THEORIZING MASS INCARCERATION: ANALYSING ABORIGINAL OVER-REPRESENTATION IN LIGHT OF SECTION 718.2(E) OF THE CANADIAN CRIMINAL CODE

by

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Abstract

This study assesses the impact of changes in Bill C-41 on Aboriginal offenders in Canada. Passed in September 1996, Bill C-41 amended the Criminal Code seeking to clarify sentencing principles. Section 718.2(e) instructs judges to use incarceration only as a last resort when appropriate. Although it indicates that Aboriginal offenders must be given special consideration, it does not provide specific conditions or parameters for its use, leaving it to judges’ discretion. In 1999 some clarification was provided in the Supreme Court of Canada decision of R. v. Gladue. Gladue clarified the application of section 718.2(e) and highlighted its role in alleviating Aboriginal overrepresentation in prisons.

This thesis considers the disproportionate incarceration levels of Aboriginal offenders in Canada and the effectiveness of 718.2(e) in ameliorating the problem. It examines judiciary reasoning for the application of section 718.2(e) in 21 Court of Appeal cases. The study employs a constructivist, grounded theory approach to discourse analysis of extant case documents. Quantitative data are also used to identify trends in offenders’ backgrounds.

Findings reveal that most cases involved male offenders between 18 and 34 years old with varying educational backgrounds. In most cases the offender pleaded guilty during the sentencing trial, had a prior record, and had made rehabilitative efforts post-sentencing. The overwhelming majority of offenders had experienced unfavourable upbringings and circumstances in their lives and abused alcohol and/or drugs. Analysis of judges’ sentencing and decision making process revealed five predominant themes: Protection of public rhetoric, Denunciation and Deterrence, Rehabilitation, Special Cases, and Considerations of Gladue. The majority of appeal cases were dismissed or maintained carceral outcomes.
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Thank you to my family and friends whose unwavering support helped keep me motivated and looking at the bigger picture when I oftentimes felt lost.

Special thank you to Mr. Wally Katigakyok, an inmate from Collins Bay, for sharing your story and experiences with me. I am beyond grateful to you for allowing me to share your poems here. I hope for readers to continue reflecting on your words well after they’ve finished reading this study.
Letter of Release

This letter is written with the intent of allowing Megha Rao, a Masters of Arts student within the Department of Sociology at Queen's University and tutor from Frontier College in Collins Bay Institute-Maximum Security Prison during the years of 2015-2017 to use the poems entitled "Our Prime Minister" and "Hurt" in her thesis.

Wally Katigakwyk
Mr. Wally Katigakwyk

Aug 23/17
Date
HURT
By Wally Katigakyok

When I was small,
You seemed very tall
You treated me like dirt
Now I’m feeling a lot of hurt…

You were the one I was supposed to look up to,
Then I realized that was not true.
I was an innocent child,
Who has gone completely wild…

Everyone can easily see,
That I don’t trust my family
Living with this pain,
Is driving me insane

Oh Great Spirit with your gentle voice
Please help me make the right choice
Help me to understand
That you are in command

Please help me to be strong
Especially when things start to go wrong
Please teach us to respect one another
Just like a sister and brother

Please help me to forgive
So that I may continue to live
Once and for all,
I want to walk proud and tall…
OUR PRIME MINISTER
By Wally Katigakyok

Our Prime Minister
Is nothing but a sinister
He doesn’t understand
That this is our land

He hates native people
Especially the ones who work in the steeple
He wishes he was native
Because we are very creative

I was in my glory
When I heard him say that he was sorry
His evil twin
Is Kathleen Wynn

We need unity
Because we are the community
This is where we have to be strong
Especially when he is wrong…

He doesn’t give a damn about us
That’s why he put up a big fuss
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Chapter 1

Introduction

General Introduction

This thesis assesses the impact of the legal changes passed by Bill C-41 on Aboriginal offenders in Canada. Bill C-41 was passed in September 1996, after which the Criminal Code underwent a series of changes and amendments to aid in the clarification of sentencing principles. One such clarification was the implementation of section 718. This section marks the first time that the fundamental purpose and principles behind sentencing offenders had been codified in Canadian history. Section 718 not only outlines the purpose and principles behind sentencing that courts must procedurally adhere to, but also emphasized that finding a ‘just sanction’ is paramount to convicting offenders.

Among the subcategories of the legislation is section 718.2(e) which instructs judges to use incarceration only as a last resort when appropriate. The provision states that all available sanctions other than imprisonment “should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”. Although it indicates that Aboriginal offenders must be given special consideration, it does not outline any specific conditions or parameters for its use, leaving it to the subjective discretion of judges. It was not until 1999 that this vague directive was somewhat clarified by the Supreme Court of Canada in the seminal R. v. Gladue decision. Gladue made clear the circumstances under which section 718.2(e) may be applied and highlighted how important its use would be in helping to ameliorate Aboriginal overrepresentation across Canadian prisons. Essentially, both section 718.2(e) and the Gladue case sought to address Aboriginal overrepresentation in the criminal justice system via sentencing

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1 This thesis utilizes the term “Aboriginal” when referring to legal literature and discussion and “Native” when referring to histories, culture, traditions, etc. Both terms are used to describe Canadian First Nation, Métis, and Inuit.
reform. Nonetheless, demographic projections suggest that the disproportionate rates of Aboriginal peoples’ involvement in the criminal justice and corrections systems will continue to rise well into the next decade.

**Significance of This Study**

This research is significant as it aims to unpack the current social issue of over-incarceration of Aboriginal groups in hopes of proposing potential solutions. It focuses on the application of section 718.2(e) given current records of disproportionate incarceration and Statistics Canada’s projection of growth in Aboriginal populations between the ages of 20 and 29. With the Aboriginal population much younger than the overall Canadian population and experiencing a higher growth rate, the issue of overrepresentation in the justice system continues to worsen rather than improve. This is because reports show that Aboriginal populations between this age group are increasingly becoming involved with criminal activity and behaviour.

The offending circumstances of these offenders are most often attributed to criminogenic variables such as substance abuse, family abuse, residential schools and the sixties scoop, lower levels of education and employment, among other factors. LaPrairie (1990) explains that because of factors such as these in conjunction with over policing and lack of community support, Aboriginal populations face being incarcerated for less serious offences because their members do not qualify for alternative sanctions. Complicating the issue even more is the fact that Aboriginal offenders experience lower levels of bail and higher levels of reconviction by courts across Canada.

For several of these, community breakdown and spiritual dissolution related to the impacts of colonialism and assimilation practices have played a pivotal role. As such, this study

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2 Statistics Canada predicts that the Aboriginal population between ages 0-14 years will grow from 6% of all children in Canada to over 7.4% in 2017. By 2017, the population of aboriginal young adults aged 20 to 29 years will have increased from 4.1% to 5.3% (Mann 2009:6)

3 Refers to a period during the 1960’s when government social service workers aggressively removed aboriginal children from their families.
aims to explore how colonialism, racism, and systemic discrimination interrelate and affect the use of the legislation in criminal Court of Appeal cases.

*Defining Bill C-41 and Section 718.2(e)*

In 1991, the Royal Commission on Aboriginal Peoples (RCAP) examined the historical and present circumstances of Aboriginal populations throughout Canadian provinces. They noted that while Canada held a reputation of being a “fair and enlightened society...[where] diversity among peoples are celebrated”, the lived realities of Aboriginal groups were starkly different from this (RCAP 1996: 1). In recognizing the history of colonialism, systemic oppression and alienation, RCAP “favoured a sentencing approach that would take into account the disadvantages Aboriginal people face in the justice system, the historical roots that led to the disadvantage, and the need to heal the offender and his or her community” (Stack, 1999: 477).

Parliament’s intent in enacting this provision is best illustrated by the Minister of Justice’s statement at the time Bill C-41 was being proposed. Testifying before the House of Commons Standing Committee of Justice and Legal Affairs, the Minister stated:

> The reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada...[what] we’re trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it’s consistent with the protection of the public- alternatives to jail- and not simply resort to that easy answer in every case.¹

The reforms outlined in Bill C-41 expanded sentencing options to favor restorative justice practices by addressing the special circumstances of Aboriginal offenders through the application of section 718.2(e) of the Criminal Code. This section statutorily preserves this intent:

> 718. (2) A court that imposes a sentence shall also take into consideration the following principles:

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(e) 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.

Thus, trial judges were to consider all other sanctions aside from imprisonment, usually in the form of community-based sentences such as “conditional sentences, healing circles, sentencing circles, or victim-offender mediation” (Berlin 2016:9).

Existing Literature and Theoretical Connections

While a growing body of literature has examined precedence cases such as the Gladue decision as well as section 718.2 (e) in general, there is little information on how courts are practically interpreting this section. As such, current literature reflects this gap in understanding of how the legislation operates, what methodology is imposed, how consistently it is being used across provinces, and whether it really does what it claims too. However, two positions can be commonly observed among the literation; retributivist law and restorative objectives.

On the one hand, Scholars criticize section 718.2(e) because it works against the retributivist foundation of Canadian law which calls for proportionality. Critical Legal Studies (CLS) argues that while racism, discrimination and unjust treatment were not values of the current retributivist system, the notion of meritocracy, colorblindness and neutrality of law are very much embedded within this ideology (Matsuda, 1987). This position for the most part dismisses many of the factors that complicate Aboriginal life. As a result, scholars such as Carol LaPrairie (1990) state that section 718.2(e) will remain ineffective because of this approach given the deprived socio-economic background many communities posses which act against the offender as well as their community during sentencing (437). She posits that proportionality and retributivist approaches to law do not weigh the disadvantaged backgrounds from which Aboriginal offenders are sometimes brought up within fairly against the potential for restorative outcomes.
On the other hand, restorative justice scholars claim that this approach to sentencing is a necessary first step. In opposition to arguments that restorative justice could impose disproportionate sanctions on offenders committing similar offences, they argue that the circumstances of Aboriginal offenders differ from that of their non-Aboriginal counterpart. Thus, they require a unique approach to proportionality. Either way, the anticipated growth of Aboriginal offender populations and the statistical reports recorded throughout Canada’s provinces and territories suggest a continuation of over-representation in correctional populations. In conceptualizing and attempting to theorize overrepresentation in relation to section 718.2(e), it becomes important to examine what type of scope and impact this provision has had in sentencing and the circumstances of its use.

**Defining This Study and its Research Questions**

Kirby and McKenna (1989) aptly describe the directive for my study as a desire to propose alternative perspectives on issues by “looking beyond the boundaries”. By this, I mean to explore new ideas and build connections which may positively contribute to the growing body of literature present on Aboriginal over-representation and the roles which discrimination, race, and restorative justice play in this discussion. Thus, this study marks one of the first steps in a much-needed sociological line of inquiry into the past, current, and future sentencing of Aboriginal offending. Much of the existing scholarly literature focusing on this area is limited to quantitative, legalistic or criminological research. As such, there is a lack of qualitative research examining court dealings and even less which specifically look at section 718.2(e) and the given justification, factors, rationales, or reasoning behind its application or non-application. A sociological approach will allow for a unique theorization of Aboriginal offenders that diverges from criminological theories or legalistic rhetoric to challenge ‘common-knowledge’ boundaries and in turn, problematize social issues unique to Aboriginal needs.
This thesis will explore judiciary reasoning for why section 718.2(e) has been applied or withheld in twenty-one Canadian Court of Appeal cases. Specifically, it sets out to explain what factors affect judges’ decision making by analyzing cases that involve Aboriginal offenders. In doing so, this study will take up a constructivist grounded theory approach to examine published Court of Appeal cases where judges mention section 718.2(e) of the Criminal Code and identify the reasons given for the application or failure to apply the section. Quantitative records will also be kept of appeal cases studied by means of a data collection instrument\(^5\) to help contextualize judge’s justifications within a broader context. This study, therefore, has the potential to draw connections and trends in the influences that weigh strongly on sentencing judge’s decision making. The study also holds the potential to identify, conceptualize, and critique the obstacles that impede or allow the application of section 718.2(e) in the sentencing of Aboriginal offenders.

**The research questions are as follows:**

1. What kinds of trends or patterns can be seen when considering Aboriginal incarceration rates on a provincial scale?
   a. Have levels of incarceration drastically increased, decreased, or plateaued after section 718.2(e) was passed?

2. How has the implementation of section 718(e) of the Canadian Criminal Code affected judges sentencing of Aboriginal offenders?

3. What factors do judges state inhibit or allow the use of section 718(e) in court decisions?

To study the application or failure to apply section 178.2(e) and answer the research questions presented above, this qualitative study will use twenty-one published Court of Appeal cases as its units of analysis where judges mention section 718.2(e).

\(^5\) For Data Collection Instrument, *See Appendices D*
The second chapter of this study consists of an in-depth literature review on current scholarly work on Aboriginal incarceration, over-representation, and approaches to law more generally. It will cover an overview of sentencing and the implementation of section 718.2(e) in its goal to reduce rates of Aboriginal incarceration. The section provides a detailed account of the landmark R. v. Gladue case in which the Supreme Court was required to explore and interpret section 718.2(e) of the Criminal Code. From my review of the literature, I concluded that Canadian research has focused on the overrepresentation of Aboriginal people as inmates, but there lacks analyses of it in a systematic way (LaPrairie, 1995; Tibbetts, 1999). As such, it was observed that Canadian research is somewhat limited to its verification that Aboriginal people, in comparison to non-Aboriginal groups, are disproportionately represented in the criminal justice system (Johnson, 1987; LaPrairie, 1992; Moffat, 1994). In addition to this, Canadian research has neglected to problematize race as a research variable for offenders in general and within the violent offender category (Hutch & Faith, 1989).

Chapter 3 of this study will encompass an overview of Critical Race Theory and Tribal Critical Race Theory. This theoretical framework is fundamental to this research as it will ground the findings of the study and tie together themes that come up throughout the case analysis. Essentially, I hope to elaborate, build on, and extend the existing theory to better conceptualize the current state of Aboriginal over incarceration.

Chapter 4 will outline the methodological approach used in this research. Beginning with my rationale for using a qualitative grounded theory approach, I will discuss my approach to constructivist discourse analysis and the steps taken to select twenty-one appeal cases for analysis. The chapter will also discuss how I chose to code, the data collection instrument and techniques used to extract pertinent information from each case. Descriptions of my positionality as an academic researcher will also be touched on.
Chapter 5 will consist of the study’s findings. The section will include descriptions of analytic categories which arose out of the grounded theory approach to coding appeal cases.

Chapter 6 will consist of a brief summary of the research findings. This section is divided into the frequency distributions of the variables collected as well as the themes which emerged during analysis. In addition to this, implications of the new found research will be discussed and the connection between Critical Race Theory and Tribal Critical Race Theory will be made. Finally, some policy reforms, program initiatives, and concluding statements will be made with regards to future research and the greater social issue.
Chapter 2

Literature Review

Overview

A considerable volume of material in Canadian sociology and criminology has been presented over the years detailing the many injustices experienced by Aboriginal populations because of the Canadian criminal justice system. Even a cursory review of this literature reveals an emphasis on the overrepresentation of Aboriginal offenders in prison, especially when compared to their numbers in the total population. Thus, an assessment of the literature is presented in this chapter to delineate the reasoning behind the current level at which Aboriginal offenders are given carceral sentences despite the enactment of section 718.2(e). As will be illustrated, Aboriginal levels of incarceration garner multiple explanations, rationales and reasoning as to why the current conditions exist. This chapter works towards synthesizing the large body of relevant academic literature to focus on the judiciary decision-making processes in Canadian Court of Appeal cases.

The chapter will begin with an overview of the current literature of Aboriginal overrepresentation generally. It works towards explaining three circumstances that are thought to impact the current situation as well as provide a case overview of the landmark Gladue appeal decision from 1999 and its contributions. Although the case itself is important, it is the appeal decision that becomes the more important reference point for later discussions. The chapter also discusses the implementation of Bill C-41, the descriptive components of section 718 and the response and impact it has had.

Steadily Increasing Rates of Incarceration

From the mid 1960’s to 2016, Aboriginal numbers in Canadian prisons have been overrepresented relative to their numbers in the general population. Statistics from over this 40-
year period illustrate this. In the years 2000-2001, the population amounted to 3% while the inmate population accounted for 19%. This is a significant increase considering during 1998-1999 when the Aboriginal population accounted for 2% of the entire population, they comprised of 17% of those admitted into provincial, territorial, and federal custody (Canadian Centre for Justice Statistics, 2001). During the period of 2011-2012, the Aboriginal population reached almost 4% of the Canadian total, while simultaneously experiencing a spike to 28% of the offenders in prisons (Statistics Canada, 2013). In 2016, Aboriginal adults made up 3% of the total Canadian population and comprised of approximately 26% of those admitted to prisons. Between 2014-2015, Aboriginal groups represented 3% of the total population while accounting for 25% of Canadian inmate populations (Statistics Canada, 2016). Thus, even in considering just these past two decades, an obvious pattern of steady growth in carceral sentences can be observed from these statistics.

In addition, despite variations in the number of Aboriginal offenders serving carceral sentences in federal prisons throughout Canada, they remain over incarcerated to varying degrees in every province and territory, and comprise the largest minority group in prisons across the nation (Lane, Daniels, Blyan & Royer, 1978; LaPrairie, 2002; Roberts & Doob, 1997). This is concerning when one notes that Aboriginal population growth rates have been increasing steadily over the past several years. What this means is a growth in younger populations that may face similar sentences and levels of sentencing because of a justice system that is not equipped to handle these cases.

Carol LaPrairie (1996) was one of the first academics to examine the issue and has written extensively on the overrepresentation of Aboriginal peoples in Canadian prisons and its relationship to sentencing. She states that the relationship between the two are not clear-cut and straightforward and provides a few reasons as to why this is the case. The main reason is simply a lack of systematic research. She is critical of the prevalent assumptions that discriminatory
sentencing processes are largely responsible for the statistics, but states that a better look must be taken at the events and decisions that occur before offenders commit crimes to fully understand the social phenomenon.

According to LaPrairie (1990), there are three generally accepted explanations for the high proportion of Aboriginal offenders in Canada. The first states that differential treatment by the criminal justice system encourages systemic racism which results in higher carceral sentences. The second states that differential commissions of crime affect the rates. In other words, recognizing that Aboriginal individuals commit more crime, and questioning what factors lead up to this. And third, acknowledging that Aboriginal people who commit crimes are more likely to be sought out and processed by the criminal justice system than others. One instance of this can be seen in the over-policing of lower socio-economic neighbourhoods where Aboriginal populations are higher. LaPrairie (1996) explains that most research focuses on the first as it serves a number of political agendas, but detracts from the much-needed attention on social inequality, discrimination, and racism.

Since the early 1960’s, Aboriginal offenders have lagged significantly behind their non-Aboriginal counter-parts on nearly every indicator of correctional performance and outcome. This issue is becoming increasingly significant given that younger Aboriginal populations are increasing faster than non-Aboriginal populations in Canada. Indicators of correctional performance and outcome for Aboriginal groups are:

a. Routinely classified as higher risk and higher need in categories such as employment, community reintegration and family supports;
b. Released later in their sentence (lower parole grant rates), most leave prison at Statutory Release or Warrant Expiry dates;
c. Over-represented in segregation and maximum security populations;
d. Disproportionately involved in use of force interventions and incidents of prison self-injury; and
e. More likely to return to prison on revocation of parole, often for administrative reasons, not criminal violations. (Statistics Canada, 2013)
Aboriginal Overrepresentation in the Criminal Justice System

Aboriginal peoples have always been overrepresented in Canada’s criminal justice system as both victims and offenders. National data on criminal justice including police-reported homicide, self-reported victimization, and provincial/territorial custody illustrate this reality (Statistics Canada, 2017). As such, this section will briefly describe five themes that have manifested within the criminal justice system by drawing from these documents to best represent the current situation (ibid).

Aboriginal people are overrepresented as crime victims, especially amongst women

Jillian Boyce (2016) notes that in 2014, 28% of Aboriginal people, ages 15 and above, reported being victimized in the prior year, compared to 18% of non-Aboriginal people. The rate of violent victimization among Aboriginal people was more than double that of non-Aboriginal people. Moreover, the rate of violent victimization among Aboriginal people was more than double that of non-Aboriginal, accounting for 163 incidents per 1,000 people versus 74. In addition, Aboriginal females had an overall rate of violent victimization that was triple that of non-Aboriginal females, and double that of Aboriginal males.

Aboriginal people are overrepresented as homicide offenders and victims

Mulligan et al. (2015) state that in 2015, Aboriginal people accounted for 25% of total homicide victims, a rate that is about seven times that of non-Aboriginal people. The homicide rate for male victims was about seven times more than non-Aboriginal and six times more for Aboriginal females in comparison to non-Aboriginal females.

For the year of 2015, Aboriginal peoples accounted for 33% of those accused of homicide, a proportional rate that was ten times higher than non-Aboriginal. The rate of Aboriginal females accused was three times that of non-Aboriginal females and eight times that of non-Aboriginal males.
Aboriginal people accused implicated in most homicides of Aboriginal victims

Statistics Canada’s Centre for Justice Statistics conducted a homicide survey in 2015 and determined that 90% of the accused implicated in the homicides of Aboriginal victims were Aboriginal. Two-thirds (67%) of the accused in the homicide of Aboriginal female victims, were Aboriginal men, and 71% of accused implicated in the homicide of Aboriginal males were other Aboriginal males. The survey notes, however, that the data on the accused in homicide cases is based on solved homicide cases where Aboriginal identity was reported in the file.

Aboriginal adults are overrepresented in custody

While admissions to adult correctional services have remained stable, Aboriginal adults account for one in four admissions to provincial/territorial correctional services (Statistics Canada, 2017). In 2015/2016, Aboriginal adults were overrepresented in admissions to provincial and territorial correctional services, accounting for 26% of admissions while representing about 3% of the Canadian adult population (See Appendices B). The findings for provincial and territorial custodial admissions (27%) were similar to community admissions (24%). In addition, Aboriginal adults in federal correctional services accounted for 28% of admissions to custody and 26% to community supervision (ibid.).

Overrepresentation in custody more pronounced for Aboriginal women

The overrepresentation of Aboriginal adults was more pronounced for females than males in 2015. Aboriginal females accounted for 38% of female admissions to provincial and territorial sentenced custody, while Aboriginal men accounted for 26% (ibid). In the federal correctional services, Aboriginal females account for 31% of female admissions to sentenced custody while Aboriginal men accounted for 23%.

Factors that May Contribute to Overrepresentation in Custody

Many academics have offered explanations for the phenomenon of Aboriginal overrepresentation in Canadian prisons, with the objective of developing effective solutions.
Several of these explanations are interwoven, share basic similarities and occupy similar positions. As such, they can generally be classified into three categories: cultural, structural, and historical factors that Aboriginal populations have encountered since the beginning of colonization and still experience today (Gladue, 1999; LaPrairie, 1997).

