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Towards ending incarceration of Indigenous peoples in Canada: A critical, narrative inquiry of hegemonic power in the Gladue report process

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TOWARDS ENDING INCARCERATION OF INDIGENOUS PEOPLES IN CANADA: A CRITICAL, NARRATIVE INQUIRY OF HEGEMONIC POWER IN THE *GLADUE* REPORT PROCESS

by

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Abstract

This study is concerned with the possibility that *Gladue* perpetuates the hegemonic powers of settler colonialism, white supremacy, patriarchy, and neoliberalism. *Gladue* is intended to remediate systemic anti-Indigenous racism by requiring judges to consider all alternatives to incarceration when sentencing Indigenous peoples, yet Indigenous incarceration rates continue to rise precipitously. On the surface, *Gladue* does not appear to disrupt the hegemonic status quo. How is it that the Canadian state, even when 'remediating,' keeps producing the same – colonial, oppressive, and tyrannical – result?

This qualitative study used a critical, narrative methodology, interviewing *Gladue* report writers (n=9) and judges (n=12) about their perspectives and experiences with *Gladue*, particularly *Gladue* reports. The study purposefully emphasized settler accountability – research as reparation – in the research design, data collection, and analysis. A careful, ethical protocol for researching with Indigenous peoples (n=9) was followed, premised in Truth and Reconciliation 'Call to Action' number 30 to reduce Indigenous incarceration in Canada.

This study found that *Gladue* is falling short of achieving its systemic aim because of (a) a hyper-individualistic, dehumanizing configuration that discursively shifts judges away from dealing with the systemic issue of anti-Indigenous racism, towards judging the individual Indigenous person before the court; (b) colonial mentalities (e.g., whiteness and patriarchy) persisting in the process; (c) a lack of funding for *Gladue* writers, as well alternatives to incarceration, constraining judges' capacities to divert Indigenous away from prisons. The study points towards the need for a more radical framework for *Gladue* that honours Indigenous self-determination and foundational treaties such as the Two Row Wampum.

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Introduction

"[T]he universe is not an object, but a story" (Jackson, 2021, p.151).

Preamble

In my office, I have my Grandad's old chair[1]. It was his storytelling chair. The chair, itself, is rather unassuming. It has a light brown colouring, or maybe more like a mix of brown and yellow. Originally it was probably a muddy brown, having faded over time. The back of it looks like an upside-down pleated dress or skirt. Can you picture it? The arms are made of wood, stretching out in a partially-open embrace, round knobs at the ends, for gripping, as Grandad would do during the more climactic elements of his stories. It's the sort of chair that is hard to slouch in, but even sitting upright, it is quite comfortable. When I visited my grandparents' house in the 1980s, I liked to sit in the chair, because it was next to a well-stocked candy bowl.
When Grandad sat there, upright yet reposed, he would share stories about his experiences: a childhood in Montreal, being raised by his aunt and uncle as his mother passed away around the time of his birth, enlisting with the Black Watch infantry during World War II and going oversees to be a part of the Canadian liberation of Holland, meeting my Nana at a dance in Brantford Ontario when he was working for the Bell telephone company, tagging cars with pamphlets when he started his own insurance business, and dozens of stories in-between. The narrative arc was similar. Some details to set up what would usually turn out to be a humorous punchline.

[1] A version of this opening was published at https://www.euforumrj.org/en/questions-almost-50-years-restorative-justice-canada

During my childhood, each story was new and exciting. When I was a teenager, the stories began to repeat. As a young adult, I'd heard each of the stories many times. Grandad's dementia and Alzheimer's had settled in, to stay. But, so too had the rhythm of his storytelling, his warm-hearted presence in my life. I came to be in his words.

Whether it was the first time or the twentieth, Grandad always told his stories with the same vigour, the same twinkle in his bright blue eyes, and the same head-thrown-back laugh at his own punch lines (e.g., he missed a lot of fighting during WWII because he got the mumps; the other soldiers wanted him to kiss them to share the virus to get the corresponding reprieve from the horrors of the frontline). Whether it was the first time or the twentieth, I would listen with the same vitality, returning his gaze with my brown eyes, and laughing enthusiastically when the punch line landed ("Well…did you kiss them?"). Stories are a gift we give each other for how to be.

Grandad's stories were repetitive. But they were a lifeline, a rhythmic heartbeat of connection and belonging and love, between a Grandad and his family. A story is a relationship. As we relate, we become. As we narrate our lives, as we imagine, we become: stories make us who we are, they are *constitutive* (Brown & Augusta-Scott, 2007; Page & Goodman, 2018). When I was a child, I was engrossed *by* Grandad's stories. Now, as an adult, I know we *are* stories (King, 2003).

This PhD dissertation is a story, a critical narrative inquiry into *Gladue*[2], or how the *Gladue* process in criminal law resists and reifies settler colonialism. It is a story about a

[2] This dissertation uses an expansive definition of the term "*Gladue*," to include the sentencing decision *R v. Gladue*, *Gladue* reports, *Gladue* principles and factors, the sentencing decision in Section 718.2(e) of the *Criminal Code*, and a signpost for addressing anti-Indigenous racism at sentencing. Further, *Gladue* is sometimes used to reference the process of the writing of *Gladue* reports, the reading of *Gladue* reports, and the use of *Gladue* reports for sentencing. While it might seem that the original definition of *Gladue* has been stretched, I have chosen a more all-encompassing use of the word based on how the participants in my study chose to use it. Moreover, *Gladue* is italicized throughout simply for emphasis. Finally, at the conclusion of my study, I discovered second-hand that,

research journey, from my social location to a theoretical framework and literature reviews, to a methodology, findings, and a critical analysis. It is also a story about research participants' experiences of *Gladue*. The story ends – and it is not often at the beginning of a story that the ending is given away – by theorizing that Canada needs a new story, a new master narrative that encompasses its systematic, violent colonization of Indigenous peoples, especially in legal mechanisms, such as Gladue, purporting to address systemic discrimination and colonization within the criminal punishment system. Without a new narrative, the tension in Gladue between resistance and reification of settler colonialism will give way to the dominance of reification. This is not a new thesis. Many (mostly Indigenous peoples) have written, argued, fought, and struggled to have another story heard above the din of the mythos of Canada as a benevolent nation. But most stories are lived stories. Any new narrative about Canada must promote settler accountability and improve Indigenous freedoms and self-determination.

Stories

What makes a story a story? A story is the linking of events and ideas in the form of a consequential or meaningful pattern (Riessman, 2008). The kinds of events and ideas conveyed by stories are those that describe knowledge systems, experiences, and identities (Archibald et al, 2019). But, as I have already written, a story goes beyond what is told, to what is lived or how what is told and what is lived become interchangeable. Along the way, through story-living, we try to make sense of our lives. The sense-making process, or how we describe it, is the narrative. Similar to Catherine Kohler Riessman (2008), I define the term "narrative" fairly synonymously

unfortunately, Jamie Gladue's family, for whom *Gladue* is named, has expressed some concern that their last name is so widely used in criminal legal contexts.

with “story”. Where the two differ is that “story is an event or sequence of events (the action)” while “narrative” is “the representation of events,” the interpretation or meaning made of the action (Abbott, 2008, p.19).

The following dissertation is a part of my story. It might be neatly organized into chapters, bookended by an introduction and a conclusion, but it is far from complete. The larger story I find myself in is as a white, male, settler is an old story with contemporary consequences. The story is Canada’s 150-year old, violent – genocidal – colonization of Indigenous peoples. The nation of Canada is itself a myth – part of the imaginary of settlers who claimed a nation-state in spite of the existing presence of Indigenous Nations. Because stories are constitutive it means that they are active, or alive. We are writing as we are living. The beginning and middle are history, but how it finishes is unknown. How we live in the present will contour the living of the next chapter of history. I aim to use my research, one small study, to do my part to make for a better ending.

One part of Canada’s colonization of Indigenous peoples was the use of “Indian” Residential “Schools” (IRS). I put “Indian” in quotes because Canada is not in India. “Indian” is a derogatory way of saying Indigenous peoples or the original inhabitants of Turtle Island, the area now known as Canada. It is important to note that Indigenous peoples are not homogeneous. They are incredibly diverse – representing many societies, cultures, languages, and communities (Coulthard, 2014; Vowel, 2016). In my dissertation, ‘Indigenous peoples’ signifies Original peoples, especially First Nations, Inuit, and Metis peoples in Canada (Vowel, 2016). I also put “Schools” in quotes because the IRSs were not schools. They were not places of learning and growth. The IRS system was explicitly designed to ‘kill the Indian in the child’ (TRC, 2012) as a violent way ‘do away with the Indian problem’ (TRC, 2012), all a part of Canada’s settler

colonial strategy. But, settler colonialism goes well beyond the 100 years of IRSs that saw 150,000 stolen from homes and communities. I will write more, later, especially about the prisonizing of Indigenous peoples, the mass incarceration of Indigenous peoples as a way to continue the ongoing settler colonial project of Indigenous disappearance to steal lands and resources.

Settler colonialism, according to Patrick Wolfe (2006), is a structure and not an event. The structure of settler colonialism is organized in a way that settler peoples, "[assert] ownership over" Indigenous peoples, resources, and lands (Vowel, 2016, p.16). Settler colonialism is the taking – the theft – of land from Indigenous peoples in order to profit from the resources (Coulthard, 2014). The structure of settler colonialism disrupts Indigenous peoples' relationships with the land and each other (Tuck & Yang, 2012; Vowel 2016). Land is property (settler worldview), something to be owned and exploited, rather than something to be in symbiotic relationship with (Indigenous worldviews) (Absolon, 2011; Tuck & Yang, 2012). Furthermore, settler colonialism is structured as natural (Wolfe, 2006): the distorted belief that settler peoples did not steal land, because it was 'rightfully' theirs. Essentially, settler colonialism is "a persistent social and political formation in which newcomers/colonizers/settlers come to a place, claim it as their own, and do whatever it takes to disappear the Indigenous peoples that are there" (Arvin, Tuck & Morrill, 2013, p.12). Socially and politically, settler colonialism is a masculinist, gendered practice (Robertson, 2016), and primarily about wealth-building or the advancement of white, settler society (Fontaine, 2014).

In 2015, the Truth & Reconciliation Commission of Canada (TRC), after reviewing the IRS system by interviewing survivors, released its final report. By that time, I was two years into my doctoral journey, intent on studying approaches to male violence and accountability.

However, I was further awakened to my own complicity as a settler person in a country that continues to colonize. Settler peoples refers to people not originally from Turtle Island (Vowel, 2016). 'Settler' denotes a relationship rather than a racial category, a physical occupation of Indigenous lands (Vowel, 2016). In *Indigenous Writes: A guide to First Nations, Metis & Inuit issues in Canada*, Metis legal scholar, Chelsea Vowel (2016) writes that settlers are predominantly European descended whites and that descendants of Africans who were sold into slavery cannot be settlers, as theirs was a forcible arrival. I realized that rather than study how others needed to be accountable, I needed to be accountable through my study[3]. The TRC identified ninety-four Calls to Action to acknowledge, repair, and dismantle colonialism—that pointed the way for settler Canadians to take responsibility. One of the commissioners of the TRC, Justice Murray Sinclair, when asked by a reporter what Canadians can do in response to the TRC, suggested, "read the Calls to Action, select one and see what you can do to make it work" (Millgate, 2016). So, I read the Calls to Action and selected #30: "We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade" (Truth & Reconciliation Commission of Canada, 2015, p.324).

I picked #30 because, by 2015, I had worked for ten years in and around the Canadian penitentiary system doing restorative justice work with people who were criminalized. I had seen with my own eyes that the many of those imprisoned were Indigenous (today, close to 30% of people imprisoned in federal penitentiaries are Indigenous, while being only about 4% of the overall Canadian population) (Office of the Correctional Investigator, 2020). I had seen enough

[3] Throughout the dissertation, when I use the terms 'settler' and 'colonial' (often interchangeably), it is shorthand for the longer descriptor, 'settler colonialism'. The shorter versions make the text slightly less cumbersome.

to know that I needed to do something. How should I start? What did I need to do to operationalize a study that responded to Call to Action #30?

Research purpose

I had known for some time about a principle in law called *Gladue*. In 1996, a section of the *Criminal Code*, 718.2(e), was enacted in order to address general over-use of incarceration as a sentencing practice, as well as the particularly disproportionate carceral sentencing of Indigenous peoples (Murdocca, 2013). Section 718.2(e) requires judges to consider: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (*Criminal Code*, 1985, s 718.2(e)). In a 1999 case, *R v Gladue*, the Supreme Court of Canada gave judicial interpretation and precedent to what Section 718.2(e) meant for sentencing Indigenous peoples (Murdocca, 2013). It was/is supposed to be remedial, steering Indigenous peoples away from incarceration. The judiciary is obligated, "to do what is within their power to reduce the over-incarceration of Aboriginal people and to seek reasonable alternatives for Aboriginal people who come before them" (Parkes et al, 2012, p.5). This case established what came to be known as the *Gladue* principles. At the time of sentencing an Indigenous person, a judge must consider, first, unique systemic (e.g., connection to colonialism) and background factors (e.g., experiences of loss of identity and culture, poverty and unemployment, substance use, interpersonal violence, and so on) to that Indigenous person, and second, a sentence that is appropriate to that person's Indigenous heritage (*R v Gladue*, 1999). A 2012 case, *R. vs Ipeelee* (2012), reinforced the 1999 decision. In fact, the language of judicial notice shifted from "may," in *R v Gladue*, to "must," in

R v Ipeelee: "When sentencing an Aboriginal offender, courts *must* take judicial notice of such matters as the history of colonialism" (2012, para. 6; *emphasis added*). Yet, since the landmark *R v Gladue* case disproportionate incarceration rates of Indigenous peoples have risen from 15% to 30%. Why? Something seems out of alignment, a remedial effort that is not remediating. Or, is it the system functioning as it should, masking colonial violence using the language of reform?

So, I set out to conduct research about *Gladue*, to get a better understanding of how Canada continues to colonize, even when so-called remedial efforts are underway. My purpose is to do my part to work towards decolonizing. Decolonization, as explained by Eve Tuck and K. Wayne Yang (2012), is not metaphorical, or superficial, or even about critical consciousness, but instead, ". . . brings about the repatriation of Indigenous land and life" (p.1). Decolonization means the elimination of settler property rights and the return of Indigenous sovereignties (Tuck & Yang, 2012). In this paper, when I write 'decolonizing the criminal punishment system[4]' I mean that settler people need to stop interfering with the self-determination of Indigenous peoples with regard to justice practices. Decolonizing the criminal punishment system is returning jurisdiction of justice processes to Indigenous peoples.

The focus of my research is *Gladue* reports, through the stories and experiences of the authors (Gladue writers) and readers/interpreters of the reports (judges). *Gladue* reports are an option – pre-sentencing – to Indigenous peoples, who enter a guilty plea or are deemed guilty, in settler Canadian criminal courts (Department of Justice Canada, 2017). In simplistic terms, *Gladue* reports detail, or tell a story about, the criminalized Indigenous person before the courts. They are written by a *Gladue* report writer – usually about twenty pages long, connecting the

[4] Throughout my dissertation I will be referring to the criminal justice system interchangeably as either the criminal punishment system or the criminal legal system, for reasons that will become evident later that the system is not geared towards justice.

dots for a judge so they can understand how a criminalized Indigenous person before them has been impacted by colonialism, from Nation, to community, to family, to personally for the criminalized person. The reports conclude with a series of recommendations for alternative options to incarceration.

Judges are obligated to use the *Gladue* principles (to follow the law in Section 718.2(e) of the *Criminal Code*), as part of decision-making at sentencing, as a way to consider all reasonable alternatives to incarceration (Parkes et al, 2012; Rudin, 2013). At face value, *Gladue* appears to be another reform that does not reform, a state-initiated solution that does nothing to interrupt state-based oppression. It is intriguing that *Gladue* is intended to be remedial, supposedly steering Indigenous peoples away from Canadian prisons (Rudin, 2013); however, the reality is that Indigenous incarceration rates, even after two decades of *Gladue* (1999 onwards), continue to intensify (Department of Justice Canada, 2017; Rogin, 2017). How is it that the Canadian state, even when 'remediating,' keeps producing the same – colonial, oppressive, and tyrannical – result? From inception, onwards, the Canadian state has criminalized Indigenous identities (Monture, 1995). *Gladue* has not changed that.

Using a critical narrative inquiry, I wanted to know more about experiences and narratives emerging from how reports are researched, written, and interpreted for sentencing – and thus lived (i.e., the impact). By interviewing Gladue writers and judges, I was able to get a better understanding of how Gladue resists and reifies power relations that are a part of settler colonialism. Part of the purpose, then, is to know more about how hegemonic power operates (and can be disrupted) in Canadian settler society.

At this point, I want to offer a preliminary definition of power that I will expand on at the conclusion of the theoretical framework chapter. Power, defined by Ruth Wilson Gilmore

(2007), "is not a thing but rather a capacity composed of active and changing relationships enabling a person, group, or institution to compel others to do things they would not do on their own (such as be happy, or pay taxes, or go to war)" (pp. 247/248). Building on Wilson Gilmore's definition, I would argue that "capacity" means an "ability to" or a "force". From a critical perspective, those at the top of a social hierarchy are invested with the *ability to* use or *en-force* their will to achieve their wants (wants as described above), while compelling others to meet those wants. Power is socially constructed in that hierarchical social relations are organized around 'made up' social categories. In my dissertation, the central categories of analysis are race, gender, and settler status. While these categories are purposeful fictions of society (as I will explain in the Theoretical Framework chapter), the impact of hierarchical power is nonfiction, or real, not simply in the minds of those who experience oppression(s), but take shape, or come to be in social systems, affecting the material realities of people's lives. Thus, I take a realist stance in understanding the very material harms perpetrated by those at the top of social hierarchies.

The other term related to power that is imperative is 'hegemony'. I wrote about hegemony, in relation to toxic masculinity (patriarchy), in *Trauma-Informed Youth Justice in Canada*:

"Drawing on the Marxist work of Antonio Gramsci, hegemony represents the notion that there are dominant, overarching social constructs that infiltrate all areas of society. Or, as critical legal scholar Douglas Litowitz describes it, there are singular, large-scale phenomena that permeate individual life" (2015, Oudshoorn, p.121). When a social construct becomes hegemonic, there is a pattern to it, whereby groups associated with certain identities become dominant, while others are subordinated and oppressed. When I write about critical race theory and critical race feminism, it will become clearer that it is the intersections of white supremacy or whiteness, patriarchy, and capitalism that I am concerned about. More plainly, because of the hegemonic

structures in society, it is white, rich, settler men that dominate and subordinate others. Thus, the *power* that I am interested in for my dissertation is the *hegemonic, interlocking powers* of white supremacy (the belief, and subsequent actions, in the superiority of the white race, as expressed by how social systems are structured to give white people power over others), heteropatriarchy (the beliefs, and subsequent actions, in the superiority of the male gender and heterosexual orientation, as expressed by social and political systems that uphold the power of heterosexual men, typically through control or intimidation tactics and other forms of violence), capitalism (the belief, and subsequent actions, that it is permissible to hoard capital at the expense and exploitation of workers or others), and settler colonialism (defined earlier).

Wilson Gilmore's definition of power is germane as it is the dynamic, relational, and coercive forces of white supremacy, heteropatriarchy, and capitalism, wielded by the settler colonial nation-state of Canada in its efforts to cage Indigenous freedoms and wage a criminal justice war to eliminate Indigenous peoples. As will become clearer below, critical race theory and critical race feminism expose the insidious purposes of legal systems, to exploit and disenfranchise non-white people: to create a fiction of purposeful domination and control that dehumanizes and disappears non-white people, often in the name of private property, or domination, control, and exploitation of land, resources, and non-white people.

Research questions

I am primarily interested in the experiences of *Gladue* report writers, as storytellers about the impacts of settler colonialism, and the experiences of judges, as audiences and interpreters to those stories. How are *Gladue* stories told? How are they received? How are they interpreted and lived? After gathering participant data, I analyzed how the hegemonic power structure of settler

colonialism was reified or resisted in the storied development and exchange between writers and judges.

Primarily, my research questions are:

1. What are the experiences of *Gladue* report writers and judges who use reports as part of decision-making at sentencing?
2. What narratives are created about Indigenous peoples, settler people, the settler state and colonialism during the researching, writing, and interpreting of *Gladue* reports?
3. How do experiences and narratives associated with *Gladue* reports follow (reify) or break from (resist) patterns of settler colonialism?

Outline of dissertation

Chapter one explores, in an autobiographical, narrative, and reflexive way, my positionality to the research. Chapter two is about the theoretical framework of the dissertation, describing in detail critical race theory and critical race feminism. Chapter three bridges theory with method by articulating a literature review of settler colonialism, decolonizing, abolition, and *Gladue*. Chapter four describes the methodology (critical narrative inquiry), as well as other concerns of the research design. Chapters five to seven share findings, with each having its own discussion and analysis section. Finally, chapter eight concludes the study.

Conclusion

There is no greater agony

than bearing an untold story inside of you.

~ Maya Angelou, 1969

Did you ever wonder how it is we imagine the world in the way we do,

how it is we imagine ourselves,

if not through our stories.

~ Thomas King, 2003

The agony of the untold story of Canada's colonial laws, courts, and prisons is their persistent oppressive nature, the suffering, the genocide, perpetrated against Indigenous peoples. From one generation to the next, settler colonialism, like a bacterium, replicates and festers in the Canadian criminal punishment system, bringing sickness and death to Indigenous peoples through the technologies of criminalization. I believe that the right thing to do is to ask critical, interrogative questions about Canada's settler colonialism—to expose it at the sources of its hegemonic power and to eradicate it. A story of violence – about Canada's oppression – needs to be told, in order that a better society can be imagined – and lived into.

Chapter 1: Narrative beginnings - Locating self in the research

"Be soft. Do not let the world make you hard. Do not let the pain make you hate. Do not let the bitterness steal your sweetness. Take pride that even though the rest of the world may disagree, you still believe it to be a beautiful place".

Introduction

This chapter is a brief summary of my social location. In it, I set out to share some of my personal story, not to centre myself, but to locate myself within the research – how my experiences and perspectives influenced research design and analysis. By social location I mean my position(s) in society, based on various identity constructs, such as gender, race, settler, and class. Following the work of Floya Anthias (2012), I view these markers not as fixed states of identity that produce various characteristics or actions; instead, I understand these constructs as processes, embedded within historical and contemporary effects of social power relations. For example, it is not because I identify as 'male' that I *will* act prescriptively; however, because I identify as 'male' it means that I am vested, or socialized, in gendered, patriarchal power relations and therefore I am *more likely* to behave in certain ways and exhibit certain characteristics related to the social construction of 'male,' and to gain benefits that society affords those at the top of gendered hierarchies. My social location influences who I am (identity), as well as how I see the world (worldview), and therefore how I participate in hierarchical social relations.

My purpose is to be clear about my own subjectivity, especially with regard to power. I use the term 'subjectivity' in two ways: to describe (a) my process of individuation (How have my experiences shaped me?) and (b) to articulate how my experiences influence how I do

research (What does it mean that it is me doing research?). I want to be accountable for conducting critical narrative research as carefully and ethically as possible. Notice that I did not write as "objectively" as possible. Certainly, I am searching out, through critical narrative inquiry, the subjective experiences of others (i.e., *Gladue* report writers and judges). John W. Creswell (2013) in *Qualitative Inquiry & Research Design* argues that qualitative researchers come to know, ". . . through the subjective experiences of people" (p.20). However, equally important, is that what I have come to know – or to present – in my writing is filtered through the kaleidoscope of my own experiences and perspectives. In other words, as Kathleen E. Absolon (2011), an Anishinaabe social work scholar, emphatically states, "The methodology is just as much about the person doing the searching as it is about the search" (p.74). Why? Because I am not a neutral, or objective bystander, somehow separate from the human experiences of the research participants. I am active in sorting, questioning, and making meaning throughout the entire research process. And, how I sort, question, and make sense of it all, is influenced by my subjective experiences, my social location. In essence, then, the research interviews and analysis are a meshing of subjectivities, mine with the participants.

My methodology, critical narrative inquiry aims to be relational (Clandinin, 2013; Kovach, 2009). Absolon suggests that research should be mutually beneficial, based on *reciprocal* relationships between researchers and participants. Consequently, doing narrative research requires researchers to reflect on the ethics of how they will be *in relationship* with participants. D. Jean Clandinin (2013) writes that narrative design requires three categories of relational justification: a clear articulation of personal, practical, and social investments. Clandinin refers to the autobiographical elements that form justifications, as "narrative beginnings" (2013, p.55). The narrative researcher is to begin all research by exploring the

experiences, or personal, autobiographical stories, that influence research wonderment. The researcher is then better prepared for how their stories will intertwine with the stories of participants (Clandinin, 2013). Relational justification also signifies a relationship with land. The places where I live and work are on the unceded territories of the Anishinaabe, Haudenosaunee and Neutral Peoples. My home and workplace stand on the Haldimand Tract, land sold by the Mississaugas of the Credit to the British and given in 1784 to the Six Nations of the Iroquoian Confederacy, six miles on both sides of the Grand River, from source to mouth, for their support of the British in the American Revolution:

> Whereas His Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians and of the loss of their settlement which they thereby sustained - that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations, who have either lost their settlements within the Territory of the American States, or wish to retire from them to the British - I have at the earnest desire of many of these His Majesty's faithful Allies purchased a tract of land from the Indians situated between the Lakes Ontario, Erie and Huron, and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation and such others of the Six Nation Indians as wish to settle in that quarter to take possession of and settle upon the Banks of the River commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river beginning at Lake Erie and extending in that proportion to the head of the said river, which them and their posterity are to enjoy for ever. (*Haldimand Proclamation*, 1784)

The chapter will be divided into three main sections: first, some of my personal investments in the research (a brief autobiography); second, my social or relational investments in why I researched the way I did (my responsibilities to treaties and decolonizing); and, third, some practical investments (intentions and hopes of my research). These are my narrative beginnings.

Personal investments: A brief autobiography

I am not sure who to attribute the quote to at the start of the chapter. The internet tells me it was written by the well-known author Kurt Vonnegut. The internet also tells me it belongs to the less well-known writer, Iain Thomas. I know that I did not write it. But it resonates deeply, encapsulating something of my worldview. Life is damn hard. Yet, life is immeasurably beautiful. On one hand, times in life where I have become hardened, like steel being heated and then quenched in water, cynicism and doubt normalized. I wondered, why bother with such pursuits as social justice. 'Everything is hopeless,' was my refrain. Hardening can be debilitating, immobilizing. It made me want to retreat within. On the other hand, times where I have softened, have led to contentment and action. Softening to me means being grounded in love. Softening does not mean that I am not angry about injustice and harm, or that I am surrendering to naïve optimism. Softening is about gaining perspective, realizing that the world is beautiful, worth living and fighting for. I believe that courage comes from softness, knowing that rewards outweigh risks. I have also found humility – an antidote to self-righteousness – in softness. When soft, I am more focused on critiquing systems rather than being critical of people. Further, I know that my identity is wrapped up in power relations, where I, as a white, settler, middle-class male, benefit from and often perpetuate social harms. Softness makes me less defensive, allowing me to better fulfill my relational obligations. My personal investments are rooted in my values: love and courage, accountability and humility – all in pursuit of integrity.

1. Love and courage

bell hooks (2001) claims that "…all the great movements for social justice…have strongly emphasized a love ethic" (p.xix). hooks explains that love is an action, a verb rather

than a noun, about nurturing growth in self and other. She writes that love without justice is not possible, or "[t]here can be no love without justice" (p.19). What that means to me is that I have work to do. I think of my Indigenous friends and colleagues, of their strength and determination. And, of their stories of pain, related to the ongoing oppression of settler colonialism. If I am to grow, I must do my part to take responsibility. If I am to be a good friend, I must work to help alleviate and end the ways that my friends are hurting. While working on the first draft of this chapter, I planted some cucumbers, carrots, and beans. Within days they sprouted. Even as tiny, days-old plants they started to bend towards the light: hoping for sunlight, trying to move towards sustenance. Erich Fromm (1968) in *The Revolution of Hope* writes, ". . . the tree hopes for the sunlight and expresses this hope by twisting its trunk toward the sun" (p.13). I see love and hope as intertwined actions, doing something, anything really, in an effort to bring about a fuller life. Fromm says that being hopeful requires fortitude, a form of acting against fear (1968). The reward is great, he argues, for whenever a new step is taken, it awakens a sense of strength and joy (Fromm, 1968). That, to me, sounds like a way to increase capacities for justice and love.

2. Accountability, humility, and integrity

When I think about the colossal (ongoing) harms of settler colonialism and the monumental task of taking responsibility, and repairing harms, I start to get overwhelmed. How do I move beyond despair, feeling pessimistic when confronted by seemingly overwhelming circumstances? I am not naïve to think that the task of accountability is anything less than enormous. How do I not slip into fantasy, feeling overly optimistic about what I can accomplish in a single dissertation? The truth is, I am not sure I know the answers to these questions.

Instead, I am trying to ground myself by acting towards abolition and decolonizing. Working in restorative justice has taught me a lot about my social responsibilities.

One of the greatest gifts of doing restorative justice work, has been an increased desire to be more loving, courageous, accountable, and humble. Walking the halls of prisons, talking to criminalized human beings behind cell doors, talking to people harmed, hearing their stories, taught me that there is no "us" and "them". In fact, it is only our criminal punishment system – the police, the court, the prison – that wants to create fractures between human beings. Because those who are labeled 'criminal,' *they* are *us*. We raised them, in our communities. We did not do a very good job. Because we invested all our resources into policing the 'other,' instead of creating good homes and good jobs and good recreation – a good community. The criminal punishment system thrives on fear. We are supposed to be afraid of 'bad guys'. But, what I have come to know is that there are no 'bad guys'. Only bad (harmful) systems. Of course, human beings are capable of harmful actions, but when I look at who is criminalized, demonized, and ostracized, I see a criminal legal system that reeks of white supremacy, colonialism, heteropatriarchy, and capitalism.

Being loving is about standing in solidarity with those who are harmed by hegemonic social systems. Being courageous means working to abolish and decolonize structural violence. It is *especially* my responsibility as a white, settler, middle-class, man to divest, defund, and dismantle systems of oppression. Being humble means that I follow the lead of Indigenous, Black, and racialized people. However, this is not some sort of benevolence project, where I am a helper and those harmed are helped – a white saviour project. I am reminded of the words of Stanley Cohen (1985) that "benevolence itself must be distrusted. A guide to future policy might be 'do less harm' rather than 'do more good,' or anyway, 'do less altogether' rather than 'do

more of the same'" (p21). As soon as I take on the mystique of goodness, I lose sight of my own complicity in unequal power relations. As soon as I take on self-righteousness, I forget that the work to undo harms repair harms is mine. In *Against purity: Living ethically in compromised times*, Alexis Shotwell (2016), offers that "if we want a world with less suffering and more flourishing, it would be useful to perceive complexity and complicity as the constitutive situation of our lives, rather than as things we should avoid" (p.8). I am in pursuit of integrity that acknowledges my own complicity in the complexity of social systems. I find the effort to live in integrated ways to be very fulfilling. When my actions match my words and when my words match my actions, I feel good about myself. When words and actions come close to aligning with what I value, I find it invigorating. I truly hope that my dissertation flows from love, courage, accountability, humility, and has some semblance of integrity.

3. Who am I?

Where or how did these values emerge? Significantly, I am shaped – as I believe we all are – by relationships, from family, to peer groups, to workplaces, to social systems, and to land and earth. As mentioned above, I am particularly interested in how hierarchies of social power influence my identity. John W. Creswell (2013) suggests that critical researchers, "need to acknowledge their own power" (p.30). Or, put another way, in the words of Jochen Dreher and Hector Vera (2016), accounting for the possibility of *power* within the social theory (ie., the social construction of reality) of Berger and Luckmann: "In the process of socialization human beings internalize and incorporate objectively established power structures; their subjective reality is formed with reference to knowledge systems and material preconditions that are

predefined by established power structures" (p. 56). Dreher and Vera argue that we experience social hierarchies – even though they are the result of human actions – as objective, or in very material ways, because of their historicity (they are outside of us, before us, and after us). How does this relate to my identity?

Black feminist bell hooks wrote that she came to theory because she was hurting (hooks, 1995). That idea resonates. Initially, my foray into graduate school and understanding theories was mostly about giving more language to some of the (family) violence that I experienced as a child. For a number of years, leading up to being a PhD student, I had been working on my own healing from childhood trauma and, at the same time, working with men who had used violence towards partners and children. In public forums, academic and otherwise, I shared some of my stories of experiencing such victimization as a child, and how I believed we needed to do better to hold men accountable for harmful behaviours – not in punitive ways, but in ways that actually fostered changed behaviour. Yet, the more I learned, the more I discovered that the opposite of what hooks writes is also true for me: I needed (and need) theory because it helps me know how – based on my powers and privileges – I cause harm to others. I slowly discovered that my healing from victimization had been facilitated by my advantageous social positions. I did not and have not experienced various intersectional harms. My whiteness, my gender, my settler colonial position, and my access to capital (or resources) all afforded me opportunities for support, care, and healing. I do not discount my own willingness to seek help, nor the work I have put into healing, but my capacity to bounce back from childhood trauma was eased by my social location. It was an awakening for me. I became aware that I had work to do take responsibility for my privileges, even as I work(ed) towards healing. Thus, my participation in racialized, gendered, settler colonial, and classed relations means that I carry a responsibility to

stop hurting others, to repairing harms and undoing inequities emanating from my social location.

I would like to share a little bit more. I grew up in a family mired in violence—a toxic mix of heteropatriarchy, fundamentalist, evangelical Christianity[5], intergenerational trauma, and abuse. Sometimes beaten up, other times psychologically terrorized by a father who lived tempestuously with a storm cloud of anger and depression, trauma and pain, immaturity and entitlement, over his head. I believe he desperately wanted to love, but neither had the capacity nor the desire to learn what it would mean to do that. As I grew up, from childhood into my teenage years, and later young adulthood, I often acted out of kindness, but deep within my own psyche my inner emotional resolve had hardened over time – an evolution from tough to simply tougher, an attitude that no matter how physically or emotionally beaten down, how abused I was, I would get back up. When my dad violently battered me down, I would stand back up. When my dad ignored, neglected, or belittled my feelings, I would stifle my tears, then move on. The walls that I built inside my mind allowed me to weather a barrage of family violence, but as I got older, the walls needed to be broken down for me to be a better partner, parent, and person. Initially, the survival narrative in my mind was one where I, through my own strength and determination, had found a way through. But, what studies on resilience have taught me, is that a person's ability to deal with adversity has less to do with personal character traits and more to do with the availability of proper support (Unger, 2008).

[5] While I do not write further about the role of fundamentalist Christianity on my life – and the process of leaving it behind – it certainly influences me as a researcher; that is, what I choose to hear and how I hear it when doing research interviews. For example, during interviews, Indigenous *Gladue* writers sometimes spoke about the interconnection between spirituality and justice. As I think more about what I wrote about the findings, I realize my own discomfort with the topic of spirituality could have influenced how I reported on the data.

In the same way that my mother, brothers and I orbited around my dad's feelings, trying our best not to disturb his slumbering – easily awakened – wrath, trying instead to keep him happy, the structures of society encircle white men constantly at attention to their needs (Bancroft, 2003). When I finally reached out for help, no one doubted my experiences, nobody blamed me for my victimization. In fact, the more I delved into the world of getting better the more I was rewarded as a "kind, sensitive" man. What if I had been poor – lacking the financial resources for medication and counseling? What if I had been non-male – blamed for my victimization by accusatory questions? What if I had been Indigenous – criminalized for my pain? My work in prisons has shown me that the answers to these questions are not rhetorical. Outcomes for me would have been dramatically and traumatically different.

While in my late twenties, I began a process, a journey of healing. At the same time, I started working in the fields of restorative and criminal justice. Over the past twenty years I have had the honour of walking alongside many survivors of violence and people who have perpetrated violence. As a mediator in the federal prison system I have brought together, where safe and appropriate, people who have been victimized with people who have caused harm for some form of facilitated contact or dialogue. The more I work with people in prison, the more I realize my traumatic past is partially comparable to some of theirs, but the social and power constructions of race (white supremacy), gender (patriarchy), sexual orientation (heteronormativity), ability (ableism), and class (capitalism) in Canada have afforded me a discriminately privileged way out. This work has strengthened my resolve to end *all* forms of violence; that includes the violence of the criminal punishment system.

My time working in prisons has taught me that prison, like an abusive father, justifies its violence. Michelle Brown (2009) claims, we do not question why we use punishment on those

we criminalize: “Because punishment is assumed to follow a crime, an act of violence or harm against another, the infliction of pain is perceived as deserved or necessary. Consequently, the question of pain’s authority and its effects rarely materializes and instead these are seen as natural and indisputable consequences of actions” (p.9). Prison practices keep most of society at a social distance. The pain of incarceration is allowable because it is invisible (Brown, 2009). We are penal spectators (Brown, 2009; Pollack, 2014). Frozen observers satiated by iconographic media, television shows, and prison tourism that keep us at a distance – ignorant of our own complicity in torturing others (Brown, 2009). And, when we are not ignorant, we are usually offering justifications for torture: “the prevailing justification for [prison] is that the horrors it creates are the perfect complement for the horrifying personalities deemed the worst of the worst by the prison system” (Davis, 2003, p.50). But, I have seen and heard the violence of incarceration. I have seen the violations of human dignities. I have heard the (literal) screams in cells. I know that prisons torture human beings. I cannot justify the violence of incarceration.

What matters about my story and my beliefs is that my experiences and worldview shape what I believe to be the purposes of my doctoral research. As I write about my theoretical framework, in the next chapter, I hold onto what Mehmoona Moosa-Mitha (2015) concluded in her chapter in *Research as Resistance*: “Theories are much more about movement than they are about rigid classification” (p.90). I do not write about theory in order to predict and control, but to grow and learn. It does feel strange to be taxonomical, classifying into categories theories and participant data. It feels strangely wrong, because research by white males has typically been about intellectual imperialism, classification meant to control (Absolon, 2011). Absolon explains in *Kaandossiwin: How we come to know* that positivist research, in particular, has been about perpetuating classed, gendered, and colonial oppressions. My intent – even though my doctoral

research does advance my own social position – is to categorize in order to *understand* how I – and other settlers – have been harmful in relation to criminal legal reforms, in order to do better to decolonize.

My own story is one of slow movement out of harmful ignorance. Cheryl I. Harris writes (1995) in "Whiteness as Property" that in her experience white people are often ". . . oblivious to the worlds within worlds that [exist] just beyond the edge of their awareness and yet . . . present in their very midst" (p.276). That is an excellent description of privilege and power. My relationship to white supremacy, heteropatriarchy, capitalism and settler colonialism, or power and privilege, remain unchanged when unexamined. Harris goes further to write that obliviousness is only part of the story. The tragedy is that obliviousness is not benign. In the case of racism, there is also a deliberate, cancerous racialization of identity that gives whites all the permission they need to subordinate Indigenous peoples (Harris, 1995). I am still learning. I hope I can remain curious and unpretentious, to use theory as a way to learn to liberate where there is oppression and pain. The restorative justice I have come to know, is not simply a mediation technique, it is a philosophy for responding to harm based on honouring relationships (Zehr, 2015).

One more final thought about my own story. I firmly believe that I must carry my part of the burdens of white supremacy, patriarchy, and settler colonialism. These are my responsibilities. It would be easy to assuage my (white, settler, patriarchal) guilt by saying, 'I am not participating in any interpersonal violence; I am working towards being kind to everyone around me'. However, there are two problems with a placation of my responsibilities, or a 'move to innocence' (Vowel, 2016). First, just because I am not participating in interpersonal violence, does not mean that I am not participating in structural violence. The privileges – various benefits,

such as social rewards and structural powers (Daniel, 2016) – afforded to people at my social location typically come at the expense of people marginalized at different social locations. Society is structured around the caretaking of white, middle- and upper-class men. Second, I am convinced that the assignment of guilt is not a necessary – or even relevant – condition for working toward justice. Sociologist and male violence educator, Jackson Katz (2006), argues that *all* men need to be involved to end violence against other genders. His claim is that we (men) are not guilty because we are men; we are *responsible* because we are men. Why is the distinction between guilt and responsibility important? While the two often get conflated, the problem is that guilt usually results in defensiveness, what Katz calls "the enemy of critical thinking," or paralysis and inaction (Katz, 2006, p.25), while responsibility leads to action and change, and hopefully an equitable society (Daniel, 2016). The social constructions of racialized, gendered, settler colonial, and classed norms are harmful, creating unequal power relations, and therefore a need for those in my social location(s) to be accountable. So, whether I am discussing heteropatriarchy, or colonialism, or imperialism, or capitalistic greed, it is my belief, as well as my contention that those afforded privileged social locations must accept responsibility, a relinquishment of control over others. Essentially, restorative justice is about reordering social relationships—making communities more just, living up to a Two Row wampum and Silver Covenant Chain promises (explained below).

Social investments

I remember the first winter I worked at Fenbrook Correctional Institution near Gravenhurst, Ontario. It is a prison located at the end of an airplane runway. The wind often

rushes down the runway, whipping over the walls, around the buildings. It is a blood-chilling wind. The mercury often freezes in the same way that time does for people living inside. On that first day, I was given a tour by the chaplain. He was a soft-spoken Catholic with an incredible warmth for all people and religions, even for an atheist, like me. We trudged on soft snow from concrete building to concrete building. Living units, administrative offices, the chapel, and a stop at segregation. Our last location on the tour was an Inuit carving hut. It was full of Indigenous men, working on various art projects. Some made of wood, some stone. I smiled. They smiled. I tried to exchange some words, but my language was foreign to their Inuktitut. After the tour and a number of meetings, I left Fenbrook, troubled. After clearing the snow from my car, I climbed in, picked up my phone and pressed the 'google maps' app. I wanted to know the distance between Gravenhurst and Iqaluit. How far would the Inuit men at Fenbrook have travelled to arrive at a prison in central Ontario? Google maps could not tell me the distance because it wanted to calculate directions – telling. So, I 'googled' the distance by air between Toronto and Iquluit: 2,342 kilometers. What are Inuit people doing in Fenbrook prison? The logical answer is that there is no federal penitentiary in Iqaluit. If someone from that region is sentenced to federal time they are flown to a prison 2,342 kilometers away. The illogical answer—well, logical if one is on the side of settler colonialism—is settler colonialism: the displacement, cultural genocide, assimilation, and elimination of Indigenous peoples, in order for settlers to illegitimately occupy or steal Indigenous lands and resources (Truth & Reconciliation Commission, 2012). If one traces the history of settler colonialism, Canada has *displaced* Indigenous peoples through the creation of a reserve system, committed *genocide* and attempted *assimilation* through Indian residential schools (Truth & Reconciliation Commission, 2015), *eliminated* the ties between many Indigenous children their parents, families, communities and cultures through the child

welfare system (Vowel, 2016), chronically underfunded Indigenous education, health and other services (Vowel, 2016), and, overall, disregarded foundational agreements or treaties with Indigenous nations, then a prison 2,342 kilometers from home is all part of a settler colonial agenda.

My predisposition, as I entered into the dissertation process, was to support the creation or resurgence of Indigenous justice systems (justice systems controlled by Indigenous communities and Nations), and a return, by settlers, to Two Row Wampum and Silver Covenant Chain treaties. These agreements are promises, legally binding international treaties, that settler peoples made long ago to a Two Row wampum (*Tekeni Teiohatatie Kahswentha*, in the Mohawk language) and Silver Covenant Chain (*Tehontatenets awa:kon*, in the Mohawk language) relationship with Haudenosaunee people (Monture, 2014; Parmenter, 2013). Promises premised upon each party (Indigenous peoples and settler peoples) being self-determining, maintaining their own laws and justice, while being bounded together in peace, friendship, and harmony, sharing lands and resources for as long as the grasses grow and the waters flow (Monture, 2014; Parmenter, 2013). The Two Row wampum treaty is 'written' as a wampum belt, made of shells: two rows of purple beads, representing two boats traveling side by side, one for settlers, one for Indigenous peoples; bounded by three rows of white beads, representing peace, friendship, and harmony (Parmenter, 2013). It was originally exchanged in the early 1600s between the first settlers (Dutch) and the Haudenosaunee people, but then also many times over the ensuing decades between the Haudenosaunee, the British, and the French (Monture, 2014). The legally binding principle is that Indigenous peoples and settlers "are to be considered separate but equal in status, never interfering in each other's social or political affairs" (Monture, 2014, p.14). The Silver Covenant Chain reinforced the relationship with settlers (British) and the Haudenosaunee

(Monture, 2014). Similar to the Two Row Wampum, the Silver Covenant Chain recognized the distinct status, "neither becoming subject to the other," as the heart of the relationship between the nations (Hill, 2017, p.95). Metaphorically, the Silver Covenant Chain was a three-link silver chain (representing peace, friendship, and forever), binding the British sailing ship together with the Iroquoian canoe to the Great Mountain (Hill, 2017). The agreement was reaffirmed – the polishing of the chain – on a number of occasions (Hill, 2017). Tragically and horrifically, settlers broke their side of these treaties, soon after they were made (Monture, 2014; Hill, 2017). Susan Hill (2017) emphatically describes it as the problem of weak memory: "The colonist's weak memory proved problematic in colonial times as it does today" (p.100). Instead of separate but equal, settlers' broke promises, stole lands and children, and forcibly imposed social and political systems, including judicial systems, on Indigenous peoples.

My social investment, the political and moral imperative, of my dissertation is to better carry my treaty responsibilities.

Practical investments

The practical value of my research is unknown. I can only guess at it. My dissertation is an attempt at settler accountability, at research as reparation. Patricia Monture (1995) asks, "When are those of you who inflict racism, who appropriate pain, who speak with no knowledge or respect when you ought to know to listen and accept, going to take hard looks at yourself instead of me. How can you continue to look to me to carry what is your responsibility?" (p.21). Monture (1995), challenges white people, particular white, middle-class, men (like me), to "consider the cost . . . of silencing others", to forge a new public discourse based on

responsibility that focuses, "not on what is mine, but on the relationships between people" (p.28). At minimum, my hope is to do research that puts a microscope on white, patriarchal, capitalist, settler society and is not "damage-centred," documenting the intergenerational traumas inflicted against Indigenous communities, in a way that oppression is the only way these communities are defined (Tuck, 2009). Instead, my research is an interrogation of the colonial state, asking why Canada continues to oppress Indigenous peoples when Canada claims to be reforming (i.e., *Gladue*). At best, my hope is to do scholarship that contributes towards decolonization of the justice system, the abolition of the use of prison violence to oppress Indigenous peoples.

The motivation for my dissertation research is the unconscionable over-incarceration of Indigenous peoples in Canada (Sapers, 2015), more aptly described as the criminalization of Indigenous identities and communities (Monture, 1995). The practical investment is that my dissertation is a response to Call to Action #30 of the Truth and Reconciliation Commission of Canada (see Introduction). If a mechanism exists in law (*Gladue*) that purportedly steers Indigenous peoples away from incarceration, then how do we strengthen *Gladue* to make it achieve its decarceration aims?

Conclusion: Reflexivity

Social work scholars are often committed to the principle of reflexivity. Cyndy Baskin and Caitlyn Davey (2017) describe reflexivity as, "[S]ocial workers explor[ing] their own oppressions and privileges, consider[ing] how their values and biases influence their actions" (p.7). The idea is to examine oneself in relation to how power has been vested in oneself and how that should influence a social worker to act towards decolonization. Kathy Absolon (2011)

calls it, "A commitment to a critical analysis of the existing unequal power structures and to consciousness raising and politicization" (p. 99). In this chapter, following the narrative inquiry of Clandinin (2013), I have put into words some of my personal, social, and practical investments, in order to position myself within the story that is my research. Linking the practice of reflexivity with reflexivity in research, Creswell (2013), claims that "…the writing of a qualitative text cannot be separated from the author…How we write is a reflection of our own interpretation based on cultural, social, gender, class, and personal politics that we bring to research. All writing is 'positioned' and within a stance" (p.215).

Before moving into the next part, I acknowledge the deficiency that is my social location as a white, male, middle-class settler in writing about hegemonic power. Given that I inhabit powerful positions in a hierarchically-structured society and that I have been for a significant portion of my life largely oblivious to the concepts I write about here, my interpretations of the theories should be heavily critiqued. I have studied the concepts carefully, however, (a) I am very open to criticism, and (b) when I argue for research as reparation, my audience is me and others in similar social locations. I have deliberately tried to offset this weakness in that the majority of the scholarship that I have read and cited over the next two chapters is written by Indigenous and non-white, female-identified scholars. I have intentionally set out to minimize the amount of reading and writing by white scholars, especially white men. So, for example, although I cite white men, such as Michel Foucault and Karl Marx in a few places, when discussing power-relations, structures and tactics of the nation-state, the arguments in the next two chapters actually find a theoretical home in the Indigenous feminist analyses of Maria Campbell, Lee Maracle, and Patricia Monture and the Black Sociology of Ida B. Wells, W.E.B. DuBois, Franz Fanon, and Claudia Jones. I believe that it is more authentic when working on a

project that desires to disrupt white supremacy and male domination, to anchor the development or formation of my knowledge, as much as possible, in Indigenous, nonwhite, nonmale sources.

Chapter 2: Storyboarding 1 – Theoretical framework

"White supremacy is the unnamed political system that has made the modern world what it is today" (1997, Mills, p.1).

Introduction

The foundation of my research is critical theory. Specifically, my dissertation is tethered to critical race theory (CRT) and critical race feminism (CRF), and incorporates vibrant, realist conceptions from abolitionist (critical resistance) and decolonizing (land back) social movements. Critical theories are ones that, in the words of Shawn Wilson (2008), "contend that reality has been shaped into its present form by our cultural, gender, social and other values" (p.36). John Creswell (2013) argues that "Critical theory perspectives are concerned with empowering human beings to transcend the constraints placed on them by race, class, and gender" (p.30). Putting those two quotes together, a consistent variable across critical research is 'power,' or how power operates and can be shifted to make societies better for all. The interwoven concepts of CRT and CRF provide an analytical storyboard, a way to map and visualize, the story of *Gladue*.

What follows is a detailed description of CRT and CRF, theorists, terms, suppositions, propositions, and values. Each of these theories informs how I see the world (worldview), what I think counts as knowledge (epistemology), what I believe is real (ontology), and why I think research is not neutral (political), either participating in liberation—contributing to just communities—or furthering oppression. My focus over the next two chapters is articulating an 'essential purpose' (teleology), or a conceptual framework for how I designed, implemented, and analyzed my dissertation research. If it is possible, my objective is research as **reparation** – a way to give back, to repair harms that I participate in as a white, settler, male person; using

research to work towards decolonizing Canada. Reparations provide an ethical formulation for my scholarship, or why I believe doing a dissertation in the way I did it, was the *right* thing for me to do, given the enormous benefits (such as those shared in the previous chapter) I have gained living on stolen Indigenous lands – and the privilege I have to be able to conduct doctoral research.

In this chapter, I will focus on articulating a theoretical framework, the overlap between critical race theory (Alexander, 2012; Bell, 1980; Crenshaw, 1989, 1995; Delgado & Stefancic, 2012; Harris, 1995; Jones, 1949) and critical race feminism (Bakan & Dua, 2014; Bannerji, 2000; Razack, 2002, 2015; Thobani, 2007), while in the next chapter I will write about the purposes of my research – 'why study *Gladue*?' and 'why now?' – by examining abolitionist (Balfour, 2014; Comack, 2008; Davis, 2003; Kaba, 2021; Pollack, 2014; Rodriguez, 2008, 2009; Sudbury, 2004) and decolonizing scholarship and social movements (Coulthard, 2014; Saito, 2020; Tuck & Wang, 2012), alongside the sociological (and some legal) literature about *Gladue*.

Critical race theory and critical race feminism

One of my favourite axioms about the criminal legal system comes from twentieth century feminist, anarchist Emma Goldman. She famously said that every society has the criminals it deserves. I interpret Goldman's adage as a repositioning of responsibility. Society, *not* individual people who commit crimes, is responsible for behaviours deemed criminal. Her argument allows for a deeper consideration of the social correlates of crime. However, while feminists during her era were working towards highlighting social ills that lead to inequality, and working towards women's rights, such as securing the right to vote, they often ignored how racism intersected with sexism (Crenshaw, 1995). Goldman's adage still accepts the state's

definition of crime. But, what if the behaviour of the state is harmful? It is not so much that society deserves certain criminals, but that society criminalizes certain people. "Criminalizing" can be understood as a process of making people, whether it be identities, pains, or struggles, into criminals – those deserving of exclusion and punishment. From a critical perspective, the criminalization of identities (i.e., Indigenous peoples, Black and racialized Canadians), pain and trauma (i.e., poverty and additions) or struggles (i.e., Indigenous land defenders) serves the function of maintaining unequal power relations (Crenshaw, 1995). Criminalizing people most directly oppressed and harmed by white supremacist, patriarchal, capitalism, and settler colonialism allows for those oppressing others to go unchecked, blaming the oppressed for their oppressions. In the following section, I will use critical race theory and critical race feminism to explain how the social/power constructions of race, gender, and class intersect in the criminalization of Indigenous peoples.

1. Critical race theory

While critical race theorists in the 1970's and 1980's, in the United States, argued for a more nuanced, intersectional understanding of oppressions—and pathways to liberation—Indigenous feminists were the first to challenge Canada as a white, settler society (Razack, Smith & Thobani, 2010). The ethical starting point of CRT is a desire for liberation, human liberation for *all* (Crenshaw, 1995). Critical race theorists in the 1970's welcomed feminist understandings of gendered social relations, but were dissatisfied with the failure of feminism (at that point in time), which they termed 'white feminism,' to interrogate race relations (Crenshaw, 1995). Feminism set the stage for how CRT intended to liberate, to dismantle gendered and racialized

power relations (hooks, 1995). bell hooks describing the struggle feminists engaged, and continue to engage in, to raise critical consciousness about the inequality, domination, and exploitation experienced by women: "We had to educate for a critical consciousness, to help people see, that patriarchy promotes pathological behavior" (p.266). For some, feminism is a way to honour lived experiences of non-male genders (hooks, 1992). Personal testimony and personal experience are fertile ground for transformation because theory is only good when it liberates the oppressed (hooks, 1992). For others, feminism emphasizes the racialized and classed natures of society (Comack, 2008). Of course, feminism encompasses many theoretical perspectives, from analyses of the material implications of patriarchy (Bakan & Dua, 2014), to how gender is socially constructed and performative (Butler, 2004). The common theme across feminism is that Western culture is patriarchal, characterized by unequal, gendered power relations, gendered domination, and gendered exploitation (hooks, 1995). The pathology that is patriarchy is structural (hegemonic) male violence leading to the advancement of men and the harm of non-male genders.

The bridge from white feminism to critical race feminism was critical race theory in the United States and Indigenous feminism in Canada. CRT made important advancements arguing that identity functions at multiple social locations (Moosa-Mitha, 2015). If a person identifies as white and female, their experience of social life will be different than if a person identifies as Indigenous and female. Race and gender are two separate constructs, but overlap in how people experience social life. For example, in Canada white women received the right to vote in elections in 1918[6], while Indigenous women did not receive that right until 1960[7]. Critical race theorist Kimberlé Crenshaw (1989) calls the functioning of identity at multiple social locations,

[6] According to the Government of Canada website: www.lop.parl.gc.ca.
[7] According to the Canadian Encyclopedia: www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage/).

intersectionality. In a well-known paper called "Demarginalizing the Issues of Race and Sex," Crenshaw explained how an 'intersectional' analysis means using multiple social constructs when exploring how different lives experience social reality:

> Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination…But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. (1989, p.149)

The purpose of Crenshaw's argument is that multiple grounds of identity need to be accounted for when understanding how patterns of domination and subordination operate in the social world (Crenshaw, 1995). Critical race theory is particularly interested in uncovering the relationship between power, the social construction of roles, and the material realities of social life (Delgado & Stefancic, 2012). As the mask of social power is peeled back, CRT advances three theses: one, racism generally and white supremacy particularly are normal parts of Western social structures; two, the purpose of racism and white supremacy is to racialize non-white people in order for white people to gain material and psychic advantage; and, three, notions of race and racism are a development of social thought and relations (Delgado & Stefancic, 2012).

(a) White supremacy is 'normal'.

White supremacy is normal, not in the sense that it is right; instead, meaning that it is not an aberration from what is deemed ordinary. White supremacy is not only a white hooded member of the Klu Klux Klan burning crosses and terrorizing African Americans. It is not only a member of the Proud Boys or some other white supremacist organization posting 'White Lives

Matter' signs, in the Spring of 2021, in a neighbouring township to my own (Connor, 2021). It is pervasive, the baseline upon that which is considered to be natural – and even good – is defined. White supremacy is not confined to the racist beliefs of a few extraneous people. As poet, educator, and activist Kyle "Guante" Tran Myhre said, "White supremacy is not the shark, it's the water" (Myhre, 2017). Or as philosopher Charles W. Mills (1997) writes in *The Racial Contract*, "White supremacy is the unnamed political system that has made the modern world what it is today" (p.1). The beliefs and material structures of Canadian society are founded upon and guided by the racism of whiteness, influencing how power relations are structured and who does (whites) and does not (nonwhites) benefit from psychic freedoms and material gains. As a result, whites are in a position of power over other races (Delgado & Stefancic, 2012). The normalization of white supremacy makes it hard to confront because its structure and impacts – that which is normal – often goes unacknowledged and are unaccountable (Delgado & Stefancic, 2012). Mills explains that the lack of accountability is in large part because whiteness is "a cognitive model that precludes self-transparency and genuine understanding of social realities" (1997, p.173). Thus, white supremacy obscures itself, even to those it benefits.

