's actions and having insight into whatever problems or addictions or issues somebody may have, because a lot of judges believe that if a person has insight into a problem it then becomes easier for them to take management controls and other actions to lessen the chance of that being repeated.

So if someone wants to bring so-called *Gladue* evidence to the court at sentencing there are a lot of hazards. What is key in sentencing is the perception of the judge regarding the genuineness and the attitude of the offender. There are some very fine lines in between showing a good attitude and showing the judge that you accept responsibility for what you have done, that you're prepared to take and accept an appropriate sanction for what you have done. You have to show that you, as an offender, are prepared to rehabilitate yourself.

There is a very fine line between that and appearing to be saying I'm an Aboriginal person, you know, so, like, I should get a break. Because what is that really saying. Well your honor I'm Aboriginal so I want you to, you know, be a little softer on me, there are too many Aboriginal people in jail. It shows that you don't have insight into why you committed the crime. You are asking for a break without acknowledging it. It's kind of like off-loading, the opposite of accepting responsibility. It can be seen as blaming others.

If the government provided a better lifestyle for us you know if they didn't flood our lands and the fishing was better then maybe I wouldn't be having these problems. If the fish were more plentiful I'd be making more money and, you know. It can be very close to taking a negative approach and divesting responsibility for oneself and blaming others, which is contrary to the attitude that judges like to see for proper rehabilitation.

Usually, because crime is not so much a group thing it is really an individual thing that results from factors such as thinking errors, attitudinal errors and those are very much personal things. (D10)

In these terms, the elements of causality linking the individual offender and the offence to the wider social context are translated into a denial of responsibility and remorse on the part of the offender. This reflects the inability of the criminal justice system to incorporate the unique circumstances of Aboriginal offenders, a concern expressed by criminologists and sociologists (Findlay 2001; Pelletier 2001; Roach and Rudin 2000). Isobel Findlay (2001: 233), for instance, is skeptical about the ability of the

“formal legal system to fully incorporate a definition of Aboriginal circumstance that included a multiple Aboriginal perspective and history within its system of relevant information as set out in *Gladue*.”

The concept of responsibility is considered part of the criminal justice system’s set of individualized, relevant information. Rob Kozak (2006: 10) explains that in determining a sentence, the fundamental principles of sentencing require “that the sentence be proportionate to not only the gravity of the offence but also to the degree of responsibility of the offender.” It is here that unique circumstances of Aboriginal people are translated into an individualized, legally-defined concept of responsibility. Associating the inclusion of the overall social context of Aboriginal peoples with a lack of remorse or denial of responsibility on the part of the individual offender creates a situation in which the mitigation of a sentence for the accused becomes less likely. This is a situation that defence lawyers wish to avoid, as it does not serve their role in gaining the lightest possible sentence for the accused.

Concluding Remarks

Defence lawyers understand the issue of Aboriginal over-incarceration as a social issue that cannot be adequately addressed through an individualized criminal justice system. Defence lawyers defined their responsibility to the section and *Gladue* as contingent upon its ability to uphold the individual interests of their clients, thus rendering the section and *Gladue* as only applicable in certain cases. The considerations made by the lawyers in determining whether or not the section and *Gladue* would be beneficial in a particular case are multi-dimensional. It was rare for defence lawyers to give one reason for their

decision and often the reasons varied depending on the individual dynamics of a specific case.

However, ideologies of “equality,” racialized constructs of what Kline (1994) refers to as “static Indian-ness” and “race-neutrality” were found to inform lawyers’ strategies, rendering the section and *Gladue* as an irrelevant argument in many cases. Furthermore, the priority given to other legal factors, including the seriousness of the offence, the offender’s prior criminal record and the degree of responsibility was also cited by the lawyers as reasons for not bringing in *Gladue* or the section for consideration at the sentencing stage.

Chapter Five

Procedural and Structural Barriers

Interviews with defence lawyers revealed that even in situations where lawyers considered the section and *Gladue* as appropriate defence strategies there were a number of procedural and structural obstacles within the Canadian criminal justice system that affected their inclusion. These obstacles were related to plea negotiations, remand (pre-trial custody) and the availability of alternatives to incarceration—the latter being situated within the broader socio-political context. Other obstacles that were apparent in the interviews with the lawyers related to the gathering and presentation of supporting information to the court. Defence lawyers explained that these obstacles often prevented or limited their use of the section and *Gladue* in specific cases and within their practice in general.

Plea Negotiations

Plea negotiations (also referred to as plea agreements and plea bargaining) are a well-recognized and integral part of the sentencing process within the Canadian criminal justice system. Although widely practiced as part of common law, plea negotiations are not codified in written law and have been criticized for lacking structure, visibility and accountability (Cohen and Doob 1995: 188; Griffiths and Verdun-Jones 2004: 52; Verdun-Jones and Tijerino 2004: 474).

From the Crown's perspective, the aim of plea negotiations is to gain a guilty plea and thereby avoid a trial. Plea negotiations also free up courtroom time and resources,

thus ensuring the accused's right to a speedy trial in Canada's backlogged courtrooms is met (Blumberg 1967; Ramcharan and Ramcharan 2005; Griffiths and Verdun-Jones 2004). According to Ramcharan and Ramcharan (2005: 65), "Plea bargaining is basically a discourse and dialogue between the Crown and defence to come to a mutually beneficial agreement as to how to conclude a case without proceeding to a courtroom trial." More specifically, "plea bargaining is concerned with reaching an agreement to secure a concession from the Crown in return for the accused pleading guilty" (Griffiths and Verdun-Jones 2004: 51). Broadly speaking, these concessions from the Crown include: 1) promises relating to the charges, for instance, charges could be reduced, withdrawn or stayed; 2) promises relating to the ultimate sentence regarding the type and severity of the sentence to be recommended and 3) promises relating to the facts that the Crown is willing to bring to the attention of the court (Griffiths and Verdun-Jones 2004: 51; Ramcharan and Ramcharan 2005: 66).

For the defence, the choice to enter into a plea negotiation is based on the assumption that the chances of winning an acquittal at trial are not good and/or that pleading guilty would result in a more lenient sentence for the accused than if a trial resulted in a finding of guilt (Sudnow 1965; Solomon 1983; Ericson and Baranek 1982; Martin and Irving 1997; Ramcharan and Ramcharan 2005). A guilty plea should result in some reduction of the sentence, as it indicates remorse and acceptance on the part of the accused (Edger 1999: 125). Verdun-Jones and Tijerino (2004: 472) estimate that approximately 90 percent of cases are resolved through guilty pleas that are frequently the direct outcome of successful plea negotiations. In combination with a guilty plea from the accused, plea negotiation will also entail an independent sentencing

recommendation from both the defence and the Crown or a joint recommendation from both indicating to the court what the appropriate sentence should be (Griffiths and Verdun-Jones 2004: 53). Although judges have the ultimate discretion in determining and imposing a sentence, they do consider the recommendations made by counsel.

If plea negotiations are an integral part of the criminal justice system, how do defence lawyers incorporate section 718.2 (e) and *Gladue* into this practice? Broadly speaking, defence lawyers were not—or at least not successfully—combining the two. It was not common practice for the defence lawyers interviewed to bring in the section or *Gladue* during plea negotiations. They noted that this was not something that was recognized as a bargaining chip during negotiations as “it doesn’t have a lot of weight on its own” (D12). Comments by D6 and D3 expanded on this viewpoint:

Plea negotiations are a completely different sort of an animal. I don’t know if I have ever sat down with a Crown in plea negotiations and said here is legislation and here is case law. (D3)

I can’t get the Crown to somehow agree that because of the *Gladue* components and the sentencing precepts set out in *Gladue*, based on the Criminal Code, it doesn’t seem to move them too much. (D6)

Defence lawyers noted that during plea negotiations, as in sentencing, other factors relating to the offence and the offender are more likely to be taken into account. For example, D9 explained that in plea negotiations, where the defence is negotiating with the Crown regarding the length of a sentence to be recommended, the typical amount of time allotted for that particular individual offence—set by legal precedent—is used as a standard. This standard period of time might be reduced based on fact that the individual offender has no prior record. Another defence lawyer (D7) noted that it would be rare for the section or *Gladue* to be brought up in a case involving an offence such as

shoplifting or minor theft. In these situations, it is assumed that the offender typically has a criminal record and the Crown will usually agree to a sentence involving a fine or probation.

Throughout the examples given by the lawyers, it can be seen that during plea negotiations defence lawyers, along with Crown attorneys, have developed a formula over the course of their interactions and repeated bargaining to determine appropriate sentences. In his study of the plea negotiation process, Sudnow (1965) found that lawyers used similar techniques in arriving at plea negotiations when determining what a charge should be reduced to. Using the concept of “normal crimes,” Sudnow explains that lawyers gain knowledge of crimes and their characteristics during the routine processing of criminal cases, which extends beyond their legal definition.

Although the defence lawyers interviewed did not go into great detail about what constitutes a “normal crime,” their comments revealed that specific offences were associated with specific sentences or sentence lengths. This determination was based on the assumption that the accused person had a prior record. Defence lawyers commonly used the accused’s lack of a prior record as a bargaining chip to reduce the length of sentence recommendation made by the Crown. If *Gladue* or section 718.2 (e) did come into plea negotiations, it was usually only a secondary consideration, with the accused’s lack of a prior record being the primary consideration:

Within a plea negotiation the Crown might agree to a reduced sentence based on the fact that, for example, that person has no prior record and also their Aboriginal background. It [*Gladue*] doesn’t automatically suggest that because the person is Aboriginal that the sentence is going to be reduced by this amount of time. It doesn’t work in that fashion. (D9)

Again, this indicates that *Gladue* factors do not have a lot of weight on their own and are only a secondary consideration after the defence lawyer has determined that there are other bargaining chips available. D1 noted that he always indicated to the Crown during plea negotiations that he is seeking a *Gladue* decision. However, he also noted that this usually did not result in an agreement on a sentencing recommendation between himself and the Crown. These defence lawyers' comments point to one conclusion: *Gladue* and the section are rarely used in plea negotiations and, if they are used, they are only a secondary consideration.

Verdun-Jones and Tijerino (2004) raised similar concerns regarding the role of victim impact statements within the process of plea negotiations in Canada. They found that victim impact statements had a very limited effect on plea negotiations. The sentencing reforms in section 718.2 (e) and subsequently *Gladue* parallel that of victim impact statements in that neither have been successfully integrated into the informal process of plea negotiations within the Canadian criminal justice system. Thus, the process of plea negotiations minimizes the use of both the section and *Gladue* by defence lawyers. This finding is of considerable importance given that a large number of cases that result in a guilty plea are the direct outcome of plea negotiations (Verdun-Jones and Tijerino 2004: 472).

Remand

Remand is a court ordered detention of a person in a secure facility while awaiting a further court appearance (Beattie 2005: 20). Canadian law states that an accused person

can be detained before trial only if the accused person might not appear for his/her trial or if there is a risk that the accused will commit another offence while awaiting trial. A person may also be detained if it can be shown to be in the best interest of the public or necessary for the protection and safety of the public. Offenders can spend considerable time in remand between arrest and sentencing. Over the past decade, the amount of time spent in remand has increased (Beattie 2006: 10). In Canada, the proportion of adults who serve more than 3 months in remand has nearly doubled from 4 percent in 1995/1996 to 7 percent in 2004/2005 (Beattie 2006: 4). Additionally, the proportion of adults who serve one week to one month and one to three months has also increased during this time from 20 percent to 25 percent and from 10 percent to 14 percent, respectively (Beattie 2006: 10).

As with other systemic problems within the criminal justice system, the effect of the rise of remand populations appears to have a disproportionate impact on Aboriginal peoples. It is not unusual to find Aboriginal people detained on remand due to concerns that they will not attend court (Rudin 2007: 52). The reason many Aboriginal people are detained on this ground follows from the systemic conditions, including low income, joblessness and homelessness. Additionally, these individuals may have previous convictions for failure to appear and comply with a bail condition or a probation order (Rudin 2007: 52). A combination of these factors makes an Aboriginal accused less likely to appear for court if released and thus they are either detained or require a surety to gain release (Rudin 2007: 52).

To avoid these potentially lengthy waits in remand for their trial, the accused will often plead guilty to their charge(s), even when they are in fact not guilty (Rudin 2007:

53; Burstein 2004: 160). Armstrong, Mossman and Sackville in *Essays on Law and Poverty: Bail and Social Security* (1977 cited in Abell and Sheehy 1996: 417) illustrate some of the reasons why lengthy waits in remand are avoided. These include emotional trauma, loss of family support, loss of job or education and financial loss. They indicate that the consequences of remand may be particularly negative for women accused, as remand may separate mothers from their children for long periods. Furthermore, individuals who spend time in remand typically have little or no access to recreational activities, work and rehabilitative programs and services in most jurisdictions (Beattie 2006: 11). Traditional rewards for good behaviour, such as remissions and the granting of temporary absence passes, are also typically not applicable to individuals held on remand (Beattie 2006: 11).

Some defence lawyers cited remand as an obstacle in applying section 718.2 (e) and *Gladue* within their practice. This is especially the case since the application of section 718.2 (e) involves the preparation of a *Gladue* report, which can sometimes take a while. As one defence lawyer notes, in his experience:

If the accused is denied bail and is spending time in pre-trial custody (remand), they do not want to delay the sentence hearing and wait for a *Gladue* report to be prepared. This is especially true if the accused is eligible for probation at sentencing. Accused offenders do not want to spend any more time in custody than absolutely necessary, even if it could be to their benefit in the long run. (D12)

If an accused is prepared to plead guilty to avoid lengthy waits in remand, it is not surprising that he or she would also choose not to have a *Gladue* report prepared if it was to lengthen a stay in custody. Furthermore, the recent increases in the length of stay in remand could translate into fewer accused choosing to have *Gladue* reports completed as the consequences of remand for the accused often outweigh the benefits of having a

Gladue report prepared. As Rudin (2007: 53) highlights, in some instances the accused person will spend more time in remand than they would receive if they were convicted for the offence itself, especially if the offence they are charged with is relatively minor.

Despite D12's efforts to encourage the accused to have a *Gladue* report completed, the accused felt that the possibility of probation at sentencing outweighed the potential benefits the report would provide at the sentence hearing given the extended length of time she would have to spend in remand. A defence lawyer, although convinced that the preparation of a *Gladue* report would serve the best interests of his client, must respect the client's wishes to not have *Gladue* factors brought before the court at sentencing. As *Gladue* (1999: 23) states, "in any case, the offender may; however, waive the right to have information pertaining to their circumstances and/or information on alternatives to incarceration gathered and applied."

In the Manitoba Bar Association's October edition of *Headnotes and Footnotes* (2005: 21), lawyer Tony Kavanagh outlined a case in which the court was faced with a similar situation regarding *Gladue* and an accused held in remand. The defence counsel in the case discussed bringing in *Gladue* with the accused, but decided against it. The court; however, chose to recess for another investigation of the *Gladue* factors, citing *R. v. Flett*. The Crown expressed no objections to an adjournment for such a brief to be prepared, if necessary, but again the client wanted no part of it, despite the fact that it could potentially benefit the accused. Although the article did not go into any detail about the influence of remand on the accused's decision not to have *Gladue* factors brought to the attention of the court, it did mention remand as a factor. This case illustrates that pre-trial detention does have an influence on the accused's decision to

have *Gladue* factors brought in and that in this situation the defence lawyer is shown to act upon his obligation to the client and, as a result, did not solicit *Gladue* factors.

Another important consideration that is made regarding remand and the application of *Gladue* is the notion of credit for time served. The amount of time an accused spends in remand is one factor that affects the use of custody as a sentence (Beattie 2006: 11). Subsection 719(3) of the Criminal Code provides the sentencing judge with the discretion to take the time that an offender has spent in remand between arrest and sentencing into account, thus allowing for a shorter prison term than would otherwise be appropriate or even a non-custodial sentence (Edgar 1999: 124). Generally speaking, sentencing judges grant credit for time served at a two-to-one ratio of remand served to sentence given. However, the decision to grant credit for time served and the appropriate amount of time ultimately resides with the sentencing judge (Beattie 2006: 11). There is no set formula and each case is decided upon its own merit (Edgar 1999: 125).

