Gladue Courts : Navigating Contradictory Orientations to Rehabilitate and Punish

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Abstract

This research thesis details a year-long observation and analysis of Gladue (Aboriginal-specific) courts in Toronto from April 2013 – July 2014. The primary focus of this project is the way Gladue courts reconcile and interpret contradictory demands to both rehabilitate and incarcerate Aboriginal peoples in light of legislative and judicial requirements. Utilizing a discourse analysis methodology for observations and transcripts, this thesis sought to analyze how rehabilitation and punishment is conceptualized and implemented in Gladue courts given recent legislative changes. The overall effect is that neo-liberal and paternalist principles are chosen and applied depending on the individual circumstances of the case, with new punitive policies left for the most egregious offenders. This application underlines a law and order policy that is concerned with pragmatic/practical concerns and which leads to a discursive framework that objectifies Aboriginal peoples through racist/colonial conceptions of intrinsic victimization.

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Introduction

The primary impetus behind this research has been based upon both personal and academic concerns regarding Gladue Courts. Gladue courts – named after a 1999 Supreme Court decision – are courts designed to deal with Aboriginal offenders in a way that respects all aspects of the Criminal Code of Canada (C-46), in particular the order 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" (s. 718.2 (e)). During an undergraduate course on youth justice, I elected to focus my research paper on the topic of youth Aboriginal offenders but found little discussion about these individuals in criminological studies. Eventually, I found myself discussing the topic with an elder who then worked with Native Child and Family Services. I was granted an interview with him and similar individuals working with Aboriginal youths in conflict with the law and used their knowledge to help reveal and elucidate the Gladue principles' relationship with Aboriginal youths. Soon thereafter, academic literature began discussing a rather troubling trend towards harsh, anti-rehabilitative justice collectively known as "the new punitiveness" or neo-punitive justice (Pratt et al. eds., 2005). This trend was originally based on American developments from the mid-90s, though I felt it was rather significant given new Canadian legislation enacted around the turn of the century echoed the rhetoric and ideology of what was thought to be a

phenomenon specific to the United States of America. The Youth Criminal Justice Act (2002) and the Omnibus Budget Bill/ Bill C-38 (2012) are two of the more notable contemporary bills that sought to transplant American-style punitiveness into the Canadian criminal justice system.

As a result, I decided to focus my Masters research on both of these topics – Gladue courts (at the adult level) and the new punitiveness' applicability to so-called rehabilitative courts. Gladue courts are specialized courts designed in response to the 1999 Supreme Court decision of R. v. Gladue and are similar to other courts with the exception that they have additional Aboriginal-focused resources provided to them and are typically restricted to guilty pleas and bail hearings (formally called a judicial interim release). These additional resources are expressly provided so that the problems and issues highlighted by R. v. Gladue are mitigated as much as is possible. In particular, the judges had concerns about ensuring that sanctions other than imprisonment be considered by judges, particularly when an Aboriginal person is before the court and that their particular background circumstances be considered. In addition to this, the court also expressed concerns that certain sanctions or sentencing procedures appropriate for the accused person or offender were not being considered despite their relevance to the case given their Aboriginal heritage or connection (R. v. Gladue, 1999, para. 24, 36, 66).

The Gladue decision was not intended to place a different standard of sentencing for Aboriginal persons, but to emphasize the individualization of sentencing through the two concerns noted above (Manson, 2001, p. 79-80). The Gladue decision also highlighted some other issues regarding Aboriginal people's difficulties with the criminal justice system, but these are the main focus of this research thesis. Regardless, Gladue courts are provided with additional resources and personnel so that the circumstances, alternatives, and background characteristics of Aboriginal accused persons/offenders are given proper consideration and a rehabilitative standpoint is promoted and encouraged by all court officials.

It should be emphasized that Gladue courts function and follow the same procedures and formal requirements as other courts and, with the major exception being that they are usually restricted to judicial interim releases and sentencing dispositions. In the court process there are multiple formal stages in which an accused person moves from being charged with an offense. The decision to proceed with a trial or alternative measures is considered by the Crown prosecutor, defense counsels are retained, pre-trial release issues are considered, preliminary inquiries may be conducted, adjudication by a justice occurs, and, upon acceptance of a guilty plea or conviction after a trial, sentences are imposed (Roach, 2012, p. 4). With regards to pleas, this means that Gladue Courts only deal with accused persons who intend to plead guilty following the arraignment,

thus eliminating the criminal trial and immediately going to the sentencing hearing (ibid., p. 21). This sentencing hearing is informal in design, with little procedural guidance provided by the Criminal Code and usually entails the submission of a criminal record (if relevant), background information about the offender (in the form of submissions), expert opinion evidence, or witness statements. Whatever is used, both the Crown prosecutor and defense counsel usually end their submissions with a sentencing recommendation and can provide structured proposals and materials outlining their recommended sentence (Manson, 2001, p. 162-163). In some instances, both the defense counsel and Crown prosecutor present the same recommended sentence, called a joint submission.

Whether or not the accused person intends to enter a guilty plea, the resources and personnel available to the Gladue court can be sent to other courts if requested. Additionally, the guidelines and recommendations made in R. v. Gladue apply to all courts, regardless of their classification as Gladue courts or not. Discussions relating to judicial interim releases are also part of Gladue courts as the directive to avoid unduly incarcerating Aboriginal peoples applies to pre-trial detention as well. Regardless of the type of proceeding in question, there are several key terms and phrases that will be referred to throughout this research paper and whose formal definitions are important to cover. The most important terms refer to the major sentencing principles, the formal powers of the prosecutor

(sometimes called the Crown or Crown prosecutor), the definition of onus, and the specifics of a hearing for judicial interim release (often called bail).

There are six primary sentencing principles outlined in section 718 of the Criminal Code. They are : denunciation ("to denounce unlawful conduct"), specific and general deterrence ("to deter the offender and other persons from committing offenses"), the separation of offenders to protect the public ("to separate offenders from society, when necessary"), rehabilitation ("to assist in rehabilitating offenders"), reparation ("to provide reparations for harm done to victims or to the community"), and promotion of responsibility ("to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community"). In addition, section 718.1 details the fundamental principle of proportionality (that the sentence "must be proportionate to the gravity of the offense and the degree of responsibility of the offender"). Lastly, judges are directed by section 718.2 to also consider other sentencing principles that involve relevant mitigating or aggravating circumstances, including the circumstances of Aboriginal offenders and the prioritization of sanctions other than imprisonment in those instances that are reasonable for them (Criminal Code, 1985, s. 718).

The Crown prosecutor (sometimes simply referred to as the Crown) determines what charge with which an accused person is charged should proceed and which charges, if any, can be diverted out of court to alternative-measure

programs (Roach, 2012, p.3). This determination is based on what is called the Crown's discretion (not to be confused with judicial/sentencing discretion), and it is often exercised in Gladue courts to allow for cases to be diverted to a community diversion program or the Aboriginal-focused Community Council of Toronto (CCT or CCP for Community Council Program), wherein the accused person admits and accepts responsibility for their actions and subsequently enters a treatment or other program and has their charges withdrawn upon its completion (Manson, 2001, 210). The decision to divert an accused person is made by the Crown prosecutor and it is guided by section 717 of the Criminal Code of Canada. Diversion is therefore not unique to Gladue courts, only its specific integration with the Crown prosecutor's office (through the Aboriginal court worker (ACW)) and the sentencing principles of the court (through s.718.2 (e)). If a case goes to trial, then the Crown prosecutor's role is to prove the accused person is guilty beyond a reasonable doubt and that they do not have a relevant defence. As the Gladue courts studied here only dealt with guilty pleas, this role of the Crown prosecutor was not observed.

The onus refers to the burden of proof placed upon the offender/accused person or Crown prosecutor to justify their position to the judge. In the majority of cases and crimes the onus is on the Crown prosecutor to prove his case, often beyond a reasonable doubt and while showing that the offender/accused person does not have a relevant defense. In the case of hearings about judicial interim

release, certain charges or elements may cause the case to become what is called a 'reverse onus' case, wherein the accused person must justify to the court that they be allowed to be released and the Crown prosecutor need only dispute their claims. This reverse onus situation is specified by section 515.6 of the Criminal Code, which lists the major reasons for such a situation as: the accused person being charged with an indictable offense while on release for a still pending trial for another indictable offense, being charged with an indictable offense while not ordinarily being a resident of Canada, failing to comply with certain judicial release orders or undertakings while on release for a charge that is still pending, or if the accused person is charged with certain drug crimes.

Judicial interim release (primarily referred to as bail) refers to the release of an accused person from custody (or 'remand') pending their trial. The decision as to whether or not the person is to be released is determined by the judge in advance of the trial and guided by the Criminal Code of Canada, notably sections 515-529. This determination is done in court as part of a formal bail hearing wherein the judge, Crown prosecutor, the accused person, and the defense counsel hear/provide submissions and evidence as to whether or not the accused person should be given bail and, if it is granted, the nature of the bail. Witnesses, if present, may also be called upon to provide evidence and they may include hearsay so long as such statements are credible and trustworthy (Allan, 2001, p.189-190). There are three main reasons a judge or Crown prosecutor may seek

to keep an accused person in detention prior to trial – called the primary, secondary, and tertiary grounds. The primary grounds involve ensuring the accused person's attendance in court. The secondary grounds involve ensuring the safety of the public and the possibility of reoffending. The tertiary grounds involve the need for detention in order to maintain public confidence in the administration of justice (Criminal Code, 1985, s.515 (10)). After all submissions have been made the judge issues a decision, clarifies any additional orders, and confirms the trial date. No matter what decision is reached, the accused person is still considered innocent until proven guilty and thus is not considered an 'offender' until that time. Note that some Crown prosecutors may simply allow the accused person to be granted bail with some negotiated stipulations decided upon outside the courtroom/confidentially. In these instances, the Crown prosecutor is said to offer a consent release to the judge.

Moving to methodological considerations, the primary focus of this paper is on how judges within Gladue courts reconcile competing and seemingly contradictory sentencing principles that call for harsh punishments and long austere imprisonments with lenient sentences and a mandate for rehabilitation. The primary focus, then, is on both a discourse analysis of Gladue Court actors and a critical analysis of the actual Gladue court processes that express these protocols and ideologies. I examined the ways in which judges and others engage with the contradictory orientations, how the actual results of their sentences

manifest, and how this then feeds back into the criminal justice system and new legislation, ad infinitum. As a result of these questions, new information and conclusions about Gladue courts and the differences between their intended conception of justice and its manifestation in practice, as well as the significant differences between Gladue courts and non-Gladue courts, would also emerge.

The primary focus for all of this research are Toronto Gladue courts – specifically, the three Toronto adult courts that sit weekly. While all Ontario courts are required to consider the Gladue principle/decision, these three courts were highlighted for several different reasons. First, they reside in Toronto, the city and province with the largest number of Aboriginal peoples in the country (absolute numbers, not per capita) (Statscan, 2006). Second, they deal with adult accused persons only, thereby avoiding ethical concerns and legal prohibitions on identifying youth accused persons. Third, all of these courts are supported directly by Aboriginal Legal Services of Toronto (ALST) lawyers as well as specialized staff and court workers. The specialized staff are at the service of the court and work alongside it, helping accused persons with questions, co-coordinating dates with defense counsels, and creating specialized treatment plans for the consideration of the Crown prosecutors and defense counsels. Though there are other specialized treatment courts they do not expressly deal with Aboriginal peoples (and some accused persons in Gladue would be transferred to those courts) nor do they have Aboriginal court workers to help support the day-to-day

operations and create culturally appropriate plans of care or provide other relevant treatment assets. Gladue courts act as both a limitation on the types of accused persons analyzed as well as a relevant subject area itself. In effect, Toronto's Gladue courts are not just locations where the negotiation/reconciliation process between rehabilitation and punishment can be studied regularly (and ethically), but are also the ones where external and non-court actors are best able to influence the final decision and the major sentencing principles, either in favour of or against rehabilitation. To emphasize, Gladue courts have been examined primarily for two main reasons : to see how the new punitiveness conflicts with a presumably rehabilitative-based court, and to see how rehabilitation and punishment are conceptualized in the context of Aboriginal peoples and judicial precedents to consider them differently. Other factors, while relevant, have not been the primary reasons why this subject area was chosen.

Gladue courts are not the exclusive venue for Aboriginal peoples nor the only location where s.718.2 (e) can come into effect – they are the courts where additional resources, training, and information is provided for the purposes of meeting the principles noted in R. v. Gladue. In other courts, the Gladue principles are still to be addressed and considered, though they may not have these additional elements and may only have the support of Aboriginal court workers when they are notified in advance. Gladue courts, in Toronto, were originally designed when the difficulties in implementing Gladue became clear.

Primarily, these difficulties related to knowing when an Aboriginal person was before the courts, and having the appropriate knowledge/context/resources to create and develop alternative sentencing regimes. The proposed solution was the creation of a court designed with these supports/resources and knowledge embedded fully. The assistance of the Attorneys General of Ontario and Canada were offered, with the Ontario Legal Aid Plan and Aboriginal Legal Services of Toronto providing defense counsels and court workers for the court. In addition, the court was publicized to defense counsels, run during normal court hours, given an eagle feather from the elders of Toronto, provided with smudging services if requested, and supplemented with specialized training for judges and duty counsels from Aboriginal Legal Services of Toronto and a community elder – eventually opening in October 2001 (Knazan, 2003, p. 3-4, 16).

Two problems involved in prior applications of the Gladue decision were the judges' inability to recognize an Aboriginal person and the lack of knowledge amongst Aboriginal communities about the Gladue principles themselves. In addition, when these issues were addressed there remained problems relating to knowledge about alternatives to imprisonment and access to them. The creation of Gladue courts was intended to meet these needs while also creating an atmosphere where an Aboriginal person would be given as much support as possible (ibid., p. 4-5). In addition to these elements, Gladue courts also utilize specialized background reports that are expressly designed to take into account the specific

circumstances outlined in the Gladue principles. These Gladue reports are similar to pre-sentence reports used in all courts, but differ in some major ways – besides their length, they are written and created by an Aboriginal person sympathetic to the circumstances described therein, and can be used to draw comparisons between the pre-sentence reports made by probation officers. They can also include references to treatment recommendations or possible sentencing options through an associated plan of care, submitted during the court proceedings (ibid., p. 9-11). As part of this stated goal, Gladue courts also receive in-depth support and assistance from the Community Council of Toronto in implementing specific diversion agreements with Aboriginal considerations placed at the forefront. Bail cases are also considered relevant areas for the Gladue decision, and they are given support in Gladue courts in order for particular problems relating to lack of mobility, homelessness, and lack of surety options to be addressed. Primarily, the solutions to these long-term problems are developed through Aboriginal court worker assistance, plans of care, deferrals to residential programs (treatment-based or otherwise) and direct financial assistance from Aboriginal Legal Services of Toronto in order to provide transportation to distant specialized programs such as the Ottawa-based Anchorage treatment facility. In addition, bail hearings are directly altered and presented in such a way that the court is more inclined to offer bail and are made with the specific circumstances of the case and Aboriginal person in mind (ibid., p. 13-14).

Gladue courts themselves primarily deal with guilty pleas and bails of the more minor variety (the most severe charge observed during the research was aggravated assault) but all offenses are to be subject to the Gladue principles and Aboriginal court workers can provide support to other courts if requested. This specific implementation of the Gladue court was not witnessed during the observation. In addition, some courts dealing with particularly severe charges are closed to the public. Within Ontario, there are a stated six Gladue courts: the three outlined and observed in this paper residing in Toronto (Old City Hall, College Park, and 1000 Finch courthouses), one at the Ontario Court of Justice in Sarnia, as well as two recently opened courts in London and Scarborough (April & Orsi, 2013, p. 5). This same study also noted fourteen other specialized Gladue-based courts across Canada, with some provinces and territories having none due to their large Aboriginal population (such that courts were already familiar with the unique provisions for Aboriginal peoples and thus did not need specialized locations to implement them) or a preference for community-based justice instead (ibid., p. 1, 5-6).

Literature Survey/Theoretical Framework

Sociological/Criminological Theory : The New Punitiveness

The punitive turn in Canada can best be described as a series of broadly neo-liberal, then neo-conservative, shifts in the conception and administration of

justice/punishments[1]. This shift began with the introduction of the Young Offenders Act (YOA) in 1984. The previous legislation - the Juvenile Delinquents Act (JDA) – was criticized for paternalistic and arbitrary results due to a lack of disposition guidelines. By allowing for large amounts of judicial discretion, the judiciary inadvertently created a system that allowed for biases and cleavages to become express elements in the form of laws that were both "oppressive and over-intrusive [and] soft and ineffective" (Hudson, 2003, p. 40). The YOA expressly attempted to create a standard guideline for youth offenders through a gradual series of amendments – these led to a slow increase in overall prison length/punishment severity, with the 1993 amendments specifically referencing the importance of harsh punishment in creating "protection of the public" (Doob & Cesaroni, 2004, p. 19-20). The final result and overall trend was contradictory, with the YOA attempting to enforce more right-based orientations while also promoting neo-liberal discourses of community-based supervision/orders, a focus on offender-led treatment/rehabilitation, and retributive/harsh sentencing guidelines based on longer, more austere, prison sentences (Bala & Anand, 2009, p. 82-83). This pattern of increasingly polarized sentencing guidelines – where there was either little government interference/assistance or extreme organized control of offenders – continued to the 2002 Youth Criminal Justice Act (YCJA) and "get tough" remains a popular punitive rallying call inside and outside

[1] 'Neo-liberal' and 'Neo-Conservative' will be defined in the following pages as different criminological and political literature is discussed.

legislatures (Hartnagel, 2004, p. 363-364). In this respect, we have seen Canadian criminal laws reflect a near-constant level of contradiction – from the JDA attempting to allow for individualized sentences (thus allowing for bias and racism to be expressed), to the YOA attempting to create equal sentences for all (thus ignoring social/environmental factors and utilizing amendments to target specific problematic populations), to the YCJA attempting to make rehabilitation of youths a significant part of the criminal justice system (while also making youths subject to ever more discriminatory police laws, putting youths under the control of probationary officers, and advocating prison as the solution to any youth who has failed to rehabilitate themselves).

These developments are relevant to Aboriginal justice and the current research topic due to their development/growth in concert with the previously discussed problems of Aboriginal over-incarceration. Most notably, the YCJA was put into practice three years after the Gladue decision and marked a significant shift away from a rehabilitative system and towards a policy of mixed dispositions where incarceration and rehabilitation were seen as equally valid methods of crime control. These policies and procedures were expressly designed to meet public and political demands to utilize incarceration more often and in response to what they saw as impossible to rehabilitate youth offenders. The link to Aboriginal peoples is based on the way these dispositions led to the same incarceration rates as the past system due to the inability of the Canadian

government to recognize the systemic factors behind Aboriginal criminality while also limiting rehabilitation programs based on related narratives of persistent offending. In effect, the YCJA and past youth criminal law acts represent emerging justice trends that continue to ignore the solutions to Aboriginal over-incarceration and promote frames and perspectives that mirror racist and colonial perceptions of Aboriginal peoples as intrinsically criminal.

The new punitiveness is described by Pratt et al. (2005) as a series of possibly global reforms aimed at re-creating the harsh criminal justice regimes of the past while simultaneously keeping prisoners and offenders in a tightly-controlled and highly restrictive environment. They point to the "modern" punishment regimes of Foucault and note that, where once the state sought to teach their populations how to be docile and compliant, now the penal regime is concerned only with containing and dominating those citizens who have been deemed a waste of human life (p. xii-xiii). To put it another way, offenders are no longer people to be reformed but human bodies that are to be kept isolated from the rest of society. Criminals are therefore only discussed in view of the public such that they serve as a reminder and warning of what happens to citizens that refuse to comply with the new social contract of the state.

David Garland, in contrast to Pratt et al., argues that the new-punitiveness is based upon the shifting abilities of the sovereign state. He argues that penal

policy has become so contradictory due to new limits placed upon states to "provide security, law and order, and crime control within its territorial boundaries" (Garland, 1996, p. 448). As a result, governments have implemented new policies and strategies to prevent the recognition of their failures: the two major forms are called adaptation and denial (Gray & Salole, 2006, p. 664). Adaptation follows more neo-liberal trends and ideologies, whereby the government acknowledges its inability to solely control crime and uses techniques of "responsabilization" to make citizens and non-state actors/agencies partly responsible for crime control and prevention (Garland, 1996, p. 452-458). There is also a redefinition of the success and failure of the prison system itself – police and prosecutors focus on only 'serious' (i.e. sensationalized or publicized) crimes and prisons and courts make success a matter of throughput, monetary cost, and customer (voter) satisfaction. In all instances, the criminal justice system is made to follow certain goals that are less likely to fail and externalities are blamed on factors out of their control and appeals to "random" or "opportunistic" offending patterns (ibid., p. 458-459). Denial follows a more neo-conservative trend – here, the state uses harsh/more punitive policies to assert its right to govern and maintain social control by force. These denial strategies are often coupled with the otherization of criminals and an intentional escalation of pre-existing cleavages between different socio-cultural groups and classes (ibid., p. 458-464). Still, the new punitiveness here is not a new phenomena but the result of pre-existing

ideologies reacting to contemporary shifts in the administrative limits of modern government/society. As such, traditional rhetorical appeals are only used to provide the appearance of authentic 'traditional' crime control orientations.

O'Malley critiques Garland's thesis by arguing that the contradictory sentencing regime is a result of what he calls the "new right" politics :

> Broadly speaking the New Right consists of two distinct and in some ways competing trends of thought: a neo-conservative *social authoritarian* strand, and a neo-liberal *free-market* strand (Gamble, 1986, 1988; Levitas, 1986; Hayes, 1994). The resulting alliance, although usually referred to as neo-liberal in current criminology, is in practice far less coherent than a single political rationality. (O'Malley, 1999, p. 185) (Emphasis in original)

The seemingly contradictory nature of criminal policy is thus conceptualized as the result of these two ideologies forming an alliance of convenience under their shared ideological hostility to welfare-interventionist policies and shared ideological support for the free-market (ibid., p. 188). That there seems to be ideological inconsistencies is not the result of the fundamental limits of the sovereign state (as Garland says) because such problems represent areas where the two ideologies have no common ground (ibid., p.188-189). Regardless of the cause of the new sentencing guidelines, both Garland, Pratt, and O'Malley agree that the end result is a regime that simultaneously promotes austere prison conditions, a shift away from rehabilitation, the promotion of community supervision and diversion initiatives, and the advocating of purely individualized

criminal narratives. It is in this context that we will begin studying the new punitiveness in the context of Canada, and Gladue courts specifically.