Many CRT scholars are guided by social constructionism, or the epistemological stance that realities, such as identity categories (i.e., race), are socially constructed. Social constructionism, according to sociologists Peter Berger and Thomas Luckmann (1966), believes that identity categories come into reality as people ascribe meaning to them: "Societies have histories in the course of which specific identities emerge; these histories are, however, made by men (sic) with specific identities" (p.173). In other words, identity as a form of reality is constituted by the meanings that people subjectively accord, not some objective, universal truth. Even though Berger and Luckmann use the sexist language of 'men' in their statement, it

exposes the maleness of who is usually determining what counts as reality. To express white supremacy or whiteness in a social constructionist manner is to argue that race is not biologically determined (Delgado & Stefancic, 2012; Kendall, Thompson & Nygaard, 2015); rather, that racial identity categories are given subjective meaning by the (white, male) societies within which they emerge.

However, most CRT scholars do not trace epistemologically back to white males (for example the social constructionism of Berger and Luckmann), instead to the sociological work and activism of African American scholars, such as W.E.B. Du Bois and Ida B. Wells, who studied and confronted racial inequality in the United States (Ladson-Billings & Tate IV, 1995). Khalil Gibran Muhammad (2010) argues that the social science of Du Bois and Wells laid the groundwork for an analysis of white privilege and a vision for racial justice. Charles R. Lawrence III (1995) writes that Du Bois helped articulate the duality of nonwhite reality. Or, the constant bombardment of dehumanizing caricatures cast by whites onto nonwhites, through which nonwhites must mediate identities, experiences, and social realities. In the late 19th century, when African Americans in the American South were being terrorized by white perpetrated lynching and sexual violence, Ida B. Wells used statistics to show that whiteness was a form of barbarism (Muhammad, 2010). In the poignant words of Muhammad: "She exposed the double bind of racial and sexual exploitation manifested in the figurative and literal dehumanization and destruction of black bodies" (2010, p.61). According to whiteness, a process of dehumanizing racialization is permissible. Racialization – the process of discriminating nonwhite from white categories – is the social construction of a hierarchy of races: whiteness is subjectively assented as natural, becoming the invisible norm of culture and civilization (Monture, 2009; Razack, Smith, Thobani, 2010). Therefore, whiteness is constructed as the

measuring stick against which all other racial categories are measured, good (white) versus evil (nonwhite), human (white) versus nonhuman (nonwhite). Subjective whiteness is the way that *people* as property (slavery) and *land* as property (conquest) become objectified realities, or subjectively defined as objects (Harris, 1995). CRT scholar Harris argues that whiteness came to be as a way to exclude other races from social life, so whites could exercise domination: "whiteness is built on exclusion and subjugation" (1995, p.283). The effect of the social construction of whiteness is that race relations are in fact unequal *power* relationships. Whites having power over nonwhites.

Some CRT scholars are influenced by French philosopher Michel Foucault's understanding of power-knowledge relations, describing the social construction of race as a technology of power (Arat-Koc, 2010; Smith, 2010; Thobani, 2007). From a Foucauldian perspective, power is the effect of a calculated position: "power is exercised rather than possessed" (Foucault, 1977, p.26). In *Discipline and Punish*, relying on Marxists Rusche and Kirchheirmer, Foucault (1977) argues that the body of the criminal is taken a hold of – marked, tortured, forced to carry out tasks – by a political investment of power relations. The sovereign, or the person punishing the criminal, exercises power as a political tactic (Foucault, 1977). Philosophically, then, the body carries the knowledges of the technologies of power. In more plain language, it means that power produces knowledge: "there may be a 'knowledge' of the body that is not about the science of its functioning" (Foucault, 1977, p.26). From a Foucauldian perspective, then, racialization is a technology of power because it is an expression of power relations—a never ending power. Foucault (1975) suggests that power does not mean sovereignty or right, but that it is "…about domination, about an infinitely dense and multiple domination that never comes to an end" (111). Sunera Thobani (2007) uses Foucault's

conception of bio-power to explain how power permeates social life, from the public to the private, from state apparatuses to intimate aspects of civil life. Sherene Razack (2002) uses Foucault's conception of 'docile bodies' to describe how social spaces in settler-colonial Canada produce racialized bodies.

Foucault's ideas are contested among CRT scholars. Not everyone finds him relevant or useful. On one hand, I did not find Foucault in many of the American founders of CRT, such as Bell (1995), Crenshaw (1995), Delgado & Stefancic (2012), or Harris (1995); however, his influence did appear in some of the more recent Canadian critical race feminist works – Arat-Koc (2010), Razack (2002), Smith (2010), and Thobani (2007). On the other hand, some CRT scholars stand in opposition to Foucault. Opponents think that his articulation of power relationships unfolds in typical white male fashion, obfuscating the material impact of white supremacy. Enakshi Dua (2014), for example, in her work *Theorizing Anti-Racism*, outlines some of postcolonial theorist Edward Said's critique of Foucault's passive use of power, his ignorance of "…'how and why' power is gained" (p.67), or how power creates advantage or disadvantage. Or, in the words of Robert Young (2014), "Foucault's work displays a virtual absence of explicit discussions of colonialism and race" (p.41). For example, in *Discipline and Punish*, Foucault argues that the technology of punishment has reoriented from public punishments on the physical body of the criminal, to private punishments upon the soul. Simone Browne (2015) counters: "While Foucault argued that the decline of the spectacle of public torture as punishment might have marked 'a slackening of the hold on the body,'…when that body is black, the grip hardly loosened during slavery and continued post-Emancipation with, for example, the mob violence of lynching and other acts of racial terrorism" (p.38). CRT scholars who argue against Foucault, or ignore him altogether, often occupy more of a Marxist-materialist

account of power relations, rather than a social constructionist perspective. I discuss the relationship between CRT and Marxism further below.

Since white supremacy is normal or ordinary, a persistent belief embedded within power relations and social life, how did it come to be this way? A historical account of CRT is necessary. Some scholars have argued that notions of race, in North America, were birthed in law, as a means of justifying the enslavement of Africans. Historian Theodore Allen (1997) in his two-volume *The Invention of the White Race* argues that the White race was established as a form of moral, legal, and social control to advance the White colonization of North America – and to create racial distinctions for the purpose of establishing lifetime bond-servitude and oppression of Africans. While laws and practices of slavery predated the 1700's, Allen points to a particular Act in 1723 in Virginia, 'An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos and Indians, bond or free,' to demonstrate the white supremacist attitude that legally denied, "…so far as African Americans were concerned, the normal distinctions characteristic of capitalistic society," including denying the right of African Americans to hold public office, to self-defence, to joining a militia, to owning a gun, and to being a witness against a white person. (p.242). Allen (1994), in the first volume, argues that legal social control also extended to Native Americans. Legislation in the state of Georgia in 1830 nullified the tribal laws of Indigenous peoples (Allen, 1994). By the late 1800's similar laws existed across the United States with the explicit purpose of coercing Native Americans to "conform to white man's ways" (Allen, 1994, p.38). Thus, Allen effectively argues that racial difference was not created by sociology, but by law – as a mechanism of white supremacist, social control:

> the "white race" invented as the social control formation whose distinguishing characteristic was not the participation of the slaveholding class, nor even of other elements of the propertied classes . . . What distinguished this system of social control, what made it "the white race", was the participation of the laboring classes: non-slaveholders, self-employed small holders, tenants, and laborers. In time this "white race" social control system begun in Virginia and Maryland would serve as the model of social order to each succeeding plantation region of settlement. (1997, p.251)

Putting Allen's research together with Harris' contention above makes clear that there exists a racial hierarchy at the very foundation of North American society. But, it is more than a hierarchy. Hierarchy is not a forceful enough descriptor. In *The New Jim Crow: Mass incarceration in the age of colorblindness*, legal scholar Michelle Alexander (2012) calls the racial hierarchy in the United States a racial caste system. Replacing the term hierarchy with caste implies how rigid, how impassible white supremacy is. A hierarchy is like stairs that can be climbed, while caste signifies an insurmountable boundary, a stairway without steps. Alexander describes racial caste as, "a stigmatized racial group locked into an inferior position by law and custom" (2012, p.12). She says slavery was a caste system, but so too is the criminal justice system (Alexander, 2012). From a CRT perspective, law is the instigator and enforcer of white supremacy in North America. Law deliberately racializes and criminalizes nonwhites, as a way of maintaining a system of racial caste.

Emphatically, CRT is concerned with how race intersects with power to keep some races, particularly non-white, oppressed (Montoya, 1994). Legal scholar Margaret Montoya calls a critical race theoretical analysis a process of unmasking. In an article in the *Harvard Journal of Law and Gender*, she quotes CRT scholar Mari Matsuda: "[t]he work of feminists, critical legal scholars, critical race theorists, and other progressive scholars has been the work of unmasking: unmasking a grab for power disguised as science, unmasking a justification for tyranny disguised as history, unmasking an assault on the poor disguised as law" (Montoya, 1994, p.185). What

critical race theory exposes, by unmasking, is indeed the prevalence of white supremacy in social institutions. In turn, what CRT reveals is that the normalcy of whiteness means material and psychic advantage for whites.

(b) Whiteness means material and psychic advantage.

In contrast to social constructionist (idealist) accounts of white supremacy and racism, which tend to analyze attitudes alongside discursive formations, economic determinists (realist) argue that racism provides privilege and status for whites (Delgado & Stefancic, 2012). CRT theorists from the latter perspective can be traced back to a foundational article written by Derrick Bell (1980) about *Brown v. Board of Education*. The legal case, *Brown v. Board of Education,* ended state-mandated racial segregation of public schools (Bell, 1980). However, in the years that followed, segregation still persisted, along with significant backlash from white communities, and white flight from African American school districts (Bell, 1980). Bell cogently puts forward his thesis that ending racial disadvantage requires more than legal remedies: "Whites may agree in the abstract that blacks are citizens and are entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied without altering the status of whites" (p.522). Ending white supremacy requires an acceptance of personal responsibility and potential sacrifice (Bell, 1980). What Bell is getting at is that segregation, as a legal strategy of white supremacy, caused harm. Where someone – or in this case, an entire racial group of people – is significantly hurt it is not enough to assert that they *now* have equal rights, some element of repair must be presented.

At its core, slavery in North America was about bringing free labour to the colonial, wealth-building enterprise of white people (Allen, 1994; Allen, 1997). In the United States, whites still have material advantage because of centuries of racism. Today, even with purported equality in law, there is still racial income disparity and substantial wealth disparity in the United States. In 2011, the median white household earned $50,400 per year, compared to $32,028 for African Americans (Sullivan et al., 2015). More troubling is the 2011 wealth gap: "In relative terms, Black households hold only 6 percent of the wealth owned by white households…a total wealth gap of $104,033" (Sullivan et al., 2015, p.7). Wealth provides an important safety net for families, improves prospects for future generations, allows for home and business ownership, and educational opportunities (Sullivan et al., 2015). Wealth and health outcomes are also correlated (Traub et al., 2017), as are wealth and criminal justice outcomes (Wacquant, 2009). For good reason, then, CRT scholars are often critical of liberalism that promotes legal equality while failing the material test; that is, legal words without reparative deeds are largely meaningless (Delgado & Stefancic, 2012).

To counter the limits of idealist CRT, some scholars have relied on Black Marxism to theorize the intersections of class-based oppression with white supremacy, to address the material consequences of racism. Some CRT scholars have critiqued Marxism generally for its conflation of race-based oppression with class-based oppression, and for its insistence on centralizing class concerns over cultural, political, and social ones (Dua, 2010). Cedric Robinson (1983) in *Black Marxism* argues that Marx was generally Eurocentric and particularly conceited when it came to the topic of slavery. Marx claimed, in the vein of Aristotle, that slavery was simply a leftover vestige from the past, not worth theorizing (Robinson, 1983). However, Black Marxism theorizes a nuanced overlap between Marxism and CRT.

By the 1930's, W.E.B. Du Bois believed that the policy of equality through liberalism had been exhausted (Bogues, 2010). In spite of some legal reforms, white supremacy continued unabated: "It had the capacity to reorganize itself and to infect every aspect of American social life" (Bogues, 2010, p.157). Du Bois began to adapt – or to paraphrase Robinson (1983), cross-fertilized with – Marx to explain why the racialized oppression of African American people persisted. Du Bois argued that capitalism was both exploitative of labour *and* exploitative of race (Bogues, 2010; Robinson, 1983). Slavery, though, according to Du Bois was a "special form of human domination," as a "system of property ownership *and* labour exploitation" (Bogues, 2010, p.165). However, the period post-slavery or reconstruction could only be explained partially in Marxist terms. Modes of production and relations of production were partially responsible for modern capitalism and imperialism, but more poignantly, Du Bois argued that the sedimentation of capitalism in the United States was a result of racism and individualism (Robinson, 1983). It was the pitting of poor whites against Black labour by white elites *and* that Northern white elites did not ultimately need Black support to grow their capital or wealth in the Southern States post-civil war (Robinson, 1983). While realist CRT scholars generally, "…apply Marx's concept of mediation, to track how social relations come into production in and through each other," (Razack, Smith, and Thobani, 2010, p.3), some CRT scholars, parallel to Du Bois, have replaced Marx's idea of class consciousness for change, with a revolutionary consciousness, or Black radical theory (Robinson, 1983) Revolutionary consciousness and Black radical theory as espoused by C.L.R. James is about a militant push for material change (Robinson, 1983).

Yet, Black Internationalist Feminists, or Transnational Black Feminists, such as Carole Boyce Davies (2016), have criticized C.L.R. James, Anthony Bogues, and Cedric Robinson for the maleness of their scholarship, for tracing history – even revolutionary history – through the

ideas of Black men, while ignoring the equally important contributions of Black women like Claudia Jones and Angela Davis. Davies (2016) uses Audre Lorde's term 'sister outsiders' to describe the sidelining of Black women. In an article with that title, Davies (2016) highlights some of the militant activism, writing, and publishing of Claudia Jones, which caused Jones to be incarcerated and ultimately expelled from the United States. Jones (1949) believed that it was the militancy of African American *women* that allowed for the survival of African American families through eras of slavery, Jim Crow, lynching terror, and police brutality. Claudia Jones writes at the outset of a 1949 article:

> An outstanding feature of the present stage of the Negro liberation movement is the growth in the militant participation of Negro women in all aspects of the struggle for peace, civil rights, and economic security . . . The bourgeoisie is fearful of the militancy of the Negro woman . . . capitalists know far better than many progressives seem to know, that once Negro women undertake action, the militancy of the whole Negro people, and thus of the anti-imperialist coalition, is greatly enhanced. (p.3)[8]

Angela Davis, too, was incarcerated for her social activism. Her action, research, and writing counters the material and psychic advantages afforded whiteness through the social injustices and mass incarceration experienced by African Americans. Davis writes, "it is clear that black bodies are dispensable within the 'free world' but as a major source of profit in the prison world" (2003, p.95).

While I highlighted wealth and income disparities, or material advantage, the psychic advantage of whiteness is just as troubling. Angela Davis writes about the dispensability of Black bodies and how this harmful ethos creates psychic trauma for racialized peoples. In the book *The Trauma of Racism*, Psychiatrist Alisha Moreland-Capuia (2021) writes about how

[8] While the works of Du Bois, James, and Robinson are readily available, it was more difficult to locate some of the writings of Claudia Jones, to trace critical theory back to her – even though her analysis is a precursor to explaining intersectionality. Jones (1949) clearly demonstrates how layered oppression is experienced by African American women. Later in the same article, Jones (1949) reminds her reader where the responsibility for overcoming white chauvinism rests: "squarely on the shoulders of white men and white women" (p.12).

racism creates pervasive fear, toxic stress, and trauma for nonwhite folks, essentially creating a constraining environment for psychic and material freedom: "it is worthwhile to consider a large portion of the population who are feeling unsafe daily and subject to systems that limit capacity for economic and social upward mobility contributing to economic uncertainty and insecurity which has further negative downstream cascading effects, which contributes to toxic stress" (p.113). A primary driver of the white supremacy that disrupts Indigenous, Black, and racialized peoples' psychic and material freedoms is policing. Desmond Cole (2015), a Black Canadian journalist shares some of his experiences of police violence in an article in *Toronto Life* article titled, "The Skin I'm In". Cole has been stopped (i.e., carded) by police more than 50 times, simply because of the Black colour of his skin. The weight of suspicion and fear that whiteness directs at him is heavy: "When I walk down the street, I find myself imagining that strangers view me with suspicion and fear". The phenomenon of viewing oneself through the eyes of racist others is what the African-American writer and activist W. E. B. Du Bois described as "double-consciousness": how Blacks experience reality through their own eyes and through the eyes of a society that prejudges them. Huda Hassan (2017) calls the weight of 'double-consciousness a "state of Black mourning," or five centuries of grieving. A society with a hegemony of whiteness is not a free society, but only a "supposedly free-society;" the way Cole writes about it: "After years of being stopped by police, I've started to internalize their scrutiny. I've doubted myself, wondered if I've actually done something to provoke them. Once you're accused enough times, you begin to assume your own guilt, to stand in for your oppressor. It's exhausting to have to justify your freedoms in a *supposedly free society*" (2015, *emphasis added*). Remember, as stated above, when whiteness is the norm other racialized groups are forced (oppressed) to mediate identities through the lens of whiteness.

Another example from policing, or how police limit the full expression of humanity, are the impacts of School Resource Officer (SRO) police programs on Indigenous, Black, and racialized people. Until recently, SRO police programs have been widely used in Canadian schools: police officers assigned to schools or school districts, supposedly doing community policing, building relationships with youth, and keeping schools safe. With a wave of outcry following the murder of George Floyd by police in the United States, many in Canada joined the call of #BlackLivesMatter to remove police from schools (UGDSB, 2021). The SRO programs have been exposed for contributing to the school-to-prison-pipeline, or the further criminalization of Indigenous, Black, and racialized youth (Maynard, 2017). The programs, like police generally, target nonwhite students and create deleterious outcomes. Not only charging and arresting more Indigenous, Black, and racialized youth, but disrupting the capacity for many to be able to learn – by introducing the fear of white supremacy (e.g., police surveillance, harassment, bullying, violence, etc) into the learning environment (WRDSB, 2021).

In conclusion, the normalcy of white supremacy means the racialization of class and the racialization of gender, which ultimately leads to psychic and material disadvantage for white males (Bannerji, 2000). CRT materialists believe that racism will not stop until the physical circumstances of minorities' lives are improved (Delgado & Stefanic, 2012). Some CRT scholars have tried to bridge the divide between idealists and realists by arguing that theorizing in either camp is relevant to ending oppression. In the words of Sunera Thobani (2010): "Whether feminists analyze…from a materialist perspective or from philosophical and psychoanalytic perspective is moot…What is indispensable, however, is the disruption of the practices that reproduce Western supremacy and white racial power, even in their feminist incarnations" (p.142).

(c) Race and racism persist through social development, thought, and relations.

White supremacy is persistent and resistant to change. As explained, above, social systems are imbued with it. How is it that in 2022, many years after the civil rights movement of the 1960's, many more years after the end of Jim Crow laws, and hundreds of years after the end of slavery does white supremacy still endure? In this section I describe two reasons why CRT contends that race and racism persist through social development, thought, and relations: first, white supremacist thought morphs or evolves over time, because; second, white people have a possessive investment in whiteness that is unexamined and therefore unaccountable. To explain the first point, I summarize the scholarship of Michelle Alexander (2012), *The New Jim Crow: Mass incarceration in the age of* colorblindness and Khalil Gibran Muhammad (2010), *The Condemnation of Blackness: Race, crime, and the making of modern urban American*. To explain the second, I rely primarily on George Lipsitz's (2006), *The Possessive Investment in Whiteness: How white people profit from identity politics*.

First, to the evolution of white supremacy. In describing the normalcy of white supremacy, I presented one argument of Alexander's (2012) *The New Jim Crow* that the United States is structured historically and contemporarily as a racial caste system. Another central argument that Alexander makes is that white supremacy has persisted over time because it transforms to fit contemporary social structures. Laws change. Political rhetoric and discourse evolves, but fundamentally, each era of Western history, law and politics upholds white supremacy. Alexander cites the work of legal scholar Reva Siegel who calls the maintenance of white privilege, "preservation through transformation" (2012, p.21). To support her claim,

Alexander tracks white supremacy through a number of significant historical eras: from slavery to reconstruction, the era of terror and lynching to Jim Crow segregation laws, from the civil rights movement to the war on drugs, to the current state of mass incarceration. At each historical epoch, the prevailing attitude and social system of white supremacy adapted to maintain the racial caste system.

During slavery, "[t]he notion of white supremacy rationalized the enslavement of Africans, even as whites endeavored to form a new nation based on the ideals of equality, liberty, and justice for all" (Alexander, 2012, p.25). Race, or more accurately, racism, was a defining category at the basic foundation of American society (Alexander, 2012). Even as slavery ended in the late 1860's and there was a brief time of reconstruction – the enshrinement of constitutional protections against slavery and full citizenship for African Americans – white supremacy was preparing to evolve. Alexander (2012) writes that "backlash against the gains of African Americans in the Reconstruction Era was swift and severe," in the form of racial terror, or mass lynchings of Blacks by whites, especially in the Southern States (p.31). Racial terror soon evolved into legal terror in two ways: first, through Jim Crow or segregation laws; and, second, through convict leasing – a new form of slavery, "whereby tens of thousands of African Americans were arbitrarily arrested" and indentured to work off criminal sentences through forced labour (Alexander, 2012, p.31).

During 1890 – 1965, reconstruction and equality before law gave way to legalized separation—in all public and many private spaces—between Black and White (Alexander, 2012). In *Trauma-Informed Juvenile Justice in the United States*, I traced the origins of mass incarceration of African Americans to the collective traumas inflicted by whites, including Jim Crow laws (Oudshoorn, 2016). I wrote this about the reason for the term 'Jim Crow':

> Jim Crow was a song and dance, an act rooted in African culture. The act involved playing dumb to confuse slave owners (Padgett, http://black-face.com/jim-crow.htm). Jim Crow became more widely known across the USA when it was appropriated and popularized in white culture by a white minstrel in the mid-1800's, as a way of mocking slaves (Padgett, http://black-face.com/jim-crow.htm). The term was later used to characterize segregation laws. Writing in *The Strange Career of Jim Crow* historian Comer Vann Woodward (1955) argued that segregation laws maintained the inferiority of African Americans, reestablishing the disparity inherent in slavery. He said, "The public symbols and constant reminders of his inferior position were the segregation statutes, or 'Jim Crow' laws. They constituted the most elaborate and formal expression of white opinion upon the subject" (7). Jim Crow laws had traumatic effects on African American communities. Many segregated neighborhoods languished in poverty (and still do), without proper public services (Hoelscher, p.671). Health outcomes were poor—including high rates of infant mortality (Krieger et al Jim Crow and Infant mortality). Educational attainment was often low. Jim Crow was an era of trauma and terror. (p.74)

As if legal segregations were insufficient to satiate white supremacists, in the early 1900's, whites terrorized African Americans. The Equal Justice Initiative (2015) has documented over 4,000 lynchings of African American people by whites during the era of Jim Crow (p.15-16). The Equal Justice Initiative writes of white supremacy: "At the end of the Civil War, the nation did nothing to address the narrative of racial difference that is the most enduring evil of American slavery. Involuntary servitude was horrific for enslaved people, but the ideology of white supremacy was in many ways a more severe barrier to freedom and equality" (2015, p.7).

With the dawn of the civil rights movement and the end of legal separation in the 1960's and 1970's, whiteness had to find a new way to persist. In the 1980's President Ronald Reagan declared a 'war on drugs'. Where the previous president, Richard Nixon in the 1970's, had used the rhetoric of 'war' to target those he defined as 'criminals', Reagan mobilized and weaponized the machinery of criminal justice against African American communities (Alexander, 2012). There was little evidence at the time to indicate there was actually a drug problem in the USA (Alexander, 2012). Talking drug crime, or 'war on drugs,' was a thinly veiled way of criminalizing Black communities: "The War on Drugs proved popular among key white voters,

particularly whites who remained resentful of black progress, civil rights enforcement, and affirmative action" (Alexander, 2012, p.54). Police departments, initially reluctant to steer resources away from other policing, took up the drug war with gusto, as the government infused them with large cash grants and military equipment (Alexander, 2012, p.73). Alexander characterizes the transformation in policing at this time from a community-based model to a militarized one. An outcome of militarized, white policing, present day, is that on average, one in three African American males will serve time in prison in their lifetime (Alexander, 2012). The war on drugs has almost singularly been the cause of the rise of mass incarceration in America – "[t]he drug war is largely responsible for the prison boom and the creation of a new undercaste [the new Jim Crow], and there is no path to liberation for communities of color that includes this ongoing war" (Alexander, 2012, p.238).

Therefore, white supremacy has morphed from slavery, to Jim Crow, to the War on Drugs, through to mass incarceration. And, so, it persists. Alexander argues that whiteness is resistant to eradication because a persistent form of denial pervades American society about it. Toward the end of her book, she claims that most white people are unable to understand that racism is more than an attitude, it is an entire system of social control structured against the lives of African Americans. She says a handful of reforms will not be enough to end the system of racialized control (Alexander, 2012).

Khalil Gibran Muhammad's *The Condemnation of Blackness* in some ways dovetails with Alexander and in other ways adds textured details. Muhammad's historical accounting of how outcomes of slavery, such as poverty and criminalization, became 'the Negro problem,' a "durable signifier of Black inferiority", rather than a problem of white supremacy, fits with Alexander's thesis of the metamorphosis of whiteness (p.3). Muhammad's research adds to the

concept of racial castes system, by giving a historical accounting of the criminalization of Blackness and the racialization of crime—how 'Black' became 'criminal' in the minds and social institutions of white people. It is not just that white supremacy naturally evolved; it is that white supremacy purposefully morphed over time in a way that criminalized Black identity and, therefore, continued the subordination of Black communities (Muhammad, 2010).

Muhammad explains how the era of terror for African American's was actually characterized by whites as an era to 'be afraid of the Black man'. Media (newspapers) and academia (sociologists) had successfully crafted a rhetoric of crime as a problem of 'the African American' (Muhammad, 2010). Muhammad cites the work of Ida B. Wells who exposed the depravity of this racist, fear-mongering. It was Wells who statistically tracked lynchings to demonstrate that "the Afro-American race is more sinned than sinned against" (Wells as quoted in Muhammad, 2010, p.59). Not surprisingly Wells was not only ignored by white academia, but was chased from the Southern United States when her printing press was burnt to the ground (Muhammad, 2010). Muhammad also writes of the concerted efforts of W.E.B. Du Bois to debunk the white academic mythology that had written crime into race (Muhammad, 2010). Du Bois demonstrated – time and again – that the social science of whites was fraught with racism and beliefs of the inferiority of the Black race (Muhammad, 2010). He, too, argued that greater harm was being perpetrated by whites: "He emphasized ongoing, not simply historical, acts of white discrimination in every sphere of black life" (Muhammad, 2010, p.68). However, the racist beliefs held by whites about the biological determinism of crime during Du Bois' era, simply gave way to the cultural determinism of the next generation of whites.

By the early to mid-1900's it was becoming increasingly taboo to claim that wrongdoing or crime was inherently biological to particular races (Muhammad, 2010). A new pseudo-science

of cultural determinism emerged instead, claiming that it was the culture of African Americans that was innately crime-inducing (Muhammad, 2010). Any Black progress was still measured against crime (Muhammad, 2010). Biology was replaced with culture, but the African American race was still being essentialized as criminal (Muhammad, 2010). Through the latter stages of *The Condemnation of Blackness*, Muhammad highlights how crime prevention efforts of the 1920's and 1930's were reserved for lower class whites, while crime fighting efforts were carried out by police forces with racist overtones and the support of unfair judiciary against African Americans (Muhammad, 2010). He concludes that one of the greatest harms to African Americans has been the narrative attached to crime statistics especially the dominant narratives of the 1850's to the 1940's that posited that Blackness meant criminality, what Muhammad characterizes as the condemnation of Blackness.

Put together, Alexander and Muhammad powerfully deliver a fulsome historical accounting of the evolution of white supremacy and its horrific impact on African American communities. While these narratives provide necessary counter-discourses to ones that racialize crime, it is also vital to theorize how and why white supremacy evolves and persists. Here, the term 'white possessive' or a possessive investment in whiteness is explanatory.

In *The Possessive Investment in Whiteness: How white people profit from identity politics*, George Lipsitz (2006) uses the phrase 'a possessive investment in whiteness' to explain white responsibility for racialized hierarchies: "I use the term possessive investment both literally and figuratively. Whiteness has a cash value: it accounts for advantages that come to individuals through profits…inherited…on the spoils of discrimination" (p.vii). Lipsitz claims that white people "are encouraged to invest in whiteness, to remain true to an identity that provides them with resources, power, and opportunity" (p.vii). Yet, Lipsitz, like others before

him, argue that whiteness goes unacknowledged and unaccounted for: "As an unmarked category against which difference is constructed, whiteness never has to speak its name, never has to acknowledge its role as an organizing principle in social and cultural relations" (2006, p.1). To those invested in this white possessive, blackness means slavery, while whiteness means freedom: a freedom gained through conquest, colonialism, and 'Indian' extermination (2006, Lipstitz). Whiteness, according to Lipstitz, is both realist and idealist. Whiteness is a social construction, rooted in ignorance, but it also creates significant social consequences or harms:

> Because [whites] are ignorant of even recent history of the possessive investment in whiteness – generated by slavery and segregation, immigrant exclusion and Native American policy, conquest and colonialism, but augmented more recently by liberal and conservative policies as well – white Americans produce largely cultural explanations for structural social problems. . . It fuels a discourse that demonizes people of color . . . while hiding the privileges of whiteness. (Lipsitz, 2006, p.18)

Whiteness is the invisible, unaccountable category against which normalcy is measured – this is the *why* of the persistence and evolution of white supremacy. Whiteness means structural advantage at the expense of nonwhites – or *how* it endures.

When explaining *how* white supremacy works, Lipsitz's argument is CRT materialist. A possessive investment in whiteness is material advantage for whites in wealth, income, housing, health, and education, at the expense of racialized communities (Lipsitz, 2006). Capitalist America was built on slave labour, yet the accrual and distribution of wealth has remained in the coffers of whites (Lipsitz, 2006). Indigenous scholar April Moreton-Robinson (2015) writes about the materiality of whiteness: "A new white property-owning subject emerged in history and possessiveness became embedded in everyday discourse" (p.49). She claims that "patriarchal whiteness is imbued with power" (p.66). A power to take from others (property), a power to be above others (status), and a power to avoid accountability (identity) (Moreton-Robinson, 2015).

Opportunities for reparations or redistribution of wealth have been stonewalled in law. Citing the scholarship of Derrick Bell, Lipsitz explains that "White resistance and refusal has led to renegotiation of antidiscrimination laws to such a degree that efforts to combat discrimination are now considered discriminatory," which "allows whites to remain self-satisfied and smug about their own innocence" (p.46). Whiteness in the contemporary United States (and Canada, too,) has "warped efforts to remediate racial exploitation" (Harris, 1995, p.290). Invisible and unaccountable, and when confronted, whiteness moves to innocence, claiming virtuous higher ground.

In summary, whiteness persists through social development, thought, and relations. At the ontological level, whites impose their will on the racialized 'other,' "because of a perceived lack of will; thus [the 'other'] is open to being possessed" (Moreton-Robinson, 2015, p.50). At the material level, the power to live with greed and the power to side-step accountability produces a racial caste system. Whiteness accumulates capital at the expense of others, whether wealth and housing, or income and status. Whiteness is normal. It is the racist measure of what it means to be human. Whiteness means rightness, but it also means a right to a positive reputation (for whites alone), and the right to exclude others (Harris, 1995).

2. Critical race feminism

While the previous section centred scholarship from the United States, with a few Canadian examples, below, I turn to critical race feminism (CRF) to highlight how critical race theory has advanced in Canadian feminist scholarship. Although there are some differences in how white supremacy has advanced in the United States, it would be a form of essentialism to

write that Canada is much different. CRF scholars have added to CRT concepts by including an analysis of the nation-state, imperialism, and heteropatriarchy to show how raced and gendered hierarchies are core components of the Canadian social order (Razack, Smith & Thobani, 2010). In essence, the nation-state is the facilitator of the settler colonial logics of whiteness, maleness, and greediness, which keeps Indigenous peoples dispossessed of lands and a racial caste system rigidly in place.

Critical race feminism (CRF) conceptually links the raced, gendered, and classed components of the nation-state to demonstrate how the hegemonies of imperialism and neo-liberalism maintain domination (Razack, Smith & Thobani, 2010). CRF owes some of its intersectional analysis (e.g., how oppression is layered against certain identities) to the work of CRT scholars. However, CRF expands intersectionality to include discussions of colonialism, imperialism, and neo-liberal economic ordering. Although, there is significant engagement and overlap between CRF scholars and Indigenous scholars, for explanatory purposes, I believe it is important distinguish the two (I write about Indigenous feminism more in the next chapter, as well as my analysis). In fact, CRF gives credit to Indigenous feminists as, "the first to powerfully critique Canada as a white settler society and to analyze ongoing colonial practices" (Razack, Smith & Thobani, 2010, p.1). In this section, I describe four components of CRF: first, expanding on CRT notions of whiteness, I outline Sunera Thobani's (2007) core arguments in *Exalted Subjects: Studies in the making of race and nation in Canada*, to connect whiteness with the violent legal formation of a white national subject and a colonized object in Canada; second, I bring together the works of Sedef Arac-Koc (2010) and Abigail Bakan (2014) to highlight that the nation-state of Canada is violently classed through a hegemonic, imperial agenda; third, I explain how Sherene Razack (2002) and Andrea Smith (2005) write about white, male sexual

violence as a weapon of the settler state – how it spatially alters bodies and environments, from respectable to degenerate; fourth, I write about how Himani Bannerji (2000) and Razack (2015) carry forward the CRT argument that whiteness remains unaccountable in Canada because it disguises concern for the 'other' (nonwhite) in the forms of meaningless policy (i.e., multiculturalism) and meaningless legal reforms (i.e., custodial inquests into the deaths of Indigenous inmates), without changing the material circumstances of those being oppressed.

(a) A white national *subject*, a colonized, racialized *object*.

The ontological core of whiteness is a belief in the superiority of the white race. The formation of Canada and its ongoing false claims to legitimacy, similar to the United States, are founded in racial difference (Thobani, 2007). Racial difference in Canada means a system of racial hierarchy, where white citizenry, Indigenous peoples, and immigrants are different types of legal beings, as well as human beings (Thobani, 2007). Thobani writes: "…fundamental categories of Canadian nationhood, born in the violence of the colonial encounter, have been institutionalized and sustained by the relations of force still invested in them" (2007, p.28). What does a belief in the superiority of whiteness mean and how does this belief translate into racialized and gendered domination?

According to Thobani, the superiority of whiteness is a belief in the exaltation of whiteness. Thobani argues that the subject position of the national is exalted as an identity *with* material benefits. As an identity, it is about worth: who deserves citizenship. Although there are multiple identities allowed to claim 'national,' the structure of citizenry is racialized, gendered, and classed. Thobani states, "Within the boundaries of the nation, 'national' worthiness is

certainly not distributed evenly among subjects. Bourgeois men, for example, are endowed with greater worthiness, and their claim to national resources are deeper and stronger than those of women, the working class, and other such internally devalued groups" (p.21). Exaltation is a powerful descriptor because it metaphorically connotes the idea of worship or transfiguration. The national subject most worshipped is the transfigured white man. When whiteness is worshipped it also receives material benefits of superiority: access to land, citizenship, mobility, employment, and other social benefits (Thobani, 2007). The white man as a "national subject [belongs] to a higher order of humanity" (Thobani, 2007, 248). For the racialized 'other,' there are consequences, devastating ones – dispossession, assimilation, and exclusion from full participation in society. It is not just that whiteness is one national identity, it is "*the* national identity" (Thobani, 2007, 85).

The move from belief to practice is political, enabled or facilitated by the power of the nation-state. The nation-state primarily uses the violence of law to maintain domination and control (Thobani, 2007). Thobani partially relies on Foucault's concept of 'governmentality' to explain that the nation-state is more than an apparatus or institution of governing, but also something that permeates daily social life – that disciplining of national subjects is exercised through power and force relations from social formation to intimate, interpersonal relationships (Thobani, 2007). However, Thobani leans more heavily on postcolonial scholars, such as Partha Chatterjee, Achille Mbembe, and Franz Fanon, to explain the operative nature of power through the institutionalization of racialized hierarchies that create a 'colonial difference,' or unequal access to institutional power (Thobani, 2007). Mbembe's work describes colonial governance as the imposition of "commandment," rules or laws that constitute "the native an object of power" (as cited in Thobani, 2007, p.41). It is here – law as violence – that the influence of Franz Fanon

also emerges in CRF. In *The Wretched of the Earth*, Fanon (1963) describes that the colonizers world is divided in two. On one side – separated by a legal line of barracks and policing – is the colonizer (Fanon, 1963). On the other is the colonized, who are dominated and pacified, as if they are not a people, "nothing else but a territory…a landscape, *the* natural backdrop" (p.182), because "[f]or the colonized subject, objectivity is always directed against him (sic)" (37). National elites may talk about colonial subjectivities, such as 'self-determination', 'human rights' and other forms of 'legal dignity', but the reality is quite different: all talk, no action (Fanon, 1963). The colonized remain objectified, 'the savage'. Thobani (2007) explains, using Fanon, that law turns the colonized into 'things' or objects of exploitation. Essentially, "[c]olonialism created an order based on absolute violence" (Thobani, 2007, p.37). Rule of law is in fact a law of whiteness. Law creates a violent social order and conceals its own "violence, to systematize it in the interest of the reproduction of the nation-state" (Thobani, 2007, p.62). The *Indian Act* in Canada is the perfect example. Not only does it define who counts as Indigenous, it regulates most areas of Indigenous lives and communities (Vowel, 2016). Furthermore, The Indian Act is as gendered as it is racialized: the legislation disrupted traditional, female-led clans, putting leadership in the hands of men (Thobani, 2007). Canadian law is "a regime of racial [and gendered] power" (Thobani, 2007, p.54).

(b) The neoliberal state is violently classed.

CRF also brings into focus how the neoliberal nation-state is violently classed. The enmeshment of a capitalist economy that fosters individual greed, with a political investment in whiteness and maleness, has created increasing numbers of people living in poverty – who are

not only left behind financially, but are "conceptualized as a form of humanity culturally apart" (Arat-Koc, 2010, p.150). CRF scholar Sedef Arat-Koc (2010) suggests that neoliberalism names this impoverished group as the 'underclass'. The term 'underclass,' "cultural*izes* and racial*izes* poverty," and represents "a language of class fixated on the body and culture of the poor" (Arat-Koc, 2010, p.150). The term implies moral degenerativity (Arat-Koc, 2010). As if the group is "*by its nature* . . . dissolute, debauched, depraved, and sinful" (Arat-Koc, 2010, p.151). White supremacy, heteropatriarchy, and capitalism enabled by the power of the nation-state, avoids detection and accountability, because it conflates class issues with moral issues. If the poor are immoral, then the wealthy must be morally upright. Arat-Koc draws on the work of sociologist Loic Wacquant to describe how the primary racialized, classed institution of the nation-state is the prison. Wacquant (2009) in *Punishing the Poor: The neoliberal government of social insecurity* details the linkages between the ascendancy of the neoliberal state, its submission to free markets, with its desire to punish, by capture and control, marginalized populations. The term 'prison industrial complex,' used to describe the toxic interplay between race, gender, and moneymaking in North America, brings to light how "prison construction and the attendant drive to fill these new structures with human bodies have been driven by ideologies of racism and a pursuit of profit" (Davis, 2003, p.84). Arat-Koc makes clear that as the nation-state kneels to the will of the white, male capitalist, it is Indigenous peoples in Canada who suffer the most. She writes that racialized bodies are disposable in the neoliberal economy. Indigenous lands "are used as sites of production or mining of dangerous chemicals, or are treated as dumping grounds for First World toxic waste" (Arat-Koc, 2010, p.162).

The work of academic Abigail Bakan (2014) provides further conceptual linkages between state, economics, and racialization of the 'underclass'. Though her work focuses on

colonialism in Israel-Palestine, it is very relevant to the Canadian context. She contends that the emergence of Zionism – a political ideology linked with capitalism, state-based imperialism, and whiteness – is "a racialization project associated with the ethnic cleansing of Palestine" (Bakan, 2014, p.259). Overtime, as Jewishness became associated with whiteness, Palestinians became the racialized 'other' (Bakan, 2014). Similar to Thobani, Bakan maintains that law and subsequently settlement, or dispossession of Palestinian lands, are the enablers of the Zionist national project (Bakan, 2014). Where her arguments add nuance are twofold: first, Bakan explains how Jewish nationhood, at the expense of Indigenous Palestinian bodies and lands, is also a desire to be a part of imperial, Western economic ideology that ties white settlement with land as resource, ownership, and hegemonic power; and second, even where a people group (in this case, Jewish people) have been victims of significant oppression (i.e., the holocaust), a move to whiteness, aided by Western imperialism, is a move to an unquestioned hegemonic, capitalistic power position. In short, a neoliberal economic order is also an imperial order of force *and* Western imperialism reifies the dynamic of white unaccountability.

(c) Male perpetrated sexual violence is a weapon of the nation state.

The third distinctive of critical race feminism comes from sociologist Sherene Razack. She defines the nation-state of Canada as a masculinist society (Razack, 2002). Razack's scholarship deftly makes known the specifics of Canadian settler society. Or, how settler society in Canada is a society of patriarchal whiteness that defines Indigenous peoples as degenerates and remnants. In the edited volume *Race, Space, and the Law: Unmapping a white settler society*, Razack (2002) brings together CRF scholars and others to theorize how space – the

material and symbolic significance of *routines* (spatial practices), *representations* (conceived space), and *interpretations* (lived space) impact specific bodies and localities (i.e., the homeless body, the female body, the settler state, etc) – produces respectable and degenerate subjects. Canada becomes Canada only through the *routine* of mythological narrative. The dominant story becomes one of settler discovery and development of empty lands (Razack, 2002). Of course, this mythos is pathological. It denies the genocide, displacement, and exploitation of Original peoples (Razack, 2002). Mythical storytelling gets written into law. And law, itself, is a collection of cases, stories, really. *Representations* or conceived spaces, over time, produce a racial and gendered hierarchy through law.

Razack tells the story of the brutal sexual assault and murder of Ojibway woman Pamela George by two white, male university students in 1995 to highlight how law is central to the routines, representations, and interpretations of white settler society, erasing Indigenous humanity, while making even violent white, male offenders respectable. Despite evidence that the men had deliberately planned the murderous act, both were only convicted of manslaughter: "At the end of the day, the record showed only that two white 'boys' lost control and an Aboriginal woman got a little more than she bargained for…The 'naturalness' of white innocence and of Aboriginal degeneracy remained firmly in place as the conceptual framework through which this incidence of gendered racial violence could be understood" (Razack, 2002, p.127–128). Razack contextualizes the individual incident of gendered and racialized violence as part of an ongoing collective violence on Indigenous bodies and territories, through legalized structured dispossession of land, and through racist ideologies. Furthermore, she connects the sexual violence perpetrated by the two white men to the sexual violence that was "an integral part of nineteenth-century settler strategies of domination" (Razack, 2002, p.130).

Another CRF scholar, Andrea Smith (2005) has written about sexual violence of white men perpetrated against Indigenous peoples as a tactic of settler genocide. Her book, *Conquest: Sexual violence and American Indian Genocide* poignantly describes how Indigenous women "are bearers of a counter-imperial order and pose a supreme threat to dominant culture. Symbolic and literal control over their bodies is important in the war against Native peoples" (Smith, 2005, p.15). Smith quotes a powerful poem by Menominee poet Chrystos, titled 'Old Indian Granny':

> You told me about all the Indian women you counsel
> who say they don't want to be Indian anymore
> because a white man or an Indian one raped them
> or killed their brother
> or somebody tried to run them over in the street
> or insulted them or all of it
> our daily bread of hate
> Sometimes I don't want to be an Indian either
> but I've never said so out loud before. (p.13)

Heteropatriarchy and white supremacy are most apparent in Canada with the thousands of missing and murdered Indigenous women (Smith, 2005). Yet, white, male violence does not stop with bodies. Smith also describes the neoliberal, capitalist rape of the land; resource extraction to the detriment of environment and people.

Returning to the work of Razack, she weaves together *interpretations* of toxic masculinity – violence and sexual aggression as "positive signs of masculinity" (2002, p.137) – with the spatial differences of racialized hierarchies that white men believe gives them permission to enact violence. That is, Razack describes the differences in behaviours of the two white men in 'respectable' spaces (i.e., their homes, their universities) versus their behaviours in the 'Stroll,' a racialized space where white men go to perpetrate sexual violence (the locality where the two white men, coerced Pamela George into their car). In white male spaces, men brag about sexual violence; in racialized spaces, white men perpetrate sexual violence (Razack, 2002).

White male spaces are protected, by law; racialized spaces are where Indigenous peoples are banished to, by law (Razack, 2002). Simply put, the routines, representations, and interpretations of space reinforce who counts as respectable and worthy and who counts as degenerate and shameful. Following along the lines of materialist CRT scholars, Razack clearly demonstrates how routines, representations, and interpretations of white supremacist, settler, heteropatriarchy and capitalism all have horrific material, physical consequences on the bodies, localities, and lands of Indigenous peoples.

(d) Dominant Power (whiteness, patriarchy, and capitalism) is not accountable.

The fourth point that CRF scholars make is that the nation-state pacifies oppressed groups by making platitudes to accommodations (policy) and reforms (law), while carrying on with the hegemonic status quo. Sociologist Himani Bannerji (2000) in *The Dark Side of the Nation: Essays on multiculturalism, nationalism and gender*, writes about globalization as economic imperialism; however, the salient part is Bannerji's critique of how Canada's policy of multiculturalism has recognized difference only as a way to grow "Canada's capitalist economy" with the labour of the "visible minority" (2000, p.30). At face value, multiculturalism appears welcoming. Yet, as a policy "multiculturalism [is] a way of both hiding and enshrining power relations" (Bannerji, 2000, p.31).

Multicultural concepts of heterogeneity and diversity are fused into political discourses in Canada (Bannerji, 2000). Unfortunately, these concepts are emptied of meaning because there is little analysis of whether or not power relations are heterogeneously or diversely wielded (Bannerji, 2000). A policy cloak of multiculturalism covers racialized, gendered, and classed

power differentials (Bannerji, 2000). Multiculturalism simply adds to the pathological mythos of Canada as a peaceful, welcoming nation. Bannerji writes that nonwhites have demanded anti-racist reforms, "instead we got 'multiculturalism'", which dichotomizes and reifies the world into 'us' and 'them' (Bannerji, 2000, p.89). It is, as Bannerji states, a "[t]hinly veiled, older colonial discourse of civilization and savagery" (2000, p.107). Bannerji calls this an "inscription of whiteness": the national characteristics of Canada are actually a morality of "masculinity, possessive individualism and an ideology of capital and market" (2000, p.107). Multiculturalism positions 'us' (white, males) as owners and 'them' (racialized, other genders) as labourers (Bannerji, 2000). Similar to other CRT and CRF scholars, Bannerji contends that Canada's hegemonic social structure remains unnoticed because it disguises structural violence, under a cloak of advancing the dominant group identity as universal.

It is difficult for opponents to argue against diversity, especially when it concedes the validity of cultural difference. Yet, it has dire effects on racialized groups. Bannerji makes clear that from a feminist perspective the personal is political, while from an imperialist perspective, "the political is personal" (2000, p.88). For nonwhites, the state "has us impaled against its spikes" (Bannerji, 2000, p.89). She recounts some of her own sickening experiences being terrorized by immigration services:

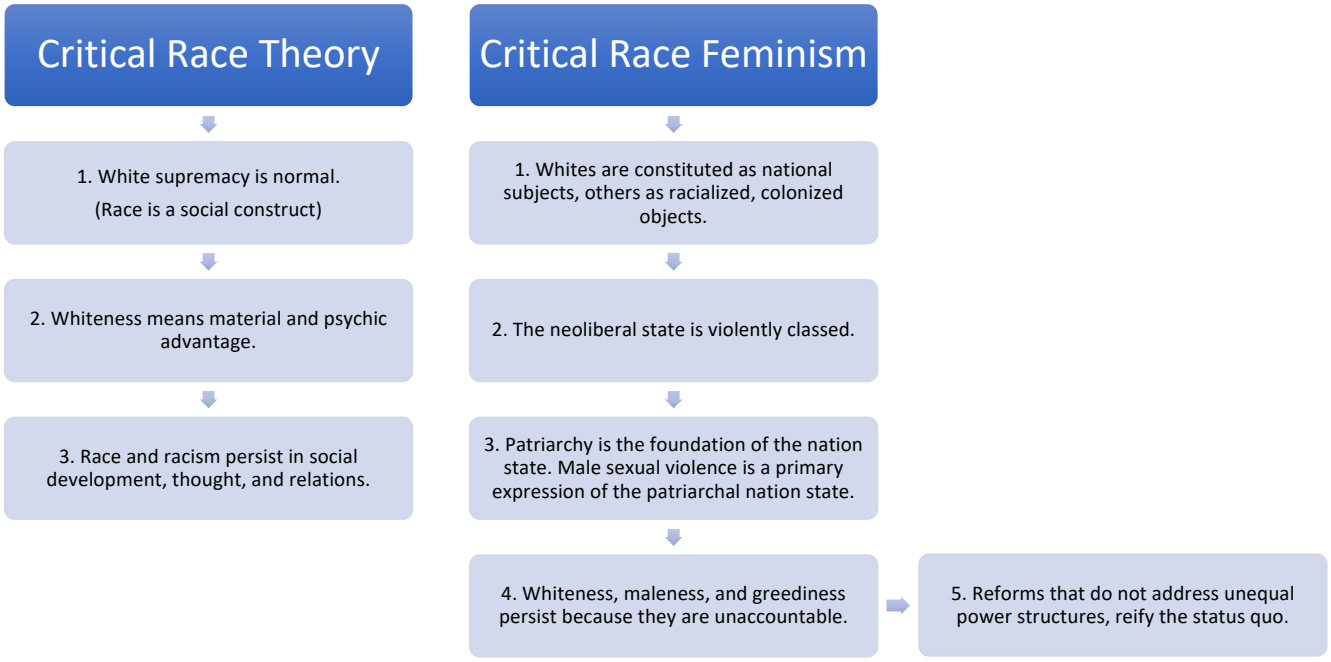
> I was facing an elderly, bald, white man, moustached and blue-eyed – who said he had been to India. I made some polite rejoinder and he asked me – 'Do you speak Hindi?' I replied that I understood it very well and spoke it with mistakes. 'Can you translate this sentence for me?' he asked, and proceeded to say in Hindi what in English amounts to 'Do you want to fuck with me?' A wave of heat rose from my toes to my hair roots. I gripped the edge of my chair and stared at him – silently. His hand was on my passport, the pink slip of my 'landing' document lay next to it. Steadying my voice I said 'I don't know Hindi that well.' …On Bloor Street in Toronto, sitting on the steps of a church – I vomited. I was a landed immigrant. (p.89)

Finally, I return to more recent research by Sherene Razack (2015), *Dying from Improvement: Inquests and inquiries into Indigenous deaths in custody*, where she argues that legal reforms initiated by inquests – even ones that claim to address problems or inequalities in Canada – are primarily about maintaining the status quo. Central to this argument is that Indigenous peoples have been disappeared in law – or written out of existence – and reforms follow the same narrative pattern, of Indigenous peoples "as remnants – as people who are dying anyway…pathologically unable to achieve modernity" (Razak, 2015, p.9; p.30). Razack researches Indigenous deaths in custody – a far too common occurrence often facilitated by direct police or correctional officer violence. However, Razack positions each of the individual deaths in the context of the long, slow colonial death-dealing of white settler society. She traces an ongoing Canadian narrative of "indifference to Indigenous life…practices born of the belief that Indian wars continue and that settlers have an obligation to subjugate Indians" (2015, 104). Questions raised at inquests were about the responsibility of *individual* actors – police officers, correctional officers, medical professionals – but the past and present *structure* of settler colonialism were conspicuously, deliberately, absent (Razack, 2015). Yet, colonialism is *the* explanation for disproportionate Indigenous deaths in custody (Razack, 2015). What is the purpose of reform efforts such as these when they do not examine the primary root cause of the problem?

Inquest after inquest, Razack peels back layers of violence against Indigenous peoples that follow a predictable narrative of settler colonialism. In 1998, Frank Paul, heavily intoxicated was taken into police custody, but released to an alleyway where he froze to death. His family members wanted to know, "Why did you fail to care?" (Razack, 2015, p.59). The inquiry did not answer that question; instead, it focused on Paul's alcoholism (Razack, 2015). In 2000, Paul

Alphonse, died in hospital while in police custody. The hospital records focused on pneumonia and alcohol withdrawal as the cause of death, ignoring what was later discovered by a pathologist: Alphonse had a police boot print embedded deep into his chest and several broken ribs (Razack, 2015). The inquest ruled it a homicide, but failed to make the connection to police brutality (Razack, 2015). In 1999, Anthany Dawson, died from "restraint associated cardiac arrest," after being arrested and beaten by a police officer (Razack, 2015, p.137). Dawson's mother wanted the inquest to concentrate on police use of force against Indigenous peoples; instead, the commission focused on some of Dawson's pre-existing medical conditions (Razack, 2015). Reforms, such as inquests, leave out ongoing settler colonialism (Razack, 2015). The mythos of settler colonialism is of the benevolent state, caring for a dying, vulnerable race of Indigenous peoples (Razack, 2015). Where tragedies occur, it is because of pre-existing, inherent vulnerabilities, not the violence of the nation-state of Canada. Razack concludes: "Settlers stand to gain in two significant ways from Indigenous disappearance. First, if 'Indians' are disappearing, the settler can legitimately become the original owner of the land. Second, the settler assists 'Indians' into modernity, a thankless and futile task in the settler's eyes, but one that confers upon the settler legitimacy as a modern subject" (2015, 193). Reforms that do not address power-relations maintain the status quo.

Figure 2.1



In summary, critical race feminism articulates five conceptual themes: first, whites are subjects of their own lives, while the racialized 'other' is subjectively determined as an object, to be used for the purposes of whiteness; second, the neoliberal state is violently classed in such a way that the racialized peoples are used for the labour of white, imperialism, and wealth-building; third, the Canadian nation-state is gendered – patriarchal and masculinist, a sexual abuser, it violates women's bodies and Indigenous peoples' lands; fourth, hegemonic whiteness, maleness, and greediness persist because they are unaccountable; and, fifth, where called to account, white supremacist, settler colonial, heteropatriarchial, and capitalist systems implement reforms that do not alter unequal power relations and thereby feign change.

Conclusion: Power

Returning to the definition of power that I offered in the 'Introduction' (that power is a force, the capacity of those at the top of social hierarchies to achieve their 'wants' through social systems at the expense of the humanity, labour, and freedoms of those lower), I want to expand on some of what power means from CRT and CRF perspectives. Clearly, power is centralized in the white, male, wealthy, settler, but it is the social systems that I want to get at, not the individual oppressor. The power of social systems is that they can:

1. Control social life.
    - Dominate and subordinate (Crenshaw, 1995).
    - Deny liberties, especially through exclusionary practices (Browne, 2015; Harris, 1995; hooks, 1992).
    - Invent categories, such as race, to create social hierarchies and beliefs about superiority (Alexander, 2012; Allen, 1994; Muhammad, 2010; Thobani, 2007).
    - Discriminately use violence (Razack, 2002)
2. Pervade human experience.
    - Create and define what is deemed ordinary (Delgado & Stefanic, 2012).
    - Make or unmake human beings (Muhammad, 2010; Razack, 2015).
3. Choose the few (white, male, upper class, settler, etc) over the many for thriving.
    - Offer psychic and material advantages (Bell, 1980; Lipsitz, 2006).
    - Attempt to crush humanity through fear and double-consciousness (Cole, 2015; Hassan, 2017).
    - Unequal access to institutions of power (Thobani, 2007).
4. Remain unaccountable.

- Claim transformation/reform but remain the same (Alexander, 2012; Bannerji, 2000; Siegel, 2012).
- Morph over time (Alexander, 2012).
- Hide the privileges of the few (Lipsitz, 2006).
- Blame the oppressed for their struggles (Arat-Koc, 2010).

It is the constellation of white supremacy, heteropatriarchy, and capitalism that causes social systems to hold and enforce power in a violent way. Does it have to be like this? The answer for me is 'no'. Why would I do the work otherwise? But a theoretical framework of CRT and CRF shows what those who wish to abolish and decolonize these systems are up against. As I move into the next chapter, I will begin to write about the specifics of settler colonialism and *Gladue* and what the literature begins to tell us about whether there are possibilities of abolition and decolonizing within the *Gladue* story.

Chapter 3: Storyboarding 2 – Literature review

"How can you continue to look to me to carry your responsibility?"
(Monture-Angus, 1995, p.21)

Introduction

This chapter forms a bridge from theory into methodology, articulating the core purposes of my dissertation, with an emphasis on settler colonialism, abolition, decolonization, and a literature review of previous *Gladue* research. If critical research is concerned with empowerment, as I wrote about in the previous chapter, then how will I know if my research agitates towards liberatory action? I believe the answer is threefold: One, by properly grounding my study in an accounting of what I am trying to change – how the legal system (especially prisons) functions as a mechanism, or violent tactic, of settler colonialism; two, by ensuring that my research design, implementation, and analysis flow from the ethics and principles of abolition and decolonization (because these social movements are working towards what I see as a vision of liberation) and; three, by building on what has previously been learned about *Gladue* to make sure that I am (a) advancing knowledge that promotes transformative and reparative actions and (b) drawing credible and trustworthy conclusions. I am inspired by questions asked of settlers by Patricia Monture (1995): "When are those of you who inflict racism, who appropriate pain, who speak with no knowledge or respect when you ought to listen and accept, going to take hard looks at yourself instead of me. How can you continue to look to me to carry your responsibility?" (p.21). I need to accept responsibility for my role in perpetuating white supremacy, heteropatriarchy, and capitalism in the totalizing, violent process that is settler colonialism in Canada.