Giving an example of an accused that is facing a charge of sexual assault and who has a bad record and/or breaches of probation on their record, D7 explained:

Typically that person is not going to be a candidate for bail and they are going to be sitting in custody for a potential lengthy period of time. Very often sentencing and/or plea negotiations, where both Crown and defence have come to terms an agreement on the resolution of the case, usually takes place just prior to the actual trial. By that time a person has been in custody for a potentially lengthy period of time. As you may or may not be aware, for pre-trial detention time the offender is usually given double credit for it. Very often by the time they have come to trial they have done a significant portion of their sentence already and whatever sentence they have remaining might not be very much. Unfortunately, that is typically the scenario that we find ourselves in. There is no point in bringing up *Gladue* because the accused has already served most of or all of their potential sentence. (D7)

According to D7, the notion of credit for time served is a greater factor than the section and *Gladue* in terms of influencing the determination of an appropriate sentence in a case. In fact, credit for time served often cancelled out the need for D7 to bring the section and subsequently *Gladue* in as a consideration at sentencing. This is based on the perception that the addition of the section and *Gladue* to credit for time served will not further reduce the sentence of an offender.

While no statistics were available on the practice of granting time served on remand by the courts or the amount of time being credited, data are available on remand in Manitoba.

- From 1995-1996 to 2004-2005 the average count of persons on remand in Manitoba has more than doubled, representing a 142 percent increase (Beattie 2006: 4).
- Manitoba has more individuals in custody awaiting a court appearance, trial or sentence than those sentenced to a term of imprisonment. In 2004-2005 Manitoba had 659 individuals in remand and 487 in sentence custody (Beattie 2006: 4).
- In regards to remand and Aboriginal peoples in Manitoba, Aboriginal peoples represented 70 percent of admissions to remand, while comprising only 11 percent of the adult population in Manitoba (Beattie 2006: 15-16).

It is important, therefore, to situate defence lawyers' comments within this context, given that remand appears to limit the use of the section and *Gladue* within their practice.

Availability of Alternatives

The availability of alternatives to incarceration influenced the decision of some defence lawyers on whether to argue for the consideration of the section and *Gladue* at sentencing. D7 and D8 noted that they are more likely to use the section and *Gladue* in a case when alternatives to incarceration for Aboriginal peoples are available.

I don't use *Gladue* a lot. I use it in situations where I am trying to argue for something notably different in a case, for example, something that involves a healing circle or a justice committee where these services are readily available. So in cases like that it may come up. (D7)

There are a lot of factors that you have to take into consideration. When you have a situation where there is a healing circle or maybe the person can serve their sentence in the community then it [*Gladue*] becomes a consideration. (D8)

Another defence lawyer (D6) noted that the availability of alternatives to incarceration also provides support to his arguments for the consideration of section 718.2 (e) and *Gladue*:

When you raise a legitimate *Gladue* component sometimes you have to substantiate it, fashion a sentence that you can sell to the court. Alternative programs can help with that. Alternatives are molded to your client, to his family and to his reserve ... It's better on some reserves that have justice committees. The justice committees can monitor your client and say what will be effective and what won't. You are more likely to sell it [the section and *Gladue*] to the judge in those situations. And too if you are sitting in some sentencing circles from time to time you can get an idea of what an Aboriginal offender and victim are going through when it comes time to present information to the court. (D6)

These lawyers, then, explained that the availability of such alternatives varies according to the reserve and/or community in which the offender resides.

A review of community-based justice strategies and programs available from the *Aboriginal Justice Implementation Commission (AJIC) Final Report* (2001) and the *Manitoba Justice Annual Report* (Manitoba Justice 2005-2006) supports these defence lawyers' claims. Out of the programs listed in these reports, there are six adult community-based justice strategies and programs specifically focused on Aboriginal peoples that are still in existence¹⁴—five of which operate outside of Winnipeg. These

¹⁴ The AJIC's final report (2001) listed a total of seven programs and strategies that specifically focused on Aboriginal people. However, after further investigation the Aboriginal Ganootamaage Justice Services of Winnipeg was found to no longer be in existence. The program provided diversion alternatives to Aboriginal offenders within the City of Winnipeg (Department of Justice Canada 1998). Their goal was to

programs and strategies vary in terms of the communities they serve as well as the services they provide. The following list is a brief description of the programs and strategies as well as the communities they service:

- **Manitoba Keewatinowi Okimakanak (MKO) First Nations Justice Strategy (Northern Manitoba):** Emphasizes community accountability and involves a Magistrate's Court, community justice workers, community justice committees and community-based diversion programs. The strategy also includes for the provision of recommendations in matters if they proceed to court (AJIC 2001: 15-18).
- **Métis Justice Strategy:** The purpose of this project is to develop community-based alternatives for court proceedings, reduce reliance on the current court system and provide culturally appropriate services for Métis people involved in the criminal justice system. This strategy serves the Métis population in the communities of Wabooden, South Indian Lake and Thompson (The Manitoba Justice Annual Report 2005-2006: 60).
- **Community Holistic Circle Healing Project:** The program is directed towards healing the cycles of conflict and abuse with a specific focus on addressing sexual abuse in the Hollow Water First Nations and in the Métis communities of Aghaming, Seymourville and Manigotogan (AJIC 2001: 19). Participation in this program is contingent on a voluntary plea of guilt and an acceptance of responsibility from the accused (Dickson-Gilmore and LaPrairie 2005: 173).
- **Interlake Peacemakers Project:** The overall objective of this project is to resolve crime and conflict through the implementation of a team of trained Ojibwa peacemakers to service each of the First Nations communities comprising the Interlake Reserve Tribal Council. It will focus on pre-charge and post-charge stages as well as post-sentence and pre-release stages (AJIC 2001: 20).
- **Waywayseecappo Aboriginal Justice Programs:** Includes an Elders panel that sits with the Provincial Court, providing advice and recommendations on sentencing. The program is also currently developing community-based options and an expanded diversionary program (AJIC 2001: 18).
- **Onashowewin:** A community-based Aboriginal justice program in Winnipeg that provides community justice alternatives. The program facilitates mediation, peacemaking/community justice forums, conciliations, as well as specific

integrate Aboriginal offenders back into society through the completion of a healing plan based on traditional culture (AJIC 2001: 19).

programs focused on auto theft, theft under and healthy decisions (The Manitoba Justice Annual Report 2005-2006: 60).

Although these programs and strategies service a variety of communities, they are not accessible to all Aboriginal peoples and communities in Manitoba. D4 noted that “there are many communities in Manitoba that lack these kinds of alternatives.” Other defence lawyers also commonly referred to the general lack of Aboriginal-specific alternatives available in Manitoba and specifically noted the lack of programs in Winnipeg. As the above list illustrates, only one program, Onashowewin, is offered in Winnipeg. In exploring the Court’s decision in *R. v. Gladue*, Roach and Rudin (2000: 5) further substantiate the defence lawyers’ claims, stating a general lack of Aboriginal justice programs and alternatives in most communities in Canada.

Consequently, defence lawyers noted that the unavailability of Aboriginal-specific programming and strategies limits their use of section 718.2 (e) and *Gladue* to only a small portion of their cases. However, there are a few defence lawyers who stated that in the absence of Aboriginal-specific programs and strategies they fashion their own sentencing recommendations in order to facilitate the consideration of section 718.2 (e) and *Gladue*.

I customize my own alternatives according to the situation. Boutique law, I guess you’d call it. For example, I work very closely with the Elizabeth Fry Society. Their program has assisted with things. I file a lot of material with the court. I like the court to be well informed to have all the tools that it needs to arrive at a just decision. So I tend to probably go overboard. But I think that it is absolutely necessary to make crowns and judges see all the alternatives to jail. Generally, I try to get some program in place for the accused. (D1)

The aim of the Elizabeth Fry Society of Manitoba (2007) is to actively seek the reduction of the number of women and girls involved with the criminal justice system. They offer a number of programs and services to facilitate this goal. Among these are

community-based alternatives to incarceration such as the STOPlifting program and the Women for Change program. The STOPlifting program is a healing-based program focusing on the rehabilitation of offenders (Conflict Resolution Conference 2007). This program explores the underlying reasons why women commit a variety of offences, including vandalism, shoplifting, break and enter, theft over \$5,000, theft under \$5,000, fraud, elder abuse and robbery (Conflict Resolution Conference 2007). Participants learn skills to prevent re-offending through discussions, work sheets and by identifying personal supports necessary to reach individual goals (Elizabeth Fry Society of Manitoba 2007). The Women for Change Program is specifically geared towards the needs of female offenders charged with physical assault, sexual assault, domestic abuse, child abuse, manslaughter and murder (Conflict Resolution Conference 2007). It is an anger management program which allows participants to identify the cycle of violence in their lives, its causes and effects and to develop safe plans as a means of protection (Elizabeth Fry Society of Manitoba 2007).

D11 also commented on using Restorative Resolutions in a case to facilitate the consideration of section 718.2 (e) and *Gladue*. Restorative Resolutions is a community-based sentencing program sponsored by the John Howard Society of Manitoba that offers an alternative to jail for a number of clients. The program is based on restorative justice principles, seeking to restore balance and harmony in a community (John Howard Society 2006). Restorative Resolutions prepares community-based sentencing plans for adult male offenders living in Winnipeg. D11 stated that these plans are “usually very detailed and involve some sort of rehabilitation component. They will usually involve a

treatment program, some intensive form of probation and even an apology to the complainant if it is a case with an actual victim and that kind of thing.”

According to the John Howard Society (2006), the sentencing plan is comprised of a detailed social and criminal history of the offender and a set of recommendations, including a variety of programs offered by the agency such as Anger Management, Families without Violence and Safe Justice Encounters (meetings between victims and offenders) as well as employment programs, literacy workshops and addictions counselling (John Howard Society 2006). These plans may also include some form of community service (John Howard Society 2006). When the court accepts a community-based plan, Restorative Resolutions becomes responsible for supervising that individual in the community (Maloney and Lloyd 2003: 4). As D11 explains:

Really what you are asking the court to do is to not incarcerate my client. Put him on a form of probation or even a conditional sentence, which is a sentence that can be served in the community, with these things that Restorative Resolutions has recommended. (D11)

D11 explained that in order for a case to qualify for Restorative Resolutions, there are certain criteria that must be met. According to Lana Maloney and Wayne Lloyd (2003: 2-3), in order to qualify an adult offender living in Winnipeg must meet the following set of criteria:

- 1) The individual must be facing a jail sentence of 6 months or more.
- 2) An individual must plead guilty to an offence(s).
- 3) An individual is willing to accept responsibility for his/her behaviour in the community.
- 4) Must be charged with either:
 - a. Property offences such as break and enter, theft, fraud and breach of trust.
 - b. Personal offences such as assault and robbery.
 - c. Driving offences where there are identifiable victims

However, D11 also notes that he has not ordered these Restorative Resolution reports very often, stating “it is kind of a rarity. You could probably pretty much do it in any case but it is something that normally doesn’t spring to mind as something to do.”

Overall, alternatives to incarceration, whether Aboriginal-specific or not, were not a common component within many of the defence lawyers’ cases. If you take into account the reasoning of the courts in more recent decisions such as *Carlick* (1999 cited in Haslip 2000: 15) and *Wells* (2000) and the practices of defence lawyers, it leads to a rather negative deduction. These two cases suggested that the unavailability of community-based treatment programs and alternatives dismissed the court’s responsibility to consider alternatives to incarceration as per the section and *Gladue*. The danger in this reasoning, when taken in the context of defence lawyers’ practices, is that the unavailability and irregularity of alternatives are interpreted as legitimate factors in justifying lawyers’ non-use of the section and *Gladue*. As one defence lawyer stated, “It is hard to recommend alternatives for Aboriginal offenders when the programs that are available are full and no new alternatives have been created” (D10). As another commented: “I can stand up here and recommend alternative measure programs, but sorry that won’t happen because there are none” (D4). Reflecting on the lack of alternatives, lawyers’ comments shifted towards the influence of the larger socio-political climate and the criminal justice system’s response—or more precisely the lack of response in relation to the development of alternatives—to section 718.2 (e) and *Gladue*.

The Socio-Political Context: Lawyering and a Lack of Alternatives

In Canada, the emerging global economy marked a “paradigm shift” in the socio-political context of the 1980s and 1990s (McBride 2001). The shift entailed the pursuit of global competition and deficit reduction (Mosher 2006: 209). The single most important catalyst for this transition was trade agreements of 1998 and 1994, which placed downward pressure on the social standards of Canada’s welfare state (Carroll 2005: 14). Governments began to focus on enhancing economic efficiency and international competitiveness (Comack and Peter 2005: 285). As, corporations began to restructure and downsize, state policies in areas such as income taxation and unemployment benefits were harmonized downward, the public sector was cutting back on other social services and there was increased pressure to privatize health, education and other services (Carroll 2005: 15). In this same period, a Statistics Canada survey documented how millions of families and individuals were living on the brink of financial disaster and at the same time a small proportion of people were managing to accumulate huge sums of wealth (Kerstetter 2002: 1 cited in Comack and Balfour 2004: 40).

These transformations in the economy and the welfare state are often connected with the emergence of neo-liberal and neo-conservative political ideologies. However, as Joyce Green (1996) points out, these two ideologies refer to slightly different, yet compatible, discourses:

Neo-liberalism is an ideology that advocates an economic arena free of government regulation or restriction, including labour and environmental legislation, certainly free of government action via public ownership. It advocates retreat from welfare’s publicly funded commitments to equity and social justice. It views citizenship as consumption and economic production. This, not coincidentally, is compatible with and advances in tandem with neo-conservatism,

an ideology advocating a more hierarchal, patriarchal, authoritarian and inequitable society. (Green 1996: 112)

In other words, neo-liberalism signifies a shift from an emphasis based upon collective or social values to market-oriented values such as self-reliance, efficiency and competition. It is a rationale based upon the “values of individualism, freedom of choice, market dominance and minimal state involvement in the economy” (Comack 2006 :44-45). Under neo-liberalism, governments were cutting back or eliminating social programs (education, health care, social assistance) and began focusing on the creation of a “business-friendly” environment (Mosher 2006: 210). Within this new individualized, market-oriented environment, individuals are expected to be self-reliant, independent, active subjects responsible for providing for their own needs and well being through the market.

In the criminal justice arena, neo-liberalism ushered in an extraordinary expansion in the scope and scale of penalization (Comack 2006: 45). According to Comack and Balfour (2004: 41) one of the obvious indicators of this is the expansion in the use of prisons. In Canada, for example, between 1986/1987 and 1995/1996 the number of offenders in provincial institutions rose by 25 percent, while offenders in federal institutions rose by 34 percent (Reed and Morrison 1997). Although not as drastic of an increase, the average number of offenders in custody continued to rise 3% from 1995/1996 to 2004/2005 (Beattie 2006). Another indicator is the shift away from crime-control strategies based upon social explanations for crime, such as poverty, racism and rehabilitation to initiatives aimed at managing and “responsibilizing” individual offenders (Moore and Hannah-Moffat 2005: 87).

“Risk management” became the mantra of neo-liberalism in the criminal justice arena. Strategies were developed to calculate the risk and needs of an individual offender; the goal was to reduce the individual offender’s risk of recidivism, while minimizing the potential risk to the community (Moore and Hannah-Moffat 2005). As such, offenders are not seen as clients in need of support, but as risks that need to be managed (Garland 2001: 175). For David Garland (2001) the business of risk management, formerly a government responsibility, has increasingly been delegated to local communities.

These developments are echoed in the lawyers’ comments, which place the responsibility for the provision of alternatives to incarceration outside the criminal justice system (a predominately government institution) and onto Aboriginal communities. As D6 stated: “it [*Gladue*] focuses the attention on Aboriginal reserves to produce programs that can accommodate the treaty members.” D7 also explained that the section and *Gladue* provides Aboriginal communities with a means to offer alternatives and “take over” the management of an offender in a non-custodial sanction: “For many of the bands I think it is an issue of governance. They want to take responsibility for the governance of their people and what happens in their communities. One way for them to accomplish this is by taking the initiative in developing alternatives.” For D10 the responsibility of providing alternatives is a combined responsibility to be taken on by not only the Aboriginal communities, but also by government.