**Cultural Explanations**

The cultural explanation focuses on the conflicting values between Aboriginal and non-Aboriginal cultures to argue that discriminatory practices are embedded within the legal system, resulting in over-incarceration. Much of the conflict resides in Canadian society’s traditional adherence to the retributivist justice model in contrast to Aboriginal restorative justice approaches (Gladue, 1999; Roberts & von Hirsch, 1995; Rudin & Roach, 2002). This explanation is also often used to explain the overuse of imprisonment as a sanction in general (LaPrairie, 1999; Quigley, 1996/1999). The following section will outline four dominant controversies as evident in the relevant literature.

There are several aspects of Canadian law that conflict with Aboriginal tradition. The first involves where the emphasis resides during case dealings. Whereas the Canadian model places the onus on the individual, Aboriginal concepts of justice often involves the idea of community. Rupert Ross (1996) states that the concept of justice involves “more than just rules and regulations” and is rather based on the notion of balance and the restoration of harmony within the community (256).

The second point considers the Canadian criminal justice systems’ focus on reactive justice. These include the sentencing objectives outlined in the code which take into account deterrence, incapacitation, and rehabilitation. Proulx (2000) states that sentencing is “interpreted by judicial discretion based on cultural notions of deterrence and punishment” (376). In contrast, many Aboriginal populations consider proactive measures to resolve issues and prevent crime. In
this process, healing and restoration are of primary interest and are dealt with as a community (Ross, 1996; Proulx, 2000).

The third instance identifies how the justice system often overlooks the many differences between Aboriginal interactions and language. A core belief within many Aboriginal populations is not interfering in another’s life and the avoidance of confrontation. This approach is said to be misinterpreted by lawyers and judges at times. Bailey (2000) also points out that in some Aboriginal cultures, eye contact does not occur as often during social interaction. Sinclair (1989) adds to this understanding by recognizing that silence is considered a demonstration of respect. In addition to this, difference in languages also creates several difficulties when trying to navigate through the criminal justice system. Ross (1996) points out that many Aboriginal terms do not have exact translations to English. For example, in some native languages there are no words for “guilt,” and the concept of “truth” holds an entirely different meaning (ibid). In addition to realizing the challenges this holds, this example illustrates how each community deals with its offenders differently. Elizabeth Comack and Gillian Balfour (2004) explain that these differences make it challenging and unfair for Aboriginal people in the proceedings of court cases.

Rudin and Roach (2002) argue that ultimately, while cultural discrepancies exist, they do not explain why Aboriginal groups are overrepresented within prisons. Rather, it simply highlights the differences while disregarding any similarities. LaPrairie (1992) states that while factors of ethnicity and culture provide contextual information, socio-economic and criminogenic variables and historical insights may possess more influence on incarceration rates.

Structural Explanations

David Stack (1999) claims that the criminal justice system has failed Aboriginal peoples in two ways. The first failure involves the justice system’s refusal or inability to take into consideration the different cultural understandings and interpretations of justice held by different Aboriginal groups. The second involves systemic and structural discrimination which result, in
part, from a lack of consideration by judges of the widespread poverty, unemployment, low education levels and other similar factors (ibid). As LaPrairie (1994) posits, “cultural and socio-economic marginality… are often interchangeable” (13).

LaPrairie (2004) states that a combination of economic variables and social factors influence higher rates of crime and victimization. This is because judges oftentimes consider socio-economic factors when determining an appropriate sentence for an offender while neglecting factors such as upbringing, family structure, community support and lack of opportunities (Abell & Sheehy, 1996; Roberts & Cole, 1999). Roberts and Cole (1999) state in agreement that convicted offenders with lower levels of education, unemployment and family instability were more likely to face carceral sentences than those with employment and higher levels of education.

Stack (1991) states that a lack of resources and support are the root causes for overrepresentation of Aboriginal offenders in carceral situations. With very few options for alternative programs for rehabilitation, judges often rely on carceral sentences even if they are not the most appropriate option. Thus, Stack (1991) notes that “if these extenuating factors are applied equally to all offenders,” Aboriginal persons who “exists at the bottom of the socioeconomic order with little or no apparent support, will likely be more adversely affected than would other offenders” (233).

**Historical Explanation**

LaPrairie (1999) states that the history of Aboriginal incarceration are predicated on colonialism and its enduring legacy. As such, scholars point to the colonization of Canada’s Aboriginal populations as the fundamental factor in the current problem of overincarceration (Quigley, 1996;1999; Roberts & von Hirsch, 1999; Rudin & Roach, 2002). As part of the legacy of colonialism, the goal of displacement and assimilation through mechanisms such as residential schools, prohibition of cultural practices, child welfare systems, gentrification, and loss of land all
became achievements of colonizers which held generationally enduring detrimental effects on each group (Royal Commission on Aboriginal Peoples, 1996). LaPrairie (1997) states that among other factors, the process of colonization, combined with cultural dislocation, led to decreased informal social control devices and an interdependency among members of Aboriginal communities. Bailey (2000) suggests that although many tribes have been able to preserve some cultural practices and traditions, the effects of colonialism are still very much experienced today, as indicated by the increasing levels of imprisonment (Laird, 1999; Bailey, 2000.)

Ultimately, both cultural and structural explanations can be connected to colonialism and its effects on Canada’s population (Alfred, 1999; Monture-Angus, 1999; Finkler, 1992, Proulx, 2000). The removal of Aboriginal tribes from their lands, the removing of children for residential schools, the forbiddance from entering legal contracts to sell their products combined with the suppression of religious practices all contribute to current mainstream understandings, stereotypes and beliefs of native heritage (Alfred, 1999; Monture-Angus, 1999; Ponting and Kiely, 1997). The historically enduring devaluation of Aboriginal cultures and practices and the denial of equal distribution of economic and political power and sovereignty are in turn still based on colonial attitudes (ibid).

These attitudes and views have manifested themselves within the institutions of society through many mechanisms including the law. Stafford (1995) states that the law is “simply the formalization of the historical status quo and its practice forms a system of control replacing the earlier more explicit form of colonial practice” (236). As such, Jonathan Rudin (1999) argues that this perspective holds the criminal justice system as a postcolonial institution which functions to protect the interests of the dominant by maintaining inequalities in a more covert way.

Building on this, Patricia Monture-Okanee (1995) contends that aboriginal offenders are “the commodities on which Canada’s justice system relies” (1). By this, she argues that prisons become industries dependent on Aboriginal offenders to provide jobs within the system, where on
the one hand Aboriginal people are overrepresented as offenders, and on the other, 
underrepresented as employees in the system. This imbalance leads to a beneficial flow of 
resources out of Aboriginal communities and into capitalist economy. These resources include the 
population in prisons, and financial resources from money spent on legal representation and fines. 
She argues that the depletion of individual resources contributes to a lack of respect towards the 
system stating that “[we] cannot (and should not) respect a system of criminal law that entrenches 
our oppression under a pretense of justice and fairness” (Monture-Okanee, 1995: 1).

The Implementation of Bill C-41

Several sentencing reforms of the Canadian Criminal Code, beginning in the 1980’s, 
culminated in the enactment of Bill C-41 and section 718.2(e) on September 3rd, 1996 (Daubney 
& Parry, 1999).\(^6\) The Bill was a response to the various sentencing commissions which revolved 
around reports by the House of Commons Standing Committee of Justice, the Canadian 
bill brought noteworthy reform to the sentencing system and had a significant impact on Canada’s 
criminal justice policy (Robert & Grimes, 2000). For the first time in Canadian history, the 
purpose, principles, and objectives of sentencing were formally identified and codified within the 
Criminal Code (LA Prairie 1999b; Roberts, 1999b). These reforms were designed to achieve 
three objectives: a) provide a consistent policy framework and processes in sentencing matters b) 
to implement a system of sentencing policy and process approved by Parliament and c) to 
increase public accessibility to the law (Daubney & Parry, 1993).

The Bill also introduced provisions to the Criminal Code of Canada that were designed to 
reduce the use of carceral sanctions with the intent of attenuating incarceration levels. One of the 
provisions was section 742.1, which introduced conditional sentencing as a new option for judges

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\(^6\) These reports include: Quimet Report (1965); Hugeson Report (1973); Goldenberg Report (1974); Bill C-14; “The Justice System and Aboriginal People” paper; Bill C-90 as cited by (Hansard, 1995); (McDonald, 1997); (Roberts & vonHirsch, 1999); (Stenning & Roberts, 2001); (Ekstedt & Griffiths, 1998)
during trial (Roberts, 1999; Seniuk, 1997). Conditional sentencing was in part a response to the overall, high incarceration rates experienced by non-violent criminals, but also contains a particular focus towards reducing the sentencing of Aboriginal offenders. This sentencing option permits judges, once they have determined that imprisonment is not an appropriate sanction in the circumstances, to order that the term be served in the community, pursuant to certain mandatory and optional conditions. The sentence can be of less than two years and represents an intermediate sanction, designed for those who would have otherwise been given jail sentences. According to section 742.1 a conditional sentence may be imposed where:

(a) The offence is not punishable by a minimum term of imprisonment;
(b) The court imposes a sentence of less than two years; and
(c) The court is satisfied that allowing the offender to serve the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing set out in section 718 to 718.2

The goal of conditional sentencing is to provide an alternative to the sanction of incarceration to help reduce the number of offenders in prison in a safe and principled manor (Daubney & Parry, 1999; LaPrairie, 1999; Reed & Roberts, 1999).

Another component of Bill C-41 was the introduction of section 718.2(e) as an addition to the sentencing principles used to restrict carceral sanctions, with special focus given to Aboriginal offenders (Roberts & Hirsch, 1999). Section 718.2(e) states that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.” The provision signified that Parliament acknowledged the disproportionate overrepresentation of Aboriginal populations within the criminal justice system, specifically in relation to their

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7 As cited in Moleku, 2002; Pelletier, 2001; Proulx, 2000; Roberts, 1998; 2009; Roberts & Grimes, 2000
disproportionate rates of incarceration (Daubney & Parry, 1999; Gladue, 1999; Wells, 2000). In addition, the inclusion signified acknowledgement in the legal system of the existence of discrimination against Aboriginal people, both within the justice system and in other institutions as well. Thus, section 718.2(e) was intended to perform the remedial function of ameliorating Aboriginal over-incarceration rates by encouraging a restorative approach to sentencing that combatted retributivist justice.

Bill C-41 did not provide sentencing guidelines for judges to follow, but rather offered basic principles and directives that must be applied during sentencing (Daubney & Parry, 1999). This was predicated on the assumption that “the Courts of Appeal will consider the reasons in support of sentences and their relation to the statement of principles and purposes of lower courts and that over time, the development of appellant jurisprudence would provide the guidelines that were being sought by those advocating numerical sentencing guidelines” (ibid: 45). The clarification of Bill C-41 was therefore left to the discretion of the Court of Appeal.

**Overview of Section 718-718.2(e) of the Criminal Code of Canada**

Perhaps what directly determines the ability to properly interpret the application of section 718.2(e)’s mandate is an understanding of the rules and principles which govern its application, as dictated by section 718. The statement of the purpose and principles of sentencing as codified within the Act is comprised of four parts: (1) the purpose of sentencing; (2) the objectives of sentencing; (3) the fundamental principle of sentencing; and (4) the subordinate sentencing principles, of which section 718.2(e) falls under (Criminal Code, 1985). The following section will provide a description of each component

**Sentencing**

*Purpose of Sentencing*

Section 718 states that the fundamental purpose of sentencing is “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful,
and safe society by imposing just sanctions”. Julian Roberts and Andrew Von Hirsch (1998) argue that because Canada does not have legislative guidelines or restrictions, sentencing decisions are largely guided by the statement of the purpose and principles of sentencing.

Objectives of Sentencing

The six subcategories of section 718 describe 10 objectives of sentencing. These 10 include: denunciation, individual and general deterrence, incapacitation, reparation to the individual, restitution to the community, promotion of responsibility in offenders, acknowledgement of harm to victims and communities, and the rehabilitation of offenders (Quigley, 1999). The objectives, as indicated by the wording “the fundamental purpose of sentencing” and the use of the phrase “one or more of the following objectives” is ambiguous and vague, leaving considerable discretion to judges.

Principle of Sentencing

The fundamental principle of sentencing is delineated in section 718.1 of the Criminal Code, and states that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The principles found under section 718.2 are subordinate to the fundamental sentencing principle of proportionality (McDonald, 1997). It is because of this that the fundamental sentencing principle influences the way in which section 718.2(e) should be interpreted and applied (Anand, 2000). Section 718.2(e) must be applied in a way that does not violate the principle of proportionality (Stenning & Roberts, 2001).

Section 718.2(e)

Section 718.2(e) states that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” The provision is not intended to be a “get out of jail free card” because it does not excuse offences committed by Aboriginal offenders (Rudin, 1999). Rather, it is used to justify a non-carceral sentence for imprisonment, where appropriate, and
depends on the circumstances that judges deem applicable. It imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims, and the community (Wells, 1998). In these instances, it is not a mitigating factor on sentencing simply to be an Aboriginal offender. Thus, while section 718.2(e) requires a different methodology for assessing a fit sentence for an Aboriginal offender, it does not necessarily mandate a different result.

The Gladue appeal case and the Gladue analysis are cited heavily throughout the literature studied for this research as it significantly impacts the new methodology that judge’s are required to employ. The verdict and justifications given by judges Cory and Iacobucci during the appeal trial have been referenced to as the Gladue analysis because they establish significant limitations, recognize goals, and acknowledge relevant factors which allow or hinder the use of section 718.2(e). It since has established the framework by which a sentencing judge is to carry out his or her duty when determining a truly fit and proper sentence for aboriginal offenders. The Gladue case, appeal, and contributions are detailed more later in this chapter. (See page 19).

The background considerations underlying the unique circumstances of Aboriginal offenders, which will direct the sentencing judge’s and appeal judge’s analysis are:

a. The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and

b. The types of sentencing procedures and sanctions, which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Gladue, 1999)

“...with particular attention to the circumstances of Aboriginal offenders.”

The Supreme Court of Canada directed the judges to apply special focus or consideration to the circumstances of Aboriginal offenders since their circumstances are unique and it has been substantiated that they have largely contributed to native criminality (Gladue, 1999). The
circumstances of Aboriginal offenders to which section 718.2(e) refers include the social factors that are specific to Aboriginal culture and tradition, the availability of sanctions, and the level of community support available (Wells, 2000). William Vancise and Patrick Healy (2002) state that the legislation was aimed at recognizing that while several Aboriginal offenders face similar barriers and social conditions, judges have been unable to take judicial notice of those circumstances.

Several concerns have been raised by Aboriginal communities regarding Parliament’s singling out of Aboriginal groups in section 718.2(e). Levine (2000) argues that many Aboriginal groups dislike the term “minority” to which they are often categorized with, because the term is often linked to immigrants, which they are not. Furthermore, the generic nature of the term “Aboriginal” is inappropriate given the circumstances to which section 718.2(e) refers which cannot be applied fairly to Canadian First Nations peoples yet is the most commonly referred term in legal settings (Hansard, 1995; Stenning & Roberts, 2001). Several differences exist within First Nations peoples, some of which include differences in culture, language and customs (Koshan, 1998). And so, a problematic question arises when considering how the single term “Aboriginal” is legally accepted as representational of all who consider themselves Aboriginal in Canada, as dictated by section 718.2(e). Levine (2000) outlines that this provision could be interpreted as discriminatory based on this premise as it simply assumes that all Aboriginal offenders have faced disadvantaged circumstances and that those circumstances are spatially and temporally the same across Canada.

The Impact of Section 718.2(e)

Despite the numerous Aboriginal justice programs and policies that have been developed to target the criminal justice system, Aboriginal over-incarceration continues to rise steadily (LaPrairie, 1999; Statistics Canada, 2017). The legislation of the new sentencing initiatives has made the use of restorative initiatives and conditional sentences possible but has failed to
alleviate the problem of Aboriginal overrepresentation within prisons across Canada (LaPrairie, 1999; Quigley, 1999).

Conditional sentences have been depended on by legal scholars, academics, and the justice system more broadly. It is significant to state that “when calculating incarceration rates, the Canadian Centre for Justice Statistics does not count conditional sentences as carceral sentences because these sentences are not served in prison but in the community” (Statistics Canada, 2002). This indicates that conditional sentenceing may not be having the results it was hoped they would have in remedying incarceration rates. This begs the question of how the provision is being applied in court and what factors surround its application or non-application. These initial questions may help in uncovering how to better approach overincarceration and what programmes or policies could be implemented to deal with the issue more satisfactorily.

**Discrimination and the Canadian Criminal Justice System**

Curt Griffiths and Simon Verdun-Jones (1989) analyzed the issue of overrepresentation in prisons and noted that “concern has been expressed that, all other factors being equal, native Indians are more likely to receive a sentence involving custody” than their white counterparts (565). But, they note that proving discrimination in Canadian courts is challenging given the complicated nature of sentencing processes, variations in sentencing options and patterns across jurisdictions. The following section will present some research that supports the claim that Aboriginal offenders are discriminated against in the criminal justice system.

Griffiths and Verdun-Jones (1989) note that while “native Indians committed less offences than non-natives, they were more likely to be incarcerated” (565). In this sense, overrepresentation may not be a direct result of discriminatory practices, but perhaps a function of systemic bias against the economically marginalized. In another study, Stevens (1991) states that overt discrimination and systemic discrimination were explored in the context of Aboriginal peoples and the criminal justice system. On the issue of overt discrimination, Stevens (1991)
notes that discriminatory sentencing against Aboriginal populations is an underdeveloped research area in Canada. When studying system-discrimination, the findings of the Commission of Systemic Racism in the Ontario Criminal Justice System (1995) suggested that discriminatory acts could be undermining judicial decision-making. The Commission states that judges sentence under very busy conditions, and sometimes must rely on inadequate information collected by others. This suggests that judges may be basing their decisions on “unexamined assumptions and stereotypes” (1995: 281). While this is specific to Ontario, the findings do shed light on the possible gaps in research on the application of section 718.2(e) as similar studies have not been conducted elsewhere.

Rudin and Roach (2002) raise the issue of systemic racism in their support of section 718.2(e) as part of a solution to the problem of overrepresentation. At the root of this, the authors posit that the current justice system being based on the notion of formal equality operates under a veil of righteousness and fairness. In this approach, all members of society should be treated the same under the law and any differential treatment would be the result of discrimination. Rudin and Roach (2002) argue that, in view of the existing conditions of inequality, when the system “treats all offenders the same, or does not allow for group-based amelioration of the disadvantaged, [this] is only a recipe for continued inequality and colonialism” (33). In line with this, Lotte Hughes (2003) states that discrimination does not need to be overt or direct, “but may occur because ostensibly neutral laws or practices have a disparate impact on particular groups” (2). Because of this acknowledgement, formal equality has since been replaced by the notion of substantive equality. Hence, the enactment of section 718.2(e) appears to move in this direction by recognizing that there are disadvantaged groups in society, and the Act tries to reduce or eliminate discrimination through the special considerations or treatments that the section permits.

According Rudin and Roach (2000), “the recognition of restorative justice is a promising sign for those who see it as a positive alternative to punitive or retributive approaches to
punishment” (6). The inclusion of restorative objectives recognizes that sentencing must take into consideration what is fit for the accused individual, the offence, and the community (Gladue 1999). Therefore, sentencing is an individualized process that varies from case to case and offender to offender. For this reason, Rudin and Roach (2002) argue that section 718.2(e) and a restorative approach to justice are appropriate responses to address some of the effects of colonization, and in turn structural and cultural factors that influence Aboriginal sentencing. The authors claim that section 718.2(e), if used correctly, can contribute to a lowering of Aboriginal offenders facing carceral punishment, as “an understanding of the impact of colonialism can lead to the creation of sentences that address the root causes of criminal behaviour, but that do not necessarily require incarceration” (19).

**Case Law Overview**

While section 718.2(e) has been applied in several judicial considerations since its legislation in 1996, the landmark *Gladue* appeal case marks a central tenant of current literature discussing the provision and is regarded as the precedent case for all cases that followed dealing with Aboriginal offenders (Turpel-Lafond, 1999). A brief overview of the facts of the case is included here to provide a contextual background that enable one to better understand the conditions which allow for section 718.2(e).

**R. v. Gladue: Case Facts**

The accused is an aboriginal woman who pled guilty to manslaughter following the stabbing of her common-law husband. On September 16th 1995, Jamie Tanis Gladue was celebrating her 19th birthday with some friends and family in the townhouse in which she and her common-law partner lived. Both the accused and the victim had been drinking together along with others when the accused suspected that the victim was having an affair with her older sister after she left the party, followed by the victim. The accused confronted her common-law
husband. The victim was stabbed twice by the accused. The accused was sentenced to three years imprisonment with a ten-year weapons prohibition order.

The Gladue Decision and Grounds for Appeal

In the reasoning provided for the imposition of this sentence, the judge pointed out several factors including balancing the judicial concepts of denunciation, general deterrence and rehabilitation. The judge further emphasized that in relation to section 718.2(e), “there was no special consideration arising from the Aboriginal status of the accused and the victim, since both were living off-reserve and not within the Aboriginal community as such” (Gladue, 1997). In addition, he stated that the severity of the case deemed carceral sentencing appropriate.

Although the case itself is important to consider, it is the appeal decision and circumstances which become the more important reference points for later decisions. Gladue claimed that section 718.2(e) of the Criminal Code had not been considered in deciding the sentence and this was an error on the sentencing judge’s part. This was the first time that the provision had been brought up and employed. Judges Cory and Iacobucci looked at how the trial judge arrived at the three-year sentence and considered many different factors relating to what they interpreted section 718.2(e) to be. Gladue did not come from an Aboriginal community; however she claimed the provision should still apply to her. At the time, Gladue had already started rehabilitation and did not need to be deterred from committing similar offences again. She had also apologized to the victim’s family and acknowledged her mistakes and actions. Missing from much of this discussion was the relevance or value of gender. The appeal case did not highlight the issue of gender and continues to remain missing from literature and debate over how the Gladue analysis applies today despite current levels of more female incarcerations than males. Ultimately, the case was dismissed, however several circumstances regarding the use of section 718.2(e) were made clear. Hence, the majority of criminal cases involving Aboriginal offenders since then have taken the Gladue contributions into consideration when sentencing. The
following section outlines the main contributions defined by \textit{Gladue} (1999) and describes the many circumstances for the use of section 718.2(e) to be applied in similar cases.

\textit{Outcomes of Gladue}

While this thesis does not focus on the Gladue case, the importance of understanding the basic principles of the case are significant because it is mentioned in several other landmark cases including \textit{Ipeelee} and \textit{Wells}, and Gladue is highlighted in much of the literature focusing on section 718.2(e). As such, this section will give a brief overview of several of the outcomes that were found to shed light on why sentencing judges in their dealings with Aboriginal offenders, often refer to the case.