In some ways my literature review forms an ethical framework, because my project is intended to work towards righting wrongs. It is not simply a description, knowledge for knowledge's sake, but is intended to be action-oriented. I have often asked myself through the dissertation journey, 'Why this study? Why now? How will it contribute towards abolition and decolonizing'? I believe there is an ethical urgency to my study. First, because of the rising, harmful rates of incarceration of Indigenous peoples in Canada *and* the role of prison as a tool of settler colonialism (the need to decolonize Canada); second, because remedial or corrective legal efforts, typically state-led, have failed; and, third, because previous studies have only partially explicated the settler colonial pattern in the so-called 'remedy' of *Gladue*. Settler people need to do the right thing, to work towards ending settler colonialism in Canada. Canada needs a new master narrative that is more honest and forthcoming about its ongoing violence towards Indigenous peoples. Essentially, the study aims to unearth whether patterns of white supremacy, heteropatriarchy, capitalism, and settler colonialism exist in *Gladue* efforts, and whether *Gladue* offers opportunities for abolition and decolonization. As I will argue later, *Gladue* contains both elements of reform and abolition/decolonizing: *Gladue* is *both* an entrenchment of and resistance to settler colonial legal mechanisms. There are, emphatically, some *real* abolitionist and decolonizing freedoms in how *Gladue* is being lived. Yet, these liberating aspects are rather tenuous, and perhaps unintended consequences of the *Gladue* process. Whether *Gladue* opens further a future free of settler colonialism remains to be seen.

The literature review will add three pieces to my research storyboard: first, I will contextualize *Gladue* reports within settler colonialism in Canada, with particular attention to how prison serves colonial purposes. Second, I will nest my research choices within abolitionist

and decolonizing ethos. Finally, I will look at the literature about *Gladue* to identify how my research fits with other studies.

A context: The mythos of settler colonialism

The study is warranted because the tyranny and oppression of settler colonialism is not an artefact of history[9]. It is alive in the present story of Canada. Settler colonialism has resulted in numerous forms of violence perpetrated by settler people and systems against Indigenous peoples: genocide displacement, assimilation, and disappearance (Truth & Reconciliation Commission, 2012). All of this violence is deliberate, in order for settler Canadians to steal and exploit lands and resources for building a nation-state and wealth for those at the hierarchical peak. By way of reminder, I have defined settler colonialism in the introduction as a structure and not an event (Wolfe, 2006). Settler peoples, "[assert] ownership over" Indigenous peoples, resources, and lands (Vowel, 2016, p.16) and thus steal land from Indigenous peoples in order to profit from the resources (Coulthard, 2014). Through land theft and displacement, settlers disrupt Indigenous peoples' relationships with the land and each other (Tuck & Yang, 2012; Vowel 2016). Essentially, settler colonialism is "a persistent social and political formation in which newcomers/colonizers/settlers come to a place, claim it as their own, and do whatever it takes to disappear the Indigenous peoples that are there" (Arvin, Tuck & Morrill, 2013, p.12). Settler colonialism is assumed to be natural or inevitable because of the distorted, hierarchical beliefs of white supremacy, heteropatriachy, and capitalism (Wolfe, 2006).

[9] A version of this paragraph, as well as some of the section on "prisonizing" appears in Trites, Henry, & Oudshoorn (2021).

In order for the theft of resources and lands to be realized by settlers, there has to be widespread rationalizing beliefs or justifications. To get at a pattern of belief – the mythos – behind settler colonialism I will use the PhD dissertation of Frank Lavendier (2019) as a guide. Titled *Rule of law, settler colonialism, and overrepresentation of Indigenous peoples in the Canadian criminal justice (legal) system*, it examines the implementation of *Gladue* in Prince Edward Island. Lavendier's dissertation is germane as it shares some similarities to my own, using a settler colonial analysis to examine how law (re)produces settler colonialism. According to Lavendier, there are "six underlying processes" that support the settler colonial logic of *elimination* (settlers removing Indigenous peoples to access land): essentialism, pathologization, erasure, dispossession, exclusion, and lawfare (2019, p.30). Rather than "underlying processes," I prefer the term "mythos," as it illuminates that the underlying processes of settler colonialism are patterns of belief in how settler people and systems view and therefore treat Indigenous peoples. Settler colonial logic is not logical. It is hardly a fulsome or fair accounting of Indigenous peoples. It is a fiction – a fantastical story – that gives settlers distorted senses of self and country, making violence towards Indigenous peoples permissible. A better understanding of each of the myths is necessary to test my research data against the stories that settlers tell themselves to justify settler colonialism. I have organized the six underlying processes of Lavendier into three myths that uphold settler colonialism: the myth of essentialism, the myth of empty land, and the myth of colonial legal order.

1. **The myth of essentialism.**

Essentialism is the racist foundation of elimination, the fundamental (white supremacist) belief that different racial groups have differing characteristics, which make some inferior (nonwhite) and others superior (white) (Lavendier, 2019). Really, essentialism is at the core of white supremacy, the belief in the superiority of the white race. According to Layla F. Saad (2020), "White supremacy is not just an attitude or a way of thinking. It also extends to how systems and institutions are structured to uphold white dominance…White supremacy is far from fringe. In white-centred societies and communities, it is the dominant paradigm that forms the foundation from which norms, rules, and laws are created" (p.12/13). In the hierarchical, racist mind of settler colonials, the mythology of essentialism posits that Indigenous peoples are 'dying race' unable to survive 'modern civilization'. In fact, as I was writing the current chapter, my local newspaper published an editorial arguing that it was inevitable for Native Americans to be conquered: "Not much in history is inevitable, but the conquest of the Americas was. It might have been done by the Chinese or the Muslims rather than the Europeans, but whichever of the older Eurasian civilizations reached the Americas first was bound to supplant the local, younger civilizations…Those civilizations were doomed" (Dyer, 2021, p.A10).

Pathologization follows in the vein of the essentialist racism of 'vanishing Indians,' putting forward the fiction that Indigenous peoples are frail or unprepared for modern life (Lavendier, 2019). Lavendier, quoting the research of Gillian Balfour, describes how, unlike white criminalized people, Indigenous criminalized people were not seen – even during the *Gladue* process – to be "transformative subjects" (Lavendier, 2019, p.45). In this instance, transformative subjects are those who deserved conditional sentences because of community status, while those not seen as transformative, were characterized as poorly educated or unsophisticated (Balfour, 2012). Lavendier contends that pathologization is at the foundation of

the mythic, racist, trope of the "drunken Indian," which according to Vowel, even though "more Indigenous people abstain from alcohol than the general population," is a widespread, racist stereotype in Canada that "All Natives are drunks" (2016, p.154). The purpose of a stereotype such as this is to dehumanize Indigenous peoples, to make them less than – and, again, in order to justify the elimination of Indigenous peoples. Really, these are forms of dehumanization that justify settler colonialism.

2. The myth of empty land.

Erasure, according to Lavendier, has two components: one, the legal principle *terra nullius* (the land belongs to no one) that settlers used to erase the fact that many Indigenous people, communities, and Nations occupied Turtle Island before the arrival of setters and thus claim title to the land. Arthur Manuel & Ronald M. Derrickson (2015): "The Americas were first portrayed as *terra nullius* on European maps. But in almost all cases, Europeans were met, at times within minutes of their arrival by Indigenous peoples. There was an attempt to get around this inconvenient fact by declaring us non-human" (p.3). Two, erasure is also the removal of Indigenous peoples from communities, families, and cultures, whether through genocide, residential 'schools,' or prisons. Others have written about *terra nullius* in conjunction with the doctrine of discovery. The doctrine of discovery continues to be the national and international legal mechanism by which white Europeans lay false claim to Indigenous lands around the world (Vowel, 2016). Chelsea Vowel (2016) explains that the doctrine of discovery is founded on two papal bulls: the *Dum Diversas* (giving Christians the right to take non-Christians as slaves) and the *Romanus Pontifex* (giving Christians the right to take the land of non-Christians). Vowel

quotes Judge John Catron (USA) from an 1835 case to show how forceful within law, this white, Christian supremacist the doctrine is: "We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of Africa, Asia, and North and South America, has been recognized as part of the national law [Law of Nations], for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial" (Vowel, 2016, p.236). The mythology of erasure permits dispossession.

Dispossession means the physical, political, and economic displacement of Indigenous peoples, from lands, as well as the denial of Indigenous sovereignties or rights to self-determination, and the resources to sustain livelihoods (Lavendier, 2019). In *Storying violence*, Gina Starblanket & Dallas Hunt (2020) make known that it is impossible understand individual experiences of Indigenous peoples, without seeing "how the dispossession of territories and lives continues to manifest in the present, as well as how this dispossession is naturalized and normalized" (p.24). Dispossession is disguised by mythic tropes of "vanishing Indians;" that Indigenous peoples either died off or were assimilated into the settler nation-state (Starblanket & Hunt, 2020, p.31). Or, more poignantly put: "The drive to eliminate Indigenous people as Indigenous is quite literally part of the foundational structure of the Canadian nation" (Starblanket & Hunt, 2020, p.32). We see, then, that dispossession moves into the realm of identity – dispossessing the very markers (e.g., languages, cultures, customs) at the heart of Indigenous identities. Dispossession becomes entrenched by exclusion.

Exclusion, in settler colonial societies, is about "othering" or creating a political order that subordinates Indigenous people through law. Lavendier gives the example of how *The Indian Act* legalized the reserve and pass systems. Essentially, those systems removed

Indigenous peoples from territories and confined them away from accessing traditional forms of sustenance. Exclusion is about white, settler society creating (impossible) barriers for Indigenous peoples to return to meaningful, sustaining relationships to land, including accessing basic needs, such as housing, employment, or other forms of infrastructure in communities (e.g., clean water) (Lavendier, 2019). In *The Trauma of Racism*, Alisha Moreland-Capuia (2021), drawing on the research of Lajos Brons defines "othering" as "a construction of identification of the in-group (self) and the out-group (other) in mutual, unequal opposition by attributing relatively inferiority and/or radical alienness to the other/out-group" (p.135). Thus, exclusion gives justification to the idea that the land is empty, because Indigenous lands are being emptied through colonial legal violence.

3. The myth of colonial legal order.

The most compelling aspect (for my study of *Gladue*) of the underlying processes of settler colonial logics, as articulated by Lavendier is that of lawfare. Primarily using the work of John Comaroff (2001), who coined the term, Lavendier explains how law is *the* primary mode of waging war on Indigenous peoples in the settler colonial state. Comaroff delineates lawfare as, "the effort to conquer and control indigenous peoples by the coercive use of legal means" (p.306). Law is oppressive because it is all-encompassing of social order. According to Comaroff, lawfare operates as follows:

1. Colonial laws transformed territories into real estate to be possessed.
2. Colonial laws established economic rights and how they were to be negotiated and policed.

3. Colonial laws established that colonial knowledge has ontological precedence, through languages of practice, and ritual, symbolic systems.
4. Colonial laws created racialized, colonial subjects.
5. Colonial laws impacted material realities through the production of an unequal social order.

While controlling Indigenous peoples through law is apparent, what is less apparent – and what Lavendier calls the dialectic of lawfare (again citing the work of Comaroff) – is that Indigenous peoples have often used colonial legal systems as a counterhegemonic way of subverting the means and ends of law (Comaroff, 2001). Dialectically, colonial law is a "site of domination and…a site of resistance, refusal, struggle" (Comaroff, 2001, p.307). The dialectic is significant to my study, because it speaks to the tensions or possibilities inherent in the contradiction of law; that is, law oppresses Indigenous peoples and seemingly offers one way for Indigenous peoples and allies to struggle against oppression. Is *Gladue* a site of domination or a site of resistance? However, it is important not to overstate the subversive possibilities of law. While recognizing some gains that colonized peoples have made using law, Comaroff argues that it is an overdetermination, or too easy to claim, that subversion and oppression are happening at the same. One pole (oppression) is clearly dominant over the other (subversion). And, perhaps, the dialectic only emerges because there are limited sites of resistance apart from law.

Gladue sits at the juxtaposition between the poles of oppression and subversion. Essentially law is the instrument for willing the myths of settler colonialism (e.g., essentialism and empty land) into material existence. Law moves the colonial narrative from *a story*, to something that is *storied* (the living of a story) for Indigenous peoples and settlers.

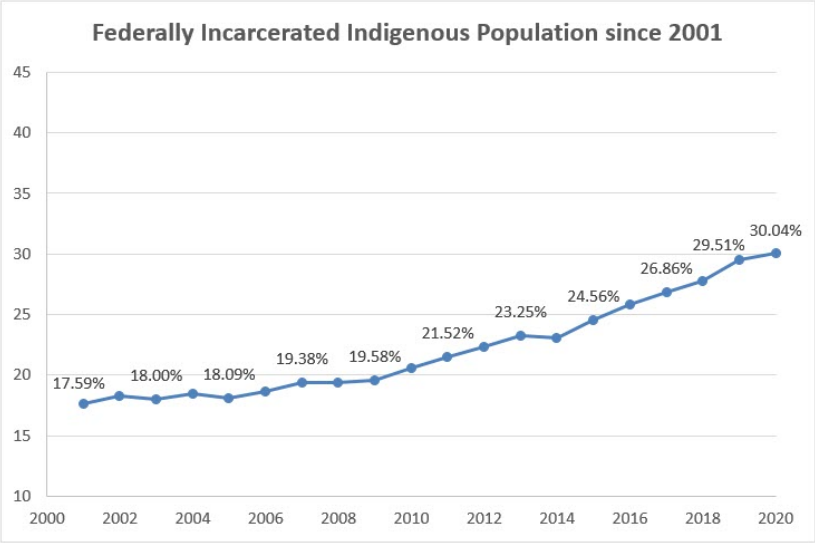
A context: Prisons as instruments of settler colonialism

Law imposed a legal white supremacist order across Canada, seeping into other social institutions. It was and is through social systems that a totalizing force of settler colonialism strikes. The most well-known example is the Indian Residential 'School' (IRS) system. The Truth & Reconciliation Commission of Canada (2015) writes in disturbing and exquisite detail about the over 150,000 Indigenous children who were kidnapped from homes, communities, and Nations, into so-called 'schools,' which in fact were genocidal death traps, physical, cultural, linguistically, and so on. In fact, as I learned through research interviews, the most common *Gladue* report story is that of an Indigenous person impacted by colonialism through the devastation of the IRS system: grandparents or parents decimated by violence in the "schools"; addictive use of substances and interpersonal violence as a means of coping; disconnection from culture and language; and then the corresponding trauma of growing up with traumatized family members. It goes beyond the scope of my dissertation to give a further detailed account of the IRS system. Instead, I want to emphasize how the criminal punishment system has operationalized the myths of colonization through the mass incarceration of Indigenous peoples. Why write more about incarceration? The primary intent of *Gladue* is to steer Indigenous peoples away from imprisonment. If we can understand better the violent function of incarceration, then we can better understand why *Gladue* is not meeting its aims.

The incarceration of Indigenous peoples has been steadily increasing since the early 1980s (Monture, 1995). The latest data from the Office of the Correctional Investigator (2020) highlights that Indigenous admissions to federal custody account for greater than 30% of overall admissions. To put such numbers in context, Indigenous peoples represent approximately 4% of

the total Canadian population (Sapers, 2015). The chart below portrays admissions to federal custody for Indigenous peoples, from 2000 – 2020. Essentially, with the *R v Gladue* decision being released in 1999, the chart shows significantly increasing rates during the era of *Gladue*.

Figure 3.1



https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx

A couple of points about framing prison data as "disproportionate". First, disproportionate does not mean that if reforms were implemented to make legal justice practices more proportionate (e.g., equal targeting of white people by police), then the system would no longer be violent. The aim is abolition (e.g., defunding the police) because the system is functioning as it is intended – as a tool of white supremacist, patriarchal, capitalistic, settler colonialism. Second, Indigenous peoples are not simply an over-incarcerated segment of the Canadian population, they are *not* Canadians – they *are* Original Peoples of Turtle Island (North America). Indigenous peoples never agreed to be Canadians (Manuel, 2017). Canada violently functions as a settler colonial nation-state (Monchalin, 2016; Monture, 2009). One mechanism, or perhaps *the* primary mechanism, for keeping Indigenous peoples colonized is the Canadian legal justice system, as

the principle of lawfare argues. In the words of Mohawk legal scholar Patricia Monture (1995), "Every oppression that Aboriginal people have survived has been delivered to us through Canadian law" (p.59), of which prisons and the criminal justice system play a particularly "racist and oppressive" role (p.34). Incarceration must be viewed as a power tactic of the settler nation-state against Indigenous peoples, a powerful force that impedes Indigenous freedoms, including access to lands.

Another way of saying it is that Indigenous peoples are criminalized, or made criminal so that Canada can justify violent dispossession. But, I worry that criminalization does not adequately emphasize the political nature of settler colonialism. It is not that Indigenous peoples are contravening the law, they are contravening the rightfulness of Canada's existence. A better term would be "prisonized"[10]: meaning that Indigenous peoples are not truly free to be self-determining peoples, whether captive behind prison bars, or captive in the community to Canadian laws, such as The Indian Act. The mass incarceration of Indigenous peoples is an extreme form of *prisonizing*. Indigenous peoples are actually *political* prisoners. The very existence, the very identities of Indigenous peoples stand in opposition to the legitimacy of Canada. If Indigenous peoples exist – and they do! – then Canada is illegitimate. Thus, the occupation of Indigenous territories, the illegal formation of the nation-state of Canada on Turtle Island, is fulfilled through *prisonizing*, a process of caging Indigenous freedoms. For Indigenous people, *prisonizing* signifies Canadian control in carceral environments, as well as community ones. For Indigenous peoples there is no release from detention. There are only different versions of it, carceral detention *and* Indian Act detention.

[10] Angela Davis (2003) uses the term "prisonized" in *Are Prisons Obsolete?* when talking about the rise of mass incarceration in the State of California. See also, Page, J. & Goodman, P. (2018). Creative disruption: Edward Bunker, carceral habitus, and the criminological value of fiction. *Theoretical Criminology*, 1-19 for a discussion of the term.

Second, Canada is wilfully silent on *prisonizing* as a tactic of settler colonialism. Conversely, high incarceration rates of Indigenous peoples are well-documented. For example, the 1991 Aboriginal Justice Inquiry in Manitoba, the 1996 Royal Commission on Aboriginal Peoples, and the Ipperwash Inquiry of 2007 all stressed the issue. Problematic sentencing has been identified as one of the sources of high incarceration rates: Canadian courts have participated in the disparate sentencing of Indigenous peoples, contributing to an increased likelihood of custody if a person is Indigenous (Roberts & Reid, 2017; Rudin, 2013). As far back as 1984, the Government of Canada called it a "concern" and, more recently, the Supreme Court of Canada called it a "crisis" (Parkes et al, 2012; Roberts & Reid, 2017). Jonathan Rudin (2013), the Director of Aboriginal Legal Services in Toronto, and a leading expert on *Gladue*, wrote that Indigenous incarceration is, "a reality for which the term crisis is no longer descriptive enough" (p.352). Corrective efforts, including *Gladue*, are allegedly underway. I will return to *Gladue*, shortly, in the final section of the chapter.

The critical resistance movement, an abolitionist movement (made up of scholars, scholar/practitioners, and scholars) that started in 1997 in the United States (www.criticalresistance.org), gives force to my argument about *prisonizing*, because it formulates incarceration as state sanctioned warfare against internal populations, principally marginalized and racialized ones, within its borders (Rodriguez, 2009; Sudbury, 2004). Critical resistance practitioners argue that criminal legal punishment is a deliberate tactic of white, patriarchal, capitalistic society, for the purposes of advancing the political and economic interests of powerful white, male elites (Davis, 2003). Unlike prison reformers, who work towards improving or humanizing responses to people who have been victimized and people who are incarcerated (Garland, 1990), or focus on individual psychology as opposed to structural

violence (Pollack, 2012), critical resistance does not accept the state's definitions of crime, or what counts as harmful, because the prison system "…works tirelessly to impose total control over every aspect" of racialized people's lives (Gilbert, 2008, p.31). The question, 'why do we punish people, especially certain racialized groups of people?', has a straightforward response: bodies and souls of prisoners are to be subjugated and made docile (Foucault, 1977). Lisa Guenther (2013), using a Foucauldian analysis, explains how identity is corrupted by incarceration. Guenther writes, "[prison] works by turning prisoners' constitutive relationality against themselves, turning their own capacities to feel, perceive, and relate to others in a meaningful world into instruments of their own undoing" (2013, p.xiii). Prison is violent (Davis, 2003; Comack, 2008; McCulloch and Scraton, 2009; Pollack, 2012). It hurts people who live inside its walls (Sabo, Kupers and London, 2001). Prison is a form of warfare, of genocide against racialized communities (Whitehorn, 2014).

Some of the themes advanced by the critical resistance movement resonate with my theoretical framework. Critical resistance is Marxist (interrogates how modes of production shape class and power relations in creating a prison industrial complex), feminist (interrogates how neoliberal globalization influences the gendered behaviour of nation-states), and builds on critical theories (interrogates the material benefits and harms of white supremacy) to articulate how a weaponized criminal justice system is deployed by Western nation-states.

1. **Carceral punishment serves the interests of the dominant class.**

In a detailed analysis of the rise of mass incarceration in California, Ruth Wilson Gilmore (2007), in *Golden Gulag: Prisons, surplus, crisis, and opposition in globalizing*

California, explains the complex interactions of capitalist economics with politics and race: "punishment has become as industrialized as making cars, clothes, or missiles, or growing cotton" (p.2). Wilson Gilmore concludes that prison expansion is reflective of economic and racial exploitation. The building of prisons is forced on rural, poorer communities as a means of economic growth (job creation); meanwhile, prisons are populated by people from similar socioeconomic statuses, if not the very same communities, while prison profits migrate to wealthier regions (Wilson Gilmore, 2007). Critical resistance theory is influenced by Marxist accounts of capitalist economies (Davis, 2003). Marxists often link dominant political and economic realities, with penal ones (Garland, 1990).

Punishment, from a Marxist perspective, is industrialized, or mirrors capitalistic modes of production, and is employed as a power technique in class struggles (Rusche & Kirchheimer, 1939). Social theorist David Garland (1990) writes the following about Marxism: "Penal law, at base, concerns itself with social authority and the governing claims of those in power. It reinforces these claims by means of coercive sanctions as well as symbolic displays, making punishment a form of power exercised as well as power expressed" (p.123). Punishment serves a class purpose, maintaining unequal exercises of power between upper and lower classes (Garland, 1990; Rusche & Kirchheimer, 1939). Angela Davis (2003) writes, "Marxist theorists of punishment have noted that precisely the historical period during which the commodity form arose is the era during which penitentiary sentences emerged as the primary form of punishment" (p.44). Don Sabo, Terry Kupers, and Willie London (2001), in their critical examination of the use of incarceration and tough-on-crime politics in the United States, *Prison Masculinities,* describe the rhetoric and practices of punishment as being about political and economic gains:

> Once we see through the media hype about "superpredators" and rising violence in our midst, it becomes evident who benefits from the "war on crime"—politicians who base

> their prospects for election on 'tough-on-criminals' rhetoric, contractors who build the new prisons, vendors who supply the prisons, and corporations that run prisons for profit or utilize prisoner labour to undercut competition. (p.15)

Critical resistance researchers describe the rise of for-profit incarceration as the 'prison industrial complex' (Sudbury, 2004). The person who is incarcerated becomes commodified. More bodies in prisons, for longer periods of time, translates into more units of profit (Wilson Gilmore, 2007). *Prisonizing* means that in the process of eliminating Indigenous bodies – while they still remain – colonizers profit from their bodily existence.

2. Carceral punishment is gendered and intensified by neoliberal globalization.

Critical resistance theory is also a feminist theory, largely drawing on transnational feminism (Sudbury, 2004). Transnational feminism puts forward a gendered critique of how the globalization of capitalism and the neoliberal nation-state intensifies oppression of non-male genders: "Transnational feminism grew out of an engagement with social, economic, and political struggles that relate to dominance and exploitation in terms of colonial and national contexts" (Moosa-Mitha & Ross-Sheriff, 2010, p.107). Globalization expands the prison industrial complex worldwide, by creating surplus transnational, criminalized populations to fill prisons and by producing excess land for poor communities to take advantage of the economic opportunities garnered through prison-building (Wilson Gilmore, 2002; Sudbury, 2004). The rise of the neoliberal, capitalist state is responsible for marginalizing racialized populations, simultaneously lessening state sponsored welfare support with increasing investment in punitive controls of ostracized people (Rios, 2011).

Transnational feminism contends that from the global south to the global north, in the neoliberal nation-state, women's lives are devalued as much in "free" society as behind bars (Davis, 2003; Moosa-Mitha & Ross-Sheriff, 2010; Sudbury, 2004). Certainly, carceral punishment as a social institution is gendered (Sabo et al., 2001). However, "What is not generally recognized is the connection between state-inflicted corporal punishment and the physical assaults of women in domestic spaces" (Davis, 2003, p.68). Angela Davis argues that "forward looking research and organizing strategies should recognize that the deeply gendered character of punishment both reflects and further entrenches the gendered structure of the larger society" (61). Julia Sudbury (2004) claims that the prison industrial complex must be theorized in similar ways to gendered violence in the family. The back and forth flow of gendered punishment from prison to society and back represents the permeability of prison walls, the prisonizing technology of the punitive nation-state. Writing about how human rights abuses proliferate in prison, Avery Gordon uses (2009) the terminology of "the normalcy of exceptional brutality" (p.172) to describe how white, male, colonial violence is dominant inside and outside prison walls. The prison system is the pinnacle of male violence – of power and control. Jude McCulloch and Amanda George (2009) in a chapter called "Naked Power: Strip Searching in Women's Prisons" in *The Violence of Incarceration* describe how sexual assault is an experience of most incarcerated women pre-incarceration (80%) and all female inmates during incarceration (strip searches). Sexual assaults inside and outside of prison walls are about advancing the interests of a patriarchal society, women's bodies violated for the dominion of men (Davis, 2003; Smith, 2005).

Patriarchal prison environments mirror the worst of hegemonic, aggressive masculinist society, inflicting pain, creating a sense of powerlessness and reduced self-esteem (Comack

2008; McCullough & George, 2009). Criminologist Phil Scraton (2009) describes prison as ". . . an expression of an institutionalized culture of masculinity emphasizing and promoting physicality and aggression" (80). Prison is violent, *intentionally* violent. The very technologies that animate prisons actually incarnate structural violence – people transmogrified into numbers, correctional plans and risk assessments, solitary confinements and the normalization of torture (McCullough & Scraton, 2009), strip searches better termed sexual assaults (McCullough & George, 2009), barbed wire and concrete walls to keep "savage/bad" people caged and "civil/good" people safe, toilets next to beds, people shitting where they sleep, eating where they shit, and isolated, lonely and forsaken, except for the ever-present companion of distrust, of hostile panoptic surveillance (Foucault, 1977). *Prisonizing* is a gendered process meaning that prison walls are permeable, especially for Indigenous women (Balfour, 2014).

3. Carceral punishment is weaponized to wage war against racialized peoples.

Finally, critical resistance theory is founded in critical race theory. Once again, white supremacy is implicated (Rodriguez, 2009). bell hooks says of race in North America, "Living in a White-Supremacist culture, Black people receive the message daily, through both mass media and our interactions with an unenlightened White world, that to be Black is to be inferior and subordinate" (hooks, 2003, p.10). The prison industrial complex serves a racialized function, establishing, "social control as a race-creating system" (Rios, 2011). Critical resistance theorists, similar to Indigenous feminists, claim that the telos of criminal justice punishment is violent erasure (Wilson Gilmore, 2007; Rodriguez, 2009). Incarceration is an act of violence (Cunneen, 2009; Pollack, 2012). As Criminologist Alessandro De Giorgi (2015) describes, "the power of

the carceral state [is] to artificially distort the official image (and public perception) of racial and class inequalities . . . by rendering invisible a large fraction of the racialized poor" (p.10). Racism, as defined by Wilson Gilmore, is "state sanctioned" and creates "premature death" for racialized subjects (2007, p.261). Dylan Rodriguez (2009) argues that racialized subjects are pathologized by the white supremacist nation-state as a way to justify subjugation and organized warfare or death. Incarceration becomes weaponized because the criminal justice system is literally at war against racialized communities (Rodriguez, 2009). While to the white subject, a 'war on drugs' is metaphorical, to racialized subjects it is literal: "The discursive techniques of this war subsume regularly available, locally recognizable artifacts of martial law (e.g. announced and valorized police roundups of 'gangs' and 'illegal aliens'), a racist police state (euphemized as 'racial profiling')…under the rubrics of law, policing, [and] justice" (Rodriguez, 2009, p.153). The criminalized subject becomes immobilized and disenfranchised (Sudbury, 2004). The racialized subject is prisonized, a political prisoner – as I quoted above: "…it is clear that black bodies are considered dispensable within the 'free world' but as a major source of profit in the prison world" (Davis, 2003, 95). *Prisonizing* is a process of warmongering against racialized communities.

Tragically, prisonizing is so natural, it is hard to imagine otherwise (Davis, 2003). The prison is so embedded in white man's belief in progress, we doubt its harmfulness (Davis, 2003). Incarceration is a political weapon, about power relations, *and* a weapon of polis—a weapon used against a body of citizens. Punishment protects the 'integrity' of the white body of citizens, while marking – violating – other bodies as criminal (Rodriguez, 2009). The more that white supremacist, colonial, and patriarchal violence are implicated within society's approach to so-called justice (Brown, 2009), the more that punitive justice exists beyond the walls into "free"

communities. Technically, “carceral punishment” refers to prison punishment. Yet, the more holistic explanation of carceral punishment espoused by the critical resistance movement acknowledges that not everyone in society is really free. The only way forward, according to critical resistance, is prison abolition (Davis, 2003).

A context: Shifting power relations

1. An ethos of abolition.

White people need abolition in order to stop the violence of white systems that dehumanize. We (again, white people) need abolition to create just communities where everyone has their needs met (Kaba, 2021). The present-day social movement for abolition (of policing and prisons) can be traced back, historically, to the abolishment of slavery. The two movements are contiguous. In fact, Rinaldo Walcott (2021), argues that “contemporary abolitionist movements represent unfinished business from the first abolition movements and are part of a renewed effort for a transformed global polity” (p.15). Understanding abolition as “unfinished business” fits with a critical race framework, as white supremacy has persisted beyond slavery, morphing insidiously into other so-called ‘normal’ social systems. But, what is ‘abolition’?

People often think of abolition as being primarily about ending the use of imprisonment. Certainly, that is a central aspect of it. Abolitionism stands against the carceral status quo (Walcott, 2021). But it is more than being opposed to carceral violence, it is for communities where all can experience safety and care (Kaba, 2020). Following the lead of the abolitionist work of Angela Davis, Beth Richie, Ruth Wilson Gilmore, Mariame Kaba, and other Black

feminists, Liat Ben-Moshe (2020) defines abolition as "creating a world without the necessity and footprint of incarceration…with all that entails for distribution of resources and social values. Thus, prison abolition insists not only on ridding ourselves of imprisonment but of imagining a 'new world order' in the absence of the carceral archipelago" (2020, p.32). A new world order presumes that the 'old world order' must be opposed. Syrus Marcus Ware and Giselle Dias (2020) explain why: that abolition goes further than "…abolishing police, prisons, and courts," because we need to get at root causes for why white people employ carceral violence, "When I began to understand the expansiveness of other carceral spaces then it became clear that abolition meant abolishing the structures that maintain the prison industrial complex (white supremacy, colonialism, racism, sexism, homophobia, transphobia, ableism, etc)" (p.33). Attempts to eliminate prisons without ending structural violence will only entrench the status quo. What needs to be eliminated are carceral logics; that is, the beliefs in superiority of white, colonial, wealthy men. Ben-Moshe claims that "Reformist reforms are situated in the status quo, so that changes are made within or against this existing framework. Nonreformist reforms imagine a different horizon and are not limited by a discussion of what is possible in the present" (p.16). Abolition is a type of nonreformist reform.

However, it would be overly simplistic to fully separate 'reform' from 'abolition'. As Mariame Kaba (2021) states, "I don't know anybody who is abolitionist who doesn't support *some* reforms" (p.96; *emphasis in original*). The challenge for supporting reforms is finding those that intersect with abolition, or as Kaba asks, "Which reforms don't make it harder for us to dismantle the systems we are trying to abolish"? (2021, p.96). Placing reform and abolition along a continuum rather than as disconnected poles, allows for a more authentic and sophisticated analysis of *Gladue*, because *Gladue* is embedded within the criminal legal system,

which is upheld by white supremacy, patriarchy, and capitalism, and at the same time, *Gladue* signals or enforces a shift in how judges are to use their power (as I will make known when I introduce and analyze findings). Or, perhaps, a better image than a continuum would be a model where nonreformist reforms are embedded within an abolitionist ethos.

Within the Canadian context, a necessary function of abolition is decolonization. In *Carceral Capitalism*, quoting Alexis Pauline Gumbs, Jackie Wang (2018), writes, "prison is an accurate name for our contemporary culture, and prison as culture presumes a certain set of problems and reinforces a dominant reaction in our imaginations" (p.315). Prison as culture links to the concept of prisonizing: the whole set of structural violences imposed by white social systems on Indigenous peoples. Ruth Wilson Gilmore (2007) argues that through the rise of prison culture, "the word freedom [began] to stand in for what's desirable" (p.12). Indigenous peoples are certainly not free of the chains of settler colonialism. Canada continues to make Indigeneity undesirable, something to be disappeared.

2. A decolonizing ethos.

Decolonizing means the returning or repatriation of lands and resources to Indigenous peoples, and the relinquishment of domination and control, by settlers, over the lives and livelihoods of Indigenous peoples (Manuel & Derrickson, 2015; Monchalin, 2016; Tuck & Yang, 2012). As I wrote about in the introduction, decolonization is not a metaphorical stance, but a practical one (Tuck & Yang, 2012): A way towards liberation is for white supremacist, heteropatriarchal, capitalist, settler society to take responsibility, by returning lands and resources, including the jurisdiction of justice processes to Indigenous peoples. There is, of

course, a lot that needs to happen in order for decolonization to be realized. In *The colonial problem: An Indigenous perspective on crime and injustice in Canada*, Lisa Monchalin (2016), defines the process and goal of decolonizing as, "unlearning and undoing colonialism…It is a reimagining of relationships with the land and peoples. It is about conscious engagement with colonial structures, ideologies, and discourses. It is also about an active resurgence against these structures, ideologies, and discourses, which have come to be so dominant" (p.293). Following Monchalin's description of decolonizing, I want to emphasize the themes of "unlearning" and "undoing".

I would define 'unlearning as decolonization,' as the process of exposing the myths of settler colonialism (the ones described above) and creating new stories about Canada that incorporates historical and ongoing settler colonial violence into its master narrative. It is difficult for settler society to take a meaningful step towards accountability until we (me and other settlers) truly (the "truth" of "truth and reconciliation") grapple with the stories we tell ourselves about what it means to be Canadian. Because, as I have argued above, our master narratives about Canada justify the elimination of Indigenous peoples. And, as David Livingstone Smith (2021) argues in his book on dehumanization, "If you want to dismantle something, it is often essential to know how that something is put together" (p.11). Marie Battiste (2013), writing about decolonization in the educational system, suggests that what is needed is to generate "an ethical space for decolonization," or a space for dialogue that brings together Indigenous and Western thought in a way that acknowledges the harm of settler colonialism: "It is in this space that Indigenous and non-Indigenous peoples can begin to truthfully speak to predicaments and issues that face them and the standards they speak for" (p.105). Colonizers, through our social systems, have "de-legitimated [Indigenous] knowledge

and languages" (Battiste, 2013, p.106); decolonizing means, in the words of Natsu Taylor Saito [2020], "Moving beyond colonial dynamics of power and privilege…[by]…'chang[ing] the stories we live by'" (p.203). Saito goes further to write that changing old stories and creating new ones is not only about "rejecting the false consciousness that mainstream culture and history would impose," it is about making sure that new understandings are founded "outside the colonial framework" (2020, p.203). Saito articulates decolonization not as 'unlearning' but as 'de-constructing' in order that Indigenous peoples can realize self-determination. For settler people, decolonization begins by unlearning and deconstructing the myths of settler colonialism that we have come to know through our processes of socialization. We must disabuse ourselves of harmful mythology that leads to harmful actions. But, the purpose is less about a new, decolonized mind or knowledge; instead, decolonizing has material implications.

Decolonization demands meaningful, material accountability of the offender, of white, settler peoples. In my work as a restorative justice mediator, I have found that when people are victimized they typically want the person who offended against them to understand the impacts of harms, to change behaviour, and to make amends (Zehr, 1990; Zehr, 2001; Zehr, 2015). My ethic of taking responsibility involves understanding the intersectional *harms* that Canadians, especially people in my social locations – white, male, middle-class, heterosexual, able-bodied, etc – perpetrate by participating (often uncritically) in a society structured against Indigenous peoples. White men thrive at the expense of Indigenous peoples. In restorative justice, I have also found that people who have been victimized want to make sure what happened to them never happens to anyone else (Zehr, 1990; Miller, 2011). Taking responsibility is usually meaningless without changed behaviour and reparations. How can I change my behaviour and make amends? How can Canada end oppression of Indigenous peoples?

A framework for decolonization already exists. It is a promise, a legally binding international treaty, that settler peoples made long ago to a Two Row wampum (*Tekeni Teiohatatie Kahswentha*, in the Mohawk language) and Silver Covenant Chain (*Tehontatenets awa:kon*, in the Mohawk language) relationship with Haudenosaunee people that I wrote about in 'Narrative Beginnings' (Monture, 2014; Parmenter, 2013). Decolonizing demands that settler peoples take *reparative* steps to return to a Two Row wampum covenant relationship. Undoing is the returning of lands and resources to Indigenous peoples. But, what does that look like in the context of *Gladue*? To live a Two Row wampum relationship also means decolonizing the criminal punishment system: It means that settlers stop interfering with Indigenous justice matters. As Opaskwayk Cree Nation member, John Hansen (2012), writes, "[t]he downfall of Indigenous people in Canada and many other colonial countries is their alienation from their original justice systems" (p.1). Monture (1995) writes, "to have justice, means to be in control of one's life and relations" (p.228). When I analyzed the data in relation to *Gladue*, I examined whether *Gladue* shifts the underlying unequal power relationship towards the principle of 'separate but equal'. In the same way, the litmus test for the quality of my research will be whether it contributes towards decolonization. Significantly, the Silver Covenant Chain had a stipulation that "both sides accept[ed] responsibility for prosecution of their own citizens should they commit a crime against a Native or colonists" (Hill, 2017, p.95).

As I wrote about in the previous chapter, whiteness, heteropatriarchy, and capitalism remain largely unaccountable because they go unexamined (Thobani, 2007). Eve Tuck and K. Wayne Yang call this: "the invisibilized dynamics of settler colonialism" (Tuck & Yang, 2012, p.2). Research as reparation means putting the microscope on the *Gladue* process to determine whether it is a way out of or further entrenches the power-mongering settler, legal system. Is

Gladue a way forward for Indigenous self-determination? Or is it part of the violent status quo? Liberation requires reparations. One-hundred fifty years of Canada has meant one-hundred fifty years of devastation of Indigenous communities, cultures, languages, and lands (Monchalin, 2016; Truth & Reconciliation Commission, 2015). African American writer Ta-Nehisi Coates (2014), convincingly argues that the moral force of compassion is ambiguous for righting systemic violence, unless it actually mobilizes material reparations for those harmed. He writes:

> …America was built on the preferential treatment of white people—395 years of it. Vaguely endorsing a cuddly, feel-good diversity does very little to redress this…Perhaps no statistic better illustrates the enduring legacy of our country's shameful history of treating black people as sub-citizens, sub-Americans, and sub-humans than the wealth gap. Reparations would seek to close this chasm. (http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/).

In the same way, liberation of Indigenous peoples in Canada will require tangible, material reparations by settler peoples.

For too long white, settler people have violently used the criminal punishment system to subjugate, assimilate, and eradicate Indigenous peoples (Balfour, 2014; Campbell, 1973; Coulthard, 2014; Monture, 1995). For too long white, settler people have played at legal reforms, pretending to respond to harms done to Indigenous peoples, while doing nothing to interrupt or change the subjugation, assimilation, and eradication of Indigenous peoples (Cunneen, 2009; Razack, 2015; Sapers, 2015). Criminal legal reforms aimed at Indigenous peoples involved with the criminal punishment system have not addressed underlying unequal power structures, Canada over Indigenous peoples (Monture, 1995; Razack, 2015). Canada still subjugates. Canada still assimilates. Canada still eradicates. The criminal legal system is a primary tool, a weapon, of settler colonialism (Monchalin, 2016; Monture, 1995).

A context: *Gladue* literature review

Gladue is a useful way to study the dynamics of settler colonialism. Undoubtedly, as Carmela Murdocca (2018) argues, "*Gladue* [has] effectively changed the terrain of sentencing methodology and procedure in Canada" (p.101). *Gladue* is meant to be a reform to address the mass incarceration of Indigenous peoples, yet in spite of these intentions, Indigenous incarceration has intensified. How is it that there is a mechanism in law that requires judges to consider all alternatives other than incarceration with criminalized Indigenous peoples, but the problem persists? So, is *Gladue the* way to decarcerate Indigenous peoples that I hoped for when I walked through prisons full of Indigenous peoples? Can *Gladue* decolonize the criminal punishment system? Unfortunately, as the chart above – the data from the Office of the Correctional Investigator – depicts the use of custodial sanctions at sentencing against Indigenous peoples has intensified. Certainly, for many decades, Indigenous feminists have written about the ongoing – ever increasing – violence of Canadian law on Indigenous peoples (Campbell, 1973; Maracle, 1996; Monchalin, 2016; Monture, 1995). Thus, a better understanding is needed about why the *Criminal Code*, Section 718.2(e) and its interpretations in *R v Gladue* and *R v Ipeelee* have not steered more Indigenous peoples away from imprisonment.

To begin to shape my own research agenda, I examined available literature (e.g., peer reviewed, policy, graduate dissertations, etc.) on the topic of *Gladue*. I read studies about *Gladue*, generally, to find what questions have been asked, what had been found, and what had been concluded about the topic. To analyze the literature, I asked, 'what has *Gladue* accomplished in relation to its aims?; How are scholars making sense of *Gladue*?; What further questions should a white, colonial, male researcher be asking'? I did searches for peer-reviewed

evidence, including dissertations (Wilfrid Laurier University library site search) and policy literature (google search) by using the terms "*Gladue*," "*Ipeelee*," "sentencing reform," "Indigenous/Aboriginal sentencing," and "*Gladue* reports". The searches did not produce a large quantity of papers, but there was sufficient evidence to formulate meaningful research questions in a way that built upon and engaged with previous work.

Thematically, I found that the *Gladue* literature fit into three categories: first, there are a number of peer reviewed journals, particularly from the disciplines of sociology and law, that examine the challenges of implementing reforms within Canadian/colonial law. Below, I have titled this stream as "reforming while erasing," or the idea that colonial law exists to subordinate, assimilate, and disappear Indigenous peoples, yet in the instance of *Gladue*, it is supposed to be reparative or remedial. The second category is research about outcomes of *Gladue*: has *Gladue* accomplished its stated purpose as a remedy to systemic discrimination in the criminal legal system? More recent studies have focused on the experiences of criminalized Indigenous women in relation to *Gladue*. The final category, a small one yet important to my study, is literature about *Gladue* reports.

1. Literature theme one: Reforming while erasing

The first stream of scholarship about *Gladue* is about the contradictory meanings of colonial law reforms—claiming reform while still erasing Indigeneity. The literature, here, is mostly anchored in the disciplines of sociology and legal studies. These studies show that there are too many contradictions, or contradictory forces, within colonial law for *Gladue* to have enough weight to make meaningful change.

(a) Contradiction 1: Obscuring political into culture.

One of the leading scholars on the topic of *Gladue* in Canada, from a sociological perspective, is York University Professor, Carmela Murdocca. Murdocca (2018) characterizes *Gladue* as encompassing "a complex set of legal and bureaucratic interpretations, arrangements, and discourses" (p.524). The term that Murdocca applies to the procedures, processes, and discourses associated with *Gladue* is "racial governance," arguing that *Gladue* is an expression of "the ethical, epistemological, and ontological foundations of law and governance in [a] white settler" nation-state (2018, p.525). In 2009, Carmela Murdocca published an important article titled "From incarceration to restoration" in the journal of *Social & Legal Studies*. In that article, Murdocca outlined some of the core challenges with using colonial law to solve colonial law's problems. The main argument is that law reinforces a denial of colonial violence by diminishing the issue of over-incarceration of Indigenous peoples from that of a political or legal issue to a cultural one, or what she calls "cultural difference". Why? Because cultural difference as a discursive framework obscures "the ongoing material violence of colonization and exploitation faced by Aboriginal communities" (2009, p.25), by sweeping Indigenous peoples into another Canadian cultural group, or placing Indigenous peoples into Canada's multicultural narrative obliterates the political reality of Indigenous peoples being Original peoples who had land and identities stolen. Thus, when *Gladue* is purposed as a response to "systemic discrimination" in the criminal legal system towards Indigenous peoples, the emphasis is on social disadvantage of one group in Canadian society, rather than addressing the "unique legacy of colonialism" that settler violently imposed (Murdocca, 2009, p.30).

(b) Contradiction 2: Obscuring restorative justice into (net-widening) social control.

Murdocca follows up further on using cultural difference to obscure colonial violence, in her (2013) book *To right historical wrongs: Race, gender, and sentencing in Canada*. Citing David Scott, Murdocca writes, "the politics of colonial governance should be understood in relation to how it continues power relations, state practices, and state projects" (p.22). Using *Gladue* as evidence, Murdocca posits how reparative legislation actually gets in the way of addressing historical harms, unless it properly contextualizes harm. For example, Murdocca notes how *Gladue* changes the methodology of sentencing by requiring judges to consider alternatives to imprisonment, but the restorative justice aims of sentencing – as defined by the courts (see paragraph 71 in *Gladue*) – were too vague: how does a judge determine whether an alternative is actually restorative justice? Concerns about vagueness are significant because part of the impetus for *Gladue* was the extensive work of the Royal Commission for Aboriginal Peoples, which, among many other important considerations, identified the disparities between Indigenous laws and practices that uphold restorative and community justice and Eurocentric laws and practices that favour retributive measures – and, how Canada's legal impositions on Indigenous Nations and communities was (and is) a form of violence. If *Gladue* is supposed to be a shift away from punishment towards restorative justice, then it is necessary to define *how* alternatives are to be considered restorative justice. For example, *Gladue* seems to have shifted more Indigenous peoples into less custodial sentences, such as conditional sentences or house arrest (Murdocca, 2018), but restorative justice as a philosophy has a much more encompassing views about accountability and meeting the needs of those impacted by harms (Zehr, 2015).

Without properly defining restorative justice, *Gladue* risks sustaining unequal power relations in the courts by "widen[ing] the carceral network for marginalized people whereby house arrest and other community sanctions function as a mode of racial governance where the community effectively works as part of the 'regulatory terrain' for Aboriginal peoples" (Murdocca, 2018, p.106).

(c) Contradiction 3: Obscuring the social into the individual.

It could be argued that obscuring restorative justice with conditional sentences was wilful in order to maintain the status quo. Paula Maurutto & Kelly Hannah-Moffat (2016) in an article titled "Aboriginal knowledges in specialized courts: Emerging practices in *Gladue* courts" suggest that it is normal practice for the Canadian legal system to decontextualize the criminalized subject. Howard Zehr (2015), an expert on restorative justice, distills the basic assumptions of the Western legal system into three questions: one, who did it (ie, the "crime")?; two, are they guilty?; and, three, what punishment do they deserve? While being a somewhat simplistic description, it rather accurately points out the individualist nature of the criminal legal system – none of the questions considers context. Legal scholars Marie-Andrée Denis-Boileau and Marie-Eve Sylvestre (2018) claim that Canada subordinates Indigenous legal systems reflecting, "an imperialist intent to reject the existence of any non-State system" (p.550). Whereas restorative justice focuses more on 'Who has been hurt? Whose obligations are those? What do they need? What are the root causes? Who needs to be involved in a justice process? What needs to be done to make things as right as possible'? (Zehr, 2015). The purpose of *Gladue*

is to open the door to another way of looking at harm (restorative justice), to contextualize systemic and background factors into the sentencing methodology (Roach & Rudin, 2000).

As I wrote about in the theoretical framework, critical race feminists have researched how reform efforts often function as a façade, a masquerade, to maintain the violent status quo (Bannerji, 2000; Razack, 2015). The sociological and legal literature affirms the arguments of Indigenous feminists and critical race feminists: judges' interpretations of *Gladue*, thus far, have not been up to the task of remediating settler colonialism (Balfour, 2013; Murdocca, 2013). As Gillian Balfour (2013) states, "Law reforms do little to tackle the complex intergenerational social problems resulting from government policies of forcible removal of Aboriginal peoples from their traditional lands, economic dependency and cultural assimilation (p.90). Carmela Murdocca (2013) contends that *Gladue* perilously appropriates cultural difference as a form of racial governance, without disavowing colonial violence. Taking judicial notice of colonialism has been narrowly applied as simply a platitude to Indigenous cultural heritage. Alternatively, the restorative justice aims of *Gladue* are impossible alongside the more punitive elements of sentencing: deterrence, denunciation, and mandatory minimum sentences (Balfour, 2013; Rudin, 2013). Even less critically-oriented legal scholars have drawn similar conclusions. Julian Roberts has tracked Indigenous incarceration rates over multiple decades. In his most recent study with Andrew Reid (2017), they concluded that *Gladue* principles, even with necessary and more consistent judicial application, are unlikely – without a "more ambitious sentencing methodology…[or]…the creation of a separate sentencing regime for Aboriginal offenders" – to be holistic enough to address "social conditions giving rise to crime and convictions in First Nations communities" (p.336). Critical legal scholar, Kelsey Sitar (2016), goes further to argue that *Gladue* is failing as shield (to protect Indigenous peoples from incarceration) and needs to

be thought of as a sword to be applied by defence council during the trial process. Marie Manikis (2016) makes a parallel argument, but for *Gladue* to be expanded to prosecutorial processes as a principle of fundamental justice, including decisions to, "charge individuals or not, the triggering of mandatory minimum sentences of imprisonment, the proposal of sentences in court" and other powers during plea bargaining (p.174).

2. Literature theme two: *Gladue* outcomes.

The second stream of scholarship about *Gladue* is about outcomes—showing that *Gladue* has made some incremental gains, but the overall picture (e.g., Indigenous incarceration) has worsened. These studies show that judges are often giving less weight to *Gladue* principles due to other sentencing considerations (Anderson, 2003), or sometimes ignoring Indigenous status altogether (Welsh & Ogloff, 2008). Others argue that the legal system as a whole runs counter to restorative justice (Roach & Rudin, 2000; Denis-Boileau & Sylvestre, 2016) and that without more financial resources alternatives to incarceration will not come to fruition (Milward & Parkes, 2014). Further, courts tend towards the diminishment or erasure of *Gladue* when a crime is considered serious (Balfour, 2013; Murdocca, 2018; Rudin, 2013; Welsh & Ogloff, 2008). And, finally, *Gladue* does not adequately account for the gendered harms of colonialism (Baigent, 2020; Kaiser-Derrick, 2019).

Even from the early 2000s, or the early days of Section 718.2(e), there were concerns about whether the *Gladue* principles were being implemented properly by judges. In a Sociology PhD dissertation, involving a case analysis from 1996 – 2001, of the first 106 sentencing outcomes (posted on *Lexis Nexis*), where *Gladue* applied, Dawn Anderson (2003), found that

judges were often reluctant to give Section 718.2(e) full force for a variety of reasons: from ignoring or rejecting section 718.2(e) outright to believing that prison could achieve restorative goals, from believing there was ambiguity about when to apply *Gladue* to being concerned that *Gladue* created unfair "race-based" sentencing. Even those judges who were implementing *Gladue* were only doing so because they were either able to prioritize rehabilitation as the goal of sentencing, or were convinced "that deterrence and denunciation [could] be met through a conditional sentence" (Anderson, 2003, p.276).

In 2008, Andrew Welsh & James Ogloff (2008) published a study with similar outcomes to Anderson. They compared 691 randomly selected cases before and after the implementation of section 718.2(e) where the criminalized person identified as Indigenous. Welsh & Ogloff concluded that Indigenous status had little bearing on case outcomes relative to mitigating and aggravating factors, such as the criminal history of the person and the seriousness of the offence (Welsh & Ogloff, 2008). A recent study called Ipeelee et le devoir de résistance (Ipeelee and the duty to resist), legal scholars Marie-Andrée Denis-Boileau et Marie-Eve Sylvestre (2016), conducted a thorough analysis of 635 sentencing decisions (trial and appellate) post-Ipeelee (2012 – 2015). As a result, Denis-Boileau & Sylvestre concluded that section "718.2(e) continues to be a resounding failure…despite a few isolated acts of judicial courage" (p.554). Why? The argument based on the evidence is that there is judicial resistance, and resistance more generally from the legal system, to innovate towards restorative or creative sentences outside of, in their words, "the monopoly of the Canadian State in matters of punishment" (Denis-Boileau & Sylvestre, 2018, p.554). However, the authors found possibilities within Ipeelee, as a "contact zone" between Indigenous legal traditions and the Canadian one, whereby a more pluralistic justice outcomes might be achieved (Denis-Boileau & Sylvestre, 2018, p.604). Especially

promising is how Ipeelee challenges judges to contextualize rather than individualize responsibility and the challenge to the legitimacy of punishment rather than restorative justice as the universality of criminal justice (Denis-Boileau & Sylvestre, 2018).

Looking deeper into the above studies, alongside other legal research on *Gladue*, shows that *Gladue* is largely aspirational in its restorative justice aims. In a 2000 article, Kent Roach and Jonathan Rudin expressed some optimism that the Supreme Court had rectified how *Gladue* was to be applied. Roach and Rudin (2000) argued that the *Gladue* decision clarified that restorative sanctions were possible even with a view to the principle of proportionality in sentencing; that is, that restorative justice options, apart from imprisonment, were still an option even in the situation of serious crimes. In fact, Roach and Rudin expressed concerns that if restorative options were equated with conditional sentences that there would be a net widening effect, because of concerns that conditional sentences would be longer than if a person was sent to jail. Roach and Rudin also warned that "*Gladue* will require more resources to be devoted to sentencing and community sanctions," but their optimism waned on whether there would be political will for investing in alternatives to incarceration (2000, p.383). After two decades, the passage of time has proven Roach and Rudin correct. Minimal resources have been put into community-based alternatives to incarceration, as well as *Gladue* reports that are often necessary to adequately inform a judge at sentencing (Milward & Parkes, 2014), and not nearly enough has been done to stop colonial courts from continuing to mass incarcerate Indigenous peoples. Evidence put forward by Murdocca and others is that *Gladue* gets 'tripped up' when it comes to defining "serious crime". In fact, the literature suggests that when it comes to harms defined as "serious" by the courts, *Gladue* has done little to shift criminalized Indigenous peoples away from prisons (Balfour, 2013; Murdocca, 2018; Rudin, 2013; Welsh & Ogloff, 2008). What this

points to is the ongoing challenge of balancing the seemingly competing principles of sentencing. Is sentencing about retribution or it is about restorative justice? How can one exact deterrence and denunciation while at the same time look for restorative justice alternatives to incarceration? Restorative justice appears to be a bridge too far within a system orientated towards punishment.

Finally, *Gladue* fails the patriarchal litmus test. One of the more recent themes in the academic scholarship has been a gendered analysis of *Gladue*, particularly looking at outcomes or impacts on Indigenous women. Elspeth Kaiser-Derrik (2019) has led the charge on some of this research, publishing a book titled *Implicating the system: Judicial discourses in the sentencing of Indigenous women*. Using feminist theory, Kaiser-Derrick thoroughly analyzed judicial discourses in 175 sentencing decisions from 1999 to 2015 specific to Indigenous women. Quoting the Native Women's Association of Canada to answer 'Why focus on Indigenous women?' Kaiser Derrick writes that it is vital to use a feminist lens because of the victimization-criminalization continuum so often a part of the stories of Indigenous women: "It is essential that those in the criminal justice field recognize…that there is a link between victimization and criminalization which occurs at both an individual and collective level. Aboriginal women/girls suffer additional gender specific forms of discrimination within the victim to criminal cycle, and attention must be paid to this" (2019, p.286). Kaiser-Derrick makes the case for expanding community-based support options, given that "Indigenous women may be criminalized for coping mechanisms developed in reaction to victimization and related to disadvantages stemming from colonization" and that the prison system is itself an active form of violent colonization (2019, pp.310).

Building on the work of Kaiser-Derrick, Charlotte Baigent (2020), reviewed 42 published sentencing decisions for Indigenous women between 2017 and 2018. Baigent concluded that judges are not accounting for the uniqueness of the experiences of Indigenous women, especially high rates of victimization. Baigent calls it the "silencing of sex," or the way that judges "homogenize the experiences of Indigenous people, obscuring the distinct realities facing Indigenous women," even where crimes are committed against an abuser or at the behest of men (p.3). Similar to Kaiser-Derrick, Baigent emphasized that incarceration adds further to the cycle of victimization that is already a part of many Indigenous women's lives and that judges need to incorporate an intersectional analysis into judgments.