Part of the impetus behind this research is the result of both a lack of emphasis on Canadian Aboriginal peoples and the criminal justice system in the criminological literature, as well as a debate within the literature about whether or not the punitive turn has actually occurred in Canada (and in what ways). Much of the work on Canadian criminological literature focuses on youth crime and the question of whether the punitive turn has actually occurred. Even in those papers, there are few instances where either topic is questioned with regards to Aboriginal offenders/accused persons. For instance, work by Doob and Sprott (2004, 2006), Hogeveen (2005, 2005, 2006), Hartnagel (2004), Faucher (2009) and Bala, Carrington, and Roberts (2009) focus predominantly on youth crime and present it as the major barometer of what Canadian penology is turning towards, primarily since non-youth criminal legislation have implemented less drastic or publicized changes. Conversely, Landau (2006), McCaslin (2005), Proulx (2003), Green (1998), Dickson-Gilmore & La Prairie (2005), and innumerable government papers and reports over the last 20 years focus primarily on the ways Aboriginal peoples interact with the justice system in general, but have paid only slight consideration to the effect new punitive legislation will have on contemporary trends and challenges. Lastly, there remains a small subset of researchers who pay particular attention to the new punitive turn and the contradictory sentencing

paradigms it creates – in Canada, some notable authors/papers include Hannah-Moffat & Maurutto (2012), Moore and Hannah-Moffat (2005), Hutchinson (2006), and Meyer and O'Malley (2005). These authors are far from agreed on both the nature and extent of the punitive turn, but most agree that the turn is weaker or more diverse than the one present in the USA.

For the purposes of this research thesis and the historical background behind it, we shall focus primarily upon those courts, principles, and studies (government-made or not) that deal with Aboriginal peoples in the criminal justice system and the effects of the punitive turn both overall and in these contexts. Therefore, youth-specific policies will be referenced in passing but will not be a primary part of this summary. Suffice it to say that their conclusions mirror much of what will be said in the general analyses of the new punitiveness, though the debate remains much more contested and arguments remain on whether or not the current trend is mere rhetoric (in the research by Doob, Sprott, and Hartnagel) or has become gradually enshrined in legislation and is only waiting to become policy (in the research by Hogeveen). It is important to note that youth Aboriginal offenders have been researched in the past, with research by Yessine & Bonta (2009) and Latimer & Foss (2005) suggesting that there is some overrepresentation of Aboriginal youth due to complex and interrelated background factors that led to a higher level of what they term "criminogenic needs" (Yessine and Bonta, p. 457-458) or "risk/need levels" (Latimer and Foss,

p. 494) which lead judges to implement harsher sentences due to the perception of persistent offending. This objectifying terminology is never criticized by these authors for its lack of agency and Eurocentric orientations – as point of fact, these terms are even present in the guidelines for the creation of pre-sentence reports within the Ministry of Justice (Hannah-Moffat & Maurutto, 2010, p. 271). Criticism and counter-discourses seem to only emerge from Indigenous theorists outside of this discipline, and these analyses will be discussed later in the thesis.

To begin, Moore and Hannah-Moffat's research on the new punitiveness takes on a more supportive view of Pratt et al.'s thesis, with some caveats :

> "First, the notion of a punitive turn fails to capture the complexity and diversity of Canadian penality… Second, the definition of punitiveness as it exists within the penal-turn literature is too narrow" (Moore and Hannah-Moffat, 2005, p. 85).

Punishment in Canada, they argue, is both rehabilitative and punitive – in fact, "therapeutic discourses and practice are also punitive" (ibid., p. 86). Their central argument revolves around the idea that neoliberal rehabilitative discourses are punitive through their coercive elements and related austere treatments and custody locations (ibid., p. 86-89). Simultaneously, there has been an administrative resistance to such punitive discourses, and an ongoing commitment to more rigid/standardized treatment regimes (ibid., p. 89-93). Therefore, there is a dichotomy between the desired organization of the criminal justice system and the discourses and methods it uses. By supporting rehabilitative programs while

encouraging harsher punishments and the notion that crime is an individual phenomena/decision, the Canadian government creates what they call a "neo-liberal veil" that masks a punitive discourse under the reality of clinical, austere, and wholly alienating custodial conditions (ibid., p. 97-98).

Meyer and O'Malley also have an entry in Pratt et al.'s book, and they contrast with Moore and Hannah-Moffat in that they argue that Canada is not oscillating between punitiveness and liberalism (or even covering one with the other) but is actively implementing a "balanced approach" that is "distinctly Canadian" (Meyer & O'Malley, 2005, p. 206). They argue that Canada has directly looked at the punitive turn occurring in the USA and implemented a system that seeks to maintain rehabilitation and offender supports (ibid., p. 207-208). While they acknowledge Moore and Hannah-Moffat's argument, they state that such contradictions were present even in welfare sanctions prior to the turn, and that the "official discourse" of penal modernism remains against further punitiveness (ibid., p. 208). Though the research and some conclusions are admittedly a bit dated (they state that Canada has no mandatory drug laws, and that the new Conservative government is unlikely to implement new harsher policies (ibid., p. 210, 214)), their overall argument is that Canada's punitive turn, if it is occurring, cannot be subsumed or covered under the same aegis that represents the global or American version (ibid., p. 213).

Hannah-Moffat and Maurutto later expanded their work in a 2012 article on specialized treatment-focused courts. Building on past research on "penal excess" and "neo-liberal penal patterns", they attempt to see how past (presumably rehabilitative) penal strategies are altered (Hannah-Moffat & Maurutto, 2012, p. 202). They focus both on sentencing and bail patterns in order to better understand how rehabilitative techniques and the growth of arms-length community agencies have recreated and rebuilt the penal regime into a newer, different, yet still coercive model (ibid., p. 203). Part of the impetus for their research is congruent to my own, as they want to see how the bail process changes, how communities are involved, how treatment providers become more influential, and how the multiple actors involved blur the lines between state and community (ibid., p. 205). However, unlike this thesis they do not specify a specific type of offender/accused person as a relevant research subject. Regardless, their conclusions eventually grow to mirror their past work in the New Punitiveness – the goal of treatment is to create a "governable liberal responsible subject" through a melding of welfare, therapeutic, and coercive state apparatuses and the resulting hidden layer of penal governance (ibid., p. 210-211). Though based on drug treatment courts, they conclude that community actors are key to the unusual Canadian penal regime and the resultant mix of interconnected welfare and penal discourses that simultaneously support and challenge the punishment/control focused criminal ideology so prevalent in contemporary

legislation (ibid., p. 214-215). Burns and Peyrot (2008), in comparison, focus on drug treatment courts in California and the resulting problems that emerge for a standardized treatment regime and how it simultaneously leads to harsher treatments for some (who then prefer incarceration) and lenient treatment for others (who deliberately exploit the system) (p. 721-722). What is notable for this thesis (and why it is mentioned alongside Hannah-Moffat & Maurutto) is that these judges have utilized their other discretionary abilities and interactional authority to make treatments more individualized and responsive while still trying to keep them lenient enough that incarceration is not preferred by the offender (ibid., p. 739-740). Here, again, we see legal protocols limiting the ability of judges to create rehabilitative sentences combined with judges utilizing informal protocols to retain some discretion and socialize the offender into accepting the rehabilitative regime in spite of the penality surrounding it. Though the origins are different, the methods are similar and help to raise questions as to how different outside resources and rehabilitative/court orientations can influence the overall melding between punitiveness and rehabilitation.

Next, Steven Hutchinson also criticizes O'Malley's previous thesis, in this case focusing on the issue of so-called neo-liberal influences/alterations. Like the previous authors, he identifies that past so-called rehabilitative regimes were not as powerful as some "catastrophe" theorists think, and that fines were and still are the most frequently used penal sanction while remaining shadowed by the threat

of incarceration (Hutchinson, 2006, p. 445-448). Thus, he disputes that the past was ever as rehabilitative as it is presented and that the so-called catastrophe is as severe as is said – modern penal policy, he says, has a "braided" nature whereby correction and repression remain ever-present (ibid., 448). One such "braided" movement is the trend of therapeutic justice, an orientation that directly echoes the Gladue decision and the overt goals of section 718.2 (e) :

> Following from this, 'therapeutic justice' has come to refer primarily to judicial approaches that address criminal behavior as a problem requiring non-traditional sanctions and/or social services in addition to traditional measures. Proponents of therapeutic justice generally agree that crime is most aptly conceived as a manifestation of an offender's 'illness' in body or character, and that the focus of the justice process should therefore be on rehabilitation, healing and teaching accountability, rather than punitive incarceration….Despite different practical manifestations, the therapeutic justice model has several core themes that include a reliance on a combination of authorities in treating offenders (e.g. a psychologist, a social worker, a judge, etc.), the 'treatment' of offenders as individual cases and the correction of 'pathologies', 'routines', 'habits' and 'behaviors'. All of this involves enhancing skills and ties to communities in order to facilitate reintegration post-treatment. (ibid., p. 453).

Despite this, Hutchinson identifies Gladue courts as an example of "restorative justice", defined by him as a justice orientation that acts as a counterweight to punitive policies and which aims to target social causes of crime and aim to treat crime as a problem that can be solved (ibid., p. 451-452). Even though he identifies therapeutic courts as revolving around specialized problems like drugs, alcohol, and domestic violence, Hutchinson places Gladue on the restorative side of the spectrum. This is possibly because he identifies restorative justice

initiatives as relying on individual-specific clinical factors over social/historical factors, and the assumption that these programs are incompatible with the welfare-based policies that made up pre-catastrophe rehabilitation (ibid., p. 455). If this is the case, he has wrongly identified the historical causes behind the creation of Gladue courts in Toronto and ignored the collective experiences of Canadian Aboriginal peoples as a result – whatever the reason, his classification of Gladue courts is incorrect[2]. Disregarding this criticism, he still acknowledges that neither approach may be entirely altruistic and may simply become a new tool for control and authority over offender/accused persons (ibid., p. 451 & 456). In this, he references the previous work by Moore and Hannah-Moffat, and the idea that "risk/need" factors are the key element behind the neo-liberal shift and the resulting control and authority exerted by seemingly rehabilitation-focused courts whereby they make the offender the sole factor behind the crime and potential treatment (ibid., p. 458). Therefore, this article most clearly articulates the link between Gladue courts, the new punitiveness, and the continuing debate over the final ideological form (though admittedly the mention of Gladue remains minor). What is significant, however, is that it remains ambivalent over the potential changes and developments within and without the post-catastrophe penal regimes.

[2] Restorative Justice, and its definition in the eyes of Indigenous justice scholars, will be covered in more detail in the next section of the **Literature Survey/Theoretical Framework**

As a final point, and to lead in to the Indigenous justice literature, there are two papers that deal expressly with Gladue courts in a manner akin to this thesis. First, a third paper by Hannah-Moffat and Maurutto published in 2010 entails research on pre-sentence reports (PSRs) within the entire criminal justice system, and a contrast between these elements and Gladue reports. In general, they identify conventional pre-sentence reports as having a "risk-based focus" that present a "decontextualized and limited understanding of the impact of racial histories on offending, sentencing, and treatment options" (Hannah-Moffat & Maurutto, 2010, p. 264). In the case of PSRs in the context of the Gladue decision, they make race (and gender) issues secondary to clinical ("actuarial") risk (ibid., p. 265). PSRs, as a result of the formal requirements and outlines, focus primarily on historic and dynamic factors and identify the historic factors as static and unchanging (ibid., p. 269). The objectification that occurs when this interpretive framework is applied to Aboriginal peoples is serious, as it inevitably links both types of factors in such a way that Aboriginality itself is interpreted as intrinsic to criminality and removes any agency or hope for healing. The viewpoint created in this manner is a continuation of longstanding racist and colonial biases and serves to continue to harm Aboriginal peoples and communities. There are even more objectifying elements within PSRs such as the mandatory order to include "criminogenic needs", and an order to refer to the

offender/accused person through their surname in order to avoid "personalizing the offender" (ibid., p. 271).

The major issue with this process is that it is also embedded within Gladue reports, creating an interpretation wherein holistic assessments and community considerations are bracketed by racist terms that objectify the Aboriginal person specifically because they are Aboriginal. In effect, Aboriginal peoples are presented as both high risk and high need, thereby being viewed as an offender that requires a paternalist and intensive sentence for his own benefit (another mimicking of racist and colonial biases) (ibid., p. 274-275). Gladue reports are not always so counter-productive because they sometimes situate and frame these elements through the lens of race relations and personal thoughts and desires, thereby re-contextualizing elements that PSRs would use to mandate treatment as historical patterns that place them at risk (ibid., p. 278). This, in turn, results in a problematic discursive framework that similarly objectifies Aboriginal peoples and presents them as without agency, primarily through perceptions of intrinsic victimization rather than criminality. This problematic discursive framing and application is a key problem within Gladue courts, and its actual effects and rhetoric will make up a significant portion of the analyses within the thesis.

The second paper that deals with Gladue courts is a PHD thesis by Andrée Dugas (2013), which utilized a constructivist discourse analysis of Gladue court transcripts/cases in order to examine the "original issues which may be hampering

the practice of section 718.2 (e), quashing its potential impact on aboriginal offender alternative sentencing which may differ from those suggested by modern penal rationality" (p. 32). A central point in the paper is the concept of modern penal rationality (MPR), an orientation and framework described by Alvaro Pires and which underpins the perspectives of punishment and sentencing in modern criminal law (ibid., p. 32, 35). Though it will be explained further when it becomes relevant to the data analysis, MPR is an orientation that can broadly be described as both binary and utilitarian in outlook. It is binary because it views rehabilitation as possible only outside the confines of custodial conditions and punishment (representing deterrent and denunciatory elements) as requiring custodial isolation from the public via imprisonment (ibid., 37-55). It is utilitarian in that it primarily views offenders/accused persons through mechanistic and deterministic orientations that prioritize the necessity of punishment as a tool for social safety and deterrence of crime (ibid., p. 57-60). In addition, with regards to Canadian law, the sentencing principle of "protection of the public" is a key discourse that emphasizes the socially exclusionary aspects of justice and can counteract the ability of the Gladue principles and s.718.2 (e) (ibid., p.103-104). This principle is further emphasized via appeals to practical concerns and presuppositions that only custody is able to keep the public truly safe from crime (ibid., p. 105-106). Overall, then, Dugas finds that MPR thought is embedded

within all courts and has an overall nullifying (or even counter-productive) effect on the implementation of Gladue/s.718.2 (e) (ibid., p. 114, 139-140).

These conclusions and factors help to articulate why this research on Gladue courts is so necessary. Alongside the past silence on the subject of Aboriginal peoples' over-representation in the criminal justice system and prisons, there remains continuing questions on how the Gladue principles are implemented, how they respond to current and emerging penal initiatives, and the effects of new and more coercive justice policies on the judiciary and their possible growth under the guise of rehabilitation and equality.

Perspectives on Indigenous Justice

Past government and criminological research on Aboriginal offenders and Aboriginal justice trends tend to identify the same problems and patterns with regards to the causes of the long-standing problem of Aboriginal incarceration rates and the conception of Aboriginal people's perceived 'risk'. Following the 1991 Royal Commission on Aboriginal Peoples, the predominant conclusion was that the current colonial and assimilation-based policies of the Canadian government are the cause of fundamentally destructive changes in Aboriginal people's lives and that this relationship must change for the damage to be repaired (Aboriginal Affairs and Northern Development Canada, 1996). Similar government-made literature outside of this commission continues this analytical focus on Aboriginal peoples with respect to both their incarceration trends and

general socio-economic status. The 1999 Manitoba Justice Inquiry, for example, supported this conclusion and listed several different recommendations in order to enact meaningful improvements in the relationship between Aboriginal communities and the Manitoba criminal justice system. Notably, they echoed the Gladue decision and the related 1996 amendments :

> "Incarceration should be used only as a last resort and only where a person poses a threat to another individual or to the community, or where other sanctions would not sufficiently reflect the gravity of the offense, or where the offender refuses to comply with the terms of another sentence that has been imposed upon him or her" (Aboriginal Justice Implementation Commission, Aug 19 2014).

In addition to these government inquiries on Aboriginal peoples in the justice system are government reports that include more theoretical and qualitative investigations of past and future trends from criminological and Indigenous studies theorists. These general government papers and Indigenous justice analyses are the main focus of this section of the thesis.

The government-produced reports generally focus on an in depth-qualitative or quantitative analysis of Aboriginal peoples from either a custodial, treatment, or socio-economic standpoint. There is rarely any consideration given to Aboriginal people's perspectives except as they conflict with co-workers in government-run rehabilitation programs and government officials. For instance, a 1992 report on substance-abuse pre-treatment identified the need for education and treatment programs to engage in cross-cultural awareness and co-operation

(Solicitor General Canada, 1992, p. ii-iii, xvi-xvii, 7). This same report noted extensive intergenerational trauma and a link between Aboriginal people's substance abuse and crime (ibid., p. vi – vii). In addition, it confirmed the effectiveness of the pre-treatment program provided it remained fully funded/supported (ibid., p. xiii). Another report noted a continued overreliance on prison, the marginalization of Aboriginal peoples in society (particularly on reserves) and the significant effect of childhood/family dysfunction on criminality and how these disadvantaged individuals move out into urban populations out of desperation (La Prairie & Ministry of Solicitor General, 1996, p. ii-iii). It goes without saying that (government-defined) risk variables are significant factors behind prison sentences, that on-reserve communities have different risk factors than off-reserve ones, and that prison/incarceration is considered overused and mostly ineffective in comparison to an integrated community approach (ibid., vi-viii).

There are a wide variety of such government-produced Aboriginal justice reports, and they all address the same general findings. A series of three reports released in 1998, in particular, have focused on urban Aboriginal corrections (APC 17 CA (1998)), the role of Aboriginal elders in sex offender treatment (APC 18 CA (1998)), and community corrections and healing projects for Aboriginal peoples (APC-TS 3 CA (1998)). All three reports have found the need to have integrated support for programs in communities/prisons, an organized and

planned response to these programs, and for both government and Aboriginal peoples to be respectful to one-another[3]. More significantly, these and similar conclusions have been echoed by the comprehensive work contained in the 1996 Report of the Royal Commission on Aboriginal Peoples and their roundtable on Aboriginal Justice issues, and even then these issues of integration, funding, and the restoration of Aboriginal-made justice initiatives were yet to be acted upon by the Canadian government (Blackburn, 1993, p. 35-38). Even more general research – on all offenders – reached similar conclusions with regards to the long-term problems caused by incarceration regardless of the background of the prisoner. In one such report, prison terms (particularly long prison terms) are more likely to exacerbate criminality (Smith at al., 2002, p. 20-21). In another general research report, conducted in 2005, Aboriginal peoples continue to have a lower socioeconomic status than the general Canadian population (Ekos research Associates Canada (EKOS) & Canada, Indian and Northern Affairs Canada, Communications Branch, Strategic Planning, 2005, p. 3). What was striking in this paper was the finding that cultural support was also significant for the purposes of gaining some measure of self-esteem and self-determination (though not to the same degree as socioeconomic elements), that the change from reserve to urban living is the main factor behind the frustrations and problems faced by

[3] pages ii-iii, 30-31, 38-39, and 49-53 for Linden, Clairmont & Government of Canada, Aboriginal Corrections Policy Unit in APC-TS 3 CA; pages 20-30, 33-35 for Nuffield & Ministry of Solicitor General Canada in APC 17 CA, and pages 15-16, 21-24, 27-28, 30, 33-37, 60-65, 89-91, 93-101, and 107-111 for Ellerby & Ellerby in APC 18 CA

these Aboriginal peoples, and that better programs/support (or even the promotion or pre-existing programs) would be of great benefit (ibid., p. 25-26).

The main issue presented by these and other reports is the slow progress (if not outright failure) of the government of Canada to both acknowledge the social context and foundation Aboriginal crime/offending and begin sharing the responsibility (and power) to solve criminal-justice problems with Aboriginal communities themselves. Additionally, from a critical standpoint, there is an outright refusal to consider anything other than one-sided integration between the Canadian government and Indigenous communities. This perspective remains strong despite the fact that the recognition of Aboriginal self-determination would remedy many of the complaints about cultural disagreements or ignorance. There are also additional problems relating to the objectification of Indigenous peoples through the clinical and detached perspectives used as well as the formation and presentation of Aboriginal peoples as lacking any agency except when granted it by the Canadian government itself, effectively making the terminology and research process part of this alienating and colonial orientation. Gladue court research is related to these trends in that the courts in question directly implicate some of the community actors in the sentencing process. Furthermore, Gladue courts attempt to integrate these groups/organizations while also taking into account the individualized sentencing paradigm, a historical background focus, Aboriginal cultural awareness and assistance, and a sometimes complete

detachment from sentencing and enforcement orders (via diversion). Thus, part of this research is designed to also examine how these problems are manifesting in modern Gladue courts and how the different actors involved attempt to reconcile their seemingly contradictory orientations to justice – in this case, the contradictions are between individualized neo-liberal justice and colonial perspectives rather than the more commonly problematized punitiveness/rehabilitation paradigms.

Within Aboriginal justice and Indigenous theoretical literature, these and other themes continue. Dickson-Gilmore & La Prairie (2005) tackle more general issues of restorative justice and communal justice, and they note several recommendations which need to be followed if true restorative justice to be enacted – notably, a need to educate Aboriginal peoples about the nature of the Canadian Criminal Justice System, and a concerted effort on both sides to keep restorative justice and political imperatives separate (Dickson-Gilmore & La Prairie, 2005, p. 185-186). Restorative justice projects, as they are currently conceived, are decidedly alien to most Indigenous communities and have only incrementally improved the lives of local residents and alleviated concerns relating to continuing victimization (ibid., p. 187-196). Other authors have similar concerns with Aboriginal justice due to the seemingly uncritical implementation of its processes and the subsequent inability of associated programs to adequately meet either community or government demands for real and authentic change

(Moses, 2005, p. 228). More troubling, the empirical data implies that, when not correctly implemented, restorative justice (and even section 718.2 (e)) can lead to even more custody-based control and the creation of certain psychological and social effects that can increase the likelihood of reoffending/recidivism (ibid,, p. 229-230). These problems are exacerbated in the urban setting, where community links with offender/accused persons are lessened and governmental control is even stronger (Daes, 2005, p. 231-232). These works also argue that the causes of crimes are the same for Aboriginal peoples and non-Aboriginal peoples, so any meaningful change or improvements will be of benefit to the entire Canadian population (ibid., p. 233, 236).