What I am saying is that 718 and *Gladue* is not a tangible thing brought by Parliament and the Supreme Court. Rather it represents an opportunity for the different levels of government and Aboriginal communities to take the ball and run with it, to take the bull by the horns and to put their heads together and review issues on a regional and local level. It is an opportunity to work with Aboriginal leadership and Aboriginal communities to devise new and novel ideas and in a

positive way using traditional values. It [*Gladue*] is not something in and of itself. It is only an opportunity for stakeholders to take action and choose to do something. (D10)

The comments by D6, D7 and D10 all reflect a move towards the delegation of responsibility for risk management, through the development of alternatives to incarceration, from government to communities. D10's comments; however, also reflect the idea of choice in relation to developing alternatives. This idea of choice has also been tied to neo-liberal criminal justice strategies. Under this neo-liberal "responsibilization" model of crime control, criminals are made responsible for the choices they make (Hannah-Moffat 2002). According to Dawn Moore and Kelly Hannah-Moffat (2005: 94):

The centralizing of notions such as freedom of choice are crucial to constituting a liberal veil because they help to create the illusion that crime is an individual phenomenon and that the individual in conflict with the law is free to choose whether or not they will commit more crimes. Of course, this sort of mentality works to completely erase any chance to see crime as a social phenomenon. Rather than allowing space for structural issues such as poverty and racism to play a role in the explanation and subsequent arresting of criminal behaviour, responsibility rests solely on the individual offender. Thus the logic tells individuals that they choose to commit a crime.

Applying this logic to the statement made by D10 regarding the provision of alternatives, the section and *Gladue* represent a "choice" given to Aboriginal communities and government to develop alternatives. Similarly, D7 deflects his own responsibility, making it contingent upon the "choice" of Aboriginal communities to provide alternatives. It is only in situations where the government and Aboriginal communities have fulfilled this responsibility that these lawyers consider their obligation to the section and *Gladue*. Ultimately, the responsibility resides outside that of a lawyer's practice.

As previously noted, the transformations in the economy and the welfare state are not only connected with neo-liberal political ideology but also with the compatible discourse of neo-conservatism. While neo-liberalism introduced massive cuts in spending on social services, health and education, neo-conservative political strategies focused on a more hierarchal, patriarchal, authoritarian and inequitable vision of society (Knuttila and Kubik 2000: 151). Neo-liberalism had also created an environment in which “healthy, stable communities and a decent standard of living for all citizens” were no longer a guarantee for all individuals (Carroll 2005: 13). With this came “increased anxiety and social unease, which easily translates into a fear of crime” (Comack and Peter 2005: 285). This environment, combined with neo-conservative political strategies bolstering coercive institutions such as the military, police and prisons, created a new ideology which informed criminal justice policies and practices (Platt and Takagi 1997 cited in Balfour 2006: 736).

This ideology—based in neo-liberalism and encompassing neo-conservative rationales premised on “law and order” and the need to “get tough on crime”—was quickly transforming the rehabilitation landscape of the preexisting social welfare model in the interests of responding to the threat that crime poses to the wider society (Comack 2006: 45; Comack and Peter 2005: 304; Comack and Balfour 2004: 42-43). Neo-conservative crime control policies in the United States include “mass incarceration, longer prison sentences, ‘three-strikes’ laws and civil detention following completion of prison terms under various sexual predator laws, the return of shaming punishments that usually involve some form of public humiliation of the offender, the return of chain gangs and the death penalty” (Pratt 2000; Pratt et al. 2005: xii). Additionally, reforms

directed at improving prison conditions have been abandoned, the innovation of ‘super-max’ prisons and ‘lockdown’ regimes denying prisoners access to programs, education, exercise and association with others” (Pratt et al. 2005: xii). In Canada similar crime control policies have been implemented, including the return of shaming punishments for individuals charged with driving under the influence or refusing to take a breathalyzer, super-max prisons, zero-tolerance for domestic violence, increased parole-release restrictions, community notification laws and boot camps for young offenders (Comack and Peter 2005: 285; Comack and Balfour 2004: 42-43).

The prevalence of a political climate in which the focus is on “getting tough on crime,” according to some of the lawyers interviewed contributes to the lack of alternatives that were (and will continue to be) a barrier in their use of the section and *Gladue*. D1 and D7 reflected on how the implementation of conditional sentences and restorative justice principles has been hindered by the prevalence of a “get tough on crime” philosophy. D7 remarked that although “conditional sentences are still with us the government is making noise that they will not be for very long, which I think would be a mistake.” D1 noted how the discourse of criminal justice has shifted towards building more prisons, a typical crime control policy under neo-conservatism.

Given the recent election and new conservative minority government I think that there is a real threat to the continuance of conditional sentences. This is a problem because there is this move to clamp down on crime and there is no focus on providing alternatives. There is a big push to build more jails, to ‘super-size’ everything including the prisons. But the problem is that they are just big storage containers. This province is an embarrassment, an embarrassment in those respects, because it offers few other solutions in terms of sentences. The solution is just to lock them up. In many cases the conditions in these facilities are less than desirable, they offer little rehabilitative programming. Often offenders are worse off at the end of their sentence than when they went in. This doesn’t accomplish anything. I think that things are getting much worse. What we need is more healing lodges and more facilities where offenders are treated with dignity

and respect. However, I have seen a progression to a much more rigid system, which to me is a frightening phenomenon. (D1)

These lawyers' worries regarding the reduction in conditional sentences and a greater reliance on incarceration are validated by a speech delivered by Canadian Prime Minister Stephen Harper in April 2006 at the Executive Board Meeting & Legislative Conference of the Canadian Professional Police Association. Harper (2006) stated that, "holding criminals to account was a number one priority." This included the end of conditional sentences for serious crimes and the introduction of mandatory minimum prison sentences for drug traffickers, weapons offences, repeat offenders and crimes committed while on parole. D1's observations regarding the "push to build more jails" is also confirmed by the then Minister of Justice Vic Toews, who commented on the provinces' calls for more funding from Ottawa to pay for more jail space (Samyn: 2006).

The public's growing fear of crime is seen as supporting these criminal justice responses to crime. According to Estella Baker and Julian Roberts (2005), globalization has created a public that is anxious about crime trends and the ability of existing policies to deal with them. Additionally, the "mediatization" of everyday life and the sensational reporting of crime by the mass media constantly calls attention to such problems (Baker and Roberts 2005). Political elites draw on these public insecurities to promote a law-and-order agenda; however, according to John Pratt et al. (2005), it can extend much further. "It can also involve the use of plebiscites, referenda and other direct channels of dialogue between governments and the public, thereby radically reshaping the penal landscape: in other words, public opinion can become an inscribed part of the democratic process" (Pratt et al. 2005: xiv). D10 commented on how the media and public opinion facilitate this process:

Take for example Mackintosh and the “tough on crime” approach taken by the NDP. This is an effective strategy to take because it will get them more votes. If they were to promote the development of alternatives for Aboriginal offenders the media and the public would interpret this as people getting a break; it would adversely affect votes. There is no appetite for the provincial government to create alternatives. There is also a perceived need for cost cutting by the province. The first things to go are things that are called ‘soft areas of law’ such as alternatives to incarceration. (D10)

D10’s interpretation of the NDP’s approach to crime is quite accurate. This was demonstrated by Gord Mackintosh’s, former Manitoba Justice Minister, agreement with Federal Justice Minister Vic Toews and the Harper Government’s Bill C-2 which promoted a crackdown on crime, including the provision of a new medium-security federal prison, tougher sentences and a reduction in the type of offences and offenders that are eligible for conditional sentences (Samyn: 2006). Furthermore, the Manitoba NDP’s crime platform in 2007 was not only calling for harsher punishments for young offenders but was also seen to support the Harper government’s commitments to “protect Canadian communities and families by tackling gun, gang and drug violence and keeping criminals off the streets,” which plays on the public’s fear of crime (Samyn: 2006).

As Loïc Wacquant (2005) explains under a neo-liberal state that is prepared to sanction more cohesive measures and a neo-conservative law-and order agenda, the fight against crime becomes a number one public priority, legitimizing the use of more punitive solutions to crime. D12 reflects on the support for more a punitive solution in terms of the expansion of police resources and risk management:

I know that a lot more money is being spent on the police force because, quite frankly getting tough on crime sells. It is what gets people elected. Look at the current Mayoral race. Sam Katz is using crime and safety as his platform. He is promising to hire more police officers, promoting the new CrimeStat and Operation Clean Sweep. He is modeling all of this after New York and Mayor Giuliani’s “get tough on crime” approach. The thing is, crime levels haven’t gone up in New York since the late 60s early 70s. This trend has nothing to do with the

policies and practices implemented by Giuliani but they promote it if his ‘tough on crime approach’ works and it sells; it sells. (D12)

D12 is refereeing to former Mayor of New York Rudolph Giuliani’s tough approach to crime, which included the implementation of Compstat¹⁵ in 1994. His approach has often been credited for cutting crime rates in New York and was taken as a basis for public policies on crime in Winnipeg by Mayor Sam Katz (Stephenson 2006). Katz implemented Operation Clean Sweep in late 2005 (Katz 2007b). This operation entailed the hiring of new officers and the placement of more existing officers on the front line to intensify police presence in Winnipeg’s West End neighbourhood (Katz 2007b). The Mayor also suggests the creation of a permanent unit to be placed on Winnipeg streets under the Clean Sweep Model (Katz 2007b). This unit would respond to the hot spots identified though CrimeStat.¹⁶

D12’s skepticism regarding Katz’s adoption of Giuliani’s approach to cutting crime is not without reason. Wayne Barrett, a senior editor of the *Village Voice* in New York and the author of the book *Rudy*, stated that what Giuliani really managed to do was “mug the media into accepting as fact that he is the man who caused the crime rate in New York to drop 60 percent” (Barrette 2006 quoted in Stephenson 2006). According to Stephen Mastrofski, a contributing author of the evaluation of CompStat and director of the administration of justice program at George Mason University in Virginia, “there is little evidence to support the claim that the system cuts crime rates. The evidence is not

¹⁵ CompStat is a system that compiles statistics on selected types of crime on a daily basis, giving police a quick view of where crime is occurring (Stephenson 2006). In most departments these statistics are then used by management to hold district commanders accountable in their area of the city (Stephenson 2006).

¹⁶ CrimeStat is a similar system to CompStat in that it compiles statistics on selected types of crime on a daily basis, giving police a quick view of where crime is occurring. In Winnipeg these statistics will inform police strategies and plans to attack crime trends early on and measure police effectiveness in solving those crimes, before they become long-term problems (Katz 2007a)

terribly strong one-way or the other” (Stephenson 2006). Nonetheless, George Stephenson (2006) noted the media are complicit in promoting Katz and his “tough on crime” agenda without question. University of Winnipeg criminal justice professor Steven Kohm (quoted in Kives 2007) noted, “CrimeStat is nothing more than a public relations exercise. The police already know where crimes are occurring and won’t learn much more than they already know from CrimeStat.”

These comments show how the strategies of lawyers, specifically regarding their ability to evoke the use of alternatives as per the section and *Gladue*, are constrained by the broader socio-political context. As described, the current neo-liberal ideology, which is premised on an expanding criminal justice system based on “responsibilization” and risk management, enables lawyers to situate the lack of alternatives as the result of the government detraction and an unfulfilled responsibility on the part of Aboriginal communities. In tandem with neo-liberal ideology, the neo-conservative “get tough on crime” philosophy creates a criminal justice system, as explained by some lawyers, in which more punitive sanctions such as the introduction of mandatory minimum prison sentences, are favored over the development of alternatives to incarceration, demonstrated by the declining support for the use of conditional sentences. This socio-political context hinders defence lawyer’s ability to recommend alternatives as per the section and *Gladue*.

Gathering and Presenting Information to the Courts

Other obstacles, related to gathering and presenting supporting information, became apparent during the interviews with the lawyers. These obstacles related to defence lawyers’ use of *Gladue* reports—as a method to provide the court with supporting

information—as well as alternative methods of gathering and presenting information. Exploring each of these issues in detail, through the comments of the lawyers and related literature, shows how and why these obstacles often prevented or limited their use of the section and *Gladue*.

Gladue Reports

One of the mechanisms by which the court can take section 718.2 (e) and *Gladue* into consideration at sentencing is by ordering what has come to be known as a *Gladue* report. These reports contain information relating to the circumstances and background of an Aboriginal offender, as well as information regarding specific resources that might be available to assist in his or her rehabilitation as per section 718.2 (e) and *Gladue* (Cameron 2006: 1; *Lamirande* 2002). In Manitoba, probation officers typically prepare *Gladue* reports as part of the pre-sentence report.

Section 721 of the Criminal Code mandates that probation officers prepare pre-sentence reports. A pre-sentence report is requested if either counsel or the judge believes it would be of assistance at sentencing (Roberts and Cole 1999: 14). The objective of a pre-sentence report is to provide the court with relevant information about the offender's personal history and present circumstances (Manitoba Justice Corrections Division 2005). It also provides an assessment of the offender's risk to re-offend and suitability for supervised probation, a conditional sentence or other community disposition options, such as restitution and/or community service work (Manitoba Justice Corrections Division 2005: 2).

The *Gladue* component of the pre-sentence report is only completed upon the request of either counsel or the judge. This component includes information addressing the specific factors set out by the *Gladue* decision, such as “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/her particular Aboriginal heritage or connection” (Manitoba Justice Corrections Division 2005: 7). According to Manitoba Justice Corrections Division (2005: 7-8) questions directed at addressing these circumstances include:

- Is the offender Aboriginal (First Nations, Métis or Inuit)?
- If so, what community does he/she come from?
- Does he/she live in a rural area, a First Nations community or urban center?
- Have any of the following factors played a significant role in bringing this particular offender before the court for the offence for which he/she is charged?
 - Speak to his/her substance abuse or substance abuse in the community.
 - Poverty/unemployment, low income, lack of other opportunities and lack of education.
 - Overt racism
 - Family or community breakdown
 - Dislocation from his/her Aboriginal community, loneliness or community fragmentation

What community does the offender consider him/herself a part of?

- What is the relationship between the offender and his/her community?
- Does the offender consider him/herself accountable to that community?
- Does the community support the offender and think that he/she is inclined towards (and capable of) change?
- Does the community have a program or tradition of alternative sanctions? If so what are they?
- Does the community have the resources to assist in the supervision of the offender?
- If the offender does not consider himself to be part of a particular community, or if the relevant community lacks any programs or traditions of alternative sanctions, or lack the resources to assist in supervision of the offender, is there any other network of support for him/her?

Despite the availability of this option, the Manitoba Bar Association (2006) reports that “recently all levels of Manitoba courts have commented that these reports are underutilized by counsel” (quoted in Cameron 2006). Rudin (2007: 48) found that between 1999 and 2004 Manitoba Probation Services had prepared fewer than 25 *Gladue* reports. He notes that, “given the reality of Aboriginal over-representation in the province, this is a shocking low number.” Comments by defence lawyers provide insight as to why that might be the case. Some defence lawyers, for instance, stated that *Gladue* reports are not always of benefit to their client or their cases.

It is very important in a criminal case for the judge to be aware of all the facts. The reports are going to be outlining all of the various details that could help the court fashion a sentence. However, in terms of the client, and this goes with anything, a pre-sentence report or a *Gladue* report, it might be a negative report and so the report might say that despite the fact that this offender comes from this particular negative environment, he or she is a hopeless case. Now in that regard, it could have a negative impact on the client. (D9)

Gladue reports are similar to a pre-sentence report. You have to take into consideration your client. If your client is just evil, dark, crazy and you are afraid that he is going to do really bad things, obviously it is not in his best interest to have Probation Services poke around and tell this to the judge. There are just some people who are not going to do well with a pre-sentence report. The more information the judge has, well, it might not be a good thing. Generally, you are going to ask for a pre-sentence report where it is beneficial to your client or the same thing with a *Gladue* report. (D12)

But, again, you know, not all offenders would want to get a pre-sentence report. As a defence lawyer, you may also choose not to get a pre-sentence report prepared. For example, if you have a person that shows absolutely no remorse that is the last thing that you would want to see in a pre-sentence report, where a probation officer says the offender exhibits absolutely no remorse. So counsel has to decide what clients they feel comfortable having a probation officer speak to regarding their background and all of that. (D5)

These defence lawyers’ comments suggest that the potential for a negative assessment of the offender in the pre-sentence portion of the report overrides the *Gladue* component of the report. D9, D5 and D12 indicated that in these situations, a *Gladue* report would not

facilitate the goal of gaining the lightest possible sentence for the offender and so they do not make a request for a *Gladue* report in such cases.