While beyond the scope of my literature review, it is worth noting that there is now extensive case law about *Gladue*. In a recent book *The Gladue principles: A guide to the jurisprudence*, Benjamin Ralston (2021), collates the existing jurisprudence on *Gladue*. What is noteworthy is the wide array of cases involving *Gladue*, from joint submissions to bail hearings, dangerous offender hearings to long-term offenders, and many other instances in-between. For example:

- *R v Kakekagamick* [2006]: clarifies *Gladue*.
- *R v Ipeelee* [2012]: clarifies *Gladue* & affirms that it applies to serious, violent crimes.
- *R v Bain* [2004]: Gladue applies to bail (cf. Rogin, 2017).
- *R v Jensen* [2005]: *Gladue* applies to parole.
- *R v Sim* [2005]: *Gladue* applies to a Not Criminally Responsible review board.

3. Literature theme three: *Gladue* reports.

The final stream of literature is about *Gladue* reports. The academic literature is fairly limited in this area. The most that was written about *Gladue* reports can be found in pp.108 – 117 (i.e., ten pages) of Jonathan Rudin's (2019) *Indigenous people and the criminal justice system: A practitioner's handbook*, as well as a study by Jane Dickson and Kory Smith (2021) that used a survey methodology to explore how judges received *Gladue* information and whether it was valuable to them. In this section, I also include a study by Carmela Murdocca (2021) of criminalized Indigenous peoples (n=15) experiences of *Gladue*, as it relates to *Gladue* reports. There are other handbooks that have been written about *Gladue* reports, but they are intended to train *Gladue* writers on how to write a good or high-quality report. Maurutto & Hannah-Moffat (2016) make some mention of *Gladue* reports in a study about *Gladue* courts. Their focus is descriptive rather than analytical, emphasizing the overall purpose as well as technical aspects of reports: "*Gladue* reports are powerful techniques used to package information, in a format that is accepted within legal structures. They document the linkages between individual behaviour and socio-cultural, political, historical, and economic processes, not necessarily with the goal of reducing the responsibility of the offender, but rather to understand and contextualize behaviour" (p.465).

Gladue reports entered the legal lexicon later than the initial *Gladue* decision (Rudin, 2019). The *Gladue* decision, itself, "spoke only for the need for courts to obtain the necessary information about the life circumstances of the Aboriginal offender before the court and the programs that might address those issues arising from the person's life" (Rudin, 2019, p.108). Reports were introduced as a way to provide that information. Yet, unlike a pre-sentence report, there is no standard format or even a legal provision for judges to order one, so the availability of a report is fully dependant on funding (Rudin, 2019). There is some debate in the field about

whether there should be a legal option to order reports, as it would create some consistency and assist judges with their judicial obligations to *Gladue*. However, at the moment, it is mostly Indigenous peoples and Indigenous organizations that are writing reports (Rudin, 2019). There is some concern that a shift from a "request" to "an order" would shift funding for reports into the hands of government agencies (similar to Pre-Sentence Reports) and out of the hands of Indigenous writers (Rudin, 2019). That said, there are some clear indications in the case law that emphasize the value of *Gladue* reports to enable meaningful *Gladue* analysis (Pfefferle, 2008).

Currently, *Gladue* reports are not formally available in Newfoundland, New Brunswick, Manitoba, Saskatchewan, the Northwest Territories and Nunavut (Rudin, 2019). In other jurisdictions, Prince Edward Island (2-3 reports per year), Nova Scotia (60 reports per year), Quebec (30 reports per year), Ontario (750 reports per year), Alberta (700 reports per year), British Columbia (80 reports per year), and the Yukon (just starting a program), reports are available, but follow different funding models and processes (Rudin, 2019). Rudin uses the metaphor of a patchwork quilt as a comparison to the availability of *Gladue* reports, but writes, "To describe the availability of *Gladue* Reports across the country as a patchwork quilt would do a disservice to quilt makers. Even patchwork quilts do not have huge holes in them" (2019, p.110), indicating the haphazard way that such a vital service is far from vigorous across the country.

Gladue reports are considered "friend of the court reports" (not expert reports with conclusions), containing systemic and background information on the criminalized Indigenous person before the courts: "*Gladue* reports tell the story of the offender but they tell that story in a broader sweep than is often before the court. The story of the offender will often begin with the story of their parents, grandparents, or great-grandparents. The story will include not only

specific events that occurred in the family, but also a discussion of larger disruptions to Aboriginal communities and nations as the imposition of the residential school system" (Rudin, 2019, p.111 & p.114). Other aspects of colonialism are often included as context: the 60s Scoop, or forced relocations, or contaminated drinking water (Rudin, 2019). It is important to writers to try to include the person being written about in their own words: "*Gladue* reports try to let those interviewed speak for themselves. Long quotes from individuals in the reports are not uncommon. In this way, *Gladue* reports provide the court with many voices and perspectives on the individual before the court" (Rudin, 2019, p.112). Although, there is limited scholarship on *Gladue* reports, the consensus from the literature, as well as case law, is that *Gladue* reports are an important aid for judges to take judicial notice of *Gladue* (Kaiser-Derrick, 2019; Maurutto & Hannah-Moffat, 2016).

Dickson and Smith's (2021) research was significant because it posed questions directly to adult court judges about whether *Gladue* information at sentencing was adequate and sufficient. Unfortunately, there were two methodological challenges with their research: first, the survey they used was distributed to judges by the chief justices' offices, meaning the researchers did not know whether it was comprehensively sent out to all judges, or if there was gatekeeping by the courts; second, the response rate was below the quantitative threshold of 33%, indicating that reliability and generalizability could not be established. However, there were still some useful 'learnings' from the study for my research purposes (especially given that the highest rate of response came from judges in Ontario). Judges indicated that *Gladue* information came from a variety of means—through oral submissions by defence council or a court worker, pre-sentence reports, or full *Gladue* reports. Judges strongly preferred the latter, full *Gladue* reports, and were mostly unsatisfied with hearing *Gladue* information through oral submissions (Dickson & Smith,

2021). Judges were not very positive about the quality of *Gladue* reports: approximately 17% said that *Gladue* reports provided "comprehensive, case-specific information," while only "11% felt that reports [were] well researched," and less than 10% found the recommendations part of *Gladue* reports to be helpful for sentencing (Dickson & Smith, 2021, p.32). Judges were more positive about the general usefulness for crafting sentences: Over 25% of judges found reports to be always helpful; approximately 34% found reports helpful most of the time; 19% indicated reports were useful about half the time (Dickson & Smith, 2021). When discussing their findings, Dickson and Smith (2021) suggested that there remains a lack of clarity about the quality and quantity of *Gladue* information required for judges to fulfill obligations to *Gladue*. Further, the researchers argued that full *Gladue* reports should be seen as a necessary part "at every point in the criminal process" for there to be a tangible impact on Indigenous incarceration: "The ability of the courts to access well-researched and -presented *Gladue* information is integral to the realization of *Gladue's* remedial goals" (Dickson & Smith, 2021, p.38).

Finally, Murdocca's (2021) research was the first study to explore the first-hand experiences of the *Gladue* process from the perspective of criminalized, Indigenous peoples. Murdocca (2021) situated participant stories within a larger analysis of ongoing colonial violence, as well ways in which Indigenous peoples are healing and standing against colonialism. Similar to this dissertation, Murdocca (2021) wrote that "the discussion of *Gladue* provided an opportunity to articulate the experiential trajectory of racism and the effects of colonialism through [Indigenous participants'] lives" and that "*Gladue* is a portal into…processes of colonial, racial state discipline and white racial violence targeting Indigenous people" (p.384/p.386). The study had six key findings: first, that prior to working with a *Gladue* report

writer, participants had a general lack of knowledge about the *Gladue* process, starting from legal counsel not providing information about *Gladue* provisions; second, Indigenous participants cited "support received from *Gladue* report writers [as] the most positive aspect of the *Gladue* process" (p.389); third, the *Gladue* process helped participants educate or connect the dots between their own life experiences and broader systems of colonialism; fourth, many of the participants (especially those who were incarcerated while completing *Gladue* reports) found the process to be re-traumatizing, because of having to share trauma stories. Some participants did note they continued, in spite of re-traumatization, because they viewed *Gladue* as a "last resort" against colonial systems (p.392); fifth, participants were very concerned and distrustful of how the *Gladue* report would be used in court, or the limits of confidentiality after sharing deeply personal information with *Gladue* writers; finally, participants shared about the effectiveness of *Gladue* reports. Participants believed that reports were effective if their sentence was reduced as a result, while others (those who held beliefs that a report should function like a 'get out of jail free card' or reduce sentences) did not find the *Gladue* report process to be effective (Murdocca, 2021). Murdocca's (2021) study demonstrates some of the intangible benefits of *Gladue* reports (e.g., dedicated support offered by *Gladue* writers), while also the limits of *Gladue* without further education in the legal community (e.g., lawyers being negligent in utilizing reports for clients). Ultimately, the study concludes that it is Indigenous peoples who must lead efforts at change, otherwise Gladue will replicate the current systems of (oppressive) racial governance (Murdocca, 2021).

Conclusion

A core mechanism or technology of how the settler nation state functions is the punitive criminal justice system—particularly laws, policing, courts, and corrections—that enforces the colonization of Indigenous peoples. As quoted earlier, and worth repeating, "Every oppression that Aboriginal people have survived has been delivered…through Canadian law" (Monture, 1995, p.59) in which prisons and the criminal justice system play a particularly "racist and oppressive" role (p.34). Punishment is weaponized to add further harm to Indigenous communities (Rodriguez, 2009). It interferes with Indigenous ways of doing justice. It criminalizes Indigenous identities, while symbolically perpetuating the notion that whiteness represents normal or 'good'. The criminalization and punishment of Indigenous peoples are tactics of the white, heteropatriarchal, and capitalistic, settler state.

In the previous chapter, I had concluded that social systems have the power to (a) control social life, (b) pervade human experience, (c) choose the few (e.g., white, male, settler, etc) over the many for thriving, and (d) remain unaccountable. When putting these themes together with the mythos of settler colonialism, we can see how the master narrative of Canada (e.g., benevolent, progressive, etc.) disguises the hierarchical and harmful process of settler social power. This settler mythos provides justification for the disappearance of Indigenous peoples into Canadian prisons—for if the state is benevolent, then it deserves to mete out justice to individuals accused before the courts. However, what I have analyzed in this chapter is in fact the opposite: Canada is an illegitimate and illegal occupation of Indigenous lands. Criminal law, then, is a colonial instrument for punishing Indigenous peoples for the impacts of colonization and for the removal of Indigenous peoples from lands. Thus, my research must account for how *Gladue* contributes (or not) to decolonization and abolition—as fundamental principles for honouring foundational treaties with Indigenous peoples.

In summary, the academic literature about Gladue follows three themes: first, research tracks the contradictory meanings and accomplishments of Gladue as a legal reform, particularly how the social context is obscured into the individual, criminalized person; second, a number of studies look at Gladue outcomes; third, a few pieces examine, in a more technical way, the role of Gladue reports. My research builds on all three, with emphasis on adding more understanding to the purposes and utility of Gladue reports.

Chapter 4: Methodology – Research design

"When we are asked to say who we are, we usually tell a story. Our truths are embedded in our stories" (2001, Zehr, p.189).

Introduction

John Creswell (2013) defines methodology as "procedures of qualitative research" (p.22). In this chapter, I will first describe *how* I designed and conducted my research: the disciplinary framework (Social Work) the methodology (critical, narrative inquiry), followed by a description of the methods of collecting data, and an outline of the organization of findings and analysis.

Disciplinary Framework

My inquiry falls within the discipline of social work. Although I arrived late (B.A. in Sociology/Criminology, M.A. in Conflict Transformation) to social work education, for close to twenty years I have been working in the social services field, with survivors of sexual abuse, people who have offended sexually, male-identified people who have used violence against partners and/or children, facilitating individual and group supports, and working as a restorative justice mediator. I resonate with the common finding in the social work literature that the best possible professional, supportive relationships occur when those who claim to help act from respect, kindness, empathy, collaboration and authenticity (Watters, Cait, & Oba, 2016). Narrative inquiry, as an investment in the power of story, fits naturally with how I view social work – or, more to the point, how I have done my work in the field. Whenever we go through difficulties, challenges, or traumas, human beings often need to make some sense – even of the senseless – in order to get through or survive (Zehr, 2001). To walk alongside someone who has

experienced pain or trauma is to enter into someone's story. Howard Zehr (2001), who has worked with trauma survivors and documented many stories in *Transcending: Reflections of crime victims*, describes the 'process of making sense' as re-storying: "To heal we have to recover our stories, but not just the old stories. We must create new or revised narratives that take into account the awful things that have happened…The re-creation of meaning requires the 're-storying' of our lives" (p.189).

Certainly, social work is often about storytelling. Many social workers begin working with people by saying: 'Tell me your story' (Shaw, 2017). It is an invitation to recount, sometimes sequentially, significant times and places, relationships and people, patterns and events in a service user's life. Storytelling is descriptive, yet more importantly, it is meaningful. A person's stories influence how that person acts within their world. The fit of social work with narrative inquiry is natural: Jessica Shaw (2017) writes, "narrative inquiry…is a specific form of narrative research that is rooted in story as a relational way of knowing" (p.209). Some of the work I have done with male-identified people who have used violence follows the narrative therapy work of Catrina Brown and Tod Augusta-Scott (2007), and Alan Jenkins (2009). Narrative therapies, in the words of Brown and Scott, start from the premise that "…our stories do not simply represent us or mirror lived events – they constitute us, shaping our lives and our relationships" (p.ix). While researching, I tried to move naturally from the relational practice of social service work, to doing narrative inquiry as a relational form of research.

Yet, being in social work goes beyond client storytelling. Studying social work, especially critical social work, has challenged me, ethically, to be more critical, anti-oppressive, and purposeful towards decolonization. A good example of a critical social work researcher who has influenced my research agenda is Dr. Shoshana Pollack. Pollack's (2012) appraisal of how

Canadian corrections ignores socio-economic and political elements of criminalization (e.g., the carceral system criminalizes individuals rather than addressing the structural harms that produce criminalization) challenged me to reflect on how my own depoliticized restorative justice practice in the correctional system was contributing to carceral violence. For example, while bringing together people impacted by harm together with those who had caused harm for dialogue, I often ignored who was being criminalized. Although social work has its own complex, contradictory and at (often)times harmful history, including practices such as child welfare 'scoops,' or the widespread removal of Indigenous children from Indigenous families by child welfare workers (Kennedy-Kish et al, 2017), critical social work is still a logical disciplinary home for my study, as it allows me to analyze individual participant stories within the larger grand narratives of Canadian society. A core value of social work is supposed to be social justice. The Ontario College of Social Work and Social Service Work defines the ethical obligation of workers to integrity as promoting social justice: "College members promote social justice and advocate for social change on behalf of their clients" (OCSWSSW, 2018, p.13). Thus, a study that focuses on participant stories, with an eye to larger social change is congruent with the discipline of social work.

Critical Narrative Inquiry

My methodology is qualitative, researching in order to learn more about how a social problem is *narrated* and *meaning* created from it (Creswell, 2013). More precisely, my methodology followed the research tradition of narrative inquiry, focusing on the stories of *Gladue* stakeholders, to gain access to narratives of experience. Humans talk about their lives in storied ways (Byrne, 2017). Narrative inquiry is about gathering experiences as told through

stories (Clandinin, 2013). As described in the 'Introduction,' a "story" is the linking of events and ideas in the form of a consequential or meaningful pattern (Riessman, 2008). The kinds of events and ideas conveyed by stories are those that describe knowledge systems, experiences, and identities (Archibald et al, 2019). Similar to Catherine Kohler Riessman (2008), I define the term "narrative" fairly synonymously with "story". Where the two differ is that "story is an event or sequence of events (the action)" while "narrative" is "the representation of events," the interpretation or meaning made of the action (Abbott, 2008, p.19). As I alluded to in the opening sentences of my dissertation, Indigenous-Greek, critical literary scholar, Thomas King (2003) writes that the way to understand the world is through stories: "the truth about stories is that that's all we are" (p.32). Narrative researchers D. Jean Clandinin and F. Michael Connelly (2000) concur: "all of us, lead storied lives on storied landscapes" (p.8). As do many sociologists. For example, sociologist Catherine Kohler Riessman (2008) claims that "stories reveal truths about human experiences" (p.10). In narrative inquiry, story is the method, as well as the unit of analysis (Shaw, 2017). Participant storytelling, through semi-structured research questions, was the way that I entered into participants' experiences (Clandinin, 2013; Kovach, 2010).

Stories or narratives involve a teller and a receiver, they are relational (Barton, 2004; Clandinin & Connelly, 2000; Shaw, 2017). *How* a person tells a story, or *what* a person chooses to tell, will be influenced by *who* is listening or receiving. The relationality of storytelling is significant for narrative inquiry. If, as Jessica Shaw (2017) states, narrative inquiry "…is rooted in story as a relational way of knowing" (p.209), then narrative researchers must understand better how they are influencing participant's storytelling. Since narrative research involves an interchange between two or more people, researchers cannot help but influence research

narratives, as people tell stories with audiences in mind (Barton, 2004). The value of narrative inquiry is the reflective or reflexive approach adopted by researchers, using narrative beginnings (described above) to acknowledge the influence and power of the researcher (Clandinin, 2013). However, reflexive research is insufficient for doing ethical research when engaging the topic of settler colonialism in Canada. Researchers need to adopt decolonizing methodologies (Archibald et al., 2019; Smith 2019).

Western, or Euro-centric, research often oppresses Indigenous peoples (Archibald et al., 2019; Stevenson, 2016). Archibald, Lee-Morgan, and De Santolo (2019) write that many Western: "…research stories of our peoples [are] used to define, destroy, and deter the valuing of Indigenous knowledge, people, and practices" (p.5). Indigenous peoples have often been misrepresented in research, their stories misused (Archibald et al., 2019). Indigenous stories have not only been misrepresented and misused, they have been suppressed – as a way to colonize Indigenous peoples (Smith, 2019). Research has been done *on* Indigenous peoples rather than *with* Indigenous peoples, often for the prestige of researchers (Stevenson, 2016). Whether misrepresenting, misusing, or suppressing, the dominant narratives in Canada continue to erase Indigenous peoples (King, 2003). A decolonizing methodology counters the harms of colonial research. Those that decolonize are careful not to reify hegemonic power structures, while also working to rectify the damage of settler colonialism (Archibald et al., 2019).

The critical theories of my theoretical framework are complimentary to a decolonizing methodology. The abolitionist stance of critical theory includes working to eradicate settler colonialism. Hence, when I describe my methodology as critical, or more fully as "critical narrative inquiry," it is a decolonizing methodology, explicitly analyzing stories for hegemonic power and oppression with the purpose of confronting settler colonialism. Critical narrative

inquiry examines the role of power in how people make assumptions about and interpret, or make sense of, life events (Fook & Gardner, 2007; Hickson, 2016). Critical narrativist, Helen Hickson (2016) writes, "Although power is identified in narrative methodologies, it is often implicitly categorised. The critical narrativist needs to look for and recognise the ways power is held and used" (p.386). To be explicit about hegemonic power, is to ask: how is it that the Canadian state, even when 'remediating,' keeps producing the same – colonial, oppressive, and tyrannical – result? Individual, participant stories reveal deeper meanings about cultural, social, and political power relationships (Shaw, 2008).

Respectful, ethical relationships with Indigenous participants

I anticipated that *Gladue* writers (research participants) would identify as Indigenous. All, except for one, did. I was not certain whether judges would. One did. There are serious ethical concerns specific to settlers (i.e., white people, like me) working, or doing research, with Indigenous populations. White people have a long history of causing harm by doing extractive, exploitative research in Indigenous communities (Absolon, 2011). As described above, research conducted by non-Indigenous researchers has often been oppressive to Indigenous peoples. My intention was to research in reparative ways, using a critical, decolonizing methodology to understand better how settler colonialism was perpetuated in *Gladue* – asking "critical questions about colonial impact, question[ing] what is not working, [so as to] understand why" (Archibald et al., 2019, p.3). Yet, good intentions are insufficient. To enact good intentions, Archibald, Lee-Morgan, and De Santolo (2019) recommend using the principles of respect, responsibility, reverence, and reciprocity as an ethical guide. In crafting my research design, I followed these principles.

1. **Respect**

According to Indigenous researcher Sara Florence Davidson (2019), respect means working with communities that are familiar to researchers. Familiarity means that researchers should have established, ongoing relationships with Indigenous communities, not simply dropping in to do research and exiting when completed, for career enhancement (Wilson, 2008). To be respectful amounts to treating participant's stories with great care because their words represent a part of who they are (Davidson, 2019). I will describe below how I sought participation from Indigenous people, communities, and nations where I had prior relationships.

2. **Responsibility**

Opaskwayak Cree researcher, Shawn Wilson (2008), describes responsibility as a form of "relational accountability". By relational accountability, Wilson appeals for authentic and credible research – research that benefits the community being researched. Responsible research demands integrity, using a methodology that meshes with the community while also serving it (Wilson, 2008). Wilson divides relational accountability into four categories: first, how we choose what we study (topic); second, how we gather information (methods); third, how we interpret information (analysis), and; fourth, how we transfer knowledge (presentation):

- *How we choose what we study*: research purpose should be community-driven, *with* Indigenous peoples, rather than *on* Indigenous peoples.

- *How we gather information*: research methodology should engage the whole person, be conversation-focused, and about relationship-building.
- *How we interpret information*: research analysis should rely on intuitive logic, rather than linear logic, putting ideas into their relational context instead of breaking them down into smaller, isolated parts: "…data and analysis are like a circular fishing net. You could try to examine each of the knots in the net to see what holds it together, but it's the strings between the knots that have to work in conjunction in order for the net to function" (Wilson, 2008, p.120).
- *How we transfer knowledge*: Research knowledge transfer should include how the researcher has changed as a result of the study. As well, knowledge transfer should be about continuing healthy relationships with Indigenous peoples.

Following the lead of Wilson's ideas, here is how I fulfilled my relational obligations:

Choice of Study	**Unmasking:** Indigenous communities have long been calling for an end to settler colonialism, a return to foundational treaties, and a return of land: "It [is] important for both Indigenous and non-Indigenous scholars to etch out the space for naming and examining the mechanisms of Eurocentric colonialism and not put those solely on the shoulders of Indigenous peoples" (Battiste, 2013, p.112). Indigenous people I know have challenged me to do my part. My choice of study was about making the evils of white, settler,

	patriarchy, and capitalism more visible, exposing how the nation-state: • imbues white supremacy, patriarchy, settler colonialism, and capitalism into social institutions (i.e., law, sentencing, etc). • uses prison as a weapon of (internal) warfare against Indigenous peoples.
Methodology	**Decolonizing:** Using a critical narrative inquiry methodology to continue relationship-building with Indigenous peoples. A narrative approach fits with Wilson's challenge to focus on the whole person and to be conversational.
Data Analysis	**Relational:** when analyzing data for patterns and themes, I fit stories and experiences into larger narratives and relationships.
Knowledge Transfer	**Honouring:** To continue building healthy relationships with Indigenous friends, colleagues, and communities, using the Two Row wampum treaty as an ethical guide: • Working towards fulfilling a promise of non-interference with Indigenous sovereignties. • Working towards living in peace, friendship, and harmony with Indigenous peoples. In the Conclusion, I reflect on how I have changed as a result of the research process and how I will continue to honour my relational obligations, once research is completed.

3. Reverence

To some Indigenous peoples, research is more than simply an exchange of ideas, or stories, between a participant and a researcher. Wilson suggests that research can be a form of ceremony, indicating the sacredness of the storytelling process. Marie Battiste (2013), Mi'kmaq educator, writes that stories from Indigenous communities, "…shape their humanity, their spirituality, and their heritage" (p.75). Sometimes embedded within participant stories are teachings and traditional knowledges (Martin & William, 2019). Davidson (2019) suggests that to be reverent while doing research is to honour participant requests, confidentiality, and that research is owned collectively, not individually by the researcher. I received the informed consent of participants to honour confidentiality. As well, when participants shared experiences, or even teachings and traditional knowledges, I reflected on how to incorporate these into my way of being in the world.

4. Reciprocity

Research should be a two-way process, beneficial to the researcher and the participants (Kirkness & Barnhardt, 1991). Wilson describes reciprocity as fulfilling roles and obligations in the research relationship, being accountable, and asking, "What am I contributing or giving back to the relationship?" (2013, p.77). At risk of being repetitive, the methodology I chose was critical and decolonizing. The philosophical, theoretical, and pragmatic orientation is to be reparative: doing my part to challenge settler colonialism through critical narrative inquiry.

The ethical impetus of my study was *research as reparation*. The fundamental question I have consistently asked myself when I designed my study was: given my privileged social

locations, how can I use research to take responsibility for and help repair harms myself and other settlers have perpetrated against Indigenous peoples? My ethical agenda aligns with Norman K. Denzin's (2017) goals of ethically responsible critical, qualitative inquiry. Ethical research places voices of the oppressed at the centre (Denzin, 2017). In my comprehensive paper, which formed the basis of my theoretical framework, I prioritized the scholarship of Indigenous, Black, and racialized peoples, especially those who had written about the violence of the criminal justice system. I sought to listen carefully to their written words. Critical scholarship has tended to do participatory research with people who are oppressed and marginalized (Denzin, 2017). Participatory work is very important for understanding how structures of power operate to subordinate and harm people, and to describe the impacts of such harms. At the same time, I would argue that hegemonic power structures avoid full accountability when the research microscope is not applied to people (e.g., through systems) who are oppressing others. Hence, I incorporated Indigenous voices (Gladue writers) alongside of those with the power to sentence Indigenous peoples (Judges).

Ethical research uses inquiry for change and activism (Denzin, 2017). I am hopeful that my research will assist *Gladue* report writers in clarifying some of what is working and some of what is not. I am hopeful that my questions will influence judges to continue to think more carefully about *Gladue* principles – and perhaps strengthen or reinforce their understandings of the connections between colonialism and carceral outcomes for Indigenous peoples. Ultimately, I am hopeful that my scholarship can contribute to the bodies of critical and decolonizing literature that are about creating communities based on justice, equity, and honouring the Calls to Action of the Truth and Reconciliation Commission of Canada—to reduce Indigenous incarceration.

Sample

My objective was to meet with 16 to 20 participants, approximately 8 to 10 *Gladue* writers and a similar number of judges. I was, in fact, able to interview 9 *Gladue* report writers and 12 judges. I did not explicitly ask for information about how participants identified (e.g., gender and race), as my research was not about making correlations between social constructs and participants' experiences. Further, my unit of analysis was *stories* about *Gladue*. However, as evident in how my research was designed, a person's social location does make a difference in how they experience and view the world. Thus, my collection of information related to identity was more implicit: how did participants position themselves in relation to the knowledge they shared? For example, did white judges talk about their whiteness? Did Indigenous *Gladue* writers speak about their Indigeneity? Based on my interviews, I was able to deduce the following about participants regarding the key social/power constructs of my study (gender, race, and capitalism):

- Eight of the *Gladue* writers identified as Indigenous, one as white.
- All of the *Gladue* writers worked for non-profit organizations.
- Ten of the judges identified as white, two as Indigenous or with Indigenous ancestry.
- All of the judges sit or previously sat at the Ontario Court of Justice.
- Approximately two-thirds of the judges had experience either sitting in an Indigenous Peoples Court or participating in a sentencing circle.
- All of the judges had significant experience with *Gladue* reports.
- Ontario Court of Justice judges earn an annual salary above $300,000.

As I analyzed the *Gladue* stories, I was able to develop characterizations of *Gladue* writers, judges, and criminalized Indigenous peoples based on the stories told by participants (see next chapter).

Figure 4.1

1. ***Gladue* Report Writers**

My inquiry required deliberate sampling (Dattalo, 2010). Following the ethical guidelines of respect and relational accountability, and given that many *Gladue* report writers were likely to identify as Indigenous, I started by reaching out to Indigenous communities where I already had ongoing personal and professional relationships to ask for participant referrals and leads: Conestoga College (Aboriginal Services and Indigenous Studies), Correctional Service Canada (Elder Services), Fanshawe College (Indigenous Studies), Deshkan Ziibiing, Healing the Seven Generations, Kitchener Waterloo Urban Native Wigwam Project, Mohawk College (Indigenous Studies), Toronto Council Fire Native Cultural Centre, and Wilfrid Laurier University (Social Work, Indigenous Field of Study). I also reached out to First Nations where I had been previously invited to do restorative justice workshops: Amjiwnaang, Chippewas of Kettle and Stony Point, Mississauga, Sagamok, Serpent River, Timiskaming, and Walpole Island. I did not

have a pre-existing relationship with Aboriginal Legal Services (ALS); however, since ALS was a founding organization for the implementation and development of *Gladue* reports in Ontario, I was able to connect with people there through some of the above relationships.

2. Judges who have used *Gladue* Reports at Sentencing

To recruit judges, I started by asking *Gladue* report writers which courts were using their reports – and who they recommended that I speak to. Typically, there are specific court days, or locations (e.g. Indigenous Peoples Courts), where judges preside over matters concerning Indigenous peoples, including *Gladue* reports and sentencing. Deliberate sampling of judges extended the purposeful, relational way of doing research (Shaw, 2017). *Gladue* writers identified a number of judges to me. I was able to reach out to those judges via email and quickly secured and completed four interviews. However, I was interrupted in the process of judicial interviews by an email from a lawyer at the Office of the Chief Justice in Ontario requesting that I follow a protocol for research with judges about which I was previously unaware. I paused my research to ensure that I appropriately followed the process. I reported the protocol to the Research Ethics Board at Wilfrid Laurier University, as well as my supervisor and committee. None of these people were aware that a research protocol existed with the Ontario Court of Justice. I contacted the previously interviewed judicial participants to inform them about inadvertently bypassing the research protocol. None of these judges were aware of it either, and each gave permission for me to keep the already recorded interview data.

I consulted with my supervisor (Dr. Shoshana Pollack) and a legal scholar on my committee (Professor Debra Parkes) about how to proceed. Professor Parkes was able to connect me with another legal scholar who had previously interviewed judges connected to the Ontario

Court of Justice (OCJ). This person recommended that I negotiate the terms of the protocol, as the OCJ was making demands through the protocol that would contravene the integrity of my research process, including that the OCJ select which judges to interview and that my dissertation be approved by the Office of the Chief Justice before publication. I was concerned that allowing the OCJ to select judges for me to interview would skew my research away from my relational protocol with Indigenous participants towards a biased selection of judges by the OCJ. I could also not agree to the stipulation that the OCJ approve my dissertation before I published it, as this would possibly delay my dissertation, potentially undermine the academic nature of my inquiry or what would qualify as publishable research, and be an affront to academic freedom. After some back-and-forth negotiations with the OCJ we were able to agree to a protocol that was satisfactory to them, as well as the Research Ethics Board at Wilfrid Laurier University and my supervisor/committee. I was able to give the OCJ a list of names recommended by Indigenous participants and they selected judges from that list for me to interview. In fact, the support of the OCJ was very helpful, as they contacted judges on my behalf, resulting in a number of participants quickly coming forward.

3. Field notes

During each interview, while participants were responding to questions, I took hand-written notes. The notes were key words or sentences that seemed thematically or reflexively important to the themes explored. Sometimes these notes helped with a follow up question or probe; however, usually, I would use what was documented to create field notes. After each interview, I created hand-written field notes, my observations (e.g., thematic, sensory, or

reflexive impressions) about the interview. To improve the analysis, sometimes field notes were about what stood out to me about a participant's responses, how those responses connected with other interviews, what I learned from the interview, or other questions that were coming up for me. To strengthen the reflexivity of the research process, sometimes notes emphasized my personal responses to what was said during interviews, including thoughts and feelings.

4. Trustworthiness, reliability, & integrity of sample

In an effort to ensure trustworthiness, reliability, and integrity within my sample and analysis, I followed the principles set out by previous narrative researchers (Lincoln & Guba, 1985; Riessman, 2008). Riessman (2008) argues that "there is no cannon, that is formal rules or standardized technical procedure for validation…Narrative truths are always partial—committed and incomplete" (2008, p.186). However, Riessman does suggest that trustworthy data in a narrative analysis should be appropriately situated within the "perspective and traditions that frame it" (p.185). I have aimed to be clear about my biases, how my methodology flows from my theoretical framework and, in turn, how my analysis is the logical outcome of the method. Further, Riessman (along with Creswell, 2013) suggests that trustworthiness means that there is some amount of cohesiveness, or persuasiveness, in the meaning that is made from the data, not whether what is shared is factually 'true': "narrative is not simply a factual report of events, but instead one articulation from a point of view that seeks to persuade others to see the events in a similar way" (2008, p.187).

I did use some peer review or debriefing to triangulate or determine some of the persuasiveness of the data (Creswell, 2013). Initially, after data collection, I thought about

having other academics (e.g., PhD student colleagues) review some transcripts to see if they would identify similar themes to what I found. In research terms, 'intercoder agreement' is often called reliability, or "the stability of responses to multiple coders of data sets" (Creswell, 2013, p.253). But, because of the situated nature of narrative analysis (e.g., the reliability of the data would be best evaluated by those who are embedded in the work of Gladue), I opted instead to do debriefing with some of the participants. According to Creswell (2013), debriefing "provides an external check…much in the same spirit of as interrater reliability in quantitative research," with the peer de-briefer asking questions and sharing ideas about "meanings and interpretations" (p.251). In qualitative research this is sometimes called 'member checking' (Creswell, 2013). To fulfill member checking, I met with one judge, one *Gladue* writer, and one defence lawyer who often did casework involving Gladue, to share preliminary findings, to assess whether my data and interpretations were trustworthy and reliable. I took notes of these conversations and added them to my detailed field notes (Creswell, 2013). I found that, for the most part, what I had heard from participants and how I was interpreting the findings were resonant with the peer de-briefers.

Even though I used peer debriefing rather than intercoder agreement, I still used some other measures of reliability to corroborate the trustworthiness of the data and my interpretations: field notes, recording of interviews, transcribing interviews, and rich, thick description of the findings (Creswell, 2013). I took detailed field notes after each interview, later comparing those notes to coded themes (Creswell, 2013). With the permission of participants, I recorded all but one of the interviews and, in order to digest in a more fulsome way the words of each of the research participants, I did all of the transcribing myself. As Creswell claims, "[r]eliability can be enhanced…by employing a good-quality tape for recording and by transcribing the tape" (2013, p.253). Finally, as will be noted in the following chapter, I used rich, thick description of

my findings (with ample quotes), so that readers will be able to determine whether the data is transferable. In narrative research, "[w]ith such detailed description, the researcher enables readers to transfer information to other settings and to determine whether the findings can be transferred" (Creswell, 2013, p.252). Riessman refers to transferability as "pragmatic use" and advises that the "ultimate test" of narrative research is whether it becomes "a basis for others' work" (2008, p.193).

The final point about transferability is whether the sample has integrity. In qualitative research, there is not a specific requirement for, or typical, sample size. Integrity comes about by the analysis that flows from the data. A sample can be one person's story or many peoples' stories. What is important is the 'unit of analysis' rather than number of cases examined – or what is being researched (Roy et al., 2015). Is the unit of study congruent with the research framework and purposes? Given that my unit of analysis was 'power as it operates in the writing, exchanging, and interpreting of *Gladue* reports' and not necessarily, whether *most* judges or *most* *Gladue* report writers say similar things about *Gladue* reports, total sample size was not as important to me as rich, thick description of participant stories and experiences, or purposefully sampling information-rich cases (Creswell, 2013; Patton, 2002). That stated, although more of a grounded theory term, I did reach several points of 'saturation,' where participants were saying similar things to me as previous participants (Creswell, 2013). Saturation was important to me, as I was searching for a collective story, or narrative, from participants, not just individual stories (Creswell, 2013).

Risk

There were some ethical considerations regarding research design related to anonymity, confidentiality, informed consent, and potential impacts on participants. Narrative research is risky because researchers are engaging intimately with participants' stories – their identities – and possibly reinventing those stories based on their own interpretations (Shaw, 2008). In order to diminish this risk:

(a) I offered to share transcripts of interviews with participants to solicit feedback. Only two participants (one judge and one *Gladue* writer) opted to review transcripts and neither requested any substantive changes. Both shared more ideas through email.

(b) I de-identified data and anonymized interviews by erasing or 'blacking out' any words in the transcripts that could potentially identify a participant, such as names, locations, specific courts, or jurisdictions. I created a label for each participant (e.g., Judge J01 or *Gladue* writer GW01), rather than using participants' names when storing the data in a password protected location. I created a separate file that linked the label with a pseudonym. I deleted audio recordings of interviews after transcribing.

(c) I mitigated risks regarding confidentiality and anonymity by ensuring I had the informed consent of participants—clearly outlining my intent, goals, and, to the extent possible, risks/benefits—so as to protect participant autonomy (Ford & Reutter, 1990; Shaw, 2008). My research design was approved by my dissertation advisory committee and the Research Ethics Board at Wilfrid Laurier University. After reading and hearing a description of the research, including potential risks and benefits, participants signed a consent form.

(d) Given the potential intensity or difficult nature of the subject matter, I offered each of the participants an opportunity to debrief after completion of the interview. None of the participants elected to debrief or access other resources for support.

Data Analysis

Analytically, I had two objectives. First, I was troubled that the *Gladue* process has failed in its professed purpose to ameliorate Indigenous incarceration. Second, I wondered if there were any redemptive elements in the *Gladue* process or whether there were narratives that resisted Canada's systemic oppression of Indigenous peoples, or was it a full-on entrenchment of settler colonialism, white supremacy, patriarchy, and capitalism. The following questions guided my analysis:

- How are the identities of Indigenous and settler peoples constructed through *Gladue* processes?
- How does hegemonic power operate in the *Gladue* process?
- Do experiences and narratives resist or reify the dominant, oppressive story of Canada's colonization of Indigenous peoples?
- What stories get told about Indigenous and settler peoples and colonial systems?
- How is it that the Canadian state, even when 'remediating,' supposedly reforming, keeps producing the same – colonial, oppressive, and tyrannical – result?

Research from a critical perspective is typically interested in questions about the macro or structural dynamics of social relations, especially how power, oppression, and social inequality operate (Antony et al, 2017). All stories are powerful, as Thomas King tells us, "controll[ing] our lives" (p.2003, p.9). This is especially so for the stories told in *Gladue* reports that the protagonists do not author. *Gladue* reports are not value-neutral. They are requested by

settler colonial state, which also defines the parameters of the process. *Gladue* reports impact Indigenous peoples' lives and freedoms. How is *Gladue* operating as part of settler colonial state, perpetuating oppression and social inequality? Therefore, I positioned the research data within its larger social context, "…to avoid reducing stories to tropes" (McAleese & Kilty, 2019, p.835). Critical scholarship is necessary for exposing the oppressive nature of hegemonic power. In *Power and Resistance*, Wayne Antony, Jessica Antony, and Les Samuelson (2017) write: "…an understanding of how power actually operates can come only through careful…research, by uncovering the ways in which the powerful try to protect their interests" (p.7).

1. Data Analysis Process

Interviews were recorded and transcribed. I transcribed the interviews myself, as I wanted to be immersed in the data and properly document any significant pauses or other audible indicators that would not show up on a written transcript (see further discussion below about coding). The data was analyzed for narrative themes and relationships. According to Riessman (2008), thematic analysis is useful for understanding participants' lives "in relation to categories of power and subordination" (p.62). Narrative methodology, particularly thematic analysis, was useful for identifying patterns of meaning-making (Bell, 2003; Riessman, 2008). Participant stories allowed me to gain access to the themes, such as hegemonic power, that emerged from "brief, bounded segment[s] of interview text" (Riessman, 2008, p.61). Thematic analyses "…are not generally interested in the form of the narrative, only its thematic meanings and 'point" (Riessman, 2008, p. 62). Further, according to Lawless & Chen (2019), *critical* thematic analysis is useful for examining, "…the interrelationships between interview discourses, social practices, power relations, and ideologies" (p.92). To analyze the data, I coded using a critical thematic

analysis (Hickson, 2016; Lawless & Chen, 2019), with attention to metaphors (Lakoff & Johnson, 1980; Lakoff, 1987), and relational webs (Wilson, 2008).

2. Coding

A critical thematic analysis *first* codes data for recurrence, repetition, and forcefulness (Owen, 1984). Recurrence is when more than one section of data has similar meaning, even where wording is different (Owen, 1984). Repetition is similar to recurrence, but is the coding of data for repetitive words and phrases (Owen, 1984). Forcefulness refers to how words are spoken, looking for dramatic pauses or emphasis in tone and inflection (Owen, 1984). For example, in the transcripts I included indicators for such auditory clues as pauses, increased volume or pace of talking, laughter, and so on. The *second* step of my critical thematic analysis was to code data for how and why the first set of codes (recurrence, repetition, forcefulness) were connected to the reproduction of social inequality, hegemonic power relationships, and larger social ideologies (i.e., settler colonialism, white supremacy, patriarchy, and capitalism) (Lawless & Chen, 2019). Special attention was paid to how participants made meaning about or sense of power relationships (Hickson, 2016).

After coding, as described above, I looked at the themes as literary devices. Critical narrative researchers often organize findings using literary themes relating to plot, setting, characters, and storytelling devices, to discover narrative connections to power. Kim (2016) suggests examining data for patterns, tensions, and themes related to plot. Miles and Huberman (1994) argue for examining activities and events for elements of conflict. Riessman (2008) advocates for looking at the time and place, or the orientation, of how stories are connected to

the flow of power, when considering setting. McKittrick (2021) is keenly interested in materiality of stories, or the "interplay between the narrative and material worlds" (p.10). The purpose is "to get in touch with the materiality of our analytical worlds" because "liberation is an already existing and unfinished and unmet possibility" (McKittrick, 2021, p.12/13). In essence, some of my coding amalgamated the work of Kim (2016), Miles and Huberman (1994), Riessman (2008), and McKittrick (2021) to analyze the story of the data.

- Who were the main characters and how were their identities constructed (Larsson & Sjoblom, 2010)?
- What were the settings and plotlines, especially in relation to the variable of power? (Hickson, 2016; Riessman & Quinney, 2005).
- How were settler colonialism, white supremacy, and patriarchy evident? (Goodbody & Burns, 2011).

3. Metaphors

The focus of narrative inquiry is the exploration of participant experience. However, the action of putting experience into words is not straightforward. It follows the contours of how a participant conceptualizes or *stories* the experience, which, of course, is influenced by many things, including social location, culture, life history, and so on. Words, therefore, become symbolic of experiences, only representative to the degree that the participant conceptualizes them. I am not making an argument, here, about 'truth' and what qualifies as a 'true' description of an event. Truth is subjective and discursive. What I would like to convey is that a researcher's

proximity to understanding what a participant is trying to express about experience will be influenced by how well a researcher knows how people employ language.

Here, I was reliant on linguistic scholars George Lakoff & Mark Johnson (1980). Lakoff & Johnson make a case for the importance of metaphor for understanding how people communicate about experience. They argue that "[o]ur ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature" (Lakoff & Johnson, 1980, p.4); we often articulate experience by comparing it to something else (Lakoff & Johnson, 1980). For example, a few sentences back, I wrote "people employ language," as if my experience of talking was about 'hiring' words – to be controlled and managed by me – for my usage. Or, I also wrote that Lakoff & Johnson "make a case," like two lawyers, making an irrefutable argument. A metaphor provides an image, or a way for a researcher to imagine, a participant's experience (Lakoff, 1987). Thus, as will become more obvious when in the subsequent chapters about findings, I analyzed the data for the metaphors in participants' stories to be able to make sense of their words (and broader narratives).

- How were metaphors used to convey meanings about experiences of *Gladue* (Lakoff & Johnson, 1980; Lakoff, 1987)?

4. Relational Webs

Rather than dividing themes into isolated parts, Wilson (2008) recommends that doing justice to Indigenous stories requires putting themes within relational webs: "…if you are breaking things down into their smallest pieces, you are destroying all of the relationships around

it" (p.119). In the final step of my data analysis, after coding and looking for metaphors, I put themes into relational contexts.

- What relationships are holding the ideas together (Wilson, 2008)?

5. How I Organized My Findings

As I immersed myself in my thick green binder of over 500 printed pages of interview transcriptions, reading, coding, bookmarking, re-reading, summarizing, and analyzing I wondered, 'what story is the data is telling'? Since, as I have argued, a story is not something that is simply told, but is lived, I analyzed how the data *storied*, or came alive in relation to the narrative of settler colonialism in Canada, by following or opposing it. Of course, the narrative search was guided by my research questions (worth repeating, here):

1. What are the experiences of *Gladue* report writers and judges who use reports as part of decision-making at sentencing?
2. What narratives are created about Indigenous peoples, settler people, the settler state and colonialism during the researching, writing, and interpreting of *Gladue* reports?
3. How do experiences and narratives associated with *Gladue* reports follow (reify) or break from (resist) patterns of settler colonialism?

Over the next three chapters, I will share findings from interviewing nine *Gladue* report writers and twelve judges. The next chapter looks at participants' views about the purposes of

Gladue. The subsequent chapter, shares participants' perspectives about impediments to *Gladue*, and the third findings chapter is about participant's ideas for improvements to *Gladue*.

In an attempt to do justice to the story that is the exchange of a *Gladue* report, between a *Gladue* writer and a judge, I will be weaving the words of participants throughout each of the next three chapters. The names of participants are pseudonyms, to protect identities. *Gladue* reports are fertile with quotes. Writers use them often, because they want the judge to hear a person's story, in first person: "*We try and use a lot of direct quotes…you can quote people as you want [as a writer], but it's not your perspective. These reports are not expert reports. We are not, we're not diagnosing people. We're not reaching conclusions. We are telling a story*" (*Gladue* writer Shannon). Judges, in turn, like to see quotes in the reports because they value hearing directly from the person before the court: "*It's nice to hear somebody in their own words*" (Justice Stanik). Or as Justice Vorcek put it, "*A good report captures some quotes, a reflection on the person. That stays with you*". Furthermore, the way that I have structured my findings has a narrative flow. I want the reader to be able to hold onto the collective story, while examining distinct parts. A river is made of drops of water, but when looking at how a stream flows around a rock the viewer does not forget which way it flows. Put another way: rather than dividing themes into isolated parts, Shawn Wilson (2008) recommends that doing justice to Indigenous stories requires putting themes within relational webs: "…if you are breaking things down into their smallest pieces, you are destroying all of the relationships around it" (2008, p.119). In my analysis, I put findings into relational contexts. What relationships are holding the ideas together (Wilson, 2008)? I emphasize how hegemonic power influences *Gladue* story, shaping settler-Indigenous relationships in Canada.

Conclusion

In the above paragraphs, I have set the methodological stage for sharing my research about *Gladue*. Coming from the discipline of social work, I have used a critical, narrative inquiry to gather and analyze stories and experiences of judges and *Gladue* report writers about *Gladue* reports. I have justified my methodological framework and procedures. What matters most to me is the journey towards accountability, ensuring that I am conducting research in respectful, responsible ways, with reverence and reciprocity for Indigenous friends, colleagues, communities, and Nations. However, doing research is not without risks. I have given great care to the process, doing my utmost to honour participants and give the issue of *Gladue* the justice it deserves. In the pages that follow, I will share a *Gladue* story, what I found from interviewing judges and *Gladue* report writers.

Chapter 5: Research story one – Participants' views of *Gladue* work

Introduction

My research is concerned with the possibility that *Gladue* might perpetuate the hegemonic powers of settler colonialism, white supremacy, patriarchy, and neoliberalism in the *Gladue* process. *Gladue* is intended to remediate systemic anti-Indigenous racism by reducing Indigenous incarceration, yet Indigenous incarceration rates continue to rise precipitously. On the surface, *Gladue* does not appear to disrupt the hegemonic status quo. How is it that the Canadian state, even when 'remediating,' keeps producing the same – colonial, oppressive, and tyrannical – result? Over the next few chapters, I will explore responses and insights to my research questions by sharing and analyzing findings about participants' (a) views of *Gladue* work; (b) perspectives about impediments to the realization of *Gladue's* remedial aim; and (c) ideas for improving *Gladue*. In this chapter, I will start by sharing four key findings: first, that even with systemic aims, *Gladue* is highly individualistic; second, *Gladue* writers and judges had dichotomous views of the purposes of *Gladue* reports; third, Indigenous *Gladue* writers viewed *Gladue* as an opportunity for healing; and, fourth, participants spoke at length about the impacts of systemic racism and *Gladue*, but did not speak much about the gendered dynamics of the colonial legal system. In the final third of the chapter, I will discuss and analyze these findings in relation to the perpetuation of hegemonic structural violence.

Participants generally agreed on the rhetorical legal purposes of *Gladue* but diverged when it came to the essential functions of *Gladue* reports, or the implementation of *Gladue*. The conflicting nature of responses about *Gladue* reports, between *Gladue* writers and judges,

exposed a rift between the experiences and perspectives of the two participant groups. Viewed through the lenses of critical race theory and critical race feminism, the findings reveal a number of analytical points. First, *Gladue* is not Indigenous justice, but a continuation of settler colonial control of Indigenous peoples. Indigenous *Gladue* writers emphasized that *Gladue* does not call into question the legitimacy of the Canadian legal order over Indigenous peoples; neither does it afford decision-making space for Indigenous ways of justice. As such, *Gladue* contravenes settlers' legal commitments to the Two Row wampum treaty. Second, even with *Gladue*, sentencing tends towards the objectification and subjugation of Indigenous peoples, rather than promoting humanization and self-determination. *Gladue* is a form of racial governance that risks de-gendering Indigenous identity, at a time when incarceration rates for Indigenous women are outpacing all other genders. Further, judges explained that *Gladue* is primarily helpful for determining moral blameworthiness of the person to be sentenced. Responsibility is thus shifted onto the individual criminalized Indigenous person instead of the courts for systemic racism.

At best, my participants seemed to indicate that *Gladue* offers some individual hope; however, overall, there was agreement that it does little to change systemic, anti-Indigenous racism in the criminal legal system. At worst, then, *Gladue* is a rhetorical flourish, a claim to systemic change cloaked in a re-entrenchment of settler colonialism. The findings are consistent with the academic literature about colonial, criminal legal system reforms entrenching the status quo rather than creating liberatory ways forward (Alexander, 2012; Kaba, 2021; Razack, 2015).

Findings

In 1996, a section of the *Criminal Code*, 718.2(e), was enacted by the Canadian government in order to address over-use of incarceration as a sentencing practice, as well as the particularly disproportionate carceral sentencing of Indigenous peoples (Kaiser-Derrick, 2019; Murdocca, 2013). Section 718.2(e) requires judges to consider: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (*Criminal Code*). In a 1999 case, *R v Gladue*, the Supreme Court of Canada gave judicial interpretation and precedent to what Section 718.2(e) meant for sentencing Indigenous peoples (Murdocca, 2013). The judiciary is obligated, "to do what is within their power to reduce the over-incarceration of Aboriginal people and to seek reasonable alternatives for Aboriginal people who come before them" (Parkes et al., 2012, p.5). The case established what came to be known as the *Gladue* principles. Judges must sentence Indigenous peoples differently by accounting for: first, unique systemic (e.g., impacts of colonialism) and background factors (e.g., experiences of loss of identity and culture, poverty and unemployment, substance use, interpersonal violence, and so forth) to that Indigenous person; and second, a sentence that is appropriate to that person's Indigenous heritage (Kaiser-Derrick, 2019; *R v Gladue*, 1999). A 2012 Supreme Court of Canada decision, *R v Ipeelee*, reinforced the 1999 decision. In fact, the language of judicial notice shifted from "may," in *R v Gladue*, to "must," in *R v Ipeelee*: "When sentencing an Aboriginal offender, courts *must* take judicial notice of such matters as *the history of colonialism*" (*emphasis added*).

But, what of that judicial notice? Is *Gladue* addressing colonialism? By interviewing 9 *Gladue* writers and 12 judges I set out to get some answers to these questions. This chapter shares findings related to participants views of *Gladue* work. By '*Gladue* work,' I mean, how

Gladue reports are prepared and written by *Gladue* writers and how reports are read and interpreted by judges. Below, I have summarized in a table the key findings in themes and sub-themes.

1. **Gladue is highly individualistic.**

At the outset of interviews, I asked participants about the goals or purposes of *Gladue*. Overall, *Gladue* writers and judges did mostly agree upon the common policy and legal rationales for *Gladue*. Both participant groups highlighted that *Gladue* was trying to reduce incarceration of Indigenous peoples. For example, *Gladue* writer, Lori[11], said, "*[Gladue] really is about...Indigenous peoples] have the highest incarceration rate in Canada, we need to start bringing it down*". Writers, such as Sherri emphasized that *Gladue* exists because of systemic discrimination: "*718.2(e) directs the judge, the judges, to look at anything that's available besides incarceration. So, incarceration should be the last outcome for everyone. But then there's also, so they have to pay particular attention to the circumstances of Aboriginal offenders. And that's because of systemic discrimination*". Judges shared similar. Justice Haynes talked about the requirements of section 718.2(e) that judges "*take into account the unique aspects of Indigenous persons*" because of how colonialism has affected Indigenous families. Justice Vorcek argued that "*the purpose of Gladue…[is]…to address, through the criminal justice system, a lot of the systemic, racist impacts of colonization*". However, the collective sentiment of the participants was that these aims were only partially being accomplished,

[11] All the names of participants are pseudonyms. In order to protect the identities of research participants (*Gladue* writers and judges), I have created pseudonyms for each. I have used the pronoun "they" for all participants.

because (a) Gladue can only function one sentence at a time, and (b) participants were not seeing systemic changes.

(a) Gladue can only function one sentence at a time.

While it is significant that *Gladue* has systemic aims, operationally, it functions with one Indigenous person, one sentence, at a time: "Sentencing is an individual process and in each case the consideration must be what is a fit sentence for this accused for this offence in this community" (*R v Gladue*, 1999). My participants spoke often about the individualistic nature of sentencing. *Gladue* writers characterized it as "*colonial*". As Indigenous *Gladue* writer, Rebecca, said: "*sentencing is such an individualized, Eurocentric thing that they're focused on the one person in front of them and they know they have to take judicial notice of colonialism*". Thus, in order to realize the purposes of *Gladue* at sentencing, a judge needs to know something about how colonialism has impacted the *individual* criminalized Indigenous person before the court. In the words of researcher Elspeth Kaiser-Derrick (2019) a judge requires, "evidence about the criminalized Indigenous person's circumstances" (p.24). The individualistic nature of sentencing is why *Gladue* reports matter. *Gladue* writer, Shannon, said merely being Indigenous is insufficient: "*...you can't say in court…'Your Honour, my client's Indigenous. We know that Indigenous people have been treated badly, historically beyond badly, and therefore I want a difference sentence"*". Thus, the implementation of *Gladue* principles at sentencing is helped by *Gladue* reports (Rudin, 2019). *Gladue* reports are a tool for presenting *Gladue* information (e.g., systemic and background factors, along with recommendations for sentencing options specific to Indigenous heritage) to the court (Rudin, 2019). Jonathan Rudin (2019), who works with

Aboriginal Legal Services and is one of the architects of *Gladue* reports. He argues that the submission of a *Gladue* report allows "the court to craft a more responsive and thoughtful sentence that can best address the needs of the offender for healing and reintegration in to the community" (p.131). In *R v Ipeelee* (2012), Justice LeBel wrote:

> Counsel has a duty to bring individualized information before the court in every case, unless the offender expressly waives his [sic] right to have it considered. A Gladue report, which contains case-specific information is tailored to the specific circumstances of the Aboriginal offender. A *Gladue* report is an indispensable tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his [sic] duties under s.718.2(e) of the *Criminal Code*.

Gladue reports are intended to enable meaningful analysis at sentencing, sharing linkages between the individual, criminalized Indigenous person and that person's experiences of colonialism (Maurutto & Hannah-Moffat, 2016; Pfefferle, 2008; Rudin, 2019). Further, a *Gladue* report offers sentencing recommendations, intended to give a judge Indigenous-specific, restorative justice options. *Gladue* writer, Shannon, explained:

> *The purpose of the report is to answer the questions that we do ask, which is, 'what are the circumstances of the individual?', but also then 'what options, what sentencing options might exist?'. You can't get to the second part, unless you know the first part. So, the bulk of the report is the history and the life and the circumstances, so that when you get to the recommendations, [a judge will] understand why they're there*.

The *Gladue* report, by moving from the general to the particular, distills a systemic issue (e.g. colonialism) to be resolved in the life of one Indigenous person.

(b) Participants believed that *Gladue* was making individual, not systemic differences.

Gladue was often described to me as not necessarily changing the overall Indigenous incarceration rates; however, participants believed that incarceration rates would be worse

without it. In other words, participants thought that the policy and legal purposes of *Gladue* were being achieved, at least on an individual, or case-by-case basis. *Gladue* writers told me that they were seeing different sentences because of *Gladue* reports. They believed that it allowed for better use of judicial discretion and a more fulsome understanding of moral culpability. Judges agreed, claiming that Indigenous incarceration statistics do not tell the full story of *Gladue*, explaining that they were tailoring more appropriate dispositions and using incarceration less. Justice Gray called *Gladue* a form of "*harm reduction...[with] offenders being treated better*" because the "*sentencing process [is] a resource"* for diversion opportunities. Justice Horne claimed that Gladue, "*hasn't kept enough people out of jail, but…overall it has helped more people get access to what they need…[but,] we're not where we should be*". While descriptions about the stated policy and legal purposes and corresponding successes of *Gladue* were similar between the two participant groups, descriptions deviated when participants discussed the essential purposes and operationalization of *Gladue* reports.