These issues and related problems of government subordination are complemented by Craig Proulx in his assessment of the ALST's Community Council Project (Diversion) in Toronto. He posits that the primary goal and benefit of such programs are their ability to recreate/establish communities in the urban environment (Proulx, 2003, p. 185-186). Part of the appeal, and effectiveness, of this program is in this Aboriginal-focused orientation and desire to link offender/accused persons back into a community support network (ibid., p. 187-188). Most importantly, the CCP is not neo-liberal in orientation or as rigid in procedures as the conventional criminal justice system (ibid., p. 189-191). The CCP is, in both orientation and design, a way for Aboriginal peoples to engage with the criminal justice on their own terms while simultaneously creating a

community support network that is wholly reflective of their environment and priorities (ibid., p. 196-197). Diversion programs are significant in the context of this research in that, in their conception described by Proulx, they are able to meet the needs and requirements stated by Dickson-Gilmore and La Prairie while also simultaneously working within the pre-existing criminal justice system – Gladue Courts specifically. As will be shown later in the thesis, Gladue courts rely to a great extent on diversion resolutions. Despite this, their actual enactment and protocols are completely hidden to the court public and, in the research, it was not very clear if the judge or Crown prosecutor were aware of their protocols any more than the researcher was. As such, Proulx's work doesn't just shine a spotlight on the utility of diversion in the context of Aboriginal peoples and the associated problematic discursive framework of Aboriginal history, but it also serves to explain and contextualize procedures that were otherwise closed off to the researcher.

Wanda McCaslin's anthology on Indigenous and restorative justice tackles a whole host of related issues, voices, and concerns with regards to Aboriginal Justice – foremost among them being "decolonizing the law" and recreating it as a tool for empowerment rather than marginalization (Henderson & McCaslin, 2005, p. 5). This movement is, in their minds, not unidirectional. Colonizers and their government need to make authentic efforts to actually improve relationships with Indigenous peoples (Valandra, 2005, p. 42). As part of this process, a return to

community-centric and healing-based Aboriginal law is to be enacted (Lee, 2005, p. 100-101)(Cousins, 2005, p.146-147). Besides these general trends and discussions, the book also includes a specific section by Judge Turpel-Lafond on the nature and implications of the Gladue decision – the importance of cultural training, cooperation between Crown prosecutors and defense counsels, extra workload for defense counsels looking into background information, the need to ensure Gladue is not used as a simple reduction in custodial dispositions, the increased length of proceedings, and the change in outlook from being a judge to being a mediator between Indigenous peoples and an unjust/colonial society (Turpel-Lafond, 2005, p. 280-293). What is emphasized here is that Aboriginal-specific justice must take into account a multiplicity of values and actors while remaining both flexible and organized, particularly when specifically disadvantaged or disorganized groups are involved (Lane et al., 2005, p. 377-379). Indigenous justice, therefore, can be conceived as a holistic way of life and action rather than a simple procedure or organizational orientation (Breton, 2005, p. 430-431). For the purposes of the thesis, McCaslin's anthology highlights a new contradiction between Indigenous and colonizer frameworks, namely in how Gladue principles and courts are, at best, designed to mitigate the colonial discourses and orientations in such a way that the communities in question can actually speak their mind and maintain their own forms of justice. When such procedures are implemented in an urban context, judges and Crown prosecutors

must make it a point to actually create a community from the (presumably) divergent and unconnected groups of Aboriginal peoples in the setting. Therefore, from the perspectives of Indigenous-justice advocates and restorative justice, Gladue courts are expected to eventually hand off some of their authority and power to the community they serve in order to establish the social bonds that prevent criminality from developing in the first place. Specifically, Gladue courts are supposed to serve as liaisons between colonisers and Indigenous peoples and attempt to empower Indigenous communities and allow them to implement justice their own way. Thus, the research must also consider the contradictions and conflicts between both restorative and colonial justice and between rehabilitation and punitiveness, all while examining how power and legal authority is conceptualized in Gladue courts. It is possible that, as a part of the neo-liberal shift and the new punitiveness, this orientation and goal has become subverted into the control-focused and ultimately harmful forms of therapeutic justice described by Hannah-Moffat, Maurutto, Moore, and others – that is, as a tool for enhanced control and individual-pathology based ideologies that only serve to make marginalized individuals and communities even more so.

Indigenous justice theories can be considered counter-discourses to both the punitive turn as well as the neo-liberal and impersonal ideologies embedded in s.718.2 (e) and the modern penal orientation. Indigenous justice, as a concept, encompasses three aspects according to Usher and Lawrence (2011):

> "1. They address problems relating to collective experiences of historical and ongoing colonial trauma.
>
> 2. Their values and processes are rooted in Indigenous epistemologies.
>
> 3. They are implicated with broader questions of Indigenous jurisdiction over justice systems." (p. 91)

Criminological theorists have, as noted previously, utilized objectifying language and analyses that serve to create problematic discursive frameworks of criminality, specifically with regards to Aboriginal peoples. Because of this language, the approaches and methods advocated by the criminal justice system inevitably reduce issues of collective trauma to simplistic and individualized Aboriginal background reports and circumstances. Similarly, by remaining rooted in the current criminal justice system and the assimilation-based approaches of the Canadian government, the Gladue principles and related Aboriginal-focused 'sentencing alternatives' retain problematic elements that run counter to the aims and goals of Indigenous justice. Because of this, these government recommended revisions might be considered not just counter to Indigenous justice as a concept, but also the stated goals of the Gladue principles. Specifically, the difference lies in the focus within Indigenous justice on encouraging Indigenous-led alternatives and recognizing the circumstances of Aboriginal peoples and their link to systemic problems and the criminal acts they precipitate. Aboriginal over-

incarceration, in the eyes of Indigenous justice scholars, is about more than the courts and sentencing principles but extends into historical trends, cultural knowledge, and Aboriginal autonomy over their own justice initiatives.

A related problem that concerns the difficulties in implementing Indigenous justice is the way certain geographic variables can limit the ability of courts to implement and access Indigenous epistemologies and support. These variables are primarily based on the courts' proximity to two types of Aboriginal rehabilitative resources – actual Aboriginal personnel (to manage and create culturally appropriate programs) and financial resources (to maintain full-time personnel, rent/purchase property to hold such programs, and to inform judges, Crown prosecutors, defense counsels, and offenders/accused persons of the presence of such sentencing alternatives). In this research, Judges perceived financial resources to be more prominent in urban locations (where such programs and resources are better supported by government or non-profit organizations) and personnel as being easier to gather in rural and reserve locations (where Aboriginal supports, in the form of sureties, family members, or elders are perceived to be closer or more common). This perspective is only partially supported by demographic research done on urban and off-reserve communities. Most notably, urban Aboriginal peoples were predominantly immigrants to the city in question and have considerable difficulty finding affordable housing, employment, education, and childcare support that can allow them to actually

volunteer or work alongside rehabilitative programs (Ekos research Associates Canada (EKOS) & Canada, Indian and Northern Affairs Canada, Communications Branch, Strategic Planning, 2005, p. 9 – 13).

Conversely, rural provinces and locations have been found to have significantly high levels of disparity between Aboriginal and non-Aboriginal peoples with regards to community well-being indexes based on education level, employment, income, and housing (Clatworthy & Peters, 2011, p. 134, 140 – 141). However, based on that same research and Statscan (2006) numbers, Ontario has not just the largest total number of Aboriginal peoples but the second smallest disparity between Aboriginal and non-Aboriginal peoples. Therefore, we can see that the perception of urban Aboriginal peoples as being less able to support treatment programs (due to a lack of community) is partially incorrect, as such locations have significant numbers of Aboriginal peoples and smaller financial disparities than rural locations. It is possible that judges and other judicial experts may be misinterpreting the cultural shock and unfamiliarity with government programs faced by recent Aboriginal immigrants to urban settings as a lack of actual interested persons or third party supports, and this can stymie efforts promoting Indigenous justice initiatives (Ekos research Associates Canada (EKOS) & Canada, Indian and Northern Affairs Canada, Communications Branch, Strategic Planning, 2005, p. 9 – 10, 14 – 16).

There are still other misinterpretations of Aboriginal peoples and their experiences with the criminal justice system. Within the debate about the punitive turn there are also issues regarding the "Eurocentric debate" and its apparent recursions when examined from the standpoint of colonial studies (Brown, 2002, p. 404-405). Penal modernity is said to entail three main tenants: "rationality, scientism, and restraint" and these elements are presumed incompatible with neo-punitive ideologies (ibid., p. 403). When the historical injustices of the colonial era are analyzed (in India, specifically) then there is a clear synergy between penal excess and the leniency of modern carceral systems (ibid., p. 409). Within India these systems formed to create an Indigenous (Indian) criminal identity based on racist and colonial biases, with the primary threat being their resistance to the evolution of the colonial state (ibid., p. 413). The identification of "criminal others", the subsequent advocacy for harsh punishments, and the emphasis on criminal "risk" were all part and parcel of the colonial era and emerged in response to conflicts within that context (ibid., p. 417-419). In this respect, O'Malley's theory is expressly referenced and described as an exploration of the modernization process itself rather than a sign of its dysfunctions (ibid., p. 419). Criminological literature, and its Eurocentric biases, ignore these colonial contexts and their significance as predictors of the punitive turn; in addition, they mimic their discourses and frameworks when they speak of and utilize clinical and (presumably) neutral terms such as 'criminogenic needs' or 'risks'.

Even outside of the punitive-turn thesis, there are express differences between Indigenous and criminological literature with regards to the use of Indigenous epistemologies and perspectives which aim to remedy problems of otherization and risk-need analyses. These terms and processes are intrinsically linked to this modernization perspective and the related colonial processes. In a Gladue context, these terms are supposedly remedied via the greater Aboriginal cultural awareness – unfortunately, the routines of the court and overarching ideological focus on practical issues keeps these problems present. The main exception to this is diversion agreements with the CCP, which is expressly utilized outside of the court system and aims to emphasize the human element of the Aboriginal person in question. The Indigenous theorists discussed previously – notably Craig Proulx – are the ones who best express how Indigenous justice frameworks can help to mitigate this perspective and allow modern penal practices to be divorced from their colonial frameworks and interpretive schemes. If implemented more thoroughly, these sentencing alternatives can limit or subvert the problematic neo-liberal and Eurocentric ideologies collectively covered under the term of penal modernity.

Legal History

Much of the history (legal, academic, or otherwise) relevant to this research thesis ranges from decades-old to the recently written. As such, an

exhaustive discussion of all the legislation and research even remotely related to the topic would not be possible. Instead, this section will focus on relevant past events as well as how public and political viewpoints on the topic of Canadian courts and Aboriginal justice are now rapidly shifting.

The first official government recognition of the problem of overrepresentation of Aboriginal peoples in Canadian prisons occurred in 1967, when the Canadian government finally recognized the trend and stated its intention to curb the trend (Monture-Angus, 2005, p. 275). By 1991 this trend had continued unabated and a new paper by the Law Reform Commission of Canada initiated a new two-pronged approach to Aboriginal justice. First, the criminal justice system must make an effort to reform the way it deals with Aboriginal peoples in the system, specifically "'accommodating' aboriginal culture, experience, and tradition within the existing justice system" (ibid., p. 276). Secondly, Aboriginal peoples themselves must make an effort to recreate indigenous "justice systems" and attempt to implement them in conjunction with the Canadian penal system; their recommendation was that Canada must give up some of its autonomy in this respect, and allow Aboriginal communities to create their own individualized programs and organizations (ibid., p. 276-277).

In 1996 a second major change with respect to Aboriginal justice occurred with the addition of s.718.2 (e) in the criminal code of Canada and its subsequent

clarification in the famous case of R. v. Gladue. The case involved a 19-year old Aboriginal woman named Jamie Gladue living off-reserve charged with killing her boyfriend. She was found guilty of manslaughter and sentenced to three years in prison, on the grounds that section 718.2 (e) of the Criminal Code of Canada did not apply to Aboriginal peoples living off-reserve (R. v. Gladue, 1999, para.15-18). She then later appealed to the British Columbia Court of Appeals that this provision did in fact apply to her regardless of where she lived; the court unanimously agreed with her argument that s.718.2 (e) did apply to all Aboriginal peoples, but only one judge dissented with the sentence ordered (ibid., para.19-23). Eventually the case was appealed to the Supreme Court of Canada, who agreed with the Court of Appeals with regards to s.718.2 (e) and the requirement 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" (ibid., para. 24). In addition, they spent a considerable portion of the case outlining the history of the sub-section, the continuing overrepresentation of Aboriginal peoples in the criminal justice system, and the specific application of s.718.2 (e) (ibid., para.25, 28). The Supreme Court thus affirmed that the sub-section required judges to approach Gladue's sentence differently :

> In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more

> importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case … What s. 718.2(*e*) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(*e*), and the legislative history of the provision all support an interpretation of s. 718.2(*e*) as having this important remedial purpose. (ibid., paragraph 33) (Emphasis in original).

The main effect of the Supreme Court decision was in these and similar statements. Primarily, that "prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender" (ibid., para.36) and that "the background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly: (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." (ibid., para. 66).

This guidance to the lower courts holds particular importance to the current research thesis, as it and subsequent sections of R. v. Gladue describe the importance of certain information for cases involving an Aboriginal person as the defendant, but contains only vague guidelines on how to implement these background considerations or to find Aboriginal-led or otherwise alternative justice regimes. It is in light of this problem that certain Canadian courts have not

just implemented specialized dates and locations for these Aboriginal-specific cases, but have also invited assistance and support from Aboriginal legal groups and professionals in order to facilitate the overall examination process. As detailed previously, the first set of Gladue specific courts emerged in Toronto in cooperation with Aboriginal Legal Services of Toronto. In other provinces, these Gladue-focused courts were considered (in the eyes of the judiciary) already present due to demographic issues, emerged in concert with other specialized courts (domestic violence, or drug treatment courts, specifically), or were already embedded in Aboriginal communities (April & Orsi, 2013, p. 5). The primary focus of the research paper, then, is in identifying how these specialized 'Gladue courts' approach section 718.2 (e) while taking into account new legislation that may limit their ability to find appropriate alternatives or stymie the flow of resources that provide them with the context to make alternative orders in the first place.

Recent Developments

Recent commentaries on new and old criminal legislation throw even more confusion over the exact role Gladue and other rehabilitative courts play in contemporary criminal policy. As late as in 2009 the then minority Conservative government of Canada began rolling out "tough-on-crime" legislation that was attacked by political opponents and undercut by its own inability to offer actual

proof that mandatory minimum penalties work (Geddes, 2009, p. 21). When their 2008 omnibus bill became enacted into policy in early 2013, a raft of new criticisms and outright defiance of the policies therein came to the fore. For instance, on November 12, 2013, the Ontario Court of Appeal struck down section 95.2 (a) of the Criminal Code of Canada regarding a mandatory minimum of three years for any possession of a loaded restricted or prohibited weapon on the grounds that it infringes section 12 of the Charter of Rights and Freedoms – the clause forbidding cruel and unusual treatment or punishments (R. v. Nur, 2013, ONCA 677, s.4, 205-207). In another instance, the Correctional Investigator of Canada tabled a report noting that over the past decade there has been a 75% increase in visible minority inmates, an increase of 80% in incarceration for Aboriginal women, and a 23% increase in the costs of corrections – all for a negligible change in crime rates (CBC News, Nov 25 2013). Even prostitution laws and the changes to the victim fine surcharge (VFS) have been targeted by judges, such as the recent Bedford case (wherein the anti-prostitution clauses recently enacted where deemed unconstitutional due to their excessive scope and infringement on their constitutional security of the person) which struck down three prostitution laws on the basis of the Charter yet again, and the subsequent criticism of the victim fine surcharge by judges who argue the costs are unrealistic for most offenders (CTVNews.ca, Jan 7 2014).

In a surprising twist, even conservative pundits are sceptical of the recent changes – an editorial by Christie Blatchford in particular called the changes to the victim fine surcharge "boneheaded" and the planned changes to victims-rights and criminal justice involvement inappropriate in light of recent changes (Blatchford, National Post Online, Dec 17 2013). The implications for this research and past punitive academic analyses are obvious, as there is now a conflict between Conservative ideologues and academics, judges, and bureaucrats on the basis of the new punitiveness in its more American form. Whereas past legislation (the YOA and YCJA) were primarily 'punitive' in orientation due to their focus on making punishments less arbitrary (and thus able to respond to specific circumstances and treat relevant problems) more recent changes – notably the 2013 Omnibus Budget Bill/Bill C-38 – are expressly referencing American political rhetoric, identifying prison as the only solution to criminal acts, and are dismissive of scholarly and government research that shows the effect on crime rates is negligible. What is intriguing is that the conflict between all these ideological orientations is being fought in courts and in public opinion pieces. Through constitutional challenges judges are making particularly harsh new punitive legislation null and void, and advocates for more egalitarian and efficient justice are speaking out and making their case that the new legislation has no basis in actual policy or evidence-based research. The new punitiveness' scope and implementation cannot be determined simply by examining any new

legislation passed, but must also take into account the ideological underpinnings of its supporters and the way the directives can be subverted through the actions of judges and other legal professionals. Thus, within Gladue courts, we can see how rehabilitative orientations don't just clash and combine with new punitive policies and neoliberal contradictions, we can also attempt to analyze how informal protocols and processes give Gladue courts the option to override neo-punitive legislation in favour of what they feel best exemplifies the proper role of Gladue courts. Whether this leads to a utopian welfarist orientation, the neoliberal contradictions of the early 2000's, or a completely new ideological principle is part of the major research goals of this thesis.

Methodology

The research thesis took the form of a three-part research plan that aimed to triangulate the various methods and processes used in Gladue courts, both in and out of court. The initial overall research stage was made up of three parts – observation, transcript analysis, and interviews/data analysis. Note, however, that due to constraints that will be addressed later, the interview section was eventually subsumed under the observation portion, therefore making the final research plan two-part.

Observations took place at the three main Gladue courts in Toronto – 1000 Finch court, College Park court, and Old City Hall court. I observed near weekly

at the 1000 Finch court from May 5, 2013 to November 4, 2013. College Park court was also observed weekly, from July 11, 2013 to November 7, 2013. Finally, Old City Hall court held Gladue cases twice a week (Wednesdays and Fridays) for the full day. I observed at least once a week from May 15, 2013 to November 6, 2013. Notably, I also attended during mid-December and mid-January 2014 simply because as I was present at the court for other business relating to transcript orders. Additionally, three weeks involved both Wednesday and Friday observations, making this the setting with the most observation days total. As a final note, due to transportation issues, observations at Old City Hall were often finished before all the cases were concluded – around 4:00 pm.

The observations themselves were done naturalistically. I entered the court as a public observer and simply recorded what was said, done, intimated, implied, or performed. Recording devices of any electronic origin are not allowed in court, so all observations were made by pen and paper. Additionally, prior to the start of the proceedings, I would copy the day's docket, which contained the names and offenses of the accused persons assigned to the court for the day. Notably, some of the dates had no docket available, I was unable to copy it in its entirety, and/or it was missing certain cases/offenses. In these circumstances I did my best to record any relevant information from the statements made by the Crown prosecutor and defense counsel. Note that the reverse was sometimes true, as not all the cases on the docket were heard each day and some offenses were

incorrectly added to the docket. As such, I combined both observations and docket recordings in order to get the best picture possible of the current day's proceedings and the crimes being discussed during a case.

The overall methodology for observation, and the data analysis to a lesser extent, was similar to research done by Bouhours & Daly (2007). In their examination of the sentencing remarks by judges to youth sex offenders in Australia, they analyzed the sentencing remarks and rationales of the judges in question, referring to a precise transcript of the speech made (p. 376). Unlike this research thesis, they did not cover the preceding remarks from the defense counsel and Crown prosecutor, such as a summary of the offense, the offender's criminal history, or relevant mitigating or aggravating factors (Daly & Bouhours, 2008, p. 505). Conversely, this thesis did not have verbatim transcripts of the sentencing speech by the judge except for those few cases which had transcripts ordered for them. Both this research and theirs did not extensively cover those whom the remarks are directed towards, the judge's aims, and whether or not the offender understood the sentence (ibid., p. 506). Their research also used a similar analysis procedure as in this paper, specifically in the way some content analysis procedures (using a detailed coding schedule) were used in concert with deductive and inductive approaches in order to understand the "latent and manifest" meanings of the case (Bouhours & Daly, 2007, p. 378). However, this research thesis also integrated discourse analysis methodologies as part of the coding

process and looked at the relationships between the code sets, patterns within them, and the formation and presentation of such speech and conversations. Furthermore, as a result of the limited number of transcripts available to order, certain transcripts were marked as particularly relevant or interesting during the observation period and analyzed after this coding process was complete (typically due to delays in receiving such transcripts). It should be noted that, despite the divergent topics, there was some similarity between the conclusions reached by their research and this one, notably the way the sentencing remarks/rationale was primarily a "one-way" performance and that it often included threats to escalate the punishment in the event of reoffending (Daly & Bouhours, 2008, p. 513, 515).

Court cases marked as particularly interesting or important enough to require transcripts were based on a few different informal criteria. For one, I made it a point to try to have a roughly proportional number of cases from each location. This proved particularly difficult for 1000 Finch court, as it had few full-length cases until later in the observation timeline. Conversely, Old City Hall and College Park had a surplus of such cases, and I decided to prioritize those cases that had the greatest number of discourses related to the research criteria and/or were relatively short cases (and therefore less expensive to order a transcript for). Additionally, transcripts were ordered as soon as possible since the process takes time and it was necessary to ensure that they were finished prior to the beginning of the writing phase of the thesis. In general, the main research criteria I wanted to

examine through the transcripts were the presence of new punitive issues (new legislation and drug crimes most notably) or notable instances of punitiveness being subverted (particularly when in conflict with the new punitiveness). Unusual and informal comments by any actor – notably the judge or Crown prosecutor – were also significant elements I wanted to examine in a transcript. Some cases would have transcripts requested simply because the offender/accused person was in a transcript already requested, and in this instance I was interested to see how different judges approached the same offender/accused person or crime and if the discourses or sentence changed and for what reasons. When possible, I tried to focus on guilty pleas rather than bail hearings, as the sentencing principles being researched primarily influenced those sections of the Criminal Code. Lastly, I also attempted to prioritize any interesting cases that involved female offenders/accused persons, as Gladue courts deal with both men and women. Specifically, judges during the observation period have commented that Gladue courts see a larger proportion of women offenders/accused persons than any other courtroom – a statement buttressed by recent data showing that the incarceration rate for Aboriginal women has increased by 80% over the last ten years (CBC News, Nov 25 2013). As a result, it was important to have at least one transcript involving an Aboriginal woman in order to better analyze this troubling trend. Once a case was deemed particularly relevant based on these criteria I would then fill out a request form and make the order the next day. Usually, I

would go over all the cases observed every 2-3 weeks and make note of any interesting cases, then fill out the forms for 1 or 2 cases to be dropped off at the start of the month.