The first outcome derives from the Court of Appeal’s conclusion that the trial judge has erred and that section 718.2(e) did apply to urban Aboriginal peoples, and is not dependent on whether or not they resided on a reserve (\textit{Gladue}, 1999). According to the decision, “section 718.2 (e) applies to all Aboriginal persons wherever they reside, whether on-or- off reserve, in a large city or a rural area” (\textit{Gladue}, 1999: 4).

The second outcome highlights the Appeal Court’s position on section 718.2(e) as remedial and not simply a codification of existing principles. Thus, the court altered the method of analysis used by sentencing judges by providing them with a framework to follow when sentencing Aboriginal offenders.

The third outcome surrounds the issue of determining appropriate sentences for offenders. The Appeal Court restated that the codification of the traditional sentencing objectives included in the Criminal code were to be universal regardless of whether the parties involved were Aboriginal or not. The decision also referenced the importance of restorative objectives and their use alongside or in place of traditional sentencing objectives (\textit{Gladue}, 1999).
Alternative forms of sentencing emphasize “community-centered sanctions that promote the offenders’ acceptance of responsibility for the crime committed and takes into consideration the needs of the victim” (Gladue, 1999).

The fourth outcome was the definition of what constitutes an Aboriginal offender by the Court. Gladue (1999) noted that anyone who falls within the scope of section 29 of the Charter and section 35 of the Constitutional Act of 1982 are Aboriginal and thus fall under the scope of 719.2. This included those identified under each as First Nations, registered and non-registered, Métis and Inuit.

The fifth outcome of Gladue (1999) also clarified the portion of section 718.2 (e) that instructed sentencing judges to pay attention to the circumstances of Aboriginal offenders. In defining the circumstances of Aboriginal offenders, the judge must consider “the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts” (Gladue, 1999: 19). This involves considering the cultural, structural, and historical background factors discussed earlier.

The sixth outcome documents the overall changes in the day-to-day functioning of court proceedings. Judges must obtain information regarding the circumstances of an Aboriginal offender as well as information on all available sentencing alternatives (ibid.).

The seventh, and final outcome, of Gladue is the recognition that overincarceration as a social issue in Canada. The Gladue decision documented the overuse of incarceration as a sanction with specific regard to Aboriginal offenders. The Court recognized the increasing use of imprisonment as a sanction in recent years, referring to the inability of imprisonment to effectively rehabilitate and reform offenders and its ineffectiveness as a deterrent (Gladue, 1999). The Court further recognized the increasing rates of Aboriginal overincarceration within the last decade and its continued disproportional growth (ibid).
Summary

This chapter covers all of the relevant literature regarding overrepresentation, sentencing, Bill C-41 and section 718, and the *Gladue* case to set the stage for this study. The next chapter builds on this fundamental knowledge to critically assess race and discrimination as embedded components of the current criminal justice system. In doing so, the next chapter explores Critical Race Theory, and its subsect Tribal Critical Race Theory to critically assess how, and in what ways, racial discrimination within the current justice system negatively affects Aboriginal populations in Canada, thus contributing to further overrepresentation within prisons.
Chapter 3

Theoretical Framework

Overview

The following chapter provides a theoretical framework for the structure of this thesis, and provides a brief introduction about how inequalities undergird the application of section 718.2(e) in its dealings with Aboriginal offenders. I have chosen to examine the applications of a relatively new theory, named Critical Race Theory (CRT) and its subsect Tribal Critical Race Theory (TribalCrit), as a frame for understanding how race and racism are embedded in the fabric of Canada’s legal system, thus impacting the equitable and just treatment of Aboriginal offenders.

CRT is an American theory based on the sociopolitical history of the United States and was created in response to the growing body of literature on Critical Legal Studies (CLS) and its hegemonic idealism. CRT is mainly applied to expose the controversies held by hegemonic power and the myth of meritocracy through studying and changing policies that affect unequal treatment based on race within the American context. The theory has since been applied to various fields including education and health, and has developed several offshoots including TribalCrit, AsianCrit, and LatinoCrit. This thesis hopes to initiate a new connection which expands CRT to the Canadian context by contributing to and expanding on TribalCrit literature.

CRT and TribalCrit are significant because of their implied connections to the findings of this research. While this particular relationship has not been studied previously, I posit that the findings solidify CRT beliefs that everyday racism defines race, interprets it, re-affirms it and decrees how personal and institutional teachings impact behavior and outcomes, especially within the legal context.

Given the prominent theme of multiplicity held by this study, in terms of uniqueness of each case, the offering of theoretical perspectives, and the many interpretations that this research
hopes to foster in its readers, I first include a brief section outlining my position, approach, and employment of theoretical frameworks. The goal is to stimulate more questioning, discussion, and interpretations of Critical Race Theory and TribalCrit and their influence over Canadian judicial decision making. The second section of this chapter consists of an in-depth analysis of CLS, CRT, and Tribal Crit. The third and final section works towards developing some critical insights and building an initial connection between CRT and TribalCrit to this study, which will be further developed in the analysis chapter.

**Position of Theory in this Qualitative Study**

Creswell (2002;2007) states that unlike quantitative research, in which there is little disagreement concerning the importance of theory, in qualitative research there is no clear agreement made regarding the purpose and significance of theoretical frameworks. Considering this ambiguity, Anfara and Mertz (2006) propose three broad considerations about the role of theory in qualitative research. The first states that theory does not typically have a concrete relationship with qualitative research (Merriam, 1997; Schwandt, 2007). The second explains that theory relates to the researcher’s chosen methodology and in turn, the epistemologies underlying it (Best & Kahn, 2003; Gay & Airasian, 2003). The third outlines that qualitative research theory, compared to methodology, has a broader and more extensive role (Denzin & Lincoln, 2003).

According to Anfara and Mertz (2006), a defining characteristic of the social sciences is their multiple theoretical orientations which “never reached consensus like the empirical referents or explanatory schemes [of] natural sciences”. Instead, for qualitative social researchers, theories exist at different and varying levels that range from the individual to the social group, demographic, or population (Yin, 2008). As such, the myriad of available theories become

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8 Some of these scholars include Anfara & Mertz (2010), Leedy and Ormrod (2005) and Merrian (2002)
significant given the complexity of social issues which warrant multiple perspectives to allow for deep, descriptive explanations.

This study is centered around a constructivist, grounded theoretical approach, in which a symbolic interactionist position is taken on to pragmatically “expand on [the] existing theory” of CRT and its subset, TribalCrit (Charmaz, 2014). Both of these theories were drawn on to conceptualize judicial reasoning and give one possible interpretation for the possible background circumstances influencing the application of section 718.2(e) in the cases analyzed. As such, the intent was not to formulate specific hypothesis to be tested, but rather allow for the results of the analysis to speak for themselves.

**Approach to Theory**

Creswell (2007) argues that a researchers’ approach to theory depends on the type of research design being employed, the types of outcomes that are being sought, the positionality and subjectivity of the researcher, and circumstances of the social issue being studied.

This study subscribes to Singleton and Straits’ (1999) assertion that “the production of scientific knowledge requires a constant interplay between theory and research (38). Hempel (1952) describes theory as a “complex spatial network” whereby systems and observations are the “floating devices,” while “rules of interpretation” control and guide them (36). As such, the relationship among concepts, constructs and propositions as component parts of a theory is significant. According to White and Klein (2008), when concepts cluster together based on shared characteristics, they form a higher-level order of thought, known as a construct, which eventually becomes a proposition. Charmaz (2014) explains that this process is inherent to the grounded-theory approach in which researchers consciously use a set of logically related propositions to propose a theory.
Grounded Theoretical Framework

Grounded theory is a method in which the researcher uses the data obtained for developing and finding a theory in the process of the study. The approach has the goal of moving beyond description in order to generate and discover a theory (Creswell, 2007; Leedy & Ormrod, 2005). While this may be true, Charmaz (2014) explains that contemporary grounded theory can be used flexibly and is often employed to expand on current theory. Over the course of the data analysis process, it became evident that many of the categories that emerged could be rooted or contextualized within CRT and TribalCrit frameworks – an outcome that had not been explored previously in the study of section 718.2(e).

Symbolic Interactionism and Pragmatism

Symbolic interactionism is a micro-level theoretical framework and perspective in sociology that addresses how society is created and maintained through repeated interactions among individuals. The emergence of the perspective began as a response to the mainstream perspective on society that dominated sociological inquiry at the time. These dominant, positivist approaches tended to examine society from the top-down focusing on the impact of macro-level institutions on social structures and how they impose upon and constrain individuals. Departing from this tradition, symbolic interactionism was developed to understand the operation of society form the bottom-up, shifting the focus onto micro-level processes to conceive of the individual as agentic, autonomous and integral to creating the social world.

Symbolic interactionism comes from American philosophic roots, unlike most classical theoretical traditions. The perspective derives from the pragmatist tradition developed primarily at the University of Chicago during the early twentieth century. Pragmatism assumes that the value of theories or beliefs rests on their effective practical application. Meanings emerge through
practical actions to solve problems⁹. Pragmatist theory views reality as fluid and somewhat indeterminate, open to multiple, different interpretations. Facts and values are seen as linked rather than separate and scientific truth is relative, provisional, and assessed through what works in empirical practice (Charmaz, 2014).

The significance of this approach to theory and the employment of the open-ended perspective lies in the overlap between symbolic interactionism, CRT, TribalCrit and pragmatism. While the above sections negotiated my position in approaching theory, the following illustrates how it works effectively for this study. Because CRT and TribalCrit are premised on a response to close-minded hegemonic understanding of law held by CLS thinkers, a pragmatic approach to symbolic interactionism allows for not only a critical analysis of the legal texts being studied from the bottom-up, but also aligns with the theories analysis of long histories of oppression and routine classifications by dominating classes. This connection yields the possibility of opening new platforms for discussion.

**Critical Race Theory (CRT)**

This study utilized CRT as the epistemological lens to understand the intersection of race and the application of section 718.2(e) in its dealings with Aboriginal offenders within Court of Appeal cases. CRT originates from the field of law, where legal scholars of colour argue that the judicial system perpetuates inequalities for people of colour, despite well-intentioned enactments of anti-discriminatory laws (Bell, 1987; Crenshaw, 1988; Freeman, 1978). Tate (1997) describes CRT as “an iterative project of scholarship and social justice” and can be both a historical movement and a philosophical orientation that recognizes the centrality and permanence of racism in society (235). At the same time, CRT is a pragmatic response to the oppression that

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⁹ Dewey, ([1919] 1948, [1925] 1958, [1929] 1960), James (1906), Mead (1932,1934), and Peirce (1878,1958) are considered the main pragmatist thinkers leading to the development of symbolic interactionism.
racial minority groups have experienced since the onset of European colonisation and the transnational slave trade (Harris, 1983).

CRT developed out of a movement known as Critical Legal Studies (CLS) which emerged in the early 1970’s as several lawyers, activists and legal scholars recognized that advances of the Civil Rights Movement had stopped (Delgado, 2003). During the movement, social activists began to challenge the legal system, segregated housing and other forms of discrimination as the number of civil rights cases began to grow. This was a result of the decisions in these cases which did not reflect the fundamental changes that were taking place in the structure of societies sociopolitical fabric. Instead, the law, rather than assisting in the deconstruction of discrimination and racism began to covertly perpetuate it. As such “new approaches and theories were needed to deal with the color blind, subtle, and institutional forms of racism that were developing [in the midst of an] American public that seemed increasingly tired of hearing about race” (ibid: 125). CRT attempts to address this view of the law as an abettor to racial discrimination, which progressive civil rights lawyers at the time failed to recognize, while simultaneously pushing for a new left scholarship that challenged CLS colour-blind ideology. In other words, CRT “sought to stage a simultaneous encounter with the exhausted vision of reformist civil rights scholarship on the one hand, and the emergent critique of the legal scholarship on the other” (Crenshaw et al. 1995: xix).

The early foundations of CRT derive from reframing civil rights litigation outcomes by questioning how the law, which claims neutrality, further perpetuated an environment of racial oppression rather than deconstructing the conditions that allow for unjust treatment. Crenshaw et al. (1995) explain that for the first time, theorists examined the entire edifice of contemporary legal thought and doctrine from the viewpoint of the law’s role in the construction of social domination and subordination. In doing so, they initially drew from philosophers such as Antonio Gramsci and Jacques Derrida as well as radical American social figures such as Sojourner Truth,
Frederick Douglas, W.E.B Du Bois, and Martin Luther King (Delgado & Stefancic, 2001). However, these are only a few examples from an ever-growing field of study.

*Historical Roots of Critical Race Theory in Critical Legal Studies*

CLS was a movement within law led by mostly Marxist postmodern legal scholars who were attempting to uncover the ideological underpinnings of American jurisprudence. CLS scholars criticized the hegemonic nature of civil rights reform, positing that antidiscrimination laws were ineffective in eliminating racial inequality. However, CRT scholars argue that CLS fail to recognize the ways in which the hegemonic system of white supremacy and racism shaped the very construction of the legal foundation upon which society is built. In fact, they argued that the enactment of such laws provided a camouflage for the perpetuation of oppression. The law merely functioned to legitimate the existing worldview, not to remediate the ills of the present social condition (Crenshaw, 1988). Harris recounts that:

There was, of course, law that had a lot to do with the lives of some communities of colour: poverty law, welfare law, criminal law, and immigration law. But there was seemingly, no language in which to embark on a race-based, systemic critique of legal reasoning and legal institutions themselves. (Delgado and Stefancic, 2001: xviii)

A central tenet for the CLS school of thought derives from the works of Gramsci on hegemony, who advocated for socialist-democracy during the time of Mussolini’s fascist regime. Gramsci (1971) believed that “all men are intellectuals” but not everyone serves the “function of intellectuals” (7). He argued that capitalist society was comprised of a band of intellectuals, with those who exercised “intellectual-cerebral intellectualism” occupying jobs such as politicians and physicians dominating over those who exercised “muscular-nervous intellectualism.” Those in the latter group included working-class labourers. Within the category of “intellectual-cerebralists,” there existed the subcategories of “organic” intellectuals and traditional intellectuals. The organic intellectuals were aristocratic elites, which by virtue of their status and prestige exerted power and influence over the laws of the land. In short, they were the dominant
ruling class in society. Meanwhile, the traditional intellectuals consisted of scholars, scientists, philosophers and theologians. Gramsci notes that although the traditional intellectuals often disparaged the elitism of the organic intellectual counterparts, both groups enjoyed the privileges and benefits of the ruling class, and thus were complacent in the oppression of the working class (Burke, 1999; 2005).

The class distinctions outlined by Gramsci are of significance for understanding hegemony, CLS thought, as well as for counter-hegemony. Gramsci (1971) defines hegemony as:

1. The spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant group. This consent is historically caused by the prestige which the dominant group enjoys because of its position and function in the world of production.

2. The apparatus of state coercive power legally enforces discipline on those groups which do not consent to hegemonic power either actively or passively. This apparatus is, however, constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed. (12).

In other words, Gramsci argued that the dominant class, known as the organic intellectuals, applied ideological control over the subordinate masses. The elites’ beliefs, attitudes and traditions were normalized into mainstream consciousness which, in turn shaped law, language and social customs. The laws of the land dominated and any attempt to challenge the dominant class resulted in punitive consequences.

In response to this power structure, Gramsci proposed the notion of counter-hegemony. Gramsci (1971) stated that to effectively overthrow the hegemonic superstructure, the consciousness of the oppressed must change in two ways. First, the oppressed must begin to recognize the state of their suffering. Second, they must desire and actively work towards the transformation of the existing social order. Freire (1970) regarded this awakening as
calling for acknowledgment of social, political and economic contradictions to push for action against the oppressive elements of life. To encourage the necessary revolution, Gramsci sought to convert as many traditional intellectuals as possible onto the side of the working class. Freire (2005) held that converts were indispensable members of the struggle because they brought with them acknowledgement of the unjust social order and a desire to move from the side of the exploiter to the exploited.

CLS scholars rely heavily on this understanding of hegemony to explain the continued acceptability of society by revealing how legal consciousness induces people to consent to their own oppression (Crenshaw, 1988). They argue that legal doctrine is susceptible to manipulation, and that the opinions of the Supreme Court often reflect the ideological positions of the original intellectuals (Freeman, 1978; Matsuda, 1987). What appears to serve the interest of the underclass in actuality confirms the higher status and power of the ruling party (Bell, 1980). The Supreme Court is able to conceal its hegemonic rulings by boldly denouncing discriminatory practices that violate the equal protection of the laws while excusing itself from the duty to ensure that its rulings are actually carried out.

Critical Race Theory’s Contentions with Critical Legal Studies

Matsuda (1987) recognizes that CLS scholars condemned racism, supported affirmative action, and generally adopted the causes of oppressed people throughout the world. However, they believe that the solutions to racial prejudice and social injustice law can be found in the ideals of meritocracy, colorblindness, and the neutrality of the legal system (Bell, 1987; Crenshaw, 1988; Delgado, 1984; Gotanda, 1991; Matsuda, 1987; Peller, 1990). That is, CLS theorists believe that by simply eliminating race consciousness, all members of society would be given equal opportunity to life and liberty.

Perspectives such as these underestimate the part that race plays in the interweaving fabric of society and law. Freeman (1978) posits two views through which racial discrimination
may be seen more effectively and clearly in society. He states that this involves looking at both the perpetrators’ perspective and the victims’ perspective.

First from the perpetrators’ perspective, antidiscrimination law serves the purpose of “neutralizing the inappropriate conduct of the perpetrator” (Freeman, 1978: 1053). This view claims that radical discrimination endures because individual biases stand apart from social and historical phenomena. Antidiscrimination law sought to redress discrimination by declaring certain practices illegal. However, it does not recognize that to remediate the effects of racism, the perpetrator needs to feel a personal responsibility for the contribution and continuation of racism. Thus, Freeman (1978) argues that “antidiscrimination law is hopelessly embedded in the perpetrator perspective” (ibid: 1054).

The second view entails that of the victims’ perspective. This involves pragmatically looking at discriminatory practices from the viewpoint of those at the bottom (Matsuda, 1987). Matsuda (1987) argues that adopting the perspective of those who “had seen and felt the falsity of the liberal promise can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice” (324). Whereas the perpetrators’ perspective took “polite issue with extoled, criticized and expanded on each other’s ideas in something like an elaborate minuet” (Delgado, 1984L 563), the oppressed daily felt the weight of their segregation at the social, political and institutional level on the mere basis of their backgrounds (Harris, 1993).

The ideological variances between the two perspectives were essentially the rift between CLS scholars and CRT scholars in law and the basis for the development of CRT theory. According to Crenshaw et al. (1995), CRT emerged out of the thoughts and traditions of CLS, but deviates from it with respect to CLS scholars’ ideals of a raceless, colorblind society. As a movement, CRT began when several students staged a protest in reaction to the departure of Professor Derrick Bell from Harvard Law School in 1981 (Crenshaw et al., 1995). His parting prompted the students to recruit professors from other law schools to teach weekly sessions on
race and civil rights. The students and faculty who participated in this movement included Crenshaw, Matsuda, Delgado, and Lawrence, who later became the founders of the CRT movement (ibid).

From the beginning, Critical Race theorists placed race and racism as the central pillars of hegemonic power and their main point of contestation against CLS scholars. They argued that oppression was rooted in racism and that race consciousness must be considered to understand hegemony and racial reform (Crenshaw, 1988). CRT theorists contended that CLS was “elitist and exclusionary, lacked a program, was cynical, and failed to resolve conflicts of value” (Matsuda, 1987: 331). By advocating an anti-law stance that lacked tangible solutions, CLS scholars discretely avoided issues of race, while simultaneously dismissing minority scholars. (Bell, 1992; Delgado, 1984; 1992; Lawrence, 1992; Matsuda, 1987). From this exclusion, CRT scholars formed a movement of their own which centered the analysis of law through “fiction, personal experiences, and the stories of people on the bottom to illustrate how race and racism continued to dominate society” (Bell, 1992: 144).

**The Basic Principles of Critical Race Theory**

No single manifesto defines CRT in its entirety. Attempts at synthesizing its variations are rare, and ultimately prove more elusive than enlightening (Alfieri, 1998). However, what is generally agreed upon is that CRT purports to: 1) describe race and racism and 2) show how the liberal legal system perpetuates racial subordination. The following section will evaluate the movement’s most common assertions by expanding on the six central themes that founding members Matsuda, Lawrence, Delgado and Crenshaw (1993) argue will remain principal so long as racism exists in society:

1. **Racism is Endemic to Society**

   All CRT writers believe, in varying degrees, that racism is endemic to daily life in western societies. More specifically, race plays a role in all decisions by court and legislatures, if
only because judges and legislators occupy a raced perspective. In this sense, legal scholarship is also racially situated within a process and pattern of decision making. To understand this better, several CRT writers argue that more attention must be paid to the taken-for-granted privilege that white people possess (Frankenberg, 1993; Giroux, 1997; Tatum, 1992). Frankenberg (1997) argues that “whiteness makes itself invisible precisely by asserting its normalcy, its transparency, in contrast with the marking of others on which its transparency depends” (6).

Harris (1993) associates whiteness with property rights that grant membership into society’s upper caste. Being white automatically ensures “higher economic returns in the short term”, as well as “greater economic, political and social security in the long run” (ibid: 1713). McIntosh (1990) builds on this to state that white privilege acts as an “invisible package of unearned assets” which is meant to remain oblivious to the owner (10). Thus, given this conceptualization of whiteness, views held by the dominant often differ from those of minority groups. As such, legal scholarship as well is racially situated, such that there are prominent “white” and “black” views on legal issues.

2. Skepticism toward Legal Claims of Meritocracy, Neutrality and Colorblindness

The existing legal system, and mainstream legal scholarship, are not colour-blind. Despite the pretence of neutrality, the system has always worked to the disadvantage of people of colour and continues to do so. Thus, people of colour are more likely to be convicted, to serve more time in incarceration, to suffer more arrests and experience greater deprivation of liberty and property. Gotanda (1991) argues that “a colorblind interpretation” of the law “legitimates, and thereby maintains, the social, economic, and political advantages that whites hold” (2). In turn, the failure to recognize race protects the property interests of dominant castes and denies the historical and social contexts of white domination (Harris, 1993).
3. Hegemony

Drawing upon Gramsci (1971), CRT scholars contend that power is socially and historically constructed and that the oppressed consent to their own subjugation through the forces of hegemony. This dominance is not necessarily maintained by force; it is supported through the consent of the subordinate group as the members of that group come to accept, adopt, and internalize the values and norms of the dominant group. Racism, thus, is a “limited historical, ideological, and political phenomenon,” that is embedded within an organized belief structure used as a tool to “demean, oppress or exterminate” (Dikötter, 2008: 1480). In turn, the laws and customs of the ruling class are accepted as the norm, despite their apparent discrimination against women and people of colour (Bell, 1987).