2. Participant groups had dichotomous views about Gladue reports

Generally, *Gladue* writers claimed that reports are intended to "*humanize*," to save Indigenous peoples from the harms of the colonial carceral system. *Gladue* writers, as a whole, actually did not speak much to how *Gladue* is impacting sentencing, but more about how it is improving the lives of criminalized Indigenous peoples. A key insight from *Gladue* writers related to my questions about the purposes of their reports was that reports were less about rules, or the law, and more about healing and preserving life. Alternatively, judges characterized *Gladue* reports as material for "*crafting*" proportionate sentences. Not surprisingly, their

explanations of the purpose of *Gladue* reports belied an underlying duty to law. In other words, judges emphasized obligations to the rules, such as the *Criminal Code*, case law, and so on, when fashioning a sentence. Both groups wanted a reduction in incarceration, but the stated goals – how to get there – were fundamentally different, philosophically and pragmatically. Humanizing meant something different than crafting a sentence.

(a) *Gladue* writers: Reports as preserving life, through humanizing.

After hours of listening to Indigenous *Gladue* writers, it became clear to me that at the core, report writers wanted me to know that their work was primarily about humanizing a criminalized Indigenous person – a person who has spent their life being dehumanized by colonial systems. From talking about removing stereotypes (*Gladue* writer Jordin) to recalibrating how the court looks at Indigenous peoples (*Gladue* writer Shannon), to using reports to portray the full humanity of their clients (*Gladue* writer Rebecca), or trying to make an Indigenous person, a more "*full person…Both with the challenges they've faced, but also their gifts and their skills and their abilities*" (*Gladue* writer Shannon), *Gladue* report writers consistently shared their desire to use *Gladue* reports as a way to humanize their clients. *Gladue* writers claimed they are trying to convince a powerful judge ("*usually white*") that their client is human (enough) and impacted (enough) by colonial oppression to deserve a noncustodial sentence. *Gladue* writer, Jordin, summed it up: "*[Report writing] is attempting to make people human in front of a white privileged judge*". I sensed urgency, if not desperation (and exasperation), about how they spoke about humanizing. *Gladue* writer, Jordin, offered a consequential analogy: "*it tends to feel like…somebody who's drowning and is kind of reaching*

out and just like tugging on their hands…their arms are flailing…they know they need help…you're not necessarily yanking them out or anything, but just kind of giving them a firm grip onto for a minute until they catch their breath". Thus, *Gladue* report writing was seen as a way to preserve life or to 'throw a life preserver' (humanizing) to "*somebody who's drowning*" (dehumanized).

Gladue writers shared with me two aspects of humanizing: *storytelling* (interviewing and report writing) and bringing *understanding* to judges (so they can use *Gladue* reports to achieve better outcomes for Indigenous peoples). Humanizing was intended towards *righting* the wrongs of colonialism (using the *Gladue* process to give 'silenced' people a 'voice'). The first part of humanizing, according to *Gladue* writers, was telling an Indigenous person's story. During my research discussions, I usually probed *Gladue* writers about how they would start their interviews with clients. I thought that question might elucidate the core purposes of their work. *Gladue* writer Lori answered: "*[I say to the client] I am here to get your story…it's a story of your life. And we're telling it to a judge*". I received similar responses from most other *Gladue* writers. *Gladue* writer Jeremy said they tell clients that the report is "*an opportunity to tell your life story to the court*". *Gladue* writer Pauline characterized it as "*bring[ing] this person's story to life*". Although 'getting someone's story' might sound rather figurative, *Gladue* writers repeatedly conveyed the sacredness, the deep relational intimacy, of the story-gathering and storytelling process. There was a sense of honour with which it was described. I will write more on the topic of sacredness below.

Second, humanizing was explained as bringing understanding to judges about how the Indigenous person to be sentenced was impacted by colonialism. *Gladue* writer Shannon held that, "*the report is to clarify to the judges how that person was affected by systemic*

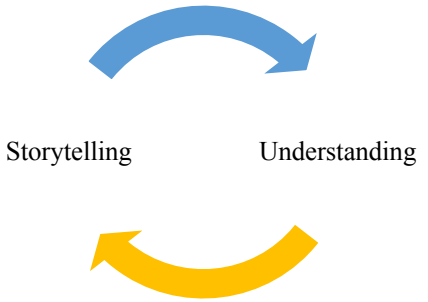
discrimination. How it affected [the person who the report is written about], their family". Indeed, I was told many times that *Gladue* reports contained in-depth narratives about the impacts of colonialism. Report writers described spending hours interviewing clients and, as much as possible, family and community members, putting an individual's story into the larger context of their family's and community's experiences. *Gladue* Writer Rebecca shared, "*Some of my most successful reports are when…It's about their family history and how like systemic factors and assimilation policies and government policies affected their family…it really shows how their family fell apart, like, the breakdown of that family's life, and which leads them into this situation they are in*". Hence, when I asked *Gladue* report writers what they were trying to convey in reports, most responded like *Gladue* writer Audrey: "*we're trying to show with telling those Gladue stories…that this person didn't become a stereotypical oppressed Indian through choice…Because what colonialism and the genocide of Indigenous peoples has done is not just have everybody else destroy Indigenous peoples. It taught them to destroy themselves, through that generational trauma*". *Gladue* writer Pauline offered: "*It's about the [criminalized Indigenous] person finally getting a say in what's happening to them. You know, finally having their voice heard and the voices of their families too. You know, and bringing, and through those voices, bringing understanding to the court about this individual*". Significantly, sharing someone's story seemed to be about "*mak[ing] that person more than the [criminal] charge…to make that person a person*" (*Gladue* writer Sherri). Writers said they wanted judges to understand their clients as people (not criminals) and therefore deserving of noncustodial sentences.

As *Gladue* writer Pauline indicated in the above quote, *Gladue* writers often correlated storytelling with "*voice*". Indeed, many described "*voice*" as the most compelling part of the report, as the way to bring understanding:

> Jude: *What do you think is the most compelling component of a Gladue report for a judge?*
>
> GW Shannon: *It is hearing the voices. Like, when we write a report they are hearing from not just the client, they're hearing from many people. They're hearing from grandmother. Those are voices they never hear. They don't hear those people. And we don't, this is why it's important for us to use quotes…But we don't edit the quotes. We don't take profanity out. Somebody swears, they swear. We don't fix the grammar. We don't change, you hear the voice as much as possible, the way we heard the voice. And that's something judges do not get*.

Voice was central to the interview conversations because Indigenous *Gladue* writers contrasted it with the deliberate silencing of Indigenous peoples by colonial systems, particularly the criminal legal system. They talked about the history of silencing in residential "schools" and the sixties and millennial child welfare scoops. They shared about the current silencing in the criminal legal system. *Gladue* writer Jordin exclaimed: "*This system [criminal legal system] has functioned the same way ever since contact, or ever since, you know, the system was developed, it's been where we have been powerless in the system, we have been the oppressed in the system we have been without voice in the system*". Jordin went on to explain that the obligation of *Gladue* writers is to "*carry*" someone's voice, their story, which is why *Gladue* writers said they prioritized quotes in Gladue reports.

Figure 5.1: Righting colonial wrongs through storytelling and understanding



Ultimately, it was having a voice that writers connected with righting wrongs. *Gladue* writer Lori summarized that: "*[Gladue] is, for an Indigenous person, an opportunity to right the wrongs of colonization. This is our opportunity to tell our story, so that the judges can understand what our people have been through. Because right now they don't understand…this is our opportunity to have a voice. We didn't have a voice before. We have a voice now to tell our story*". To *Gladue* writers, 'righting colonial wrongs' occurred when someone was provided the opportunity to share their story (*Gladue* report) and had that story understood by a judge (e.g., applying the recommendations in the report).

(b) Judges: Reports as more material (an object) for crafting sentences.

There was a discursive shift in the way judges talked about *Gladue* reports. The overall purpose of *Gladue* was explained as remedial: to reduce the incarceration rates of Indigenous peoples. However, Indigenous peoples' liberties, the notion of whether or not Indigenous people were deserving of noncustodial sanctions, came to be talked about as an object – a sentence to be "*crafted*". *Gladue* reports were spoken about as additional material for "*crafting*" sentences. Almost every judge used the word 'crafting' to allegorize sentencing. For example, Justice

Cleary talked about "*craft[ing] a sentence that is appropriate*". Justice Lefebvre said the purpose is to "*craft an alternative to incarceration*". "*Fashioning*" or "*tailoring*" were other terms used to explain sentencing (Justices Haynes, Horne, Lefebvre, & Vorcek). Justice Horne said that, "*I really do think [Gladue reports] have helped tailor appropriate* dispositions". Justice Vorcek stated that a *Gladue* report helps "*fashion a sentence that addresses…Indigenous heritage and ultimately reduces…incarceration*". Beyond the foundational information for the purpose of crafting, several judges described *Gladue* reports as a tool for assisting them in following a "*a different process*" (Justice Gray). One judge compared sentencing to twisting a kaleidoscope, a long black tube with mirrors and small coloured objects (tissue paper) into which one can peer inside to see bright, patterned colours when pointed towards a light source. Each twist of the tube created a new, brilliant configuration: "*[Gladue] provides a sentencing framework for me to consider when dealing with Indigenous people. And it's sort of like shifting the sentencing kaleidoscope…you know, those twisty telescopic kaleidoscopes, where you're looking at it one way and then you turn it and you get a different viewpoint. And for me, that's what Gladue is*" (Justice Horne). To Justice Horne, the *Gladue* report added another colour. In essence, whether an object to be crafted or a kaleidoscope to be twisted, I came to understand that judges viewed an Indigenous person's *story* (i.e., a *Gladue* report), as adding *material* to the design of the sentencing *object*, in order to achieve the purpose of *Gladue*. *Gladue* reports are, at maximum, expanding the sentencing framework, or at minimum, but one object in an arrangement of sentencing objects. Remarkably, the use of the crafting metaphor by judges mimicked how the term was employed in *R v Gladue* (1999). In one instance, the decision states that *Gladue* gives judges more power for crafting sentences: "Through its reform of the purpose of sentencing in s.718, and through its specific directive to judges who sentence aboriginal [sic] offenders,

Parliament has, more than ever before, *empowered sentencing judges to craft sentences* in a manner which is meaningful to aboriginal [sic] peoples" (*R v Gladue*, 1999; *emphasis added*). When interviewing judges, I wondered how all the pieces fit together to make a sentencing object that amalgamated other purposes and principles of sentencing with judicial notice to *Gladue*.

In fact, judges seemed to experience difficulty in talking to me about *Gladue* reports without getting into the fundamental purposes and principles of sentencing. Even the one Indigenous judge in my study, when I pressed about 'how is it possible for any judge to sentence any Indigenous person to jail given Canada's treatment of Indigenous peoples,' responded by saying, "*Well, definitely the judge who's sentencing any offender before [the court] has to follow the law. Like we can't just make up some creative sentence and do what we want. There is, [laughs], there's a lot of discretion, but there's also a lot of rules that we have to follow*". I probed most judges about those rules with the question: what else did the law require them to consider? Justice Whilton explained:

> *Well, I mean, there's, there's a number of sentencing principles in the code that the judge has to consider. There's rehabilitation. There is reparation of harm to victims. There's denunciation and deterrence. There's considering all other sanctions other than imprisonment. Acknowledgment of responsibility in the offender. And you have to understand that when you sentence an individual who comes before you, the judge has to consider two things. The first thing the judge looks at, is the offender and how it is they came before you. What is it about them that brought them to this moment where they committed this crime? You also have to consider the crime.*

Effectively, Justice Whilton had articulated, in his own words, a part of Section 718 of the *Criminal Code*, which reads as follows:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and maintenance of a just, peaceful and safe society by imposing 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 offenders, and acknowledgement of the harm done to victims and the community…

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other judges, too, talked about these objectives, asserting that *Gladue* fit well with two of the objectives of sentencing: "rehabilitating offenders" and promoting a "sense of responsibility in offenders". Judges were rather dismissive of deterrence (e.g., that it did not hold much weight because judges viewed it as an ineffective principle). However, the other objectives, from denunciation to incapacitation, were often regarded as interrupting the prospects of a noncustodial sentence, especially when a crime was considered serious and/or a victim, vulnerable. I will return more to these aspects (seriousness and vulnerability) in the next chapter.

When I asked judges what made for a 'good' or compelling *Gladue* report, they identified two factors: first, a good report was one that helped them consider the level of moral blameworthiness of the person, by clearly demonstrating how that person had been expressly impacted by colonialism; second, judges claimed that reports with reasonable recommendations were 'good'. First, with regards blameworthiness, judges clearly regarded those impacted by colonialism as less blameworthy. They stressed that *Gladue* reports expanded their lens to see responsibility in a different light, claiming to use *Gladue* reports to assess "the degree of responsibility of the offender," or the moral blameworthiness of the criminalized Indigenous person. Justice Stanik shared with me that: "*[Gladue reports] can, in some circumstances, help a judge to understand that this person's actions should be seen in a different light, perhaps not as morally blameworthy*". Further, they went on to say that *Gladue* reports are a mitigating factor,

or a way to potentially reduce sentencing length, "*So, when somebody's got those sorts of difficulties in their background…that arises out of intergenerational trauma…that's deserving of real weight in sentencing, as a mitigating factor*". In order to know this, judges suggested they were interested in "*the story*" of the person before them. Justice Haynes described it as follows: "*Every person has their story. They do, and it's up to us to try and understand that story, because the individual story should shape what we do, when we're looking at sentencing…It's the offender's life story. It's the offender's family story and it's the offender's community story".* Justice Stanik explained: "*What makes a good report is something that really gets at the story of the person before the court, educates me about the history and current circumstances of the Indigenous community, and connects that history to this person*". Justice Whilton agreed:

> *So, um, that reports always tell us, as well, gives us that contextual history to help us to have more insight, and I'm not saying pity, you know, this isn't an 'I feel sorry for you,' pity. But, to have insight with respect to the moral blameworthiness of an individual that plays directly into one of the sentencing factors that we consider. That impacts the length of sentence; that impacts, whether we incarcerate a person at all. Okay. So, that's the other piece, is very, it's very profoundly impactful on our assessment of the moral blameworthiness of an individual, because if you've had all of these factors into where you are today that puts you in this spot. Really, and in some way that is connected to your, to the criminality. You've been sexually abused. You've been physically abused. You've been raised in a pattern of domestic violence then, you know, and you now abuse your child. We understand then, but, that that some of those things impact your moral blameworthiness and the assessment of whether a rehabilitative focus is justified, right.*

Pointedly, judges claimed to be more interested in hearing specifics and less interested in general information about colonialism. For instance, Justice Miles talked about a 'good' *Gladue* report as one that, "*…gives a full picture of the individual, but also goes back in a generational sense to describe what happened to the family. Those ones are terrific. The colonial aspect to it, after you've read a few, you know, a half dozen or a dozen of those reports…your mind has been alerted to that problem*". The term "*boiler plate*" (Justice Horne) was used to describe things like the "*history of colonialism and general background in general of Canadian history, the effects of*

colonialism, the effects of residential schools" (Justice Lefebvre). A few judges said that once they had read a few reports, they would often skim the elements about residential schools and sixties scoops, not because it was irrelevant, but because they already knew the general history. One judge even suggested the need for a general library for each Indigenous community that catalogued general impacts of colonialism for each Indigenous Nation, so reports could focus more on the individual and family.

Another element that made reports compelling to judges was the quality of the recommendations. Judges told me that once a determination was made that a noncustodial sentence was an option in a case, they would want to know what recommendations were contained in the report and whether these were realistic. 'Good' recommendations were said to be ones that gave a sense of: (a) availability of restorative justice or alternatives to incarceration; (b) a clear plan with motivation for follow through by the criminalized Indigenous person; and (c) specific to the person to be sentenced. Justice Whilton articulated the value of recommendations:

> *So [the Gladue report] gives me, it gives me community-based alternatives, always. It always gives me a foundation of some kind, to consider as an alternative to incarceration. And it gives me, and it gives me some insight about the level of motivation and commitment of the person to a plan. It gives me a sense of how detailed and how realistic the plan is. And you know there are some cases where I'm going to have to sentence a person to jail, no matter what. But it can also give me some insight as to whether I can sentence a person instead of to the penitentiary to a provincial institution…or like something that is more tailored to the needs of an individual and that can be tied to a plan.*

Justice Cleary emphasized the importance of the specificity of recommendations: *"There's also the part where there's like recommendations so that, for example, depending on the specific issues the person has been dealing or struggling with, and you have a little bit more specific ideas from someone who knows better than me what, what are the services available*". Justice

Lefebvre said something similar: "*So a compelling report is, what are the specifics, what are the recommendations and, you know, where did this person come from, can that help explain the problems, and how can that help me craft a solution that's what it comes to? What is the appropriate sentence for it for that particular individual*"? Overall, judges claimed to be keen to at least try recommendations: "*…it's worth it to try and with every person. And to the extent that there is motivation, to the extent that there is something that can be done in a more meaningful way, it's worth doing"* (Justice Whilton).

In summary, while Indigenous *Gladue* writers were attempting to humanize – to preserve the lives of – their clients through *Gladue* reports, judges used reports as material for crafting sentences, with particular attention to the impacts of colonialism as a way to reduce moral blameworthiness.

3. *Gladue* reports create a possibility for Indigenous healing.

When asked about the impacts of *Gladue*, writers would sometimes share about positive sentencing outcomes; however, the more common responses were how the *Gladue* report writing process helped Indigenous peoples reconnect with spirit, families, communities, cultures, and creation. The process was described to me as a healing one, a way for criminalized Indigenous peoples to heal from the harms of colonialism. Writers shared that clients were usually disconnected, due to colonialism, from important aspects of identity and belonging. *Gladue* writer Rick said: "*When I interview, talking to some pretty intense people. They're just, they're just mad. And we don't know why. And they cry, 'I don't know why I keep doing the things I do'. And the reason for that is because there's no culture. The culture is not there. They don't know*

what the seven grandfathers are. They don't practice them, daily smudging, or know what the medicines are about". *Gladue* report writing was said to create a healing space whereby clients often heard for the first time, as *Gladue* writer Lori stated, "*parents' [and] grandparents' stories, as well as start[ed] to understand how they [had] been a product of colonization and historical trauma*". *Gladue* writer Rebecca said, "*I really love it when I'm able to get enough information to make those connections, because that, in my opinion, is what the Gladue report is for*". *Gladue* writer Lori shared that *Gladue* work is "*having people reconnect, reconnect to their spirit, reconnect to creation, reconnect to their culture that has been lost*". Lori went on to say that "*It's important that we use our, our medicines and our culture to reconnect people…When they hear the stories and feel and know what their parents went through, they break down crying. Now they get it*". Some judges seemed to notice the healing aspect of *Gladue* report writing. Justice Whilton said that it "*starts a process of healing…starts a process of communication*" with the person before the court and their family and community. *Gladue* writers indicated that not all reports received favourable sentencing outcomes; yet, in spite of that, writers shared that they wanted all reports to at least offer some measure of healing for their clients. To this end, *Gladue* writers spoke extensively about the importance of (a) Indigeneity in report writing; (b) the sacredness of interviewing clients and report writing.

(a) Indigeneity matters to *Gladue* report writing.

Gladue writers suggested to me that the best report writers were Indigenous, because Indigenous writers knew how to be with Indigenous clients in sacred, traditional ways. Even the one writer who did not identify as Indigenous, suggested that Indigenous peoples were better

suited to be *Gladue* writers. Indigenous people were portrayed as more understanding of the circumstances of criminalized Indigenous people than settlers. That mattered to *Gladue* writers because shared identities and experiences were said to create better interviewing relationships and, therefore, better reports (*Gladue* writers Shannon, Jeremy, Audrey, & Lori). Indigenous *Gladue* writer, Lori, laughed in disgust when sharing a story about meeting some non-Indigenous *Gladue* writers at a conference, who seemed to treat *Gladue* writing as a sort of pre-sentence report to be completed by template. Lori exclaimed, "w*e're not a template!*"; instead, Lori argued that experiences resulting from shared or similar Indigenous ancestry were central to the understanding that is necessary to write a *Gladue* report:

> *As much as people feel they have compassion and empathy and [are] unbiased and can write these reports and they're non-Indigenous…I'm going to be honest with you, I feel they need to be Indigenous to have some understanding, because it's just as, you know, I've seen the reports, written by lawyers, I've seen reports, written by you know, a worker in a social agency, it's not the same. And they don't get the same rapport and trust from the person. When you can sit down with a person and say, 'oh yeah I remember that'…and they talk about, you know, living like you, you can identify with the parent, the grandparents, the client. It really brings home, you know, they know, they know you've got it. It's not just going, 'Yeah, I understand'. You don't understand if you're not Indigenous. You can't.*

Gladue writer, Audrey, concurred, suggesting that Indigeneity mattered because Indigenous peoples have "*the right type of understanding*" for doing *Gladue* report writing. To Audrey that meant a "*sacred way of being in…somebody's story*":

> *I understand that there are allies who are very well-informed, who are qualified in education and understanding, to be able to take the course in Gladue and understand the importance of a Gladue story. But I do agree that it is better held by Indigenous peoples just for the fact that it's such an honour, and it's such a sacred, sacred dance, the sacred way of being in…somebody's story and to be able to tell that story in a respectful, traditional way that helps a person to heal, while approaching the reduction of Indigenous peoples in the justice system and in jails. So, it's… really [a] delicate balance between telling a person's story to help them heal and telling the story so that the courts understand the trauma and the systematic racism and oppression and genocide…these individuals have gone through because of the colonization of Indigenous people. So, it's a very, very delicate balance that I think takes the right type of understanding. And it*

> *seems that there are more Indigenous people who take that understanding a little more seriously due to the Seven Grandfather teachings and the way our culture and our spirit hold the importance of these stories and the understanding of these stories.*

Even well-informed, qualified allies were viewed as less capable, for report writing, than an Indigenous person. Allies would not have the right teachings or cultural understandings. Indigenous peoples could engage in a sacred process to get the best story for a *Gladue* report: one that helped a person heal and, at the same time, assisted the court to understand.

(b) The "best story" comes from the heart, realized through a sacred process.

Indigenous *Gladue* writers shared that the sacredness of *Gladue* interviewing meant using traditional methods, such as teachings, ceremonies, and medicines. A number of writers discussed that they drummed with clients. I was told that drumming connected clients to their hearts and Mother Earth. Others would smudge with clients. The use of ceremonies and medicines were described by *Gladue* writer Pauline as a "*sacred way*" of being, in order to not add further harm to the writer or the client and so "*it doesn't give [the client] a bad sentence*". *Gladue* writer Lori spoke about wanting to create the "*best story*" by getting clients to speak "*from their heart*," because "*that's what changes a judge's mind*". When Lori shared this, I probed further because I was curious, pragmatically, about what would make a "*best story*" for changing judges' minds. Our exchange was evocative, because it exposed that I might be asking a different (colonial-minded) question than Lori wanted me to ask:

> Jude: *Okay. Yeah. Tell me more about that, then, like, what influence do you think Gladue reports have on judges and…?*
>
> GW Lori: *So, as I believe how they're written. I mean, I have a very high success rate. I don't think there's been a Gladue that hasn't had an impact…I put a lot of work into*

> *these. And I see, and why I do is because I see the difference…Yes, so I think it's how it's written.*

What became clearer was that Indigenous *Gladue* writers wanted me to know that *how* report writing happened would shape *what* went into a report. *Gladue* writers talked about building relationships with clients founded on sacredness, trust, and integrity in order to get the best story. Trust and integrity also supposedly translated into believable reports for judges. *Gladue* writer Shannon said:

> *Integrity is a good word because that's the only that that gives these reports any weight, is that the person who reads them believes that the person who wrote them is being, is a person of integrity, and what they're getting is a real picture…I know that our reports are well received, because…the judge knows that it's coming from someone who has done the best they can and has presented information as clearly and fairly as possible.*

Inevitably, of course, we did talk about what goes into a report, such as systemic and background factors, information from family members, and as much as possible direct quotes, or the voices of family members and the person being interviewed, but the 'best' story of those details, the one more likely to bring understanding to a judge, happened in the context of sacred, relational inquiry, and story-gathering. *Gladue* writers told me they try to uphold the sacredness of a person's story by using as many direct quotes as possible in the reports, so that the client's voice is heard by the courts: "*We try and use a lot of direct quotes…These reports are not expert reports. We are not, we're not diagnosing people. We're not reaching conclusions. We are telling a story*" (*Gladue* writer, Shannon). Ultimately, though, it was impressed upon me that this deep process, embedded in relationship and immersed in sacredness, mattered most for the implementation of *Gladue* reports. The best story was a sacred story that came alive through ceremony, ritual, and medicine.

4. Participants did not say much about the gendered dynamics of *Gladue*.

In each of the interviews with *Gladue* report writers, not always right away, Indigenous writers (n=8) shared with me aspects of their Indigeneity and sometimes cultural or linguistic heritages (e.g. Anishinaabe, Haudenosaunee, etc), or First Nations status. Some shared with me experiences of the impacts of colonialism, family members who had been forced to attend residential "schools," or how they had been impacted by intergenerational traumas. But only a few spoke about their gender. Comparably, only a few judges talked about racial self-identities and two discussed their gender. What became clear, is that my research conversations had created opportunities to talk about race, but *not* sufficiently about gender.

Yet, *Gladue* is an Indigenous woman. Jamie Tanis Gladue, the "*Gladue*" in '*R v Gladue*' and '*Gladue* reports' is an Indigenous woman. She was 19-years old when she killed her common law husband (*R v Gladue*, 1999). The court defined it as an act of manslaughter, based on a quarrel about a possible affair; however, as Carmela Murdocca (2013) has documented, Gladue's partner had a history of criminal convictions for assault against her. The well-known supreme court decision was about *her*. Nonetheless, gender rarely came up in my interviews. The best way I can endeavour to represent the absence of gender in the data is by comparing it to the presence of other themes. Narrative research is as interested in the stories that are told in interviews, as well as those that are not (Clandinin, 2013). When I searched the 172,747 words in all 21 transcripts, the word "*women*" appeared 13x ("*men*" 7x), the word "*woman*" only 11x ("*man*" 9x), and the term "*gender*" showed up twice. By comparison "white" (in reference to race) was spoken 74x and the word "*Indigenous*" 461x. In the chart below, I compare gendered terms to other words to demonstrate how gender was absent. I selected the comparators based on

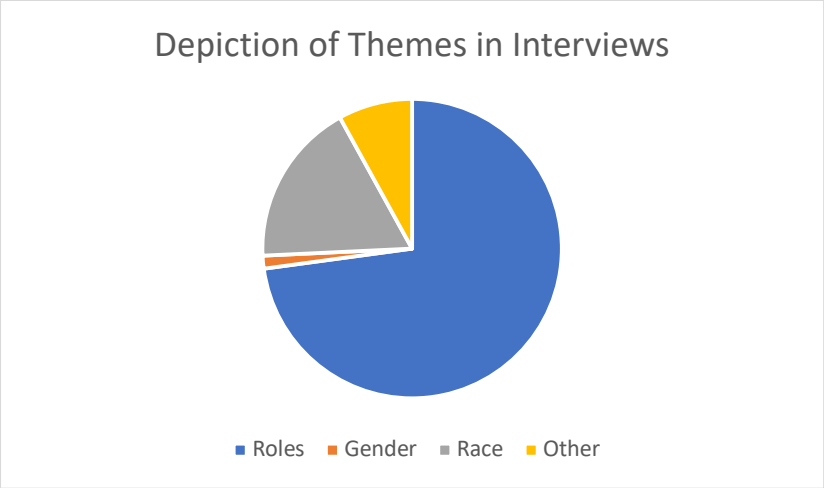
other significant identity markers (e.g. race), roles (e.g. judge), and themes (e.g. related to a critical examination of *Gladue*) that one would expect to show up in discussions about *Gladue*.

Figure 5.2: Chart of themes and key words

Theme	Word	Count
Roles	*Gladue*	1,012
	Writer	296
	Report	882
	Judge	529
Gender	Women	13
	Woman	11
	Female	6
	Men	7
	Man	9
	Male	3
	Two-Spirit	1
	Gender	2
Race	White	74
	Indigenous	461
	Aboriginal	127
Other	Settler	14
	Colonial(ism)	100
	Money	24
	Resources	86
	Land	69
	Property	6
Total	All words	172,747

While word counts do not fully represent ways that themes were discussed, they do represent specifics of what was discussed. The thematic comparison is important because it is indicative of vastly disparate totals – of time spent on certain topics over others.

Figure 5.3: Depiction of themes in interviews



As I reflect on my role as a researcher, I made a deliberate decision *not* to ask participants about their genders or other identity constructs. I was curious to hear what they would bring up about identity. One of the main premises of narrative inquiry is that stories represent and constitute who we are (Brown & Augusta-Scott, 2007); therefore, by relating to others through (research) stories, we learn something about how participants' view their identities (Shaw, 2017). In my field notes, after finishing about half of the interviews, I did question my approach of not asking more specifically about gender. I started to wonder whether it was a failure on my part that I should have asked more about Indigenous women specifically (e.g., my own patriarchal socialization making me dismissive of the centrality of the topic of gender). In reviewing a draft of this chapter, my supervisor, Dr. Shoshana Pollack, reminded me that when people are talking to male researchers and gender is not a topic, it rarely gets discussed unless the male researcher mentions it. Thus, as I thought reflexively about my involvement in the research data, my role in shaping conversations as an interviewer, I realized that I participated in silencing the experiences of Indigenous women, girls, and 2SLGBTQQIA folx.

The topic of mass incarceration of Indigenous peoples *should* be intersectional, with a special emphasis on gender. I even wrote about the work of Angela Davis (2003) and Julia Sudbury (2004) that both argue that carceral punishment has a deeply gendered character that is permeable beyond prison walls to how nonmale genders are generally treated in society. If I were to conduct the research again, I would have designed some questions or probes about gendered aspects of colonialism, *Gladue* report writing, and sentencing. If gender had mattered in the same way as race, participants would likely have spoken about it when discussing the purposes of *Gladue*. In other words, if 21 research interviews about *Gladue* did not bring up the particularity of gendered oppression in the criminal legal system against Indigenous women, girls, and 2SLGBTQQIA people, then it seems safe to argue that *Gladue* reports risk de-gendering Indigenous peoples. The irony is that, in the interviews, we did mention Jamie Tanis Gladue's last name over 1,000 times.

As a caveat, it is worth noting that when asked about the purpose of *Gladue*, the judge who identified as Indigenous did bring up gender in relation to ameliorating overincarceration of Indigenous peoples:

> *But it's really shocking some of those statistics like page 224 of that [TRC] report. It's talking about Indigenous females. So young offenders make up forty nine percent of the in-custody population. So, when a person under the age of 18 is going to be incarcerated as a female youth, forty nine percent are Indigenous girls. I mean, that's an alarming statistic when you consider that Indigenous people think at this point make four or five percent of the population of Canada, but almost half of one population of inmates. So, one of the purposes of would Gladue is to draw attention to sentencing judges. That they really need to take a strong, hard look at ameliorating the problem of overincarceration of Indigenous offenders.*

Notably, the same judge also argued that the court was fairly useless for resolving the issue of systemic racism in the legal system, or the basic task of *Gladue*: "*If you're looking to the court system to solve this problem, that's never going to happen. When, when people ask me about*

court, I always say, 'if you were a brain surgeon and you used a sledgehammer and a chisel to do your brain surgery, that's about how good the court is at solving issues". The metaphor came up after a long explanation by the judge about systemic and background factors that lead to the criminalization of Indigenous peoples, from unemployment to poverty, addictions to overpolicing, residential schools to colonialism. But, apart from the one judge, participants did not speak about the specific concerns of Indigenous women in relation to Gladue.

Figure 5.4: Table of themes and sub-themes: Participants' views of Gladue work

Finding 1: Even with a systemic aim, *Gladue* is highly individualistic.	
(a) *Gladue* can only function one sentence at a time.	(b) *Gladue* is making a difference in some individual instances, but not so systemically.
Finding 2: Participant groups had dichotomous views of the purposes of *Gladue* reports.	
(a) *Gladue* writers: Reports as preserving life through humanizing.	(b) Judges: Reports as material for crafting sentences.
Finding 3: Indigenous *Gladue* writers viewed Gladue reports as an opportunity for healing.	
(a) Indigeneity mattered for report writing.	(b) The best *Gladue* report story was a sacred story, achieved through ceremony and other traditional means.
Finding 4: Participants did not share much, if at all, about the gendered dynamics of sentencing Indigenous peoples.	

Discussion & Analysis

The findings reveal two significant discussion points for analysis: first, *Gladue* is not a form of Indigenous justice; it sustains colonial, legal control, contravening the Two Row Wampum treaty obligations of settlers, by relegating Indigenous notions of justice as intangible outcomes; second, even with the presence of *Gladue*, the structure of colonial sentencing still tends towards objectification, including patriarchal dominance, rather than humanization of Indigenous peoples, disguising the need for systemic colonial accountability, by shifting the full weight of law onto the individual, criminalized person.

1. *Gladue* is *not* a form of Indigenous justice: "This system has functioned the same way ever since contact…[Indigenous peoples] have been powerless in the system"

Gladue exists because of unequal, colonial, harmful, power relations, but my data indicate that, even while claiming remediation of systemic harms, *Gladue* sustains rather than disrupts these power relations. Where I live and work, and where most of the people I interviewed work, the Two Row Wampum treaty is supposed to be in force. The legally binding principle of the treaty is that Indigenous peoples and settlers "are to be considered separate but equal in status, never interfering in each other's social or political affairs," but share land and resources in peace, friendship, and harmony (Monture, 2014, p.14). The Two Row Wampum was affirmed by the Silver Covenant Chain treaty, reinforcing the separate but equal relationship between settlers and the Haudenosaunee (Monture, 2014). Haudenosaunee citizen, Susan M. Hill, writes in *The Clay We are Made Of* that the Silver Covenant Chain recognizes the distinct, self-determining status of each group: "neither becoming subject to the other," as the heart of the relationship between the nations (Hill, 2017, p.95). Both of these treaties matter for my research. The way that settlers (Canada) have broken these treaties is evident in *Gladue.* As Opaskwayk

Cree Nation member, John Hansen (2012), writes, "[t]he downfall of Indigenous people in Canada and many other colonial countries is their alienation from their original justice systems" (p.1). Patricia Monture (1995) writes, "to have justice, means to be in control of one's life and relations" (p.228). Indigenous nations never agreed to the dominion of Canada, neither have they surrendered their rights to self-determination, including having their own systems of justice. Section 718.2(*e*) empowers a judge to consider alternatives to incarceration for Indigenous peoples, but continues to make Indigenous peoples subject to colonial justice. *Gladue* offers some space for healing and decarceration; however, the colonial justice system, even with *Gladue*, continues to alienate Indigenous peoples from self-determined forms of justice and control of outcomes at sentencing. *Gladue* represents a continued breach of the Two Row Wampum and Silver Covenant Chain treaties, a continuation of unequal power relations. The unequal power differential – colonial over Indigenous – can be seen in (a) how Indigenous notions of justice (e.g., justice as healing) are relegated, an intangible part of *Gladue* report writing, but not central to the process; (b) Indigenous resistance to (continued) dehumanization; and (c) how *Gladue* performs a politics of recognition, but reproduces colonial configurations.

(a) Indigenous notions of justice continue to be relegated within *Gladue*.

My initial assumption after reviewing the research data was not as forceful as the preceding paragraph. I had previously assumed that much of the tension that I was hearing between Indigenous *Gladue* writers and colonial judges about the purposes of *Gladue* reports, could be distilled down to a clash of worldviews about what constitutes justice. After several of the interviews, I wrote in my field notes, "What *is* justice"? Indigenous participants were

articulating a form of justice different from the one they claimed to be experiencing in the courts. While *Gladue* writers and judges identified similar aims (e.g., the rhetorical legal purpose to reduce Indigenous incarceration), Indigenous *Gladue* writers appeared to posit a healing form of justice for *Gladue*. Healing supposedly happened through the traditional, sacred story-gathering process of *Gladue* report writing. Healing to *Gladue* writers, was using *Gladue* reports as a life-preserver, to rehumanize Indigenous peoples. Not surprisingly, judges' responses about the purposes of *Gladue* reports were anchored in their legal obligations to the principles and purposes of sentencing. This obligation to law correlated with judges talking about sentencing as a craft; or, in other words, using the life story of an Indigenous person as material for the application of sanctions. It is not an oversimplification to compare the two worldviews by stating that *Gladue* writers (Indigenous justice) articulated an obligation to (Indigenous) people, whereas judges (colonial justice) talked about being beholden to (*Criminal Code*) statutes.

It is pertinent, before going further, to make a comment about my positionality as a researcher. Some of my biases came through in the interviews. My own understanding of justice has been shaped by working as a white, settler in the criminal legal system, particularly in prisons. Over time, I have become an abolitionist and thus oppose much of the so-called justice system. As well, it is not new to me that many Indigenous peoples consider justice to be about healing. However, having grown up in a society that upholds colonial systems, I have absorbed some colonial mindsets, such as colonial concepts of justice as a linear process, a step-by-step – outcome-oriented – response to harm, rather than as a way of being and living together that brings about healing. Even though interviews were semi-structured, and I was fairly comfortable following the conversational direction of participants, I had some moments where I struggled to shift away from the template of my interview guide or, in essence, my own colonial mindset. For

example, I wanted to keep pressing interviewees on 'what' was in a *Gladue* report, instead of considering 'how' a *Gladue* report is done. When I (re)listened to the transcripts, I do not think, during interviews, that I always understood the distinction that *Gladue* writers were making between 'what' and 'how'. When I would probe about what went into a *Gladue* report, *Gladue* writers would respond by talking about *how* they did the work – the sacredness of *Gladue* work, the value of Indigenous story-work, and the duality of the role, one part for the courts, the other for Indigenous peoples. After I interviewed Pauline, they emailed, recommending the book *Justice as healing: Indigenous ways*, edited by Wanda D. McCaslin (2005). Pauline seemed to pick up on my colonial-brain-blockage, suggesting that by reading the book, I would understand better that *Gladue* is a healing journey. Other Indigenous research participants, too, seemed to be nudging me towards a better understanding of holistic ways of doing justice.

The idea of 'justice as healing' is common in many Indigenous traditions (McClasin, 2005). For many Indigenous peoples, 'justice as healing' is primarily understood as a way of life, of being in good relations, something beyond only a response to harm (McClasin, 2005). Mohawk lawyer, Michael Cousins (2005), writes about Haudenosaunee justice as a way of living natural law. Haudenosaunee justice is holistic, contextual, and cyclical, and follows the Great Law of Peace (Cousins, 2005). As a result, Cousins suggests that individual rights are diminished in favour of duties and responsibilities to others: "people learned that the welfare and interests of society as a whole are of paramount importance. This priority, in turn, leads the members of Haudenosaunee society to develop relationships based on equality, respect, and regard" (2005, p.146). To Cree lawyer and artist, Gloria Lee (2005), healing justice means restoring balance in the physical, emotional, spiritual, and mental elements of people. Throughout the book, it is asserted that 'justice as healing' means achieving balance and harmony, by "being a good

relative" (Youngblood Henderson & McClasin, 2005, p.7). The "backbone" of living justice is a way of connectedness with others and creation (Youngblood Henderson & McCaslin, 2005, p.7). Even when responding to harm, Navajo Chief Justice Robert Yazzie (2005) writes that to his people, the terms 'justice' and 'healing' are synonymous. To the Navajo, healing involves prayer, expressing feelings, teachings, and so on, all leading towards consensus about what needs to happen after harm has occurred. Yazzie states, "Consensus is what makes our justice…a healing process. Navajos believe in a greater degree of equality than you will find in Canadian and American law. What does it mean when people are equal? Navajos believe it is wrong to use coercion, so the legal process requires consensus among equals" (2005, p.128).

What *Gladue* writers shared makes more sense (to me) when viewed through a 'justice as healing' perspective. *Gladue* writers used language such as "*being in someone's story*" to talk about their work. To writers, that was not a metaphor. Report writing was instead described as making someone human through the sacred intimacy of journeying with clients in a traditional way. The colonial system dehumanizes and destroys life. The *Gladue* process is an opportunity to rehumanize and reinvigorate an Indigenous person's life. Reading the book recommended by Pauline opened my eyes more to why writers were telling me that Gladue reports are about bringing someone's story to life. In some ways 'story' and 'life' are interchangeable. By "*being in*" and "*carrying*" a story, *Gladue* writers were really talking about bringing someone back to life. The *Gladue* story (i.e., report) makes present an Indigenous person's sacredness as a person.

Further, without Indigenous peoples doing the writing of *Gladue* reports, the elements of healing would be missing from the *Gladue* process. *Gladue* writers were steadfast that their role should be held by an Indigenous person. Murdocca's (2021) research with criminalized Indigenous people who had experienced *Gladue* reports confirms this: Indigeneity is important to

clients. Moreover, participants in Murdocca's (2021) study found the support they received from *Gladue* report writers to be *the* most important part of the process. Indigenous peoples were thought to be those who could be in right relationships with Indigenous clients and, therefore, get the "*best stories*". When Audrey talked about the importance of Indigeneity, writers being able to have "*the right type of understanding*," they seemed to be communicating about Indigeneity, sacredness, and healing. Indigenous writers could "*be in*" someone's story, to fully honour the person, in a way that colonizers could not. The Indigeneity of the writer brought shared experiences and opportunities for reconnection to family, community, culture. James Sa'ke'j Youngblood Henderson and Wanda D. McCaslin (2005) articulate why a healing vision of justice, grounded in Indigeneity, is vital to Indigenous peoples:

> We feel it is important that our visions of justice as healing be founded on our knowledge and language – rooted in our experiences and feelings of our knowledge, jurisprudence, and language – as well as founded on our experiences and feelings of wrongs and indignation. These emotions cannot be avoided in creating our vision of justice…We cannot simply borrow the Eurocentric versions…They have never known who we are. (p.6)

Through traditional Indigenous ways of being, whether through teachings, ceremonies, or medicines, Indigenous writers brought a story – an Indigenous person – to life. However, the colonial system continues to relegate healing to a byproduct of *Gladue*, as judges are interested in the stories only in as much as it is information for sentencing.

(b) Indigenous resistance to (continued) dehumanization.

The attempt by Indigenous *Gladue* writers to use *Gladue* for healing purposes, revealed a struggle for power, a way for Indigenous peoples to stand against colonial domination. The idea

of using *Gladue* reports to resist dehumanization was not only about telling stories of the historical impacts of colonialism, but also that *Gladue* writers wanting to find a healing pathway with clients through present-day, oppressive experiences of colonial courts. The idea of Indigenous resistance came through in how often Indigenous *Gladue* writers emphasized 'voice' as the most compelling part of *Gladue* reports. *Gladue* writer Lori said, "*We didn't have a voice before. We have a voice now to tell our story*". *Gladue* writer Shannon said that Indigenous voices are being heard in a way "*that they never hear*". So, *Gladue* seemed to create a space for resistance. However, several writers stated that the system was still oppressive. Jordin, for example, said that the criminal legal system has always created powerlessness for Indigenous peoples: "*This system has functioned the same way ever since contact…[Indigenous peoples] have been powerless in the system*". Anishinaabe Professor, Kathleen E. Absolon (2011) writes that resistance is a core part of Indigeneity: "Resistance is a subtext to the journey: resistance to being silenced and rendered invisible, insignificant, uncivilized, inhuman, non-existent and inconsequential" (p.91). The struggle for voice could be characterized as one that is about agency, self-determination, or control of what constitutes justice. By doing work in a sacred way, Indigenous writers were resisting the objectification of a colonial process.

But, just as 'voice' entered the *Gladue* process, it was often squashed in favour of punitive sentencing outcomes. In the section of *R v Gladue*, cited above, the judgment uses the word "empower" to signify what parliament is doing with Section 718.2(*e*). Judges are given *even more* power at sentencing, meaning they have more discretion "to craft" outcomes *for* Indigenous peoples. *R v Gladue* makes known – in a clear way – who is deciding justice for whom. The *Gladue* report is taken by colonial justice and re-positioned to fit dominant sentencing practices. The power differential mattered to my participants when they spoke about

the purposes of *Gladue* reports. Justice Whilton characterized sentencing as a fairly cold calculus, arguing that the addition of a *Gladue* report is not an opportunity for feeling "*pity*," but instead is merely another "*factor*" for sentencing. The best that Indigenous *Gladue* writers could do was try to have the "*voice*" of their client heard. However, "*voice*" was reduced to a sentencing factor. McClasin (2005) claims that without changing the core model of what constitutes justice, colonial justice will continue to impose force, but under the guise of being more benign or friendly. McClasin also writes, "For those on whom force is exerted…guises do not hide what is actually happening: force will be experienced as force…transformation and healing will not occur, and so patterns of harm will continue" (2005, p.220). *Gladue* seems to misplace power, giving more to judges, when it is Indigenous peoples who are the ones being oppressed.

In my analysis, it is not just that healing justice is different than colonial justice, they are diametrically opposed. As a white, male, settler, my interest in the *Gladue* topic is understanding how colonizers can do better to make reparations for colonialism and cease interfering in Indigenous self-determination. My analysis is only partially on the topic of Indigenous healing, limited by being a settler. My research aim is not to extract an understanding of Indigenous healing practices, but to make sense of how to undo settler colonialism in the criminal legal system. Cree lawyer Gloria Lee (2005) writes that Euro-Canadian justice is not justice to First Nations people: "the Euro-Canadian concept of justice is too narrow and confining. It doesn't appreciate all the elements involved in a holistic perspective of justice. The Euro-Canadian justice model primarily delivers punishment for wrongdoing" (p.100). McClasin (2005) argues that colonial law is premised on "exerting force on those who lack the power to resist," while Indigenous law is a form of natural law, "inherent in the order of things", and built upon "good

relations…which involves finding ways to work things out without coercion" (p.218/219). Of course, *Gladue* exists because the imposition of colonial law on Indigenous peoples has had devastating consequences (McClasin, 2005), yet Indigenous *Gladue* writers need to resist the force of colonial law, the violence of a punitive, hierarchical system, in order to create spaces for healing for their clients.

The way that Indigenous *Gladue* writers cared for clients by emphasizing the sacredness of their stories was evidence of how Indigenous peoples resist being criminalized. Colonial law has always sought to criminalize Indigenous identity (Monture, 1995). In fact, some of the first aspects of Indigeneity to be made illegal, through the Indian Act, were sacred ceremonies (Joseph, 2018). A *Gladue* report is a struggle for humanization. It is a form of healing and resistance. In the final chapter, I will write more about *Gladue* as a counterstory, storytelling that challenges dominant narratives about race and racialization (Martinez, 2020).

(c) Gladue performs a politics of recognition, but reproduces colonial configurations.

Some have argued that *Gladue* is a performative act, a politics of recognition that only reproduces colonial configurations. My data adds something to this argument. Carmela Murdocca (2013) has theorized that *Gladue* accommodates cultural, not power differentials in the process of doing justice, calling it a 'cultural difference' framework. Cultural difference employs a notion of 'cultural sensitivity,' by mandating judges to pay attention to the particular circumstances of Indigenous peoples, *but* "packages difference as inferiority and obscures both gender-based and racial dominance" (Murdocca, 2013, p.22). Essentially, by emphasizing culture, *Gladue* "obscures the ongoing violence of colonization and exploitation faced by

Aboriginal communities…[through]…a particular technology of racial governance" (2013, p.22). Yellowknives Dene scholar, Glen Coulthard (2014), in *Red Skin White Masks*, describes cultural difference more as an impotent politics of recognition. That is, Canada (ab)uses a form of recognition whereby Indigenous identity is accommodated in a way that "reproduce[s] the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend" (Coulthard, 2014, p.3). Certainly, the judicial participants in my study acknowledged the uniqueness of Indigenous culture and why sentencing should be different for Indigenous peoples. However, most of the judges did not question the hierarchical order – colonial judges making decisions about what is best for Indigenous peoples at sentencing. The value of *Gladue* reports for judges was primarily to determine how it fit within a colonial configuration of sentencing, especially the moral blameworthiness of a criminalized Indigenous person. George Lipstitz (2006) argues that white people "produce largely cultural explanations for structural social problems," because 'culture' disguises white supremacy as the source, thus blaming Indigenous, Black, and racialized folks for white-inflicted traumas. Thus, I would argue that *Gladue* re-entrenches unequal power relations. *Gladue* is a gesture towards Indigenous culture, while upholding dominant culture.

Hegemonic white power persists because the settler court does not share power with Indigenous peoples. *Gladue* is not intended to honour Indigenous self-determination and sovereignty. Nor does *Gladue* offer an opportunity for settlers and Indigenous peoples to collaborate in the design and implementation of the legal power structure (there were some hints of that in how Indigenous Persons' courts were described to me, but that is outside the scope of the current study). If *Gladue* was Indigenous justice, outcomes would be determined by Indigenous peoples. Instead, the level of Indigenous involvement is relegated to report-writing.

Regrettably, Section 718.2(*e*) is not beholden to the Two Row Wampum treaty, instead Canada continues to interfere with Indigenous governance, including determining justice. As such, I believe that "a clash of worldviews" is not quite forceful enough of a descriptor about what is happening with Gladue, as it misses the power differential between the collision of settler colonialism with Indigenous self-determination, or in the instance of *Gladue*, colonial justice with Indigenous justice (RCAP, 1996). Certainly, there seemed to be differences about what justice means between Indigenous *Gladue* writers and colonial judges, but more crucially, *Gladue* continues a violent enforcement of colonial power on Indigenous peoples through the criminal legal system. Colonial justice holds the power, to compel Indigenous peoples to do what they would not do on their own (Wilson Gilmore, 2007). The clash is better illustrated as a struggle for Indigenous peoples, for healing in the midst of a system that continues to violate their inherent rights to self-determination. Sentencing justice is not something that is lived together, settlers with Indigenous peoples, as the Two Row Wampum and Silver Covenant Chains demand but is something that colonial judges *do* to Indigenous peoples. Hegemonic white power overpowers Indigenous peoples' inherent capacities for self-determining justice.

2. Even with Gladue, colonial sentencing tends towards objectification rather than humanization of Indigenous peoples: "sentencing is such an individualized, Eurocentric thing".

Given the colonial, hierarchical relationship, *Gladue* reports are at the core, a struggle over power, representation, and freedom from carceral control. Embedded within the data was the power struggle between 'voice' and 'silencing'. Colonialism has meant that Indigenous peoples struggle to have voices and stories heard, and to have those descriptions validated

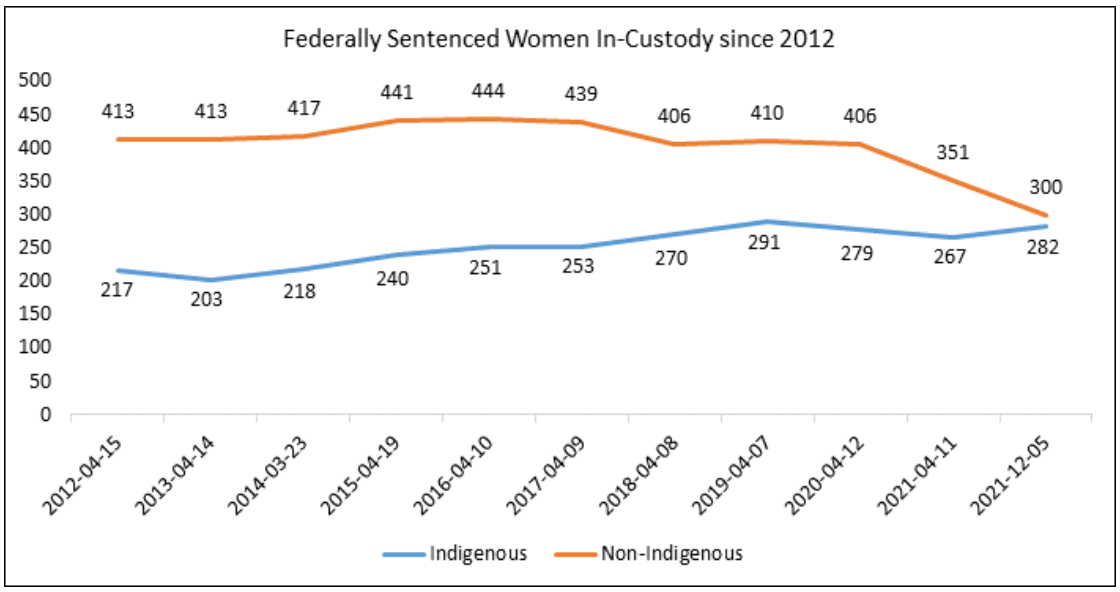
(Smith, 2012). Yet, it is judges who control outcomes, *crafting* sentences: justice is created or fashioned by the colonial court. The life story of an Indigenous person told in a *Gladue* report, the relational, sacred process that helped make that person human, according to *Gladue* writers, becomes only one object of the sentencing kaleidoscope. The *Gladue* report adds colour, but the kaleidoscope is viewed through the eye of the judge. The way that judges talked about sentencing as craft, exposed how objectification persists within *Gladue*. Right at the moment a dehumanized person becomes humanized (through sharing their story), a judge presses the story into an object, for crafting an outcome. Objectification is the judiciary subjugating criminalized Indigenous peoples to rules, over what *Gladue* writers believed gave that person their humanity – their story. In my analysis, there were two forms of silencing in the research interviews: (a) the silencing of Indigenous women and girls, or the erasure of gender in interviews about *Gladue*; (b) the silencing of colonial harms (e.g. systemic racism) by making the moral blameworthiness of the criminalized Indigenous person the emphasis (for judges) of *Gladue* reports.

(a) The silencing of Indigenous women, girls, and 2SLGBTQQIA people in *Gladue* reports.

Certainly, colonization is gendered oppression (Green, 2007). The National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) makes known that "the history of colonization is gendered, and must be considered in relation to the crisis of missing and murdered Indigenous women and girls as a serious of encounters that has ultimately rendered Indigenous women, girls, and 2SLGBTQQIA as targets" of colonial violence (p.231). Further, proportionally, Indigenous women are the fastest growing demographic in Canadian prisons. Incarceration rates of Indigenous women are significantly higher than Indigenous men.

Indigenous communities and scholars have been warning for a while about "spiraling rates of incarceration of [Indigenous] women" (Balfour, 2014, p.265). Even though Indigenous women "represent less than 5% of the total population of women in Canada," they are almost 50% of the prison population (OCI, 2021).

Figure 5.5: Federally sentenced women in-custody since 2012



(OCI, 2021: https://www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx)

In some ways, the erasure of women and girls in the *Gladue* process should not be surprising. When the *Criminal Code* was being updated to include section 718.2(*e*), legislators were warned that it ignored the gendered realities of Indigenous women (Murdocca, 2013). Carmela Murdocca (2013) begins her book about *Gladue* by sharing about Martha Flaherty's (President of Pauktuutit, the Inuit Association of Canada) 1995 testimony to the Standing Committee on Justice and Legal Affairs about the proposed changes to section 718.2 of the

Criminal Code. Flaherty argued that sentencing would not address the real dangers that Indigenous women and girls experience and, in fact, would lead to an increase in violations and inequities against Indigenous women and girls (Murdocca, 2013). Murdocca explained why: "As the women of Pauktuutit point out…[*Gladue* sentencing] does little or nothing to address the broader historical, social, and political context of their lives…sanctions do not incorporate a 'multi-faceted' understanding of violence against women – one that would address the material context of violence in [I]ndigenous women's lives as well as the continued colonial, political, and legal system that supports Indigenous women's subjugation" (2013, p.65). Indigenous women have long been skeptical of reform efforts that rely on the state for change, as "male dominance" is viewed as "a constitutive feature of state power" (Coulthard, 2014, p.101). Indigenous women have long made known concerns about *Gladue*.

Previous research, using a feminist analysis, has argued that *Gladue* is not intersectional, only focusing on race at the expense of gender and other identity constructs (Kaiser-Derrik, 2019; Murdocca, 2013). As I wrote about in Chapter three, Elspeth Kaiser-Derrick (2019) thoroughly analyzed judicial discourses in 175 sentencing decisions, from 1999 to 2015, specific to Indigenous women. Kaiser Derrick writes that it is crucial to use a feminist lens because of the victimization-criminalization continuum so often a part of the stories of Indigenous women: "It is essential that those in the criminal justice field recognize…that there is a link between victimization and criminalization which occurs at both an individual and collective level. Aboriginal women/girls suffer additional gender specific forms of discrimination within the victim to criminal cycle, and attention must be paid to this" (2019, p.286). Essentially, the victimization-criminalization continuum, "suggests that women's criminality should be understood as connected to their experiences of victimization, and that women's responses to

victimization can lead to criminalization" (Kaiser-Derrick, 2019, p.9). Without a doubt, the story of Jamie Tanis Gladue would fit within a victimization-criminalization analysis. The erasure of gender in *Gladue*, as well as in my research conversations about *Gladue*, were evidence of the persistence of patriarchy in colonial projects.

According to critical race feminists, patriarchy is influential in why white colonizers are viewed as citizens and subjects, while Indigenous peoples are made into racialized objects (Razack, 2002; Thobani, 2007). Patriarchy, as a form of gendered domination and control, dehumanizes and restricts material and psychic freedoms of Indigenous women (Green, 2007). As Maori-Scots researcher Makere Stewart-Harawari (2007) writes, "Ultimately…the dominance of patriarchal ideologies led to the dogmas responsible for the marginalization of both women and Nature" (p.133). Indigenous feminism conceptualizes some of these particularities – the impacts of settler colonialism on the subjectivities of Indigenous women and two-spirited people, as well as some of the ways that Indigenous women and two-spirited people are resisting, surviving, and thriving. An especially significant argument made by Indigenous feminists is that colonialism has disrupted the traditional roles of women, whether as leaders, water protectors, mothers, or teachers (Green, 2007). Women's roles in traditional Indigenous societies have "been one of the most impacted as a result of colonization processes. Aboriginal women have been ignored and their knowledge and contributions to sustaining Creation have been devalued by colonial society" (McGregor, 2009, p.134). Patriarchal values, embedded in colonialism, have disrupted Indigenous peoples' subjectivities, including gender roles.