Observations were later transcribed by hand into a Word Document, often with one document per day of observation. Afterwards the files were imported into WEFT QDA qualitative analysis software and coded as described in **Appendix A**. Each 'group' of code-sets were coded in their entirety before moving on to the next set, primarily to allow for both an exhaustive coding procedure, and to ensure that the coder did not give preference to certain similar code types. Additionally, over the course of the analysis some new code-sets would be created if they were necessary and others would be revised if mistakes were spotted. Several code-sets were designed to both provide interesting cross-tabulations and observations as well as to provide 'sanity-checkers' to ensure that the problems and limitations of the software were mitigated as much as possible. These problems, when present, were mentioned in the relevant table and analysis. To summarize them briefly, the primary issue involved the software interpreting the relationships between certain code-sets as being less numerous than they should be. In many instances, this problem was inconsequential (as the main concern was with the rates and percentages of these code-set relationships) or remedied by directly checking the relationships by hand.

Data analysis occurred afterwards, and followed a two-stage process. The first stage was a simple review of the relevant code-sets, often via cross-tabulations to see where some similar codes coincided. In some instances these code-sets would be cross-analyzed with other more general coding categories such as total case numbers (to eliminate repeat instances within a case) or the type of proceeding (to clarify the prevalence of certain charges, and to delimitate between the standard court proceedings and non-Gladue or incomplete cases). To specify, sometimes the court would hear cases involving non-Aboriginal peoples. This was often the result of the Gladue court for that day being combined with the general guilty plea court (due to a lack of cases or scheduling problems) or the result of a case from the previous day being transferred/moved to the currently sitting Gladue judge in order for it to be completed. 'Incomplete' cases involved observations that were never observed fully due to the case being traversed to another court (when Gladue court was particularly busy that day) or were cases that were left incomplete as the researcher had to leave before they had finished. That said, a direct observation of these two problematic case/proceedings types showed that they were small in number and small-talk/informal interviews with some court actors gave the impression that these non-Gladue cases were not too far removed from Gladue-specific policies. Regardless, after this preliminary reading a more complex cross-analysis amongst relevant topics would be enacted in order to see how certain discourses, cases, processes, and other code-sets

interacted and intersected. In some instances, this necessitated the creation of new code-sets in order to create the aforementioned ‘sanity checkers’ or when some code-set groups became big or distinct enough to necessitate the splitting of a pre-existing code. Some examples of these revised tables are **Table 2 : Treatment/Punishment Location by Proceeding Type**, and **Tables 5 & 6 : Sentencing Principles and Bail Concerns by Sentence/Decision**.

The second stage of the analysis entailed a detailed overview of the cross-tabulations between each code-set in the form of relationship tables, checking that certain groups were coded and counted correctly and deriving basic statistics and percentages across them in order to better understand the numbers and incidence rate of some significant code-sets. One such significant analysis involved identifying which codes-sets were repeated most often per case, and seeing which code-sets had notably high or low rates of direct/side-by-side referrals (for example, seeing if certain sentencing principles are directly mentioned alongside particular victim/offender/accused person characteristics or were stated as part of a different argument/submission). After this, a general analysis would be created, often once per code-set. This analysis would attempt to contextualize the findings and highlight the relevance of the statistics and observation to the overall research project. In particular, the analysis would look at unusual statistical inferences and comparisons to other related code-sets and attempt to explain any incongruities. After this process of observation and analysis was completed for each major code-

set of a table, a final analysis would be performed on the entirety of the code-sets in question. The goal of this final analysis is to draw comparisons across similar code-sets and explain the relationship between certain court activities, processes, actors, and discourses. After this process was completed for single table/code-set group, it would be repeated on another set. In some instances the analysis would skip some code-sets or combine particularly small or similar ones.

As part of the final data analysis stage, after all code categories/tables had been analyzed at least once, any particularly relevant combinations of code-sets would be created and observed/analyzed as before. The primary focus of this stage was to ensure that particularly interesting combinations of codes and discourses would be compared correctly and only after they were given an initial cursory examination via the above analysis. This additional analysis was therefore designed to both explain unusual findings from the initial analyses, but also to place certain important code-sets under a critical lens and ensure that all the aspects of interaction and relevance were examined. In total, the overall data analysis of just the code-sets took approximately 3 weeks, and it involved 11 tables and repeated incidents of revision with respect to the overall coding file as problems and errors were spotted. After this series of code-set observation and analysis had exhausted all possible interesting or relevant cross-tabulations, I reviewed all of the data and research gathered by them and began comparing with transcript observations in order to reach the final conclusions below.

Transcript analysis was much briefer than the observation and data analysis portions as the cases in question were included as part of the observations previously. The primary method of the transcript analysis was an in-depth analysis of the formation and presentation of the discourses utilized in court – their formedness (the formation and presentation of the speech), their organization on the basis of information exchange, and how certain structural elements affected their content (either formal requirements of the court, or socio-structural limitations). In addition, much of the transcript analysis also involved checking and cross-referencing some of the conclusions drawn from the observation, particularly as it related to the exchanges between the judge and the defense counsel or their client. After this, there was some analysis of how the transcription process itself may have altered or influenced the discourses spoken and served as additional structural or limiting elements. Finally, some notable cases or exchanges were detailed with respect to the general conclusions drawn during the data analysis.

The interview portion of the data analysis was originally designed as informal interviews that aimed to provide greater context for certain problematic cases or features. They were not designed as their own substitute for data or observations out of concerns that this would take too much time to fully incorporate into the research project as well as issues of confidentiality. As the observation periods progressed I gradually began developing rapport with the

court workers, Crown prosecutors, and defense counsels typically working at the Gladue courts. Unfortunately, only some were regular participants in Gladue cases and would not make good interview subjects. Despite this, several did agree to answer any questions I had or to be interviewed more formally. However, these interviews never came to fruition for both ethical and pragmatic concerns.

Ethical concerns were based around the confidentiality of the interview participants. As stated previously, only a few court actors were commonly seen in Gladue courts, and only a dozen or so could really be considered well-versed enough to provide adequate information or satisfying interviews. As such, any formal interview would likely breach rules of confidentiality and anonymity. Gladue court actors in Toronto are a small community – approximately 6-7 Aboriginal court workers, and an equal number of duty counsels and Crown prosecutors. Judges, unfortunately, rotated around the court too quickly for any rapport to be developed. As a result, I was forced to conclude that any interview process would be unlikely to fulfill ethical obligations while also providing valuable research data; this was in spite of pre-existing approval for such interviews.

Thankfully, court developments made the point moot. Many of the major court actors, including some judges, would inquire often about my research and answer any questions I had about the proceedings and Gladue court itself. While

this did facilitate much of the rapport-building mentioned above, it also helped to eliminate the need for me to actually engage in the interview process itself. Judges would even sometimes invite other researchers present in courts to brief question-and-answer sessions with the assistance of some Crown prosecutors and defense counsels. These, too, would provide me and other interested parties the ability to ask any relevant questions and receive answers off the record. As a result of this, the actual need for any informal interviews (on the basis of context exploration) was rendered unnecessary. Often, judges and Crown prosecutors would make it quite clear why they made the decisions and actions they did, leaving me with few questions about specific cases. These questions and other brief conversations were written down and included as part of the observation notes of the day in question.

This research and analyses were not without their limitations, both methodological and practical. One major problem was with the particular orientation and experiences of the researcher. Though the researcher had some experiences and knowledge of both court observation methods, criminal policy, and Aboriginal/Indigenous theoretical foundations, there remains problems of positionality due to his lack of connections to those communities as well as his academic orientation. There are also problems with interpretation of the data due to this positionality, as well as the way this may have coloured his observation notes during that phase of the research. It was due to these concerns that the researcher sought to analyze transcripts alongside his field notes. There is also the

possibility that these personal characteristics altered the reception/response from court actors with regards to questions and discussions.

There were also some emotional distress on the part of the researcher caused by the observation portion. About one case per week of observation would involve some form of personal crises on the part of the offender/accused persons encountered, and some of these would recount highly personal traumas that unfortunately would continue to occur. The judges, Crown prosecutors, and defense counsels present seemed to be aware of these particular individuals, and were similarly at a loss of how to deal with them. Though some form of emotional distance is necessary in any academic work, qualitative research of this kind makes such detachment difficult to do and such incidents frequently troubled me throughout the observation process. A criminological approach necessarily demands this detached orientation, though other approaches would see this result as valuable information and data in and of themselves. Primarily, this response could be seen as a sign of the humanizing effect of the background information process and limitations of the criminal justice system. Further examination of these cases and background reports, in retrospect, show these humanizing incidents and moments of individualization to be rare – most often, the offender/accused person was rarely presented as anything other than a series of tragic incidents and histories. This pattern of discursive framing contravenes the intentions of the Gladue decision and serves to objectify Aboriginal peoples and

subject them to the same racial and colonial biases of the past[4]. Regardless, in some instances the researcher was mistaken for an offender/accused person by the court or other members of the public, and some of these individuals became slightly embarrassed when he told them that he was a researcher and had no (criminal) business in the court. The defense counsel, court workers, and even a few judges were also particularly interested in conversation with the researcher, and these helped to alleviate his nervousness and feelings of alienation from the entire proceedings.

Another potential problem was the sampling method/section used for the court locations and cases. Due to financial issues, the researcher could only observe at Gladue courts in Toronto. While this was one of the best locations to study Gladue courts – the large Aboriginal population and two full-day courts are unprecedented in Canada – this does mean that the rationales and conclusions derived from them only apply to these or similar contexts. Three important elements in any Gladue decision – the effects of institutional racism, treatment centre access, and community supports – are differently applied to a large cosmopolitan urban centre rather than a rural community or a wide-ranging suburb. Even then, there are problems that arise due to the urban immigration of Aboriginal peoples into Toronto and how that directly changes the

[4] This problematic discursive framework of Aboriginal peoples makes up a significant portion of the **Data Analysis** and **Discussion**

offenders/accused persons seen in the Gladue court. As a result, we must take these conclusions, rationales, and interpretations with caution, as Toronto is an exemplary example of these factors and can only really be compared to other major metropolises.

A related problem is based upon the selection process for the transcripts ordered. Due to the previously discussed financial constraints, only relatively short cases could reasonably be ordered while maintaining a large enough sample size – courts charge per page, with most of the transcripts costing approximately $70 or so. Similarly, the researcher elected to select cases with notable or unexpected discourses rather than what could normally be expected, as well as a self-imposed limitation to have at least one transcript detailing a diversion and a bail. In addition, in order to have a somewhat broad sample of examples the researcher also desired to have two or more instances of the same offender being tried for different offenses/for reoffending. Therefore, these transcripts should be studied and analyzed with these conditions and problems taken into account – not to mention legal restrictions with regards to recordings and transcriptions within the court.

The technical problems related to the research process were primarily the result of the limitations of the coding process. The qualitative analysis software had some peculiarities – most significantly, it cannot adequately code separate

lines of code/discourses into different passages. A ‘passage’ is any unbroken set of text, typically between one to three sentences long. The problem is that if there are two passages coded identically which have no text between them, the program instead interprets/parses them as a single passage that may in fact be several lines of discourse /text long (or, alternately, a single line of discourse). Because of this, it is difficult to adequately gauge the frequency of certain discourses and their commonality in court contexts. Similarly, when cross-tabulating between certain code sets each passage only applies once, rather than any number of times required. For instance, if a single long passage of text is coded as [code a], and within that same text are two separate lines/passages coded as [code b], then the software cross-tabulation will only see one instance of direct correlation between [code a] and [code b] even when it should be two. Because of this, at several points in the research analysis it became necessary to recode substantial portions of the notes. In addition, it meant that some of the analyses had to take these peculiarities into account as they may have skewed the data in an unusual direction. This was primarily countered by the previously mentioned recoding and in-depth analyses, but the researcher also made it a point to check certain unusual correlations by hand and focus on percentage-based patterns/trends rather than the total values.

Another problem with the data analysis was the way the notes were made. As they were verbatim transcriptions of the notes made during the court

observations, there were several instances of short-hand terminology and many cases were split up due to the nature of the court proceedings. Though much of this was countered by including official transcripts into the analyses, as well as the researchers growing experience with such note-taking procedures, it did mean that the analysis software may have had several cases/numbers of cases increased due to their inclusion into data sets even when their practical value to the research was small. That said, the focus on percentage-based correlations and direct examination of the data helped to alleviate this concern. Furthermore, the fact that court cases are so split up and take place over multiple parts of a court session is an important finding that should not be ignored or made 'invisible'.

A final problem that only emerged late in the observation/research period was the rapid shifts in court proceedings brought on by recent criminal legislation. Most notably, changes to mandatory minimums regarding drug offenses and the raising of the victim fine surcharge and restrictions on waiving it. Both of these changes were put into practice mid-late October 2013, and unfortunately the researcher set a personal deadline to finish observation by the start of November 2013. As a result, only a few cases/observations actually managed to include these recent changes despite their critical importance to the overall research project. Thankfully, later in January 2014 there was a day in which more observations were possible and the changes between then and the previous observations were rather stark. As a result, these concerns are mitigated by this incidental

observation, albeit only partially. However, prior to these changes the court and related personnel were aware of the upcoming effects and mentioned/criticized them frequently off the record.

The Production of Transcripts

The actual processes involved in various cases follow a certain pattern. To begin with, nearly all of the cases/transcripts were 'split' between multiple court instances. That is, first the judge asks what case is ready and then requests that the accused person be brought up from the cells below. While they wait, the preceding case is resolved, paperwork is read in advance, or other conversations are spoken. These 'in-between' discourses are not recorded as part of the transcript. Once complete, the judge asks the defense/duty counsel what offenses will be resolved, if the case is a bail (and what onus, if so) and only after this does the proceeding begin. In some instances, questions/confirmations about Aboriginal heritage are performed here. A small number of judges/accused persons issue specific questions and discussions about the charges to be plead to. These questions are determined based on the judge/accused person in question; for instance, some judges are specifically concerned about this based on problematic past experiences, and some accused persons are known to plea regardless of the charges.

Following this brief conversation is the plea inquiry (in the event that it is not a bail proceeding). This takes up a significant portion of the proceedings, and entails a long question-and-answer session by the accused person and either his defense counsel or judge. In this instance, they are coached through the questions in order to ensure that they understand all the charges and what a guilty plea entails. Though this plea inquiry seems to be rather easy to answer, judges place great emphasis on the accused person comprehending the intricacies of pleading guilty and will be upset if it is later shown that they did not do so. After the inquiry has been satisfied, the accused person is arraigned in another long speech wherein the clerk simply stands and reads the offenses without interruption and little acknowledgement from the rest of the court. Some transcripts omit the arraignment entirely and simply have a notice that "the arraignment was entered at this time".

The facts of the case are next read by the Crown prosecutor. This is another long speech that is rarely interrupted, though in contrast to the others the Crown prosecutor may sometimes speak clearly and with authority or they may stumble over their words. This difference is predicated over whether or not the facts have been written down beforehand and have been written/noted in an easy to comprehend way. The facts, being derived from police reports and CPIC criminal records, are often scattered amongst different texts/sources and can sometimes contradict one another. It is when this confusion is present and the

Crown prosecutor has had little time to prepare their thoughts/read the work that there is the most apprehension and ill-formed discourse. The accused person, as well, may similarly stumble or show trepidation in speaking (admitting) the facts and will sometimes question them or clarify certain elements. If the accused person denies them or has a substantial enough clarification to make, then the judge will question him about these discrepancies since he supposedly was familiar with the facts based on the plea inquiry. While small clarifications may simply cause the Crown prosecutor to redefine an offense, an outright denial or substantial clarification can cause the judge to strike the plea out and order the defense counsel to prepare a trial date as a plea is inappropriate based on their response.

Once the facts have been read in and admitted by the accused person, the judge pronounces them guilty (thereafter referring to them as an 'offender' or convicted person) and the Crown prosecutor can begin their submissions. Often, the first submission is the offender's record, which must be reviewed by them or their defense counsel to ensure that the information is correct. Victim impact statements (VIS), if present, are also submitted at this time and given to the judge. In the event that the plea concerns multiple crimes or sentences over a long period of time, the judge will often ask the Crown prosecutor to explain and detail the dates of the offenses in order to create a 'timeline' and determine the time

between each occurrence. Following this, the Crown prosecutor usually offers their position with regards to the final sentence.

The Crown prosecutor's submission is where another long uninterrupted discourse begins, and it often entails several minutes of constant speech without outside inputs. Unlike the facts of the case, this position is stated (often read aloud) clearly and succinctly, with little stuttering or ill-formed discourses. In addition, the Crown prosecutor also speaks to aggravating and mitigating factors and how they directly influence their position. The Crown prosecutor also directly references and declares what they regard as the appropriate sentencing principles in this case and their relevance to the offender/accused person, victim, and/or the public. In some instances, the Crown prosecutor may also refer to some expected appeals and desires from the offender/accused person and leave them without comment or directly refute them on the basis of their reasonableness. In general, this is the point where the discursive processes and analysis mentioned in the upcoming data analyses occurs. It is usually at this point where the judge's mood and final sentencing position is 'set' and any following discourses and rhetoric only alters/shifts it by degrees.

After the Crown prosecutor's position and recommended sentence is stated, the defense counsel has his opportunity to speak. Typically, he will clarify the nature of the submission (joint or not) followed by the pre-sentence

(background) report of the offender./accused person If there is a physical copy of the report, then it is usually passed up to the judge at this point if it is not in his possession already. Background reports often start with upbringing-based histories, with an emphasis on the most severe circumstances and experiences – often with direct references to Aboriginal and colonial histories. The defense counsel, in another long uninterrupted speech, deliberately ties his rhetoric and sentencing principles to the offender/accused person's life and attempts to create a narrative that shows how these problems contributed to the charges in question. The judge, too, will ask questions about the background report in order to ascertain what influenced or precipitated the crime. Even without the background report, judges seek to understand why the crime occurred and will, if necessary, ask the offender directly. Other significant questions involve the relationship to the victim, ties to the location where the crime occurred, his current job/employment prospects, and past treatment histories. After the general background report, the defense counsel will begin to offer his major submissions. These background characteristics are where the Gladue principles are most often mentioned (and linked to the past background report) but frequently this section is an ad-libbed or improvised critique of the Crown prosecutor's case. These discourses, again, appear ill-formed despite the fact that the defense counsel is rarely, if ever, interrupted. This is likely due to the fact that the defense counsel is reacting to the Crown prosecutor's submissions for the first time, and needs to

consider the body language and initial interpretation of the judge. Even with these limitations, these final and major submissions are where most of the rhetorical power of the Crown prosecutor's discourse is derived and the judge's position shifts the most drastically.

Witnesses, sureties, or any other person to be directly questioned and sworn in are done so during the appropriate submissions – either the Crown prosecutor's or the defense counsel's. These questions are predominantly ill-formed despite their methodical formation and planned nature. The questions are often stated with hesitation and repeated if the answer is not understood or incomplete, and the answers themselves are stated slowly and with some stuttering and self-correction. The entire process is designed and acted out such that the witness is almost led into referencing the rhetorical goals and discourses of the questioner or deliberately echoes their specific interpretations and their links to the values and concerns of the court system. In effect, the witnesses are utilized as supporting discursive elements and are rarely utilized as a way to enter new submissions or topics into the case.

After all the submissions are complete, the offender/accused person is then asked if they want to speak directly to the judge or make their own submissions. Again, despite the predictability of this stage of the court proceedings (the judge is required to grant the them the opportunity to speak, and defense counsels notify

them in advance or let them prepare a written letter in its stead) the discourses made by the offender/accused person are typically ill-formed and stated in a nervous or cautious manner. Stuttering, hesitation, and the avoidance of direct eye contact are common. This can also be somewhat conversational in format, with the judge directly asking questions to the offender/accused person in order to directly confirm some facts or to engage with some of the direct submissions made by them. For instance, the judge may object to claims about treatment by referencing the record, or they may ask for more background information that was not disclosed in the background report.

Lastly, the judge makes their decision and the reasons for it. The explanation begins with a listing of relevant mitigating factors, and then aggravating factors. After this, the judge can rationalize or explain the applicability of the Gladue principles to the case in the event that such principles were slightly vague or otherwise unclear. Sometimes, the judge will directly speak to the offender/accused person (that is, use 'you' instead of their full name) and speak to their history – criminal, personal, treatment, or otherwise. What are most common here are direct reprimands or appeals regarding their potential treatment or future reoffending. This monologue gradually segues into a formal statement of the sentence and the relevant conditions, and this may also include a direct warning or appeal to them about the consequences of reoffending and the overall purpose of the sentence (i.e., the main sentencing principle). Probation orders, or

similar sentences, are explained in detail if applicable and the judge may ask the offender/accused person directly if they understand the conditions. Any waiving of the VFS, or the withdrawing of charges by the Crown prosecutor, are done last. With this, the case is over and the offender/accused person is escorted out with their defense counsel following.

There are some caveats and clarifications to be made here with regards to these surface observations and the typical formation and flow of the court. For one, sometimes the defense counsel makes their submissions before the Crown prosecutor, often when there is a joint submission. In these cases, the Crown prosecutor does little more than affirm what was said by the defense counsel rather than make the argument himself. Another rare discourse is made by the judge during the end of the Crown prosecutor's submissions, and it details a confirmation that their position is what was written down in the preparatory document rather than what was stated during their submissions. In this instance, the judge is deliberately looking to check that any discrepancies are not actual flaws but are the result of misspeaking. Lastly, some cases, notably bails, skip some sections or rearrange them. Bails, for instance, do not include an arraignment or a plea as the accused person is not being tried or admitting guilt for anything.