4. Challenging Ahistoricism and Hegemonic Power in Favour of the Historical/Contextual Analysis of Law

A major contention of CRT scholars is the importance of experiential knowledge. The goal of CRT is to construct alternative realities through storytelling and counter-storytelling to push for race consciousness. Critical Race theorists use storytelling to disassemble perceptions of the norm to include the voices of the oppressed through the sharing of their realities (Bell, 1987;1992; Delgado, 1984;1990;1990; Matsuda, 1987). Examples of storytelling include parables, chronicles, stories, poetry, fiction and revisionist histories” (Ladson-Billings & Tate, 1995: 57). These counter-accounts point out the discrepancies between what the dominant class conceptualize as truth and what the oppressed know to be true based on their own personal experiences.

The subjective experiences of women and people of colour render them well suited to analyze race relations law and discrimination law. Matsuda (1991) states that “every person has an accent” and with that accent “carries a story of who [they] are” (3129). Thus, storytelling from the perspective of those on the bottom is a technique that is heralded by CRT scholars (Matsuda,
This practice allows for the contestation, deconstruction, and reshaping of the master narrative by enlisting multiple perspectives and experiences as sources of valid knowledge which can serve as catalysis for transformation.

Thus, CRT rouses a “cognitive conflict” to “jar white dysconscious racism” which compels society to question whether neutrality and meritocracy really do exist as fundamental principles of democracy (ibid). Delgado and Stefancic (2001) explain that counter-storytelling serves to “help us understand what life is like for others and invites the reader into a new and unfamiliar world (41).

5. An Interdisciplinary, Eclectic, and Pragmatic Critique

Matsuda et al (1993) explain that CRT is derived from a number of theoretical perspectives, including “liberalism, law and society, feminism, Marxism, poststructuralism, critical legal theory, pragmatism, and nationalism” (6). From these perspectives, CRT writers learned to view race and racism as historically and socially constructed. The goal is to empower the lives of the marginalized by engaging them in emancipatory discourse, to constantly search for answers, to reject the inevitability of the present state, and to challenge dominant ideologies and thereby resist conforming. CRT is additionally interdisciplinary not only because of the sources it draws upon, but also because of the sources to which it contributes. To broaden its understanding from the initial black/white dichotomy, CRT has grown to include FemCrit, LatCrit, AsianCrit, TribalCrit, and WhiteCrit (Yosso, 2006). Each of these critically consider how the legal system represses groups based on gender, sexual orientation, ethnicity, culture and social status.

6. Working towards Eliminating Racial and Other Forms of Oppression

A core belief of CRT is that racism is not limited to individual acts of discrimination, but rather is a historic, systemic, and ideological manifestations of power which serves, maintains, and protects white privilege (Delgado, 1989; Harris, 1993). Ever aware of this fact and their
“double consciousness,” CRT scholars recognize that the worldview that they employ differs significantly from that of the dominant class (DuBois, 1903; 1969). DuBois (1903; 1969) argues that those “gifted with a second-sight in this American world” are forever struggling to navigate their “twoness” in which one side is struggling to fit within an existing world that seeks to exclude them while the other side seeks to preserve their ethnic identity in the face of assimilation and popular culture. The goal of CRT theorists and activists is to raise race consciousness by the dominant class, as proposed by Gramsci, to eradicate this struggle (Delgado & Stefancic, 2000; Matsuda, 1987).

In realizing that race is only one of several elements that are subject to discrimination, CRT’s goal is to work towards eliminating all forms of discrimination in hopes of fair treatment both within legal systems, and in society as a whole. In seeking this goal, the marginalized understand that so long as a group of people has the power to exert control over the legal, political, social and economic aspects of society, those who fall outside the circle of the dominant group are not safe from oppression.

**Tribal Critical Race Theory (TribalCrit)**

Aboriginal scholars began employing CRT to examine the effects of race, racism and power on their communities by using the theory as a mechanism to vocalize the truth and to speak back to colonization and oppression. Lumbee scholar Brayboy (2006) introduced Tribal Critical Race Theory (TribalCrit) to examine the issues of Aboriginal people in relation to the United States and its laws. Wilson and Yellow Bird (2005) state that “since the truth about injustices perpetuated against Indigenous Peoples has been largely denied in the United States, truth telling becomes an important strategy for decolonization” (7). Thus, TribalCrit functions to expose the inconsistencies in structural systems and institutions to help make the situations of Aboriginal people in society better.
TribalCrit is rooted in the multiple, nuanced, historically, and geographically-located epistemologies and ontologies found in Indigenous communities. Though they differ in terms of spatial, temporal, community and individual subjectivities, there appear to be commonalities in fundamental understandings. TribalCrit is rooted in these commonalities while simultaneously recognizing the range and variation that exist within and between communities and individuals. TribalCrit moves away from CRT’s central tenet of colour-based discrimination and inquiry towards a more pragmatic and individual-based understanding of Aboriginal groups, their communities, and how factors such as colonization affect their circumstances of discrimination. Brayboy (2006) outlines the nine tenets of TribalCrit as follows:

**The Central Tenants of Tribal Critical Race Theory**

*Colonization is endemic to society.*

The primary tenant of TribalCrit is the notion that colonization is endemic to society. In this sense, scholars are referring to not just histories of colonialism, but also colonized thought, knowledge, and power structures that dominate present-day society. Mattiste (2002) argues that “Eurocentric thinkers dismissed Indigenous knowledge in the same way they dismissed any socio-political cultural life they did not understand because they found it to be unsystematic and incapable of meeting the productivity needs of the modern world” (5). Thus, Aboriginal identities have become regulated by governments to meet Western interests rather than those of the people who take up their identities. Smith (1993) argues:

> legislated identities which regulated who was an Indian and who was not...who had the correct fraction of blood quantum, who lived in the regulated spaces of reserves and communities, were all worked out arbitrarily [but systematically], to serve the interests of the colonizing society. (ibid:22)

Therefore, the process of colonization and its debilitating influences are at the heart of TribalCrit, of which all other points become offshoots.
Policies are rooted in imperialism, White supremacy, and a desire for material gain.

Williams’ (1878; 1989) analysis of early policies by the U.S. were rooted in a self-interested reading of legal concepts that allowed White settlers to rationalize and legitimate their decisions to take land from Aboriginal tribes which originally occupied the land. The removal of tribes from their traditional lands by U.S. governments was justified by arguing that Indigenous peoples needed to be moved for their own good. For example, the government claimed that Aboriginal peoples were underutilizing the lands on which they lived and would remain safe in the new territory they had been allotted. Brayboy (2005) states that at the heart of the removal was White supremacy.\textsuperscript{10}

*Indigenous peoples occupy a limited space that accounts for both the political and racialized natures of their identities.*

The third belief of TribalCrit expands on the notion of Aboriginal groups occupying limited spaces that account for both the legal/political and racialized dimensions of their identities. Brayboy (2006) argues that “we are often placed between our joint statuses as legal/political and racialized beings” (432). That is, Aboriginal people are both political and racialized beings, but are rarely treated as such, leaving them in a state of controversy wherein they define themselves as both, with an emphasis on the legal/political, but are framed as racialized by other members of society. In light of this, Deloria and Lytle (1984), Wilkins (2002) and Brayboy (2006) argue that Aboriginal groups were nations before the Constitution was signed and therefore their status as nations should go without question.

*Aboriginal Peoples have a desire to obtain and forge tribal sovereignty, tribal autonomy, self-determination, and self-identification.*

The fourth tenet of TribalCrit is rooted in a desire to obtain and forge tribal autonomy, self-determination, self-identification, and ultimately tribal sovereignty. Tribal autonomy

\textsuperscript{10} White supremacy is viewed as taken for granted and legitimate and it is through naturalization of privilege and “whiteness” as property right that it derives its hegemonic power.
consisting of the ability of communities and tribal nations to have control over existing land bases, natural resources, and tribal nation boundaries. Tribal autonomy encompasses interacting with the governing structures in society on a nation-to-nation basis (Brayboy, 2006). Conversely, self-determination rejects the leader/follower dichotomy currently in place between the U.S government and Aboriginal populations as well as Canadian government with their Aboriginal populations. Finally, self-identification calls for the ability and legitimacy for groups to define themselves and to create what it means to be Aboriginal.

The concepts of knowledge and power take on new meaning when examined through an Indigenous lens.

TribalCrit problematizes the concept of culture, knowledge and power, offering alternative ways of understanding them through an Aboriginal lens. In so doing, TribalCrit scholars separate themselves from dominant Western/European notions of power, knowledge and culture in favour of those ideologies that have been circulating among Aboriginal groups for thousands of years (ibid). Culture is understood within TribalCrit as fluid and dynamic yet fixed and stable. Brayboy (2006) says that “like an anchor in the ocean, it is tied to a group of people and often a physical place” (434).

Knowledge, then, becomes the ability to recognize change, adapt, and move forward with change. For TribalCrit writers, there are three forms of knowledge including cultural knowledge, survival knowledge and academic knowledge. While Aboriginal ways of knowing are seen as different, and in some instances contrasting to that of Western knowledge, their forms do not necessarily mean that they conflict. Rather, TribalCrit writers argue that the blending of knowledges creates knowledge that is key to survival and the thriving of society (Barnhardt & Kawagley, 2004; 2005; Deloria, 1970; Medecine, 2001).

Aboriginal scholars suggest that power is elusive and complicated, however certain themes do emerge. Power is not a property or trait that an individual should exercise control over,
rather it is grounded in a group’s ability to define itself, its place in the world, and its traditions (Deloria, 1970; Stoffle & Zedeño, 2001; Vizenor, 1998; Warrior, 1995). There is a clear link between knowledge in the form of experience and power. Power, through an Aboriginal lens, is an expression of sovereignty and self-determination. Deloria (1970) extends this point to state that “the responsibility which sovereignty creates is oriented primarily toward the existence and continuance of the group” (123).

**Government policies and educational policies towards Indigenous peoples are intimately linked around the goal of assimilation.**

The sixth component of TribalCrit is the recognition that government policies and educational policies targeting Aboriginal peoples have, historically, been oriented towards a goal of assimilation. According to Klug and Whitfield (2003), “early treaties emphasized that education appropriate for Indian students was to be provided” to allow for the right kinds of knowledge to be taught (31). Not surprising, appropriate education was assumed to be that which eradicated histories and traditions in favour of Anglo-European ways of life. TribalCrit rejects the call for assimilation and argues instead that to be successful, people must maintain a strong sense of their Aboriginal identity as distinctive and a source of pride.

**Tribal philosophies, beliefs and traditions are central to understanding the lived realities of Indigenous peoples, but they also illustrate the difference and adaptability among individuals and groups.**

The seventh key component of TribalCrit emphasizes the importance of tribal philosophies, beliefs, traditions, customs, and visions for the future. Aboriginal writers honour the adaptability of groups and recognize the differences among individuals and between people and groups. Within legal systems, this calls for a re-evaluation of Aboriginal law, court dealings with Aboriginal offenders and a recognition of the starkly different methods of dealing with crime within both communities. In recognizing this, Burkhart (2004) states that Native philosophy states
that “We are, therefore I am” (25). In this sense, individuals are parts of communities rather than individuals alone in the world.

Stories are not separate from theory; they make up theory and are therefore, real and legitimate sources of data and ways of being.

Contrary to scientifically based research being the sole resource for justifiable knowledge, TribalCrit hold as their eighth tenant that stories, oral histories and counter-storytelling are reliable for legitimate forms of data. In other words, stories are not separate from theory, rather they make up theory. Like the need for experiential knowledge called for by CRT scholars, TribalCrit emphasizes the need for traditional Aboriginal storytelling as a means for learning and growing. Battiste (2002) cites Pillax in saying that “stories…are to be listened to, remembered, thought about, meditated on. [They] are not frivolous or meaningless, no one tells a story without intent or purpose” (25). Likewise, Basso (2000) argues that stories are moral tools with psychological implications that remind individuals of ways of being. Thus, oral stories remind populations of their origins and serve as lessons for younger members as guideposts (Basso, 2000; Battiste, 2002; Olivas, 1990).

Theory and practice are connected in complex and detailed ways such that scholars must work towards social change.

Like CRT, the final component of TribalCrit states that there must be a component of action or activism to form a connection between theory and practice. Building on what Williams (1997) defined as Critical Race Practice, TribalCrit must be praxis. Praxis involves researchers utilizing theory to make an active change in the situation and context being examined.

TribalCrit, in all its facets, endeavors to expose the inconsistencies in structural systems and institutions present in society. Brayboy (2006) states that the tenets discussed above should serve as a starting point for future dialogue on TribalCrit allowing for critical insight to be made on the various social issues faced by Aboriginal populations today. Because of its explanatory
power and fundamental values embedded within Aboriginal traditions, TribalCrit has the potential to be a well suited theoretical lens through which one may describe and understand the lived experiences of natives.

**TribalCrit and Section 718.2(e) of the Canadian Criminal Code**

CRT theorists and TribalCrit theorists combine the struggle for racial justice with critiques of the punitive legal and scholarly norms which are themselves viewed as part of the illegitimate, hegemonic hierarchies that need to be changed. As part of a growing body of literature that seeks to identify inadequacies of conventional legal practices, this section begins to address how section 718.2(e) of the Canadian Criminal Code has become part of the problem, despite being well intentioned. The inadequacies of 718.2(e) are developed by extending CRT’s offshoot discourse of TribalCrit into the Canadian context. The following section will provide some critique of CRT and TribalCrit generally before touching on how the theoretical framework can be extended to better conceptualize how judges employ section 718.2(e) of the Criminal Code. The Analysis Chapter will engage with these ideas in greater depth to more specifically apply the study’s findings and themes to CRT and TribalCrit.

As with other critical forms of theory, the contentious nature of CRT attracts critics who remain dissatisfied with some of its assertions. Litowitz (2009) argues against CRT’s opposition with liberalism, which he understands as civil rights proceedings characterized by confidence in the legal system. He claims that, to liberals, the law’s main purpose is to protect citizens from threat of harm so that they can be free to pursue their goals. In exchange for the protection, society should follow social laws (Litowitz, 2009). He also argues against CRT scholars criticizing liberalism for the “oppression and inequality of blacks or for the mistreatment of Native Americans and Chinese immigrants” when liberals have been widely regarded as active supporters of minority rights (Litowitz, 2009: 298). Some CRT theorists like Matsuda (1987) also fault liberalism for tolerating racial labels, claiming that such tolerance promotes racist speech;
however, Litowitz (2009) maintains that the state provides a “neutral forum for speech,” regardless of the type of speech (299).

TribalCrit has yet to contribute to this discussion of liberalism and its impact on the treatment of Aboriginal offenders, however it does reveal a crucial detail about the position of law and the governing state. Because the law is tasked with protecting citizens from harm, this leads to the conclusion that legal bodies are not necessarily considering the circumstances of the offender to any significant extent. Instead, judges work in favor of the sentencing objective of protecting the public. This provides the basis for a better understanding of the repetitive reasoning’s apparent in the court of appeal cases studied for this project.

Litowitz (2009) takes further issue with CRT’s tenet of narratives, arguing that it is wrong for lawyers to incorporate stories into legal cases, and that stories have no place in constitutional law. He asserts that personal stories are “private issues” whereas the law “turns on public issues” (Litowitz, 2009:301). He also says that storytelling can lead to unforeseen biases because lawyers must remain neutral and devoid of their emotions when dealing with their clients. Storytelling may lead to undesirable consequences, such as causing individuals to become less sensitive rather than increasing feelings of empathy toward the experiences of people of color (ibid).

In response to Litowitz’s (2009) assertion, CRT scholars propose that a lack of personal narratives or discussions of racial inequality could be a cause of historic and the current state of disproportionate jail sentences experienced by Aboriginal groups. They also argue that in the case of traditional Aboriginal decision-making, the goal of collective consensus is achieved through healing circles and sharing circles. As such, the offenders’ stories become of public concern and significance. This is to ensure that the best solution can be found to help rehabilitate the offender, while instilling in society what is right from wrong. Thus, what requires further exploration and
consideration are the individual and subjective experiences of Aboriginal dealings with race and discrimination.

In light of TribalCrits’ assertion for a need for experiential knowledge and counter-storytelling, social phenomena become infinitely more complicated considering not only the historic effects of colonization but also treatment by the punitive governing system and how it applies differently to each Aboriginal community. Considering how complicated this may appear, TribalCrit posits that autonomy, self-identification and self-determination yield promises of better relationships and interactions between Canadian society, its law, and the Aboriginal tribes present. This would allow for better treatment of Aboriginal offenders and allow for more knowledgeable dealings and decision-making by judges and juries. Conversely, this would involve the elimination of a colorblind and neutral approach occupied by legal scholars and the greater justice system in favour of a more subjective and fair practice.

Current literature on TribalCrit and Section 718.2(e) of the Criminal Code study very different aspects or dimensions of Aboriginal life. While TribalCrit is mainly contextualized within the United States and focused on education systems, both qualitative and quantitative studies of section 718.2(e) routinely study statistical records that equate at-risk demographics with overrepresentation across Canadian prisons. In recognizing the significance of the elements of both CRT and TribalCrit, it is evident that the tenets of each can be applied in the Canadian context to the current situation of sentencing of Aboriginal offenders. While part of this issue seems to rest in the opposing natures of the current punitive legal system present in Canada, the other part rests in judiciary knowledge, or lack thereof, of how to best apply or employ Aboriginal restorative justice techniques during sentencing.
Summary

CRT scholars often state that governing structures may have good intentions when enacting laws aimed at creating equitable treatment under the law, however they also state that by simply instating laws without proper understanding or knowledge, those who hold the power to make change in the legal system, such as judges, do not possess the knowledge or experience to justly sentence Aboriginal offenders. In the same way that describing whiteness is a complicated question to ask those who are white, presenting judges with several cases featuring Aboriginal offenders allows for a taken-for-granted approach to sentencing that does not consider descriptive background factors and experiences. Common rationales used by judges in these cases as “high risk”, “lack of resources or family for support” and “deterrence” have become commonplace and naturalized justifications for sentencing Aboriginal people with jail sentences. Hence, Aboriginal populations have accounted for a large portion of prison populations amongst the places studied within this research, as well as the nation as a whole and will continue to do so, so long as perceptions of the criminal Aboriginal remain neutralized and devoid of critical analysis.

In working towards making connections between theory and praxis, the following chapter will outline this studies methodological framework used to analyze the data. In doing so, my position as a researcher and the approach I take to studying cases will be explored in greater depth.
Chapter 4

Methodology

Empirical Foundations

The objective of this chapter is to describe the methodological approach that was used to examine the application of section 718.2(e) of the Canadian Criminal Code. Much of the existing literature in this area is based on quantitative research, examining factors such as rates of incarceration and types of offences in relation to Aboriginal offenders. A few scholars who have looked at sentencing of these groups include Anand (2000), Brodeur (2002), Daubney (2002), Stenning and Roberts (2002) and Roach and Rubin (2002). While several academics have taken up problematizing Aboriginal overrepresentation, sentencing procedures and practices, few have looked at how section 718.2(e) is being applied, thus creating an opening for discussions of what conditions influence the use, or failure to use, the recommendations outlined by the provision. Conversely, there is also a lack of qualitative research in this area and more specifically, little information which discusses section 718.2(e), its application in court, and the reasons given by judges for its application whether used or not. The type of qualitative methodology and analytical strategy I chose to employ in this study is a qualitative constructivist approach to grounded theory. In what follows I will explain my approach to qualitative research, constructivist grounded theory, the sampling process and data analysis techniques.

The specific method used in this study is content and discourse analysis of court of appeal cases. The extant documents are written sentencing decisions that were available prior to the initiation of this project. The rich data collected is therefore not researcher generated, but “a product of the context in which they were produced and therefore grounded in the real world” (Merriam 1998: 126). Because judges are expected to provide reasons for their sentencing in written case briefs, it is logical to look at these documents to determine the conditions or
justification under which section 718.2(e) is being applied. This approach has the added benefit of providing a contextualized understanding for the sentencing decision. Rudin and Roach (2002) argue in favor of this method as sentencing decisions alone can be misleading since they do not provide information about offenders who do not receive prison sentences. Furthermore, Rudin and Roach argue that “the reason for the apparent disparity will not be found anywhere other than the reasons for the sentencing given by the judge [in the specific case]” (ibid:8). Rudin and Roach’s rationale for the use of in-depth qualitative examination is both relevant to this study and validates the choice of research methodology.

**Justifying the Qualitative Approach**

In order to answer the research questions presented in the introductory chapter of this study, I chose to utilize a qualitative approach to data collection and analysis for the application of section 718.2(e) on Aboriginal offenders in a series of court of appeal cases. The decision to use a qualitative approach was made prior to undertaking the research project. Because the objective of this research is to pinpoint, offer my understanding or interpretation of, and to contextualize court of appeal justifications of the provision, a qualitative approach seemed logical given its propensity towards the production of categorical, situated, and contextualized bodies of knowledge (Ritchie & Lewis, 2003).

A qualitative approach to analyzing the data was deemed more appropriate than a quantitative approach because of the need to understand the rationale behind appeal sentencing decisions. This cannot be learned as easily from data sets analyzed by quantitative techniques. Merriam (1998) states that qualitative research is richly descriptive and seeks to answer questions regarding the existence of a social phenomenon. Furthermore, this study is not testing an existing theory or hypothesis, but rather uses a constructivist approach to identify and describe themes and ideas which emerge from a rigorous review of the data. The exploratory intention of this research does not expand beyond stating what the aggregate sentencing numbers describe and what the
frequency of types, circumstances or conditions of each case are in hopes of having a more
human and holistic approach to understanding social issues.

However, to better understand and contextualize descriptive analysis, statistical records
of this study specifically were used to conduct a univariate analysis of frequency distributions
based on 30 variables. A few of these variables include age, alcohol abuse, family structure, etc. I
believe that this will aid in supporting categorical themes that arise and in identifying patterns or
trends which emerge through the qualitative approach to analysis. The main aspect of this section
is not simply to quantify how often section 718.2(e) is applied or how many offenders are being
sentenced to prison under the provision, but rather to provide more detail and context about why
section 718.2(e) is being applied and to see if there are strong inclinations in the factors that affect
judges’ decision-making about whether to apply the provision or not. In this sense, this thesis is
less concerned with the result or outcome of sentencing than it is with the process of sentencing
and judiciary decision-making.

The Constructivist Paradigm

To ensure a strong methodological design, we should choose a research paradigm that is
“congruent with [our] beliefs about the nature of reality” (Mills et al., 2006:2). I believe as
researchers that our habitus and knowledge is shaped and influenced by our histories and cultural
fields of context. Berger and Luckmann (1976) state that reality is socially constructed and the
sociology of knowledge must analyse the process in which it occurs. Sociological interest in
questions of reality and knowledge is thus justified by the facts of social relativity. It follows that
specific collections of reality and knowledge pertain to specific social contexts, and these
relationships must be included in an adequate sociological analysis. Berger and Luckmann (1976)
illustrate this by stating that “the knowledge of the criminal differs from the knowledge of the
criminologist” (15).
Constructivism as a research paradigm denies the existence of a directly accessible objective reality (Lincoln & Guba, 2005). This means that reality and knowledge is always constructed and the construction depends on the perspective of the researcher and the context from which they study. As per Guba and Lincoln (1989), constructivism claims that “realities are social constructions of the mind, and that there exists as many such constructions as there are individuals” (43). As a researcher, I align myself with Berger and Luckmann (1976) and Lincoln and Guba (2005) in this understanding of reality as multiple and dependent on studying the processes and contextualized circumstances that characterize social phenomena. Constructivism allows me to take a sociological perspective to analyze case laws which gives me access to the multiple legal “realities” constructed around section 718.2(e) of the Canadian Criminal Code.