Gladue writers affirmed that one of the core impacts of settler colonial violence was the profound disorganization and disconnection for many Indigenous peoples from family, community, and culture. Writers shared stories about struggling to put together reports because

many criminalized Indigenous people have become isolated over time, unsure of where, or even who, family members were. *Gladue* report writers described themselves as connectors, like a bridge between their client and the client's history, family, community, and culture. I had expected to hear from *Gladue* writers more stories about keeping Indigenous people out of prison – and, certainly, I did hear some of those – but more often than not, I heard stories about criminalized Indigenous people learning for the first time how residential schools had impacted their parents or grandparents (and, in turn, them), or stories about families re-connecting and understanding each other better; actions that Indigenous *Gladue* writers portrayed as healing. Yet, still, Indigenous peoples are put in a constant state, by settlers, of resisting objectification that creates disorganization and disconnection.

By contrast, in *Gladue*, the judge is the self-determining subject, empowered by colonial law to impose decisions on Indigenous freedoms. The only recognition given by judges to Indigenous identity is that of race. *Gladue* has been characterized as a form of racial governance or a way of governing through race (Murdocca, 2013). Power is maintained through racialization (Stewart-Harawira 2007). By de-gendering Indigenous women in *Gladue*, Indigenous women are reconstituted, emptied of their humanity: objectified. The liberty of Indigenous women is owned by colonial judges. As Kimberly Robertson (2016) suggests, "The settler state's desire to regulate Indigenous jurisdiction works hand in hand with its desire to regulate Indigenous identity" (p.14). Settler colonialists thus continue their regulation Indigenous identity through carceral environments (Dell, 2002; Robertson, 2016).

It is a logic of the settler Canadian state to eliminate Indigenous peoples "whose very existence (as sovereign peoples with prior claims to and relationships with land) threatens the legitimacy of settler colonial formations. As long as Native peoples (laws, epistemologies,

claims to land, etc.) have not yet been entirely disappeared, practices of elimination must be maintained" (Robertson, 2016, p.11). The aim of the settler colonialism is to maintain racial hierarchies (Thobani, 2007). The erasure of gendered oppression is one way to make Indigenous peoples (i.e., women, girls, and 2S2SLGBTQQIA) disappear. Through the (de)gendered practice of sentencing, the oppression of Indigenous women persists in Gladue. Sarah Ahmed (2017) writes in *Living a Feminist Life* about the word 'press' at the root of the word oppression, "Presses are used to mold things or flatten them or reduce them in bulk…Oppression: how we feel pressed into things, by things, because of who we are recognized as being" (p.50). Given the astronomical rates of Indigenous women incarcerated in Canada, sentencing is the patriarchal molding, the crafting, the pressing of Indigenous women into objects to be controlled by patriarchal, settler violence.

(b) Sentencing disguises the need for systemic colonial accountability, by shifting the full weight of law onto the individual, criminalized person.

Gladue demands that a judge examine the impacts of colonialism. However, my interviews indicated that *Gladue* focuses a judge on the individual before them rather than the systemic impacts of colonialism. I found it significant that judges did not identify as perpetrators of colonialism. The raison d'être of *Gladue* is the response to the systemic racism of settler colonialism. Colonizers and colonial systems are blameworthy for hundreds of years of ongoing harms to Indigenous peoples. *Gladue* supposedly signals that Canada is taking responsibility for systemic racism in the criminal legal system. Yet, judges told me they used *Gladue* to determine the moral blameworthiness of the individual, criminalized Indigenous person. The weight of responsibility was shifted from the colonial legal system to the Indigenous individual. The harms

written about in *Gladue* reports were viewed as *individual* mitigating factors, rather than *collective* obligations for the settler judicial system. The fact that several judges admitted that they often skimmed the parts related to colonialism demonstrated that the harms of colonialism mattered less to the colonizer (the judge) than the individual behaviour of the colonized (Indigenous person). "*The colonial aspect to it*," Justice Miles said, *"after you've read a few, you know, a half dozen or a dozen of those reports…your mind has been alerted to that problem"*. The message was that colonialism was less important than the impacts on individuals.

Clearly, the colonizer is not on trial. Descriptions of colonization were viewed as unimportant. Instead, judges told me that the task of *Gladue* at sentencing was to discover if an Indigenous person had been impacted *enough* by colonialism in order to consider alternatives to incarceration. So, only a narrow segment of that person's story mattered to some judges. The measuring stick of colonial justice does not reflect Indigenous healing. When listening to judges, I imagined how that explanation would feel if we were discussing interpersonal harm. It would be problematic if one person abused another, but at the moment of responsibility-taking, dismissed the context of the story (the ongoing pattern of abuse) and then judged the behaviour of the person who had been victimized (which so often what happens in many instances of interpersonal, gendered violence). Why is it not problematic when the judicial system does that? The crafting of sentences represents another form of silencing of Indigenous stories. The *Gladue* process follows the colonial court structure of turning Indigenous peoples into singular, neoliberal, responsibilized agents, whereby their individual actions can trump the entire history of colonialism. At the moment of remediation, the colonial system reproduces whiteness and colonial control of justice.

However, while the colonial system wanted to deflect from collective responsibility towards individualizing *Gladue*, I found it significant how Indigenous *Gladue* writers positioned themselves in solidarity with their clients. *Gladue* writers seemed to be struggling against neoliberal notions that dismiss collective responsibility in favour of a responsibilized self (Browne, 2015). The way they spoke about Gladue reports showed they viewed themselves as inseparable from the 'stories' of their clients. Indigenous *Gladue* writers often used 'we' not 'them' when discussing clients. When Jordin was talking about being powerless and oppressed: "*we have been powerless in the system, we have been oppressed in the system, we have been without a voice*". Lori said, "*We didn't have a voice before. We have a voice now to tell our story*". The consistent use of 'we' was a form of identification, indicating that the struggle is not their client's alone, but a collective one. The 'we' seemed to be in direct opposition to colonial individualism. Sentencing was said to be a "*Eurocentric*" or "*individualized*" process. By their words, Indigenous participants were illustrating a form of resistance to the primacy of colonial the colonial worldview, a refusal to be subjugated by neoliberal whiteness.

Some judges acknowledged the futility, or disconnect, between solving a systemic problem with an individual focus. The analogy of "*if you were a brain surgeon and you used a sledgehammer*" to the court solving issues, speaks to how sentencing smashes into silence the myriad impacts of colonialism, as well as the stories and voices of Indigenous peoples in *Gladue* reports. The tools of sentencing hammer away, crushing people and opportunities to resolve injustices. Oppression is a form of molding, as Sarah Ahmed argues. The image of a sledgehammer doing brain surgery is incredibly violent: molding, crushing, and pressing at a moment when Indigenous peoples aspire to heal. The sledgehammer could be viewed as the patriarchal tool of violence that dominates and controls people by causing harm where

remediation is claimed. The way that law molds (oppresses) Indigenous peoples, also molds judicial actors. At the moment of state accountability for colonialism (i.e., *Gladue*), the law constrains judges' capacities to think systemically through how sentencing is legislated (e.g., the principles of sentencing that demand deterrence, mandatory minimum sentences, case law, and so on), thereby limiting the range of judicial responses. The judge wields the sledgehammer, but the law directs its aim.

The hegemonic power of white supremacy, patriarchy, and settler colonialism continues to operate through the *Gladue* process by steering a judge away from the bedrock of systemic issues, towards a single, criminalized Indigenous person. The blame is placed upon the colonized 'other' (Thobani, 2007), at the expense of resolving the injustices of the colonizer. The problem becomes a proportionate sentence, rather than disproportionate harm (colonialism). Further, judges viewed the recommendations in *Gladue* reports in relation to Indigenous heritage, not Indigenous self-determination. That is, judges talked about whether recommendations would contribute to the rehabilitation of the criminalized Indigenous person. Again, the weight of responsibility is put on the individual, not the system. The normalcy of white supremacy is that it goes unacknowledged (Delgado & Stefancic, 2012). The rule of law that flows through *Gladue* is, in fact, a rule of whiteness, disguising, not exposing, the colonial legal order. My research makes sense in relation to several aspects of critical race theory and critical race feminism. White supremacy persists because it is normal, an ordinary part of the fabric of social systems in North America (Delgado & Stefancic, 2012). A number of critical race scholars demonstrate that racial hierarchies are so deeply entrenched in law that law creates a racist caste-like system (Alexander, 2012; Montoya, 1994). The normalcy of the whiteness of the judiciary and the (white) supremacy of law in *Gladue* furthers a racial caste of colonizer over Indigenous peoples. The

whiteness of the judiciary is not really accountable to the harms of colonialism written about in Gladue reports. The racial caste is not disrupted at decision-making. *Gladue* is a classic example of how white systems claim reform, but remain hierarchically the same (Alexander, 2012; Bannerji, 2000). The power of adjudication remains with the colonial judge, leaving unchallenged the colonial state as a manifestation of patriarchal power (Monture, 1995; Coulthard, 2014).

Conclusion

In summary, my data reveals that *Gladue* is not a form of Indigenous justice, but is co-opted to sustain colonial control of justice processes. Essentially, *Gladue* adds another colour to the judicial sentencing (crafting) kit. Judges can paint with it, but only if it is mixed properly with pre-existing materials (e.g., the *Criminal Code*, case law, etc). Or, judges can choose not to paint with it at all. *Gladue* writers aimed to preserve life, to humanize, to dodge the sledgehammer of the court, and to create space for healing. Yet, criminalized Indigenous peoples are still subjugated to colonial law. They are objectified, the sentencing object of a colonial judge. Even the imagery of a life preserver exposes that only one person at a time is being helped in the water. They can swim with the preserver, but what about when the next colonial wave comes along? Is it much different than helping one person pull themselves up by the bootstraps? The whole process is highly individualistic (i.e., neoliberal), based in a colonial system that prizes individualism to deflect from collective responsibilities. *Gladue* reports offer some space for individual, Indigenous healing, but does not disrupt the hegemonic control of settler

colonialism, white supremacy, patriarchy, and neoliberalism in the criminal legal system at sentencing.

Chapter 6: Story two – Participants' views of impediments to *Gladue*

Introduction

The previous chapter outlined key findings related to participants' views of *Gladue* work. In this chapter, I will explore related findings about participants' perspectives of the various factors that impeded the realization of the remedial aims of *Gladue*. During my interviews, I asked *Gladue* writers what influence or impact they believed their reports had on decision-making and, concurrently, I asked judges what they did differently in sentencing as they considered *Gladue* reports. I was curious to know more about what was happening with the *Gladue* reports. Were they useful? Were they functioning as intended to help steer Indigenous peoples away from incarceration? Were judges understanding the stories being told in reports in the way that *Gladue* writers wanted? Is *Gladue* actually 'righting the wrongs of colonialism'? Three main findings about barriers to *Gladue* emerged from these questions. First, *Gladue* writers believed that judges had difficulty understanding the experiences of criminalized, Indigenous peoples. Second, the persistence of colonial mentalities, including the omnipresence of anti-Indigenous racism in the courts constricted Indigeneity to either 'damaged' or 'dangerous'. Third, legal and funding constraints limited the availability of *Gladue* options.

An analysis of these findings exposes persistent patterns of whiteness and settler colonialism in the *Gladue* process. My observation is that whiteness in *Gladue* is (a) using the same (racist) system to remediate the harm that caused the harm in the first place; (b) using a revisionist, deliberately forgetful, accounting of colonialism as a historical construct rather than an ongoing one; and (c) colonial judges being unfeeling about causing harm, even when presented with the impacts colonialism in *Gladue* reports. Settler colonialism is evident in

Gladue by the way the process fortifies a constricted version of Indigeneity, as either damaged or dangerous, and whiteness as benevolent, all as justifications for colonial control of Indigenous peoples. The analysis adds intricacy to the argument of the previous chapter that, even with – or *especially* with – *Gladue*, sentencing turns Indigenous peoples into objects, dehumanized and controlled by a colonial system. Essentially the data substantiates that *Gladue* is swept into the totalizing systems of whiteness and settler colonialism, reifying hegemonic violence against Indigenous peoples – the continued use of incarceration to steal land and subordinate Indigenous peoples.

The chapter will begin by outlining key findings (see chart below), followed by a discussion and analysis.

Findings

1. *Gladue* writers: It is difficult to get judges to understand Indigenous experiences.

Most *Gladue* writers identified experiencing struggles with getting their reports to be understood by judges. Four related themes appeared in the data: (a) there was too much variability from judge to judge; (b) the lives of judges were too far removed from criminalized Indigenous peoples; (c) judges did not come to their role knowing much about Indigenous experiences; and (d) that judges did not seem to feel empathy or sympathy (what writers wanted them to feel), in relation to the traumatic nature of stories told in *Gladue* reports.

(a) Too much variability judge to judge.

Gladue writers shared that there was variability or inconsistency from judge-to-judge in regard to their willingness to bring *Gladue* into effect. Many judges were thought to take *Gladue* seriously, but others were described as "*not good*" for Indigenous peoples. *Gladue* writer, Audrey, spoke about the variability:

> *It all really depends on the judge. And I know that shouldn't be the case, but it really is. Some judges are very, have very negative outlooks on Indigenous peoples. So, a Gladue report or Gladue principles don't seem to really matter…you hear it constantly throughout the courthouse that specific judges are not good for Indigenous people to go in front of…as somebody who worked in the court system, I know that the reality of it is that although the majority of judges will use it to aid them and will take it seriously, there are still going to be a few that aren't even going to probably look at it.*

It was a common theme among *Gladue* writers that, after doing the work for a little while, they would have a sense of which judges were understanding of *Gladue* reports – willing to use reports for sentencing – and which were not. *Gladue* writer Sherri expressed frustration about one judge who did not even bother to read a *Gladue* report:

> *I don't think all judges read the report, to be completely honest…I've been in court where I've sat there and listened to the judge go, you know, 'say, I don't see how his past is connected to his crime'. And I'm like that's on page four. It couldn't be any clearer. I mean, he was up for drug charges. And page four, explained how his mother used to hide drugs on him when they visited his dad in jail. So, at 10 months old, 10 months of age, he was starting to be a drug trafficker, right*?

Audrey concluded the above comment by saying that it was oppressive for judges to ignore *Gladue* reports: "*And that's part of the, that's part of this…oppressive system that needs to, needs to be relooked at and reevaluated".* Overall, writers expressed considerable frustration at the inconsistent use of *Gladue* reports by judges. "*Not good*" was more than the absence of something positive; it was negative and detrimental to criminalized Indigenous peoples.

(b) *Gladue* writers characterized judges as far removed from the life of a criminalized, Indigenous person.

Another impediment, identified by *Gladue* writers, were the differences in life experiences and worldviews between judges and criminalized Indigenous peoples; essentially, judges were said to be making decisions about Indigenous peoples' lives with very little understanding of what it was like to be Indigenous in Canada. When I asked about challenges of *Gladue* report writing, writer, Pauline, described: "*When a [judge] doesn't know something and they're fully in charge of something, but they don't know enough…that understanding becomes even more important…now, I think, they're forced to gather those facts, but still we don't know if they understand or not*". Why did judges not understand? According to *Gladue* writers, judges were typically white and privileged, far removed from the experiences of Indigenous peoples. For example, *Gladue* writer, Shannon, said, "*The life of the judge…is totally removed from that of Indigenous people…[they] don't understand [Indigenous] life*". Such a significant difference created distance in judges' understandings. This dissonance and the dominance of colonial law, is compounded by the inherent power of judges in the criminal legal system. As a result, some judges were thought to be deliberately punitive towards Indigenous peoples or dismissive of their experiences. The disconnect between a judge and the criminalized Indigenous person meant that *Gladue* writers were convinced that judges were not very understanding of Indigenous experiences written about in *Gladue* reports.

Another challenge that came up for *Gladue* writers was conflicting worldviews or values between colonial judges and Indigenous peoples about how to do the work of justice. In opposition to how Indigenous *Gladue* writers valued humanizing clients, judges were said to value hierarchal authority and 'professionalism'. *Gladue* writer Rebecca talked about the

hierarchical power of judges as a form of "*otherizing*," making it difficult for judges to see the criminalized Indigenous person as "*a person*":

> *Yeah, I mean I think I'm just trying to get the most, like, sympathetic view of my client…I want [the judge] to see the person that I see in my office and just make them a person. Right. Like, because it's so easy to otherize in a courtroom, especially the way it's set up, the way people dress, and it's really easy to feel, like, isolated in a courtroom. Especially when you're not used to dealing with people in suits, or who speak in a certain way, and you know there's, like, that professionalism that a lot of [Indigenous] people don't care for…decorum over humanity that exists in the courtroom, like 100%.*

Several *Gladue* writers referred to judges as the "*suits and ties*," when they talked about how they felt about the hierarchical power differential between a judge and the person to be sentenced. A hierarchical worldview was said to create a distance that is visually apparent, that links dress and presentation to credibility and competence, and that promotes a lack of understanding.

(c) Judges claimed to know little about Indigenous experiences until they read *Gladue* reports.

Another identified obstruction to *Gladue* was the acknowledgment by judges about how little they knew about Indigenous people and their experiences. When asked about how *Gladue* work had impacted their lives, judges told stories of feeling grateful for learning about Indigenous peoples, but contrasted these with how *little* they had learned through prior, formal education. Most of the judges claimed that they had not learned about Indigenous worldviews or even colonization until they started reading *Gladue* reports. Justice Vorcek described it as follows:

> *[S]o understanding why Indigenous persons ought to be treated differently and why they need to be addressed differently by the criminal justice system was something that for me*

> *I wasn't exposed to in my formal education, you know, in high school or in university or law school. You know, that's how do, how do you get that far in education and not be educated on those issues? It's, you know, it was a shock to me.*

Similarly, Justice Cleary, had also not been educated about colonization and Indigenous issues before becoming a judge, until being invited by a more seasoned judge to attend a sentencing circle for an Indigenous person. Justice Cleary shared the story of that first experience and some of the discomfort associated with it:

> *I felt very nervous, like my heart, I thought was gonna pass out of my chest…But, I like, I was thinking. It must be a joke for them. Like Indigenous courts and this Indigenous peoples' courts and all rise and they see me walking in. They must say, what is this? Right like. Ugh. Like we start with a smudging ceremony. I had never seen that EVER in my life. I didn't even know what it looked like, what it meant. I had to ask, 'Am I allowed? Can I smudge? How do they smudge'? Ugh. Oh my goodness. I felt like an idiot. And I, because I knew this is my fault. Like you know. It's not my fault that I'm white. That's not what I mean. But it's my fault that I don't know more and I'm going to pass judgement on them?!? Ohhh. So, not, not a great feeling…*

Justice Cleary went further to say that the problem of colonial judging was not only that many judges had not learned about Indigenous concerns, but that judges were white or not Indigenous:

> *Unfortunately, we don't have, we don't have to my knowledge, in [city] 15 judges, we do not have anyone with any kind of Indigenous background. [One judge] married a person with Indigenous in the background of her children, and she really embraces the culture which is the closest we have, and that's. Right there. You see the problem.*
>
> *So, imagine, we don't have a Black People's Court right, we don't have that. But let's say we did. And all white judges walk in. There's no difference. And I never used to think of myself as…white, privileged…but I read the book…White Privilege.*

Justice Cleary's words get at a part of the emerging realization that I heard reflected by (a few) judges about the problem of white people passing judgement on Indigenous peoples, when it is white people who have caused harm. What was unique to Justice Cleary's comments was an explicit discussion of their race. Justice Cleary was one of the few judges to self-identity as white in relation to *Gladue*, and the only one to acknowledge white privilege. Most others, though,

admitted the same lack of education. A few had heard of residential schools in high school, but the majority had not had any formal training on Indigenous experiences or colonialism.

Another significant theme arose when I discussed with judges the temporality of colonialism: judges talked about colonialism as if it was an artifact of the past, a *historical* construct. Judges commonly spoke about colonialism in the past-tense. For example, Justice Haynes shared that the value of a *Gladue* report was that "*people begin to understand just what the impact of colonialism has been*". When asked further about their understandings of colonialism, judges mostly shared about Residential "schools"[12] and the corresponding impacts. Justice Zezel told a few stories about reading *Gladue* reports and tracing clients' struggles back to Residential "schools": "*The grandparents…had been to residential schools and the parents were dysfunctional, into drugs, you know, that stuff. So, he got into that stuff fairly early*". Only two judges (out of twelve) talked about *Gladue* as necessary because of *current* colonial structures. The anomalies were Justices Whilton and Stanik who both had a contemporary view of colonialism, recounting it as a present-day concern. Colonialism was, according to Justice Whilton:

> *…injustices, historical and present day that affect Indigenous people adversely in our, in our country, and more obviously, in our criminal justice system. Which is, you know, largely focused on the overrepresentation of Indigenous people in our prisons and jail populations, but also generally in our criminal courts and, you know, in terms of the kinds of sanctions and approaches taken in a more widely discriminatory way within the system.*

Justice Whilton claimed that *Gladue* allowed them to "*be alive*" to systemic issues. 'Being alive' meant, "*to learn and understand better*" the harms of colonialism. Justice Whilton further described *Gladue* reports as a "*teaching tool*" for judges about colonialism. Justice Stanik shared

[12] The word "schools" is in quotation marks because the primary purpose of the IRS system was genocide and assimilation, not education.

a similar view stating that *Gladue* is "*to recognize…historical wrongs that continue through to today. In other words, they're not just historical wrongs, they continue. To recognize those and to translate those and take account of them in the sentencing process*". Nonetheless, the other ten judges understood colonialism as a remnant, residing within individual Indigenous peoples, rather than being embedded in an ongoing way within current laws, institutions, and systems. Overall, judges claimed little knowledge about Indigenous experiences and colonialism until working in the courts.

(d) Judges were said to be void of feeling at sentencing, when *Gladue* writers wanted empathy and sympathy for clients.

There was a discrepancy between the hope expressed by *Gladue* writers that their reports would touch judges on an emotional level (in addition to a factual one) and judges' assertions that feelings were not relevant to sentencing. I asked *Gladue* writers what feelings they were trying to evoke. Many responded by saying they hoped that judges would feel empathy and sympathy towards the Indigenous persons they were sentencing. *Gladue* writers believed that these feelings would bring judges closer (contra the distance described above) to the experiences of criminalized Indigenous peoples and, thus, assist them in diverting Indigenous peoples away from prison. I quoted *Gladue* writer Rebecca earlier, who spoke about the value of sympathy to *Gladue* reports: "*I'm just trying to get the most, like sympathetic view of my client. Right, because we're talking about very personal things and intimate things. And, so, I want them [the judge] to see the person that I see in my office…I just want them to feel sympathy for this person*". However, *Gladue* writers perceived judges as *not* being connected at an emotional level

to empathy or sympathy: "*I realized others such as judges…they're not connected [at a deeper emotional level] like that…it's a whole other layer when you have that connection*" (*Gladue* writer, Pauline). From the perspective of *Gladue* writers, the perception of judges being disconnected from emotions at sentencing created an incongruity between how emotions were used to write *Gladue* reports and how judges were receiving *Gladue* stories at sentencing.

I heard contradictory statements from judicial participants about whether emotions were appropriate for sentencing. Several were opposed, others expressed ambiguity about feelings. Justice Davis unequivocally said, "*I'm not there to be emotional*". However, a number of judges spoke about being emotional during sentencing, but conveyed concerns about whether emotions should influence decision making. For example, Justice Haynes emphasized the ambiguity inherent in having feelings invoked by listening to people's stories while in court: "*It's difficult, listening to, it's difficult, listening to people's stories and it's difficult sometimes in the courtroom to keep emotions in check. But I've always been able to do that, I struggle to do that. I don't know whether that's good or bad*". The statement "*I don't know whether that's good or bad*" suggested an ambiguity or tension between the mandate that Judges craft sentences based on the law, or the purposes and principles of sentences, rather than how the story of the person before the court made them feel.

By contrast, whether judges were empathetic, sympathetic, or not, *Gladue* writers were committed to using a full range of emotions as part of their work. *Gladue* writer, Pauline, shared about how emotions created deeper connections with clients' words:

> *I can tell you a little bit about my personal experience…I'm a very sensitive person. And I show my emotions very easily and not being able to stop it, sometimes…I've shown emotion during interviews, one on one interviews. Because it's, because it's reality, because that's what happened. And I think that a lot went into me showing my emotions in, in those instances, it was because what I was being told I was also connected to. I also came from that reality of being a person whose Grandfather went to residential school.*

> *Great aunts and uncles went to residential school. And aunts went to residential school, so just my next generation. That's how close this is to me. So, I was connected to what was being said.*

I followed up with gratitude, acknowledging the depth of personal sharing.

> Jude: *Thank you for sharing that. And sharing so personally…It seems like in the way that you described, being a Gladue writer, it's about being authentic, being able to bring all of that to the conversation.*

Pauline responded by emphasizing, again, the value of connection: *Yeah, I think it's very important whether you're doing the interview or writing the report…There has to be more connection.* Feeling together with a client was a way of identifying with that person, creating a connection in a way that the judicial system does not. Remember, from the previous chapter, Indigenous *Gladue* writers did not appear to distinguish their stories from the stories of their clients – they were in a client's story, with them. In summary, feelings were an important topic to *Gladue* writers. Judges talked little about emotions and were ambiguous or opposed to relying on feelings when interpreting *Gladue* reports. On the topic of emotions, the contrast between Indigenous worldviews and colonial ones came through in the data. Indigenous participants emphasized wholeness, or the use of emotions, while judicial participants seemed to compartmentalize what they were feeling, believing that feelings might interfere with rational decision-making. That apparent contrast frustrated *Gladue* writers who wanted empathy and sympathy to influence sentencing.

2. Colonial mentalities persist in the *Gladue* process.

Another substantial impediment from the perspective of Indigenous *Gladue* writers was the presence of colonial mentalities in the *Gladue* report process. *Gladue* writers used a variety of

metaphors to represent the totalizing, entrapment of the white, colonial court. *Gladue* writer Pauline allegorized it as follows: "*...we're trying to incorporate Indigenous law principles. It's very difficult because you're trying to fit a round ball into a square box (italics added). We're bringing the Indigenous perspective into it. They're accepting as much as they can, I think [laughs]. And some they can't handle…And so they're still the boss, right!*" I remember the laugh when Pauline shared this idea. It was a laugh of resignation, as if to announce, 'what else can we do? What choice do we have?' After the interview, I wrote more about it in my field notes:

> The more common parlance is 'trying to fit a square peg into a round hole,' or the idea that it is futile to fit two objects together that do not belong together. If I try to put a square peg into a round hole, it will only create frustration. But, what would happen if one was to put a round ball into a square box? If the ball was the same size as the box, or larger, it would get stuck, trapped in a space not created for it. The box would capture and entrap the ball. The ball would become wedged and disappear into the walls of the box (edited field note, June 2020).

The analogy of trying to fit a round ball into a square box is significant. Pauline's point was accentuated by other *Gladue* writers, and even in how some of the judicial participants shared about *Gladue*. Colonial mentalities – the entrapment of Indigenous peoples – were represented in the data when participants described (a) using the same legal system that caused the harm to fix the harm; (b) the constricting of Indigeneity to either 'damaged' or 'dangerous'; (c) the pervasive experience of anti-Indigenous racism that *Gladue* workers identified experiencing in the courts.

(a) It is nonsensical to use the same colonial system to address the harms of that system.

When I asked, near the outset of interviews, about training for *Gladue* writers, I heard numerous times that the training is as much about teaching writers *what* to put into a report as it

is about *how* to adapt to the colonial structure of the courts. For example, this exchange with *Gladue* writer Audrey speaks to this:

> Jude: *So, it almost sounds like part of the training then is about helping writers adapt the message to the colonial courts.*
>
> GW Audrey: *Yeah. It really is. It is, it is difficult. I will say that in my, in my time and working in the court, it is difficult to work in a colonial setting, a very colonial setting because you're working in the courthouse and they, everything's about the law. And, you are right. Yeah. Yeah. [pause] So working in the court and being surrounded by lawyers and judges and police officers and being the only Indigenous court support in the building like that…being the only one there fighting for the Indigenous rights, and then also doing it in a colonial way is very frustrating and difficult.*

Indigenous *Gladue* writers described the colonial way as harmful and traumatizing. Many shared with me the vicarious trauma of doing reports and then working in courts and experiencing even more trauma. In fact, crucially, the pain of doing *Gladue* work was positioned as being a "*continuation of the genocide*" of settler colonialism. Audrey, voice quickening, made the following point:

> *[talking quickly] And it's the thing that Gladue report, you want to fight for the individual who's gone through all of this trauma and they're just in the cycle of recidivism. And there's a revolving door because of all of these traumas that were caused by colonialism and then police brutality and this continuation of the genocide. And you can't. So, it is very hurtful. It is very difficult to do.*

Audrey explained that Indigenous peoples are traumatized by colonialism, then dragged before another system of colonialism and expected to justify the deservingness of their freedoms. *Gladue* writer Jeremy portrayed it as an ongoing struggle for survival: "*clients are in survival mode and they've been in survival mode their whole life*". *Gladue* writers were fairly clear, they were experiencing the same colonial harms while purportedly using a (colonial) approach to solving colonialism.

In fact, a number of *Gladue* writers pointed out the absurdity of using the same colonial system to fix the harms of that system. In some ways, it was like hearing Audre Lord's famous

axiom that 'the master's tools cannot dismantle the master's house'. *Gladue* writers spoke in exasperated tones about the trap of the master's tools; Rick shared:

> *...the purpose of a mistake is to not repeat [increased volume] things and to learn from them. So, Canada as a whole, has a big mistake and to not repeat them…[but, Canadians] are just closed. 'Oh, God, that happened so long ago, just get over it'. You know, it's not long ago. [emphatically] NO! It's not something that gets pushed into a culture for 150 years…How do we fix something that's 150 years old…cultural genocide. It's a tough one. Basically, it's a British colonial system. So, it's actually opposite. It is actually opposite of what Indigenous people know and believe in, right.*

Not only was the colonial system not helpful, Rick said, it was the exact opposite of what was needed. His volume increased each time he said "*not repeat*". The opposite, according to Rick, was happening, meaning the mistake was being repeated. And thus, the damage continues to exacerbate harm, despite better knowledge.

One of the few judges to make a similar argument was Justice Gray. When talking about residential "schools," his voice intensified. I remember interviewing him over Zoom, the light behind him, his face a shadowed silhouette, hands gesticulating, he fervently shared the backwardness of colonial justice: "*A national crime. Yes. Yes. And I always say, you know, a national, a national crime, the residential schools. And, so, a national crime and now the individual who broke into the car is being judged by the nation who committed a crime*". Another way Justice Gray described it later in the interview was using the language of 'success' and 'failure,' to say that *Gladue* was intended to remedy the failure of Canada: "*in Gladue the Supreme Court of Canada quotes the Royal Commission on Aboriginal Justice and says the Canadian criminal justice system has failed the Aboriginal people of Canada. So, you don't have to, you don't have to go as far as calling it a crime. It is. It has failed. And I guess that's another purpose of the section and the decision to, to succeed, to not, to not fail*". The point of *Gladue* writers and (some) judges was that the mistake of colonialism was being repeated by using the

same system that caused the harm to resolve the harm. What was especially striking about Justice Gray was his expression of frustration – of feeling – about the overall colonial system. Yet, I just finishing writing above that judges withheld feelings at sentencing. Judges working in colonial systems have the convenience of hiding behind compartmentalization in order to uphold the system. The national crime compartmentalized to a distant past in order to criminalize Indigenous peoples in the present. The system is perpetuated.

(b) Indigeneity is constricted in the *Gladue* process.

Recall from the previous chapter that even though *Gladue* is a response to a systemic issue, judges can only make sentencing decisions about the person "*in front of them*," not for all Indigenous peoples. Because of the need to move from the general (systemic discrimination) to the particular (sentencing one Indigenous person at a time), most judges spoke about the value of *Gladue* reports as "*an educational tool*". Judges described the tool as educating them whether the impacts of colonialism should impact an Indigenous person's moral blameworthiness at sentencing. For a judge to consider the degree of responsibility or diminished blameworthiness for an Indigenous person there must be evidence to support that. Thus, I was interested in hearing from judges what stories they typically read in *Gladue* reports and what the reports 'tell about Canada and colonialism'. Ultimately, it was the either the trauma of colonialism (the damage) or the seriousness of the offence (the dangerousness) that seemed to be what judges took away from *Gladue* stories.

(i) Damaged: Participants believed that trauma was the most important part of a *Gladue* report.

A number of judges characterized *Gladue* reports as "*horror*" stories. Justice Clearly said *Gladue* reports are "*always horror stories*". Justice Davis said the genre of reports are "*always a drama, sounds like a horror*." 'Horror' to judges were stories of intergenerational traumas, including family breakdown, sexual and physical abuse and other adverse childhood experiences, and the corresponding effects of alcohol and drug addictions. Many of the judges described poverty and mental health challenges as ongoing impacts of colonialism for Indigenous communities (Judges Cleary, Davis, Zezel, Watson, & Miles). Further, judges described addictions as the single most common factor that brought Indigenous persons before the courts (Judges Lefebvre, Zezel, Watson, & Miles). Independent of each other, several of the judges cited anecdotal estimates that 90% of criminal cases related to Indigenous peoples have to do with substance use. For example, Justice Lefebvre argued that "*90% of criminal cases that come before me, there is a substance use component*". Justice Watson, quoting from the Final Report of the Truth & Reconciliation Commission, "*Indigenous persons are 6x more likely than the general population to suffer from alcohol related deaths and 3x more likely to suffer drug-induced deaths*" (2015, TRC). Judges described the reports to me as being full of trauma and pain – the horrors of intergenerational traumas.

Even though they claimed it was often traumatizing for clients to talk about (and for them to hear) *Gladue* writers were rather emphatic about the importance of putting traumas in reports. *Gladue* writer Rick matter-of-factly stated "*You want those traumas in there. You want the dysfunction*". *Gladue* writer Jeremy: "*Gladue reports contain a lot of personal information about*

sexual trauma, or physical trauma, or abuse, and things like that". With only limited time with clients, *Gladue* writer Pauline said the most important elements to get into reports were experiences of abuse: "*Sometimes when you get together with somebody you don't have a lot of time. You got to get right down to business. You got to start talking to them about their child abuse in 30 seconds*". Writers did talk about trying to write more fulsome stories to humanize people, including their gifts and strengths in the report narrative. However, for judges, the most valuable part of the report was the trauma component.

In fact, on a related point, the depth of trauma in *Gladue* stories was so horrific that participants (judges and *Gladue* writers) worried about Indigenous peoples having to share these stories in open court: "*I can't, I can't for the life of me imagine what it's like having been sexually abused as a child. And then sit in an open court room in front of a bunch of strangers and talk about that…the horror of doing that*" (Justice Haynes). Justice Watson thought the whole *Gladue* report process was somewhat demeaning: "*I think the worst thing that you can do for any human being…is reduce the sum total of somebody's life, the story of their life down to a checklist. We hear that all the time. And it's, it's maddening. You know, like, you're check-listing sexual abuse, you're check-listing addiction…it's almost demeaning and minimizes those traumas*". Similarly, *Gladue* writers expressed concerns about traumatic stories being shared publicly. Many said that clients would sometimes refuse to do *Gladue* reports because they did not want their painful stories made public. Further, a number of writers shared that they had heard of instances where *Gladue* reports were being misused by others in the legal system (e.g. correctional workers) against Indigenous clients (e.g., using *Gladue* reports to inform correctional risk assessments), or media sharing a story publicly that was meant to be private. Criminalized Indigenous people were being asked to be vulnerable, to share stories of traumatic

experiences, yet courts were public forums and other institutions (e.g., media and corrections) were said to misuse reports for their purposes.

(ii) Dangerous: Serious crime was said to trump noncarceral sentencing options.

Even while containing horror stories of pain and suffering, *Gladue* reports were not always adequate for producing noncarceral sanctions. Many times, I heard judges (and a few *Gladue* writers) use the analogy that "*Gladue is not a 'get out of jail free' card*". In instances where the crime was considered "*serious*," or the criminalized Indigenous person was labelled as "*dangerous,*" or judges believed they needed to "*protect vulnerable victims,*" judges claimed that incarceration was the best option. Justice Cleary, for example, stated: "*If it's a violent offense, case law says, you know, Gladue is not a 'get out of jail free' card and we all understand that, like if there was violence involved, it's more serious*". The consistent message from judges was that seriousness of an offence outweighed the traumas shared in *Gladue* reports. In the words of Justice Miles, even with *Gladue*, the sentence had to fit the individual circumstances and the nature of the offence:

> *[Y]ou get the Gladue report and it tells you a whole bunch of things about the person, but what can you do with it?…[F]rom a sentencing judge's perspective, [it is] a bit of a dilemma in the sense that if you, if you read the Gladue report and the Gladue report gives a long narrative of how things came to be in that person's life, extending back a number of generations and looking back even further into the colonial aspects…there's a natural inclination to be sympathetic to the trauma that that person has experienced, or at least their family has experienced…And at the same time, however, you've got people in the community who've been offended against…And you can't simply say, well, the person gets a pass because of this…So I think what happens is… that the matters that were less serious and, you know, that's a very broad term, you would, you would tend to be less heavy handed in the sentencing aspect of it.*

Seriousness and dangerousness were often used interchangeably by judges. Justice Whilton shared that it would be irresponsible not to incarcerate someone who was dangerous:

> *There are people who are dangerous…you've committed a serious offense, you're going to get a serious penalty…It's something significant then it makes it difficult to take a more lenient approach…If the more serious the offense and the more vulnerable the victims and the harm, and the greater harm that's been caused, you lose, unfortunately, you just move away from the ability to be sympathetic to the individual.*

Here, Justice Whilton, similar to other judges, posited that alternatives to incarceration amounted to sympathy and leniency. The traumas that a criminalized, Indigenous person experienced as a result of colonialism, were less relevant once the crime was considered serious.

I often probed judges on the topic of seriousness, because I had a hard time understanding how an individual's actions could outweigh the totality of colonialism. Judges were somewhat incongruent in their responses. Most believed that *Gladue* was not meant to be a "*discount*" case. For example, Justice Miles thought that *Gladue* helped "*move the dial*" (on Indigenous incarceration), but only in instances that were less dangerous: *"[Y]ou could move the dial with a Gladue report that spoke about the person's struggles, and the offenses themselves were not of a dangerous nature…dangerous to children or vulnerable people in their community".* A few judges claimed that *Gladue* could be used to reduce sentence length even in situations of serious crime. Justice Gray, for instance, shared that perspective, when probed:

> Jude: *So, then in the case of the violent crime and how, how do you, what role or what influence does Gladue have then in those types of circumstances?*
>
> Justice Gray: *Well, with the goal being to reduce the disproportionate incarceration every, every day shorter does that…it's not only jail or no jail…A seven-year sentence is an alternative to the, to imprisonment for nine years.*

Justice Gray took it a little further, sharing that when sentencing someone to prison, he was also guided by imagining a feeling of being trapped in an elevator:

> *I don't like when the elevator doors jam…I didn't like when the door closed behind me…It's human not to feel good, deprived of your physical freedom. So, I was trying to keep that in mind, in general sentencing with jail…You keep that in mind and then if you shorten you make it as short as possible, keeping the other factors in mind… the Gladue report would be relevant there in in in helping to inform the lower sentence.*

Overall, judges appeared to believe that seriousness or dangerousness was tied to imprisonment, again, indicating that the actions of the criminalized Indigenous person mattered more than systemic racism in the legal system.

Judges also spoke about seriousness when sharing about using incarceration as a way to acknowledge the harm to victims, or the need to protect vulnerable people. Justice Watson spoke about weighing *Gladue* in light of the harm that had been committed: "*You must also look at the offense that that person committed and the harm that it caused to the victim, or the harm that it caused to the community".* Justice Zezel, who claimed to have worked with Indigenous peoples for decades even before becoming a judge, suggested that Indigenous peoples, like Canadians, wanted carceral outcomes to protect people who had been victimized:

> *Native people themselves… they want safety. They view criminality, the ones who are law abiding, and they're I think the majority would be, even on isolated reserves, they view criminality as terrible…So, my experience with Native people is that…they want to be safe and they want to be at peace. They don't want drunks running around, ramming into them, running over them, beating them up, terrorizing them, robbing and doing all these kinds of things. So, they have a right to be protected. They have a right to safety. So, you've got to kind of look at Gladue…But, then what about how you, how do you protect, how do you protect a woman who's been beaten to an inch of her life from another Native person, i.e. her spouse or somebody they were dating? What, what do you do about that?*

Significantly, that was one of the few instances where gender was spoken about. Seriousness and danger were thus also connected to gender. The judge gendered the victim in providing an example of why incarceration was necessary based in seriousness and dangerousness (and also claimed to know from an Indigenous perspective what constituted justice). That said, Justice Zezel's comments about protecting victims were commonly shared by other judges.

Gladue writers shared, usually with some resignation, that regardless of *Gladue* reports, jail was inevitable for some clients. However, given what I described in the previous chapter (about their hopes of *Gladue* reports), writers still spoke about the value of *Gladue*: using reports for healing purposes, such as connecting someone with community and culture, or finding ways to use the report to present the person as a "*full person*". For example, *Gladue* writer Shannon said:

> *[W]e tell people that if you're doing this report, it doesn't mean you're not going to go to jail. Some people do some really serious things and they're going to go to jail. But the other thing that's really important is that we are not just failures. So, if all the report does, is talk about the person's deficits and what's gone [wrong] then that's not a full picture. We need to present the person as a full person, both with the challenges they've faced, but also their gifts and their skills and their abilities.*

While the "*full person*" might not be of as much interest to the judge for crafting sentences, it mattered to Indigenous *Gladue* writers and clients. Really, it seemed that judges only made partial use of *Gladue* reports. Writers would try to contextualize, including greater depth, to mitigate 'damage' and 'dangerousness,' but judges mostly indicated positioning criminalized Indigenous peoples within those two categories.

(c) *Gladue* writers experienced anti-Indigenous racism in their work.

Whether it was from police, judges, or other court workers, Indigenous *Gladue* writers shared many experiences of anti-Indigenous racism while doing their work in the courts. They spoke about racist tropes such as Indigenous peoples getting all sorts of breaks from the Canadian state (e.g., not having to pay taxes, *Gladue* as a "*get out of jail free*" card), the 'just get over it' racism that residential schools are a thing of the past and not a concern of the present, and Indigenous peoples as 'lazy,' 'drunks,' and 'dirty'. *Gladue* writer, Rebecca, spoke about

experiencing racism: "*[Indigenous peoples] are operating in a system that doesn't respect their identity or who they are, where they came from…that's all people want, is respect and to be heard and seen*". Writers revealed the anti-Indigenous racism enacted by judges. Some judges were viewed as ignorant to Indigenous concerns or especially punitive towards Indigenous peoples, or in the words of *Gladue* writer Jordin, "*always throw[ing] the book at Native people*". *Gladue* writers Rebecca, Audrey, and Lori shared details about the racist targeting, or overpolicing, of Indigenous peoples, who were characterized as being arrested at disproportionate rates. *Gladue* writer, Audrey, said that *Gladue* was arduous because of overpolicing: a constant flow of criminalized Indigenous peoples into the legal system (writers cannot keep up with the work), making it very difficult to try: "*to break that cycle of continuation of Indigenous people being arrested. And being arrested for the most ridiculous things ever*". Justices Zezel and Watson shared the same concerns about the overpolicing of Indigenous peoples, expressing worries about alleviating systemic racism when police keep charging more and more Indigenous peoples. Most writers shared awful experiences of racism from lawyers and other court workers. For example, *Gladue* writer Sherri lamented that she heard a lot of racism because people assumed with her lighter skin that she was white and so she could share in, or be let into, the secretive racist frustrations in which other non-Indigenous people indulged: "*I see the racism that goes on in the court, the kind that people hide in public. I'm a white skinned Native, so people don't realize it unless I tell them, so I see the dark side, that people don't want to show*". Anti-Indigenous racism was a significant theme, with *Gladue* writers describing numerous experiences of racism.

Experiences of racism were traumatic for Indigenous *Gladue* writers. *Gladue* writer, Sherri, generously shared a poem she had written after the Ipperwash crisis, about rampant the racism in that area of Southwestern Ontario:

> *A Native, so they'd hear "hey r*dskin," "hey sq*aw".*
>
> *But it doesn't bother me that I'm a [Indigenous nation]*
> *.*
> *I see them around lying in the sunshine. They try so hard, to have skin like mine.*
>
> *"You shouldn't have rights, that was years ago. When you hunted and killed with an arrow and bow".*
>
> *But the pain's still inside, what they did in the past. The things they say now make sure to last. Of how we are drunk, and unemployed bums. Just look what a mess you Natives have become.*
>
> *Never mind the land they've taken away, or the language and heritage [inaudible]. How we pay no taxes in the land of the free. Free dental, free medical, help for university. Of course, to get these, we must live on the lands, that they do not need, unless they demand. You see it might be useful for beaches or resorts, and if we don't give it up, they'll take it by force.*
>
> *But when they try to take away your pride, let them know deep inside it will not die.*
>
> *Let them think what they wanna, but don't let them forget what they've taken away.*

Right after reading the poem, Sherri shared with me that their father was a residential "school" survivor and that their son was born before the last of those "schools" closed. Sherri was imploring that the genocidal aims of colonialism were a part of the present, not relegated to the

distant past: "*the things they say now make sure to last*". Even in the measured way they spoke, the pain was audible. It was probably one of the most profound moments of the interviews for me. It reminded me of the sacredness of stories and of my relational responsibilities, to help end settler colonialism (Wilson, 2008). I am also keenly aware that as a settler, I do not have the lived experience, and that my relational responsibilities require me to not just suspend but work toward eradicating my own colonial mentalities (as well as that of others), through listening and joining. Interestingly, where the law separates emotion from fact, I am trying to resist this separation in the writing of this narrative.

Gladue writers spoke about the isolation of *Gladue* work and mistreatment by court workers; Audrey talked about it as being the "*token Indian*". Audrey was sharing how exhausting and painful it was to do *Gladue* work in colonial courts. They told a story about the prodigious volume of *Gladue* reports, the impossibility of keeping up ("*the waitlist is so long that people don't get Gladue reports*"). Then on top of *Gladue* report writing, court workers would want Audrey's time for personal education about Indigenous issues or to be affirmed that they were one of the good, white court workers. Audrey then shared that doing *Gladue* reports was only one part of what they did, as they also participated in community activism around "Land Back" and other Indigenous justice issues. The racism inherent in Audrey's commentary speaks to explicit and implicit forms of anti-Indigenous racism. Audrey defined being the only Indigenous court worker as being the "*token Indian*" and "*set up against roadblocks*". Audrey suggested it was like a "*ballgame*," requiring a "*strategic balancing act*" between activism and colonialism:

> *[B]eing the token Indian in court is a completely different ballgame…It then becomes…a game of chess…you have to make strategic moves, like you can't just make a decision off the top of your head. You have to think about what that move is going to do, if it's going make you vulnerable to this, or if it's going to put you in conflict with this, or if it's going to make your team vulnerable…So, it becomes a very strategic balancing act of activism and colonialism. [laughs] And it's really weird and it's hard for me because I know my*

> *community needs it. But then my community often looks at me differently because I walk, I have to walk in both worlds. So, I can't be part of all of the protest and activism that I would have normally been involved in. Because I could lose my job. But, if I don't partake in any of it, then I lose my community.*

Not just any 'token Indian' but, according to Audrey, a "*good token Indian*". "*Good*," according to Audrey, meant allowing lawyers to "*pick your brain about how to do this and how to do that and how to say this and how to say that*," effectively doing the emotional labour of educating white court workers. 'Good' also meant not being the activist that Audrey wanted to be. The strategic game of being a "*token Indian*" carried the potential for significant consequences, even potentially losing one's community.

Most of the judges interviewed did not overtly reproduce anti-Indigenous racist tropes. However, one judge – Justice Zezel – who claimed that their objective was to "*put a human face on the justice system*" did call Indigenous peoples "*shrewd*," hinting that they were trying to use *Gladue* as a scheme to avoid consequences. As well, the same judge struggled to explain the 'unique circumstances' of Indigenous peoples, claiming that *Gladue* should apply to any marginalized group, thereby failing to connect systemic racism in the criminal legal system to the violence of colonialism – the specificity of *Gladue*. However, Justice Zezel's comments were somewhat contradictory. On one hand, they bemoaned Section 718.2(*e*) of the Criminal Code, suggesting that it was creating special classes of human beings based on race. On the other hand, they argued that Black Canadians had experienced a legacy of slavery and therefore, also deserved special consideration at sentencing:

> *[T]his is a problem with Gladue…You want to treat a person before you as a human being, as a fellow human being. Doesn't matter whether they have three eyes or what gender they are, what color they are, what face they are. You want to treat that person as a human being, as your brother or sister, if you will. So, when you bring in these special considerations, the concern is that you are setting up a separate class of people. So, everybody else, blacks and whites and browns, all get treated a certain way. And then you get, you know, other people treated in a different way because of their particular*

> *status. And, so, I think that that you, you have to ask yourself, okay, well, what about the ones who are succeeding and working hard? Like, it's hard to work hard. You know, any of us that get anywhere in society and even those that are born in more favorable terms still have to prove themselves, still have to earn their place and their, their spot and all the rest of it. So why, why would that not apply to Native people?*

Justice Zezel's concern was not the pain caused by colonialism. The statement represented a neoliberal commentary: 'it is not fair to those who have succeeded' to give special treatment to those who have not – essentially equating success with an individualistic, neoliberal notion of hard work. However, most of the judges I interviewed did not speak like Justice Zezel, offering instead thoughtful arguments about the value of *Gladue* specifically for Indigenous peoples.

The statements made by Justice Zezel and the examples shared by *Gladue* writers (above), indicated some of the anti-Indigenous racism and brutality that Indigenous peoples were/are exposed to in colonial courts. While a number of these examples are of *interpersonal* racism, my study is oriented more towards addressing the *systemic* racism of *Gladue*. Principally, my analysis moves beyond interpersonal to systemic (of course, the presence of patterns of interpersonal racism are symptomatic of systemic racism). As such, I was curious to know if judges would take ownership for colonialism; that is, would judges talk about reading *Gladue* reports as a form of taking responsibility? This came from my own commitment to a method of research as reparation.

The judges in my study did not take, what I would consider to be, responsibility. The emphasis was consistently on the moral blameworthiness of the criminalized Indigenous person, viewed through the lenses of who was 'damaged' (e.g., criminalized Indigenous person had been impacted enough by colonialism to deserve an alternative to incarceration) or how significant was their 'dangerousness' (e.g. crime was too serious to not consider jail time). The role of a judge as a responsible agent for colonialism was not part of the words of judicial participants.

The court seemed to reduce, once again, systemic racism to an individual phenomenon, even though Indigenous *Gladue* workers were repeatedly subjected to it, and the implementation of *Gladue* was/is because of systemic racism. By contrast, *Gladue* writers articulated that the harms of racism went beyond the interpersonal and included systemic racism of the colonial state. Participants spoke of such harms as land theft, residential "schools," the abuse of Indigenous people through the criminal legal system, and the overall aim of colonialism as genocidal.

3. *Gladue* is structurally constrained from realizing its remedial aims.

Participants identified further restraints on *Gladue*, particularly legal roadblocks and insufficient funding for *Gladue* report writing and alternatives to incarceration.

(a) *Gladue* is limited by law and legal practices.

When asked why *Gladue* had not reduced Indigenous incarceration rates, by and large, judges did not question the use of the colonial legal system with Indigenous peoples. Generally, judges did wonder whether sentencing was the 'right time' to fix systemic issues. Many argued that sentencing was 'too late' to fix the social causes of crime (e.g., most named poverty and addictions [but not racism] for why Indigenous peoples became criminalized). In particular, judges explained that sentencing decisions were limited by other technical aspects of law, such as precedent (i.e., previous case law), joint submissions (i.e., when crown attorneys and defence councils came with an agreed upon custodial recommendation for sentencing), and mandatory minimum sentences (i.e., in many instances, judges wanted to impose noncustodial sentences,

but were restricted by a mandatory custodial sentence for certain offences). Many of the judges were critical of mandatory minimum sentences, describing them as interfering with the implementation of *Gladue*, especially the opportunity for conditional sentences (Justices Stanik, Cleary, Davis, Miles & Gray). Justice Stanik, referring to mandatory minimum sentences, said: "*You know, there are days, sure, when it's difficult to impose a jail sentence because you realize it might not be serving any purpose whatsoever. But, it's what the law requires*". Other judges spoke about mandatory minimum sentences as legislators purposefully curtailing *Gladue*: "*the introduction of mandatory minimum sentences and the restriction on conditional sentences…it was an end-run amendment*" (Justice Gray). Not only were mandatory minimums viewed as obstructive, they were thought to be a deliberately so. The law becomes a barrier to law. That is, judges cannot divert Indigenous peoples from prison, when a mandatory minimum sentence for a particular crime requires a period of incarceration. Certainly, it would be an overestimation to imagine that *Gladue* (i.e., sentencing) could resolve colonialism, but when one examines its operationalization within law, it is easy to see how other technical aspects of law interfere with its attempts at addressing overincarceration of Indigenous peoples.

(b) *Gladue* is limited by a lack of funding for *Gladue* writing and alternatives to incarceration.

I was told that *Gladue* report writing takes time. However, because of an identified lack of funding and resources, *Gladue* report writers struggled to find adequate time to interview clients, as well as family and community members, and then to write suitable reports (*Gladue* writers Jordin, Shannon, Pauline, Rebecca, & Lori). Funding was often explained as fragile,

coming and going at the whim of changing governments or changing government platforms: "*[it's] a fragile system…funding can be ripped from your hands at any time*" (*Gladue* writer Rebecca). *Gladue* writer Rick expressed deep frustration with how often funding was cutback: "*We don't have funding…it's assbackwards, you know, in social work communities. It's always the voiceless communities that get hit. Always the ones that's where the cutbacks come first. They hit us first*". Judges, too, shared some of these sentiments, suggesting that the successful implementation of *Gladue* required 'good' *Gladue* reports written by local writers (Justice Cleary), with enough time to write (Justices Haynes, Vorcek, Stanik, Whilton, Cleary, Lefebvre, & Horne), and with job stability to create consistency and quality of reports (many cited high turnover in writers as a challenge). Justice Stanik said, "*Gladue writers, I think, are stretched, I would assume stretched pretty thin*," which, in the words of Justice Whilton was "*completely antithetical to Gladue*". In absence of sufficient funding, many First Nations communities in Southwestern Ontario were adopting the use of *Gladue* letters or scaled down reports that articulate a few key points and focus on recommendations. Of course, in many places, judges indicated that *Gladue* reports were altogether not available, making it challenging for them to give judicial notice to *Gladue*. Overall, participants agreed that *Gladue* report writing was not adequately funded, and the lack of funding perpetuates an inadequate and inequitable justice system.

An additional, and repeated concern, was that in many locations, there were not alternatives available to incarceration. As I wrote in the previous chapter, judges valued the recommendations in reports; Justice Haynes, articulated what I heard from most judges: "*It's the plan, in many cases, that allows that person to remain out of jail*". Yet, how can a judge give judicial notice to *Gladue* when alternatives to incarceration do not exist? The judges in my study

believed there was a "*…lack of investment in resources that would provide meaningful alternatives to incarceration*" (Justice Stanik), creating a void in Indigenous-appropriate services: "*There's not enough [alternatives]"* (Justice Cleary). Justice Lefebvre expressed frustration that alternative options cannot be utilized when they do not exist, stating that there is a "*lack of available restorative justice alternatives…if you don't have an alternative then how, how can you fashion one…I'm constrained by what's out there*". Justice Horne indicated that "*Some areas are better serviced than others*". A lack of resources, diminished some judges' confidence in noncustodial options: "*There's no doubt that the more confident one can be that a person can access resources, the more confident you are in putting that person back into the community*" (Justice Vorcek). Judges seemed to be legitimately concerned with how a lack of noncarceral options was impeding *Gladue*.

The *Gladue* writers in my study also believed that without alternatives to incarceration, judges cannot implement *Gladue*. Most talked about a lack of funding for community-based sanctions, especially culturally-appropriate ones (*Gladue* writers Shannon, Jeremy, Pauline, Sherri, Rebecca, Rick, and Lori). When asked why *Gladue* has not made a dent in Indigenous incarceration rates, Audrey responded by saying:

> *Why hasn't it made a dent? Well, because our people are still getting incarcerated…they're getting arrested at alarming rates. We're not getting, we don't have the money in our communities too. So, you do a Gladue and I put all these wonderful recommendations in and the clients agree to it and stuff, and then, you know, funding gets cut, so we don't have in our communities, specifically the funding for the social services that the people need.*

While *Gladue* writers and judges were unanimous in their concerns about limited sanctions other than incarceration, the implications of their roles and positionalities remain far from unanimous. Judges can certainly throw up their metaphorical hands and claim helplessness in the exasperation described above, due to legal limitations and lack of options. However, *Gladue*

writers face a different helplessness, one from which they cannot throw up their hands. They are pressured to keep using their hands to write reports under inadequate funding and a lack of comprehensive services.

Figure 6.1: Table of themes and sub-themes; Participants' views of Gladue work

Finding 1: It is difficult to get judges to understand Indigenous experiences.	
(a) Too much variability judge-to-judge about responsiveness to *Gladue*.	(b) *Gladue* writers characterized judges as far removed from the lives of Indigenous peoples.
(c) Judges claimed to know little about Indigenous experiences until reading *Gladue* reports.	(d) Sentencing was said to be void of feelings, when *Gladue* writers wanted to evoke sympathy from judges.
Finding 2: Colonial mentalities persist in the *Gladue* process.	
(a) It is nonsensical to use the same colonial system to address the harms of that system.	(b) Indigeneity is constricted to 'damaged' or 'dangerous' in the *Gladue* process.
(c) Indigenous *Gladue* writers experienced anti-Indigenous racism in their work.	
Finding 3: *Gladue* is structurally constrained from realizing its remedial impact.	