Discourse Analysis

The original theoretical framework of the research thesis was based on critical discourse analysis. As my preparatory readings on discourse analysis theories grew I began to consider the possibility that the new punitiveness and rehabilitative orientations are also used in both a functional and interpretive fashion; that is, as both a method of framing certain submissions and court statements and a tool for encouraging an offender to desist from crime in whatever way is best for them (Heracleous, 2006, p. 11-17). Critical discourse analysis theories were also relevant to certain criminological texts as well – notably, the so-called "catastrophe theorists" described by Hutchinson (2006) previously. In these theorists' eyes, the punitive shift is directly based around express goals of control and domination. In contrast, other discourse analysis theorists would approach the punitive turn via alternative discourse analysis processes in order to ascertain the effects of new legislation with regards to the separate domains within the criminal justice system (judges, police, Crown prosecutors, etc.) – O'Malley, Hannah-Moffat & Maurutto, and Doob & Sprott, for example.

Indigenous theorists are similarly divided on their conceptions of Canadian justice and their usage of critical theories, and those theorists that do utilize a critical perspective (such as McCaslin) can emphasize other analytical

processes when discussing Indigenous-led justice and restorative programs. The main issue is that this research thesis is primarily built upon the work and research of these authors and must necessarily consider their approaches and methodology when deciding what orientation is most appropriate for this thesis. Because of the divergent approaches utilized by different authors, the decision of what process to utilize is more difficult to make and adapting only one may emphasize certain processes and conclusions at the expense of other equally valid ones.

It is probable that critical discourse analysis is effective only in the context of the Canadian punitive turn and politicking (that is, not the effect/implementation of them in Gladue courts). Primarily, this is because many of the criticisms and examinations made of the punitive turn and the criminal justice system are based on macro-level processes and legislative trends rather than the unique and particular implementations of them 'on the ground' or in courts. In this macro- context, all three elements of discourse – textual, discursive-practice, and social-practice - are exemplified and the ideologies and power embedded in them are explicit. For instance, textual elements are at their most literal – legislation directly calls to mind punitive elements, politicians repeat party lines and slogans verbatim, and the media echoes public concerns and outcries in a way most beneficial to their ratings and political concerns (Blommaert & Bulcaen, 2000, p. 448). Discursive-practice elements are also expressly called up in the ways that legislation is conceived and moved through

the political and public realms until finally being signed into law; ultimately it ends up in the courtrooms where a second stage of contextualization and alteration is performed (ibid., p. 448-449). Finally, social-practice elements are the end-goal of the legislation and call to mind domination and control as the express purpose of any law. This includes the use of discourse in creating popular conceptions of criminals and citizens such that particular political power is maintained and ideological and normative conceptions of justice are made a tool for greater influence (ibid., p. 449).

In this context, the classical Foucauldian conception of modern penality and discipline is directly referenced and compared to the precursor eras where punishment and repression were key elements (Seidman, 2008, p. 181-182). This orientation fits perfectly when broad strokes of the new punitive movement are examined – particularly catastrophic conceptions of the new punitive turn – but is too focused on both the extremely powerful and extremely weak actors to accurately represent the multiplicity of actors in the court context and the subversive discourses and methods they use. Court agents can be aware of the importance their speech has on the proceedings and the way it may influence the future prospects of offenders (directly via the sentence, and indirectly due to the associated effects of it) and to make the argument that they are unaware of these elements and effects – either on the record sentence or associated effects – will similarly rob them of the agency and reflexive thought already shown through

existing criticisms of discourses and orders that they feel are inappropriate. In some instances, judges and lawyers will call these discursive practices out on their obviously divisive goals and attempt to challenge them in their own way.

Thus, outside of a general broad-strokes analysis, critical discourse analysis and the Foucauldian paradigm fall into significant problems, particularly issues of reductionism (with regards to the reasons and meanings behind discourse) and an overreliance on psychoanalysis (wherein there is a suspicion of what is manifest and a preoccupation with the hidden meanings of texts) (Burman and Parker, 1993, p. 158-160, 163). These problems are also related to criticism by Martyn Hammersley, who notes that some researchers utilize the orientation in an overly polarized and activist manner and (in the case of the current topic) this could lead to an excessive focus on offender/accused persons and judges/politicians rather than other court actors and could also encourage inappropriate comparisons to all courts and jurisdictions rather than delimitating between specialized and mainstream/criminal courts (Hammersley, 1997, p. 239, 244-245).

Interpretive discourse analysis, in the context of this thesis, is primarily concerned with four out of the five main approaches identified by Heracleous : hermeneutics, rhetoric, symbolic interactionism, and storytelling (Heracleous, 2006, p. 38). All of these methods are primarily applied to the court setting and

submission stage rather than political or out of court elements . It is partly because of these ‘on-the-ground’ elements that this discourse analysis theory is considered more relevant for Indigenous-led and non-catastrophe theorists. These methods allow for reflexivity and agency to be granted to both authorities and those they presumably control. Regardless of these factors, there are several different methods that may be relevant. For instance, hermeneutics is primarily concerned with textual interpretation, and is therefore fundamentally related to the way judges and Crown prosecutors interpret both statutory law and background submissions relevant to the offender/accused person (particularly the Gladue report). Though these interpretations may differ from that of the writer and vary from court to court, they are nevertheless standardized through judicial precedence and commentary as well as their specific historical context (that of the punitive turn, and rising Aboriginal and criminological theoretical scholarship) (ibid., p. 38-40).

Rhetorical approaches look at speech and arguments themselves as well as the context and situation in which they are used and their persuasive power. For Gladue courts, this approach is concerned with all the court actors outside of a joint submission, wherein each actor is appealing to specific rules/norms that are taken for granted or they are directly arguing against them on the basis of other competing rules (for instance, the new punitiveness can be argued against on the basis of practicality and effectiveness). Some of these common rhetorical

elements are enthymemes, which include unstated and assumed premises that are taken for granted by the audience/actors but not necessarily the larger society. These enthymemes can contribute to some of the conflict between lawyers/judges and the lay public/offender/accused persons who are not privy to the reasons for these processes/premises and who may mistake them for omissions or internal formal processes rather than spontaneous interpersonal constructs (ibid., p. 40-42).

Symbolic interactionism focuses on how interaction and meanings shape one another, often in an observational and interview context. Besides the obvious link to the methodology and the limits of the research thesis, symbolic interaction in the Gladue context is concerned with how certain meanings and discourses are institutionalized in the form of precedence and rote actions. Besides sentences and judicial discretion, symbolic interactionism can also apply to the small subset of actors involved in Gladue courts and how certain discourses and processes grow to develop certain meanings and roles alien to an outside observer. For instance, legal shorthand and informal processes that are used to keep the court moving smoothly or which occur behind the scenes that are outside the purview of the court yet nonetheless are essential to the overall process (ibid., p. 44-45). For similar reasons, symbolic interactionist theories can also directly implicate harmful or problematic discursive frames – built upon the assumptions and routines of the court and the values therein – that can undercut the presumed goals

of Gladue and which may lead to continued issues of unconscious marginalization.

Finally, the storytelling approach focuses on how stories fulfill certain needs for the storyteller. In the Gladue context, there are cathartic effects from the Gladue report and the ability for an offender/accused person to explain and humanize themselves given the larger structural effects that may have shaped their upbringing. This is slightly different than the normal use of storytelling methods, but it still emphasizes the presentation, context, and meaning behind the story and how its interpretation is arguably more important than its literal meanings (ibid., p. 45-46). In this instance, both Indigenous justice and criminological literature are both concerned with this element of discourse analysis from a framing perspective – notably, Hannah-Moffat and Maurutto's (2010) work on PSRs described previously.

Functional approaches view discourse as a tool for actors to use in their everyday lives. The primary method of discourse in this context is to create metaphors in order to allow for greater understanding, coercion, or to facilitate negotiation (ibid., p. 65). Metaphors utilize three forms – semantic (speech), spatial (location), and embodied (relational), though embodied metaphors go beyond this basic classification in that the metaphors and objects they relate to are often are constructed and practiced by the very actors in question, thus drawing on

contextual and particularistic settings and actors. That is, embodied metaphors are neither static nor universal (ibid., p. 65-67). Embodied metaphors, for instance, are actively created and changed over the course of societal interaction while being altered by the speech and locations therein. In this sense, they can be considered the result of an interaction process that integrates both semantic and spatial metaphors in order to create a discourse that extends into societal actions and modes of thought.

In the context of Gladue courts, functional uses of discourse revolve around embodied metaphors, primarily ones relating to the collective construction of the sentencing principles and their relation to the offender/accused person and his sentence. For example, Crown prosecutors and judges may differ on how specific deterrence is defined and to be enacted, and this metaphor implicitly references the offender and their circumstances. Following this, a metaphor of specific deterrence is created in reference to a particular type of offender (perhaps an unrepentant, violent criminal, for example), and this metaphor construction is repeated often enough that mentioning specific deterrence or a violent, unrepentant offender immediately calls both concepts and metaphors to mind. Thus, to an outside observer, some descriptions and discourses seem unfinished when in reality they are embodied metaphors that were constructed outside of their purview. In some instances, these metaphors can change subtly over time in response to new legislation or organizational imperatives, while in some cases,

these metaphors are directly challenged or questioned by an outside actor (defense/duty counsels, offenders/accused persons, or politicians) and are altered in turn or force a confrontation with unconscious thought patterns (ibid., p. 74). These types of embodied metaphors directly speak to Indigenous justice theories and concerns about the continued preference for Eurocentric definitions of justice as being solely about punishment or rehabilitation, never traditional "healing" (Henderson & McCaslin, 2005, p. 4)(Lee, 2005, p. 99-100). In these instances, embodied metaphors of the court system ignore anything other than rehabilitation or punishment based sentences and enforces a false dichotomy that marginalizes Aboriginal peoples on the basis of continued subordination to colonial legal systems.

A discourse analysis methodology as described above is particularly appropriate given the multiple types and functions of discourse in the court setting. Textual discourses arise from multiple actors and manifest in different ways – police reports, criminal records, letters, background reports, the sentencing rationale, and of course legislation itself. Verbal discourses also have different forms, from speeches summarizing (or emphasizing) the textual discourses above, Crown prosecutor and defense counsel submissions, formal statements and protocols, personal submissions and appeals, admonitions and pleas, as well as the final on-the-record sentence. There are even silent physical discourses/communication, such as the physical setup of the court room, the

different physical restraints placed on an offender/accused person, emotional outbursts, protocols relating to when speech is allowed, refusals for last statements, and omissions from textual discourses. These are not exhaustive lists, but the point to be made is that not only is there a deluge of information admitted to a court proceeding, but they each have different forms and are altered by both their presentation and application.

A simple background report, for instance, is the entirety of an offender/accused person's history and life, condensed into a document through an interview and written by a complete stranger to them. It is then given to defense counsels, Crown prosecutors, and judges who are similarly estranged and are not aware of any omissions or statements deemed unimportant by the interviewer or interviewee despite their possible relevance. After this, these actors discuss the report but only insofar as they can highlight information they feel is relevant to their goals and which can vary depending on the offender/accused person or the personality of the Crown prosecutor. Next, each of these actors must take into consideration all the information they feel is relevant and contrast it to what the others promote (even other actors outside of court, such as the public), eventually arriving at a ephemeral 'shortlist' of relevant facts and items that is then applied to the sentencing principles and legislation (which has in turn gone through much the same group reinterpretation process, both in the court setting and in the sense of norms and taken-for-granted beliefs). The methodology and interpretations

used to create this shortlist sets the precedent to be followed in subsequent cases with slight revisions and alterations, possibly to the point where it becomes a structure in and of itself (the scope of which can vary, but should be considered limited to the specific courthouse in question at the least). Thus, a simple conversation can, through the discursive process, come to influence national standards and practices with regards to Gladue courts as well as the smaller-scale organizational and personal activities relevant to the actual administration and application of the law and legal norms/beliefs.

Probably the most important part of the court process – and the main focus of the thesis – is the actual sentencing rationale. Each judge is expected to include a rationalization/explanation justifying the sentence with direct references to submissions or sentencing principles. This is a significant element of court discourse, as an observer is able to see how the judge interprets, frames, and alters the speech/text. For instance, the judge may ignore one mitigating factor in preference for another, or he may omit statements made by the offender /accused person on the basis that they are not important to the process. What is significant is that these patterns of interpretation/framing can be compared across multiple actors, offense types, and settings such that a pattern of interpretation and application of court discourse can be created and particularly relevant or important variables can be identified.

Furthermore, from the critical standpoint, discourses used in court or in relation to criminal sentences are quite literally used as tools of control and domination – albeit presented as beneficial in the grand scheme of things. These discourses also go through the communal interpretation phase as described above, and therefore implicitly involve Foucauldian conceptions of unspoken discourse and how speech from positions of power can be used to marginalize and render other positions invisible. For instance, judges often abstain from directly mentioning harmful colonial policies even when they are relevant to the circumstances of Aboriginal offenders (as the Gladue principles dictate). That is, they would mention incidents of foster care, cultural genocide, and forced assimilation without directly naming the racist government policies in question that created them. In so doing, they erase these events and make them seem legitimate in the eyes of society. This specific utilization of Foucauldian thought is directly implicated in the theoretical frameworks of Indigenous justice literature, where theorists posit that the modern system of enforcing subjugation and "assimilation" is not just counter to Aboriginal peoples' beliefs, but also rooted in colonial thought and ultimately counterproductive and self-defeating (Huculak, 2005, p. 161-162). Similarly, offender/accused persons who reference colonial frameworks (in the form of background incidents of racism, institutionalized or otherwise) can directly challenge these and other dominating discourses with respect to the egalitarian preconceptions of Judges and public

norms. The effectiveness of these criticisms differs depending on how dehumanized the Aboriginal person becomes through these impersonal background processes and the clinical orientation of the modern judicial framework, though Gladue courts are designed to allow an offender/accused person to feel a sense of community and present themselves as more than a alienating list of criminal charges and risk/need analyses. More significantly, judges need to consider how sentencing principles and legislation can possibly legitimate these dominating colonial frames and actions while taking into account contradictory demands and directive from defense counsels, the Gladue decision, and legislation such as the Charter. In this sense, the conception of "penal modernity" is contrasted with neo-punitive reactionary ideologies (as in the criminological literature) as well as Indigenous justice critiques and arguments that challenge the racial basis of the legal system as well as the recent conflicts presumed by catastrophe theorists (Brown, 2002, p. 403).

Interpretive and Functional approaches are preferred in comparison to classical critical discourse analysis because of the important micro-elements involved in this paper's analysis and methodology as well as their emphasis on evaluation and shared construction of the discourses observed/anticipated. These factors are still present in Foucauldian critical discourse analysis processes, but are (in the evaluation presented here) more prominent in the alternative approaches. In addition, these elements are essential to the analysis topic since the

primary focus of the thesis is the specific judges within certain Gladue courts as well as their reactions/adaptations to neo-punitive policies. As a result, these approaches were prioritized over a critical discourse analysis but did not completely override it, particularly when the analysis turned to larger macro-trends or specific instances of controlling or domineering discourses. This understanding and application of discourse analysis is therefore primarily defined here as an explicit examination of textual and verbal information in order to understand the phenomena and processes behind sentencing rationales in the contemporary Gladue court context. As a result, discourse analysis in this thesis is oriented towards the verbal application (speech) of textual and verbal directives (court submissions and criminal legislation, respectively). This orientation, in turn, is predicated upon the presumption that there are multiple directives and that the speakers in question must reconcile them or utilize alternative discourses to avoid incongruities between the two. This reconciliation process, if it is present, is the primary focus of the thesis and overall analysis.

Discourse analysis is therefore the only real means for this examination of judicial reconciliation to occur. Criminal legislation is discourse in and of itself and as described previously there have been contradictory findings and results from academic research focused on Canadian criminal legislation (with little research done on their in-court implementation). The contemporary contradictions between the Gladue principles and s. 718.2 (e) and new punitive legislation like

the Omnibus Budget Bill/Bill C-38 act as further signs of conflict within the ideological and moral frameworks of the Canadian criminal justice system. When we take these issues into consideration and how this conflict is escalating, it becomes more apparent that formal court speech and discourse are being used as tools to promote these ideologies while also being the very subject matter that is being debated. Thus, we come to the research subject itself – the judge and Gladue courts. In Gladue courts, the difficulties in reconciling rehabilitation and punitiveness becomes ever more apparent due to a more explicit directive to rehabilitate as well as the historical and contemporary patterns of domination and control inflicted on Aboriginal peoples though various agents of Canadian society, including the courts themselves. Additionally, Gladue courts involve a multitude of non-court actors as well as agencies that can possibly support or criticize the criminal justice system. Judges are also uniquely suited to a discourse analysis, as they are required to actively navigate a multitude of discourses – from within and without the court – while also having to rationalize their decisions and sentences in respect to these submissions and considerations. If we consider less critical orientations or frameworks, we must still take into account how this negotiation and reconciliation process is constituted and representative of other outside factors and past patterns of discourse, thus highlighting possible institutional inertia and the way that distorts the fundamental application of justice. That possible distortion is one of the main concerns of this thesis, as there is a need for

criminal justice legislation to accurately reflect political priorities (whether based on the Charter of Rights and Freedoms, the prerogatives of the Judicial system, or partisan political issues), and this discourse analysis can explain how these distortions occur and highlight possible ways to remedy them. These priorities differ in their primary ideological framework and goals, and only judicial values and charter-based priorities have shown even tacit support for reducing Aboriginal people's overrepresentation in the criminal justice system. Partisan priorities (in the form of direct political ideologies within the neo-liberal Canadian political system) can even be considered opposed to this attempt at healing the damage caused from colonial and racist policies and support the continued escalation of Aboriginal over-representation within the justice system.

The other main concern – how these political priorities are indicative of rehabilitative and neo-punitive ideologies – is to be discussed in light of judicial discretion and negotiation, which is similarly based around discourses (functional, critical, or otherwise) and their eminently social construction. Thus, the Gladue court setting serves not only methodological problems of sampling and/or procedural concerns (the cases heard and the explicit directives), but it also highlights the area where these conflicts, questions, and contradictions are made most apparent. The discourse analysis to be performed in this thesis is not just utilizing this topic out of a personal preference, but also because it is the perfect arena in which to examine the academic and political issues currently being

debated as well as their long-term effects on Canadian society, Canadian norms, and the actual implementation of justice itself. More starkly, it can also illuminate how recent attempts to decolonize Aboriginal peoples may be in conflict with contemporary colonial institutions and reactionary legislative changes.

Data Analysis

Preliminary Information

I will begin with some details of the research process and the locations of the research. All of the observations were written and transcribed in point form as the court dialogue was far too fast to be recorded in its entirety, and much of what was said were based on form responses or formal statements with the offender/accused person's name in the correct location. Furthermore, many cases were 'broken up' over the course of the observation as different actors would bring up a case only to be interrupted by another one. As such, the actual observation note transcripts often have some cases divided up over the course of the day/observation and have some repetition of statements/discourses/data as the case is brought up later on in the day. Most cases do not suffer from this effect, but the transcripts maintained this separation in order to properly emulate the sometimes confusing nature of court cases. Note that some interesting cases had transcripts ordered for them, and as such their unique analysis and data will be done separately from the observation and cross-tabulation analyses. The following

sections will entail references to the terminology of the coding software as well as some of the problems and quirks of its parsing logic. Furthermore, many of the code cross-tabulations and relations have some interesting correlations and values that will make up much of the focus for their respective sections. See **Appendix B** for an explanation about the coding software and terminology, and **Appendix C** for the interesting correlations and notes. These interesting correlations and notes form the bulk of the data/information to be discussed, and should be considered integral to understanding the discussion or used in lieu of directly reviewing the specific cross-tabulation table and noting the intersections personally.

The research took place over three court locations. 1000 Finch Court only holds Gladue court for half a day each week and is often combined with non-Gladue guilty pleas. It is also primarily concerned with shorter cases and often had less than 6 cases per day; moreover a majority of these cases were remands or otherwise rescheduled. As such, 1000 Finch Court is not a significant location with respect to this research, though many cases and outside support workers do sometimes attend there. College Park and Old City Hall (OCH), on the other hand, both contribute roughly the same amount of data to the overall research, with slight differences in that College Park has longer proceedings than OCH on average. OCH and College Park sometimes transfer cases to and from another, though OCH has slightly more support in the form of specialized courts. Because of these factors, the majority of cases and observations are drawn from College

Park and Old City Hall, with their differing levels of outside support and resources.

Finally, several of the tables discussed and analyzed here were split up into multiple parts in order to allow for them to be properly displayed and to comply with certain formatting guidelines. As a result of these requirements, many of these 'split' tables utilize some short-form terminology. It is therefore recommended that interested readers refer to the **appendices** (to clarify any confusing terms) or check the attached supplementary files (which are the same tables here, but not split up or divided across multiple pages).

Table 1 : Proceeding Type

	Drug	Prop.	Viol.	Bail	Plea	Diver.	Rem.	FTC	Misc.	Odd Res.	Unkn.
Drug	38	20	2	18	9	2	8	15	5	4	4
Prop.	20	170	53	51	70	24	29	82	19	10	9
Viol.	2	53	104	34	37	12	21	44	15	8	2
Bail	18	51	34	115	7	0	3	40	14	8	38
Plea	9	70	37	7	147	2	2	73	13	8	35
Diver	2	24	12	0	2	53	1	10	1	0	20
Rem.	8	29	21	3	2	1	376	26	14	4	16
FTC	15	82	44	40	73	10	26	142	20	13	4
Misc.	5	19	15	14	13	1	14	20	39	4	0
Odd Res.	4	10	8	8	8	1	4	13	4	27	8
Unkn	4	9	2	38	35	20	16	4	0	8	115

(Figure 1 – Table 1 : Proceeding Type)

Table 1 cross-tabulated the specific resolutions for each proceeding. Note that there is no offense that is 'exclusive', even when common sense might make it seem so. For instance, one case involved a combined bail and plea that was later resolved with a detailed bail plan and a type of special supervised order that – if completed – would count as diversion. Similarly, there are several types of proceedings that must necessarily be combined – the offense types and failure to comply charges, in particular. This table mostly serves to provide some context as to the types of offenses and their proceeding type. Note that this and subsequent sections will only focus on the most significant observations available for the admittedly small table.