The findings produced within a constructivist paradigm provide “local and specific constructed realities” (Lincoln & Guba 2005: 256). Research that embodies this paradigm therefore do not intend to uncover data or reflect reality as a whole (Alassutari, 1995). As a researcher, I am presenting one possible interpretation of the data analyzed. This allows for the reader to make their own interpretations of the material and data presented.

**Decentralized Researcher Stance**

For this thesis, I opted for a decentralized author position, as explained by Grbich (2004:84). From this stance, the researcher does not need to be completely removed from the text but should stand apart from the narrative. This encourages readers to entertain multiple interpretations of my analysis of section 718.2(e) as opposed to accepting the study in its entirety as objectively valid. In taking a decentralized approach, the process encouraged me to be reflexive of the material and data as presented though my interpretations. Charmaz (2014) defines reflexivity as the ongoing examination of how the researchers’ interests, positions, and assumptions influence his or her inquiry (344). The hopes of my interweaving of reflexive commentary throughout the text alongside the case narratives is to direct the reader’s attention to
the complexities of text analysis while providing one interpretation. In addition to this, I proactively engaged with relevant literature throughout the process to contextualize the data and structure my interpretations.

Because I examine written court of appeal cases as opposed to participant narratives, I will not be speaking for or to judges. Instead, my approach centers around speaking about them, or more precisely about the multiple legal realities that are constructed in sentencing decisions and about their implications with regard to the decision-making process pertaining to section 718.2(e). It is important to note that while I have attempted to draw out well-founded conclusions about the rationales behind the application or failure to apply the provision in sentencing Aboriginal offenders, I do not claim to know about the complexities and difficulties inherent to judges and their sentence decision-making. What I present rather is an analytic framework from which interpretations may be made. The interpretations, patterns and trends found in this study were contrasted against existing literature and knowledge as an additional measure of confirmation.

In my search for a research methodology that provided a good epistemological and ontological fit with my positionality, I found myself aligning with the constructivist discourse analysis approach to research.

**Methodology and Analytic Strategy: Constructivist Grounded Theory Approach to Discourse Analysis**

A contemporary version of grounded theory adopts methodological strategies such as coding, memo-writing, and theoretical sampling (Charmaz, 2014). Constructivist grounded theorists attend to the production, quality, and use of data, research relationships, the research situation, and the subjectivity and social locations of the researcher. Charmaz (2014) explains that this approach aims to draw abstract understandings of studied life and present analysis as located in time, place and the situation of inquiry. This method consists of systematic yet flexible
guidelines for collecting and analyzing qualitative data to construct theories from the data themselves. Hence, this research will do the following:

1. Conduct data collection and analysis simultaneously in an iterative process
2. Analyze actions and processes rather than structure
3. Use comparative methods
4. Draw on data (i.e. narratives and descriptions) in service of developing new conceptual categories
5. Develop inductive, abstract analytic categories through systematic data analysis
6. Emphasize theory construction and extension rather than simply the application of existing theory
7. Engage in theoretical sampling
8. Search for variation in the studied categories of process
9. Pursue developing a category rather than covering a specific empirical topic (Charmaz, 2010)

Originally, a pure grounded theory approach was to be employed as the analytic tool for this research. However, it quickly became apparent that the concepts which emerged from this could be related to the field of Critical Race Theory.

Strauss and Corbin (1998) define theory as “a well-developed set of categories (e.g. themes, concepts) that is systematically interrelated through statements of relationship to form a theoretical framework that explains a relevant social phenomenon. The statements of relationship explain who, what, when, where, why and how and with what consequences an event occurs.” Once concepts are related through statements of relationship into an explanatory theoretical framework, the research findings move beyond conceptual ordering to theory. Thus, Strauss and Corbin (1998) state that “theorizing is work that entails not only conceiving or intuiting ideas (concepts) but also formulating them into a logical, systematic, and explanatory scheme” (21).

This research uncovers categories that emerge from the reflexive, continuous analysis of court of appeal cases to “elaborate and extend existing theory” of Critical Race Theory. The connection between this researched data set and Critical Race Theory are the product of my interpretations of the categories that emerge. They can be related to many other concepts
including those such as Modern Penal Rationale (MPR) and Foucauldian adaptations to bio
power and governmentality, however I chose to pursue this route to provide one unique and
unaccounted for perspective to the judgement rationales of court of appeal judges application of
section 718.2(e). In validating my choice, Turner (1981) explains that “some of the decisions
about which facts to pursue are solved for the researcher by subconscious perceptual processes
which influence what is observed and other influences are directed upon the analysis by the
limited capacity of the human mind” (4). The understanding that is extracted out is the result of
my habitus and background and the social phenomena under study.

The approach to discourse analysis used in this study employs both content analysis and
discourse analysis. Because analysis is conducted differently through both these methods of
textual analysis, very different information arises from the same data set. Babbie and Benaquisto
(2002) state that content analysis is the study of recorded human communications. Content
analysis is well suited to the study of communications and in answering the questions of “who
says what, to whom, why, how and with what effect” (ibid:279). Discourse analysis is different
in that its approach to documents is more interested in examining linguistic repertoires and how
these are linked to different representations of the social issue being studied. Thus, while content
analysis views discourse as a source of knowledge and reiterates information that is available in
the document, discourse analysis allows for the analysis of structures and milieu which give
context to the discourse.

Jorgensen and Phillips (2002) state that underlying the word ‘discourse’ in discourse
analysis is the general idea that language is structured according to patterns that people’s
repertoires follow when they take part in different domains of social life. Discourse analysis thus
becomes the examination of these patterns. Burr (1995) asserts that this method of inquiry
depends on four interrelated components; a critical approach to taken for granted knowledge,
historical and cultural specificity, link between knowledge and social action (ibid:2)
It is important to note Charmaz’s (2010; 2014) thoughts on social constructionism, of which discourse analysis falls under, at this stage given the conflicting nature of its approach in comparison to grounded theory. Charmaz (2014) argues that while sociologists who conduct social constructionist research produce impressive analysis and findings, they often “treated their analysis as accurate renderings of these worlds rather than as constructions of them” (14). In keeping with these conventions, researchers often erased the “subjectivity they brought to their studies rather than acknowledge it and engaged with it reflexively” (ibid). In line with this, I subscribe to Charmaz’s (2014) constructivist approach to discourse analysis to acknowledge subjectivity and my involvement in the construction and interpretation of data. As such, my position aligns with social constructivists like Vygotsky (1962) and Lincoln (2013) who emphasize social contexts, viewpoints and interpretive understandings.

Discourse analysis does not seek to expose the reality behind the discourse because this would be an impossible task, rather it treats discourse as an object of inquiry to identify the consequences of it on reality (Jorgensen & Phillips, 2002). It is this study’s purpose to analyze, interpret and understand how and what legal discourses are employed through the application of section 718.2(e) in the sentencing of Aboriginal offenders and the potential consequences this has for the use of imprisonment as a sanction.

**Data Collection**

The main research question guiding the present study is *how has section 718.2(e) been applied in court of appeal cases involving Aboriginal offenders, since the enactment of the provisions in 1996 to the present?* 12 This study is an example of unobtrusive research. This method involves studying social behavior and social issues without affecting it.

Judges are required to provide reasons for why they apply or do not apply section 718.2(e) when sentencing Aboriginal offenders. Written statements from twenty-one Court of

12 For research questions, *See* page 6.
Appeal cases were collected from across Canada to assess if and how judges were implementing section 718.2(e). Since the provision was entrenched in 1996, and my data collection was completed in 2017, the research will sample cases from this twenty-one-year period. These cases in turn become the units of analysis in my data set.

This study approaches the aforementioned research question in two ways. First, through a constructivist grounded theory approach to content analysis and discourse analysis of twenty-one published appeal case judgements, in which line-by-line coding is employed. The purpose is to effectively draw out categorical ideas or concepts that emerge from the cases to identify patterns or trends in the use of the provision. The second way in which this study attempts to answer the research question is through data gathered on approximately thirty key variables that may play a role in influencing sentencing decisions. The descriptive statistics of these variables are explained and highlight some of the key elements of the cases that involved section 718.2 (e) and Aboriginal offenders at sentencing. Univariate analysis is conducted to analyse frequency distributions amongst key variables.

While this research hoped to collect data based on all the cases in the sample, in reality many cases did not contain all the relevant information. As such, the analysis chapter presents the data collected from those variables which were prevalent in almost all cases. Variables with little information collected, such as employment history and status, were ultimately omitted.

The court of appeal judicial decisions were collected from the electronic legal database called Lexis Nexis Quicklaw, accessed from Queen’s University’s Faculty of Law library. Quicklaw is one of Canada’s largest electronic legal publishers and is highly utilized by academic researchers across various disciplines. It is Canada’s largest single source platform for full text “court, board and tribunal decisions” and has “the largest collection of Canadian case law summaries” (Quicklaw, 2017). This allowed for me to avoid issues of gathering information from various sources and bypass issues such as trying to retrieve cases in hard copy from sources such
as the Canadian Statute Citations. Lexis Nexis Quicklaw allows users to search records in a variety of ways, including keyword searches, jurisdiction, and court level.

Since sentencing judges have been directed to at least consider section 718.2(e) in their decision making of Aboriginal and non-Aboriginal offenders, it was thought that this information may be included in many, if not all, cases. The present study only uses those cases that involve both an Aboriginal offender and section 718.2(e) at sentencing\textsuperscript{13}. Furthermore, given the assumption that the provision would be mentioned in all cases regarding Aboriginal offenders, a preliminary examination of a sample of cases were reviewed to confirm that this was the case. This was done prior to data collection.

Through Quicklaw’s search directory I narrowed my search to find the most relevant court decisions for my research. From the panel, I selected from the ‘citation digest’, ‘criminal law and disposition of offenders’ under the ‘topics’ rubric. Then, I searched under the ‘criminal law cases’ category. The search can then be narrowed to find criminal case law including any cases that appeared before any court at any level. The cases date back to 1876 and it is stated that the database is updated daily.

Searches on Quicklaw can be completed by inputting case name, court, judge, counsel, phrases or words. Under the category ‘court’, ‘court of appeal’ is entered and then provinces and territories were individually selected. Once this was complete, a search of ‘section 718.2(e) of the Criminal Code’ was entered. The search results ensured that only results from the province and court level specified were produced relating to section 718.2(e) of the Criminal Code. No other subsection of 718 was searched or collected for data.

Since section 718.2(e) was not codified until September 3\textsuperscript{rd}, 1996, the cases selected could only range from that day onward. The decision was to restrict the study to case decisions from British Columbia, Ontario, Alberta. 7 cases were selected from each of these totaling in

\textsuperscript{13} Because section 718.2(e) applies to all offenders, the initial search included cases involving non-Aboriginal offenders as well. These cases were screened out and not used in the analysis
twenty-one cases overall. The decision to restrict the sample to twenty-one cases was made in light of project feasibility, time constraint, and with the aim of providing detailed and accurate accounts of the use of section 718.2(e). The grounded theory approach to research can be very lengthy and time consuming given the laborious nature of coding and categorizing. With the aim of reaching theoretical saturation, as outlined by grounded theory, cases were gathered until I reached this point.

**Sampling**

Nonprobability sampling in the form of purposive sampling was selected as the method for choosing each unit of analysis for this study. Purposive sampling involves the selection of units to be observed based on our own judgement about which ones will be most useful or representational. This method is also referred to as judgemental sampling. Strauss and Corbin (1998) state that this method involves sampling to the point of redundancy. In this study, saturation was reached after the first twelve cases as justifications could already be discerned. For example, one trend that emerged was the justification of custodial sanction based on the rationale that there must be a deterring effect which could only be achieved through a prison sentence. However, while the point of redundancy was reached early on, all twenty-one cases collected were coded to ensure that categorical concepts and ideas that emerged were accurate products of the entire data set.

**Data Collection Instrument**

The data collection instrument developed for the purpose of the case judgements’ analysis contains approximately 30 variables (*See Appendices D*). The tool was used for the purpose of gathering information on a variety of factors, including which party appealed the sentence and the age of the offender. Information regarding the type of offence committed and whether the initial plea was guilty or not-guilty was also recorded.
In addition, data were gathered based on the demographics identified in each case. The purpose of this was to see if there were any correlations between such variables and the sentencing decision of sentence. In cases where more than one offender was involved, information was coded for only one in order to simplify the data collection process. In addition to this, factors such as ‘favourable background’ were differentiated from that of ‘unfavourable background’ and ‘adopted-favourable’ and ‘adopted-unfavourable’. Favourable background was operationally defined as having a stable home and healthy upbringing. Conversely, unfavourable background encompassed dysfunctional family life, poverty, presence of alcohol or sexual abuse. In addition to this, the variable adopted-unfavorable and adopted-favorable were included as inferences can be made from this based on current research studying Aboriginal youth and children in foster/adoptive systems.

Data were also gathered on which party raised the applicability of section 718.2(e) and whether defence counsel was properly informed of the offenders’ circumstances. Information was also gathered on whether a pre-sentence report was submitted to the court, and what the recommendations of the report were with respect to the type of sentence.

The choosing of which variables to test for this study derives from several different sources. Primarily, variables were listed based on an initial reading of the cases for similar factors that judges noted were significant. While initially choosing to begin with basic information such as age, gender, and type of crime, other variables were drawn from inquiries or statements made by the various literature studied for this research. One such example is Pelletier’s (2001) article in which variables such as which party appealed, education level and circumstances of upbringing were discussed as being directly correlated with increased criminal involvement.

The grounded approach to constant comparison facilitated by purposive sampling and saturation was an asset to this study. Charmaz (2014) states that constant comparison involves comparing and integrating statements into each category that emerge from the data. Therefore, as
we sample, collect data, and conduct data analysis simultaneously, we add “new pieces to a research puzzle”. In addition to piecing together an intricate puzzle, the constant comparative model enables researchers to identify when new information is not emerging. Charmaz (2014), Glacer (2001) and Morse (1994) explain that saturation is not about seeing the same pattern over and over. Rather, it is the conceptualization of comparisons of these incidents which yield different properties of the pattern, until no new properties of the pattern emerge. This yields conceptual density that when “integrated into hypotheses make up the body of the grounded theory with theoretical completeness” (ibid: 191). In this approach to sampling, the researcher does not highlight the generalizability of the sample, instead it focuses on sample adequacy (Bowen, 2008).

**Coding**

Grounded theory is a flexible research method that will enable researchers to develop a theory that is grounded in the data accumulated. The process consists of analysis in an inductive manner, coding and categorizing, comparing and interacting with data, memo-writing, and then collecting more-focused data in a deductive manner.

The ‘tool’ which was utilized in this study is “line by line” coding. For many grounded theorists, line-by-line coding is the first step, called initial coding. Coding every line involves naming each line of your written data (Glaser, 1978). In this rigorous process, each line is meticulously coded without prior categories which allows the emergent “in vivo” concepts to appear (Strauss and Corbin, 1998: 105). Charmaz (2006) explains this as the process of naming segments of data with a label that simultaneously categorizes, summarizes and accounts for each piece of data. Essentially, “it generates the bones of the analysis” (ibid: 45). Careful line-by-line coding also helps researchers to refrain from imputing personal motives, fears, or unsolved personal issues into the data collection and analysis steps. Therefore, by studying the data and
following leads as they emerge, researchers are able to make “fundamental processes explicit, render hidden assumptions visible, and provide new insights” (ibid: 133).

This method works particularly well with detailed data about fundamental empirical problems or processes, including documents and records, prompting researchers to maintain a fresh outlook throughout the process. Charmaz (2014) explains that researchers see more nuances within the data when using this approach as less information has the chance to escape the researchers’ attention when reading data for a general thematic analysis. In this sense, Thomas (1993) says that a researcher must “take the familiar, routine, and mundane and make it unfamiliar and new” (133).

Focused coding presents the second major phase in coding. These codes appear more frequently among initial codes or have more significance than other codes. In focused coding, codes are sifted, sorted, synthesized and further analyzed (Charmaz, 2014). This type of coding condenses and sharpens what has already been collected because it highlights and emphasizes what is found to be important. Glaser (1978) explains that focus codes advance the theoretical direction of the data set. These codes represent a more conceptual understanding than the initial codes. While the process of focused coding is straightforward and proceeds quickly, it represents much more than simply selecting and pursuing codes. Rather, it involves concentrating on what initial codes say and the comparisons with and between them.

Thus, consistent with the logic of grounded theory, both initial and focused coding are emergent processes where unexpected ideas emerge.

Limitations

As with any research endeavour, there are limitations to the study. The data analysis conducted in this research is limited to court of appeal cases chosen through the purposive sampling technique. To this end, my judgement of which cases to select may be regarded as grounds for contention against the findings. As stated earlier, this study is one interpretation
based on my academic and personal upbringing. Its sole purpose is to offer some meaning of the cases selected.

Babbie and Benaquisto (2002) state that there are, of course, dangers in this form of analysis. One risk is misclassifying observations so as to support emerging categorical themes. Berg (2201) offers techniques for avoiding these errors. First, if there are sufficient cases, randomly select from each category in order to avoid picking those that best fit. Second, give at least three examples in support of every assertion you make about the data. Third, have your analytic interpretations carefully reviewed by peers who are uninvolved in the research. Fourth, report any inconsistencies that emerge or cases that do not fit. And fifth, realize that all social problems are not “100 percent consistent” and researchers “should be honest with readers in this regard” (257).

Coding is a creative process that inevitably involves the interpretative biases of the researcher. This raises questions about the ‘neutrality’ of the process and the findings which it produces. However, just as the research participants construct data, the researcher constructs the codes. Given the interpretive nature of the constructivist paradigm upon which this research is built, the quality of this project is not measured in terms of objectivity but rather subjectivity, valuing an interpretive process.

Case selection was restricted to those available on Lexis Nexis Quicklaw database. While this database is dependable, it may not contain every recorded case dealt with in court. Nonetheless, the most reliable source had been chosen for the purpose of this study.

Summary

This chapter examined the methods used to gather rich data from twenty-one published court of appeal cases to explain how section 718.2(e) has been applied in sentencing cases involving Aboriginal offenders, since the enactment of the provision in 1996. Chapter four will reveal the findings of the analysis of case judgements.
Chapter 5

Analysis

This chapter presents the findings of the analysis of 21 published Court of Appeal case judgements in an effort to determine how section 718.2(e) has been applied and justified in sentencing cases involving Aboriginal offenders since the enactment of the legislative provision in 1996 (See Appendix A). To answer the research questions presented earlier in this study, two analytical components are presented here. The first consists of statistical considerations of a number of variables that may have some influence on the decision-making processes of sentencing judges. Specifically, several descriptive statistics in the form of frequency distributions are measured to find trends or patterns involving section 718.2(e) and Aboriginal offenders at sentencing. The second supplements the statistical findings with a discussion of the justifications supplied by judges in the application or non-application of section 718.2(e). There are four broad themes that will be discussed; they include the following:

The first section, entitled “Protection of Society” outlines judges’ use of societal protection rhetoric as justification for being unable to apply section 718.2(e).

The second section, “Denunciation and Deterrence” considers Court of Appeal judges’ use of the primary sentencing objective in their justifications for the use of the legislation. This theme is divided into two sections consisting of the prohibitive and permissive aspects of the sentencing objectives.

The third section, “Special Cases,” examines the significance of prior records in appeal sentence decision making by judges. In addition, this section also discusses the rare instances in which section 718.2(e) had be effectively used to justify non-carceral sentences and points to their inability to be repeated in other cases.
The fourth section, entitled “Gladue” illustrates the use of the Gladue analysis and Gladue principles as justification for the allowance or prohibition of the legislation. This section also analyzes the theme of “restorative justice” which was often mentioned in conjunction or in accordance with Gladue.

**Descriptive Statistics**

Table one provides the frequency distributions for the cases that were studied.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>Total</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Year of Judgement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998-2004</td>
<td>9</td>
<td>21</td>
<td>43.0</td>
</tr>
<tr>
<td>2005-2011</td>
<td>5</td>
<td>21</td>
<td>24.0</td>
</tr>
<tr>
<td>2012-2017</td>
<td>7</td>
<td>21</td>
<td>33.3</td>
</tr>
<tr>
<td><strong>Province of Judgement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>7</td>
<td>21</td>
<td>33.3</td>
</tr>
<tr>
<td>Ontario</td>
<td>7</td>
<td>21</td>
<td>33.3</td>
</tr>
<tr>
<td>Alberta</td>
<td>7</td>
<td>21</td>
<td>33.3</td>
</tr>
</tbody>
</table>

**Table 1: Information relating to the year and province of the cases**

**The Years**

While this study considered all the cases available on Lexis Nexis Quicklaw database ranging from 1996 to 2017, when selecting cases for the sample, the majority of published cases (43%) analyzed were heard between 1998 and 2004. Seven of the 21 cases (33.3%) studied were appealed between 2012 and 2017 (see table one).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence Appealed By</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused</td>
<td>18</td>
<td>21</td>
<td>86</td>
</tr>
<tr>
<td>Crown</td>
<td>3</td>
<td>21</td>
<td>14</td>
</tr>
<tr>
<td><strong>Plea During Trial</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilty</td>
<td>13</td>
<td>21</td>
<td>62</td>
</tr>
<tr>
<td>Not Mentioned</td>
<td>8</td>
<td>21</td>
<td>38</td>
</tr>
<tr>
<td><strong>Offences</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homocide</td>
<td>1</td>
<td>21</td>
<td>4.76</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>1</td>
<td>21</td>
<td>4.76</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>3</td>
<td>21</td>
<td>14</td>
</tr>
<tr>
<td>2nd Degree Murder</td>
<td>1</td>
<td>21</td>
<td>4.76</td>
</tr>
<tr>
<td>Assault</td>
<td>7</td>
<td>21</td>
<td>33</td>
</tr>
<tr>
<td>Impaired Driving</td>
<td>4</td>
<td>21</td>
<td>19.04</td>
</tr>
<tr>
<td>Robbery</td>
<td>2</td>
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<td>9.52</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
<td>21</td>
<td>9.52</td>
</tr>
</tbody>
</table>

Table 2: Background information

The Types of Offences

While the cases averaged with one to two cases per type of offence, the majority of cases (33.3%) involved assault. The offences that offenders were most often convicted of included weapon related assault, sexual assault and interference, and aggravated assault (see table two above). Cases involving manslaughter (14%) and impaired driving (19%) accounted for the next most frequent crime for which offenders were convicted.
The Offender

The demographic information for each Aboriginal offender was interesting to study. The majority of offenders in the cases studied were male (86% n = 18). There were only three cases in which female offenders were involved (14%). Equal percentage of the cases were observed to have offenders within the 18 to 24 age range (33%) and 25 to 34 age range (33%). Offenders in the 35 to 41 age range and 42 to 60 age range comprised the smallest proportion of cases studied (see table three). These data are consistent with current statistical findings of heightened criminal activity occurring most often amongst younger adults (Statistics Canada, 2017).