Another defence lawyer reflected on the impracticality of ordering *Gladue* reports for all of his Aboriginal clients:

Reports take up a lot of resources and resources are limited, so you have to minimize the number of reports ordered. Ninety percent of my practice consists of Aboriginal clients, so I could have reports for all of them. But that is not realistic or appropriate. (D12)

The possibility of receiving a negative report, combined with the impracticality of ordering these reports in every case, limits the use of *Gladue* reports as an option for these defence lawyers.

Defence lawyers who did choose to use *Gladue* reports noted problems with them. Despite the fact that there is a standard format provided to prepare these reports, the lawyers indicated that the quality and depth of the reports vary.

It depends on how good the probation officer is and how well the probation officer deals with the background. (D5)

Report quality often depends on the probation officer who is working on it. Some probation officers will really do an in-depth analysis of a person's background. Sometimes they will even contact defence for more information or make suggestions to defence based on their findings. This is; however, very rare. There is definitely a difference between probation officers, just like anyone else. They are human, right? So, yeah, there will be differences in the reports as far as quality and detail. (D12)

A poor report that lacks depth in relation to the circumstances of the Aboriginal offender and possible alternatives to imprisonment is of little benefit to defence lawyers as far as gaining the lightest possible sentence for the accused. Some lawyers noted participating in the preparation of these reports with probation officers in order to ensure

the report will contain information they perceive as relevant to *Gladue* and section 718.2

(e).

You don't just say to the probation officer "I want a *Gladue* component" and then leave it and see what turns up. You're not doing your job unless you tell him what you expect or hope he will find. And if he doesn't, you still have the entitlement to raise *Gladue* factors before the court, so you have to be ready with that stuff. (D6)

I tend to find out who is doing the report. I ask for the Crown's permission to speak to the probation officer. I always do that. I want to make sure that the probation officer has done their homework. I want to make sure that they cover everything. Looking at all of these factors takes time and you have to be aware of the fact that probation officers have time constraints as well. So I tend to be ... over protective in a sense because if I'm seeking this [*Gladue*] I want to make sure everybody is doing his or her job. And (pause) I'm a bit of a perfectionist so I'm not going to hold them to that standard but I want to make sure, you know, that everything is being covered. (D1)

In place of a *Gladue* report compiled by probation, some defence lawyers specifically D1, D5, D6 and D8 stated that they collected their own information. They found this to be more beneficial, noting that they had more control over the information being presented to the court.

I often bring in letters from elders and the community. (D8)

I prefer getting my own material such as letters of reference for my clients from employers. I also do extensive interviews with my clients into their background so that I have some control over the material filed with the courts. (D5)

By collecting their own information, defence lawyers are able to present a wider range of information from a variety of sources, ensuring that positive aspects of their client are portrayed. According to the lawyers, these positive aspects facilitate the consideration of the section and *Gladue* in a case.

Overall, while *Gladue* reports were not necessarily seen as an obstacle, they are also not seen as fully assisting defence lawyers in arguing section 718.2 (e) and *Gladue*

within their practice. Some defence lawyers preferred to be involved in the collection of information, as they have more control over the information being presented to the court. Nevertheless, opting to collect information relating to the circumstances and background of an Aboriginal offender, as well as information regarding specific resources that might be available to assist in their rehabilitation, places additional responsibility on defence lawyers.

Additional Time and Financial Resources

Defence lawyers noted that there were obstacles related to the gathering of supporting information. These obstacles included the additional time, work and financial resources that are required. As D1 explained:

When referring to the *Gladue* decision in a case the individual circumstances of the Aboriginal offender, the general systemic and background factors affecting Aboriginal peoples in Canada all have to be linked. You have to, you have to bring both in. You have to link the micro to the macro constantly, you know. Because otherwise there is no nexus and it's not particularly beneficial to the court. So you have to tie it together. Separating out that one person from the sort of sea of humanity, to individualize a person as I said, requires time. It requires you finding out the individual things about their lives. (D1)

D8 explained how bringing in *Gladue* can be more time-consuming and require more financial resources, especially if the person the lawyer is representing comes from a distant community:

I think that if you are looking at the *Gladue* aspect of it, there is quite a bit more work to present the facts and those aspects than in a normal situation. It can be a bit trickier. They might come from a band up north and so meeting these people and talking to them means I have to go up there. So that is more time consuming and requires additional finances for travel. (D8)

Locating the individual accused within the context of his or her community requires the defence lawyers to gain an understanding of the community. In situations where lawyers are not familiar with the community, they must do research into it.

Lawyers should take the time to understand what they are talking about. If you are talking about reserves, you have to understand how they came to be. For instance, in running down a case, I went out to a reserve. I wanted to know the origins of the reserve, what and how people lived there. They enacted for me how Treaty 3 took place. It's an oral tradition, like a play. So you get to know what it is like on a reserve and what attracts people there and what keeps people there and how reserves work. (D6)

According to Roach and Rudin (2000: 37), "taking into consideration an Aboriginal offender's circumstances and available sentencing alternatives, as required by *Gladue*, will place new and onerous obligations on all members of the criminal justice system." For example, in considering the unique circumstance of Aboriginal peoples, counsel will need to spend more time with their Aboriginal clients. D6 explained that it is "more difficult to present a *Gladue* defence than it is not to." Similarly, D1 notes in reflecting on his efforts to utilize *Gladue*, "It is inordinately difficult to practice law the way I do, inordinately difficult!" Defence lawyers are not able to handle every criminal case as if they have unlimited time and resources (Emmelman 2003: 121). The reality is that practical constraints of time and financial resources influence defence lawyers' application of the section and *Gladue* within their practices. This is especially the case when their clients are being funded by legal aid.

Legal Aid

Legal Aid Manitoba became a legislated program in 1971 and opened its doors to clients in 1972. It provides legal assistance to people with low incomes in criminal, family,

poverty, immigration and child welfare matters. The majority, 55 percent, of cases handled by Legal Aid Manitoba involve people facing criminal charges (Santos 2007: 17). Legal Aid Manitoba operates at arms length from the government and is funded by the Province of Manitoba, the Government of Canada, the Manitoba Law Foundation and fees paid by clients (Santos 2007: 12).¹⁷

In Manitoba, legal aid is delivered through a mixed judicare-staff model. This model uses both private defence lawyers paid by Legal Aid Manitoba and staff lawyers, employed by Legal Aid Manitoba to deliver services, including duty counsel and formal representation. Duty counsel is a free service available to any unrepresented individual appearing before the provincial court. These lawyers provide information regarding charges, court procedure and police reports, as well as advice on a plea (Legal Aid Manitoba 2007). Their services may also include recommendations for remand, plea negotiations with the Crown and representation at sentencing (Legal Aid Manitoba 2007; Tsoukalas and Roberts 2002: 47). Duty counsel lawyers typically deal with “straightforward matters involving less serious charges” (Statistics Canada 2001: 51). They do not represent the accused at trials or at preliminary hearings (Legal Aid Manitoba 2007; Tsoukalas and Roberts 2002: 47). Legal aid also provides formal representation services to financially eligible individuals charged with an indictable offence or a summary offence when there is a danger of imprisonment or loss of employment if convicted (Tsoukalas and Roberts 2002: 20-21; Statistics Canada 2001:

¹⁷ Clients may be required to pay a processing fee and make financial contributions to legal aid (Legal Aid 2007; Tsoukalas and Roberts 2002: 18-21; Statistics Canada 2001: 50). These requirements are dependent upon the type of service provided by legal aid as well as legal aid's assessment of the client's financial eligibility (Legal Aid 2007; Tsoukalas and Roberts 2002: 18-21; Statistics Canada 2001: 49-51). For more information on legal aid eligibility criteria and coverage in Manitoba see: Perozzo 2004; Tsoukalas and Roberts 2002; Statistics Canada 2001.

48). Appeals are also covered by this service. Appeals by the Crown are covered if the accused received legal aid in the original matter (Tsoukalas and Roberts 2002: 21; Statistics Canada 2001: 48). Appeals by the accused are only covered if the case has merit and the accused received a prison term (Tsoukalas and Roberts 2002: 21; Statistics Canada 2001: 48).

Although the services provided by both private and staff lawyers are the same, the remuneration the lawyers receive differs. Legal aid staff lawyers are paid a salary whereas private defence lawyers are paid for their services through legal aid tariffs (Perozzo 2004). According to Ron Perozzo (2004: 48):

These tariffs outline the standards and guidelines for how private lawyers' accounts should be paid in differential areas such as criminal, family and other civil law. The tariff usually sets out both an hourly rate and a block fee (a flat fee prescribed for certain types of cases and/or services). The current tariff in Manitoba nominally pays \$57.00 per hour. While some items are paid at an hourly rate with prescribed maximum, the tariff is, for the most part, a block fee tariff. For example the usual fee for a break and enter guilty plea is \$290.00 whereas a usual fee for a robbery case comprised of a one day preliminary hearing and a two day trial is \$2,725.00.

Furthermore, Perozzo (2004: 49) explains that the fees paid to private defence lawyers through legal aid can be increased through discretionary increases or decreased through the use of tariff holdbacks. In order to receive discretionary increases, Perozzo notes, lawyers must submit a list of costs and an explanation justifying the additional costs. According to Perozzo, "the use of discretionary increases as payment for private defence lawyers has become increasingly common in Manitoba specifically in criminal cases involving serious and complex offences such as aggravated sexual assault, manslaughter, murder, attempted murder and conspiracy to commit murder" (p. 49). Tariff holdbacks,

on the other hand, are a cost reduction measure initiated by Legal Aid Manitoba that decreases the fees paid to private lawyers by a fixed percent.¹⁸

In recent years legal aid has initiated a number of other cost reduction measures as the result of a reduction in federal funds for legal aid, higher volumes of legal aid cases and an increase in case complexity and expense (Perozzo 2004: 10-11). In early 2003, Legal Aid Manitoba “reduced the scope and amount of the legal aid tariff paid to private defence lawyers” (Perozzo 2004: 11). Legal Aid Manitoba also announced that it would “no longer pay any discretionary fees to lawyers” (Kuxhaus 2003a). These cost saving measures were met with opposition from private criminal defence lawyers. As a result, sixty lawyers withdrew their services, refusing to take on new legal aid cases, for a period of two weeks in February 2003 (Perozzo 2004: 11; Kuxhaus 2003b). Additional funding from the federal and provincial governments facilitated an overall increase in the tariffs paid to private lawyers¹⁹ and prompted defence lawyers to continue taking on legal aid cases (Perozzo 2004: 11; Kuxhaus 2003b).

In the long-term these increases were not enough to expand or even maintain private lawyer participation in legal aid. The total number of private bar lawyers able and willing to take on Legal Aid Manitoba cases, including civil, youth and adult criminal cases, continued to decline from 358 in 2003 to 270 in 2007 (Santos 2007: 9). The residual problem is the inadequate rates paid to private lawyers by legal aid. Gerry

¹⁸ According to Statistics Canada (2001: 53) all private bar lawyers have been subject to a 12 percent holdback since 1992, which was fully repaid for the 1996-97 fiscal year. This holdback was later reduced to a 5 percent holdback 1991 (Statistics Canada 2001: 53). Later in 2004 the province provided Legal Aid Manitoba with additional funding to eliminate the need for a holdback (Perozzo 2004: 49).

¹⁹ The tariff rates were increased on April 1, 2003 and included both an hourly rate increase from \$48.00 to \$53.00 per hour as well as an increase in the hours of work included in block tariff rates (Perozzo 2004: 49). The hourly rate was again increased from \$53.00 per hour to \$57.00 per hour in 2007 (Kirbyson 2007).

McNeilly (quoted in Kirbyson 2007), head of Legal Aid Manitoba, explains that “Legal aid pays its private bar lawyers \$57.00 per hour, which is the lowest rate in the country and significantly less than they can charge for work through their firms.” Journalist Dan Lett (2007) notes that “legal aid rates are insufficient and make it difficult for lawyers to take on cases and still pay their bills.” According to McNeilly (quoted in Kirbyson 2007), “It’s a crisis. We’re having difficulty finding private defence lawyers to take work and our own lawyers are saturated, overburdened.” This situation is alarming given the continued increase in the volume of legal aid cases. For example, between 2006 and 2007 there was a 30 percent increase in criminal cases allotted formal representation through legal aid, the majority of which were taken on by staff lawyers (Santos 2007: 20).

Despite the persistence of the problems associated with legal aid over the years, all of the lawyers interviewed for this study were involved with Legal Aid Manitoba and in a variety of capacities. Two of the lawyers interviewed were staff lawyers for Legal Aid Manitoba. The remaining ten lawyers interviewed were private defence lawyers who provide legal aid services. One lawyer provided part-time duty counsel services for legal aid. The remaining nine lawyers provided formal representation for legal aid clients. Four of these defence lawyers noted that a significant majority of their cases are legal aid cases. Another four indicated that approximately half of their caseload consists of legal aid cases. The remaining lawyer indicated that he only does some legal aid work and that these cases do not comprise a large percent of his overall caseload. These lawyers are; however, not immune to the problems associated with heavy caseloads and inadequate financial compensation.

Lawyers who provide legal aid services noted that the additional time and resources required to compile supporting information, as per *Gladue*, was often not provided for.

I think that is part of the problem with what is going on with *Gladue*, you know. With the legal aid crisis lawyers are simply not getting paid for the research, for the time. And that is why people are not using *Gladue*. That is why people are not taking the time. And it's really affecting the quality of legal services. (D1)

This statement by D1 reflects the findings of research conducted by Melina Buckley (2000) on the *Legal Aid Crisis in Canada*. According to Buckley (2000: 63), lawyers are often paid a fraction for their work on legal aid cases in comparison to their retainer in non-legal aid cases. She cites two factors to explain this difference: defence lawyers work more hours than they are actually paid for due to the limitations on the number of hours they can bill in any given legal aid matter; and the hourly rate paid by legal aid is well below the amount charged in private practice (Buckley 2000: 58; McNeilly quoted in Kirbyson 2007). Despite this restriction, Buckley (2000: 58) found that most lawyers are providing the same services and taking the same amount of time working on legal aid as they do with non-legal aid cases; however, there is one area in which she noted that services differ: client interviews (p. 63). Lawyers spend less time interviewing their legal aid clients than they do in non-legal aid cases (see also AJI 1991; Buckley 2000: 63). This is of great concern given that gathering supporting information for the consideration of the section and *Gladue* requires counsel to spend more time with clients (Roach and Rudin 2000). Under-funding by legal aid can make the provision of supporting information for the section and *Gladue* extremely difficult for defence lawyers.

Defence lawyers also referred to the lack of funding provided by legal aid to cover the additional financial cost of travelling outside the area in which their practice is

located to collect supporting information. In referring to collecting information from Aboriginal offenders located in northern communities, D8 stated that if it is a legal aid case “you can’t just fly around everywhere you like. You are depending on legal aid to authorize this spending so it can be pretty unfair sometimes.” D3 notes that he no longer takes cases outside the area in which his practice is located. He explained that if he takes a case in another community an hour and a half away from his practice, he is spending three hours on the road. “Adding to this the time in court waiting for my matter, your hourly rate from legal aid is down to about \$25.00 an hour, which isn’t enough. This is not even including the time required to collect supporting information.”

These defence lawyers’ statements regarding legal aid’s lack of funding for travel is supported by the findings of the Aboriginal Justice Implementation Commission (AJIC) (1999). The AJIC (1999) found that Legal Aid Manitoba will not pay travel time or expenses for defence lawyers, unless there are no other lawyers available in the community where the accused resides. For this reason, very few defence lawyers are willing to take cases in remote northern communities. The lack of funding by legal aid for travel makes the provision of supporting information for the section and *Gladue* extremely difficult for defence lawyers when their clients or cases are located outside the general area of their practice, such as northern communities.