(a) *Gladue* is limited by law and legal practices.	(b) *Gladue* is limited by a lack of funding for *Gladue* writing and alternatives to incarceration.

Discussion and analysis

The stories shared in this chapter expose the persistence of whiteness and settler colonialism in the *Gladue* process in several forms: the variability from judge-to-judge of whether they even read a report or use it in decision-making, the disconnect between the lives of white, privileged judges and criminalized Indigenous peoples, the lack of education for judges about settler colonialism and the impacts of colonization, sentencing as devoid of feelings, the constricting of Indigeneity to damaged or dangerous, experiences of Indigenous *Gladue* writers with anti-Indigenous racism, and legal and fiscal restraints. All of these inter-related factors point towards outcomes of the *Gladue* reform as reifying the hegemonic status quo. As the previous chapter indicated, *Gladue* writers and judges shared many individual experiences of success with *Gladue*. However, the overall systemic, remedial purpose of *Gladue* is falling short likely because of the ways that the reform upholds the hegemonic power of whiteness and settler colonialism.

1. **The persistence of whiteness in *Gladue*.**

My data exposes a persistence of whiteness in *Gladue*. Whiteness in the context of this research, is (a) using the same (racist) system to remediate the harm that caused the harm in the first place; (b) using a revisionist, deliberately forgetful, history of harms perpetrated to define the *Gladue* process (colonialism as an artefact of history); and, (c) colonial judges being unfeeling about causing harm, even when presented with the "*horror*" stories of colonial impacts in Gladue reports.

(a) Whiteness is using the same system that caused harm to fix harm: "*A national crime… now the individual who broke into the car is being judged by the nation who committed a crime".*

My data puts an exclamation point on the futility of the colonial legal system functioning in the very same way to resolve the issue of systemic racism as how the system caused racism in the first place. The challenge is that *Gladue* reports are unlikely to make a systemic difference because they are being read and interpreted within the framework of the white, colonial power structure. As such, the relational, emotional, and human aspects of *Gladue* are not only ultimately ignored, but are further silenced by an unyielding court system. The widespread experiences of interpersonal and systemic racism by Indigenous *Gladue* writers were indicative of the hegemony of whiteness that persists even with the presence of *Gladue*. Further, evidence of colonial legal control came through in how participants talked about the constraints (legal and political) undermining *Gladue*. To paraphrase the Audre Lorde quote that I used earlier: a hegemony of whiteness at sentencing cannot be undone by a hegemony of whiteness. The

Indigenous person who stole the car should not be judged by the colonizer who stole their land and culture.

The stories about anti-Indigenous racism that *Gladue* writers experienced were horrific. Under the performative guise of reconciliation, the court invites a *Gladue* report to respond to systemic racism, yet Indigenous *Gladue* writers bore the brunt of the true racism underlying this performative adherence to remediation. From being the "*token Indian*," to being subjected to derogatory comments, to being under-resourced, to having their work ignored, the writers were consistently mistreated through the racist actions of court workers and the court structure. My data suggests that not only are the people in the system unwilling to change, consciously and unconsciously, they want to carry on in the same harmful way. Mariame Kaba (2021), in *We Do This Til We Free Us*, argues that increasing incarceration rates of Black, Indigenous, and racialized peoples is not a failure of the criminal legal system – it is an example of the system working as intended: "white supremacy is maintained and reproduced through the criminal punishment apparatus" (p.93). The criminal legal system is a violent force to keep Black, Indigenous, and racialized peoples subordinate to white people (Kaba, 2021). *Gladue* needs to be viewed through this type of critical lens to expose how even with judicial notice to colonialism, the system is working as intended to maintain white power. The horrors exposed in the stories are amplified in the *Gladue* process in the face of the court system, furthering a dogged resolve to maintain racism and add to the harms for criminalized, Indigenous persons and their communities.

Thus, it is not that *Gladue* is dysfunctional, my data suggests that it might be operating *as intended* to maintain the colonial status quo (Kaba, 2021): racism is the intentional structure, to do away with Indigenous peoples (Monture, 1995). The myriad examples of interpersonal racism

shared by Indigenous *Gladue* writers are evidence of a deliberate way to violently remind Indigenous peoples of their inferior place in the colonial structure. The interpersonal racism mimics the larger settler political project of violating, stealing, and eradicating Indigenous bodies, treaties, and lands. Certainly, *Gladue* is an adaptation (sentencing is done differently with Indigenous peoples), but critical race theory posits that racism is also, "highly adaptable" (Alexander, 2012, p.91). The horrors of racism certainly extended from Gladue reports into the experiences of Indigenous *Gladue* writers, as they collected and shared those stories. This is a persistence of whiteness.

It became evident in the data that *Gladue* writers were forced into an untenable position – needing to use *Gladue* to offer support to clients (because there is no other option), but at the expense of their own wellbeing and connections to communities. Indigenous *Gladue* writers, as much as their clients, have experienced the oppression of colonial systems (see Sherri's poem above). Subsequently, writers are forced to conform to a colonial process that not only fails to acknowledge their pains, but adds further traumas. The cost of being the "*token Indian*" to Audrey was pain, exhaustion, emotional labour for the colonizer, *and* a potential loss of community – participating in the colonial way meant, "*then I lose my community*". If *Gladue* writing forces an Indigenous person to lose their community in order to do the work, then it is a form of racism and assimilation. Racism and assimilation, rooted in white supremacy, are well-documented technologies of settler colonialism, pathologizing Indigenous peoples for the sake of maintaining superior status (Lavendier, 2019; Vowel, 2016). Those who write about settler colonialism theorize that racist narratives structure social relations: for example, Saito (2020) argues that "Colonialism cannot function without perpetuating difference between the colonizers and the colonized" (p.53). It is a reasonable and legitimate claim that one cannot fix a broken

system by using that broken system. *Gladue* is not an ending of, nor refuge from, racism and assimilation for *Gladue* writers nor their clients.

Further, evidence of status quo, colonial control repeatedly came through in how participants talked about aspects of the legal and political structures that constrained or undermined *Gladue* efforts. The characterization of mandatory minimum sentences as an "*end-run*" (Justice Gray) on *Gladue*, eliminating opportunities for noncustodial sanctions, meant the law turned against its own remediation. Just as the government appears to give (*Gladue*), it quickly takes away (mandatory minimums). This is significant for *Gladue* and it is also significant for understanding hegemonic power because *Gladue* seemed to only be helpful for a select few: those considered damaged enough, but not too dangerous (more on the topic of 'damaged' and 'dangerous' below). Additionally, a harm of colonial control is that judges indicated wanting to opt for noncarceral sanctions in some instances, only to discover that community-based or restorative justice options were not available. To accomplish the systemic aims of *Gladue* would require much more investment in alternatives to incarceration. Yet, to the participants in the study, there was a lack of political will and a woeful absence of funded alternatives.

(b) Whiteness is revisionist history, deliberately forgetting harms: "*how do you get that far in education and not be educated on those issues?*"

The ignorance of white people to our own historical and contemporary actions is a harm of whiteness. There is a collective, white amnesia about the violence of settler colonialism (Shotwell, 2016). More accurately, whiteness is a deliberate forgetting of harms (Campbell,

2014)). Alexis Shotwell (2016) argues that "A central feature of white settler colonial subjectivity is forgetting; we live whiteness in part as active ignorance and forgetting" (p.37). The way that colonial history has been taught – or not – has impacted the judiciary's understandings, at least the ones in my study, about colonialism. Most shared that they had not learned about the issues of colonialism until they began in their roles as lawyers or judges. Justice Vorceck called it a "*shock*". In *Our faithfulness to the past: The ethics and politics of memory*, Sue Campbell (2014) writes that "Human memory is self-representational. It secures our identities, is at the core of our practices of responsibility, and is the basis of our sense of temporality…[and]…that we cannot talk about memory without discussing the social power that authority over the past secures" (p.3). Viewed through this lens, judges awareness of settler and Indigenous issues only after judicial appointments is evidence of a white identity that employs a practice of forgetting. The purposeful forgetting of whiteness allows for the white, colonial court to reposition itself as 'judge' rather than 'perpetrator'. Forgetting is also a convenient and passive way to perpetuate revisionist history.

Indeed, the whiteness of the judiciary was named as a "*problem*" by *Gladue* writers, but only by one judge. Justice Cleary spoke about it as a problem: being white and ignorant, and then being tasked with passing judgment on Indigenous peoples. Later, after my interview with Justice Cleary, I wrote in my field notes that, on one hand, it was refreshing to hear a judge be self-reflective and articulate a core feature of colonialism, but on the other hand, I was dismayed at the audacity of the colonial legal system putting white people, with neophyte understandings, into such positions of authority *over* Indigenous peoples. I wrote: "the legal system doesn't even bother to demonstrate care for Indigenous perspectives. We're not even hiding our disdain for Indigenous peoples. A judge doesn't have to know anything about colonialism. They can choose

to read *White Privilege*, the most basic of books about whiteness, in their free time, while locking up Indigenous peoples in their professional time" (August, 2020). The problem, after making sense of what Justice Cleary seemed to be awakening to, is that whiteness employs purposeful forgetting to deflect responsibility (Campbell, 2014; Shotwell, 2016). So, while one judge read a book and raised the issue of whiteness in the judiciary, it was done apart from the institution, and therefore not part of the institution. And so, the institution is not held to account for forgetting.

Linking this section to the previous chapter that the colonial court violates the Two Row Wampum treaty is a reminder that we (settlers) have also deliberately forgotten our promises – our legally binding treaties. Forgetting violates the relationship between Indigenous peoples and settlers. Cayuga Elder, Gae Ho Hwako (2022), writes that "We have forgotten about *o da gaho de:s* (the sacred meeting space) between the ship and the canoe, where we originally agreed on the Two Row and to which we must return today if we are to talk about the impacts that we have experienced because of its violation" (p.7). *Gladue* reports could be a point of remembrance, but they are narrowly conceived to emphasize colonial impacts, not a reminder of treaties or a treaty relationship. The amnesia, therefore, continues.

In my study, evidence of 'forgetting' was in the judges' descriptions of colonialism in the past tense, historical rather than ongoing. Only two judges portrayed the necessity of *Gladue* because of contemporary colonialism and the particular harms of the criminal legal system. The rest were quite loquacious about the impacts of colonialism (e.g., poverty, mental health, and addictions), yet silent on its structures. I would presume, then, that the novel education they were receiving about colonialism, through *Gladue* reports, cast their minds to the past, rather than settler colonialism as an ongoing structure. Learning about colonialism as an ongoing structure

rather than a historical event is part of what Shotwell (2016) characterizes as a 'politic of responsibility' that settlers must engage with in order to "unforget" (p.37). This certainly begs the question: how does one 'forget the present' when one is living in the present? Perhaps it is human to be forgetful, but here forgetfulness is intentional and the cost is high. I would argue that when the past is reduced to impacts of colonialism instead of structures, it allows for judges to 'forget' the colonial power structure of the present. Perhaps a better word than 'forget,' when applied to the present, is 'neglect,' because it denotes a failure to uphold a responsibility. Yet, neglect likely does not take the settler relationship with history far enough. 'Forgetting' and 'neglect' have actually been systemic (e.g. educational system) and deliberate: the conscious erasure of history, purposefully omitting the oppression and harms of settler colonialism.

Building on the words of Gae Ho Hwako, Timothy B. Leduc (2022) suggests that "*O da gaho de:s:* is a sacred place where we are asked to honour our responsibilities by slowing down to reflect on the 'truth' of colonial violence, which can be seen without and within" (p.21). The structure within which *Gladue* is embedded permits and makes space for a judge to be neglectful of *O da gaho de:s:. Gladue* reports, for the vast majority of judges who spoke to me, evoked neither a politic, nor an honouring, of responsibility. The colonizer remains unaccountable, a form of preservation of whiteness through a claim of transformation, thus hiding the responsibility of the settler judge and pushing blame on the oppressed for their struggles (Arat-Koc, 2010; Bannerji, 2000; Lipsitz, 2006). The call to reflecting on the truth is a call to remember, yet remembering in *Gladue* is skewed towards the neglectful hegemony of whiteness.

(c) Whiteness is being unfeeling about causing harm: "*I'm not there to be emotional*".

Whiteness is a colonial judge choosing whether or not to feel something about the harms of colonialism. Colonial courts invite stories about the systemic harms of colonialism, but exclude feelings (of the perpetrator) in making judgments about those stories. In my research, judges described themselves as either resistant or ambiguous to feelings when reading *Gladue* reports. Judges talked about keeping emotions "*in check*" or, more candidly, that they were "*not there to be emotional*". Sentencing was characterized as a rational, calculated process, a weighing of evidence against the principles and purposes of sentencing. By remaining in denial of feelings, judges can feign innocence of harm and move towards judgment, in lock-step with white supremacy that criminalizes Indigeneity.

Indigenous *Gladue* writers deeply valued feelings as a central part of their work. They tried to share the sacredness of their clients' stories, while working in a holistic way. They said emotions created connections. *Gladue* writer Pauline's description of the vitality of emotions for creating connections demonstrates how a 'feeling way of being' is another element of healing justice (see the previous chapter): what is more, *Gladue* writers believed that if they could evoke some feeling, some sympathy from judges, they could get favourable outcomes for their clients.

As I thought reflexively about it, the feelings part of my data was significant. It made me feel something, too, and reminded me of some previous work experiences to which I will refer later. Part of my research impetus, as a settler, is to learn how to be more deeply, genuinely, and practically accountable for being a settler on stolen Indigenous land. I was careful to follow an ethical protocol when inviting Indigenous participants into my study. When Indigenous participants shared, I was present and felt their words. I sought to bring my whole self – mind, body, spirit – to these conversations. I was honoured to hear their stories and I attempted to humbly share my gratitude. Nonetheless, a research conversation is only a start. Whereas judges

(and researchers) are not there to be emotional, I was. And in staying with the emotions, the narrative deepened for me, and I 'got more' from the process beyond achieving the checkboxes of a colonial graduate degree. I have more to do, to act reciprocally, to carry my responsibilities – to respond to these stories by doing my best to support social change.

I wondered why judges would conform to a colonial structure that denied feelings especially at the point of a supposed ethical and just response to harm. I remembered my own experiences working with survivors of violence, having spent many hours listening to survivors, as part of preparing for restorative justice dialogue. When a person is hurt, they often want the person who caused harm to feel what they have felt; to know at an emotional level the distress that they have caused. As such, during a restorative justice process, survivors often share, in great depth, about the impacts of being harmed. In the circumstance of *Gladue*, *Gladue* reports function in a similar manner, sharing the impacts of survivors of colonial violence. But, the person who caused the harm, the judge as the representative of colonialism, is unwilling to feel what colonizers have done, even after reading an account of the "*horror*". If I were assessing the suitability of a participant who had caused harm to participate in a restorative justice process and they stated to me that they were not willing to feel in response to the other party, I would assess that person as unsuitable for dialogue, because of the real possibility of causing further harm to the victimized person. Imagine a survivor of violence sharing their pain with the person who caused harm, and the person remaining emotionally unresponsive, distant, unfeeling, disengaged. This is a form of disrespect, which is harmful.

The commitment of judges to a sentencing structure that denies their feelings is a marker of whiteness. Whiteness is built on exclusion and subjugation (Harris, 1995; Thobani, 2007). The "*decorum over humanity*" that *Gladue* writer Rebecca spoke to, means that Indigenous *Gladue*

writers, as well as their clients, experience subjugation, as if "*suits and ties*" are more important than being a feeling human being. Rebecca described it as professionalism "*that Indigenous peoples don't care for*," but also one that gets in the way of deeper view about humanity. CRT and CRF theorizes that reparative and remedial efforts are thwarted because of ways that whiteness reinforces its own innocence and claims a virtuous higher ground (Bell, 1980; Harris, 1995). The example, in my data, of a colonial court system denying feelings (e.g., sympathy and empathy) of accountability, in *Gladue*, in favour of a rational, "*suits and ties*" (professional) judgment adds more evidence to these CRT and CRF arguments. Having Indigenous peoples giving an accounting of their pain and not expressing sorrow is an especially brutal feature of the colonial court.

Further, "*suits and ties*" represents masculinized and classed versions of a 'professional'. That *Gladue* writers used that terminology to characterize judges and lawyers, shows that the patriarchal routine of court (what 'professionals' wear) asserts who counts as respectable and worthy (Razack, 2002). As the violence of patriarchy intersects with the exploitative nature of capitalism, clothing becomes symbolic of power, of 'upper' and 'lower' classes. Yet, the symbolism of the court also shapes the lived experiences, the materiality, of criminalized Indigenous people and *Gladue* writers. From a CRF perspective, Arat-Koc (2010) argues that those in the lower class (not the "*suits and ties*") lack morality because of their lower, ontological position. Thus, the hegemonic power structure of the court is justified through what people wear. The interpretations, or lived spaces, of decision-making flows from the white, patriarchal, classist court to those who 'properly' represent it (Razack, 2002).

Emotions were so important to *Gladue* writers. Yet, judges emphasized whiteness, a colonial rationality devoid of emotions. Indigenous peoples are sharing life stories – their pains,

their traumas – through *Gladue* reports, so why is there no protocol (like my research protocol) for judges to receive these stories in an honourable, feeling way? The dichotomy around feelings in the data, between judges and Indigenous *Gladue* writers, not only exposed different values, but also the cruelty of the colonial judicial system towards people that it continually harms.

2. Settler colonialism is evident in *Gladue* with how Indigenous identities are constructed and constricted.

My data reveals that *Gladue* follows settler colonialism by upholding certain settler myths of Indigenous peoples. In my research interviews, I heard two primary (stereotypical) characterizations of criminalized, Indigenous peoples: first, of the "damaged" Indigenous person and, second, the "dangerous" Indigenous person. First, the "damaged" Indigenous person was the one who has been impacted enough by colonialism to be granted a noncustodial sanction. By using the term "damaged," I am invoking the work of Eve Tuck (2009) who called out colonizers (and systems) for the way we (colonizers) narrowly define Indigenous peoples by their trauma, as only victims of pain and loss, in order to maintain superiority. Second, the signifier "dangerous" that showed up in the data follows a long history of the criminalization of racialized identities, by white settlers, in order to justify legal violence. The "dangerous" Indigenous person was the one who must be incarcerated because they have done something "too serious" to warrant a noncustodial option. These are two of the ways that Indigenous peoples are objectified – or building on the previous chapter, turned into sentencing objects – during the Gladue process, reinforcing the mythical narratives of settler colonialism.

(a) Damaged: *Gladue* is a "*check-listing*" of pain to construct a fictional Indigenous identity as only broken and whiteness as a benevolent helper and saviour.

In 2009, Unangaŷ scholar, Eve Tuck, published an article titled "Suspending damage: A letter to communities". In it, Tuck argues that an obstinate trend of research on Indigenous communities is that it is "damage-centred"; that is, research on Indigenous peoples most often documents the impacts of oppression on Indigenous communities, thus reinforcing settler colonial logics that Indigenous peoples are a "defeated and broken" people (Tuck, 2009, p.412). Tuck wrote:

> In damaged-centered research, one of the major activities is to document pain or loss in an individual, community, or tribe…It looks to historical exploitation, domination, and colonization to explain contemporary brokenness, such as poverty, poor health, and low literacy. Common sense tells us this is a good thing, but the danger in damage-centered research is that it is a pathologizing approach in which the oppression singularly defines a community (2009, p.413).

The problem with damage-centred approaches is that structural violence, such as white supremacy or colonization, that produce the damage, are left out. Instead of focusing on exposing and changing structures, Indigenous peoples are further pathologized (Tuck, 2009).

Similarly, I would argue that *Gladue* reports function as a form of damage-centred storytelling: they centre Indigenous peoples' traumas (i.e., ways in which the person has been harmed or damaged by colonialism) over a more fulsome version of Indigeneity. While many *Gladue* writers tried to tell a holistic story of their clients, all of them described the necessity and centrality of individual pain and intergenerational trauma in reports. *Gladue* writer Rick stated, "*You want those traumas in there*". Writers believed that part was the most compelling to judges. Indeed, according to the judges I interviewed, it was the trauma, the damage, that judges focused on to establish an object(ive) of sentencing (i.e., determining moral blameworthiness). Justice

Watson defined *Gladue* reports as a "*check listing*" of pain. To Tuck's point, a *Gladue* report shares damage without locating or analyzing the source. It singles out the broken aspects of Indigenous nations, communities, families, and individuals, telling an incomplete, damaged-centred story.

My sense was that one outcome of damaged-centred storytelling was the fictionalization of Indigenous peoples' stories. The way that trauma in reports was characterized by judges potentially dehumanized Indigenous peoples and their stories. Judges emphasized that *Gladue* reports were "*horror*" stories, full of suffering. There was often so much pain to check list that Justice Clearly said of reports that they were "*always a drama*". Based on the metaphors used – horror and drama – I did wonder if judges were believing *Gladue* reports. I could have probed further, perhaps asking if reports sounded unbelievable. The terms, drama and horror are problematic, making reports sound fictional. Drama invokes a sense of making something more than it is and not 'rational' or 'credible' (e.g., the saying 'you're being too dramatic'). When a report appears dramatic to somebody, then they get to decide how much of it to take seriously and how much of it to discard. Certainly, in criminal justice institutions, as well as any colonial system, it is the ones in power who get to decide the level of attention they pay to something given how much dramatic impact they have assigned to it. As a genre, horror is meant to create fear, but is usually sensationalist and intentionally manipulative about reality. Perhaps judges were struggling to find appropriate comparisons for the level of trauma they were reading. However, metaphorically fictionalizing trauma as theatrical genres discursively positions the judge as an observer, an audience member, even a voyeur, of pain and suffering, rather than responsible for the cause. Essentially, judges are communicating to an Indigenous person, 'you *are* a drama, you *are* a horror'. Indigeneity is dehumanized, cast as damaged and broken.

Tuck argues that an incomplete story of Indigenous peoples as damaged "is an act of aggression" because people and communities are so much more than their pain (2009, p.416). This is part of the round ball in the square box metaphor, put forward by Pauline. Indigeneity becomes reduced to a check listing of horror. It is not that the damage or horror is insignificant; indeed, it is. However, the square box entraps Indigeneity, but also fractures it, truncates it, cuts it, and tries to fit it into its dominant square. Through *Gladue* reports therefore, Indigenous identities are portrayed as primarily damaged, without regard for the box, the structure, that causes damage. *Gladue* is a missed opportunity for linking damage to *structures* of colonialism. The effect of a *Gladue* reform, then, is that it not only reproduces, but embeds settler colonialism.

What about the colonizer? What sort of identity gets constructed of whiteness in *Gladue*? While damage-centred storytelling positions the oppressed as broken and defeated, the colonizer is situated as benevolent, a savior or a helper. Amanda Gebhard et al. (2022), defines white benevolence as "colonial scripts [that] allow [for white people] to assume the role of innocent do-gooders who simply wish to help and to see themselves as providers of what they imagine Indigenous peoples are lacking" (p.9). Gebhard et al. argue that white benevolence is embedded within settler systems, such as the criminal legal system, to position whites as "helpers" over Indigenous peoples in need of "saving" (2022, p. 9/10). One of the more obvious ways white benevolence manifested in my data was the judge who desired to "*put a human face on the justice system*". That judge could not articulate the specificity of *Gladue* for Indigenous peoples, yet in a patronizing and patriarchal way, claimed to know what Indigenous peoples need from the justice system (e.g., "*They view criminality, the ones who are law abiding, and they're I think the majority would be"*), especially when victims were woman (e.g., "*how do you protect a*

woman?"). While those *individual* attitudes were not explicitly stated by other judges in the study, white benevolence was implicit in the data. I would argue that the judge as 'helper' is the one who decides upon a noncustodial option, because a criminalized Indigenous person has been 'damaged' enough by colonialism to decrease their moral blameworthiness. The judge as 'saviour' is the one who opts for incarceration because a criminalized Indigenous person is too 'dangerous' to the community. White benevolence is at the core of the court *structure* in Gladue.

According to Cree researchers, Gina Starblanket and Dallas Hunt (2020), one of the primary purposes of colonial law is to advance mythical tropes of Indigenous peoples. Through these myths, settlers act in a superior way because the flawed belief is that Indigenous peoples will need the help of white people to survive in modernity (Starblanket and Hunt, 2020; Razack, 2015). In fact, the oldest settler colonial story is of Indigenous peoples being a dying or disappearing race (Razack, 2015), and that white settlers could save them. Racism and assimilation go together. In fact, racism as a form of 'othering,' creating racial hierarchies, is the very foundation of the forced assimilation of Indigenous peoples (Coulthard, 2014; Murdocca, 2009, 2021); the belief that Indigenous peoples are a 'fading people' and, thus, 'for their own benefit' must be assimilated into Canadian citizenry (Saito, 2020; Vericini, 2010). Lorenzo Vericini (2010) explains assimilation as "the general tendency…to perceive the [I]ndigenous population as rapidly degrading and/or vanishing" and thus the "settler colonial situation operates towards its ultimate supersession" (p.25). These explanations of the essence of settler colonialism are not that different than how CRT theorizes about the purposes of the criminalization of race, or how it is accomplished. Charles Lawrence III (1995) argues that whites force dehumanizing caricatures onto nonwhites to justify criminalization and hegemonic power. Gladue's version of damage-centred storytelling follows the same settler colonial pattern

of using mythical tropes about Indigenous peoples to maintain control. Through these tropes the harmful structure of colonialism goes undetected, because whiteness discursively becomes benevolent rather than accountable for harms.

(b) Dangerous: *Gladue* is "*not a get out of jail free card*".

Another violent, racist myth created by settlers about Indigenous peoples is that of the "savage". Indigenous peoples are considered "bestial, close to nature, and *a threat*" (Razack, 2015, p.84; *emphasis added*). This myth reproduces "racialized notions of criminality, terror, and culpability," giving settlers an excuse to move Indigenous peoples off lands and into prisons (Starblanket & Hunt, 2020, p.23). The very existence of Indigenous peoples threatens settler colonial claims to territories. The mythology of 'dangerousness' provides a rationale for Indigenous peoples to be individually culpable for their behaviours, to justify mass incarceration. Starblanket & Hunt (2020) claim that "[t]he depiction of Indigenous populations as savage, unruly, uncivilized people did more than bolster settlers' sense of superiority and entitlement; it also constructed a narrative of violent, bloodthirsty, irrational Indians who, left to their own devices, were sure to engage in unprovoked violence against settlers" (p.79). Indigeneity was thus equated with "deviance" and "terrorism" (Starblanket & Hunt, 2020, p.79). Some of these themes were found in my data.

I often heard the refrain, from judicial participants (and a few *Gladue* writers), that *Gladue* was "*not a get out of jail free card*". In fact, 'dangerousness' or 'seriousness of the crime' were the primary reasons cited by judges for overruling noncustodial options. Sometimes, judges claimed to be curtailed by mandatory minimums; however, most judges stated that the

seriousness of the crime would make them less willing to consider alternatives to incarceration. The underlying (colonial) assumption was that jail was necessary for more serious matters, while community-based, restorative justice options were a way to avoid consequences, like a player in the game of Monopoly card drawing a 'get out of jail free card'. This reveals that the court believes that colonial prisons are better than community-based, restorative justice options for dealing with 'dangerousness' or 'seriousness'. It trivializes the capacity of Indigenous ways of justice to deal with harm. What is more, how can our (settler) definitions of 'dangerousness' or 'seriousness' be considered trustworthy, given that is how we have consistently defined Indigeneity from contact onwards? These labels attached to a criminalized Indigenous person's behaviour cannot be divorced from the pattern of stories the legal system tells about Indigenous peoples: Indigenous peoples have always been concocted as dangerous by colonial law (Razack, 2015). The danger, instead, is a colonial system that continues to cause harm. Rather than the "get out of jail free" card being an inconvenience, or an excuse, it needs to be seen as a right, a path towards reconciliation and respect.

It becomes clearer, then, why there are legal roadblocks and a lack of investment in *Gladue* writing and alternatives to incarceration. The patronizing, colonial court believes these barriers are necessary, even in the best interests of Indigenous peoples, in order to preserve the current hegemonic situation. If Indigenous peoples were to 'get out of jail free' it would mean that the colonial system could not control Indigenous peoples through sentencing outcomes; therefore, limiting the power of the colonial state. By defining Indigenous peoples as dangerous, the state justifies the criminalization of Indigeneity.

Conclusion

I concluded my theoretical framework (see Chapter two) by arguing that incarceration is a weapon of settler colonialism, violently wielded to keep Indigenous people, subjugated at best, and at worst, disappeared or dead. Incarceration replicates and produces theft (of land), domination (of people), and death (of Indigeneity). Indeed, use of carceral environments knot together white supremacy (Davis, 2003), patriarchy (Snider, 2014; Sudbury, 2004), class domination (Wacquant, 2009) and settler colonialism (Balfour, 2014; Monture, 2009) into a web of patronizing social control that entraps Indigenous peoples (Sapers, 2015; Snider, 2014). Indigenous peoples are up against a system of 'justice' that criminalizes Indigeneity (Monchalin, 2016). Ojibwe scholar, Heidi Kiiwetinepinesiik Stark (2016) describes the telos of criminalization at the core of settler violence: "Framing Indigenous peoples as criminals enabled the US and Canada to avert attention from their own illegality…The imposition of colonial law…made it possible for the United States and Canada to shift and expand the boundaries of settler law and the nation itself by judicially proclaiming their own criminal behaviours as lawful" (p.2). Not only does the Canadian state own (i.e., impose) the definition of crime, as well as what constitutes seriousness, it also monopolizes the response to crime, a so-called justice system that legitimates the use of violence, particularly the criminal legal system's use of the deprivation of liberty through incarceration (Cunneen, 2009; Jiwani, 2002). Fundamentally, incarceration is a political weapon, a weapon of power, which undermines Indigenous sovereignties and capacities to resist (Green, 2007; Jiwani, 2002; Maracle, 1996). Further, I argued that *prisonizing* (the making of Indigenous peoples into political prisoners) extends carcerality beyond prison walls into Indigenous communities and Nations. The state tries to maintain control over all aspects of Indigenous life.

Dynamics of *prisonizing* are apparent in *Gladue*. Whiteness and settler colonialism persist in *Gladue* reports, from using a colonial system to solve a colonial problem, to advancing a revisionist, neglectful version of history, to denying feelings, to casting Indigenous peoples as damaged or dangerous and white people as benevolent, all to maximize colonial control and minimize settler accountability. There are powerful narratives structuring relations between *Gladue* report writers and judges, and Indigenous peoples and the colonial court system. These narratives follow the larger scripts and stories – the mythology – of whiteness as benevolent and Indigenous peoples as disappearing. Sherene Razack (2015) argues, legal processes are pedagogical, because "[t]hrough them we learn about superior races and inferior races" (p.9). Razack goes on to write that it is useful for settlers to maintain a view of Indigenous peoples as inherently flawed and, therefore, unable to be stewards of the land, thereby justifying "the settler as legitimate owner of the land" (2015, p.135). Thus, racism is purposeful; settler colonialism "cannot function without perpetuating difference between the colonizers and colonized" (Saito, 2020, p.53). Racial subjugation, according to Saito, serves "to strengthen, enrich, or otherwise legitimize the settler state" (2020, p.207). Through the law and courts, whiteness is imbued with power (Moreton-Robinson, 2015), to mark racialized bodies as criminal and 'other,' as objects of exploitation, in order to sustain a violent, hierarchical social order (Thobani, 2007). Whiteness is an identity that has power to avoid accountability for its harms (Alexander, 2012; Moreton-Robinson, 2015). *Gladue* becomes *prisonized*: *Gladue* is swept into the totalizing systems of whiteness and settler colonialism (e.g., "*a round ball in a square box*"), reifying hegemonic violence against Indigenous peoples – the continued use of incarceration to steal land and subordinate Indigenous peoples.

Chapter 7: Story three – Participants' ideas about improvements to *Gladue*.

Introduction

In this chapter, I will share participants' views about what is needed to improve *Gladue*. Broadly, participants' perspectives on this topic fall under three categories: first, all of the participants mentioned that more resources were needed to fully implement *Gladue*; second, many participants spoke about refining the current *Gladue* report process; and, third, a few Indigenous participants shared ideas about improvements outside of, or beyond, the existing *Gladue* structure. Most of what participants had to say about improving *Gladue* would be viewed as reforms, or recommendations for changes within the hegemonic power configuration. While these would likely improve outcomes for many individual Indigenous peoples, in my analysis, the ethics of decolonizing and abolition would demand more radical transformations.

Findings

Near the conclusion of interviews, I asked participants what needed to change to improve sentencing outcomes, or to make *Gladue* more remedial. The most common responses from *Gladue* writers and judges were: first, more financial resources to (a) increase the number of *Gladue* writers, as well as (b) the time for writing reports, and (c) to create more community-based alternatives to incarceration that would meet the needs of Indigenous communities. Second, beyond resources, both participant groups spoke of ways to improve *Gladue* by (a) involving victims more with sentencing decisions, (b) more education for people working in courts, (c) making *Gladue* reports private, and (d) repealing mandatory minimum sentences.

Third, *Gladue* writers shared a few ideas about making changes beyond the current *Gladue* process, including (a) defunding the police and (b) for colonizers to relinquish power over Indigenous nations and provide more support to those communities.

1. More resources are needed in *Gladue* to reduce Indigenous incarceration rates.

Participants were resolute that the best way to improve *Gladue* was to invest more financial resources into it. The argument was that in spite of changes to the *Criminal Code* that created *Gladue*, adequate funding for successful implementation had not followed. Given what I shared in the previous chapter about insufficient time for *Gladue* writers to complete their work and a woeful lack of community-based, restorative justice alternatives to incarceration, the recommendation for further financial outlay was logical. Participants suggested three areas for resources: (a) more *Gladue* writers; (b) more time for writers to do their jobs sufficiently and sustainably; and, (c) more Indigenous-specific, community-based alternatives to incarceration.

(a) More *Gladue* writers.

Both participant groups wanted to see *Gladue* writing expanded into areas where there were not writers. *Gladue* writers and judges said that without proper funding there would continue to be sentencing disparities. Judges indicated that *Gladue* reports were vital for crafting sentences. Several interviewees suggested that national incarceration rates were being driven by a few provinces, such as Manitoba and Saskatchewan, where there were said to be few (if any) writers. However, participants also advised there was some inconsistency in accessing report writing between First Nations in Ontario (where my participants were located). As Justice Horne

said about Ontario, "*Some areas are better serviced than others*". Moreover, I was told that the funding model for *Gladue* reports centralized most report writing out of Aboriginal Legal Services (ALS) in Toronto. Because of insufficient funding (to ALS), the organization was stretched too thin to meet the demand for *Gladue* reports across the province. In absence of sufficient funding, some First Nations were hiring *Gladue* writers to submit *Gladue* letters, a scaled back version of a *Gladue* report, focusing mostly on sentencing recommendations. Participants hoped for better consistency across Ontario and Canada and for more investment in *Gladue* writers.

Indigenous participants were convinced that the failure to fund writers in some areas, especially provinces with large Indigenous populations, was deliberate – an oppressive and genocidal tactic of the Canadian government. *Gladue* writer Audrey asserted:

> *Why does Manitoba not have Gladue reporters throughout the province, when Manitoba is one of the, it has one of the largest populations of Indigenous people in Canada?...[E]specially with the Supreme Court decision saying that we have to meet a specific standard for Gladue. And the provinces aren't meeting it. And the ones that are closest to meeting it are B.C. and Ontario. So, if B.C. and Ontario are the only provinces that are close to meeting that Supreme Court decision standard, then the question is really, why? Unless it's an actual act of oppression and genocide, in that you're deliberately defying your own laws in order to oppress a population*.

The issue of scant funding for writing reports, frustrated *Gladue* writers and was explained as a conscious effort of the Canadian government to continue causing harm. Employing more Indigenous *Gladue* writers was considered a way to counter colonial violence.

(b) More time for *Gladue* writers to do their jobs sufficiently and sustainably.

The next suggestion from participants to improve *Gladue* was more time for writers to do their jobs sufficiently. It was suggested that more time was necessary to complete decent reports,

without burning out writers. Judges observed that *Gladue* writers were "*stretched pretty thin*" (Justice Stanik). *Gladue* writers described a high demand for reports with limited time for writing fulsome reports in the way they wanted (*Gladue* writers Shannon, Sherri, and Rebecca). Both judges and *Gladue* writers said they observed a lot of turnover in their work. Gladue writer Rebecca characterized it as exhausting work and *Gladue* writer Shannon said, "*we need to recognize this is really difficult work*". Some writers shared with me about vicarious trauma: a combination of hearing traumatic stories (e.g., doing interviews to complete *Gladue* reports), as well as experiencing racism within the courts (*Gladue* writers Jeremy and Rebecca). Overall, participants believed that further financial investment in report writing would give more time for writing reports and make for better working conditions for *Gladue* writers – thus, in turn, improving sentencing outcomes for Indigenous peoples.

(c) More investment in Indigenous-specific, community-based alternatives to incarceration.

Judges made it abundantly clear that without options for community-based alternatives to incarceration, which do not exist in many jurisdictions, it is not possible to give judicial notice to *Gladue*. For instance, when I asked Justice Stanik why Canada had not made a dent in Indigenous incarceration rates with *Gladue*, they speculated that there was a "*lack of investment that would provide meaningful alternatives to incarceration*". Some judges were more specific about the types of Indigenous services needed. Justice Horne suggested that every Indigenous community should have "*resources on the ground…for mental health support and addictions*

support". Judges believed that noncustodial programs should be culturally-specific or Indigenous-led. Justice Stanik said:

> *Sometimes I feel that's where the ideal of Gladue comes up short, not because there's any fault on the part of the writers, but because governments have not invested in real alternatives that would, you know, hold the person accountable. But, offer them something that's culturally appropriate and useful in terms of addressing the underlying factors that might, you know, stop a recurrence of the behaviour.*

Every *Gladue* writer spoke about the need for investment directly to First Nations, or the need for noncustodial programs within Indigenous communities. Indigenous *Gladue* writer, Lori, said:

> *We're not getting, we don't have the money in our communities…so, you do a Gladue and I put all these wonderful recommendations in and the clients agree to it and stuff, and then, you know, funding gets cut. So, we don't have in our communities, specifically the funding for the social services that the people need.*

Gladue writer Rick, shared the sentiment that Indigenous programs were cut first: "*we're always the ones, that's where the cutbacks come first. They hit us first*". *Gladue* writer Rebecca argued the Canadian government needed to trust and respect Indigenous communities, living nation-to-nation relationships, by properly funding services and allowing them to lead, "*otherwise mutual respect is never going to exist*". However, participants wondered how to actuate the political will to get the Canadian government to follow through on funding. Justice Clearly talked about the need to influence the "*decision-makers and money spenders*" to increase resources for *Gladue*. *Gladue* writers were more cynical, saying that funding would likely disappear as quickly as it appeared. Overall, participants agreed that more investment was needed in Indigenous-led alternatives to incarceration.

2. **Many participants wanted improvements within the current *Gladue* framework.**

Many of the participants made suggestions for improvements that would fall within the existing *Gladue* framework, or power structure. I would characterize these as 'reforming the reform;' that is, these were suggested changes within the current *Gladue* structure. Even though my research points to some of the harms against Indigenous *Gladue* writers of working within the colonial court system, many of the *Gladue* writers were effusive about *Gladue*, saying that it gave them "*a little bit more power"* (*Gladue* writer Jeremy), to enact Indigenous forms of justice and stand against the colonial legal institution. Indigenous *Gladue* writer Jeremy said that it was a *"stepping stone…in fighting the system*". There were four themes in the data about building more stepping stones: first, both judges and *Gladue* writers were interested in improving decision-making at sentencing, especially by better inclusion of victims' (of crime) voices; second, many of the participants believed that better education for judges and lawyers would improve outcomes for Indigenous peoples; third, as alluded to in the previous chapter, participants would like the privacy of clients safeguarded; fourth, most participants wanted mandatory minimum sentences to be repealed to give judges more latitude to use *Gladue* in serious cases.

(a) Improving decision-making, especially victim involvement.

Many of the participants raised the issue of lack of victim input in the *Gladue* process, and even some victim opposition to it. Judges shared that they would, generally, like to hear more from victims about their perspectives on sentencing options, especially given that *Gladue* demands the consideration of alternatives to prison. Justices Vorcek, Stanik, and Horne believed that hearing from victims would improve their decision-making abilities. For example, Justice

Stanik humbly shared that *Gladue* had made them less confident at sentencing, as it helped them realize "*more what it's like to be somebody else*". Justice Stanik suggested that utilizing a sentencing circle (i.e., a community-based, restorative justice approach) with community members, including victim involvement, would give them more confidence at sentencing:

> *Sentencing is really hard…but, in our court you're expected to do a lot of it, and I am just one person. I would feel, like, I would really like to hear the views of a community… I guess I'm talking about a restorative approach. Sentencing as problem solving, as opposed to whatever else it is…It would help if there was consensus…not just the defendant, but with the victim…about what would achieve the necessary accountability, and if necessary, of the healing that's going to take place.*

Justice Horne, too, was an advocate for involving victims in sentencing, especially since some of what "*victims may want*" are at odds with recommendations in *Gladue* reports.

> *The more sources of information we have, the better. The more we can tailor, the better for everybody. I found sentencing circles very helpful, especially when the victims have chosen to participate. It's one of the biggest tensions I find in Gladue…the tension there between what the victims may want to see as a sentence versus the teachings in Gladue. It's a live issue in a lot of cases.*

The tension between victim and *Gladue* report perspectives came up with *Gladue* writers, too. In fact, a number of the *Gladue* writers shared that they often heard the 'get out of jail free' mantra from victims (even Indigenous ones) with regards to *Gladue*. *Gladue* writer Jordin said, "*I understand why victims tend to not like Gladue…it [seems] like the accused, or the person being sentenced…have all the rights. They have a support system that naturally develops around them…victims don't have that same system".* Jordin emphasized that *Gladue* was meant to be restorative, but victims are often left out of the process. Generally, in an effort to improve decision-making at sentencing, participants wanted a more restorative, or participatory process, involving victims.

(b) More education for court workers (e.g., judges and lawyers).

Education was a fairly common theme in response to questions about making improvements to *Gladue*. As discussed earlier, *Gladue* writers cited how little judges knew about Indigenous experiences and judges confirmed it; so, participants believed that more education should be mandated for judges and lawyers on topics related to *Gladue*. For example, more than half of the *Gladue* writers in the study wanted lawyers and judges to receive more training about *Gladue* reports and colonialism. Writers thought that better awareness would improve sentencing outcomes. *Gladue* writer Pauline suggested more education for the reason that "o*nce a person becomes aware of something they can't be unaware of it*". Justice Watson took the topic of education a step further, proposing that education needed to start at a young age, so when adults became lawyers and judges they would already have a deeper understanding: "*Nobody has taken the time to educate our young kids. And it has to start young. Like it has to start in public school about these atrocities…It starts with teaching tolerance and understanding, and the real meaning of what it is like to walk in someone else's shoes*". Moreover, Justice Watson implored me to use my study to further educate the general public about the topic of *Gladue*. To summarize, participants were fairly convinced that education would make a meaningful difference on sentences involving *Gladue*.

(c) Privacy of *Gladue* reports/stories.

Another recommendation had to do with privacy concerns about *Gladue* reports. As previously written, several participants cited concerns about stories being shared in open court and how certain institutions (e.g., media, corrections). were using stories for their own

advantage, to the detriment of criminalized Indigenous peoples. Participants believed *Gladue* reports should remain private. In particular, *Gladue* writers Sherri and Rebecca were convinced that reports should not be read in open court without permission of the criminalized Indigenous person, nor used by the prison system for classification purposes. Rebecca commented that sometimes even the accused's lawyer would use *Gladue* reports as part of their submission to the court, exposing private information without care to consequences: "*...[T]hat's another thing I've noticed about lawyers, they will just use the Gladue report as their submissions and…read the report in open court, which is not okay. Like, that is very personal information that should only be read…in private and alluded to [in submissions], not 'I'm going to read this huge chunk of your trauma to an open court"*". Interviewees thought that better safeguards to privacy would invite more participation from potential clients and protect reports from being misused by other institutions.

(d) Repeal mandatory minimum sentences.

Several interviewees recommended repealing mandatory minimum sentences. A few of the participants seemed to view it as a form of political interference in judicial discretion (*Gladue* Writer Shannon; Justices Stanik & Gray). *Gladue* writer Shannon stated that increasing Indigenous incarceration was not a failure of *Gladue*, but "*[t]he fault is with a system that still imposes mandatory minimum sentences. It restricts access to conditional sentences*". Shannon went on to say that the government needs to "*restore the ability of judges to sentence people appropriately and not restrict them with mandatory minimums*". Justice Zezel agreed, but with the caveat that any repeal should be Indigenous-specific: "*Maybe Indigenous peoples shouldn't*

have mandatory minimum sentences". The elimination of mandatory minimums would give judges the option to use noncustodial sanctions even with more serious crimes; although, it should be noted that judges also spoke about being constrained by the history of case law. Repealing mandatory minimums would make space for more judicial discretion, but would still be limited by how Indigenous peoples have been constructed as 'dangerous' in case law.

3. Gladue writers wanted changes beyond the current *Gladue* framework.

Gladue writers expressed a few ideas about changes beyond, or outside, the current *Gladue* framework. I expected more on this topic from participants, but my data, here, was rather small (but not insignificant). Perhaps it was challenging to imagine otherwise when in the midst of violence. Or, the data could have been limited by my settler identity. Conceivably, Indigenous *Gladue* writers might have been hesitant to talk to me, as a white settler, about more radical, abolitionist ideas. Or, maybe the questions I asked focused participants' imaginations within the existing framework. Indeed, I wanted to ask open-ended questions, so as not to lead participants towards certain responses, but the question about changes to *Gladue* was possibly too open-ended. I asked participants: "We know from research that efforts such as *Gladue* have not changed the incarceration rates for Indigenous people. What are your thoughts about why this might be"? Another option could have been to provide a brief description of the Two Row Wampum treaty with a follow-up question, "What would *Gladue* look like if it were aligned with the Two Row Wampum treaty"? That sort of approach might have challenged participants to think outside the colonial power structure. That said, there were two themes worth reporting on: (a) Defunding the police; (b) Relinquishing power over Indigenous communities and offering better supports to address impacts of colonialism.

(a) Defunding the police.

Quite a number of *Gladue* writers spoke about problems with the overpolicing of Indigenous peoples, leading to Indigenous peoples "*getting arrested at alarming rates*" (*Gladue* writer Lori). From this point of view, mass incarceration of Indigenous peoples was a problem of how Indigenous peoples were policed. Effectively, policing was viewed as the doorway into the criminal legal system. Further, some, like *Gladue* writer Audrey, were distressed by police brutality against Indigenous peoples and the corresponding fear of trying to survive against genocidal, colonial policing:

> *It's normal for Indigenous peoples to feel afraid for their life when they get pulled over by a cop. It's normal to feel like somebody is always watching them when they walk down the street. It's normal for them to tell their family that they love them when they go to walk out the door because they don't know if they're going to come home that day…this is because of colonialism…This is because of genocide.*

Several *Gladue* writers spoke about defunding the police as an answer (*Gladue* writers Rebecca, Audrey, and Lori) to mass Indigenous incarceration. "*Defund the police*," said *Gladue* writer Rebecca, "*then fund other things*" (Rebecca went on to advocate instead for more investment in social services, especially mental health and addictions supports). The sentiment of these writers was that by defunding the police, the flow of Indigenous peoples into the carceral system would be interrupted earlier rather than too-late at sentencing.

(b) Relinquish power over Indigenous communities and provide better support to address impacts of colonialism.

In the previous chapter, I wrote about the persistence of colonial mentalities in the *Gladue* process. In the one before that, I argued that the court violates the Two Row Wampum treaty, as *Gladue* is not about settlers sharing power with Indigenous peoples – walking side-by-side – at sentencing. At the core, Indigenous peoples are self-determining, sovereign peoples and are not being treated as such in the court. Indigenous *Gladue* writers expressed exhaustion and exasperation with these circumstances. Further, they stated they did not anticipate that the colonial legal system would give up control of the justice process (*Gladue* writer Pauline said it would be "*mission impossible*"); yet, they did hope for, first, the relinquishment of colonial control and, second, that resources should be shifted away from enforcement towards the preventative side of addressing the impacts of colonialism.

First, at the heart of *Gladue* writers' descriptions of colonialism and the impacts of doing *Gladue* work in the courts (e.g., Audrey's quotes in Chapter 5 about ongoing genocide) was a plea for colonial violence to cease. With a justifiable amount of anger, Rebecca, summed up much of the sentiment I heard from *Gladue* writers: "*relinquish some power and control and trust the [Indigenous] communities that you want to service and serve, like, because otherwise that mutual respect is never going to exist*". The word "*relinquish*" connotes the idea of renouncing and handing over. The quote is evidence of a plea for colonizers to renounce illegitimate, judicial control of Indigenous peoples and to return – to hand over – control of justice to Indigenous peoples. Doing so would put an end to one aspect of legal violence against Indigenous peoples and, according to some *Gladue* writers, begin a process of returning to mutual respect.

Second, similar to the findings above about more investment in alternatives to incarceration, Indigenous *Gladue* writers were keen to see more financial support from the

Canadian government for social issues in Indigenous communities. The main idea, here, was moving resources from enforcement to prevention. Many participants felt that sentencing (e.g., Section 718.2[*e*]) was too late to fix the impacts of systemic racism. When talking why *Gladue* has not done more to change Indigenous incarceration rates, *Gladue* writer Shannon, said: "*the justice system is not the place for systemic change; the justice system lags behind the rest of the world*". Investment in social services, according to *Gladue* writer Rebecca, "*would be a big answer to overincarceration*". Rebecca went on:

> *We just need better health, mental support. We need better housing. We need to get rid of homelessness. We need to get better addiction workers, we need more outreach workers who are on the street actually doing the work instead of at a desk waiting for someone who doesn't have a phone to call them*.

The belief was that funding preventative measures would keep Indigenous people out of colonial courts. What is more, it could function as a form of reparations.

Finding 1: *Gladue* needs more investment in resources to reduce Indigenous incarceration.	
(a) More *Gladue* writers are needed.	(b) *Gladue* writers need more time to complete successful reports and to make the work sustainable.
(c) More Indigenous-led alternatives to incarceration are needed.	
Finding 2: Many participants wanted improvements to the current *Gladue* structure.	
(a) Improved decision-making, by involving victims.	(b) Judges and lawyers needed to be better educated about Indigenous experiences of colonialism.
(c) Clients need to be assured privacy of *Gladue* reports.	(d) Mandatory minimums should be repealed.
Finding 3: Some participants wanted changes beyond the existing *Gladue* framework.	

(a) Defunding the police would eliminate the overpolicing (and police violence) of Indigenous communities.	(b) Indigenous *Gladue* writers wanted the courts to relinquish control of justice to Indigenous communities and invest in better prevention services in those communities.

Discussion and analysis

Considering the above data, about participant views of improvements to *Gladue*, leads me to two analytical points: first, without changing the power structure, there is a risk of falling into the trap of endlessly reforming the reform; second, there is a real possibility that with some changes, *Gladue* could open up space for decolonizing sentencing and even some abolitionist elements.

1. **Reforming the reform.**

Without a doubt, the list of suggestions provided by participants would make a significant difference in the *Gladue* process. More funding seems necessary. *Gladue* cannot be properly realized without significantly more investment in *Gladue* writing and Indigenous-led alternatives to incarceration. Improving decision-making by involving victims, educating judges and lawyers, ensuring the privacy of clients, and repealing mandatory minimums are just as necessary. Yet, these sorts of changes, according to abolitionists, would be labelled as "reformist reforms" (Ben-Moshe, 2020). Liat Ben-Moshe (2020) argues that "Reformist reforms are situated in the status quo, so that changes are made within or against this existing framework. Nonreformist reforms imagine a different horizon and are not limited by a discussion of what is possible in the present" (p.16). The risk of reformist reforms in the *Gladue* process is that they are still enclosed by the

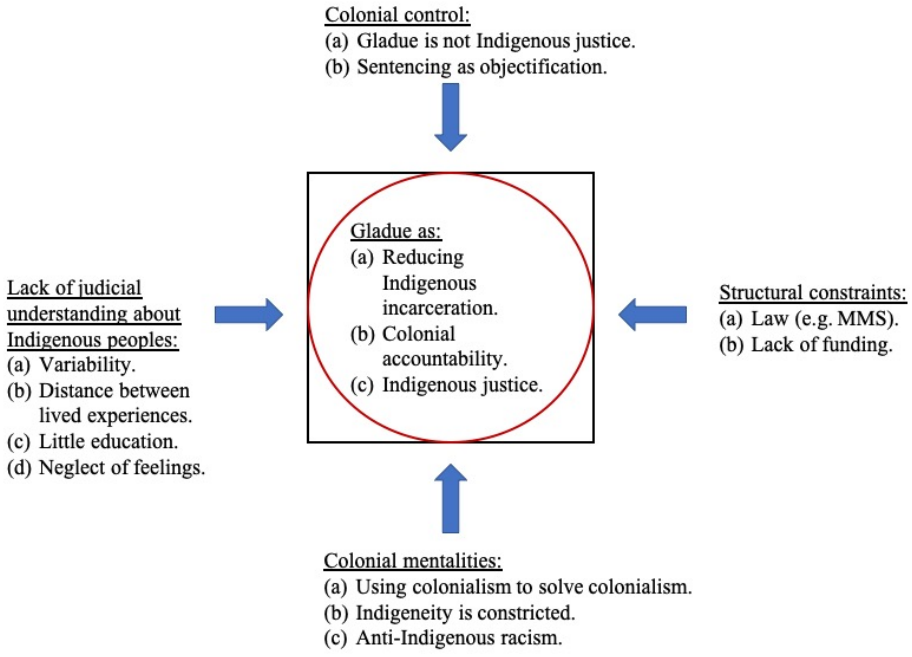
carceral logics of settler colonialism, white supremacy, patriarchy, and so on. Nonreformist reforms are abolitionist, working towards end structural violence. The question remains whether the participant recommendations, would be sufficient to break *Gladue* out of colonial control.

In my assessment, the remedial aim of *Gladue* is likely not fully possible within the current framework. It is clear that Canada has not come close to operationalizing the infrastructure of *Gladue*. Would a reformist reform eliminate the overincarceration of Indigenous peoples? Participants seemed to think that with more funding, more *Gladue* writers, and more community-based alternatives to incarceration that incarceration rates would decline. To a certain extent, I think they are right. Chances are, incarceration rates for Indigenous peoples would go down with these improvements. However, when I compare these ideas about reform to my previously shared data and analyses, *Gladue* is structured in a colonial, hyper-individualistic way – one Indigenous person at a time being sentenced. The suggestions of participants would likely make outcomes better for more *individuals*, but would be unlikely to make a sustained *systemic* change. What is the difference? The difference is that the hegemonic power structure would remain intact – and, moreover, the hegemonic power structure is invested in doing away with Indigenous peoples.

Returning to one of the more poignant metaphors from the data, *Gladue* is a round ball trapped within a square box (see *Figure 6.1*). *Gladue* is attempting to reduce Indigenous incarceration, increase colonial accountability, and make space for Indigenous forms of justice. Yet, it is restrained on four sides by the walls of colonial control of the justice process. At the base of the box is a wall of colonial mentalities. On either side, the box is walled by structural constraints and a lack of judicial understanding about Indigenous peoples. The weight of the wall, at the top of the box, is colonial control. Each of the walls oppresses (e.g., cue Sara

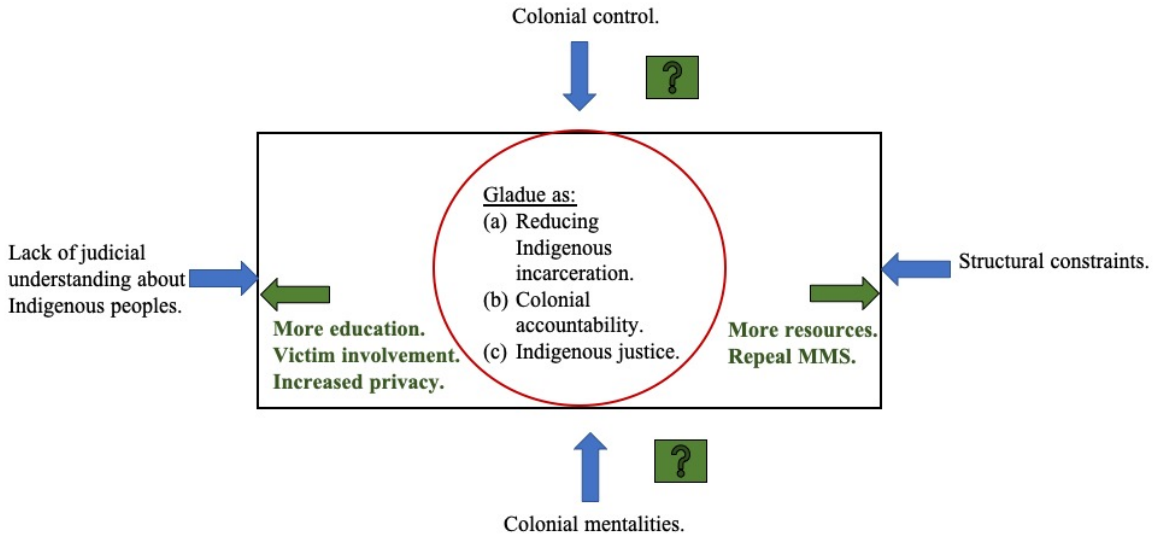
Ahmed's [2017] analysis about oppression as pressing, molding, or flattening) the *Gladue* process. The process is literally imprisoned by settler colonial, white supremacist, capitalistic, and patriarchal impediments.