In eight of the 21 cases studied, there was not indication whether the offender had pleaded guilty or not guilty. Conversely, in the remaining 13 cases (62%), it was noted that the offender had pleaded guilty (see table two above). No cases indicated that an offender had pleaded not-guilty. However, this does not mean that the eight cases in which no mention was made can be regarded as a non-guilty plea.

Only a little over half of the cases studied (57% n = 12) included some information regarding the level of schooling the offender had reached. The remaining cases did not mention the level of education attained and in some instances left out other relevant information as well. One-third of the cases in which education level was mentioned involved offenders who fell within the high school level ranging from grade 10 to 12 (see table three above below).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>18</td>
<td>21</td>
<td>86</td>
</tr>
<tr>
<td>Female</td>
<td>3</td>
<td>21</td>
<td>14</td>
</tr>
<tr>
<td>Age at time of offence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18-24 Years Old</td>
<td>6</td>
<td>18</td>
<td>33.33</td>
</tr>
<tr>
<td>25-34 Years Old</td>
<td>6</td>
<td>18</td>
<td>33.33</td>
</tr>
<tr>
<td>35-41 Years Old</td>
<td>4</td>
<td>18</td>
<td>22</td>
</tr>
<tr>
<td>42-60 Years Old</td>
<td>2</td>
<td>18</td>
<td>11</td>
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<td>Upbringing</td>
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<td></td>
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<tr>
<td>Favourable</td>
<td>3</td>
<td>17</td>
<td>17.65</td>
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<tr>
<td>Unfavourable</td>
<td>11</td>
<td>17</td>
<td>65</td>
</tr>
<tr>
<td>Adopted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favourable</td>
<td>2</td>
<td>17</td>
<td>11.76</td>
</tr>
<tr>
<td>Unfavourable</td>
<td>1</td>
<td>17</td>
<td>5.88</td>
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<td>Education Level</td>
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<td></td>
<td></td>
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<td>Grades 1-6</td>
<td>2</td>
<td>12</td>
<td>16.67</td>
</tr>
<tr>
<td>Grades 7-9</td>
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<td>12</td>
<td>16.67</td>
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<tr>
<td>Grades 10-12</td>
<td>4</td>
<td>12</td>
<td>33.33</td>
</tr>
<tr>
<td>College</td>
<td>2</td>
<td>12</td>
<td>16.67</td>
</tr>
</tbody>
</table>

Table 3: Information relating to background of offenders

A high percentage of offenders had severe upbringings (65%) which may have played a role in their criminality or deviant behaviour. Many of the circumstances included some form of familial dysfunction, familial/relative emotional, physical, or sexual abuse, or alcohol and drug abuse. In a few cases, the judge pointed out that a caregiver for the offender had been a victim of residential schools or experienced the intergenerational effects of colonialism. In 81% of cases
some note of the offenders’ upbringing was made. The remaining four cases did not have any explicit reference to the conditions under which the offender was raised (see table three above).

With regard to substance abuse, the highest percent (38% n = 8) of offenders abused alcohol. Thirty-three percent (n=10) of offenders abused both alcohol and drugs (see table four below).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substance Abuse</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alcohol</td>
<td>8</td>
<td>21</td>
<td>38.1</td>
</tr>
<tr>
<td>Drugs</td>
<td>2</td>
<td>21</td>
<td>9.52</td>
</tr>
<tr>
<td>None</td>
<td>4</td>
<td>21</td>
<td>19.05</td>
</tr>
<tr>
<td>Both</td>
<td>7</td>
<td>21</td>
<td>22.2</td>
</tr>
<tr>
<td><strong>Substance Use at Time of Offence</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alcohol</td>
<td>10</td>
<td>21</td>
<td>47.6</td>
</tr>
<tr>
<td>Drugs</td>
<td>1</td>
<td>21</td>
<td>4.76</td>
</tr>
<tr>
<td>None</td>
<td>7</td>
<td>21</td>
<td>33.3</td>
</tr>
<tr>
<td>Both</td>
<td>3</td>
<td>21</td>
<td>14.29</td>
</tr>
<tr>
<td><strong>Rehabilitative Efforts</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>13</td>
<td>19</td>
<td>68.42</td>
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<tr>
<td>No</td>
<td>6</td>
<td>19</td>
<td>31.58</td>
</tr>
<tr>
<td><strong>PSR</strong></td>
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</tr>
<tr>
<td>Yes</td>
<td>8</td>
<td>21</td>
<td>38</td>
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<tr>
<td>No/Unknown</td>
<td>13</td>
<td>21</td>
<td>61.9</td>
</tr>
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</table>

Table 4: Substance abuse, rehabilitative efforts, and PSR Recommendations
Table four also indicates that the highest percentage of abuse during which an offender committed a crime was while intoxicated (47% n = 10). It is interesting to point out that 33% did not abuse any substance when committing a crime. It should be noted that rehabilitative efforts were made by offenders in over half of the cases (68%) since the time of the offence. In addition to this, only 38% (n = 8) of the cases included a Pre-Sentence Report (PSR) which provides much of the offenders’ biographical information including background, alcohol and drug abuse, as well as connection to Aboriginal heritage or roots.

**Application of Section 718.2(e) to Offenders**

All cases analyzed for this study at least mentioned section 718.2(e) as part of the reason justifying the sentencing judge’s decision. The provision operated 28% of the time to lessen the sentence for an offender and 14% of the time eliminated carceral sentences in favour of community or conditional term. Of the 21 cases, 38% (n = 8) of the cases in which incarceration was sentenced during the initial sentencing trial were dismissed. Two cases experienced increased carceral terms and another two were made carceral during appeal (see table five).

Where section 718.2(e) could not be used, 61% of the cases were deemed too serious to be able to justly apply any other sanction than incarceration. Furthermore, 23% of cases in which extensive prior records were prevalent and a dangerous offender designation was noted prevented judges from applying section 718.2(e). Risk factors accounted for the smallest percentage of reasoning for not applying the provision, accounting for 15% (see table five below).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Was s. 718.2(e) discussed?</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>21</td>
<td>21</td>
<td>100</td>
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<tr>
<td>No</td>
<td>0</td>
<td>21</td>
<td>0</td>
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<tr>
<td><strong>Appeal Sentence Outcome</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Increased Carceral Term</td>
<td>2</td>
<td>21</td>
<td>9.52</td>
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<tr>
<td>Reduced Carceral Term</td>
<td>6</td>
<td>21</td>
<td>28.57</td>
</tr>
<tr>
<td>Made Carceral</td>
<td>2</td>
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<td>9.52</td>
</tr>
<tr>
<td>Made Non-Carceral</td>
<td>3</td>
<td>21</td>
<td>14.29</td>
</tr>
<tr>
<td>Appeal Dismissed</td>
<td>8</td>
<td>21</td>
<td>38.1</td>
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<tr>
<td>Carceral Term Added</td>
<td>0</td>
<td>21</td>
<td>0</td>
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<tr>
<td><strong>S. 718.2(e) used</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Yes (Lesser Sentence)</td>
<td>6</td>
<td>21</td>
<td>28.57</td>
</tr>
<tr>
<td>Yes (Made Non Carceral)</td>
<td>3</td>
<td>21</td>
<td>14</td>
</tr>
<tr>
<td>No</td>
<td>12</td>
<td>21</td>
<td>57.14</td>
</tr>
<tr>
<td><strong>s. 718.2(e) not used</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Crime too serious</td>
<td>8</td>
<td>13</td>
<td>61.54</td>
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<tr>
<td>Prior</td>
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<td>13</td>
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<td>15.38</td>
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<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cited Sentencing Objectives</strong></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Data were collected regarding the specific sentencing objective or reason given by judges as to why section 718.2(e) could be used to justify either a carceral or form of non-carceral
sentence. The case analysis revealed the frequency with which the different sentencing objectives were mentioned, resulting in some interesting trends. There were seven different objectives cited. In brief, they were “denunciation,” which mandates that a sentence should communicate society’s condemnation of an offense and should be punished as such; “deterrence,” by which the intent was to deter the offender and other persons in society from committing similar offences; “rehabilitation,” which was intended to assist in the rehabilitation of offenders; “reparation,” which involved repaying, repairing or compensating the victim or community; “responsibility,” which aimed at the offender acknowledging the harm done to the victim and community; “proportionality,” which meant that the sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender; and finally “protection of society” which outlines the government’s responsibility to protect the general public from threat of harm.

Denunciation and deterrence were always cited together by judges, indicating that they may be mutually exclusive. They were also the most cited sentencing objective in the cases examined (57%). This is representational of the literature which argues that these primary sentencing objectives were most often considered during sentencing. These sentencing objectives were followed by rehabilitation (38%), separation from society (19%), responsibility (19%), and proportionality (9%). Rehabilitation, although cited second most often was always cited in addition to another sentencing objective. The sentencing objective, reparation, was not cited in any cases studied. This may be indicative of low importance granted to this sentencing objective by judges, or just shear chance given the small sample selected for this study (see table 6 below).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>$n$</th>
<th>Percent (%)</th>
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</thead>
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<td><strong>Denunciation</strong></td>
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</tr>
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<td>12</td>
<td>21</td>
<td>57.14</td>
</tr>
<tr>
<td>No</td>
<td>9</td>
<td>21</td>
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<td><strong>Deterrence</strong></td>
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<td></td>
</tr>
<tr>
<td>Yes</td>
<td>12</td>
<td>21</td>
<td>57.14</td>
</tr>
<tr>
<td>No</td>
<td>8</td>
<td>21</td>
<td>38.1</td>
</tr>
<tr>
<td><strong>Separation from Society</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>4</td>
<td>21</td>
<td>19.05</td>
</tr>
<tr>
<td>No</td>
<td>17</td>
<td>21</td>
<td>80.95</td>
</tr>
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<td><strong>Rehabilitation</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>8</td>
<td>21</td>
<td>38.1</td>
</tr>
<tr>
<td>No</td>
<td>13</td>
<td>21</td>
<td>61.9</td>
</tr>
<tr>
<td><strong>Reparation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>0</td>
<td>21</td>
<td>0</td>
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<tr>
<td>No</td>
<td>21</td>
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<td>100</td>
</tr>
<tr>
<td><strong>Responsibility</strong></td>
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<td></td>
</tr>
<tr>
<td>Yes</td>
<td>4</td>
<td>21</td>
<td>19.05</td>
</tr>
<tr>
<td>No</td>
<td>17</td>
<td>21</td>
<td>80.95</td>
</tr>
<tr>
<td><strong>Proportionality</strong></td>
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<tr>
<td>Yes</td>
<td>2</td>
<td>21</td>
<td>9.52</td>
</tr>
<tr>
<td>No</td>
<td>19</td>
<td>21</td>
<td>90.48</td>
</tr>
</tbody>
</table>

Table 6: Sentencing Objectives Cited in Cases

Case Judgement Emergent Themes

Protection of the Public

The first theme to emerge from the sample cases surrounds safety and overall protection of society from the threat posed by an offender. It is the primary concern in all instances to ensure the safety of citizens although it is often achieved to the detriment of the offender’s wellbeing.
given that their actions or intentions have broken social contracts. Several judges had stated that in cases where there is a tangible threat to public wellbeing, few alternatives to incarceration can be considered appropriate to achieve protection. The following examples from the cases analyzed demonstrate this:

[16] Unfortunately, whatever the forces may be that have caused Mr. Carrière to live the life he has led, the present reality is that Mr. Carrière presents a danger to the community. He has shown himself to live unlawfully within the community. [15] Not only do the circumstances of the offender demand a denunciatory sentence, Mr. Carrière approaches the “worst offender category” (R. v. Carrière [2002] O.J. No. 1429).

[49] The trial Crown emphasized the need for evidence of the availability of some measures to help manage the risk of re-offence by the appellant in the community. [63] With the paramount sentencing objective of protection of the public, the judicial discretion to determine an appropriate sentence is significantly circumscribed. [65] An offender with an incurable anti-social personality disorder, several equally-incurable paraphilia’s and a significantly elevated likelihood of violent recidivism (R. v. Radcliffe [2017] O.J. No. 1060).

[30] The sentencing judge found that given the extremely serious nature of the offence, which involved an utterly defenceless newborn, violating the safety and security of the hospital… and a significant effect on the victim’s family and the broader community, a conditional sentence was not available. [38] In such circumstances, the primary concern in sentencing shifts from deterrence to treatment as that is the best means of ensuring the protection of the public and that the offending conduct is not repeated (R. v. Batisse [2009] 93 O.R. [3d] 643).

In all three cases presented above, background circumstances, conditions of upbringing, access to resources and other such variables did not affect the outcome of incarceration or non-custodial sanction because protection of the public was considered paramount. In turn, the need for societal protection above all has a strong neutralizing impact on the use of section 718.2(e)’s directive to consider all other sanctions to incarceration.
In addition to this, the idea of providing lesser sentences for Aboriginal offenders because of their colonial histories and upbringing as compared to their non-Aboriginal counterparts becomes evident through several judges’ concerns about the use or intent of section 718.2(e).

_Gladue_ discusses this idea by stating that:

[43] It was noted in _Gladue_ that while in some circumstances the length of an Aboriginal offender’s sentence may be less than that of any other offender “the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same” (para 79). (_Gladue_, 1999)

The cases analyzed in this study reiterated these thoughts:

[51] While it may have been preferable to have a more robust record on the issue, the respondent reminds us that Aboriginal status and s. 718.2(e) have a diminished role in dangerous offender proceedings. They exert no influence on the fundamental decision of whether the requirements for designation of an offender have been met. Further, to the extent that it has anything to say about eventual control of the risk in the community, what is crucial, and lacking here, is evidence about the availability of programs realistically likely to achieve that goal. Here, the risk resides in the appellant’s paraphilia and his personality disorder, neither of which can be ameliorated by Aboriginal programming (R. v. Radcliffe [2017] O.J. No. 1060)

[28] The sentencing judge stated that “she [the respondent] has already been sanctioned for simply being who she is, and where she was born and raised” The Crown submits that the sentencing judge effectively gave an automatic reduction in sentence to the respondent because she was Aboriginal. The Supreme Court…expressly rejected the view that section 718.2(e) “requires an automatic reduction in sentence for an Aboriginal offender,” or “remission of a warranted period of incarceration because the offender is Aboriginal.” The sentencing judge’s determination was therefore an error in principle. (R. v. Stimson [2011] A.J. No. 156

[48] The section [s.718.2(e)] is not to be taken as a means of automatically reducing the prison sentence of Aboriginal offenders; nor should it be assumed that an offender is
receiving a more lenient sentence simple because incarceration is not imposed. (R. v. Logan [1999] O.J. No. 3411)

[47] The offence the respondent committed here was a serious violent offence. And not the first serious violent offence in which the respondent has participated. Gladue teaches that generally, as a matter of practical reality rather than sentencing principle, particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. It is all the more so for recidivists (R. v. Peters [2010] O.J. No. 128).

Special Cases

While the examples above emphasize the practical use of section 718.2(e) as not being used to alter rates of incarceration, what remains is its hypothetical mandate or purpose of helping to reduce current issues of the overrepresentation of Aboriginal peoples across Canadian provinces and territories. Current literature has attempted to deconstruct this social paradigm by considering judges’ use of alternative sanctions in cases where incarceration has been foregone in favour of a community sentence or non-carceral intermittent sentences. The following examples illustrate judges’ justifications for noncarceral sanctions where protection of the public is not considered a threat:

[19] The pre-sentence report was favourable to the accused. [18] The appellant was 39 years old at the time of the sentencing hearing. He is an aboriginal and a member of the Delaware Thames Band and lives on the Moravian Reserve…the evidence strongly supported the fact that the appellant was extremely close to his family and was their primary provider. [35] The appellant, according to the material before us, had been highly responsible member of his community before and after the tragic accident, which led to his conviction (R. v. Logan [1999] O.J. No. 3411).

[23] The seriousness of the offence and the terrible consequences of the offence demanded a significant penitentiary sentence. In my view, however, the trial judge should have, to the extent possible, fashioned a sentence that would minimize the risk that the
imprisonment of the appellant would undo all of the positive things he had recently achieved and set him on a more antisocial course. The community as a whole will be the loser if the appellant does not continue the positive development demonstrated by him in the last several years. The grim reality is that the longer the appellant spends in the penitentiary, the greater the risk to his chances of becoming a contributing and respected member of his community (R. v. Brooks [2012] O.J. No. 4925).

In cases where no prior record, minimal record of offending, or strictly offences recorded in youth exist, some judges justify the use of non-carceral sanctioning as means of satisfying sentencing objectives given the gravity of the offence. This is also evident in cases dealing with mental illness and severe childhood and youth upbringings where abuse was present. Aside from these circumstances, offenders with good behavior, favourable backgrounds, good employment history, and strong community ties may also experience more favourable sentencing outcomes during appeal trials.

*Denunciation and Deterrence*

The second theme to emerge from the cases is the sentencing objectives of denunciation and deterrence. One of the most challenging and complicated questions facing courts across Canada in the application of section 718.2(e) is how to balance the restorative aims of the legislation with retributivist goals of the criminal legal system. As such, this theme will be divided into two sections to describe how the principles of denunciation and deterrence are used in cases that prohibited the use of section 718.2(e) as well as those that permitted its use.

*Denunciation and deterrence justifications as prohibitive to the application of s.718.2(e)*

Denunciation and deterrence significantly weighed on judges’ determination of an appropriate sentence in 12 of the 21 cases studied (see table six). These sentencing objectives, alongside proportionality and protection of the public, dominated all other sentencing objectives employed by the judges. As noted in the case of R. v. Hunter [1998] A. J. No. 510:
A conviction without any meaningful consequence would not sufficiently reflect society’s repudiation of the crime. A sentence must be proportional to the harm done as well as to the moral blameworthiness of the offender. This is society’s way of affirming fundamental values, protecting the public, and making it clear to those who transgress these values that they are accountable for their actions. Nor can they equate the denunciation implied by actual imprisonment with probation, a suspended sentence or even an ordinary conditional sentence (R. v. Hunter [1998] A.J. No. 510).

Judge Ioacobucci also iterates this core value in the landmark case of R. v. Wells [2000] 1 S.C.R. 207 in that:

[42] Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goal of denunciation and deterrence are fundamentally relevant to the offender’s community. As held in Gladue… to the extent that generalization may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances the goals of denunciation and deterrence are accorded increasing significance.

The examples above demonstrate the limited scope of restorative and rehabilitative sentencing objectives in cases where the seriousness of the offence is said to require denunciatory sanctions. In several cases, judges felt that a sentence of incarceration was the only sanction that was appropriate given the gravity of the offence. This was in instances where the offender was given a “dangerous offender,” “long-term offender,” or “worst offender category” designation for crimes relating to armed robbery, aggravated assault, murder, sexual assault, rape, and sexual interference. Another case in which this can be noted is that of R. v. Carriére [2002] ONCA 1429. The accused was convicted of second degree murder after shooting a convenience store owner while committing a robbery. Mr. Carriére approached the worst offender category given his long-term offender record and aggravating circumstances including the use of a large-calibre handgun.
and mask, planning, targeting a vulnerable victim group, the shooting of the victim in his son’s presence, and premeditation (ibid, para 10). The judge noted that given the seriousness of the offence, the primary sentencing objectives were denunciation, deterrence, and isolation from public. Rehabilitation was possible given his “disadvantaged and troubled background” in which he had “very little chance in life,” however this remained of secondary importance (ibid, para 16).

The following note from the case illustrates how judges must weigh restorative aims with punitive sentencing in serious cases such as this, with consideration to Aboriginal heritage:

[15] Not only do the circumstances of the offence demand a denunciatory sentence, Mr. Carriére approaches the “worst offender category”. [17] Mr. Carriére is an aboriginal. Section 718.2(e) directs the sentencing court to consider that status in determining the appropriate sentence. That consideration is intended to ameliorate the serious problem of overrepresentation of aboriginal people in our jails and to encourage the sentencing court to have recourse to a more restorative approach to sentencing. The provision is also a statutory recognition of the systemic disadvantage suffered by aboriginals in the Canadian community. Section 718.2(e) does not, however, mean that a sentence should be automatically reduced by virtue of the accused’s status as an aboriginal offender. As with all sentences, sentences imposed on aboriginals must depend on a consideration of all of the relevant sentencing factors. Where the offence is a violent and serious one and the principles of denunciation and deterrence dominate the sentencing calculus, the appropriate sentence will often not differ as between aboriginals and non-aboriginal offenders (ibid).

Thus, taking into account the purposes of sentencing as set out in section 718 of the Criminal Code and to the totality of the circumstances in each unique case, the objectives of denunciation, deterrence and isolation are given paramount consideration despite offenders’ poor upbringings, drug and alcohol addictions and mental health considerations. While several judges emphasize the aim and goal of section 718.2(e), judges appear to be unable to unlock its beneficial potential due to a fear of re-offending and protection of the public. Only in a few cases
where judges felt that the offender had strong community support, family ties, and connection to Aboriginal roots did sentences become non-carceral, mitigated carceral or intermittent.

_Denunciation and deterrence as permissive to the application of section 718.2(e)_

The cases studied emphasize that denunciation and deterrence continue to be the most important sentencing goals even when section 718.2(e) and _Gladue_ are considered applicable. In the case of _R. v. Devries_, the judge notes that:

[12] By means of s.718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community yet comply with the mandated principles and purpose of sentencing.

Several judges employ similar terminology when describing their approach to the provision which gives way to the notion that section 718.2(e), although determined to function under a different methodology entirely, operates within a very small scope or spectrum of applicability between the other sentencing objectives. Thus, because the principles of denunciation and deterrence dominate the sentencing calculus in serious or violent crimes, only in rare and exceptional cases are they satisfied through more restorative means to sentencing. Three of the 21 cases studied fall under the permissive scope of section 718.2(e). The examples below highlight the conditions that allowed judges to justify or rationalize a non-carceral sentencing option in the three cases:

[12] In my view, the sentencing judge did not give adequate weight to s. 718.2(e) or to the personal and family circumstances that militated in favour of a conditional sentence in this case. Given Mr. Bodaly’s attitude and recognition that he cannot keep breaking the law; it is likely that deterrence and protection of the public are not as important in this case as rehabilitation. It appears now that there is a reasonable alternative to imprisonment that may help Mr. Bodaly return to a way of life that is stable and productive and enables him to continue to provide his daughter with the environment she needs (_R. v. Bodaly_ [2010] B.C.J No. 172).
In my opinion, the evidence in this case indicates that imposing a conditional sentence would achieve the objectives of rehabilitation and restorative justice. The critical and most difficult question is whether the principles of deterrence and denunciation require that the appellant serve a period of incarceration. Rather it is my view, that in the great majority of cases, a conditional sentence would not adequately reflect the appropriate denunciation of the crime of impaired driving causing death. However, after a consideration of the unusual and compelling circumstances of this case, I have concluded that a sentence of twenty months is appropriate. I am further satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing (R. v. Logan [1999] O. J. No. 3411).