Legal aid does pay staff lawyers and private lawyers providing duty counsel services for travel. However, those lawyers who have had experience as duty counsel also note that the time they spend with their clients is minimal and not conducive to preparing the quality of supporting information required for the section and *Gladue* in their cases. As D8 explained:

When I started out I worked at legal aid as duty counsel and they sent me up North. Every once in a while they will still fly me up there to act as duty counsel. I used to go up there to a very small community, approximately 2,000 people. You would have a couple of hundred people on your docket, same as here. That was interesting because you don't have a lot of time to prepare and you have to help a lot of people at the same time. No, it is not exactly a lawyer's dream to do things that way. But you are doing something for people who can't afford it. It's basically pro bono and it's a good way to start out. (D8)

The limited time lawyers providing duty counsel services have with their clients and their large case loads are issues that have also been raised by the AJIC (1999). The Commission notes that duty counsel lawyers are not able to gain a full knowledge of their clients' situations under these circumstances. The lawyer will be less informed about the circumstances of the offence and the offender as well as the resources available as sentencing alternatives. Given this context, it is not surprising that defence lawyers find it extremely difficult to gather the supporting information required for implementing section 718.2 (e) and *Gladue*²⁰.

Documentation Prepared by Aboriginal Communities and Organizations

There is one other alternative mechanism in which defence lawyers can obtain information supporting the section and *Gladue*. In some instances, Aboriginal

²⁰ Since this research was conducted Legal Aid Manitoba announced that they were going to raise the hourly wage of private bar lawyers handling criminal (and family) cases for legal aid from \$57.00 to \$80.00 per hour (Kirbyson 2008). Mario Santos, Chariman of Legal Aid's Management Council, says that "it's an important step in the right direction," noting that previous wages were not covering the overhead costs associated with the cases (Santos quoted in Kirbyson 2008). He is hoping that the increase will have a "significant effect" maintaining the lawyers who are currently doing legal aid work, encourage other lawyers to take on legal aid cases and reduce the backlog in the court systems (Santos quoted in Kirbyson 2008). Adding optimistically "that the wage increase will improve the situation in Northern Communities such as Thompson, Dauphin, Swan River and the Pas, where Legal Aid Manitoba has had to fly lawyers in to handle cases" (Kirbyson 2008). However, in-house legal aid lawyers are not scheduled for a similar wage increases (Kirbyson 2008). The effect of this recent change is yet to be seen. It would be interesting to track if and how these changes to legal aid will influence defence lawyers use of the section and *Glaude* in the future. Will the challenges, noted by the lawyers interviewed, relating to a lack of monetary compensation for research, time and travel as well as large case loads be elevated? If so, will this result in an increased use of section 718.2 (e) and *Gladue*?

communities and organizations will prepare a document containing information relating to the circumstances of the defendant and the offence and possible alternatives to incarceration. In comparison to the reports provided by probation services, defence lawyers noted these documents are “much more extensive, going into greater depth and detail than those produced by probation services” (D12). As D11 explained, “they are a very intensive analysis, in the sense that they really go into a lot of depth and worked at trying to come up with some sort of solid plan for a sentence.” D7 had a similar experience with such a document:

There was a case where the community from which the offender was from came up with a plan, an alternative to jail. The community had a whole plan put together and it was a big thick sort of thing saying he [the offender] was going to do this program and that program. There was also something about him spending time in the woods for so many days. I honestly don't remember all the details, because it was a number of years ago, but it was a big thick plan. (D7)

Although these lawyers had experience with these alternative mechanisms for providing the court with supporting information, their experience was limited to one or two instances. Defence lawyers indicated that it was rare to have access to this type of document, as there are only a few Aboriginal organizations and communities that are able to produce such reports. Furthermore, in all of these situations the access to the documentation was facilitated through the offender's community and/or organizational networks and not by the defence lawyers themselves. The lack of direct access to these documents, as well as the Aboriginal communities and organizations that prepare them, limits defence lawyers' ability to use this as a primary mechanism for providing supporting information regarding the consideration of the section and *Gladue*.

Efficiency: Keeping it Simple

In most cases, defence lawyers did not provide the court with supporting information when asking the court to consider the section and *Gladue*. They argued that that the provision of this information was not only unrealistic given the problems associated with *Gladue* reports, such as the time and financial restraints associated with collecting information and the limited access to alternative documentation, but also unnecessary and impractical given the dynamics of courtroom practices.

It becomes apparent that in most situations defence lawyers would simply either refer to the section or *Gladue*. As D3 explained when he argues for the court to take the section into consideration in a case:

Most often it is simply either by section number or reminding the judge that 718.2 (e) exists and that it is applicable in the case that I am dealing with, not usually with a lot of argument. It is one of those sections which, in most situations, if you stood up in front of a provincial court judge and started to quote the wording of the section the judges would raise their eyebrows. And that is what we would refer to as “trite law.” Everybody knows it. We have been dealing with it long enough now that it’s not something that you really need to go in and start educating the judge on. Because everyone knows about it, understands that it is there and that it is one of the things that have to be taken into account when you are passing sentence. (D3)

Although most defence lawyers would go into some detail about their clients’ background, their arguments are limited. Defence lawyers, with the exception of D1 and D6, were not typically going into an explanation of how and why the section is applicable. They were not linking their client’s background directly to the factors laid out in *Gladue*. More specifically, they were not presenting detailed information linking their client’s background to the broader systemic factors, including socioeconomic conditions, colonial experiences and discrimination as required by *Gladue*. As D10 explained:

I mean, a judge would probably listen if you describe the socioeconomic conditions but, I mean, I think they kind of take judicial notice of that so it wouldn't be very effective. Everything has to be taken in context. You see, criminal court practice is like a sausage factory. You might read books that might seem like they are really in-depth, in-depth inquiries, a sophisticated thing, but it is very much a sausage factory. And a lot of links are being turned out and turned out fast. There is no luxury of—if you go to the sausage factory—there is no time for esoteric discussions. You're wasting time. You're going to get the judge irate with you very fast. If you have a point to make, get right to the point and make a specific point. Don't make general esoteric things of, you know, like, I would say as a practitioner it would be totally out of order. (D10)

Similar to D10's statement, other defence lawyers noted that the dynamics of the courtroom are such that your arguments have to be limited and precise. D2, for instance, explained that, "You don't have a lot of time in court. You are usually in and out. You have to present the judge with a sort of synopsis of the case."

Defence lawyers' decision to limit the information they present to the court regarding the section and *Gladue* aligns with the bureaucratic nature of the criminal justice system and the corresponding managerial emphasis on efficiency in processing cases through the courts. Blumberg (1967:325) notes that this managerial/organizational logic creates pressure on defence lawyers to process cases within the context of limited resources and personnel.

The strategy of these defence lawyers in presenting information to the court also assumes that the judge is taking these broader systemic factors into consideration and therefore to repeat them would be of no benefit to their argument. Their assumptions are supported by *Gladue* (1999: 23), which states that judges have the responsibility to "take notice of the broad systemic and background factors affecting Aboriginal peoples and of the priority given in Aboriginal cultures to a restorative approach to sentencing." Thus, the information that defence lawyers are presenting is limited to the individual factors of

the specific case and the offender, often void of information relating to the unique circumstances of Aboriginal peoples as per *Gladue*. This strategy helps to maintain an outward commitment to the client's interests and needs (as directed by due process), while limiting the scope and duration of the case (as directed by organizational logic) (Blumberg 1967).

Similarly, Erez and Laster (1999) explore the strategies employed by legal professionals, including defence lawyers, in terms of the inclusion of victims and their statements within the criminal justice system. They explain how the logic of managerial/organizational justice, which focuses on the smooth operation and efficiency of the criminal justice system, appeals to legal professionals yet excludes victim input reform initiatives. Erez and Laster found that even in situations where legal professionals take victim input into consideration, their input is often marginalized through the routinization and objectivity of the process. Thus, legal practitioners do not necessarily see themselves as excluding or limiting the implications of victim input reforms. Their actions are justified based on the requirements of the system.

Although defence lawyers justify the lack of supporting information they provided for the consideration of section 718.2 (e) based on a managerial/organizational criminal justice logic, this lack of supporting information is often criticized. In May 2005 the Aboriginal Law section of the Manitoba Bar Association held a Continuing Legal Education (CLE) conference focusing on the court's need for information when sentencing indigenous persons (Cameron 2006: 1). During the panel discussions, Judge Champagne noted that in the Winnipeg courts the information provided about Aboriginal offenders was often sparse (Cameron 2006: 1). The discussions also included Gerry

McNeilly, the Executive Director of Legal Aid Manitoba, who highlighted the challenges that are faced in bringing the “spirit of *Gladue*” to fruition when sentencing the offender without the benefit of a report and a lack of knowledge of community resources in relation to available alternatives (cited in Cameron 2006: 2). The conference concluded that the best way to present information in the “spirit of *Gladue*” was through “effective comprehensive reports” (Cameron 2006: 2).

However, the current practices of defence lawyers do not reflect this expectation. As shown, defence lawyers rarely ordered or relied upon *Gladue* reports prepared by probation services to present information to the courts. Furthermore, defence lawyers noted the limited access to other forms of comprehensive reports, such as the documentations provided by Aboriginal communities and organizations. The current practices of defence lawyers in collecting and presenting their own forms of information to the courts or the more typical practice of simply providing the court with a synopsis of the case and referring to the section and/or *Gladue* could result in the court’s failure to fully consider the section and *Gladue* at sentencing.

The Manitoba Court of Appeal demonstrates this very concern in the 2005 case of *R. v. Flett* (co-accused Thomas). In this case Chief Justice Scott, C.J.M indicated that Manitoba criminal practitioners were not necessarily acting as envisioned by the Supreme Court in the 1999 *Gladue* case. Commenting on the case, he noted that “while the sentencing judge was assisted by extensive memoranda composed by the appellant Flett and was clearly alive to the situation of the appellants as ‘Aboriginal offenders,’ I cannot help but conclude that all would have been better served in this instance had a thorough

and comprehensive *Gladue* brief [report] been initiated by counsel and presented to the court” (Flett 2005: 7).

Concluding Remarks:

As shown, criminal justice procedures and structures, specifically, plea negotiations, pre-trial custody (remand) and alternatives to incarceration influenced defence lawyers’ ability to incorporate the section and *Gladue*. In the examples of plea negotiation defence lawyers noted that the section and *Gladue* were not recognized as bargaining chips and “did not have a lot of weight on their own” (D12). It is in fact uncommon for many defence lawyers to bring in the section or *Gladue* during plea negotiations. Remand, in certain cases specifically those that were time sensitive and/or when there was a high probability of a probationary sentence if the accused pled guilty, also negatively influenced lawyers’ use of the section and *Gladue*.

Many defence lawyers commented on how the lack of alternatives resulted in their limited use of the section and *Gladue*. The lawyers saw the lack of alternatives as a persisting problem, given the current government’s neo-conservative and neo-liberal agenda, further impeding their use of the section and *Gladue*.

Defence lawyers also noted a number of issues related to gathering and presenting information to the court as per *Gladue* in support of the section. For instance, *Gladue* reports were not seen as fully assisting defence lawyers in arguing for the consideration of the section and *Gladue*. Alternatively, some defence lawyers decided to collect their own information. However, they noted the additional time, work and financial resources required as practical constraints that inevitably limited their application of the section and

Gladue to only some of their cases. For those defence lawyers who were engaged in cases funded by legal aid, these practical constraints were often more substantial as they were not accounted or provided for. Some lawyers noted receiving supporting information through documents prepared by Aboriginal communities and/or organizations. However, access to this type of documentation was often limited, making it an uncommon strategy.

These issues, combined with the reality of courtroom proceedings based upon a managerial/organizational criminal justice logic that prioritizes the need to efficiently process cases through the courts, constrains defence lawyers' strategies in presenting the courts with the information as indicated by *Gladue* (1999).

Conclusion

The Canadian criminal justice system has endeavoured to address the issue of Aboriginal over-incarceration through sentencing legislation, specifically by the addition of section 718.2 (e) to the Criminal Code in 1996. The section makes specific reference to the sentencing of Aboriginal offenders, stating 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.” In 1999 the application of section 718.2 (e) became a focus of the Supreme Court in its decision in *R .v. Gladue*. Essentially, *Gladue* set out a framework to be followed when sentencing Aboriginal offenders.

Commentators have noted that *Gladue* has created additional responsibilities for defence lawyers. These responsibilities include initiating the consideration of the section and *Gladue* as well as the provision of information to the court that is necessary to support this consideration (Turpel-Lafond 1999; *Flett* 2005). Furthermore, it has been assumed that the consideration of the section and *Gladue* would be to the benefit of defence lawyers—a means or a tool for defence lawyers to gain the lightest possible sentence for the accused—especially in cases involving Aboriginal offenders. According to Rudin (2007: 48) assuming that the same system that had routinely processed Aboriginal offenders for years would suddenly re-orient itself to make *Gladue* real seems simplistic. Indeed, interviews with defence lawyers reveal that they were not fully integrating the section or *Gladue* into their practice, specifically within their sentencing submissions.

Review of the Findings

Defence lawyers understood the issue of Aboriginal over-incarceration as a social issue, which therefore could not be adequately addressed through a criminal justice system based upon an individualized legal ideology. For some, the section and *Gladue* did not change the actual practices of sentencing. Defence lawyers defined their responsibility to the section and *Gladue* as contingent upon an ability to uphold the individual interests of their clients, thus rendering the section and *Gladue* as only applicable in certain cases. The considerations made by the lawyers in determining whether or not the section and *Gladue* would be beneficial in a particular case were multi-dimensional. It was rare for defence lawyers to give one reason for their decision and often that reason varied depending on the individual dynamics of a specific case.

Relying upon the criminal justice ideology of “equality,” some defence lawyers were able to dismiss the application of the section and *Gladue* by defining it as reverse discrimination. For others, their use of the section and *Gladue* was guided by particular racialized constructs or what Kline (1994) refers to as “static Indian-ness.” In other words, for cases in which an Aboriginal offender was born and/or raised on a reserve the section and *Gladue* was seen as a worthwhile pursuit. In other cases, defence lawyers’ strategies were based upon a “race-neutral” approach, which supported their use of mitigating factors at sentencing as opposed to the consideration of their client’s Aboriginality. The adoption of a “race-neutral” approach rendered the section and *Gladue* as irrelevant for many defence lawyers.

The priority given to other legal factors, including the seriousness of the offence, the offender’s prior criminal record and the degree of responsibility, also influenced

defence lawyers' use of the section and *Gladue*. Most defence lawyers noted that the seriousness of the offence was one of the most important factors considered at sentencing. They explained that *Gladue* clearly excluded the consideration of the section in cases involving a serious offence. Thus, most defence lawyers were not arguing for the consideration of the section in cases where the offence was serious. The definition of what constituted a serious offence; however, was not clear for all defence lawyers. Some made the distinction based on the categories of violent and non-violent offences. However, using this distinction could result in the overestimation of the types of offence the court would consider serious, further limiting defence lawyers' use of the section. In relation to the offender's prior criminal record, half of the defence lawyers interviewed explained that in situations where the offender had a prior record, especially one that was extensive and related to the current charge, they were unlikely to refer to the section or *Gladue* in their sentencing submissions. The element of responsibility in determining an appropriate sentence was also a factor considered by one of the defence lawyers interviewed. D10 explained that the priority given to this individualized factor transforms the inclusion of the overall social context of Aboriginal peoples, as per *Gladue*, into a lack of remorse or denial of responsibility on the part of the offender. He cited this as an additional reason for not bringing in "*Gladue* evidence" to argue for the consideration of the section in his sentencing submissions.

As shown, criminal justice procedures and structures, specifically plea negotiations, pre-trial custody (remand) and alternatives to incarceration influenced defence lawyers' ability to incorporate the section and *Gladue*. In the examples of plea negotiation given by defence lawyers, it can be seen that they (along with Crown

attorneys) have developed a formula over the course of their interactions and repeated bargaining to determine what they would recommend to the court as an appropriate sentence. However, during these negotiations defence lawyers noted that the section and *Gladue* were not recognized as bargaining chips and “do not have a lot of weight on their own” (D12). It was in fact uncommon for many defence lawyers to bring in the section or *Gladue* during plea negotiations. Two defence lawyers also explained how remand negatively influences their use of the section and *Gladue*. D12 gave an example of an accused held on remand that chose not to have the section and *Gladue* brought in at sentencing by the defence because the gathering of supporting information for their consideration would extend the time the accused spent in custody. The accused’s decision was also motivated by the possibility of a probationary sentence which, despite the encouragement of D12, overshadowed the potential benefit that arguments for the section and *Gladue* would provide. Credit for time served was also explained by D7 in relation to his use of the section and *Gladue*. For D7, credit for time served cancels out the need to bring the section and subsequently *Gladue* in for consideration at sentencing as they would not further reduce the sentence of an offender. Alternatively, many defence lawyers commented on how the scarcity of Aboriginal-specific alternatives influenced their use of the section and *Gladue*. The lawyers saw the lack of alternatives as a current and persisting problem, especially given the prevailing socio-political context of neo-liberalism and neo-conservatism. The persistence of this problem can be understood as further impeding their use of the section and *Gladue*.