Firstly, remands and similar results – despite being condensed due to coding peculiarities – make up the vast majority of proceedings at 376 cases to 370 (the rest of the cases combined). Second, about 1/3 of all diversions had unknown charges – this was partially the result of their omission from the docket and the fact that Crown prosecutors never detailed their specific charges. Third, property crimes applied to roughly half of all non-remanded cases. Fourth, about 1/3 of bails and ½ of pleas involved a Failure to Comply (FTC) offense. The discrepancy between the two is likely the result of accused persons with FTC offenses recognizing their slim chances of winning the bail case and therefore declining to attempt.

The data demonstrates that the vast majority of cases are remanded over the course of the day, and that the most common offenses seen in the court were property and FTC offenses. Notably, violent offenses were somewhat common, with drug offenses as unlikely as the 'miscellaneous' offenses (a general catch-all for offenses that were difficult to classify into the above groups[5]). Additionally, bails are only slightly less common than pleas, followed by diversions. The main conclusion to be drawn from this is that Aboriginal people before the court are infrequently charged with drug offenses, and are predominantly subject to property and FTC offenses. This speaks to the offender/accused persons generally not following court orders as well as addictions to alcohol or other non-controlled substances. Furthermore, we can see that some of them decide to not attempt bail – either due to the low chances of getting it, or because they seek to begin their custodial sentence as early as possible. In light of the Indigenous justice literature and comments by Judges and defense counsels, this trend is common for Aboriginal peoples living in urban environments due to a lack of family or community ties that would meet judicial standards for supervision or surety positions. In addition, this is also compounded due to socio-economic factors such as homelessness/poverty (a lack of contact information for bail officers or funds to pay a deposit) and the racist colonial framework that brands them as

[5] See **Appendix A1** for an exhaustive listing

intrinsically separate and unable to rehabilitate/assimilate themselves into the colonial Canadian society.

Table 2 : Treatment/Punishment Location by Proceeding Type

The primary purpose of **table 2** is to see what relationship, if any, is present between the type of proceeding and the location of the punishment/supervision/release as referred to in the judge's disposition (that is, if the offender/accused person is more likely to be sent to prison/pre-trial detention for particular types of offenses or cases). Furthermore, it should be noted that the length of custody was coded into 2 different sections – custody lengths of 1 day and/or time served, or lengths greater than that. Those sentences that entailed short custodial sentences were coded as both types. To briefly summarize these major elements of this table, we can see that community release/supervision was more common for cases involving drug offenses and least common for violent offenses. Similarly, only 13% of bail hearings resulted in the bail being denied. In addition, treatment centre-based releases were always combined with other forms of custody/supervision, and were the most likely to involve failure to comply offenses (such as a breach of court orders or recognizance). Lastly, diversion orders (to the Community Council Program or otherwise) were never combined with other treatment locations and were the least likely to involve failure to comply offenses.

	Anchorage (Case-Wide)	Prison/ Custody (Case-Wide)	1 Day and/or Time served (Case-Wide)	Community (Case-Wide)	Treatment-Centre (Case-Wide)	Diversion/Community Council of Toronto (Case-Wide)	Intermittent (Case-Wide)
Anchorage (Case-Wide)	6	0	0	2	1	0	0
Prison/Custody (Case-Wide)	0	83	17	17	10	0	1
1 Day and/or Time served (Case-Wide)	0	17	17	12	1	0	0
Community (Case-Wide)	2	17	12	168	39	0	1
Treatment-Centre (Case-Wide)	1	10	1	39	51	0	1
Diversion/Community Council of Toronto (Case-Wide)	0	0	0	0	0	54	0
Intermittent (Case-Wide)	0	1	0	1	1	0	5

(Figure 2 – Table 2a :Treatment/Punishment Location by Proceeding type, part 1)

	Anchorage (Case-Wide)	Prison/ Custody (Case-Wide)	1 Day and/or Time served (Case-Wide)	Community (Case-Wide)	Treatment-Centre (Case-Wide)	Diversion/Community Council of Toronto (Case-Wide)	Intermittent (Case-Wide)
Drug	0	2	2	27	5	2	1
Property	2	49	9	72	25	25	1
Violent	3	30	4	39	14	12	1
Bail	3	14	2	77	21	0	0
Plea	1	72	17	81	23	2	5
Diversion	0	0	0	0	0	53	0
FTC Offenses Confirmed	2	41	6	63	26	10	1
Misc. Offenses	2	10	4	19	9	1	1
Odd Resolutions	2	3	0	16	8	1	0
Unknown Charges	0	14	1	44	6	20	3
Incomplete Observation	0	1	0	3	1	0	0
Not Gladue	0	1	0	11	3	0	2

(Figure 3 – Table 2b : Treatment/Punishment Location by Proceeding Type, part 2)

The main analytical conclusion to draw from this data set is that the offense/proceeding type serves a communicative function that makes concerns about public safety and supervision manifest. For instance, drug offenses are primarily addiction-based, so it is interpreted by the court as a problem that will harm the offender/accused person themselves (hence, the lack of prison and preference for community release). In contrast, violent offenses (even if they overlap somewhat with drug offenses) are interpreted in a much more potentially dangerous light (hence their preference for prison/custody). Offenses that involve FTC issues similarly communicate a need for intensive supervision or control via treatment centres or long-term rehab work (or, if such controls are unavailable, the court interprets this offense as necessitating custody instead). Additionally, when FTC offenses are rare, then a more lenient or less supervised disposition is allowed instead – such as diversion and intermittent sentences.

In this sense, offense and proceeding type frames the offender/accused person and the court's perception of his actions and potential as either a persistent offender or potentially able to be rehabilitated. Notably, some combinations of offenses can lead to either intensely controlled or relatively open rehabilitative regimes. The final punishment location (in prison, the community, or treatment-centres, to name the most common) is therefore primarily determined not on the basis of 'punishment' but rather on the basis of whether or not it serves as an adequate fit for the offender/accused person and the necessary sentence (either for

promoting rehabilitation or preventing reoffending). These punishment locations are therefore 'scaled' in the minds of court actors (that is, Crown prosecutors and judges) and are considered either 'lenient' or 'harsh' with some level of granularity between them via supervision, probation, or other applicable orders. These applications of discourse (in a functional sense) are also related to other discourses in causal relationship such that, when custody is mentioned, it requires other discourses to be mentioned to both legitimate the sentence and to facilitate its implementation. This makes the punishment locations both functional discourses as well as discursively abstract/malleable in the minds of the actors present; in other words, they are both discourses and physical constructs/structures.

Table 3 : Sentencing Principles and Bail Concerns by Proceeding Type

Like **table 2**, certain causal relationships and discursive forms and applications begin to take form at this point of the analysis. Note that **table 3** focuses on the discourses used in particular types of cases and their relationship to formal sentencing principles and concerns. Thus, it is primarily concerned with how certain sentencing/bail principles may be more or less common in certain case types or may be linked to other discourses/sentencing/bail principles in a relationship of mutual reinforcement or interaction. The major findings to discern from this table involve the highly diverse application of the formal sentencing

	Denunciation	General Deterrence	Specific Deterrence	Prot. Of Public	Rehab.	Mitigating Factors	Aggravating Factors	Other (Plea)
Denunciation	38	26	27	5	6	5	1	5
General Deterrence	26	48	44	4	10	7	1	6
Specific Deterrence	27	44	64	5	9	9	7	6
Prot. of Public	5	4	5	19	1	2	4	2
Rehab.	6	10	9	1	424	86	18	21
Mitigating Factors	5	7	9	2	86	469	16	11
Aggravating Factors	1	1	7	4	18	16	313	7
Other (Plea)	5	6	6	2	21	11	7	192
Primary Grounds	0	0	0	0	5	0	2	0
Secondary Grounds	0	0	0	1	7	0	6	1
Tertiary Grounds	1	0	0	1	0	0	0	0
Past Failures	0	0	0	0	16	2	18	1
Surety Viability	0	0	0	1	9	1	1	2
Bail Program	0	0	0	0	9	3	2	1
Other (Bail)	0	0	0	0	0	0	0	1
Bail	3	3	3	5	59	53	40	25
Plea	30	41	52	10	96	117	106	78
Diversion	0	0	0	0	6	2	3	5
Odd Res.	1	2	2	1	14	6	4	15
Cases - Rehab.	27	36	44	12	195	139	113	88
All Cases	30	42	53	16	195	196	157	123
Note : Bail total = 115, Plea Total = 147, Diversion Total = 53, Odd Total = 27, All Cases = 851, Rehab. = 198								

(Figure 4 – Table 3a : Sentencing Principles and Bail Concerns by Proceeding Type, part 1)

	Primary Grounds	Secondary Grounds	Tertiary Grounds	Past Failures	Surety Viability	Bail Program
Denunciation	0	0	1	0	0	0
General Deterrence	0	0	0	0	0	0
Specific Deterrence	0	0	0	0	0	0
Prot. of Public	0	1	1	0	1	0
Rehabilitation	5	7	0	16	9	9
Mitigating Factors	0	0	0	2	1	3
Aggravating Factors	2	6	0	18	1	2
Other (Plea)	0	1	0	1	2	1
Primary Grounds	35	27	0	2	1	1
Secondary Grounds	27	87	1	11	11	2
Tertiary Grounds	0	1	2	0	0	0
Past Failures	2	11	0	65	5	4
Surety Viability	1	11	0	5	63	0
Bail Program	1	2	0	4	0	35
Bail	19	34	1	21	31	22
Plea	0	5	1	14	5	2
Diversion	0	0	0	0	0	0
Odd Resolutions	1	1	0	2	0	1
Cases - Rehabilitation	18	29	2	29	21	16
All Cases	23	46	2	32	35	26

(Figure 5 – Table 3b : Sentencing Principles and Bail Concerns by Proceeding Type, part 2)

principles – notably, denunciation, general deterrence, and specific deterrence were often mentioned directly alongside one another and were incredibly rarely mentioned during a bail hearing. Protection of the public, in contrast, was rarely mentioned whereas rehabilitation was the most frequently mentioned. With regards to bail hearings, the most common bail concern was the secondary grounds whereas the second most-common concerns related to possible reoffending (past treatment history and surety viability, mainly). Note, however, that rehabilitation was mentioned frequently during bail hearings despite not being an express consideration of such cases.

This set of observations are primarily focused on how certain types of sentencing principles are linked to certain case types and are also discursively linked to one another in certain circumstances and locations. Notably, diversion was unique in that few sentencing principles (or sentencing elements beyond rehabilitation) were ever mentioned. Additionally, these few sentencing principles are the ones most common to defense counsels and the offender/accused person's supports. This relationship is rather unexpected, as the entire diversion proceeding is organized by both the Crown prosecutor and defense counsel and it is only brought up in court in order to get approval from the judge themselves. Rehabilitation, in contrast, is the most common sentencing principle referenced and is commonly directly mentioned alongside other sentencing principles, including punitive ones. In fact, rehabilitation is so commonly cited that it can be

considered the ‘starting point’ of any Gladue case (or at least the discourse/principle that must be considered no matter the circumstances). When rehabilitation is also brought up, Crown prosecutors must necessarily reference counter-discourses related to it such as deterrence, denunciation, and aggravating factors. This counter-discourse is both rhetorically-based (Crown prosecutors contest rehabilitative discourses with ones that impugn on its applicability to the offender/accused person or case) as well as institutionally required (those sentencing principles are formally considered the primary means by which judges can decide upon a particular punishment). When defense counsels bring up rehabilitation, they implicitly reference problematic racial discursive frames that make addiction, trauma and victimization seem intrinsic to Aboriginal peoples. This discursive framework is, despite its inaccuracy and objectifying effects, presented and understood as a sort of historically-situated or otherwise temporally-based discourse.

Therefore, rehabilitation is, in addition to being the ‘starting point’, also utilized and interpreted in two different forms – a temporally assessed form based on history and potential future prospects, and a second form wherein it is utilized as the required/necessary opposite to any punitive sentencing principles. Aggravating and mitigating factors are similarly utilized in this manner, though their repetition is a sign that such discourses are being considered and countered directly rather than inciting a direct counter-discourse as

rehabilitation/punitiveness does. It is through these sentencing principles/discourses that much of the debate and rhetoric relating to rehabilitation as a sentencing goal is made manifest. The predominant pattern was that rehabilitation itself is never really argued against as an appropriate sentencing principle and at most is only considered inappropriate for the circumstances specific to the offender/accused person or case in question. Rehabilitation is therefore not ignored, but rather inapplicable for the current case and left aside until the next case (where it again becomes the 'starting point'). This pattern applies to bail as well, except that release is the default (even in reverse onus) and discourses relating to past treatment failures and surety viability replace many conventional aggravating factors with the primary and secondary grounds replacing the punitive sentencing principles. In bails that are Crown-onus, this trend of rehabilitative 'starts' is further accelerated, since in those instances bail is explicitly supposed to be allowed unless the Crown prosecutor can convince the judge otherwise. This process of interpretation and application of the formal sentencing principles – and how they actually manifest – will be examined in the D**iscussion** and **Conclusion** sections, below.

This analysis, coupled with the information drawn from **Table 2**, provide an overview of how judges sentence certain offenses and the express Criminal Code principles they view as relevant. In light of this, we can see that the primary focus – in Gladue courts – is on protection of the public and rehabilitation. These

two principles are presented by judges as being somewhat dualistic, but they have made some comments regarding the utility of rehabilitation as a tool for protecting the public from further crime (this type of statement was rare, but the concept remains a possibility in some instances). Despite this, most often these two sentencing principles relate to the chance that prison/custody will be the sentence, and they work on the basis of a cost-benefit analysis of the possible sentence In this respect, they echo Dugas' (2013) observations of modern penal rationality (MPR) in a Gladue context. The main element of MPR in this instance is the focus on utilitarian (practical) aims that view incarceration as the primary (but not sole) means of public protection with rehabilitation entailing wholesale exclusion from the penal system itself (p. 55, 59-62). The general evaluation process is based around similarly 'clinical' and cost-benefit interpretive schemes, and these elements are the primary means by which Aboriginal over-representation in the criminal justice system continue to climb.

Table 4 : Treatment/Punishment Location by Sentencing Principles and Bail Concerns

Whereas the previous table and set of observations looked at how the sentencing principles may be influenced/related to certain case types, **table 4** is concerned with which sentencing principles may influence the final sentence and whether certain sentences require/necessitate certain sentencing principles in order

	Cases - Rehabilitation	Prison/ Custody (Case-Wide)	1 Day and/or Time served (Case-Wide)	Community (Case-Wide)	Treatment-Centre (Case-Wide)	Diversion/ CCT (Case-Wide)	Intermittent (Case-Wide)
Cases - Rehabilitation	198	58	10	95	40	6	2
Prison/Custody (Case-Wide)	58	83	17	17	10	0	1
1 Day and/or Time served (Case-Wide)	10	17	17	12	1	0	0
Community (Case-Wide)	95	17	12	168	39	0	1
Treatment-Centre (Case-Wide)	40	10	1	39	51	0	1
Diversion/Community Council of Toronto (Case-Wide)	6	0	0	0	0	54	0
Intermittent (Case-Wide)	2	1	0	1	1	0	5

(**Figure 6 – Table 4a : Treatment/Punishment Location by Sentencing Principles and Bail Concerns, part 1)**

	Cases - Rehabilitation	Prison/ Custody (Case-Wide)	1 Day and/or Time served (Case-Wide)	Community (Case-Wide)	Treatment-Centre (Case-Wide)	Diversion/ CCT (Case-Wide)	Intermittent (Case-Wide)
Denunciation	27	19 (23%)	4 (24%)	15 (9%)	7 (14%)	0	0
General Deterrence	36	24 (29%)	4 (24%)	20 (12%)	7 (14%)	0	1
Specific Deterrence	44	34 (41%)	4 (24%)	21 (13%)	6 (12%)	0	1
Protection of the Public	12	11 (13%)	1 (6%)	3 (2%)	1	0	0
Rehabilitation	196	59 (71%)	11 (65%)	101 (60%)	43 (84%)	6	2
Mitigating Factors	139	68 (82%)	15 (88%)	96 (57%)	29 (57%)	2	5
Aggravating Factors	113	66 (80%)	15 (88%)	83 (49%)	25 (49%)	3	4
Other (Plea)	88	45	10	64	18	5	2
Primary Grounds	18	2	0	10	4	0	0
Tertiary Grounds	2	2	0	0	0	0	0
Past Treatment Failures	29	12	1	14	6	0	0
Surety Viability	21	7	1	19	5	0	0
Bail Program	16	3	0	14	2	0	0
Other (Bail)	5	3	1	5	3	0	0

(Figure 7 – Table 4b : Treatment/Punishment Location by Sentencing Principles and Bail Concerns, part 2)

to be considered appropriate. Note that this table looks at the final locations of the punishment (such as prison/custody, the community, diversion options, or treatment-centres) rather than who 'won' the case – for that data, see **tables 5 and 6**, below. To briefly summarize the significant findings from this table, cases that resulted in prison/custodial sentences involved the most sentencing principles and/or bail concerns out of any location, and were the only one that mentioned the protection of the public in significant amounts. Cases involving community release/supervision had fewer principles in comparison, and very few punitive principles. Finally, cases that resulted in a treatment-centre release (either alone or in concert with other sanctions) were relatively similar to community release/supervision but reference rehabilitation the most out of any sanction/location.

The main conclusions to be drawn here are based on both interpretive and functional discourse analysis, though the implications of them for the entire thesis will be discussed later in the **discussion** and **conclusion** sections. First, we can conclude that the more 'contested' the case, the more likely that prison/custody will be applied, though it is also possible that when prison/custody is the expected result, then the defense counsels/Crown prosecutors will utilize as many discourses as they can in order to rhetorically influence the proceedings. The most rhetorically powerful discourses that push for imprisonment are protection of the public, followed by specific deterrence. These discourses are, notably, the ones

most focused on the offender/accused person themselves rather than the larger public as well as the ones that imply that further crimes are likely to occur were imprisonment not applied. Thus, sentencing principles are primarily functional (metaphorically linked to other discourses) when they reference these types of reoffending concerns.

In contrast, sentencing principles are rhetorical (persuasive in intent) and interactionist (created via shared interactions and practices) discourses when this ties the Aboriginal offender/accused person to problematic frameworks of victimization that present them to be a persistent offender (partially othering the Aboriginal person further). Specifically, none of the sentencing principle discourses and frameworks observed during the research ever presented Aboriginal peoples (offenders/accused persons or not) as possessing some measure or agency or being anything other than a historical account consisting solely of tragic past events. As a note, for those prison/custody sentences involving short '1 day' and/or time served orders, there is a desire to allow for an easier release and less paperwork rather than pure punishment/incarceration. These sentences often involve additional community sentences or attendance at a treatment centre, so it should be noted that prison/custody can in these cases be interpreted as a rehabilitative and self-critical discourse. In these particular instances the rhetorical and functional aspects of the discourse are present but

their influence/incidence is limited, particularly with regards to the most powerful punitive discourses of specific deterrence and protection of the public.

Furthermore, mitigating factors serve as a sort of counter-discourse to the punitive ones noted above since they are rhetorically utilized and interpreted in such a way that the use of custody is not warranted, or that the time spent in custody should be reduced due to offender-specific factors. This is mostly a storytelling application of discourse, but it is still couched in rhetorical applications of discourse as they do admit that the failures/crimes occurred but that the moral blameworthiness is reduced. The main point to make via such appeals and factors is that the Aboriginal person in question is not a persistent offender; rather, they seek to frame them in an equally problematic and colonial manner of objectifying Aboriginal-specific discursive frameworks of intrinsic victimization. In this manner, they have unduly articulated colonial discourses and interpretive frameworks in an attempt to bring to mind the implications and perceptions such histories have in a Gladue context.

Much like what was discussed in the previous table, rehabilitation remains the ‘default’ in the eyes of the judges and Crown prosecutors; it is rehabilitation that all other discourses must orient themselves towards and it can be considered the primary ‘structure’ of the Gladue court. It is only when the discourses of pro-rehabilitation (mitigating factors) or anti-rehabilitation (protection of the public)

reach a discursive breaking-point that the result is decided. Because of this rehabilitative 'base', the onus is on the Crown prosecutor even when a guilty plea is entered. For bail cases, bail program support or a surety serves as additional pro-rehabilitation discourses. In these instances, concerns are interpreted and framed as practical in orientation. For instance, the offender/accused person could be implied to need support or coercion to prevent bail failures. Thus, bail hearings look to outside factors for rehabilitative (or MPR-based 'risk') prospects, whereas guilty pleas look to the specific offender's record as the basis for both factors. Notably, both look to reoffending as the main concern, and though bails do implicitly reference a criminal record via the primary and secondary grounds they are not named directly and are presented/metaphorically stated via aggravating or treatment factors.

Treatment centres are much like community release/supervision, but they have both a greater emphasis on rehabilitation and (in the case of bails) a greater emphasis on possible failures of rehabilitation. Therefore, treatment centre releases are considered a more rehabilitative and restrictive form of release. It is applied in order to allow for rehabilitation while taking into consideration the past failures of more open rehabilitation plans. Thus, while treatment centres are not discursively framed as a type of punishment/control location, they are still applied in much the same manner. In this sense, treatment centres are both the midpoint

and extreme-end of disposition/punishment locations – they are both rehabilitative and controlling.

Diversions are unique in that they are discussed and implemented off the record and only mentioned briefly in the court. As such, they have very few sentencing principles overall and can be considered the primary exception to the above conclusions and even the antithesis of normal court procedure. That said, as will be described later on in the **Discussion** and **Conclusion** sections, they still are somewhat limited by neo-liberal elements.