There was an abundance of material before the sentencing judge which detailed the appellant’s background, the steps he had taken in rehabilitating himself, the kind of support he received from other members of the aboriginal community in doing so, and the success he had achieved in overcoming his drug addiction and altering his lifestyle. Appellant’s counsel points out that despite the material showing that in the eighteen months following the offence the appellant had made extraordinary progress in turning his life around, the sentencing judge said that nothing in his reasons which would indicate that in sentencing the appellant he considered the methodology for assessing a fit sentence for an aboriginal offender referred to in R. v. Gladue [1999] 1 S.C.R 688…and again in R. v. Wells, [2000]1 S.C. R. (5th) 254 (R. v. Dennis [2001] B. C. J. No. 122).

As noted in the above examples, special circumstances in which exceptional community support was present or rehabilitative efforts had been extensively made allowed for a non-carceral sentence to be deemed fit. While several points were made in each case in justification of how this was applicable to the case specifically, each judge made a point to enforce the idea that this was a sort of “one-time” exception. Thus, these cases were not intended to be considered as precedents for future cases with similar characteristics. Rather, they further complicate the understanding of how to appropriately use section 718.2(e).
Furthermore, where courts allow for the use of a non-carceral sanction, the goals of
denunciation and deterrence are still felt and emphasized by the strict conditions and
requirements that are also put in place. In the case of R. v. Logan [1999] O.J. No. 3411, the thirty-
month driving prohibition imposed by the sentencing judge for driving while heavily intoxicated
resulting in the death of one passenger and serious bodily harm to the other passenger was
supplemented with strict conditions. Aside from abstaining from the consumption of alcohol or
other intoxicating substances or entering premises licensed to sell alcoholic beverages, he is to
“remain on the Moravian on the Thames Band reservation except for purposes of employment, to
obtain medical attention for himself or his family and to see his supervisor or legal counsel” only
(ibid, para 62). Curfews between 11:00 pm and 6:00 am and a 240 hours of community service
requirement were also instated. Similar curfews and conditions were observed in the case R. v.
Bodaly [2010] B.C. J. No. 172 as well which restricted mobility, access to certain public places,
and forbade communication with members of society.

Rehabilitation

Rehabilitation as prohibitive to the application of section 718.2(e)

As one of the primary sentencing objectives, it is unsurprising that this theme was
recurrent throughout the analysis process. Whether gauging the potential for an offender to
achieve rehabilitation, or recognizing that few rehabilitative efforts were made by an offender
since the time of the offence, the theme was fleshed out and justified by the use of similar
terminology and descriptive elements used by judges to rationalize the use of section 718.2(e). In
instances where judges recognized the rehabilitative efforts or potential of an offender, they often
noted in a similar manner how this may have a positive impact on the decision-making process.
Ultimately, the sentencing objective was observed to occupy a subordinate role to its
denunciatory counterparts, failing to challenge the minimum-sentence requirements for many of
the offences committed by offenders studied in this study. A few examples of this can be found in the following examples:

[23] However, material placed before the court indicates that Mr. Carrière’s behaviour has improved significantly in recent years. He has discovered his aboriginal roots while in custody and with the help of an aboriginal support group, has developed an appreciation of his heritage and his culture. This new found appreciation seems to have given Mr. Carrière a focus and a sense of self-worth that was sadly missing in his life.

[18] Having regard to the purpose of sentencing as set out in s. 718.2 of the Criminal Code and to the totality of the circumstances in this case, we conclude that the objectives of denunciation, deterrence, and isolation must be given paramount consideration. Other considerations, such as rehabilitation cannot be ignored but must, in our view, assume a subordinate role (R. v. Carriére [2002] O.J. No. 1429).

[40] The appellant has been fully remorseful for her actions from the beginning. She plead guilty three weeks after her arrest, which avoided the need for witnesses to testify. She made numerous other expressions of remorse. She is a single parent of two young children with strong family and community support. After her arrest and while on bail, she made unmistakable progress in her rehabilitation. [41] A sentence of two and one-half years’ incarceration would adequately reflect the seriousness of the offence while recognizing the background and systemic factors which led to the offence, thus giving effect to the remedial purpose underlying s. 718.2 (e) (R. v. Batisse [2009] 93 O.R. (3d) 643).

While the above examples note the secondary importance placed on the theme of rehabilitation as grounds for section 718.2(e), appeal judges still stated that its presence was significant to consider as it could permit sentences on the lower end of the spectrum. In the case of R. v. Fox [2001] A.J. 268, the appellant was convicted after a trial of two counts of dangerous driving causing death and one count of dangerous driving causing bodily harm. The trial judge sentenced the appellant to a term of imprisonment of three years for the dangerous driving convictions and two years imprisonment for dangerous driving causing bodily harm, the sentence to be served concurrently. As per the PSR, Mr. Fox had been extremely remorseful for the crimes he committed and self-
referred himself to the Poundmakers’ Lodge Treatment centre for alcohol and drugs and he completed the 28-day program. The probation officer’s opinion was that the appellant was not a danger to the community and recommended a conditional sentence. The judge ultimately stated that they agreed that “denunciation and deterrence are principal objectives in a case of this nature. However, the rehabilitation of the offender must also be considered” (ibid, para, 27). Given his rehabilitative efforts, remorseful demeanor, and PSR recommendation, Mr. Fox was sentenced on the lesser side of the sentencing spectrum for his offence.

Minimum sentences for certain crimes were a prevalent theme that arose in the cases studied despite extensive rehabilitative efforts made by the offenders. Similar sentiments to that of Mr. Fox can be observed in other cases studied. The following example from the case of R. v. Brooks [2012] O.J. No. 4925 illustrates this:

[9] The trial judge faced a very difficult sentencing problem. The offence, manslaughter using a firearm, carries a minimum sentence of four years in the penitentiary. Mr. Archer was a fine young man with a bright future who was well loved by his family and friends.

In this case, the appellant, Mr. Archer, accidentally pulled the trigger of his firearm while sitting in the backseat of a friend’s car after a night of drinking, killing the man sitting in the passenger seat. The judge in this case reiterated similar sentiments to that of Mr. Fox in that a minimum sentence must be applied given the severity of the case. The judge in this case was the only one to point out and highlight the limitations of section 718.2(e) with regard to rehabilitation and minimum sentencing requirements. The judge notes that:

[11] It must be stressed that the appellant faced a significant mandatory minimum jail sentence. This was not a situation in which the trial judge had a variety of sentencing options available to him. The appellant had to go to the penitentiary for at least four years. No doubt, s. 718/2(e) applies in all cases, including those where there is a mandatory minimum jail term. However, the existence of a minimum, particularly one that requires a four-year penitentiary sentence, must, of necessity, limit the practical
impact of s. 718.2(e) just as it limits the impact of other potentially mitigating factors particular to the individual offender.

**Rehabilitation as permissive to the application of section 718.2(e)**

Rehabilitation was used as justification for the permissive application of section 718.2(e) in rare instances. Rehabilitation through social inclusion was employed in *R. v. Dennis [2001]* BCCA 30. The judge states that:

[27] … The evidence and material was overwhelmingly in favour of the appellant’s having rehabilitated himself by the time the case came on for sentencing and, in view of that, it is difficult to see how the principle embodied in s. 718.2(e) would not have relevance, regardless of whether the appellant was an aboriginal offender.

The appeal judge states that the offender had made significant rehabilitative efforts while within the community and had found support within his Aboriginal community. As such, the judge felt that Mr. Dennis would most benefit from remaining in the community instead of incarceration. Mr. Dennis was sentenced to a conditional sentence which was reduced to time served already prior to the appeal.

Cases such as Mr. Dennis’s are rare as it is not often that judges grant greater importance to social inclusion over a carceral sentence. It is interesting to consider that rehabilitative measures and sentences that coincided with this in favour of non-penitentiary sentences occur so rarely despite the directives outlines in s. 718.2(e) of the Criminal Code. Moreover, when further considering cases such as this, it becomes apparent that rehabilitative considerations were not enough on their own to justify the application of the provisions. Rather, outlining the rehabilitative efforts made by offenders were of great importance throughout all cases studied, but could not warrant the application of an alternate sanction to incarceration without other sentencing principles being applied such as denunciation and deterrence.
Gladue Considerations

As mentioned earlier in this study, in 1996, Parliament codified Part XXIII to the Canadian Criminal Code, which included the institution of provision 718.2(e). Shortly after, the first comprehensive interpretation of the section was undertaken in the case of R. v. Gladue (1999), which set the boundaries for the provision’s successive applications. Since then, section 718.2(e), the Gladue case, and Gladue analysis have undergone ongoing interpretations within courts across Canada. Twenty out of the 21 cases studied for this thesis mention Gladue in their analysis. What has been noted by analyzing the application of section 718.2(e) and its interpretation by the courts in cases after Gladue is the identification of both the prohibitive and permissive dimensions to Gladue which affect the application of the provision. Overall, judges state that Gladue emphasizes that restorative justice is paramount to sentencing Aboriginal offenders. The problem, however, is that the courts do not give judges the latitude to give greater priority to restorative justice than the primary sentencing objectives of denunciation, deterrence and protection of public. As presented earlier, only in rare instances can these sentencing objectives be satisfied through restorative justice approaches to sentencing. Thus, although Gladue outlines that section 718.2(e) of the Criminal Code was intended to encourage sentencing judges to “apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations”, it is noted that the application of these restorative principles is only possible insofar as they do not compromise the traditional ends of sentencing such as deterrence, denunciation and retribution. (R. v. Gladue - 1999] S.C.R 688, para 50). Empirically speaking, both permissive and prohibitive dimensions to Gladue have been observed in this study.

With regard to the prohibitive aspects of Gladue, Judges Cory and Iacobucci stated that special consideration should be allotted to the circumstances of Aboriginal people as the method
for sentencing and principals involved are starkly different from that of the general population.

More specifically, they note that:

[70] A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community… However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e).

Although it is explicitly mentioned repeatedly in cases that there is a serious need for restorative justice given the overrepresentation of Aboriginal people within prisons, Judges Cory and Iacobucci state in *Gladue* that all sentencing objectives must be considered to ensure that restorative justice should not be mobilized at the expense of other considerations. Since then, judges have reiterated this notion in conjunction with the primary sentencing objectives of denunciation and deterrence as well as the seriousness of the crime at hand. In the case of *R. v. Batisse*, the judge notes that:

[51] Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Furthermore, in *Gladue*, as mentioned the court stressed that the application of s. 718.2(e) does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation. As a result, it will generally be the case, as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as non-aboriginal offenders. Accordingly, I conclude that it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one (*R. v. Batisse* [2009] 93 O.R. (3d) 643).

The outcome of Judge Cory and Iacobucci’s conditions on the achievement of restorative justice have weighed heavily on the prohibition of section 718.2(e). While there is a requirement to
consider background factors, upbringing, connection to roots, and mental health, in many cases considered for this study, the punitive goal of punishment trumps all other sanctions despite serious background circumstances. In R. v. Batisse, the appellant, an Aboriginal woman from the Matachewan First Nations Reserve, abducted a newborn infant from a Sudbury hospital. Her life had been characterized by physical, sexual and emotional abuse at the hands of her mother, uncle and several common-law partners. She suffers from serious mental health challenges as a result of that abuse. Against this background, she became pregnant in her first healthy relationship but was later viciously beaten by three individuals near her home. Some time later, the fetus died and was delivered stillborn. She convinced her boyfriend that she was still pregnant and devised a plan of going to the hospital alone, ostensibly to have the baby, and dressed as a health care worker to abduct a newborn to pass as her own for her partner. The appeal judge pointed out several errors which the sentencing judge had made in the process of re-sentencing her more fairly. The judge began by noting that in Gladue, the Supreme Court of Canada directed the courts to consider systemic and background factors which play a role in bringing Aboriginal offenders before the court by stating that “s. 718.2(e) creates a judicial duty to give its remedial purpose real force” (ibid, para 36). The appeal judge further notes in reference to a case cited by the sentencing judge that:

[38] Furthermore, unlike Hill, where mental illness was not a factor, here the appellant’s mental health problems played a central role in the commission in the offence. In such circumstances, deterrence and punishment assume less importance… Where offenders commit offences while they are out of touch with reality due to mental illness, specific deterrence is meaningless to them. Further, general deterrence is unlikely to be achieved either since people with mental illnesses that contribute to the commission of a crime will not usually be deterred by the punishment of others. As well, severe punishment is less appropriate in cases of persons with mental illnesses since it would be disproportionate to the degree of responsibility of the offender.

In stating this, the judge also emphasizes that:
[38] In such circumstances, the primary concern in sentencing shifts from deterrence to treatment as that is the best means of ensuring the protection of the public and that the offending is not repeated.

[40] The appellant has been fully remorseful for her actions from the beginning. She is a single parent of two young children with strong family and community support…She has made unmistakable progress in her rehabilitation. She received mental health care and counselling, and had the opportunity to participate in native healing ceremonies with her daughters and other members of the community. Her risk of re-offending, as noted by the sentencing judge and attested to by all of the experts at the sentencing hearing, is minimal.

The judge here reiterates the subordinate role of the primary sentencing objectives of denunciation and deterrence in favour of more appropriate sanctions of protection of public and rehabilitation. However, like several of the cases studied in which severe background circumstances or mental health conditions were in play, a minimum incarceration sentence was still required given the seriousness of the offence:

[39] Without in any way minimizing the seriousness of the offence and the consequences for the victim’s family and the community within which it occurred, in my view, a sentence of two and one-half years’ incarceration in addition to pre-sentence custody is adequate to properly reflect society’s denunciation and act as a deterrent, while allowing the appellant the hope of meaningful rehabilitation.

Thus, although the determination of a fit sentence is said to be an individualized case-by-case process, several cases, including Gladue, seem to disregard this principle in favour of greater focus in the gravity of the offence and the imperative to apply denunciation and deterrence to each criminal case. Despite being deemed non-threatening, significant efforts towards rehabilitation, and considerations of her Aboriginal heritage, the judges felt compelled to impose a carceral sentence. Similar to Judges Cory and Iacobucci and in the case of Gladue, the judges studied in these cases felt the need to justify a sanction of incarceration on the grounds that such
crimes require punishment no matter how mentally ill or how dire the background story of the offender.

**Summary**

This chapter presented the findings of the analysis of 21 published Court of Appeal case judgements in an effort to determine how section 718.2(e) has been applied in appeal cases that involve Aboriginal offenders since the enactment of the provision in 1996. The analysis focused on presenting the broad themes that emerged through a grounded theory approach to content and discourse analysis. It also presented statistical accounts of frequency distributions of several different variables which help in creating a more detailed understanding of how section 718.2(e) is being used by appeal judges. The following chapter will assist in the interpretation of the case analysis findings and provide a discussion of the various considerations of this research including its connection to TribalCrit and overrepresentation as a social problem in the regions being studied, as well as Canada more generally. Potential avenues for future research will also be explored with the goal of contributing to a growing body of literature.
Chapter 6

Discussion and Conclusion

Through an analysis of how judges utilize section 718.2(e) in the decision-making process of Court of Appeal sentences with Aboriginal offenders, this study set out to better understand a relatively understudied gap in the literature which hopes to ameliorate over-representation across Canadian prisons. The analysis is intended to increase understanding of how the legislation may be falling short of its intentions and promises to better serve Aboriginal communities given the historic, systemic, cultural, and legal discrimination faced by these populations in all aspects of life. Through analyzing 21 published Court of Appeal cases from British Columbia, Ontario and Alberta, this study worked towards answering the following research questions:

1. What kinds of trends or patterns can be seen when considering Aboriginal incarceration rates on a provincial scale?
2. How has implementation of section 718.2(e) of the Canadian Criminal Code affected judges sentencing of Aboriginal offenders?
3. What factors or rationales do judges use as justification for the application or inability to apply the legislation?

To date, there has been minimal examination of published Canadian criminal cases involving Aboriginal offenders and section 718.2(e) at appeal sentencing. The present study is, therefore, exploratory in nature. The research findings are contextualized within the theoretical frameworks of Critical Race Theory and Tribal Critical Race Theory. These theories address not only the incompatible nature of the current criminal justice system with Aboriginal values, but also shed light on how to better approach legal issues. These theories guide the current research by proposing underlying or embedded reasoning which may work against section 718.2(e) despite its emergence within the punitive justice system.

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CRT seeks to establish a greater recognition of racism and discrimination as interwoven within the fabric of society and in turn, the legal system. While the early foundations of the theory derive from civil rights litigations and a reframing of legal understanding that challenges the presumed neutrality of law, current literature, and this research, question why Aboriginal rates of incarceration continue to increase, especially among younger population groups. This research also works towards extending CRT’s subsect, TribalCrit, towards the legal system in hopes of proposing new and better ways to use section 718.2(e).

In this chapter, the findings of the analysis presented in the previous chapter are briefly summarized. Through the discussion of the research findings, the research questions which structure this study are answered. In turn, the contributions of this study to the greater body of knowledge and theory is understood. In addition, some legal implications, policy suggestions and potential avenues for further research are delineated. This is followed by some closing remarks.

**Summary of Research Findings**

*Frequency Distributions*

The analysis of the Court of Appeal case judgements revealed that most cases involved offenders between the age ranges of 18-24 and 25-34 years, involved males, and the appellants involved had varying levels of educational backgrounds. Most cases were heard between 1998 and 2004. Most cases stated that the offender pleaded guilty during the sentencing trial and had a prior record as youths and/or adults. It was also revealed that the overwhelming majority of offenders had experienced unfavourable upbringings and circumstances in their lives and abused alcohol and/or drugs. Almost half of the offences occurred while the appellant was intoxicated. Most of the offenders had made some rehabilitative efforts since the time of the crime. It was interesting to note that a PSR was not included for most cases studied.

It is also interesting to note that while section 718.2(e) was mentioned in some capacity in all cases studied, the majority of cases judges did feel that they were not able to employ its use.
In most instances where judges did use the provision, sentences were reduced to a lesser penitentiary sentence. In cases where section 718.2(e) could not be applied, the reasons most often cited were the seriousness of the offence and the existence of a prior record.

The majority of cases that were appealed were ultimately dismissed. Conversely, the sentencing objective most often cited was that of denunciation, deterrence and rehabilitation. The sentencing objectives of denunciation and deterrence were almost always cited together. The overwhelming number of dismissed cases indicates that most appeal judges were in agreement with the sentence meted out during the initial trial despite most appeals being made by the accused on the grounds of little or no mention of Aboriginal background.

The research conducted observed some crucial considerations regarding the practical use of section 718.2(e). Despite unfavourable background circumstances, rehabilitative efforts, remorse and guilty pleas, appeal judges felt they were still unable to allow for non carceral sentences given the seriousness of crimes and previous records.

Themes

The grounded theory approach to analyzing the cases revealed some interesting themes about the use of section 718.2(e) by judges. The first involved the “Protection of the Public” rhetoric which mandates the safety of citizens to be given higher priority than the wellbeing of the offender. In cases where the offender had made rehabilitated efforts, despite a tragic upbringing, carceral sentences were still allotted where the judge felt there was a potential threat to the public.

Special cases were observed within this analysis. These cases were extremely rare and allowed for a noncarceral sentence to be used appropriately. It is interesting to note that the judges in these cases emphasized and highlighted that these were “one-time occurrences” indicating that they should not be used as precedents for future cases with similar circumstances. This indicated that judges consider all cases regarding aboriginal peoples on a case-by-case basis.
The primary sentencing objectives of denunciation and deterrence were cited often throughout most of the cases. Judges made clear that these sentencing objectives would most often dominate the sentencing calculus in serious crimes given the gravity of the offence. These sentencing objectives, when applicable almost always resulted in a carceral sentence.

The theme of rehabilitation was a recurring one in the cases under analysis here. In instances where rehabilitation was cited as a primary component to an offender’s case given their extensive commitment to community programs, rehabilitation, or remorse and guilt, the judges often stated that a minimum jail term was still required. In fact, it was observed that judges were employing the use of rehabilitation as a sentencing objective in cases to rationalize decreasing carceral sentences rather than to debate whether the offender could benefit more from not being incarcerated. In cases where the judge ruled that rehabilitation was not a possible consideration in the application of section 718.2(e), the sentencing objectives of protection of public, denunciation and deterrence were given primary consideration.

All cases made some reference to Gladue except one. The Gladue analysis was used in several cases to help understand the background circumstances experienced by Aboriginal offenders. However, it was noted that while restorative justice was the primary concern of this approach to analysis, it should not be given higher priority than that of the primary sentencing objectives. In line with this, where restorative justice was cited as appropriate to the application of section 718.2(e), it was always made in conjunction to other sentencing objectives.

Implications

Section 718.2(e)’s original purpose versus its actual use by judges

Since the enactment of section 718.2(e) in 1996, significant changes regarding the methodological approach employed in the sentencing process and the outcomes of cases have been observed. Judges have recognized the extent to which the social problem has grown, emphasizing systemic discrimination, lack of opportunity, and poor upbringing as detrimental
factors which influence deviant behavior by offenders. In fact, some of the cases studied for this research involved appeal judges requesting more background information and a great degree of knowledge about the offender to be provided prior to re-sentencing. Nonetheless, while sentences had been mitigated, most of the terms meted out by judges remained carceral. Further analysis of the judges’ explanations indicated that they used section 718.2(e) simply to rationalize applying the least severe carceral penalty in cases where crimes were very serious rather than for looking for alternative sanctions. This is because in most cases, there was either minimal or no discussion of whether a non-carceal option was applicable. This result emphasizes the idea that section 718.2(e) has not been employed within the framework of its original purpose. Rather, the methodology involved in sentencing Aboriginal offenders works towards punishing more leniently as recommended by Gladue. Thus, what appears to be taking place is a greater reliance or dependence on the Gladue case and analysis as opposed to the original purpose of the legislation.