Defence lawyers also noted a number of issues related to gathering and presenting information to the court that negatively influence their ability to integrate the section

and/or *Gladue* into their practice. In relation to *Gladue* reports prepared by probation officers, defence lawyers noted a variety of problems, including the possibility of receiving a negative report, the impracticality of ordering these reports in every case and the varying quality and depth of the reports. As a result, some defence lawyers decided to participate in the preparation of these reports while others opted to collect their own information. Overall, *Gladue* reports were not seen as fully assisting defence lawyers in arguing for the consideration of section 718.2 (e) and *Gladue*. For those defence lawyers who decided to collect their own information, they noted the additional time, work and financial resources required as practical constraints which inevitably limited their application of the section and *Gladue* to only some of their cases. For defence lawyers who were engaged in cases funded by legal aid, these practical constraints were often more substantial as they are not accounted or provided for by this organization. Some defence lawyers explained that they had received supporting information through documents prepared by Aboriginal communities and/or organizations. However, access to this type of documentation is often limited, making it an uncommon strategy. These issues associated with the collection of supporting information—combined with the reality of courtroom proceedings based upon a managerial/organizational criminal justice logic that prioritizes the need to efficiently process cases through the courts—constrained defence lawyers’ strategies in presenting the courts with the information as indicated by *Gladue* (1999). This could negatively affect the court’s ability to fully consider the section at sentencing, limiting its overall remedial influence.

These findings suggest that the goal of section 718.2 (e), which prioritizes the use of alternatives to imprisonment specifically in relation to Aboriginal offenders, is more of

an ideal than a reality within the current practices of defence lawyers. In this regard, the framework set out in *Gladue* did not adequately consider the role or the agency of defence lawyers within the criminal justice system.

The Agency of Lawyers

The agency of defence lawyers came into view early on in this study. As previously emphasized, despite the fact that section 718.2 (e) has been part of the Criminal Code since 1996 and that the Supreme Court, in the case of *R. v. Gladue* (1999), affirmed its remedial nature, the vast majority of the defence lawyers interviewed were not using it. However, two of the lawyers interviewed stated that they referred to section 718.2 (e) and/or *Gladue* on a regular basis. This is an indication that the form of law does not wholly constrain the agency of lawyers. Lawyers can and do enact their agency in an influential way to either support or oppose the form of law. As Cain (1994: 20) points out, “in all its particulars [law] is infinitely malleable.”

Comack and Balfour (2004: 44) maintain that lawyers are “powerful social actors in the administration of justice.” Using James Messerschmidt’s (1997: 5) theory of crime as “structured action” in which structures are enacted in everyday interactions by “people who know what they are doing and how they are doing it” as a basis they argue that “lawyering is one form of structured action in which lawyers exercise considerable agency.” They also draw from the work of Cain (1994) to demonstrate the instrumental role that lawyers play in the legal process. Cain’s work highlights the agency exercised by lawyers in their practice in terms of how they decide upon their strategies, but also how their work can in turn shape law. In the present study, the strategies implemented by

the majority of the lawyers rendered the section as an insignificant piece of legislation and *Gladue* as a less than helpful decision which provided little guidance. As such, the section and *Gladue* are found only to be relevant in a small number of cases—if at all—limiting the overall influence of law.

*The Discord between Policy and Practice:
Lawyering Within the Broader Social Context*

This brings us back to the initial discussion of the discord between policy and practice. Although professional codes of conduct stipulate that a lawyer's duty is to his or her client, lawyers exercise agency in their work (Comack and Balfour 2004: 45). In chapter two a number of studies and theories were reviewed that revealed the gaps between the practice of law and written law as well as the explanations for their existence.

For example, the classic gap studies by Blumberg (1967) and Sudnow (1965), as well as the more recent gap studies by Verdun-Jones and Tijerino (2004) and Erez and Laster (1999), reveal that lawyers are more likely to adhere to managerial/organizational ideology (which stresses speed and efficiency) than to traditional ideologies (associated with professional codes of conduct that stipulate a lawyer's duty to serve the interests of his or her client within an adversarial system).

Furthermore, post-structuralism, provides an understanding of how ideologies of race, class and gender affect the practices of lawyers. This perspective encompasses the work of feminist socio-legal theorists Smart (1992) and Naffine (1990) that explain law as gendered, informed by prevailing assumptions of masculinity and femininity. It also includes the critical race perspective, specifically the work of Kline (1994), Jiwani (2002), Daly (2004:450) and Razack (2000) who investigate law as a racialized strategy.

The work of Cain (1994) and Harrington (1994) as well as that of Comack and Balfour (2004) bridge the divide between these two seemingly different streams of understanding law and lawyering. These authors define law and lawyering as structured action. Focusing on lawyers, they examine how the practices of lawyers are influenced by the broader context of managerial/organizational ideology as well as ideologies of race, class and gender. Comack and Balfour (2004: 47) also bring in the influence of wider socio-political context in which law is situated, explaining that “the strategies of lawyers must resonate with the wider social-political context.” They found that this ideology, along with the current socio-political context, creates an environment which enables lawyers to employ “strategies that contest and undermine legal reforms” (Comack and Balfour 2004: 177).

In the present study, the agency of the lawyers was found to be influenced by the broader context of ideology and structure. As described earlier, defence lawyers’ strategies were informed by ideological constructs specifically related to the predominance of value placed upon individualization, ‘equality,’ definitions of Aboriginality and legal factors. Structural barriers associated with the socio-political context and the predominance of the managerial/organizational ideology also influenced lawyer’s practice. As such the agency expressed by the majority of the defence lawyers—enabled by these criminal justice ideologies, racialized constructs and structural realities—hinders the incorporation of section 718.2 (e) and *Gladue*.

Lawyers Challenging the Norm

There were a few exceptions, as some lawyers have been able to incorporate the section and *Gladue* into their practice. Two of the lawyers interviewed stated that they refer to section 718.2 (e) and/or *Gladue* on a regular basis. As previously mentioned, lawyers can enact their agency in an influential way to either support or oppose the form of law. Those lawyers whose agency advocated for the integration section and *Gladue* within their practice were often critical of and in some instances challenged these criminal justice ideologies, racialized constructs and structural realities that hindered their counterparts.

For instance, D1 and D6 referred to bringing in the section and *Gladue* factors as their duty and obligation, regardless of whether or not they thought it would have a direct effect on the sentencing of a specific individual they were representing. According to the Supreme Court's interpretation of section 718.2 (e) in *Gladue*, defence lawyers are obligated to present relevant information about their client to the court. More specifically, this obligation requires defence lawyers to assist the court in providing a full picture of the case, including the circumstances of the defendant, the offence and possible alternatives to incarceration (Turpel-Lafond 1999).

I really feel that it [*Gladue*] has created an obligation upon counsel to provide the court with relevant materials. The section and *Gladue* was not implemented so the judge can just sit there and try to figure out ways to make his or her decision. You, as a lawyer, have an obligation. Even if it [presenting the court with relevant material] doesn't affect the sentence in this specific instance, if I don't get the results I anticipated, if the judge and/or the crown don't agree with me, at least they have been required to listen. Maybe the next time they have a similar case they will be reminded of the issues and information I had presented and it could affect their decision [regarding a sentence]. I am kind of an optimist, I always try to be true to my obligations, in hopes that someday my efforts will make a difference. (D1)

The Court says that the *Gladue* decision states that we [lawyers] should take into account the Aboriginal background of the accused in so far as it would affect the disposition that should be afforded to that accused and what makes that accused, because of his Aboriginal background, different than another accused. It doesn't matter what I think, it is my obligation and duty to make these considerations. (D6)

Many defence lawyers had quite the opposite interpretation of the section and *Gladue*, noting that these legal changes represented more of an opportunity than an obligation, bringing in the section and/or *Gladue* only when they felt it was beneficial to a particular client or in a specific case. Some other lawyers perceived the section and subsequently *Gladue*, in a different manner, noting that they had not created any changes on the ground level or added anything new to the actual practice of sentencing.

D1 was also able to reflect on the individualized legal ideology in a very critical manner, noting that the “restorative approach to sentencing has not been fully realized,” stating that he would “like to see a more holistic view of justice, one which includes the offender, the victim and the community as opposed to what currently exists, a concept of sentencing that focuses on the individual accused.” In contrast other defence lawyers, for example D7, were aware of the individualized ideology but were not critical of it, accepting it as the way the criminal justice system is. D1 also explained the main objective in a different manner than other lawyers, stating: “I think that the main objective of *Gladue* was to decriminalize Aboriginal peoples.” The influence of law in criminalizing Aboriginal peoples was not something that was mentioned by any of the other lawyers. This shows D1's awareness of racialized constructs and their role within the criminal justice system.

D6's comments reflected notions of equality that recognize the objective of the section and *Gladue* to treat Aboriginal offenders fairly by taking into account their

differences. D6 mentioned the importance of *Gladue* in bringing to the forefront the differences faced by many Aboriginal peoples, stating that “if there was no difference between Aboriginal and non-Aboriginal peoples [*Gladue*] wouldn’t mean anything. Considering the person’s Aboriginal background makes a case different not more equal.” This differs in comparison to the other lawyers; two lawyers interpreted the section and *Gladue* as reverse racism and an additional six adopted a ‘race neutral’ approach to their cases, not seeing their client’s Aboriginality as a factor.

Although D9, D5, D2 and D4 stated that they did not use the section and *Gladue* in cases involving serious offences, citing that it would not influence the sentence according their interpretation of the section and *Gladue*, D1 and D6 were adamant in using the section and *Gladue* in these cases, despite the limited effect it may have on the outcome of the offender’s sentence.

I’d rater devote my time to people who are charged with major crimes which require that sort of input, to sort of present a composite picture to the court. Well, that is my philosophy. A lot of lawyers don’t give the court enough information. Although *Gladue* demonstrates that it is not a get-out-of-jail-free card with violent crimes and be that as it may, I have still used it in violent crimes. I mean, even *Gladue* addresses that issue, stating that there is not going to be that much of a difference. Still, it’s something that should be taken into account. More information needs to be gathered in more serious offences because the consequences are worse for the defendant. (D1)

Following these same lines, D6 explained that although 718.2 (e) and *Gladue* have not been beneficial arguments to make in cases involving serious offences, he still made the argument.

I have used it in what is considered a violent crime, impaired driving causing bodily harm. However, in those cases the judge did not see it as a factor he would take into account in sentencing. (D6)

D1 and D6 also explained that they referred to the section and *Gladue* during plea negotiations. D1 noted that he always indicated to the Crown during plea negotiations that he was seeking a *Gladue* decision. However, he also noted that this usually did not result in an agreement on a sentencing recommendation between himself and the Crown. D6 described that although he often referred to *Gladue* during plea negotiations, “I can’t usually get the Crown to agree based upon the *Gladue* components and the sentencing precepts set out in *Gladue*. It doesn’t seem to move them [the Crown] too much” (D6). The other defence lawyers who commented on plea negotiations stated that it was not common to bring in the section or *Gladue* during plea negotiations, noting that this was not something that was recognized as a bargaining chip during negotiations.

Most defence lawyers noted that the unavailability of Aboriginal-specific programming limited their use of section 718.2 (e) and *Gladue* to only a small portion of their cases. However, there were a few defence lawyers, including D1, who noted that in the absence of Aboriginal-specific programs they fashioned their own sentencing recommendations in order to facilitate the consideration of section 718.2 (e) and *Gladue*. D1 referred to customizing his own alternatives to suit the particular situation and the accused. He notes incorporating the programs offered through the Elizabeth Fry Society in some of his sentencing recommendations.

D6 noted that the availability of alternatives to incarceration provided support to his arguments for the consideration of section 718.2 (e) and *Gladue*. He recalls suggesting alternatives to the courts that are specifically designed for his clients, their family and their community. Furthermore, D6 notes bringing in past experience with sentencing circles and to inform the court of their outcomes in regards to determining

appropriate and effective and sentences. His statements indicate that his arguments were not contingent upon the availability of alternatives. This was not the rationale for the reasoning of D4, D7, D8 and D10. The unavailability of alternatives justified their limited use of the section and *Gladue*.

In order to offset the problems outlined by other lawyers in choosing to have a *Gladue* report prepared by probation officers—such as the possibility of receiving a negative report (noted by D5, D9, D12) and the possibility of receiving a report which lacks depth—D6 and D1 noted participating in the preparation of these reports with probation officers in order to ensure the report will contain information they perceive as relevant to *Gladue* and section 718.2 (e). As D6 explains:

You don't just say to the probation officer "I want a *Gladue* component" leave it and see what turns up. You're not doing your job unless you tell him what you expect or hope he will find. And if he doesn't, you still have the entitlement to raise *Gladue* factors before the court, so you have to be ready with that stuff. (D6)

D1 and D6 (along with D8 and D5) also noted collecting their own information in place of a *Gladue* report compiled by probation services. This point is illustrated by the following comment from D1:

Sometimes I do not request a *Gladue* report and just present the factors myself, I've done that as well. I try to get letters of reference or support letters or some evidence before the court rather than just me, you know. It may be a letter from the band office or the chief or from the council, a family member about the situation [of the client], you know, things like this so there is some other evidence besides just me standing up discussing this person's life. Because I feel the court needs some objective material that it can rely upon and not just counsel, so I'll attack it that way. At least I have quality control. I know what is going in. (D1)

By collecting their own information, D1 and D6 were able to present a wider range of information from a variety of sources, facilitating the consideration of the section and *Gladue*.

It became apparent that in most situations lawyers would either simply refer to the section or *Gladue* or go into limited detail about their client's background. These lawyers were not linking their client's background directly to the factors laid out in *Gladue*. More specifically, they were not presenting detailed information linking their client's background to the broader systemic factors including socio-economic conditions, colonial experiences and discrimination as required by *Gladue*. D1 and D6 were again an exception. D1 explained that when referring to *Gladue* in a case he brought in both in the individual and the broader social aspects of the client and the circumstances. He also noted that was not enough to merely present these factors but that that the link between them need to be presented to the court in a clear and understandable manner. Locating the individual accused within the context of his or her community requires lawyers to gain an understanding of the community. D6 explained a situation where he visited a rural community to gain an in-depth understanding of its history, present situation and people.

While this study demonstrated that the majority of the lawyers interviewed have their agency informed by justice ideologies, racialized constructs and criminal justice structures, D1 and D6 were found to have their agency informed by other—often contradictory—ideologies, constructs and structures which enable them to incorporate the section and *Gladue* into their practice. How were these lawyers able to critique and challenge the criminal justice ideologies, racialized constructs and structural barriers that hindered the other lawyers?

From their interviews it became apparent that the knowledge D1 and D6 have gained outside of law books and outside the confines of the courtroom and the criminal

justice system has influenced their agency.²¹ A variety of information gained through other academic sources and recognized community resources have provided these defence lawyers with an alternative perspective on law, the criminal justice system and Aboriginal peoples. Furthermore, the life experiences of D1 and D6 have not only provided an in-depth understanding of Aboriginal peoples both on and off reserves but also of alternative forms of justice outside the traditional Canadian criminal justice system. This is; however, not to imply that D1 and D6 have always been successful in their challenges. They have run into situations in which difficulties are encountered. As D1 expressed in his interview when reflecting on his efforts to utilize *Gladue*, “It is inordinately difficult to practice law the way I do, inordinately difficult!” Similarly D6 explains, it is “more difficult to present a *Gladue* defence than it is not to.”

Although D1 and D6 noted that they felt it was their duty to refer to the section and/or *Gladue* in cases involving Aboriginal clients, even in cases that involved serious offences and/or were entered into plea negotiations, they noted the limited effect that the section and/or *Gladue* has had on the outcome of the offender’s sentence in these situations. They also noted the lack of alternatives to incarceration as a difficult obstacle to overcome when making recommendations for the consideration of the section and/or *Gladue*. D6’s comments illustrated that although his arguments were not contingent upon the availability of alternatives, they were made easier in situations where alternatives were available. D1 also commented on the challenges posed by a lack of alternative programs:

²¹ To protect the anonymity and confidentiality of the respondents and their responses no specific details can be provided on this point. However, an attempt is made to provide information and responses in a way that would not reveal the identity of the individual respondent.