Continuing the application of modern penal rationality from **Table 4** above, we can confirm that protection of the public is intrinsically linked to the conception of prison/custody as a deterrent/secure holding spot. However, there were some instances where protection of the public only merited a prison length of 1 day and/or time served, as well as some treatment-centre and community releases (possibly in concert with a prison/custody sentence). As such, we can see that the MPR focus on punishment (to deter, separate, and enact retribution) are slightly overestimated, as 1 day custody sentences are still lenient yet to not entirely meet primary ideological prerogatives that advocate for incarceration (Dugas, 2013, p. 60-61). Conversely, 1 day stays are discursively related to the protection of the public through their past effects and deterrent elements (specific deterrence). As a result, the presumed leniency of the sentence is masked by an

overarching ideology that makes prison a legitimate sentence and possible long-term threat. On a similar note, the rehabilitative perspective of MPR is based around an emphasis on "social inclusion", to which we can add a caveat on the basis of diversion assessments (ibid., p. 55). In this case, diversions are specifically designed to rehabilitate an offender/accused person from a position of inclusion in their Aboriginal community and an exclusion from the criminal justice system. While this is not always the case (the Aboriginal community in question was described as fragmented by the judges, and the final decision is still made by a colonial/judicial authority) MPR in the Gladue context is further altered in its conventional definition in that it identifies exclusion from the criminal justice system as necessary for full inclusion to be enacted. Those who require both orientations are given an in-depth rehabilitation regime that simultaneously excludes the Aboriginal person while attempting to induce them into a position where they can later be allowed inclusion. As such, Gladue courts' end up reinterpreting penal modernity in such a way that both ideological poles are included rather than treated as mutually exclusive.

Tables 5 & 6 : Sentencing Principles and Bail Concerns by Sentence/Decision

This table set was split into two sets of tables (one of which was further split into 2) simply for greater readability and it otherwise follows the same format and presentation as the previous sets. Whereas **table 4** looked to the

	Denun.	G. Deter.	S. Deter.	Prot.	Rehab.	Mit. Fac.	Agg. Fac.	All Cases
Joint Submission	8 (Seen in 8% of all joint sentencing rationales	11 (11%)	10 (10%)	0	36 (36%)	35 (35%)	16 (16%)	99
Joint Submission (C)	13 (Seen in 12% of all joint submission cases)	16 (15%)	16 (15%)	1 (1%)	69 (64%)	70 (65%)	61 (57%)	107
Prob.	6 (8%)	9 (13%)	10 (14%)	3 (4%)	35 (49%)	43 (61%)	27 (38%)	71
Prob. (C)	14 (20%)	21 (27%)	25 (34%)	4 (5%)	58 (75%)	65 (84%)	60 (78%)	77
Other O.	7 (9%)	8 (11%)	10 (13%)	2 (3%)	38 (51%)	36 (48%)	25 (33%)	75
Other O. (C)	14 (17%)	18 (22%)	19 (23%)	4 (5%)	64 (79%)	64 (79%)	60 (74%)	81
Cond.	1	0	0	1	3	8	5	10
Cond. (C)	1	3	3	1	7	11	8	12
Interm.	0	0	0	0	1	3	2	5
Interm. (C)	0	1	1	0	2	4	4	5
Susp.	4 (17%)	4 (17%)	4 (17%)	0	18 (75%)	17 (71%)	9 (38%)	24
Susp. (C)	4 (16%)	6 (24%)	5 (20%)	0	23 (92%)	23 (92%)	21 (84%)	25
Fines.	5 (29%)	5 (29%)	5 (29%)	1 (6%)	8 (47%)	9 (53%)	5 (29%)	16
Fines. (C)	6 (33%)	7 (39%)	8 (44%)	1 (6%)	11 (61%)	15 (83%)	16 (89%)	18

(Figure 8 – Table 5a : Sentencing Principles by Sentence/Decision, part 1)

	Denun.	G. Deter.	S. Deter.	Prot.	Rehab.	Mit. Fac.	Agg. Fac.	All Cases
Crown	0	0	1 (8%)	2	4 (31%)	8	7	13
Crown (C)	2 (14%)	2 (7%)	5 (36%)	4 (29%)	10 (71%)	13 (93%)	9 (64%)	14
Defense	2 (6%)	2 (6%)	4 (13%)	1 (3%)	17 (55%)	20 (65%)	12 (39%)	31
Defense (C)	4 (11%)	8 (22%)	9 (25%)	2 (6%)	29 (81%)	31 (86%)	29 (81%)	36
Compr.	4 (12%)	5 (15%)	9 (26%)	4 (12%)	20 (59%)	25 (74%)	19 (56%)	34
Compr. (C)	11 (30%)	13 (35%)	20 (54%)	7 (19%)	32 (86%)	35 (95%)	31 (84%)	37
Unkn.	1 (4%)	3	3	2 (8%)	7 (27%)	8	7	26
Unkn. (C)	2 (7%)	5 (19%)	5 (19%)	2 (7%)	10 (37%)	17 (63%)	14 (52%)	27

(Figure 9 – Table 5b : Sentencing Principles by Sentence/Decision, part 2)

	Prim. G.	Sec. G.	Tert. G.	Past Treat.	Surety Viability	Bail Prog.	Bail Cases
Joint Submission	4 (Seen in 8% of consent release case rationales)	6 (12%)	0	2 (4%)	7 (14%)	3 (6%)	51
Joint Submission (C)	8 (Seen in 15% of consent release bail cases)	14 (26%)	0	6 (11%)	17 (32%)	12 (23%)	53
Prob.	0	1(14%)	0	2 (29%)	0	0	7
Prob. (C)	1 (13%)	5 (63%)	0	6 (75%)	1 (13%)	1 (13%)	8
Other	4 (14%)	4 (14%)	0	4 (14%)	6 (21%)	1 (3%)	29
Other (C)	9 (45%)	15 (48%)	0	13 (42%)	11 (35%)	5 (16%)	31
Crown	2 (33%)	5 (83%)	1 (17%)	4 (67%)	2 (33%)	0	6
Crown (C)	2 (29%)	7 (100%	1 (14%)	6 (86%)	4 (57%)	2 (29%)	7
Defense	2 (22%)	2 (22%)	0	3 (33%)	1 (11%)	0	9
Defense (C)	6 (50%)	7 (58%)	0	8 (67%)	2 (17%)	3 (25%)	12
Comp.	0	0	1	4	2	0	3
Comp. (C)	1	2	1	7	3	2	4
Unkn.	0	0	0	1	0	0	4
Unkn. (C)	0	2	0	2	0	0	5

Note : Fines, Intermittant, Suspended, and Conditional Sentences omitted

(Figure 10 – Table 6 : Bail Concerns by Sentence/Decision)

punishment/treatment location, this set – **tables 5 and 6** – looks at who 'won' the case, unusual sanctions, and related sentence concerns. Note additionally that the different sentence/decision sections are split into two – one refers to just the judge's sentencing speech/rationale, while the other refers to all statements made during the case. This was done to allow for a greater understanding of what statements/principles are stated and which ones are actually considered important enough for the judge to repeat them during the rationale. Furthermore, the previous table was mostly concerned with how such sentencing principles may influence the final punishment/treatment location. While this may appear similar, the two tables discussed here are focusing on different applications of the formal sentencing principles and their influences.

The most notable findings to be gleaned from this set of tables concern the distribution of certain sentencing principles. Firstly, cases that were a compromise between the Crown Prosecutor and defense counsel positions were the most common result, and cases that ended with the judge accepting a joint submission had few references to any sentencing principle, excepting rehabilitation. Cases that involved a probation order had the highest rates of punitive sentencing principles with the exception of protection of the public (more formally based on the separation of the offender from society). This sentencing principle, in contrast, was often mentioned in cases that were decided in favour of the Crown prosecutor. For cases that were resolved in favour of the defense counsel,

sentencing principle rates were between a compromise and joint submission and had only slightly high rates of the primary grounds.

The main conclusions to draw from these tables are based around how sentencing principles are applied to certain case types as well as their influence on the proceedings (that is, their functional and interpretive discursive aspects). To begin with, joint submissions are rather similar to diversions, as the majority of their discourses and interactions are performed outside of the court setting; albeit not to the same degree as diversions. Regardless, when joint submissions are brought up in court, we can observe that they are 'muted' with regards to all sentencing principles, not just punitive-based ones. Note that joint submissions are not necessarily rehabilitative or punitive; rather, they are simply agreeable to all the parties and subject to their own preconceptions of what an appropriate sentence is and isn't. What is notable is that punitive principles, when present, are often repeated by the judge during the sentencing at a rate slightly higher than in other cases. It can be concluded that, because joint submissions must be justified before the judge rather than resolved solely by the Crown prosecutor, then they are interpreted as a mid-point between diversion and a contested plea and therefore utilize sentencing principle discourses as functional tools to a proportional degree. In effect, the rhetorical element is lessened and is replaced with a more metaphorical use of the sentencing principles in their form of the procedural requirements to state them. Their reduced number of total references is

simply a sign that these references/statements are the bare minimum number needed to satisfy the perceived requirements. For pleas/bails these discourses are actually used in a rhetorical manner and thus are utilized as often as is needed, whereas diversions are done outside of the court system and therefore have no 'minimum standard' of sentencing principle discourses.

Probation, in contrast, is not its own type of case or resolution method and can be combined with other punishments. However, it has some similarity to those cases decided in favour of the Crown prosecutor's disposition and is different only with respect to mitigating factors and concerns regarding the protection of the public. Probation itself tends to take the form of a regimented or supervised treatment order done outside of court and with conditions extending past rehabilitative programs. For instance, the most common probation requirements are to not reoffend, to follow the orders of the probation officer (with regards to treatment), to avoid contact with the victim, and to avoid the location where the crime was committed. Thus, probation is interpreted and applied in instances where the Crown prosecutor's case is perceived and interpreted as 'strong' and the main concern is that reoffending will reoccur unless some level of control is exerted upon the offender/accused person. Rehabilitation remains a goal in the minds and interpretations of the court, but it is limited by strong concerns that the offender/accused person will reoffend despite mitigating factors; the absence of concerns about the protection of the public is

likely a sign that the offenses in question are likely non-violent. Again, the modern penal rationality and its concern with risk/need evaluations (also a part of government requirements and criminological theories) is exemplified in probation orders. It should be noted that, from the standpoint of some Indigenous justice theorists (McCaslin, Proulx, and Green) the culturally inappropriate elements of government-designed probation orders (ostensibly for treatment) is only marginally mitigated by orders that they attempt to utilize 'culturally appropriate' resources. This contravenes cultural prerogatives for "holistic and integrative" justice by wholly subordinating Aboriginal peoples to a colonial authority and emphasizing even further control over their presumably rehabilitative sentence (Green, 1998, p. 37-38). As such, these orders (which are outside the purview of the Gladue decision) are also the ones that fall back upon non-Gladue frameworks and interpretations and lead to further marginalization of Aboriginal peoples.

Cases that were contested but ended with the judge agreeing with the Crown prosecutor's disposition (termed 'Crown-won cases') are predominantly different from other cases in that the references to the protection of the public are at their strongest and most influential. Despite this link, this sentencing principle is not the main rhetorical discourse at the disposal of the Crown prosecutor. Aggravating factors, as well as past treatment failures, as similarly utilized; there is also a surprisingly small amount of references to other punitive sentencing principles. Therefore, we can conclude that the rhetorical strength of their case is

dependent upon how judges interpret the offender/accused person's chances of reoffending on the basis of both the likelihood of success and the threat such reoffending would pose to the public. Similarly, the low rates of mitigating factors and rehabilitation would also imply that this rhetoric is strengthened by the absence/weakness of such discourses on the part of the defense counsel. Dugas' (2013) work, mentioned previously, supports this interpretation. In his eyes "The protection of the public is the main sentencing objective. This public protection rhetoric has a most limiting effect on the application of section 718.2 (e)" (p. 103-104). This is due to the emphasis on exclusionary punishment which is the default in a modern penal system and which is consequently made stronger when public protection is mentioned (ibid., p. 106). Note that defense counsels and Crown prosecutors are not working on the basis of simple rote memorization/application of discourses and sentencing principles, though their interpretative schemes may be (through MPR ideologies, for instance). Both parties are engaging with one another's rhetoric and interpretations and will tailor their responses on the basis of each others' submissions. For instance, if the defense counsel realizes that their client is indeed likely to reoffend, he will not appeal to rehabilitative grounds and instead reference mitigating grounds in order to reduce the overall severity of the sentence. This interpretive schema is understood by Crown prosecutors, defense counsels, and judges and is made manifest by their individual reluctance to utilize rhetoric that is understood to be 'weak'.

The analysis of cases that were contested but ended with the judge agreeing with the defense counsel's disposition (called 'defense-won cases') support this conclusion, as they had some instances of basic punitive discourses, but significantly less instances of protection of the public appeals. They did have somewhat high rates of aggravating factors, though these were outnumbered by mitigating factors and rehabilitative concerns. Evidently, judges were cognizant of this counter-discourse role, as they were mentioned by the judge at higher rates than in other case types. Judges therefore use these rhetorical discourses as well, primarily to legitimate the sentence to themselves, the norms of the court, and the Crown prosecutor. In this case, judges are also engaged in a constant self-reflection and interpretation of the discourses presented to them, all to ensure that the sentence complies with the narratives and frames of the Crown prosecutor and their own idea of what makes an offender/accused person or their requested sentence appropriate.

Bails follow a similar pattern, with the secondary grounds, past treatment failures, and surety concerns taking the place of protection of the public discourses. The primary grounds are therefore interpreted and applied as the weakest possible bail concern, typically because it is a less severe manifestation of the same elements behind the secondary grounds (complying with the law). Again, reoffending is the main concern in the eyes of the court, and bails are

interpreted and understood by judges to need to meet the same set of demands and concerns as in guilty pleas.

Compromise cases are, from the standpoint of sentencing and bail principles, much like a midpoint between sentencing hearings that followed the recommendations of the defense counsel and Crown prosecutor. Furthermore, the interpretation and application of such discourses – from a functional level – also seem to be the 'midpoint' between the two. Though they seem to lack protection of the public discourses to the same degree as 'Crown-won' cases, they also include smaller numbers of aggravating factors. High rates of past treatment failures are unable to push for this type of sentencing results unless combined with concerns about the protection of the public. If such concerns are not present, then the result is likely to be a compromise since there likely remain legitimate concerns and a need for control/supervision/support, albeit with no clear risk to the public. The offender/accused person is still interpreted and framed by this rhetoric as being in need of some disciplinary regime, though they are not necessarily a threat to the public without it. The reference of mitigating factors and rehabilitation can also serve as rhetorical discourses that are interpreted as possible reasons for a compromise position to be created. Notably, these are the cases where both rehabilitation and incarceration are implemented alongside one another, thereby refuting the dualistic perception of justice embodied in MPR. In this respect, judges indirectly criticize and subvert the implicit interpretive

schemes of MPR when they are forced into cases where there are strong demands for both principles and the dualistic conception of justice is subsequently challenged.

Again, rehabilitation is interpreted/understood by the judges as being the 'basic' sentence that is modified and shifted in response to defense counsel submissions and the way such submissions frame the offender/accused person, reference the norms of the court/legal system, and are constructed in a communal manner on the basis of all court actors present. Whereas some of these interpretations are unique to the specific case, many of them become standardized over time as a result of simple routine, judicial precedence, and the overarching ideology of modern penal rationality and its own evaluation scheme. Concerns about protection of the public are the primary way to shift the discourse towards imprisonment/punitiveness as it speaks directly to what judges feel is the most important reason to keep an individual imprisoned; again, based around MPR's cost-benefit analysis and the need to maintain imprisonment as a sanction regardless of its appropriateness to the case. In effect, prison is pre-emptively considered a valid sentence in MPR and must be considered an option in any sentence. If public protection concerns are not present, but failed rehabilitation patterns/histories are, then a treatment-centre or compromise sentence can be applied instead in order to allow for some manner of control – prison/custody, in contrast, is primarily utilized to enforce denunciation and deterrence in addition to

incapacitation (Dugas, 2013, p. 112). As such, treatment-centre sentences are a valid part of MPR on the basis of its incapacitating effects. Compromise positions – bail or otherwise – are therefore not understood as their own specific type of case as much as they are 'weaker' forms of a sentence wholly decided in favour of the preferred sentence of the defense counsel or Crown prosecutor. Note that interpretation, in this instance, is of both the submissions entered as well as the actual form of the compromise position.

Table 7 : Victim/Offender/Accused Person Characteristics by Sentence/Decision

Table 7 looks to see if particular mitigating or aggravating factors are relevant to the final decision. Primarily, it looks to confirm the previous conclusions regarding rehabilitation, reoffending, and treatment priorities and their interpretation and application to the final sentence by the judge and Crown prosecutor. It should be noted that, while this section applies to both victims and offenders/accused persons, it was very rare for any victim information to be disclosed by the Crown prosecutor and, when it was considered relevant, it primarily dealt with physical and mental trauma. Therefore, for all code-sets besides these two, one should work with the understanding that they apply to offenders/accused persons rather than victims. In fact, the original research plan was to split the characteristic code sets between the two, but the small number of

	Paren. Dis.	Paren. Ad.	Interg. Trau.	Abuse	Addic.	Drugs	Alco.	Foster Care	Home.	Crim. Hist.	Recent Hist.	Succ. Hist.	Fail. Hist.	All Cases
Paren. Dis.	4	2	2	0	0	1	0	0	1	0	0	0	0	4
Paren. Ad.	2	13	2	1	0	0	6	2	0	0	0	0	0	12
Interg. Trau.	2	2	11	1	1	1	2	0	1	0	0	0	0	9
Abuse	0	1	1	16	2	3	0	4	2	2	0	0	0	16
Addic.	0	0	1	2	47	3	4	0	5	9	3	3	1	42
Drugs	1	0	1	3	3	47	5	0	6	5	0	0	1	37
Alco.	0	6	2	0	4	5	72	2	1	3	0	1	1	47
Foster Care	0	2	0	4	0	0	2	15	1	0	0	0	0	14
Home.	1	0	1	2	5	6	1	1	126	10	2	3	0	84
Crim. Hist.	0	0	0	2	9	5	3	0	10	326	9	5	15	200
Recent	0	0	0	0	3	0	0	0	2	9	30	7	8	25
Succ. Hist.	0	0	0	0	3	0	1	0	3	5	7	55	1	46
Fail. Hist.	0	0	0	0	1	1	1	0	0	15	8	1	114	66
All Cases	4	12	9	16	42	37	47	14	84	200	25	46	66	851

(Figure 11 – Table 7a : Victim/Offender/Accused Person Characteristics by Sentence/Decision, part 1)

	Paren. Dis.	Paren. Ad.	Interg. Trau.	Abuse	Addic.	Drugs	Alco.	Foster Care	Home.	Crim. Hist.	Rec. Hist.	Succ. Hist.	Fail. Hist.	All Cases
Joint Submission	0	0	2	1	3	2	5	0	6	16	2	3	7	99
Joint Submission (C)	1	3	3	6	17	8	15	7	27	68	5	14	15	107
Crown	0	0	0	0	0	3	0	0	0	4	0	0	3	13
Crown (C)	0	1	0	0	2	5	3	0	7	11	3	1	8	14
Defense	0	0	0	0	1	3	1	0	4	7	2	0	8	31
Defense (C)	0	2	1	4	10	8	8	2	16	27	6	7	16	36
Compromise	0	0	0	2	4	2	4	0	1	17	1	1	10	34
Compromise (C)	1	3	3	6	7	12	15	5	20	33	3	10	15	37
Probation	1	1	3	3	3	3	6	0	6	21	4	2	8	71
Probation (C)	3	6	6	7	16	15	20	10	38	59	11	20	16	77
All Cases	4	12	9	16	42	37	47	14	84	200	25	46	66	851

(Figure 12 – Table 7b : Victim/Offender/Accused Person Characteristics by Sentence/Decision, part 2)

	Trau.	Phys. Trau.	Ment. Trau.	Other/ Unsure	Fam. Issues	Comm. Fact.	Rem.	Men. Ill.	All Cases
Trau.	29	4	4	1	0	0	1	7	27
Phys. Trau.	4	29	13	2	0	0	0	1	21
Ment. Trau.	4	13	32	1	4	0	0	3	18
Other/ Unsure	1	2	1	303	5	0	6	3	171
Fam. Issues	0	0	4	5	80	2	4	0	58
Comm. Fact.	0	0	0	0	2	43	2	0	34
Remorse	1	0	0	6	4	2	152	2	99
Men. Ill.	7	1	3	3	0	0	2	52	39
Joint Submission	3	3	3	22	1	3	12	2	99
Joint Submission (C)	5	5	6	58	19	11	31	10	107
Crown	0	0	0	4	0	1	3	0	13
Crown (C)	1	0	0	12	6	2	8	3	14
Defense	0	0	1	14	3	1	7	2	31
Defense (C)	3	5	5	30	13	7	18	10	36
Compromise	0	1	1	12	1	3	10	0	34
Compromise (C)	1	3	3	32	13	8	24	4	37
Probation	1	2	2	28	1	4	15	2	71
Probation (C)	5	6	8	63	23	13	40	12	77
All Cases	27	21	18	171	58	34	99	39	851

(Figure 13 – Table 7c : Victim/Offender/Accused Person Characteristics by Sentence/ Decision, part 3)

victim disclosures rendered this decision moot. Additionally, some background information was not disclosed to the public since the general format in the courts was for such information to be submitted in a written form to the judge and Crown prosecutor (as a Gladue or background report) with them or the defense

counsel mentioning particularly notable aspects of it as they pertain to the sentence.

Note that, as with the previous sections, only the most significant observations and correlations will be discussed. To summarize the particularly interesting data and relationships from the table, we can start by noting that characteristics relating to the upbringing of the offender/accused person are very infrequently cited, and this is likely because they are rarely disclosed verbally and are left in the background report submitted to the judge. Conversely, alcohol addictions were the most common addiction, but had fewer direct references alongside other victim/offender characteristics in comparison to drug addictions. Drug additions, as well, were most common in cases where the judge went with the Crown prosecutor's disposition. Homelessness/poverty references were the second most common characteristic, and often had a joint submission or compromise position given by the judge. Criminal/treatment histories were the most common characteristic cited, and frequently entailed the Crown prosecutor alleging a criminal record or referencing concerns about reoffending. Treatment histories, failed or otherwise, were also rarely mentioned directly during the sentencing rationale except when they referred to failed or incomplete treatment orders. Lastly, expressions of remorse/desires to change were the third largest group and were primarily directly referenced alongside criminal/treatment history – despite this, they had little correlation with the final sentence/sanction received.