The research further suggests that the sentencing of Aboriginal offenders may not be directly impacted by section 718.2(e), but rather operates under the notion of sentences being made on an individual basis. The case judgements imply the notion of judges applying the legislation in very specific instances which cannot be transferred to other cases. What is significant in these instance is the judges’ reliance on precedent cases to rationalize why the sentence they decided on was appropriate. The analysis of case judgements helps in answering the first research questions of what trends or patterns can be observed regarding the use of section 718.2(e) since enactment across the provinces studied for this research. Apart from those cases that were dismissed, in most cases, section 718.2(e) had been used to justify mitigated carceral terms only on a case-by-case basis. Thus, this study had results that implied that section 718.2(e) could not really function to justify non-carceal terms, but rather worked towards decreasing terms which could not be replicated for future similar cases.
In addition to this, while section 718.2(e) was originally mobilized to help bring more information about the offender’s background to the forefront of discussions pertaining to the crime, this appears to have taken on a different effect on judges’ decision making. In some instances, judges required specific information regarding an offender’s connection to their roots and required very clear statements of how colonialism may have been linked to the individual and how it affected them negatively. This process implied that Aboriginal people who hoped to employ section 718.2(e) must show clear connections to residential schools, intergenerational trauma or other such consequences that were the direct influence of colonisation. Appeal judges also discussed extensively how section 718.2(e), and in turn the more lenient sentence given during the original trial, should be revoked as the offender did not have any real relation to their Aboriginal heritage. This was the case where offenders had been raised in a non-Aboriginal household or within a community that appeared to be unaffected by similar problems faced by Aboriginal communities elsewhere.

_Aboriginal over-representation and the broader picture_

Aboriginal over-representation is one of the most documented trends in the Canadian criminal justice system and is attributed to the everlasting effects of European colonisation. This sentiment is reflected and acknowledged through the wording of the legislation to include “background circumstances” and the philosophy of eradicating over-representation. However, the primary reason why Aboriginal over-representation levels continue to increase and remain unaffected by section 718.2(e) is because the provision does not address the root causes of the social problem. As discussed in Chapter Three, numerous factors that are structural, covert or hidden within an ideology of normalcy contribute to the involvement of some Aboriginal peoples in the criminal justice system. In this sense, it is unsurprising that section 718.2(e) has failed in its attempt to ameliorate Aboriginal over-incarceration since the provision does little more than address the circumstances of the offender and marks the first and only legislative attempt to
resolve the issue. As such, Aboriginal criminality and subsequently over-representation ought to be looked at as components of a much larger social issue as opposed to an isolated pattern of events.

*Judiciary considerations is out of scope for the greater social problem*

This study’s findings posit that section 718.2(e), and perhaps the criminal justice system itself, may not be the most efficient mechanisms to address a social issue which stems from problematic social, economic and political dimensions of Aboriginal life. In this sense, recognizing that judicial bodies and the legal system are limited in their capacity to address broader social problems given their primary role of interpreting and applying existing laws, for the purpose of conflict resolution, is fundamental to realizing that new approaches are required. In other words, even if section 718.2(e) were applied by appeal judges in a manner that better contributed to the decline in Aboriginal over-incarceration, the root causes of Aboriginal criminality and deviance would remain unaddressed.

*CRT, TribalCrit, and Section 718.2(e)*

At this point, it becomes crucial to shift the focus of the discussion to that of the systemic, economic, and historical disparities faced by Aboriginal communities throughout Canada and how this influences criminality. Consistent with arguments in CRT, Court of Appeal judges use of the legislation and *Gladue* fail to acknowledge and identify several systemic and racial factors that contribute significantly to the growing population of Aboriginal criminals. In doing so, greater emphasis needs to be given to CRT’s notion of the law acting as an abettor to racial discrimination in order to expose legal claims of neutrality, colorblindness and meritocracy (Crenshaw, 1988). Building on this, CRT posits that through an interdisciplinary approach towards eradicating racial oppression, the legal system must challenge ahistoricism and hegemonic power in favour of historical and contextual analyses of law and legal processes. While judges have attempted to include more background information of the offender in appeal
cases, CRT states that storytelling and personal narratives would better work to disassemble perceptions of the norm held by unknowledgeable judges to include the voices of the oppressed themselves through the sharing of their own stories. In line with the literature, the method of analysis and expression of information may aid in judicial consideration being less mechanical and mundane, in favour of a more personal and detailed approach to the methodology of consideration. Not only would this better allow for more accurate accounts of upbringing and circumstances, it also keeps in line with judiciary’s concerns of handling each case on an individual basis given the uniqueness of each offender and the circumstances of the offence.

The results of the sample also indicated that the methodological approach to sentencing Aboriginal offenders was flawed with respect to the consideration of colonialism, connection to roots, and background circumstances. The theme of section 718.2(e) operating under an entirely new methodology which aims at recognizing the complexity of Aboriginal life was observed to have taken on a different interpretation by the judiciary. Treated in the same manner as other circumstances considered for non-Aboriginal offenders, section 718.2(e) appears to just be another box to check off by judges when discussing appropriate sentences. This ideology is in line with TribalCrit contentions of the law operating within a colonized means of thinking or colonized thought. Reiterating Mattiste’s point (2002), Eurocentric thinking, as taught in Canadian law schools, “dismiss indigenous knowledge in the same way they dismissed any socio-political cultural life they did not understand because they found it to be unsystematic and incapable of meeting the productivity needs of the modern world (5). This is evident in the systemic and routine ways many of the judges in this study discussed Aboriginal backgrounds.

Thus, the Court’s analysis of section 718.2(e) and Gladue fails to go beyond simply acknowledging and identifying systemic or background factors relevant to CRT and TribalCrit that are helpful in understanding the reasons behind Aboriginal over-representation in prisons. The reliance on legally relevant factors such as the presence of a prior criminal record, an
offender’s employment status and an offender’s education level can have undue influence on the rate of imprisonment as the single check box of “background circumstances” does not outweigh the cumulative weight of these other factors. Hence, as presented in this research and thoroughly observed throughout most of the cases in this study, a denunciatory sanction was deemed unavoidable given the seriousness of the offence and the conditions of the offender.

**CRT, TribalCrit, and Policy Intent**

The findings of this study suggest that Aboriginal over-representation within the sample can be attributed to the inability to apply non-carceral alternatives during trial given the seriousness of the crime and the prevalence of prior records. In Chapter Two, literature concerning what factors may have contributed to criminal involvement were discussed indicating that most of these factors or circumstances came down to experiences of disadvantage. Lower socio-economic background, homelessness, joblessness, lack of resources, limited educational attainment, and lack of social and employment skills are only a few of the criminogenic factors that may be attributed to disadvantage. As suggested by CRT and TribalCrit, disadvantage and racial discrimination must be addressed, but there must be elements of praxis that follow. This research posits that the employment of what Williams (1997) calls Critical Race Practice is incumbent to expose the inconsistencies of structured systems and institutions in society beyond just the legal system to reduce the levels of disadvantage experienced, and in turn, levels of incarceration. Efforts targeted towards reducing criminogenic factors within communities may help Aboriginal groups who have been severely disadvantaged throughout their lives and simultaneously help the justice system more effectively handle serious cases by reducing the number of cases that commonly overwhelm courts throughout Canada today.

**Potential Policy and Program Initiatives**

If significant changes are the goal to address and resolve Aboriginal over-representation in the Canadian context, then various programs and preventative policy initiatives must be
implemented on a scale that accounts for the many facets that complicate Aboriginal
disadvantage. The results of this study emphasize the need for a more multi-faceted approach to
criminal behavior which considers and targets the different points of discrimination inflicted on
Aboriginal populations prior to the commission of crimes. Because most crimes are too serious or
an offender’s background inhibits the ability to apply section 718.2(e), policy initiatives and
programs must alter their approach to be more proactive and preventative than reactive.

Policy initiatives would bode well to focus on researching how disadvantage operates in
the different facets of Aboriginal life. In turn, by addressing long-term solutions like better
housing, counselling, Aboriginal rehabilitation and health care may improve levels of sentencing
and positively impact communities across Canada. While many such programs exist, perhaps a
re-evaluation of their effectiveness and reach to the many Aboriginal populations who do not
have access to resources could remedy parts of the larger social issue. This study’s findings
revealed that section 718.2(e) could not be applied to certain cases because there was an absence
of community/familial support. Thus, a comprehensive policy initiative is recommended to
include the collaboration of various levels of government, researchers, rehabilitation centers and
counselling services that implement preventative interventions to help build community support
and familial ties.

To date, one of the Canadian government’s most noted program is the Aboriginal Justice
Strategy (AJS). The program was created in 1991 to support a range of community-based justice
initiatives such as diversion programs, community participation in the sentencing of offenders,
and mediation and arbitration mechanisms for civil disputes (Department of Justice, 2015). AJS
focuses on strengthening the capacity of Aboriginal communities to reduce victimization, crime,
and incarceration rates through increased involvement in the local administration of justice. This
research recommends a greater focus on preventative community-based justice programs to aid
Aboriginal populations uniquely depending on their needs, heritage, and disadvantages. This would be in addition to reactive programs such as this one.

Other programs also exist which positively contribute to addressing the issue of over-incarceration of Aboriginal communities. In British Columbia, the Ministry of Justice, Corrections Branch implemented a four-year strategic plan to increase the effectiveness of Aboriginal programs and to strengthen the government’s relationship with Aboriginal communities (British Columbia Ministry of Justice, Corrections Branch: 2012). However, like the example above and others present in Canada today, the program appears to take on a more reactive stance to criminals who have already committed offences. And while they highlight inclusivity, rehabilitation, and spreading of knowledge, they fail to go beyond this to target youth groups who are more susceptible to committing offences.

Program Suggestions

This research posits that a basic human rights policy for all Aboriginal groups within Canada may prove to be an effective first step to remedying an enduring social problem. Providing a minimum standard of living, access to good healthcare, education and financial resources could work to curtail criminal involvement. This, in conjunction with a few of the following points may contribute to the rectification of injustice inflicted onto these populations.

First, it was observed in cases that many offenders belonged to households in which the mother was abusive, absent, an alcoholic or drug addict. Thus, this may be a strategic starting point for helpful programs. A preventative approach to aiding Aboriginal women specifically may help in reducing the number of offenders facing incarceration. Family education programs which focus on nutrition, effects of substance abuse, and abuse may be helpful in this sense. In addition to this, greater accessibility to drug treatment programs, resources such as counseling, pre/post-natal medical care must also become readily available. In many of the cases, offenders were thought to suffer from fetal-alcohol syndrome as a result of the lack of resources and poor
upbringings of their mothers. Programs with this focus which have greater reach to women across Canada would greatly benefit Aboriginal communities.

Second, many of the offenders studied possessed some level of high school education. Parenting programs and specific training provided to educators regarding Aboriginal heritage and discrimination may aid in fortifying the need and importance of education on the side of the family, as well as the positive responsiveness of educators in school systems who are better equipped to teach in more innovative ways.

*Repealing the problem: Section 718.2(e)*

In addition to applying the above-mentioned suggestions, repealing section 718.2(e) should be considered an integral step to resolving over incarceration. Because the provision has for the most part remained ineffective in achieving its goals since its enactment in 1996, re-evaluation may be of significance to this discussion. The following section points to some of the flaws that inhibit the use of section 718.2(e).

First, the approach to sentencing appears inconsistent, confusing and unmanageable because judges employ their own interpretations of the legislation. In some instances, appeal judges cited that little to no background circumstances were collected and the sentencing judge did not have the Gladue analysis for reference on hand. This proposes that equitable application of section 718.2(e) cannot be made as an argument for its use and may likely contribute to its ineffectiveness in reducing carceral sanctions. Among other things, this research reveals that Aboriginal offenders continue to receive carceral or mitigated carceral sentences since the enactment of the provision.

Second, the wording of the provision states that Aboriginal circumstances “should be considered.” This implies and has been interpreted by judges in this study as a sort of supplementary consideration. Similar to the point mentioned earlier, this circumstance is simply interpreted as another check box alongside poor educational background and lack of employment.
A rewording of the legislation may impact judges’ deliberations to be more serious when considering other sanctions to incarceration.

Third, is the approach to sentencing offenders as individualized cases, rather than as part of a larger systemic issue. The legislation directs judges to consider background factors on an individualized basis. This is problematic because it treats each Aboriginal offender as if the circumstances were unique to them only. This devalues the complex histories, deprivations, and loss of culture experienced by populations which ultimately makes rationalisation of a carceral sentence seem fitting. In addition, the focus on the individual prevents the provision from effectively doing its job, which is to help make aware the current situation and context of Aboriginal over-incarceration and does nothing to address how the problem is cyclically perpetuated in many communities.

Fourth, the provision requires judges to consider the personal factors so that an appropriate sentence can be sought out. However, as mentioned several times, the presence of a prior record or a serious offence void out any possibility for a non-carceral sanction. Several other factors prevent the use of section 718.2(e) as well. Thus, although the provision is well-intentioned, its wording has been interpreted to weakly apply to the offender’s case as simply a means to slightly lower the sentence. The question of what its true purpose is thus becomes incredibly confusing. While the provision is meant to influence lower levels of incarceration, judges repeatedly emphasize its inability to affect the difference in sentencing outcomes between Aboriginal and non-Aboriginal offences. And so, the issue of why there is not a consistent understanding and why mitigated sentences are still so often sentenced despite the legislation becomes a pressing issue.

Fifth, the provision singles out Aboriginal groups without consideration of other minority groups that are overrepresented. A more effective approach to legal dispute resolution may to be more inclusive to account for many different personal narratives and a more just and holistic
approach to sentencing. Perhaps this may lead to a shift in the system’s approach from retributivist to restorative justice. Furthermore, it may be wise to reconsider the practice of simply grouping all indigenous Canadians under the name “Aboriginal.” Because differences exist between several tribes and communities, Koshan (1998) states that some groups disapprove of the title and view it as racist.

Sixth, the legislation should be repealed for the commonly held understandings by judges throughout Canada who argue that they had already known about the condition of Aboriginal offenders prior to its enactment. This probes the question of whether section 718.2(e) simply acted as a Band-Aid response to a growing discomfort by society years ago. The most notable example of this can be seen by judge J. A. Sounthan in the case of R. v. Devries [1999] B.C. J. No. 2384:

[17] …I have been observing the legal system in British Columbia for longer than anyone else in this courtroom, and it was my observation going back to the 50’s and forward that the judges at every level in this Province did take account of the aboriginal circumstances of the offender. Perhaps not expressed in quite the words of the Criminal Code, but the judges were well aware of the poverty and lack of education and opportunity and so on that many aboriginal people had, especially those who left northern and interior reserves and came here to the lower mainland where they had little or any help or support. As far as I am concerned, the addition of the words “with particular attention to the circumstances of aboriginal offenders” does not add much at all, if anything, to what was always the concern of judges of this Province whatever may have been the situation in other less enlightened parts of this country.

As discussed throughout this research, section 718.2(e) represents the same half-hearted approach that the Canadian governments applies to many such social issues which involve an under-developed solution with face value, but little depth and sincerity. Thus, a revision and rewriting of section 718.2(e) may prove invaluable to the justice system.
Limitations and Future Research Considerations

As with all research, this study was subject to limitations that are important to consider when interpreting the study. First, this research is qualitative and so the connections between CRT, TribalCrit, and the themes which emerged through the analysis process cannot be finitely made or discussed in entirety. This research hoped to bridge a new connection between these concepts with regards to section 718.2(e). Consequently, while it may represent aspects of the larger social context, it cannot be extended completely to wider contexts. As such, the connections made here are meant to be interpreted suggestively.

Second, future research would bode well to incorporate a mixed-methodological approach to build a more comprehensive case. Alongside this, a larger sample size may allow for more concrete findings to be observed as patterns or trends may be more explicit or visible.

Third, because the cases span a long timeline, 1996 to 2017, with cases selected from throughout this block, claims about specific trends for specific time periods are difficult to make. Also, because the span of this study is so large, broader patterns and ideas were observed. Future researchers may wish to take head of this and opt to select a smaller time frame, or even draw a comparative study of different time periods to discover more critical details or circumstances which may not be visible in studies designed like this one.

Finally, given the qualitative nature of this study, researcher bias may have impacted the validity of the conclusions drawn from the data based on personal reflexivity. It is inevitable that the researchers bias plays a role in the grounded theory approach to data analysis. However, keeping in line with TribalCrit narratives, individual perspectives, ideas, and different researcher perspectives help build a greater body of literature which is dynamic and complex and comprehensive. I would encourage future researchers to continue contributing to this growing body of literature in hopes of gaining a better understanding, and thus, influencing positive social change.
Contribution and Conclusion

This study aimed at exploring and analyzing twenty-one published Court of Appeal cases to try and piece together what sorts of methodologies and rationales judges employed when applying or not applying section 718.2(e) for Aboriginal offenders. To this end, my specific goals were to uncover what themes emerged amongst judges’ rationales across the provinces selected for the sample, and to attempt to extend the existing theories of CRT and TribalCrit. Ultimately, this study hopes to stimulate a shift in thinking to consider the flaws within the methodological approach to sentencing which judges are employing. A shift in thinking here includes a shift in understanding of the purpose of section 718.2(e) from one that “should consider all other sanctions” to one that invokes the goals of restorative justice and rehabilitation without a minimal sentence.

In addition to this, more aggressive policy initiatives and programs need to better target the many facets of disadvantage in order to occupy a more proactive approach, rather than reactive. Given the fact that Aboriginal youth populations are increasing exponentially faster than other population groups, targeting younger groups would benefit the community, the justice system, and most importantly, Aboriginal youth.

In conclusion, this research hopes to stimulate feelings of discomfort and dissatisfaction with the current criminal justice system in its dealings with Aboriginal offenders. It hopes to start a new narrative embedded within the contentions of CRT and TribalCrit in order to diversify existing literature and encourage new perspectives on an age-old issue.
Appendices

Appendix A
The Purpose and Principles of Sentencing (Criminal Code Sections 718-718.2)

718. Purpose - The fundamental purpose of sentencing is to protect and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
   a. to denounce unlawful conduct and the harm done to victims or to the community that is caused by 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 to the community; and
   f. to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community

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

718.2 Other Sentencing Principles - A court that imposes a sentence shall also take into consideration the following principles:
   a. A court that imposes a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing
      i. evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
      ii. evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner,
      iii. evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
      iv. evidence that the offence was committed for the benefit of, at the direction or in association with a criminal organization,
      v. evidence that the offence was terrorism offence or,
      vi. evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act
   Shall be deemed to be aggravating circumstances;
   b. a sentence should similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
   c. where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
   d. an offender should not be deprived or liberty, if less restrictive sanctions may be appropriate in the circumstances; and
   e. 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.
### Appendix B

**Admissions to adult correctional services, by characteristic of persons admitted, type of supervision and jurisdiction, 2015/2016**

This table displays the results of Admissions to adult correctional services. The information is grouped by Jurisdiction (appearing as row headers), Custody, Community, Total correctional supervision, Female and Aboriginal, calculated using percent units of measure (appearing as column headers).

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Custody</th>
<th>Community</th>
<th>Total correction supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Female</td>
<td>Aboriginal</td>
<td>Female</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>12</td>
<td>26</td>
<td>24</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>16</td>
<td>6</td>
<td>22</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>13</td>
<td>10</td>
<td>24</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>13</td>
<td>11</td>
<td>22</td>
</tr>
<tr>
<td>Quebec</td>
<td>11</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>Ontario</td>
<td>13</td>
<td>13</td>
<td>19</td>
</tr>
<tr>
<td>Manitoba</td>
<td>19</td>
<td>73</td>
<td>26</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>16</td>
<td>76</td>
<td>23</td>
</tr>
<tr>
<td>British Columbia</td>
<td>11</td>
<td>31</td>
<td>19</td>
</tr>
<tr>
<td>Yukon</td>
<td>12</td>
<td>70</td>
<td>20</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>5</td>
<td>86</td>
<td>17</td>
</tr>
<tr>
<td>Nunavut</td>
<td>4</td>
<td>100</td>
<td>17</td>
</tr>
<tr>
<td><strong>Provincial and territorial—total</strong></td>
<td><strong>13</strong></td>
<td><strong>27</strong></td>
<td><strong>20</strong></td>
</tr>
<tr>
<td><strong>Federal</strong></td>
<td><strong>7</strong></td>
<td><strong>28</strong></td>
<td><strong>7</strong></td>
</tr>
</tbody>
</table>

**Note:** Additional data are available on CANSIM (Tables 251-0021, 251-0022, 251-0025, 251-0026 and 251-0028). Admissions represent movement from one legal status to another. For instance, an individual who moves from remand to sentenced custody is counted as one admission to remand and one to sentenced

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custody. The calculation of percentages excludes admissions for which the information was unknown. Admissions data excludes Alberta due to the unavailability of data.

**Source:** Statistics Canada, Canadian Centre for Justice Statistics, Adult Correctional Services Survey, 2015/2016.
Appendix C
Case Citations

Ontario

British Columbia

Alberta
Appendix D
Data Collection Instrument

Case Citation:

Year Judgement Rendered:

Province/Territory:

Sentence Appealed By:

<table>
<thead>
<tr>
<th>Offender</th>
<th>Crown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reason for Appeal</td>
<td></td>
</tr>
<tr>
<td>Charge(s)</td>
<td></td>
</tr>
<tr>
<td>Offences Convicted of</td>
<td></td>
</tr>
</tbody>
</table>

Plead During Trial:

| Guilty | Not Guilty |

Offender:

| Number of Offenders | |
| Sex | |
| Age at time of offence | |
| Prior Record | |
| Education Level | |
| Residence | |
| Employment | |

Background:

| Favourable Background | |
| Unfavourable Background: | |

Adopted:  

| Favourable | Unfavourable |

Substance Abuse:

<table>
<thead>
<tr>
<th>None</th>
<th>Drugs</th>
<th>Alcohol</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Noted Family Support:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Substance abuse at the time of crime:

| No | Drugs |
| Alcohol | Both |
Rehabilitation efforts made by offender since offence:

Yes
No

Did Defence Council adequately inform the Court of the offender’s circumstances or background:

Yes
No

What sentencing principles were cited to justify the appeal sentence given?

Denunciation (s. 718a)  Deterrence (s. 718b)
Separation from society (s. 718c)  Rehabilitation (s. 718d)
Reparation (s. 718e)  Responsibility (s. 718f)
Proportionality (s. 718.1)  Retribution (s. 718.1)

Was there a Pre-Sentence Report (PSR):

Yes  No  Unknown

PSR Recommendation:

Incarceration  Non-Carceral Alternative  Aboriginal consideration mentioned

If s. 718.2(e) was not applied in appeal, what was the reasoning given?

Serious crime  Prior record  Risk factors

No family or community support
Other______________________________

Sentences Given at Appeal was:

Made Carceral: ________________________________
Made Non-Carceral: ________________________________
Increased Carceral: ________________________________
Reduced Carceral: ________________________________
Carceral Term Added: ________________________________
Non-Carceral Term Added: ________________________________
Appeal Dismissed: ________________________________

Was section 718.2(e) used to justify a non-carceral or mitigated carceral sentence at appeal?

Yes  No
References


Corrections Branch. (2012). British Columbia Ministry of Justics, Corrections Branch


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Statistics Canada (2016). Canadian Centre for Justice Statistics, Adult Correctional Services Survey


**Supreme Court Rulings**