There is almost no alternative programming available in rural Manitoba and there is very little else in Winnipeg. That is one of the problems with suggesting the courts consider the section. There has been a dramatic shift in government funding away from these types of programs. Those programs that do manage to survive have a staggering number of people on the waiting lists. It is very, very difficult to get people into alternative programs. That is the problem, it not just a question of recommending a program, its getting in. (D1)

Expanding on the shift in government funding and alternatives, D1 went on to explain that the implementation of conditional sentences and restorative justice principles has been hindered by the prevalence of a “get tough on crime” philosophy. He noted the discourse of criminal justice has shifted towards building more prisons.

...I think that things are getting much worse. What we need is more healing lodges and more facilities where offenders are treated with dignity and respect. However, I have seen a progression to a much more ridged system, which to me is a frightening phenomenon. (D1)

Defence lawyers who did choose to use the option of *Gladue* reports, including D1 and D6, noted problems with them. Despite the fact that there is a standard format provided to prepare these reports, the lawyers indicated that the quality and depth of the reports varied. A poor report that lacked depth in relation to the circumstances of the Aboriginal offender and possible alternatives to imprisonment is of little benefit to defence lawyers. Although the strategies of D1 and D6—participating in the preparation of the report and collecting their own information—offset the problems associated with the lack quality and depth of the reports, they noted new obstacles. These obstacles were typically related to the gathering of supporting information and included the additional time, work and financial resources that were required for implementing this strategy. As D1 explains:

As I said, when referring to the *Gladue* decision in a case you need to link the individual circumstances of the Aboriginal offender to the broader factors

affecting Aboriginals. Gathering that type of information requires time. It requires effort on the part of the lawyer. (D1)

Similarly, D6 notes, “it takes time to understand the factors set out in *Gladue*. You have to understand what you are talking about and be able to communicate that to a judge. All this takes time.” D1 also explains that in legal aid cases the additional time and resources required to compile supporting information, as per *Gladue*, are often not provided for.

I think that is part of the problem with what is going on with *Gladue*, you know. With the legal aid crisis lawyers are simply not getting paid for the research, for the time. And that is why people are not using *Gladue*. That is why people are not taking the time. And it’s really affecting the quality of legal services. (D1)

The difficulties encountered by D1 and D6 have not directly influenced their use of the section and *Gladue*. They have; however, had some indirect consequences on D1’s profession in terms of size and direction. D1 notes that criminal law has now become his focus whereas before his practice was much more diverse. Reflecting on the additional work associated with *Gladue*, D1 stated:

I’m just saying that it is becoming exceedingly difficult to advocate for your client. I myself know that if I want to keep doing the quality of the work that I have been doing then I have to make certain choices. You really have to limit yourself. I am making a very conscious decision now to try and be very extraordinarily restrictive and only accept criminal cases. Even then I can’t take on every criminal case I’m presented with. (D1)

Directions for the Future:

Law as a Mechanism of Social Change

In Stephen Brickey and Elizabeth Comack’s article entitled, “The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?” they argue that:

The jurisprudence of insurgency is based on the idea that to abandon law as an agent of change is to negate one method that can be used to challenge the present system. The insurgent role of law is to identify the existing contradictions within

legal ideology and to use those contradictions to pit that ideology against itself. (Brickey and Comack 1987: 113)

Law can be a site of change, as demonstrated by the comments of D1 and D6. However, as the majority of the defence lawyers' comments have shown, the practices of lawyers need to be addressed to ensure that their agency supports legislation and Supreme Court decisions designed to create a more 'just' criminal justice system for Aboriginal peoples. As Comack and Balfour (2004: 177) note "Any efforts to fashion a new paradigm of justice will require paying attention to how the adversarial system mandates defence lawyers to resist and subvert legal change in the interest of defending their clients." The comments of the defence lawyers interviewed revealed a number of factors that could be changed and opportunities that could be provided to facilitate the agency of lawyers to incorporate section 718.2 (e) and *Gladue* into their legal practice and reduce the difficulties encountered by lawyers whose strategies support their incorporation.

Using the information provided by the lawyers in their interviews and suggestions from other available literature on the section and *Gladue*, as well as literature related to the practices of lawyers, general recommendations can be made to improve and enhance the ability of lawyers to incorporate the section and *Gladue* into their practice to achieve their reformative goals. The following recommendations are separated into two groups. The first group focuses on strategies and models of lawyering that would encourage the integration of the section and *Gladue* as well as ways to promote and transmit these strategies. The second group of recommendations focuses on ways to reduce the procedural and structural obstacles faced by defence lawyers when integrating the section and *Gladue*.

Recommendations for Creating a New Form of Lawyering

As Michael Diamond (2000-2001: 130) suggests, a new model of lawyering needs to be created which permits effective collaboration between lawyers, clients and other professionals. “The struggle of subordination is an ongoing one and those lawyers who are allied with subordinate people must understand the nature of their adversary, the weapons it commands and the arsenal available for their own use in meeting these challenges. The traditional weapons are not the only ones that exist, nor are they the best ones.” He goes on to state that this model of lawyering—referred to as activist lawyers or rebellious lawyers—is founded in the connection between the lawyer and the community (131). “This kind of involvement also can help to bridge the often-present race and class gap between community and lawyer” (Diamond 2000-2001: 131).

Rose Voyvodic (2006) looked at the characteristics of the culturally competent lawyer, characteristics she found to be increasingly necessary to practice law in an increasingly diverse social context. As stated by Voyvodic (2006: 563), a culturally competent Canadian lawyer “values an awareness of humans and of oneself, as cultural beings who are prone to stereotyping; acknowledges the harmful effects of discrimination upon human interaction; and acquires and performs the skills necessary to lessen the effects of these influences in order to serve the pursuit of justice.” She also suggests guidelines which encourage the development of these attributes that would “further the public interest in the pursuit of justice by providing lawyers with cultural competence skills, attitudes and values that will help them to build a more just legal system” (582).

These guidelines include:

KNOWLEDGE: about how “cultural differences affect client experiences of the legal process as well as their interactions with lawyers;

SKILLS: through self-monitoring, to identify how assumptions and stereotypes influences the his/her [lawyers] thinking and behaviour, as well as the thinking and behavior of others and to work to lessen the effect of these influences;

ATTITUDE: awareness of him/herself [lawyers] as a cultural being and of the harmful effects of the power and privilege; and the willingness and desire to practice competently in the pursuit of justice. (Voyvodic 2006: 582)

Using these models as a basis, it is projected that adopting similar guidelines as a framework will create a new form of lawyering. This new form of lawyering would improve and enhance the ability of lawyers to incorporate the section and *Gladue* into their practice.

First and foremost, the role of the defence lawyer—to serve the interest of their clients and to gain the lightest possible sentence for the accused—needs to be expanded. Taking direction from the comments made by D1 and D6 regarding their integration of the section and *Gladue*, lawyers need to realize that their actions influence the form of law. They need to reflect on how the information that they provide the court with may affect, not just this case or the specific individual they are representing, but what influence it will have on future cases and offenders. For example, in situations where lawyers have determined that the section and *Gladue* would not facilitate their role in gaining the lightest possible sentence for the accused, they may still take the opportunity to present information and bring up relevant issues. By taking this opportunity the lawyer would remind the court of section 718 and *Gladue*, possibly affecting the sentencing in a future case. Lawyers need to expand their role from focusing on the individual to addressing the collective injustices faced by Aboriginal peoples would promote the incorporation section 718.2 (e) and *Gladue* into legal practice.

To address the problems associated with the role of legal ideology—equality, neutrality and particular constructs of ‘Indian-ness’ identified in the interviews with the defence lawyers—a connection needs to be created between lawyers in Manitoba and Aboriginal communities, both urban and rural, outside their experiences within the criminal justice system. This should include educating lawyers on issues related to the tradition, history, social, economic and political realities of Aboriginal peoples. It could also entail lawyers directly participating in the community through, for example, project planning, development and implementation of social, political and economic aspects of community action (Diamond 2000-2001: 131).

To further address the problems associated with the role of legal ideology lawyers must develop skills to recognize and critique the political, educational, economic and more specifically, the legal structures that oppress marginalized peoples (Henry and Tator 2006: 335). Lawyers must be professionally socialized and given the knowledge and tools to deconstruct the meaning behind discourses that surround them, such as “individuality,” “equality” and particular constructs of ‘Indian-ness’ and “race-neutrality”. According to Voyvodic (2006: 582) through self-monitoring, lawyers can learn to identify how assumptions and stereotypes influences their thinking and behaviour, as well as the thinking and behaviour of others and to work to lessen the effect of these influences. Given these tools and knowledge, lawyers would for example, become more critical of the traditional liberal legal framework of ‘equal’ treatment and blind justice and more open to notions of substantive equality or equality of outcome, which recognize differences (Kramar and Sealy 2006: 135).

In attending to the problems associated with the integration of the section and *Gladue* in cases involving serious offences and offenders with prior records, lawyers must become educated on the need to prioritize the investigation of unique circumstances and possible alternatives to incarceration over individual, legally defined mitigating and aggravating factors such as the seriousness of offence, the offender's prior record and concepts of remorse and responsibility.

In order to achieve this objective, defence lawyers must develop the skills required to take a reflective approach regarding their use of legal terms and categories in determining when the investigation of unique circumstances and possible alternatives to incarceration are considered relevant information and how this determination can negatively effect the judge's ability to craft a meaningful restorative sentence for an Aboriginal offender. According to Pelletier (2001: 486) "considering an offender's circumstances at the final stage of the sentencing analysis gives insufficient attention to the factors outlined in *Gladue* and will not assist in achieving Parliament's objective of alleviating Aboriginal over-representation in prison."

Associated with this challenge is the need for training that enables lawyers to gather, synthesize and present information on these individualized legal factors within the overall social context of Aboriginal peoples. According to Rudin (2007: 48), "lawyers are not necessarily equipped to ask clients the types of questions that would elicit a real picture of a person's life," nor are they familiar with how to present such information to the sentencing judge. Skills related to the development of sentencing submissions need to be prioritized (Roberts 2001: 1167). This would enable defence lawyers to clearly

express to the courts the relation between the individualized legal factors and the broader social context so they can be understood as more than merely an aggravating factor.

In specific relation to the seriousness of the offence, whether the section is and is not applicable in relation to serious and non-serious offences needs to be clarified along with the definition of serious and non-serious offences. Haslip (2000: 18) suggests a focus on a non-custodial restorative approach to all offences except for those offences with a minimum term of incarceration or for those offences involving domestic violence, child abuse and sexual assault, thus addressing the present high incarceration rate for non-payment of fines, property offences and non-violent offences. She also suggests that the offences involving domestic violence, child abuse and sexual assault may still involve a restorative component but would require the consultation of the victim, the offender and their respective communities (18).

However, adopting Haslip's suggestions could potentially contribute to the problem of "net widening," producing more rigorous penalties for individuals who otherwise would have received probation order, fines or suspended sentences (Comack and Balfour 2004: 176; Roach and Rudin 2000; Pelletier 2001). As such, in order to fully maximize the remedial purpose of the section and avoid the potential of "net widening," it is suggested that the types of offence considered by lawyers should be extensive and include those considered serious offences. Defence lawyers need to be aware of the consequences of net widening and include these in their sentencing recommendations when incorporating the section and *Gladue*. Furthermore, this approach is not meant to imply that people who engage in violent offences should not be held accountable for their

actions but that the social context of Aboriginal peoples should to be considered regardless of the seriousness of the offence.

To ensure that lawyers are receiving the information they need to implement a new form of lawyering, mandatory pre-service training programs in law schools and in-service professional development programs through the Bar Association must be implemented to ensure that lawyers develop critical self-reflective skills required to engage in social transformation. Voyvodic (2006: 581) noted that “knowledge about diversity work and accompanying skill development, do not appear to be widely regarded as a necessary requisite of legal education or bar admission requirements in Canada. This may be attributable to common perceptions within the profession that is not necessary because the legal profession is itself becoming more diverse due to increased enrolment in law school and hiring by firms of women and other previously underrepresented groups.” This alone; however, does not guarantee a profession without bias. The Canadian Bar Association needs to make ongoing legal education a priority to ensure that the agency of lawyers is influenced in a way that enables the incorporation of new legislation and Supreme Court decisions.

Recommendations for Reducing Procedural and Structural Barriers

This second group of recommendations focuses on ways to reduce the procedural and structural obstacles faced by defence lawyers when integrating the section and *Gladue*. It addresses factors related to plea negotiations, remand and the availability of alternatives as well as issues related to gathering and presenting information to the courts. As Rudin (2007: 51) notes, “the institutional pressure to move an already overburdened criminal

justice system also means that there must be some real changes in the way information is gathered and presented regarding Aboriginal peoples for change to truly occur.”

In relation to plea negotiations, the lawyers interviewed stated that the section and *Gladue* were not recognized as bargaining chips. This practice needs to be changed, given the large number of cases that result in a guilty plea that are the direct outcome of plea negotiations (Verdun-Jones and Tijerino 2004: 472). One way to address this issue is to mandate that defence lawyers integrate the unique circumstances and possible alternative to incarceration into their negotiations. One way to ensure this practice is to make plea negotiations more visible. For example, if a guilty plea is the direct result of plea negotiations defence lawyers should inform judges that a plea negotiation has taken place as well as the factors taken into consideration during the negotiation and how they pertain to the recommendations made by the defence and Crown. Plea negotiations need to be subject to judicial regulation and supervision to ensure that investigation into the unique circumstances and possible alternatives to incarceration section are being considered.

Some of the lawyers interviewed also noted that pre-trial detention and notions of time served often negate the need to bring in the section and *Gladue*. The issue of whether or not the *Gladue* decision applies to bail applications was, until recently, an open question. The decision of Mr. Justice Archibald in the case of *R. v. Brian*—a bail review—appears to have settled the matter in Ontario (cited in Rudin 2007: 54). In that case, Justice Archibald said: “clearly the principles of *Gladue* are overriding principles in the justice system from the time a person comes into the justice system to sentence” (quoted in Rudin 2007: 54). To address this issue in the Manitoba context and elsewhere

in the country, legislation needs to be amended to allow the section to be a consideration sooner within the criminal justice system process when pre-trial detention (remand) becomes an issue.

Furthermore, the implementation of Aboriginal bail programs, such as those implemented in Ontario, would provide much needed bail supervision to those Aboriginal individuals who would not otherwise be released due to having no fixed address, no suitable sureties or a combination of these and other factors. According to Rudin (2007: 53) an Aboriginal bail program works with individuals who might not be ordinarily released. For example, Aboriginal bail Programs will take individuals who are unable to find a surety and supervise the person on release. They provide referrals to counselling and housing sources (53).

One of the purposes of the *Gladue* decision is to provide sentencing judges with options to incarceration that would address the root causes of the individual's offending behaviour. Defence lawyers have a responsibility to provide the judge with these options (Turpel-Lafond 1999; *Flett* 2005). However, as this study has revealed, there are few options available and even fewer Aboriginal specific alternatives to incarceration available in Manitoba. Ideally increasing the number and capacity of these alternatives is suggested, as it would enhance lawyers' application of the section and *Gladue*.

Rudin (2007: 62-63) suggests expanding the range of Aboriginal justice programs as well as enhancing social services for Aboriginal people. He explains that Aboriginal justice programs should be designed to "specifically work with Aboriginal offenders and address some of the root causes of the person's offending behaviour" and focus on "integrating or re-integrating the person back into the community and minimize further

conflict with the law” (63). Furthermore, Rudin notes that these programs can also work for additional social service programming in the community (63). Haslip (2000: 30) adds to this by noting that when increasing the provision of Aboriginal specific alternatives, considerations need to be made regarding the ability and willingness of communities to offer these programs. Rudin (2007: 63) also speaks to this issue, explaining that in order to address the issue of Aboriginal over-incarceration in a holistic manner, social services for Aboriginal peoples need to be enhanced.