Figure 6.1: Gladue is a round ball trapped within a square colonial box



What participants have proposed would not necessarily do away with the box – the walls. Granted, each of their suggestions would likely create more breathing room for the *Gladue* process (see *Figure 6.2*). Recommendations would likely decrease incarceration rates, increase colonial accountability, and make more space for Indigenous-led forms of justice. With the recommendations in place, the image would become more like *Figure 6.2* below.

Figure 6.2: Gladue is a round ball not-quite-as trapped within a square colonial box.



However, there are two significant 'questions marks' in the above diagram. What about colonial control and mentalities? Reformist reforms do not address either. *Gladue* would still be oppressed.

From a critical perspective, the problem with reformist reforms is that they do not get at the core of *why* Indigenous peoples are being incarcerated by Canada. Carmela Murdocca (2021) said it best, writing that: "Reforming criminal justice does not fundamentally alter how carceral strategies of criminalization, racialized dehumanization, policing and surveillance are constitutive of ongoing colonialism, perpetuate cultural genocide, and continue to deny Indigenous people access to their land" (p.381). Similarly, as I have written earlier, CRT and CRF theorize that the invention and purpose of race or racism is the white supremacist control of racialized people (Allen, 1994; Alexander, 2012) and that one of the primary mechanisms for white supremacist control is the criminal legal system (Davis, 2003; Rodriguez, 2009). Anchored in beliefs of white, settler superiority, Canada has consistently used the violence of law, police,

courts, and prisons against Indigenous peoples, in order to steal land (Monture, 1995). These are some of *why* systemic racism is present in the first place in the criminal legal system, which *Gladue* is meant to address. The state, then, deploys reforms to intentionally conceal 'the why,' in order to uphold the hegemonic power structure, somewhat like a mirage of progress, to obscure the need to abolish underlying forces of harm (Razack, 2015). The research participants claimed that *Gladue* is making tangible benefits in the lives of some individual Indigenous peoples and have recommended ideas for meaningful change; yet, as indicated above, I am concerned that unless the power structure changes, the whiteness and settler colonialism of the court system will continue to disrupt *Gladue*'s remedial aim (Harris, 1995).

For example, the proposal of including more victim voice at sentencing would likely create more opportunities for consensus; nonetheless, colonial judges could still overrule the accord of the circle. In fact, there was a well-known case, in Saskatchewan, of a judge overruling a sentencing circle's consensus for a noncustodial sentence in favour of imprisonment. In that circumstance, a young, Indigenous dad was so intoxicated after a party that he tragically abandoned his children outside in -50 degrees Celsius temperatures and they froze to death. After substantial deliberation, a sentencing circle (made up of family, community members, Elders, and judicial participants) reached a consensus that the dad should serve his sentence in the community; however, the sentencing circle was overruled by the judge (Goldbach, 2011). The young dad was sentenced by the judge to a three-year term of imprisonment (Goldbach, 2011). In this instance, the colonial court seemed to follow the theme of "seriousness" that I set out in the previous chapter; that if a crime is considered serious, it demands incarceration as a response. Without a clear (re)commitment to nation-to-nation relationships, and thus a recognition that Indigenous peoples have equal standing to colonial courts at sentencing (or should have

jurisdictional control of situations involving their own peoples), I would hypothesize that even with more sentencing circles there will be many similar, colonial outcomes as the above anecdote – colonial judges using their power to override the autonomy of Indigenous peoples. Similarly, I worry about the same fate befalling some of the other recommendations. The elimination of mandatory minimum sentences would be a significant stepping stone forward for *Gladue*; yet, judges also told me they are beholden to the long history case law, which we know from the research literature narrates Indigenous peoples as 'dangerous' (Monture, 1995; Razack, 2015). More education, too, without a shift in power, is unlikely to do more than improve the thinking (and maybe feeling) of individual judges; however, they will still be steered by the rudder of colonial law. *Gladue* needs decolonizing and abolition.

Now, I do not want to be misunderstood; reforms might be a pathway (more "*stepping stones*") towards decolonizing and abolition. My observation is that *Gladue* is one of the few processes that Indigenous peoples have some control over within the colonial court system. *Gladue* follows the dialectic of law argument of Comaroff (2001); that law is both a site of oppression and a site of resistance for Indigenous peoples. Canadian law is violent towards Indigenous peoples and the law (of *Gladue*) creates a small space for resistance. The above paragraphs are not an argument to do away with *Gladue*, or opposed to the recommendations of participants. In fact, I believe that it makes good sense to fully implement each of their proposals. Canada owes it to Indigenous peoples to make reparations for systemic racism in the criminal legal system; to fully operationalize *Gladue*. My argument is that, in addition to participants' recommendations, I would like to see decolonizing, abolitionist steps that begin to tear down the walls of the box.

2. *Gladue*, decolonizing, and abolition.

What would it look like to decolonize *Gladue*, for the process to follow an ethos of abolition? As Tuck & Yang (2012) stated, decolonizing is not a metaphor. It literally means colonizers returning land and resources to Indigenous peoples (Manuel & Derrickson, 2016; Tuck & Yang, 2012). *Gladue* is not a land grab, but is evidence of colonizers stealing control of justice away from Indigenous peoples. Rebecca's word, "*relinquish*," is apt for decolonizing *Gladue*. Colonizers need to *relinquish* control of justice processes involving Indigenous peoples. It is not enough to offer an improved *Gladue* report, which may or may not impact whether an Indigenous person is incarcerated; instead, Canada needs to go farther and create a framework that decolonizes judicial control, by ceasing to interfere with self-determining Indigenous nations who have every right to oversee justice processes for their peoples. Decolonizing will also involve reparations; meeting the demands of research participants for more funding into Indigenous communities. Relinquishment would accomplish two aims of decolonizing: first, it would cease the violence of colonial, juridical control of Indigenous peoples; second, ideally, it should stimulate a process of reparations – a way for colonizers to pay back some of the harms of settler colonialism.

(a) Relinquishing colonial control of *Gladue*.

A clear statement, from Canada, about the cessation of colonial legal control over Indigenous peoples is necessary. Through *decolonizing as relinquishment* of colonial power over the *Gladue* process, the abolition of white supremacy, patriarchy, capitalism, and settler colonialism inherent in *Gladue*, might be possible. Renouncing colonial control of justice

outcomes over Indigenous peoples would a marked shift away from the master colonial narratives that position white, settlers over Indigenous peoples. Abolition is concerned with dismantling white supremacy and other forms of structural violence that create the harmful foundations for carceral and punitive logics (Davis, 2003). A relinquishment would be abolitionist. It would be an acknowledgement that whites should not be supreme, thus bursting the myths of essentialism, empty land, and colonial legal order (Lavendier, 2019). It would demonstrate that settlers are not entitled to interfere with the sovereignty of Indigenous peoples; it would be a returning of justice (processes) to Indigenous peoples. Colonialism has alienated Indigenous peoples from original justice systems (Hansen, 2012). Decolonizing is the material realization of self-determination with justice by Indigenous peoples (Saito, 2020), a return to being "in control of one's life and relations" (Monture, 1995, p.95). Decolonizing *Gladue* is settlers relinquishing control of the legal process and outcomes of criminal proceedings with Indigenous peoples.

For decolonizing to happen, *Gladue* would need to be tethered to a binding legal agreement that honours nation-to-nation relationships between Canada and Indigenous Nations. Otherwise, Canada is unlikely to stop doing legal violence to Indigenous peoples. Saito (2020) argues that "states do not see it as in their interest for peoples purportedly under their jurisdiction to exercise their right to self-determination and, as a result, have developed strategies for resisting such efforts or minimizing their impact". As I have advocated, the Two Row Wampum treaty and Silver Covenant Chain would be logical legal contracts for settlers to recommit to. The Two Row Wampum treaty legislates the principle of 'separate but equal,' between settlers and Indigenous peoples, or the principle of non-political interference in matters of governance. The Silver Covenant Chain stipulates that "both sides accept responsibility for prosecution of their

own citizens should they commit a crime against a Native or colonists" (Hill, 2017, p.95). Decolonizing *Gladue* would require Canada to be accountable to the Two Row Wampum and Silver Covenant Chain treaties.

(b) Using *Gladue* to repair the harms of structural violence.

It is clear from the contents of *Gladue* reports that reparations are necessary to address the devastating consequences of colonialism on Indigenous individuals, families, communities, and Nations. Mariame Kaba (2021) argues that reparations are foundational to abolition. Reparations provide material ways for society to move from individualized reforms to systemic abolitionist responses (Kaba, 2021). Ceasing violence without offering reparations would only be partial accountability. Making amends is central to responsibility taking (Zehr, 2015). Participants proposed a number of reparative ideas: fully funding *Gladue* writing and Indigenous-led community-based justice responses, and moving financial resources from enforcement to prevention (e.g. defunding the police). A fully funded *Gladue* process could provide a pathway for reparations by increasing the capacity of Indigenous nations to be in control of justice processes and outcomes.

Conclusion

When it comes to *Gladue*, the legal system is like a dog trying to run forward while biting its own tail. It is a spinning, tripping disaster. The dog struggles to advance because mandatory minimums cause it to spin around and bite its own tail. The dog trips as it encircles itself because

there is little investment in noncarceral options to move forward with. It is not that *Gladue* has failed (as *Gladue* writer Shannon stated); rather, the government has impeded and undermined its own legal progress and failed to build a suitable structure for the full implementation of *Gladue*. Thus, the law is not a bumbling creature. It is better understood as rabid, deliberately creating chaos and inflicting pain. Colin Dayan (2011) calls the law a "white dog", to implicate how legal realities function like specters, metamorphizing human beings into subordinate creatures. Dayan (2011) grew up in Atlanta, Georgia, in the 1960s, when the police were known as "the laws" (p.252), exacting brutality on Black people through slave patrols:

> The law was angry
> The law was rabid
> It came upon you in the night
> The paterollers
> Seeking you out
> They always came with a white dog
> With their white cone hoods
> And their white capes
> Ghosts in the night (p252).

Black people were warned to "beware of the flash of the white dog" (p.252), because it meant impending white (legally-sanctioned) violence. The purpose of the white dog was to inflict violence and to instill fear, to create legal narratives that "recast [people] anew as civil nonentities" (2011, Dayan, p.65). The specter of law makes and unmakes human beings. Canadian law is not that different towards Indigenous peoples. What does it say about Canada that we are over twenty years into *Gladue* and it still has not nearly been fully implemented? An inadequately funded reform is not bumbling, it is calculated. The biting of the tail is only a distraction that the white dog uses to get its rabid teeth into people, infecting them with a legal fiction that turns them into criminals, to be disappeared.

In summary, the research shared in this chapter reveals two streams of findings. First, that *Gladue* is still viewed by some Indigenous peoples as a "*stepping stone*," a pathway of opportunity for some Indigenous control of justice outcomes. The suggestions of participants would add more stepping stones: further investment in the process (i.e., more *Gladue* writers, more time for report writing, and more Indigenous-led community-based options at sentencing) and some changes to the structure (i.e., improving decision-making by involving victims, more education for lawyers and judges, ensuring the privacy of *Gladue* reports, and repealing mandatory minimum sentences). Second, some Indigenous participants proposed changes outside of the current *Gladue* structure (i.e., defunding the police and settlers relinquishing control of *Gladue* while funding prevention initiatives). In my analysis, the first stream of findings could be understood as 'reformist reforms,' because they uphold the hegemonic power structure. Stepping stones might improve individual outcomes, but would be unlikely to make instigate much of a systemic change. The second stream of findings is more abolitionist, agitating *Gladue* towards decolonizing.

In conclusion, to decolonize *Gladue*, the 'white dog' of law must be confronted. Decolonizing *Gladue* would mean settlers relinquishing power over Indigenous peoples through the *Gladue* process. It would mean settlers paying reparations to Indigenous nations to support preventative measures and the resurgence of Indigenous forms of justice. Only then could the spectre of the white dog disappear. In the next chapter, I will propose some specific policy ideas for implementing a decolonizing, abolitionist approach to *Gladue* rooted in the Two Row Wampum and Silver Covenant Chain treaties.

Chapter 8: Conclusion – Narrative endings

Introduction

In this concluding chapter, I write about the key findings and analysis of the study, the limitations, and its implications for *Gladue* policy, the discipline of social work, and for me, personally. The study exposes the need for settlers (especially white men) to take responsibility for the harms of the colonial courts, to dismantle the hegemonic power structure that subordinates Indigenous peoples in the *Gladue* process, and to address the white supremacist, patriarchal, settler colonial underpinnings. Without a doubt, the journey of studying *Gladue* has challenged me towards decolonizing and abolition, towards fulfilling my Two Row Wampum and Silver Covenant Chain obligations, including contributing to Truth & Reconciliation Commission 'Call to Action' number 30.

Summary of key findings and analysis

To share the story of the research, I organized the data and corresponding analysis into three thematic areas: first, participants' views of *Gladue*; second, participants' perspectives of impediments to the *Gladue* process; and, third, participants' ideas for improvements to Gladue. Below, I summarize the key findings and analysis from the previous three chapters.

1. **Participants' views of *Gladue*.**

Gladue writers and judges mostly described the purpose of *Gladue* as a means to reduce Indigenous incarceration rates; however, fundamentally, judges and writers differed on the reasons for *Gladue* reports. Indigenous *Gladue* writers were using reports as 'life preservers' for their clients, as a way to heal from – and resist – the harms of colonialism. Indigenous writers did not view themselves as separate from the stories of their clients. They were "in" their clients' stories, living the experiences of writing their stories together with them. Interviewing, writing, and reporting were viewed as sacred, life-giving practices. By contrast, judges were primarily using reports as material for crafting sentences. As such, *Gladue* reports were transmuted by judges from a life-story, a living person (Indigenous worldview), into an object for manufacturing sanctions (colonial worldview). This judicial objectification exposed, first, that Indigenous peoples were dehumanized in the process, pressed into objects of colonial, sentencing control; and, second, that *Gladue* followed a hyper-individualistic configuration, discursively shifting away from dealing with the systemic issue of anti-Indigenous racism towards judging the individual Indigenous person before the court. Dehumanization and individualism (judicial approach) juxtaposed *over* sacredness and healing (Indigenous approach) represented the furthering of the hegemonic power of settler colonialism, especially the specific gendered harms of the colonial legal system (e.g., the incarceration of Indigenous women as fastest growing prison population), while masking the need for the state to be meaningfully accountable for systemic racism at sentencing.

2. Participants' perspectives about impediments to the *Gladue* process

A deeper exploration of participants' perspectives of impediments to *Gladue* exposed some of *why Gladue* has not realized a reduction in Indigenous incarcerations rates. Several participants talked about the backwardness of the colonial system using the same problematic patterns to address the harms of that system. For instance, some of the identified patterns included the way that Indigeneity was constricted by judges to either 'dangerous' or 'damaged'. At sentencing, judges claimed to choose community-based sanctions for those 'damaged' by colonialism (*Gladue* reports primarily document the harms of colonialism), unless the Indigenous person before the court was too 'dangerous' and, therefore, must be incarcerated to protect vulnerable victims. Essentially, these stories of Indigeneity followed the racist narratives of settler colonialism that dehumanize Indigenous peoples as 'savages' (i.e. dangerous) or a 'dying, disappearing race' (i.e., damaged), positioning Indigenous peoples in the *Gladue* process as subservient – beholden – to the benevolence of colonial judges. Would judges save them from incarceration, or save vulnerable victims from them? Moreover, *Gladue* writers were concerned that judges knew too little of these colonial dynamics, as well as generally about Indigenous peoples to be making appropriate judgments. Judges were thought to be 'white and privileged,' too far removed from the life experiences of Indigenous peoples. Finally, all of the participants agreed that *Gladue* was not adequately funded. According to participants, there were not enough writers, including a complete absence of writers in some provinces with the highest Indigenous populations, and not nearly enough Indigenous-led, community-based options at sentencing. Each of these dynamics, from anti-Indigenous racist tropes, to a lack of judicial understanding, to a lack of funding, demonstrated the persistence of settler colonial logics in *Gladue*, thereby undermining its remedial aim of reducing Indigenous incarceration.

3. Participants' ideas for improvements to *Gladue.*

Participants had ideas about how to improve the *Gladue* process, but mostly within the existing structure. Participants argued that *Gladue* needed significantly more investment – more funding for *Gladue* writers and for *Gladue* writers to do their work sufficiently, and more funding for Indigenous-led alternatives to incarceration. Participants proposed other amendments to *Gladue*: improving decision-making by involving victims, more education for lawyers and judges, better privacy for *Gladue* reports, and repealing mandatory minimum sentences. These proposed changes would likely decrease the number of Indigenous peoples incarcerated in Canada and give Indigenous peoples a little bit more power over the process; however, I classified these as reformist reforms as they would do little to disrupt the underlying hegemonic power structure. A few Indigenous participants did share more radical – decolonizing and abolitionist – views for improving *Gladue*. Ideas included defunding the police and for the colonial courts to relinquish control of justice processes involving Indigenous peoples. In my analysis, there was a greater need for the state to examine the limits of its own accountability to systemic racism through a reformist reform and instead move the process towards decolonizing – and relinquishing power over Indigenous peoples.

Limitations of the study

The current study was limited by a number of factors: first, by my subjectivity as researcher; second, the study applied an intersectional analysis, using critical race theory (CRT) and critical race feminism (CRF) with attention to the ethics of decolonizing and abolition. It

analyzed whiteness and settler colonialism, with some attention to patriarchal and neoliberal dynamics – the power constructs that seemed most salient to the data. However, further study might add complexity by critically examining *Gladue* through other theories related to capitalism and Christianity. Finally, the study was limited by the type of methodology and sampling.

First, the study was limited by researcher subjectivity. It was shaped and influenced by my identity, socialization, and experiences. As I wrote in chapter one, my gender, race, settler, and class positions – of privilege – influenced how the research was carried out. There should be a certain amount of suspicion, or critical examination, of scholarship that emerges from privileged social locations. For example, as I wrote about in chapter five, a lack of insight about my gender privilege contributed to my failure to ask more about the gendered dynamics of *Gladue*. Similarly, I wonder whether some Indigenous participants were reticent to share more radical ideas for changing *Gladue* because of my white and settler statuses, thus impacting data collection. Certainly, I have sought to mitigate these limitations by ensuring trustworthiness, reliability, and integrity of the research through such practices as member checking and following an ethical protocol for research with Indigenous peoples.

If I were to conduct more research on *Gladue*, I would think carefully about how to follow up open-ended questions with ethical probes or dialogue about various power constructs (e.g. patriarchy). In the future, one way to conduct anti-oppressive research would be to follow the approach of social work scholar, Christine Mayor (2021). In a recent study, Mayor used an anti-racist praxis with interviewees when researching the topic of whiteness and anti-Black racism with school-based social workers. Mayor was "more explicit and honest with participants about [her] own identity, politics, and relationship" to the research topic, rather than simply doing a question-answer approach based off an interview guide (2021, p.311). What I found

profound about reading Mayor's scholarship was how she experimented with intentionally moving beyond research 'neutrality' into a position where she engaged in ethical and critical conversations with research participants, even challenging instances of racial bias shared by participants: "I…began to more explicitly name my own whiteness and complicity with and critique of education systems and social work with both white and racialized participants…[which]…provided an opportunity to move into critical reflection with participants about racism and whiteness, and was also a way for me to challenge my own white, colonial, and capitalist desires for an insatiable need to extract more data as a resource" (2021, p.285). Mayor's approach seems more authentic; it acknowledges ongoing power dynamics. In future, I will continue to work towards fulfilling my ethical and moral obligations to address settler colonialism when conducting research, which requires being accountable for mistakes – even harm – that I might cause during research processes.

Second, the study was demarcated by my analytical framework. Following the scholarly traditions of CRT and CRF, the study analyzed whiteness, settler colonialism, and patriarchy, with some attention to neoliberalism, in relation to *Gladue*. Although outside the scope of the current analysis, I wondered as I reviewed the data whether further study on the topic should also critically explore how capitalism and Christianity have shaped *Gladue* outcomes. For example, from a capitalistic perspective, even something as simplistic as comparing the disparity in income between judges (e.g., $300,000+/annum) versus *Gladue* writers (nonprofit wages), or that Gladue writers are often working out of humble offices, while courthouses are multimillion-dollar palaces (e.g., in my home town, a new courthouse was recently built with $766 million-dollar price tag), would expose something of the power structure of *Gladue*. Another analytical theme that I would be curious to pursue later would be the influence of Christianity on *Gladue*. A

few judges raised the topic of punishment, as a philosophy of legal justice, and the futility of prisons for creating community safety. It is difficult to research punishment and conceptions of justice without getting into the Judeo-Christian philosophies of retribution and atonement at the core of why Western criminal legal systems use punishment to address harm (Snyder, 2000). Expanding the analytical framework to include other theories and variables would certainly enliven understandings of *Gladue*.

Third, qualitative research cannot be generalized (Creswell, 2013; Lincoln & Guba, 1985)). My study was a qualitative study with a deliberate, nonrandom sample. Following a detailed ethical protocol for engaging with Indigenous research participants, I interviewed a total of 21 people because of their 'closeness' to the topic. The study sample is not random, nor representative of all views. For example, I chose not to interview criminalized Indigenous peoples, those who *Gladue* reports are written about. Future studies might want to consider the experiences of criminalized Indigenous people with the *Gladue* process. As well, several *Gladue* writers and judges indicated to me that defence and crown attorneys would offer useful research information. Due to the size and scope of the study, I did not interview those groups. Moreover, because of my ethical protocol (e.g., giving opportunity for Indigenous participants to recommend which judges to interview), I ended up interviewing judges that all had significant involvement with *Gladue* reports. At times, I wondered whether I was speaking to an 'expert' crowd and whether judges with less experience of *Gladue* would provide different information. In summary, the methodology as well as the sample does not allow for broader generalization to all *Gladue* experiences.

Implications of the study

This study has many implications for the *Gladue* process and for the discipline of social work. There are also implications for me, as I think about how I have changed as a result of my ten-year doctoral journey, and what I plan to do about it, in light of my reciprocal obligations to Indigenous participants.

1. Implications for *Gladue*.

The current study has a number of implications for the *Gladue* process. These can be categorized under two themes: first, there is a need for *Gladue* to move from an individualistic response to a more systemic one; second, there is a need for colonizers to relinquish control of doing justice to Indigenous peoples. How might *Gladue* become systemic in its approach? What would it take for colonizers to relinquish control of the *Gladue* process? I would suggest, first, to properly systematize *Gladue*: (a) *Gladue* should be fully funded, premised on Canada's need to make reparations for the harms of colonialism and systemic racism, and (b) an ethical protocol should be created that honours *Gladue* reports as sacred life stories. Second, it is necessary for Canada to relinquish control of matters of justice related to Indigenous peoples by (a) introducing a legislative framework to steer Indigenous justice matters to Indigenous communities and nations; and (b) defunding the police in order to stop criminalizing Indigenous peoples and to fund reparations.

(a) Properly systematizing *Gladue*.

The highly individualistic nature of (colonial-controlled) sentencing is not achieving the systemic change necessary to reduce Indigenous incarceration rates. In order to achieve its aim, *Gladue* needs (i) significant investment in *Gladue* report writing, as well as in Indigenous-led alternatives to incarceration; and, (ii) an ethical protocol for the sharing/receiving of *Gladue* reports. By 'systematize,' I do not mean 'standardize,' or making *Gladue* the same, everywhere; instead, I mean improving the *Gladue* process so that it better accomplishes its systemic aim.

(i) Fully funding *Gladue* as a form of reparations.

In the previous chapter, I argued that fully funding *Gladue* would represent a form of reparations to Indigenous peoples for some of the harms of systemic racism in the legal system. One of the central issues impeding the reduction of Indigenous incarceration rates is the underwhelming funding of *Gladue* report writing and Indigenous-led alternatives to incarceration, making *Gladue* more individualistic than systemic in its achievements. Through Section 718.2(*e*) of the *Criminal Code*, the Canadian state has acknowledged systemic racism; yet, to *actually* take responsibility for systemic racism would require financial reparations in order to build up a sufficient number of *Gladue* writers, as well the creation of (many) more Indigenous-led, noncarceral justice responses. Every criminalized, Indigenous person should have the option of a *Gladue* report. At sentencing, judges should not have to choose incarceration for a criminalized Indigenous person because alternatives do not exist. Canada claiming *Gladue* as a response to systemic racism without sufficiently operationalizing *Gladue* is misleading; really, *Gladue* only offers limited opportunities for some Indigenous peoples before

the courts. To properly systematize *Gladue* would require fully funding it, across all provinces and territories.

(ii) An ethical protocol that honours *Gladue* reports as sacred, counterstories.

To properly systematize *Gladue*, there should be an ethical protocol created between the courts with each Indigenous community or nation about how reports are to be shared and received. Courts need to honour the sacredness of *Gladue* stories. Indigenous *Gladue* writers shared that *Gladue* reports, or stories, are sacred to Indigenous peoples. Further, my data found that reports are not being treated as such by the courts. An ethical protocol could include ensuring the privacy of *Gladue* stories and anchoring reports in the courts' obligation to rectifying systemic racism at sentencing.

Part of the protocol should address the issue of privacy. Participants in my study were concerned about how criminalized Indigenous people are being exposed to the court in a potentially dehumanizing way, especially when reports are (mis)used by other institutions, such as media and corrections, for exploitative purposes. Clients should have control of when, where, and how their personal stories of pain and trauma are shared. This is similar to Murdocca's (2021) argument that a protocol should be created for incarcerated Indigenous clients who are completing Gladue report reports. Murdocca (2021) found that breaches of confidentiality were especially apparent in carceral contexts. An ethical protocol could include guidelines for privacy, dependent upon the wishes of each client.

Moreover, the court needs to properly be accountable for the stories of harm told within reports. Judges should not be using stories *only* for objectified sentencing calculus, as my

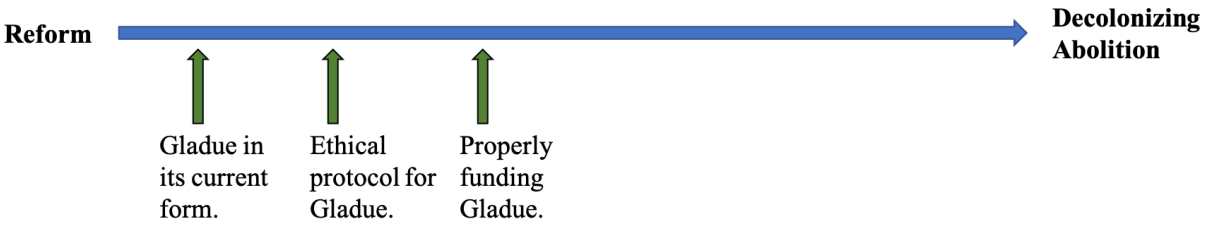
research revealed, but should be *answering* in meaningful ways – taking responsibility in court – for the harms of colonialism. One way to improve accountability would be for *Gladue* reports to be written more like counterstories, as espoused by CRT. Counterstories are narrated dialogues or autobiographical reflections that disrupt master narratives (Martinez, 2020). They are formed and told from the perspectives of people who are oppressed (e.g. been silenced by master narratives), in a way that empowers (Martinez, 2020). *Gladue* reports are powerful because they reveal the impacts of settler colonialism, from the individual, back through generations of family and community. *Gladue* reports are close to being counterstories, but they are missing a key component – more context – that could potentially further empower those whose stories are being told. I believe writers have been trying to contextualize stories, but it seems that the section about colonialism in reports becomes "*boilerplate*" and dismissed by judges, rather than being determinative at sentencing. An essential element of counterstories is a critique of social oppression. According to Aja Y. Martinez (2020), "to present counterstories necessarily requires descriptions of rich, robust contexts in which to understand the stories and lived experiences…[turning] the focus from individual participants to the larger issues faced by groups" (p.24). *Gladue* reports leave judges to do the critical analysis, to decide how the Gladue story should be contextualized as part of the systemic racism of Canada. While many of the judges in my study had some understandings of colonialism, others talked about only learning it when becoming lawyers or judges. To make *Gladue* into a form of counterstorying would require better naming of intersectional oppressions, such as settler colonialism, white supremacy, and patriarchy, in reports, and how these forms of structural violence operate in the life story of the person before the court. What is more, reports should be properly tethered to treaties (e.g., Two Row Wampum) and commissions (e.g. RCAP, TRC, and MMIW), in order to position any

sentencing outcome against commitments that the settler state has made. Once a more well-rounded (counter)story is told in *Gladue* reports, judges need to be acknowledging the harm – even with some feeling – in court, as well as indicating how a sentence forms a part of the state's accountability to Indigenous peoples.

(b) Properly relinquishing control of Indigenous justice matters.

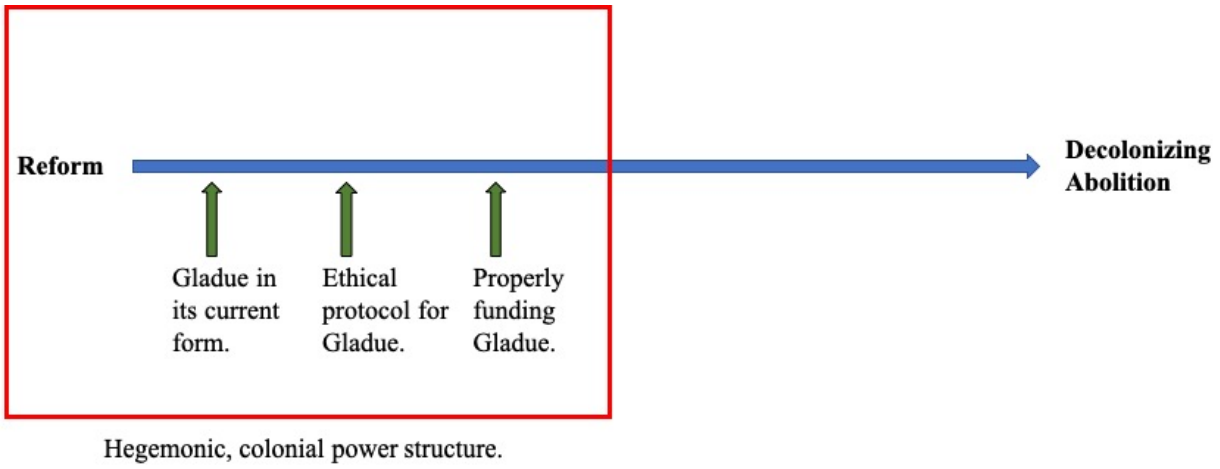
Properly systematizing *Gladue* could put the process on a pathway towards decolonizing *Gladue*, or returning justice processes to Indigenous peoples.

Figure 8.1: A pathway towards decolonizing and abolition with Gladue.



However, without settlers relinquishing control, *Gladue* would stop short of meeting settler obligations to walk side-by-side with Indigenous peoples in a way that honours nation-to-nation relationships (e.g., Two Row Wampum treaty). The greatest barrier to the success of *Gladue* continues to be the hegemonic, colonial power structure.

Figure 8.2: Pathway towards decolonizing and abolition, blocked by hegemonic power.



In my estimation, based on carefully reviewing my data, any efforts at improving outcomes for *Gladue* and reducing Indigenous incarceration rates, will fall short without addressing that barrier. In order to shift the power structure towards Indigenous self-determination, I would advocate for (i) improving the legislative framework around *Gladue* and (ii) defunding the police in order to fund reparations.

(i) Improving the legislative framework, towards *Gladue* as a 'get out of jail free' card.

One of the underlying myths of the criminal legal system is that serious crime requires a retributive, carceral response (Brown, 2009). The refrain that I heard many times in interviews that "*Gladue is not a get out of jail free card*," represents an example of that belief. Furthermore,

judges often said *Gladue* was bounded by the seriousness of the crime, indicating that incarceration was necessary in instances of predatory violence, especially when victims were considered vulnerable (e.g., meaning, according to some judges in my study, women and children). However, what this assumption disguises is *both* the reformist critique of the futility, if not counterproductivity, of society's use of prisons for creating community safety *and* the more critical, abolitionist view that carceral responses have less to do with addressing harm, and more to do with violently maintaining the hierarchical social order (Davis, 2003; Monchalin, 2016). As I have written, I take the more critical view that incarceration has been weaponized against communities made vulnerable by social structures and especially that carcerality reinforces settler colonialism, against Indigenous peoples (Monture, 1995; Rodriguez, 2009; Sudbury, 2004). Regardless, whether one is a reformist or an abolitionist, sustaining the idea of imprisonment as a response to serious crime is not helpful in the circumstances of Gladue. First of all, it deflects from the validity of Indigenous-led, community-based options to define seriousness and the response to it. Secondly, *the* seriousness that *Gladue* is meant to remediate is *systemic racism in the legal system*, not the actions of individual, Indigenous people.

Thus, I would argue that the best way to address the seriousness of systemic racism *and* the serious harm perpetrated by individuals would be to *actually* make *Gladue* a 'get out of jail free card'. Or, perhaps my argument is better framed that *Gladue should* be a 'get out of *colonial court* free card'. That is, any Indigenous person in conflict with the law should automatically be diverted away from the colonial system towards an Indigenous-led justice process. Why? This would accomplish two objectives: first, it would acknowledge that the systemic racism of the criminal legal system is too serious a matter for the same system to respond to; second, it would make known that Canada does not have jurisdiction over matters of Indigenous justice. Really, as

Gladue currently stands, Canada seems to have a 'get out of consequence free card' from the harms of systemic racism – the state keeps causing the same harm, even with *Gladue* in place. A more rigorous systemic, accountability framework is needed for *Gladue*.

One option might be updating the principles of sentencing in the *Criminal Code*, by including a principle that diverts matters related to Indigenous peoples away from the colonial court. This principle could be similar to how the *Youth Criminal Justice Act* (YCJA) has legislatively incorporated diversion. Prior to the adoption of the YCJA, Canada had one of the highest youth incarceration rates in the world (Oudshoorn, 2015). The state recognized that incarceration was often counterproductive with young people and that restorative justice approaches were, in many instances, a more reasonable response. As such, diversionary options (e.g., extrajudicial measures and extrajudicial sanctions) were written into the "Declaration of Principle" of the YCJA to motivate police, crowns, and the courts to use community-based, restorative justice approaches instead of incarceration. Since that time, incarceration rates for youth have dropped significantly, as restorative justice is, now, more often used with young people (Oudshoorn, 2015). Essentially, the YCJA created a legal 'escape hatch' for communities to respond to harm without using prisons with young people. By incorporating a similar principle in the *Criminal Code* with *Gladue*, Canada could divert matters involving Indigenous peoples away from the criminal legal system. Diverting Indigenous peoples out of the criminal legal system towards Indigenous-led justice processes would honour the Two Row Wampum treaty and Silver Chain Covenant.

Of course, this proposal raises some questions about specific circumstances, two of which I will address. First, what if the person who caused harm was Canadian, while the person victimized was Indigenous, or vice versa? In these circumstances, the Two Row Wampum treaty

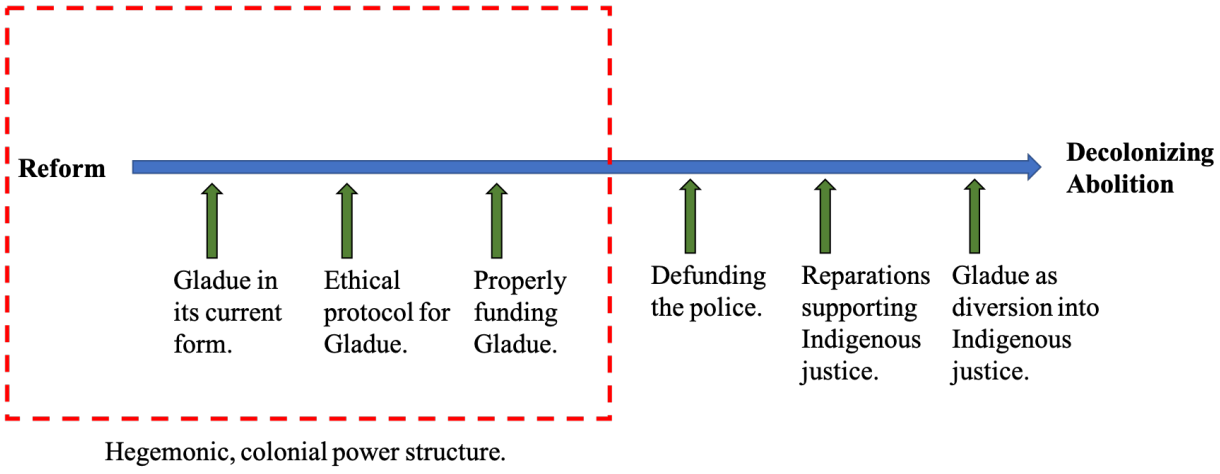
would be instructive. Is there a policy that could be created whereby the two nations involved could litigate the matter collaboratively, a policy founded on legal pluralism between (equal) nations? Second, if *Gladue* was inherently diversionary, would *Gladue* reports still be necessary? The likely answer is that it would depend upon what purpose or value Indigenous nations put on reports. Through my research, I have come to understand that *Gladue* reports do an excellent job of sharing the life story of an individual (getting at 'the why' of harmful behaviours) and proposing useful recommendations for healing and accountability. It seems that *Gladue* reports could continue to be valuable for identifying needs and exploring solutions. Perhaps *Gladue* reports could be expanded, to also be written with people who have experienced harm, to gather their ideas and input about what they need from a justice process. Participants in the study were keen to get more victim involvement. Certainly, there are other questions to address regarding making *Gladue* a "get out of colonialism free card". This proposal is intended to build on what I learned from participants and to spark some imaginative thinking towards decolonizing *Gladue*. Without legislative change, *Gladue* will remain under colonial purview, making Indigenous peoples subservient to colonial law and courts. Ultimately, a more radical, decolonizing legislative approach is needed for *Gladue*.

(ii) Defunding the police and reallocating funds into Indigenous communities.

While really only a small portion of the data, the idea of 'defunding the police' put forward by a few Indigenous participants, does make sense from decolonizing and abolitionist perspectives. Further, as a result of #BlackLivesMatter, 'defunding the police' is a topic of concern in the broader community, including to some in the discipline of social work (Ware et

al., 2020). Research has consistently shown Indigenous communities to be overpoliced, leading to the current state of the mass incarceration of Indigenous peoples in Canada (Comack, 2012; Starblanket & Hunt, 2020). Defunding the police would accomplish two aims: first, the police are the gatekeepers of the criminal punishment system. Rather than steer Indigenous peoples away from the system at sentencing (e.g., a few judges did say that *Gladue* was "*late*" in the legal process for addressing the social issue of colonialism), it would make more sense to do so earlier in the criminal legal process by doing away with the colonial policing of Indigenous peoples. Second, resources for policing could be put into properly funding Indigenous-led justice services. In Canada, policing is a multibillion-dollar industry, with much of that put towards colonizing Indigenous peoples (Maynard, 2017). Defunding the police could be a first step towards keeping Indigenous peoples out of the colonial legal system, in the first place.

Figure 8.3: Decolonizing Gladue by dismantling the hegemonic power structure.



2. Implications for the discipline of social work.

The current study has a few implications for the discipline of social work. These can be categorized under (a) social work research and (b) improving social work education to influence practice.

(a) Social work research.

The current study fits within a multidisciplinary framework. It follows genealogically from criminology (e.g., Welsh & Ogloff, 2008) and sociology (e.g., Balfour, 2012), to socio-legal studies (e.g., Maurutto & Hannah-Moffat, 2016; Murdocca, 2009, 2013, 2018, 2021) and legal studies (e.g., Baigent, 2020; Denis-Boileau & Sylvestre, 2018; Kaiser-Derrick, 2019; Milward & Parkes, 2014; Parkes, 2012; Roach & Rudin, 2000; Rudin, 2013; Sitar, 2016). In particular, the study contributes knowledge about the experiences of *Gladue* report writers, judges use of *Gladue* reports, and the overall *Gladue* report writing process. The research also fits within a growing body of scholarship on decolonizing social work research (e.g., Rowe et al., 2015) and decolonizing social work practice (e.g., Crampton, 2015; Gray, 2013; Sinclair, 2019; Tamburro, 2013; Tefera, 2022). It contributes knowledge towards decolonizing research, by using a methodology that supports research as reparation, as well as a critical analysis of how the logics of settler colonialism persist in a reform when not enough attention is paid to the hegemonic power structure.

My dissertation also contributes to settler social work scholars wishing to design research that emphasizes accountability for settler colonialism. As a white, settler, I was keen to shine the

research spotlight on judges (i.e., those with the decision-making power at sentencing) and move away from "damage-centred research" as described in the previous chapter (Tuck, 2009), which is the reason I did not interview criminalized Indigenous peoples. My research did not explore 'damage' but asked instead 'why the damage?' and 'what can I do to repair the damage'? I believe a strength of the study was that it emphasized ethical reciprocity with Indigenous peoples throughout the research process (Absolon, 2011; Smith, 2012, 2019). Most of the interviews with Indigenous participants resulted from long-standing relationships with Indigenous friends, colleagues, communities, and nations. My approach, throughout, from design to analysis, was on my obligations to analyze the hegemonic – white, settler, patriarchal – power structure in order to abolish it and decolonize. I view my research process as reparative in the sense that it is geared towards righting some of the wrongs of colonialism.

(b) Improving social work education to influence practice.

My study contributes to social work education and practice. It provides data for better understanding the linkages between micro and macro social work, as well as the relational and political project of social justice at the heart of the profession (Pollack & Mayor, 2022). My experience doing social service type work is that individual practice can often be disconnected from challenging some of the macro forces that influence why micro practice is necessary in the first place. For example, in some of my restorative justice work in prisons, I would facilitate dialogue between a person who was victimized, with the person who caused harm, resulting in some individual, healing opportunities. However, my practice of restorative justice emphasized the interpersonal without much consideration for the systemic. The more aware of systemic

injustices I became, the more I realized some of the macro (e.g. structural) issues influencing criminalization (e.g., colonialism, white supremacy, and patriarchy) were why we needed interpersonal restorative justice in the first place (and that the restorative justice project was often upholding the status quo by adopting the legal system's decision of who was an "offender"). Those understandings allowed me to shift some elements of my (micro) practice with clients, while also acting as a catalyst to push me towards advocating for structural change. My research spotlights why those in positions of power need to be accountable for their actions and demonstrates some of the inherent roadblocks to change inherent in the hegemonic power of the legal system, including colonial mentalities, reforming in rhetoric not with resources, and so on. In some ways, my study is the story of how individuals are constrained by larger, socio-legal structures – and that without attention to structural change, individual reforms favour the status quo. Understanding dynamics such as these might assist other social workers in challenging hegemonic institutional power whatever their context might be.

Further, the *Code of Ethics and Standards of Practice* for Social Workers and Social Service Workers in Ontario mandates the pursuit of social justice: "College members promote social justice and advocate for social change on behalf of their clients. College members are knowledgeable and sensitive to cultural and ethnic diversity and to forms of social injustice such as poverty, discrimination and imbalances of power that exist in the culture and that affect clients" (OCSWSSW, 2018, p.13). Many social work practices are invitations for people to recount significant times, places, relationships, people, patterns, and so on. As such, social work is a storytelling discipline (Shaw, 2017). Yet, storytelling without context (e.g., master narratives, like settler colonialism) is only a description of an event. It is difficult to competently support individuals, groups, and families without a broader understanding of the environment

(e.g. social injustices) from which their experiences emerge. The same holds true for social workers – it is difficult to do 'good' work without knowing ways that the worker is complicit in harm. Shoshana Pollack and Christine Mayor (2022) challenge social work professionals to think of social justice "as a project of the full self – *as a politics of being and acting*" (p.3; *emphasis in original*). The current research might assist with a politics of being and acting towards social justice as it posits that the ones who claim benevolence (in the study, it is judges) are often part of the problem because the helper identity (a common identity taken up by social workers) blocks a more useful, critical reflexivity that acknowledges the complicity of helpers in causing harm.

In essence, then, the study would promote the idea, in social work education and practice, that to do social work well requires a strong analysis of systemic injustice (e.g., the need to link micro with macro), how social workers are often implicated in those injustices (e.g. the need for social justice to be "a project of the full self").

3. Personal implications: A conclusion.

To conclude, I would like to share a few personal implications of the study. A reciprocal research process with Indigenous peoples requires me to ask how I have changed as a result of the research process, as well as what I plan to do about it. In order to do so, I want to share a piece of art that I made as I reflected on the data and my obligations.

In one of the earlier versions of a 'findings' chapter, I struggled to adequately represent and analyze the data through my critical, theoretical framework (as Dr. Pollack can attest). At that point, I paused writing and started re-listening to some of the transcripts to find out if I had

accurately coded and summarized themes. At the same time as listening, I did some artwork. I have often used art for expressing things that are hard to put into words, whether the beauty of nature (e.g., a landscape painting), the experiences of trauma survivors (e.g., using art as research method), or, in this instance, some complex research findings. So, while listening to the transcripts of Indigenous *Gladue* workers, I created a linoleum cut print of a house where an Indigenous organization (see *Figure 8.4* below) is housed in my hometown (Kitchener, Ontario). The process involved drawing the image on a piece of linoleum and using a variety of knife-like tools to carve out the lines. Then, I used an oil-based paint on the linoleum and hand-pressed it onto paper. As I created the artwork, I listened intently to the transcripts and reflected on my obligations to carry on with the work of decolonizing after my dissertation is complete.

Figure 8.4: Indigenous resurgence linoleum print

The house in the picture is home to Healing of the Seven Generations (H7G). H7G uses traditional ceremonies and teachings to offer a variety of supports and services to Indigenous folks suffering the effects of intergenerational trauma from the residential "school" system. One of the programs at H7G is called *Dehsahsodre*, which means "you will join things together in unity". The program offers legal services, supports (including Gladue reports), and Indigenous justice processes to Indigenous community members (www.healingofthesevengenerations.ca). As I re-visited the recorded data, I could not help but think about the work of H7G – how they do so much with so little. The small house is down the road from a massive, palatial colonial courthouse and a soon-to-be completed state-of-the-art police station. Yet, the work of the people at H7G is powerful, a resurgence of Indigenous self-determination and justice. The raised fist represents that power. The voices of Indigenous participants in my study wafted over the artwork as I created it, reminding me that I need to join with this resurgence.

Ethical research is used for change and activism (Denzin, 2017). Over the course of my ten-year process of working on my dissertation, I have shifted from being a reformer to becoming an abolitionist. Violent systems cannot be reformed to be less violent, they must be dismantled. I plan to carry on my commitment to decolonizing the criminal legal system and, especially, to the Truth and Reconciliation Call to Action #30 to reduce Indigenous incarceration. I *intend* to follow through in three ways: first, I hope to disseminate my findings in a way that the Gladue process can be improved, principally advocating for *Gladue* to be fully Indigenous-led, as a way to return justice processes to Indigenous peoples. Second, as an educator, I will continue to teach about the obligations of settlers to decolonize our social systems and Canada, sharing what I have learned about *Gladue*. Finally, as a community member, I will continue to support the work of defunding the police – to stop harms to

Indigenous peoples – and the "landback" movement – to fulfill my treaty obligations to the Two Row Wampum and Silver Covenant Chain!

Appendices

Appendix A: Recruitment flyer

Invitation to Participate in a Research Study about *Gladue* Reports!

- Are you, or have you been, a *Gladue* report writer?
- Are you, or have you been, a Judge in Ontario who has used a *Gladue* report as part of a sentencing decision?

If you answered "yes" to either question, you are invited to participate in a research study about *Gladue* reports

- Participants will be asked to complete a 45 – 60 minute interview at a time of their choosing, by phone or video conference.
- Participants will receive a $25 gift card for a coffee shop.

Gladue is intended to be remedial, supposedly steering Indigenous peoples away from Canadian prisons. However, Indigenous incarceration rates continue to increase. The study will explore the experiences of *Gladue* report writers and Judges to understand better the purposes and impacts of *Gladue* reports.

Please contact **Judah Oudshoorn** at [redacted] or **ouds0220@mylaurier.ca** to learn more.

The study is part of Judah Oudshoorn's doctoral dissertation and has been approved by the Wilfrid Laurier University Research Ethics Board (REB#6459).

Appendix B: Informed consent

WILFRID LAURIER UNIVERSITY INFORMED CONSENT STATEMENT

A Critical Narrative Inquiry of the *Gladue* Report Process

Principal Investigator: Judah Oudshoorn, PhD Candidate, Faculty of Social Work, WLU
Faculty Supervisor: Dr. Shoshana Pollack, Professor, Faculty of Social Work, WLU

You are invited to participate in a research study. The purpose of this study is to learn more about your experiences and stories of writing or using *Gladue* reports. The researcher is a Laurier doctoral student in the Faculty of Social Work, working under the supervision of Dr. Shoshana Pollack (spollack@wlu.ca).

Information
Participants will be asked to complete a 45 – 60 minute telephone interview. Data from approximately 16 – 20 participants (*Gladue* report writers and Judges who have used a *Gladue* report to make a sentencing decision) will be collected for this study.

- As a part of this study you will be audio-recorded for research purposes. You have the right to refuse being taped. In that instance, Judah will take hand-written notes of the research interview.
- Only Judah Oudshoorn (other than transcription, below) will have access to these recordings and information will be kept confidential.
- Recordings might be transcribed by someone other than Judah. Any transcribers will be committed to confidentiality, by following ethical guidelines for research and signing a consent form.
- The audio files will be deleted following transcription.

Risks
As a result of your participation in this study you may experience painful feelings related to the harmful oppression of Indigenous peoples in Canada. In some rare instances, there might be a possibility of reputational loss, or fear of job loss, if a participant speaks negatively about court procedures and standards. After the interview is completed, you will be provided an opportunity to debrief, involving discussion of resources for support

You are free to discontinue the study at any time and to choose not to respond to any question without loss of compensation.

Benefits
An objective of the study is to better understand why Canada continues to incarcerate Indigenous peoples at disproportionate rates, in spite of corrective attempts. The hope is that the research will contribute to advancing knowledge and action about holding the Canadian state accountable for improved justice outcomes for Indigenous peoples. Your experiences and stories matter.

Confidentiality
The confidentiality/anonymity of your data will be ensured by data being de-identified, meaning that personal identifiers will be removed, to improve the chances of anonymity. Any quotes used in the publication of results will be anonymous, or not attributed to a specific participant.

The audio data will be stored on a password-protected recording device located at Judah's office, along with any hard copy data, in a locked cabinet.

- If you consent, quotations will be used in write-ups/presentations and will not contain information that allows you to be identified. If you wish, you will be able to vet your quotations, by reviewing a copy of your transcript at the completion of all interviews.
- The de-identified data will be stored indefinitely and may be reanalyzed in the future as part of a separate project (i.e., secondary data analysis).
- While in transmission on the internet, the confidentiality of data cannot be guaranteed.

Compensation
For participating in this study, you will receive a $25 gift card for a coffee shop. If you withdraw from the interview prior to its completion, you will still receive this amount.

Contact
If you have questions at any time about the study or the procedures or you experience adverse effects as a result of participating in this study you may contact the researcher Judah Oudshoorn at ouds0220@mylaurier.ca or 519-574-3606.

This project has been reviewed and approved by the University Research Ethics Board (REB# 6459), which receives funding from the Research Support Fund. If you feel you have not been treated according to the descriptions in this form, or your rights as a participant in research have been violated during the course of this project, you may contact Jayne Kalmar, PhD, Chair, University Research Ethics Board, Wilfrid Laurier University, (519) 884-1970, extension 3131 or REBChair@wlu.ca.

Participation
Your participation in this study is voluntary; you may decline to participate without penalty. If you decide to participate, you may withdraw from the study at any time without penalty. You have the right to refuse to answer any question.

If you withdraw from the study, you can request to have your data removed/destroyed by contacting the researcher up until one month after the completion of the interview.
Feedback and Publication
The results of this research might be published/presented in a doctoral dissertation, course project report, book, journal article, conference presentation, class presentation, or other format.

- The results of this research may be made available through Open Access resources.

Consent

I have read and understand the above information. I have received a copy of this form. I agree to participate in this study.

Participant's signature _____ Date _____

Investigator's signature _____ Date _____

The use of audio-recording:

☐ I consent to my interview being audio-recorded.
☐ I do NOT consent to my interview being audio-recorded.

Participant's signature _____ Date _____

The use of participant quotes:

☐ I consent, **without vetting**, to the use of anonymized quotes from my interview in reports of the study findings.
☐ I consent, **with the vetting process described above**, to the use of anonymized quotes in reports of the study findings.
☐ I **do NOT** consent to the use of anonymized quotes from my interview being used in reports of the study findings.

Participant's signature _____ Date _____

Appendix C: Initial Ontario Court of Justice research protocol

Ontario Court of Justice Survey / Questionnaire Protocol

The Ontario Court of Justice welcomes research requests to study the judiciary's views and experiences through surveys, questionnaires and interviews of the judiciary.

Recently, the court has received an increasing number of requests to survey or question the judiciary about court-based programs.

The research may consist of questions that require subjective or hypothetical responses from the judiciary. Consequently, the responses provided by judicial officers may give rise to an allegation of bias in future cases, be perceived as representing the views of the Court, or have other unforeseeable harmful consequences to the Court.

The following protocol shall apply to each research request:

1. Research requests should be sent to the Office of the Chief Justice.
2. The research request should include details of the research, including the questions asked of the judicial officers, the methodology used in the research, and the number of judicial officers who will be asked to participate.
3. All research requests must be reviewed and receive ethics approval through the university's research ethics committees.
4. The Office of the Chief Justice will only accept research requests in September and May of each calendar year.
5. The identities of the judicial participants, the level of court, and their court location shall be kept confidential and not published.
6. The Office of the Chief Justice will choose the judicial members who will participate and will send the research requests to the judicial officers.
7. Each judicial officer will determine if he or she wishes to participate in the research.
8. The data collected from the research will be stored and maintained on a password protected computer.
9. The completed manuscript will be sent to the Office of the Chief Justice for comments before any submission to publication.

Appendix D: Agreement by Ontario Court of Justice to adapted research protocol

THE HONOURABLE LISE MAISONNEUVE
CHIEF JUSTICE
ONTARIO COURT OF JUSTICE

1 QUEEN STREET EAST
SUITE 2300, BOX 91
TORONTO, ONTARIO M5C 2W5

L'HONORABLE LISE MAISONNEUVE
JUGE EN CHEF
COUR DE JUSTICE DE L'ONTARIO

1, RUE QUEEN EST
BUREAU 2300, CASE 91
TORONTO (ONTARIO) M5C 2W5

TELEPHONE/TÉLÉPHONE (416) 327-0612
FAX/TÉLÉCOPIEUR (416) 326-4787

August 31st, 2020

Judah Oudshoorn, PhD Candidate
Faculty of Social Work,
Wilfrid Laurier University
ouds0220@mylaurier.ca

Dear Mr. Oudshoorn,

Thank you for your email requesting an interview with Ontario Court of Justice judiciary regarding the purposes and impacts of Gladue reports.

After consideration, I agree that you may interview the judiciary with two (2) caveats:

1) Regarding your question: *How does the Gladue report factor into sentencing?* As you outline in your research request, please ensure that you follow the protocol and that you do not ask about individual cases.

2) As per the Ontario Court of Justice interview protocol, the court chooses judges for participation in surveys, interviews, and questionnaires. I understand that Gladue writers have suggested the judiciary who should be interviewed in accordance with your ethical obligations to indigenous participants and the TCPS 2. As such, my office will select 8-10 judiciary from your list for your interviews.

Thank you for your interest in the Ontario Court of Justice

Yours truly,

Lise Maisonneuve

LISE MAISONNEUVE
Chief Justice / Juge en chef
Ontario Court of Justice / Cour de justice de l'Ontario

Appendix E: Interview guides

Gladue Report Writers

1. Who can become a *Gladue* report writer?
2. How does one become a *Gladue* report writer?
3. What training is involved for *Gladue* writers?
4. What is the purpose of a *Gladue* report?
5. What are the principles and goals of *Gladue*? How does a Gladue report reflect these principles and accomplish these goals?
6. When you write a report, what is the story you are trying to tell?
7. What does a *Gladue* report tell you about Indigenous peoples and communities?
8. In what ways, if any, is the person about whom the report is written involved in the process? What is your sense of how they experience the report writing process?
9. What are the main challenges of completing a *Gladue* report? What are the institutional constraints on the report? What do you wish you could put in it that may not be permitted to include?
10. In your experience, what influence does the Gladue report have on Judges' decision-making? Can you tell a story of how your report was used by the courts and what the outcomes were? And of when it may not have been used for sentencing? What is your sense about which aspects of the *Gladue* report narrative is most compelling to the courts?
11. Can you talk about your perception of the impact *Gladue* reports make on individual, criminalized Indigenous people? On Indigenous communities?

12. How has doing *Gladue* work influenced or impacted your life/work?
13. We know from research that efforts such as *Gladue* have not changed the incarceration rates for Indigenous people. What are your thoughts about why this might be?
14. In your opinion, what might be changed in order for *Gladue* to make a difference in sentencing rates?
15. Is there anything else you would like to add that we have not already discussed?

Judges

1. What is the purpose of *Gladue*?
2. What are your experiences of reading *Gladue* reports?
3. What story does a *Gladue* report typically tell?
4. How does a *Gladue* report factor into your decision-making at sentencing?
5. What makes a "good" or compelling *Gladue* report?
6. What difference does a *Gladue* report make when sentencing an Indigenous person?
7. What has been the impact of *Gladue*? What difference has *Gladue* made on individual, criminalized Indigenous people? On Indigenous communities?
8. How has doing *Gladue* work influenced or impacted your life/work?
9. What does a *Gladue* report tell you about Canada and colonialism?
10. In your view, why has *Gladue* has not reduced Indigenous incarceration rates?
11. What needs to change in order for *Gladue* to be fully remedial?
12. Is there anything else you would like to add that we have not already discussed?

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