If organizations know that the court might consider using a particular program as an alternative to jail, there is incentive to develop such a program. Once such programs are developed they are often open to all who can use the service and thus can perform a preventative role as well. The identification of a social problem through the court system can often produce meaningful community responses. (Rudin 2007: 63)

Additional programs, enhanced social services and alternatives to incarceration, are only part of the solution. Lawyers need to be made aware of the programs and services available in the Aboriginal community or in the community in general that might prove to be a valid alternative to a sentence of incarceration (Rudin 2007: 48). To ensure that lawyers are aware of such programs and services, a regular forum of information sharing needs to be established between government, community agencies (Aboriginal and non-Aboriginal) and defence lawyers. This would allow lawyers to gather information on new and existing options in the community and assist in their presentation of sentencing alternatives to the courts.

Lawyers also need to be provided with some direction in how to craft meaningful restorative solutions and programs in light of a shortage in community resources (Haslip 2007: 18). As Rudin (2007: 48) points out, lawyers need to be provided with a sense of how information pertaining to the section and *Gladue* as a whole should come to the

courts. In Manitoba, a practice has been developed for counsel to make a ‘*Gladue* Report’ to the court that enables the sentencing judge to consider specific evidence concerning the circumstances and background of the Aboriginal offender and to be made aware of any specific resources that might be available to assist in rehabilitation” (*R. v. Lamarande* 2002). Probation officers typically prepare this report as part of the pre-sentence report. This study has shown that lawyers typically do not request these reports as they are unsatisfied with them for a variety of reasons, including their lack of quality, depth and consistency. Lawyers are thus left with the option of collecting their own information. This is a path rarely chosen, as many are not necessarily equipped to ask clients the types of questions that would elicit a real picture of a person’s life or with the information necessary to suggest alternatives. Those who do chose this path find it difficult noting the additional time, work and financial resources that are required. Alternative ways of providing information pertaining to the section, *Gladue*, the specific case and the offender needs to be implemented.

According to Rudin (2007: 61), the Aboriginal Legal Services of Toronto has created a position referred to as a *Gladue* Caseworker, as an alternative way to provide information to the courts regarding Aboriginal offenders. Generally, the role of a *Gladue* Caseworker is to research and write *Gladue* reports for the courts. Similar to probation officers in Manitoba, these caseworkers prepare these reports at the request of defence lawyers, the judge or the Crown. The reports prepared by the caseworkers, also referred to as *Gladue* reports, contain similar information as do the *Gladue* reports prepared by probations in Manitoba. However, as an Ontario judge explained:

The *Gladue* Caseworker can, in most cases, establish a rapport with the offender and elicit information about the offender’s Aboriginality background by the very

fact that they are themselves Aboriginal. They know what questions to ask; they know the significance of certain answers, such as where a person is originally from, or recently from and how to follow up on apparently inconsequential information. (quoted in Rudin 2007: 49-50)

As Rudin (2007: 50) highlights in his report, “it is clear from the experience of the caseworker that expecting a probation officer to provide that level of detail or support is unlikely in most cases.” For example, *Gladue* Caseworkers provide very detailed recommendations as to sentencing options. If a report recommends that an individual enter an alcohol or drug treatment program, the recommendation will be accompanied by an intake date for the client (Rudin 2007: 50). In order to obtain this date, the caseworker may have researched treatment options, discussed them with the offender, assisted the offender in completing an application form for the treatment center, sent the application off and lobbied on behalf of the offender with the treatment center (Rudin 2007: 50). While it has not been sufficient to expect probation officers to take on the preparation of *Gladue* reports as part of their current workload,²² taking from the experience of Aboriginal Legal Services of Toronto, it would be feasible to create a *Gladue* Caseworker program in Manitoba.

None of these recommendations—those associated with the form of lawyering and those focused on reducing the procedural and structural barriers faced by defence lawyers—should be put into practice without further investigation and consultation. Aboriginal peoples, communities and organizations need to be meaningfully involved in consultations regarding the development of any policy or recommendation that is related to Aboriginal and restorative justice issues. Rudin (2007: 65) recommends that “the

²² According to Rudin (2007: 50), “a Gladue Report can take between 15 and 20 hours of work to prepare—a courtworker who is expected to be in court on a daily basis simply does not have that sort of time.”

province ensure that there is input from Aboriginal organizations with an interest and experience in the justice area from the outset as guidelines, protocols and principles are developed. True consultation means that those whose work will be affected by the development of government policies will have input into the process from the beginning and not merely have an opportunity to comment on what might be virtually a finished product.”

All of the recommendations require additional resources. In some instances, these resources refer to the provision of training and educational programs, in others they refer to the provision of specific programs and services. These recommendations cannot be implemented without additional funding at the federal and provincial levels. However, given the government’s current philosophy of neo- conservatism and neo-liberalism, it can be argued that there is no room for additional spending in this area. Although money is not the answer to solving the problems facing Aboriginal people in the criminal justice system, it is pointless to pretend that change will simply happen without a reallocation of some fiscal priorities (Rudin 2007: 67). Money will not necessarily make the changes necessary in the system to occur, but without it, change is simply not going to happen (Rudin 2007: 67). If the inability of defence lawyers to incorporate the section and *Gladue* is illustrative of nothing else, it is evidence that the criminal justice system is a very difficult entity to promote change through.

**Concluding Remarks:
The Limitations of Law as a Mechanism of Social Change**

The larger socio-political context of neo-liberalism and neo-conservatism work in tandem to support notions of individual responsibility and a ‘get tough on crime’

rationale. As such, they are the antithesis to the underlying ideology that mandates consideration for the broader social context—regarding the lives of Aboriginal peoples—and its calls for restorative justice. Without addressing this larger socio-political context it is uncertain if the proposed changes to the criminal justice system and the practices of lawyers will fulfill the goals of *Gladue* to reduce Aboriginal over-incarceration.

However, law is not the only avenue that should be addressed when tackling the issue of Aboriginal over-incarceration. As the defence lawyers in this study indicated and as many scholars who have examined the issue of Aboriginal over incarceration have noted, other systemic factors should not be overlooked. As the Supreme Court noted in *Gladue* (1999), the fact of over-representation and the failure of the criminal justice system to deal fairly with Aboriginal peoples reveals a sad and pressing social issue. The problem is tied directly to the systemic issues faced by Aboriginal people throughout Canada and related to the continuing impact of colonialization on Aboriginal people (AJI. 1991; Alfred 1999; Monture-Angus 1999; RCAP 1993; Finkler 1992; Proulx, 2000). Given this reality, solutions to this problem cannot be addressed solely through the criminal justice system.

Rather than focusing on criminal justice policies designed to reduce Aboriginal over-incarceration, the focus should be on creating a more inclusive society. As Comack and Balfour (2004:178) note, “holding the state and law accountable for the provision of social welfare, education, health care, affordable and adequate day care may have far greater potential for creating safer communities.” This is an innovative idea, one that easily applies to the situation of Aboriginal peoples, as study after study have indicated that the criminal justice system has failed to meet the needs of Aboriginal peoples not

only as offenders but also as victims. Perhaps it is time to look outside the criminal justice system for the answers to questions of inequality.

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Appendix A:
Invitation to Participate

October 1, 2005

Dear _____;

I am currently conducting research for my Master's Thesis through the University of Manitoba's Department of Sociology. The research is intended to explore aspects of defence lawyers' legal practice, particularly in light of the 1999 Supreme Court decision in *R. v. Gladue* as it pertains to section 718.2 (e) of the Criminal Code.

My purpose in writing you is to request an interview to discuss your insights and experiences as a defence lawyer. The interview will entail a series of open-ended questions and will take approximately one hour of your time. These questions are designed to obtain general information from you and will not be based on any specific case(s) or clients that you have been or are currently involved with. The interview will be tape recorded (with your permission) and later transcribed. Be assured that the research will follow all of the ethical guidelines as required by the University of Manitoba's Psychology/Sociology Research Ethics Board – including confidentiality and anonymity.

I will be contacting you by telephone in the next while to determine your willingness to participate and a convenient time and location for us to meet. In the meantime, if you have any questions, please contact either myself or one of my thesis advisors, Dr. Stephen Brickey and Dr. Elizabeth Comack, at the numbers listed below.

Yours truly,

Rana McDonald
M.A. candidate
Department of Sociology
University of Manitoba
XXX-XXXX
Thesis Advisors
Dr. Stephen Brickey XXX-XXXX
Dr. Elizabeth Comack XXX-XXXX

Appendix B:

Verbal Script for Contacting Defence Lawyers via Phone

Researcher: “Hello, (Participants Name), my name is Rana McDonald and I am currently conducting research for my Master’s Thesis through the University of Manitoba’s Department of Sociology. I recently sent you a letter outlining the purpose of my research, which is to explore aspects of defence lawyers’ legal practice, particularly in light of the 1999 Supreme Court decision in *R. v. Gladue*. I was wondering if you had had a chance to look over the letter?”

Potential Participant: (Their response) “Yes or No”

Researcher: (If potential participant responds “No”) Read over the letter found in Appendix B.

Researcher: “Do you have any questions about the letter, your role if you chose to participate or the research in general?”

Potential Participant: (Their response) “Yes or No”

Researcher: (If potential participant responds “Yes”) “What question do you have?”
(Researcher will then answer potential participants questions)

Researcher: “Are you willing to be interviewed as part of this research project?”

Potential Participant: (Their response) “Yes or No”

Researcher: (If potential participant responds “Yes”) “What would be a convenient time and location for you to meet for the interview?”

Participant: (Their response) A specific date, time and place

Researcher: (To All) “Thank You Very Much For Your Time”

Appendix C:

Consent Form

Research Project Title:

The Effects of *R. v. Gladue* on Legal Practices within Manitoba Criminal Courts

Researcher: Rana McDonald

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

This research is being conducted as part of the University of Manitoba's Department of Sociology thesis requirements for a Master of Arts degree. The purpose of this research is to explore defence lawyers' perspectives and experiences, particularly in light of the 1999 Supreme Court decision in *R. v. Gladue* as it pertains to section 718.2 (e) of the Criminal Code. Specifically this research will focus on a number of issues including, defence lawyers and the nature of their work, the *Gladue* decision and its bearing, if any, on the practices of defence lawyers. This research will also address more general experiences and perceptions of the *Gladue* decision with regards to the overall positive and negative outcomes of the decision. These questions are designed to obtain general information from you and will not impose on lawyer-client confidentiality.

Participants in the study will be interviewed using a prepared interview guide that employs open-ended questions. Each participant will be interviewed in person by the researcher. The interviews should take approximately one hour. The interviews will be tape recorded and later transcribed. In instances where the participant is uncomfortable with their answers being tape recorded, the researcher will take written notes during the interview. Participants in this research will not be at risk of any harm that is greater than that which one experiences in the normal conduct of everyday life.

The information provided by participants will be confidential and anonymous. During the course of the research only the researcher (Rana McDonald) will have access to the audio recordings and transcripts, which will be kept in a locked facility and destroyed upon the completion of the research. Furthermore, no information that could identify an individual participant will be cited in the reporting of the findings. For example, while the participant's words may be cited verbatim in the final report, their identity and the identity of others, will remain confidential.

Participants in the study can request the results by contacting the researcher, Rana McDonald, either by phone at XXX-XXXX or through e-mail XXXXXXXX@XXXXXXXX.

Your participation in this research project is completely voluntary. Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research and agree to participate as a subject. In no way does this waive your legal rights nor release the researcher or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time and/or request the tape recorder to be turned off at any time and/or refrain from answering any questions you prefer to omit, without prejudice or consequence. You will not be compensated financially or otherwise as a result of your participation in this research. Furthermore, 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. Information is available from:

Rana McDonald (Principal Researcher) XXX-XXXX
Dr. Stephen Brickey (Thesis Advisor) XXX-XXXX
Dr. Elizabeth Comack (Thesis Advisor) XXX-XXXX

This research has been approved by the University of Manitoba's Psychology/Sociology Research Ethics Board. 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 XXX-XXXX or e-mail XXXXXXXXXX@XXXXX. A copy of this consent form has been given to you to keep for your records and reference.

Participant's
Signature _____

Date _____

Researcher's
Signature _____

Date _____

Appendix D:

Interview Schedule

Introduction

The purpose of this interview is to explore aspects of your legal practice, particularly in light of the 1999 Supreme Court decision in *Gladue* and its clarification of section 718.2 (e). Part One consists of some demographic questions and a discussion of the nature of your practice. Part Two contains some general questions regarding the *Gladue* decision as well as questions regarding your use of *Gladue* in plea negotiations and sentencing submissions. Part Three contains more specific questions regarding your experiences with the *Gladue* decision. This is followed by some additional questions related to your opinions on the positive and negative outcome of the *Gladue* decision.

Part One

Demographic Information

Age?

Gender?

Race/Ethnicity?

The Nature of Your Legal Practice

How long have you been practicing law?

What courts do you typically deal with?

(Court of Queen's Bench, Provincial Court of Manitoba, Circuit Courts, or other?)

What kinds of cases do you most often take on?

(Criminal vs. Other?)

(What percentage of your cases involve legal aid work?)

Can you describe your typical client to me?

(What percentage of your clients are Aboriginal?)

Part Two

General Questions about the Gladue decision

Are you familiar with the Supreme Court's decision in *Gladue*?

What do you consider to be the main objective of *Gladue*?

[and its clarification of section 718.2(e)]

Gladue and Plea Negotiations

Has *Gladue* had any impact on decision in your plea negotiations?

Describe why not or how often and in what way

Has the Crown ever raised *Gladue* in plea negotiations?
Describe why not or how often and in what way

Gladue and Sentencing Submissions

Has *Gladue* had any impact on your sentencing submissions?
Describe why not or how often, in what way

Has the Crown ever raised *Gladue* in their sentencing submissions?
Describe why not or how often and in what way

Has a judge ever suggested that *Gladue* should be a consideration at sentencing?

Part Three

Questions for those defence lawyers that have referenced Gladue in either plea negotiations or in sentencing submissions

What criteria do you take into consideration when determining if *Gladue* is appropriate in a specific case?

When referencing the *Gladue* decision in relation to a case, what aspects of the *Gladue* decision do you convey?

When referring to the *Gladue* decision in a case, what specific information do you provide the court with?

Probe: Do you refer to the individual circumstances of the Aboriginal offender?
(elaborate)

Probe: Do you refer to the general systemic and background factors affecting Aboriginal peoples in Canada? (elaborate)

Probe: Does the information that you provide the court with vary according to the gender of the offender? (elaborate)

When referring to the *Gladue* decision in a case, what types of alternative sentences do you recommend?

How do you present information pertaining to *Gladue* to the court?

Probe: Do you use pre-sentence reports, pre-disposition reports, *Gladue* reports?
(elaborate on each one used)

Probe: Is the information presented verbally by you to the court or through community representatives, expert testimony or by other means?
(explain)

Do cases in which you cite *Gladue* differ from other cases?

Does the consideration of *Gladue* have an impact on your workload?

Do you think that the consideration of *Gladue* has had an impact on the workload of others in the Criminal Justice System?

Has *Gladue* ever affected the sentencing of an accused you have represented?

Part Four

Additional Questions Pertaining to Gladue (for all defence lawyers)

What do you think have been the main consequences of the Supreme Courts Decision in *Gladue*?

In your experience have there been any positive outcomes?

In your experience have there been any negative outcomes?

Do you think that *Gladue* is underused in Manitoba courts? (Why or Why not?)

Do you think that there are enough resources in Manitoba dedicated to the implementation of the recommendations made in the *Gladue* decision?

Do you think that Manitoba judges are receptive to the Supreme Court's views in *Gladue*?

Toronto has a *Gladue* court, which hears only cases of Aboriginal defendants. The court accepts guilty pleas, sentences offenders and considers bail hearings. It also has a staff that consists of Caseworkers – who write reports on the life circumstances of Aboriginal offenders. Do you think that this type of court would be viable in Manitoba? (Why or Why not?)

In the *Gladue* decision the Court recognized the over-incarceration of Aboriginal peoples as a problem and focused on the sentencing stage as a means to correct it. Do you think that focusing on the sentencing process is where the over-incarceration of Aboriginal peoples should be addressed (Explain)?

If you had the opportunity to respond to the Supreme Court about *Gladue* decision, what would you like to tell them?

Are there any other issues or points about the *Gladue* decision that we have not discussed that you would like to add?

Thank you for your participation.