First, discourses that directly referenced abuse, foster care, or topics that are otherwise related to difficult upbringings are interpreted and applied as the strongest mitigating factors and were subsequently likely to lead to decisions that were joint submissions, compromises, or otherwise not in favour of the Crown prosecutor's preferred sentence. This is a strong indicator that the primary basis of the Gladue principles – interpreted as a racist and colonial discursive framework of Aboriginal peoples as intrinsically victimized – are at least given token influence and applied in a somewhat distorted manner. However, when discussing the background reports that make up the problematic colonial frameworks there are some references to victimization that is either systemic or not the product of expressly designed government policies. Even these issues are interpreted by judges as being worthy of some leniency. In effect, these characteristics are not this effective at eliciting more lenient sentences because they reference Gladue, but because the judges in question already perceive and apply them as particularly strong mitigating circumstances. This raises questions about whether or not the problematic discursive framework of Aboriginal peoples is actually the result of the court's misinterpretation/application of the Gladue principles or is a pre-existing problem in the court system already. In either case, the result is the previously described assumption that all Aboriginal peoples are victims and without agency, as well as a subsequent objectification of Aboriginal peoples themselves.

Addictions are similarly relational in their influence on the proceedings and the court's interpretation of the Gladue principles. Addictions are implicitly referencing the problematic discursive framework described above through a metaphorical and symbolic link between Aboriginality and criminality, supported by racist and colonial assumptions and the presence of victimization discourses. Other strong mitigating circumstances as well as rehabilitation are directly referenced alongside it in order to collectively strengthen the overall rhetoric of 'leniency' and (paternalistic) treatment. In some instances, addiction may be the discourse that is related to others – in this case, addiction is interpreted/utilized as an amplifier of certain background events/circumstances related to the problematic discursive framework of Aboriginal peoples, again implementing the aforementioned colonial and racist assumptions. Drug addictions referred to controlled substances and narcotics such as cocaine, methamphetamine, and other 'hard' substances, and are more likely to result in sentences that followed the Crown prosecutor's preferences due to their perception that drug addictions are harder to rehabilitate/treat than other addictions. As such, drug offenders are perceived as more likely to reoffend/fail treatment programs and this necessitates a more controlling/harsh sentence on the grounds of both rehabilitation and protection of the public (likely within a controlled treatment centre). Note that, as **Table 2** indicated, drug charges are more likely to result in a community release/supervision of some type. Though not all addicts are charged with drug

offenses, the pattern presented remains consistent provided that the Crown prosecutor's position is lenient and already includes some level of rehabilitation in the community. This community rehabilitation may be with or without prior custody, and may also require subversions of recent mandatory minimum sentencing legislation. As for homelessness/poverty, there were some cases where they were interpreted in a 'practical' manner and were used to reduce monetary punishments, but in general they were implicitly part of both problematic discursive frameworks and support their resultant interpretive frame of victimization and objectification. In general, we find that homelessness/poverty has both metaphorical and rhetorical aspects.

Trauma is also relational and has links to the previous characteristics in an overarching framework of intrinsic victimization, though it also has links to the victim as well. Another characteristic involved family issues, which generally referred to recent family deaths/health issues, interfamilial problems, conflicts, or supports, concerns about the children of the offender/accused person, and the current domestic situation of them and/or victim. In all instances, they were again presented as part of the objectifying colonial discursive framework through their racist assumptions that such elements are intrinsic to Aboriginal peoples. This problematic discursive framework is typically presented without much reflection or criticism, leading to the assumptions and histories being interpreted as mitigating factors that are rhetorically weak or possibly counter-productive in that

they may make it seem that the offender/accused person has fewer controls and supports available to them in the community (and thus, fewer people to supervise or enforce a community-based treatment regime). As such, these issues speak most clearly to the criminological research described previously, specifically with regards to the background elements Gladue courts view as relevant. Latimer & Foss noted that Aboriginal youth are given longer sentences than non-Aboriginal peoples likely due to their perceived higher "risk/need levels" (Latimer & Foss, 2005, p. 496). This conclusion was further supported by Yessine & Bonta's analysis which echoed similar conclusions on the basis of backgrounds of poverty (Yessine & Bonta, 2009, p. 460). What is interesting is that the way these elements were presented in the court was as an overarching framework of intrinsic victimization. This framework was one in which Aboriginal peoples were nearly always presented as suffering from near-constant issues and problems due to racist/colonial policies. Modern penal thought in Gladue courts is based around historical events and long-term problems that require intervention (for their own benefit). Again, this is part of the reason why such characteristics are emphasized and explains how they contribute to the problematic narrative. As such, many of these historical characteristics result in a framework that can be counter-productive to avoiding incarceration as they indirectly create frameworks that advocate paternalistic orientations.

The problematic discursive framework can be examined in comparison to the recognition of 'collective trauma' as both a contributor to the problematic discursive framework as well as a critical component of agency-building initiatives. Collective trauma is expressly recognized as a key element of the Gladue decision and, as stated before, must be acknowledged in order to ensure that the racist and colonial context behind the lives of Aboriginal peoples is recognized and understood fully (Usher & Lawrence, 2011, p. 91-92, 94). Within the courts studied here, there was recognition of collective trauma that was sometimes used to explain and legitimate restorative and similar sentences, primarily in the context of diversion agreements (ibid., p. 95-96). Not all histories would lead to the identification and promulgation of problematic racist and colonialist orientations that deemed aboriginal peoples intrinsically victimized and in need of government intervention; some few judges would recognize the long-term harm caused by government interference and assimilation policies and would respond with a sentence that avoided direct government interference/supervision. However, in most instances these possibilities were overshadowed by the ideological orientation of modern penal rationality which would reinterpret such elements as being key 'risk-factors' endemic to Aboriginal peoples.

This reductive process is part of how collective trauma is reinterpreted and transformed into a fundamentally harmful and counter-productive interpretive

framework that views aboriginal peoples as requiring intensive (government-supervised) treatment regimes in order for them to be adequately rehabilitated. Rather than viewing the recognition of collective trauma as a way to understand and help rebuild Aboriginal communities, the detached viewpoint of MPR applies such historical and theoretical elements in a manner that makes them out to be 'problems' to be solved or which necessitate intervention. In this misapplication, collective trauma is used to further dominate and control Aboriginal peoples rather than allow for the recognition, prevention, and healing of past injustices. Because modern penal rationality is only capable of thinking in terms of 'risk' or 'need' or other cost-benefit utilitarian ideologies it necessarily colours other processes within the court in such a way that they are framed as problems to be solved as well as the sole focus of the court. By emphasizing these elements above all else during histories and background discussions, the Gladue courts have created narratives that only present Aboriginal peoples as being intrinsically victimized and without their own agency; a perspective that underlies the MPR ideologies at the heart of modern criminal justice systems.

Some characteristics are broad in that they can be both strongly mitigating and aggravating in their interpretations and applications. General criminal/treatment history is one such characteristic, as it directly references the possibility of both reoffending and rehabilitation. In general, however, it is almost always initially presented/interpreted as an aggravating factor as the Crown

prosecutor brings up a criminal record as part of the arraignment process. The data from **table 7** corroborate this conclusion, as it is primarily mentioned during sentences that are far away from the 'lenient' side of the spectrum. The repetition inherent to this discourse is based on this reinforcement (from the judge) or counter-argument (from the defense counsel). This second repetition is what determines the discourses' interpretation and its final influence on the sentence. Thus, when it is brought up during the sentence it is much more likely to be used to support a punitive measure rather than not. This interaction is also present for the offender/accused person's discourses of remorse, where the majority of such speech is based around reoffending and their potential rehabilitation. They are only allowed to express remorse in the context of their record and the criminal justice system rather than their family, personality, or otherwise non-criminal relations. This trend was by far the most common, but there were a handful of times when remorse was based around non-criminal matters.

Recent history is similar yet the opposite of general criminal/treatment history as it is repeated by judges during a sentence when it is used to encourage rehabilitation, and it is not mentioned during the sentencing speech/rationale when it does not (in these instances, the general criminal/treatment history is mentioned instead). It is likely for this reason – along with the importance of recent treatment as a sign of rehabilitative prospects – that makes this discourse seemingly more punitive than others, though keep in mind that this discourse is still more likely to

be correlated with cases that ended with the defense counsel's recommended sentence being followed than not. Therefore, the general interpretation and application of recent criminal histories and their relevant information is utilized as an 'amplifier' of the general criminal/treatment histories. Successful treatment histories are best understood as the most mitigating form of criminal/treatment history and, in some instances, it can even counteract concerns related to the protection of the public and shift the sentence towards a compromise position. Judges, in this respect, interpret/value rehabilitation higher than potential concerns for the public provided that the offender/accused person has shown at least some movement towards it. Remorse, when coupled with this discourse, can reinforce this perspective and orientation by promoting the idea that the offender/accused person seeks to further escalate his rehabilitative regime. On the other side, failed treatment histories reinforce this trend with the caveat that failed treatment alone is not enough to create a punitive sentence. Histories of failed treatment require other punitive-focused discourses in order to adequately work as a punitive-based discourse, notably mention of protection of the public. By itself, failed treatment histories lead to a more controlled rehabilitative regime rather than a wholly individualized/open treatment program. It is because of this that failed treatment histories are referenced during the sentencing speech/rationale more frequently than successful treatment histories. Specifically, they are used to support the interpretation that the offender/accused person is likely to reoffend and thus a

sentence that is not purely rehabilitative is needed. Rehabilitative sentences, due to their shared interpretation as the 'starting point' of a sentence, need no further rationalization or support and only require an absence of dissenting/punitive submissions.

The main conclusion to draw from this analysis set and the related observations is that the overall sentence-making process is not solely based on rhetoric and the frame of the offender/accused person, but also on how such arguments can be symbolic of other sentencing principles, court preconceptions, or shared interpretive schemes regarding the role and orientation of the entire criminal justice system. As detailed in Dugas' (2013) work, these elements are part of the modern penal rationality and its preoccupation with both incapacitation and practical/utilitarian risk assessments (p 113 -114). In either instance, the utility of Gladue as a tool for healing and restoration is stymied by pre-existing interpretive schemes rather than the new punitive movement. Put more simply, the ability of Gladue to be of benefit to Aboriginal Peoples is limited through internal, not external, discursive forms. In addition, the presentation of these discourses are done in such a way that a new discursive scheme (such as the problematic framework of Aboriginal peoples) is created out of this blending of the two ideologies, simply replacing one colonial and racist bias with another. In either instance, the overall process works on the basis of a sliding scale of punishment wherein the default plan is based on a generally neo-liberal perception of

rehabilitation and the judges shift towards paternalistic treatment regimes or completely restrictive custodial dispositions as submissions are presented.

Table 8 : Informal Processes by Sentence/Decision, Proceeding Type, and Victim/Offender/Accused Person Characteristics

For this observation, the 'Aboriginal Court Worker workarounds' passages/code-set will be ignored as there was only one passage noted as such. Though it will be repeated later, it is necessary to state here that this is a gross under-representation of the work done by Aboriginal Court Worker. As the majority of their work is done out of court, in private conversation with defense counsels and/or offenders/accused persons, or with treatment agencies, the researcher was unable to observe any of this and thus many of the observations did not include these references even when their influence was present and a significant effect on the proceedings. **Table 8** looked to many of the previous discourses as well as informal processes and expressly functional discourses. The informal processes studied here include both discourses meant as tools as well as discourses that aimed to replace the formal court procedure for some reason or another. As such, the primary concern is on how some of these informal protocols influence/are influenced by the major elements of the case (the offender/accused person and the crimes) as well as the final sentence itself.

	Def.-Crown Neg.	Crown Disc.	Fines/ VFS	Mand. Min.	New Leg.	Impact Vict./ Comm.	All Cases
Def.-Crown Neg.	249	39	2	2	0	5	216
Crown Disc.	39	165	1	4	0	4	156
Fines/VFS	2	1	44	7	8	0	36
Mand. Min.	2	4	7	81	6	1	58
New Leg.	0	0	8	6	13	0	7
Impact Vic./ Comm.	5	4	0	1	0	98	63
Recon. Off./Acc.	10	7	0	2	2	6	174
Off./Acc. - Def. Neg.	13	2	0	0	0	1	74
Impact Off./Acc.	1	2	0	0	0	12	57
Personal Resp.	3	4	0	0	0	5	151
Threats	3	0	0	3	0	2	170
Informal Back.	0	0	0	3	0	3	146
Proof	7	8	0	1	0	0	131
Drug	12	17	2	9	2	0	36
Property	54	55	17	31	5	20	160
Violent	25	35	9	13	2	28	96
Bail	30	29	3	8	0	15	105
Plea	50	40	33	46	7	35	148
Diversion	19	48	0	1	0	2	54
All Cases	216	156	36	58	7	63	851

(Figure 14-Table 8a : Informal Processes by Sentence/Decision, Proceeding Type, and Characteristics, part 1)

	Recon. Off./ Acc.	Off./ Acc. - Def. Neg.	Impact Off./ Acc.	Personal Resp.	Threats	Informal Back.	Proof	All Cases
Def.-Crown Neg.	10	13	1	3	3	0	7	216
Crown Disc.	7	2	2	4	0	0	8	156
Fines/VFS	0	0	0	0	0	0	0	36
Mand. Min.	2	0	0	0	3	3	1	58
New Leg.	2	0	0	0	0	0	0	7
Imp. Vic.	6	1	12	5	2	3	0	63
Recon. Off./Acc.	229	6	6	47	17	22	24	174
Off./Acc. - Def. Neg.	6	77	1	5	35	1	0	74
Impact Off./Acc.	6	1	77	9	7	14	0	57
Personal Resp.	47	5	9	290	96	20	14	151
Threats	17	35	7	96	257	8	6	170
Informal Back.	22	1	14	20	8	202	22	146
Proof	24	0	0	14	6	22	159	131
Drug	7	6	4	9	10	12	7	36
Property	51	24	22	75	77	66	32	160
Violent	26	8	13	44	49	40	17	96
Bail	25	4	19	43	30	44	16	105
Plea	62	39	36	94	112	97	34	148
Diversion	7	0	2	6	8	2	4	54
All Cases	174	74	57	151	170	146	131	851

(Figure 15-Table 8b : Informal Processes by Sentence/Decision, Proceeding Type, and Characteristics, part 2)

	Def. - Crown Neg.	Crown Disc.	Fines/VFS	Mand. Min.	New Leg.	Impact Vict./ Comm.	All Cases
Joint Sub.	26	15	15	10	2	4	99
Joint Sub. (C)	61	42	19	18	4	17	107
Crown	0	2	0	5	0	1	13
Crown (C)	1	2	1	7	0	3	14
Defense	0	4	3	6	0	4	31
Defense (C)	5	6	3	6	0	10	36
Comp.	1	5	9	12	3	8	34
Comp. (C)	6	7	9	19	3	13	37
Prob.	15	12	17	15	2	11	71
Prob. (C)	33	23	20	22	3	22	77
Susp.	8	5	6	3	1	4	24
Susp. (C)	12	9	6	5	1	7	25
Addiction	2	1	0	0	0	0	42
Drugs	0	0	0	0	0	1	37
Alcohol	1	0	0	0	0	4	47
Homeless.	0	0	3	3	1	3	84
Crim.History	8	7	1	2	0	5	200
Recent His.	1	1	0	0	0	0	25
Successful	0	1	0	0	0	0	46
Failure	0	0	0	0	0	1	66
Remorse	2	4	0	1	0	2	99

(Figure 16-Table 8c : Informal Processes by Sentence/Decision, Proceeding Type, and Characteristics, Part 3)

	Recon. Off./ Acc.	Off./ Acc. - Def. Neg.	Impact Off./Acc.	Personal Resp.	Threats	Informal Back.	Proof	All Cases
Joint Sub.	4	1	5	31	30	12	5	99
Joint Sub. (C)	29	23	21	45	57	50	20	107
Crown	3	0	2	5	5	2	1	13
Crown (C)	8	1	7	10	10	13	5	14
Defense	3	0	2	13	13	3	4	31
Defense (C)	19	4	8	30	25	32	11	36
Comp.	5	1	1	14	17	6	2	34
Comp. (C)	16	12	11	28	31	31	10	37
Prob.	3	1	4	23	31	12	4	71
Prob. (C)	33	25	23	47	61	58	19	77
Susp.	2	0	0	9	12	4	1	24
Susp. (C)	9	9	7	20	22	20	6	25
Addiction	8	1	0	2	3	21	6	42
Drugs	1	0	1	4	4	23	1	37
Alcohol	4	1	4	9	4	24	3	47
Homeless.	24	0	9	9	2	58	4	84
Crim.History	17	0	3	15	18	42	38	200
Recent His.	4	0	1	2	1	8	9	25
Successful	5	0	1	4	0	20	35	46
Failure	1	0	0	26	14	13	12	66
Remorse	51	1	0	93	15	20	14	99

(Figure 17-Table 8d : Informal Processes by Sentence/Decision, Proceeding Type, and Characteristics, Part 4)

To again briefly cover some of the most relevant findings from this table, we can start by noting that Crown discretion was primarily mentioned alongside defense counsel-Crown prosecutor negotiations, for the most part reflecting the discussions related to diversion proceedings. Fines/VFS (victim fine surcharges) were primarily discussed directly alongside reactions to new legislation and mandatory minimums – reflecting the recent changes that made such fines unable to be waived by judges. Discourses that referenced reconciling the offender/accused person's desires were relatively common and primarily concerned the final statement made by them prior to the judge pronouncing their sentence – often, this involved them referencing personal responsibility discourses such as desires that the offender/accused person take some responsibility, act on their own accord, or accept some blame for the crime. These personal responsibility discourses were the most common informal process discourse, and included the plea inquiry at the start of the proceedings. Threats/warnings/appeals tracked closely to these personal responsibility discourses, but were repeated less often and primarily occurred in joint submission or compromise cases. Lastly, implied threats/commands were made up of directed discourses and half of them were deliberately put on the record. These recorded discourses predominantly involved the judge and/or the offender/accused person.

Negotiated discourses are a significant part of the Gladue court process, even outside of joint submissions. Admittedly, such submissions seem to be the

most fortuitous examples of such negotiations, and an absence of violent offenses seems to be most likely to encourage such processes due to concerns regarding the protection of the public. Even when a complete joint submission is not enacted, the mere presence of negotiations is able to shape the rhetoric and interpersonal aspects of the case such that the defense counsel's recommended sentence and compromise sentences are more likely to be followed (or, alternately, this trend is due to the proportionally lower number of violent offenses). These negotiations are developed by Crown prosecutors in order to engage in mutually beneficial plea deals wherein they save time, and the offender gets a slightly more lenient sentence. In order to justify the plea to the judge, Crown prosecutors are required to utilize Crown discretion as well as their own rhetoric in order to convince the judge that the offender/accused person is an appropriate candidate for such leniency, typically via references to criminal/treatment history and their own personal remorse. As such, the rhetorical power of such discourses is increased when they are spoken by a Crown prosecutor rather than the defense counsel or offender/ accused person. These cooperative elements and actions best exemplify the overall interaction process of modern penal rationality, particularly the emphasis on practical concerns and maintaining the bureaucratic/procedural order of the court system. Joint submissions, as well as negotiations, therefore represent the point where penal rationality is concerned with what Garland defined as the

redefinition of judicial success (on the basis of "efficient and cost-effective [justice]" (Garland, 1996, p. 459)).

With respect to diversions, this aspect of Crown discretion and out of court negotiation is even more relevant and significant to the overall process. In diversions, the Crown prosecutor is given the ability to determine the form of the release and recommend a staying of the charges rather than the judge. In these cases, the judge's discretion to determine the sentence is still present, though it is now limited to agreeing or disagreeing with the Crown prosecutor's recommendations (in all observed diversions, never once was a diversion request denied). If a judge were to disagree with a recommendation for diversion, then he would either alter the agreement to be amenable to all parties or tell the accused person to schedule a plea or trial date. In normal circumstances, these speculative diversion agreements presented by the Crown prosecutor are expected to have already considered the Gladue principles, and the defense counsel and offender/ accused person have had their say as well. Because of this, these negotiations are interpreted as being less controversial and adversarial than conventional court cases/arguments and further emphasize an 'efficient' judiciary – particularly since they allow for treatment to be performed and organized outside the criminal justice system itself. Therefore, despite never being privy to the actual negotiations the judge is still interpreting and applying the statutes and submissions in a way that favours the Crown prosecutor. The overall effect is that

their submissions and claims are given a higher weight when supported by the defense counsel. A defense counsel who presents these negotiations imbues them with less rhetorical strength than if a Crown prosecutor were to do so, even if the Crown prosecutor later supports them in turn, and this reflects the adversarial and practical elements still embedded in the cooperative framework of Gladue and joint submissions. Regardless of the speaker, diversions all involved Crown discretion discourses being expressly used and interpreted in a way that subverted conventional punitive policy and disciplinary penology. Even when the case did not involve a diversion, the enactment of Crown discretion was needed in order to avoid mandatory minimum sentences. An examination of these passages showed that judges questioned this application of the discourse, but nevertheless agreed with such results for reasons they did not disclose vocally. Crown discretion is, primarily, used in concert with defense counsel discourse with respect to the offender/accused person's criminal/treatment/personal history and chances of reoffending. In this sense, it is implicitly an embodied metaphor that expresses an overall assessment of the mitigating and aggravating factors present in the current case. Negotiations between the offender/accused persons and defense counsels are difficult to conceptualize as they often occur off the record or in private. In many cases, this discourse is primarily only seen during the plea inquiry and it can inadvertently be used to expose addictions or frustrations otherwise hidden by the offender/accused persons (such as in statements that they want to plea 'now, not

later' or 'to get it over with'). In these instances, the discourse is criticized by the judge even when the defense counsel is the actor applying it, though the plea is entered regardless.

Fines/VFS were both informal processes and punishments due to their peculiar position within the Gladue context and the drastic changes in their use during the research period. These drastic changes were what changed their classification from being purely a sanction to also being an informal process that has importance beyond conventional punishment. Specifically, fines were considered nearly a non-issue in most instances due to the shared group understanding that Aboriginal people put before the court were unable to afford the fines due to endemic poverty. In many instances, this claim/interpretation was backed by the individual offender/accused person providing direct evidence of such. However, once the October 2013 changes to the VFS were enacted each judge was directly challenged to reconcile these past assumptions with new regulations; the results varied. Some judges followed the regulations, others directly ignored them, while still others gave tacit assistance to defense counsels seeking to subvert the changes. Though the observation period ended 2 weeks after the change, some later observations showed that this ad-hoc resistance eventually became more organized, pre-planned, and 'hidden' from the observers. For instance, some directly mentioned VFS whereas others subtly changed the use of reparations and fines such that the overall effect of the new law was reduced.

Effectively, each actor went from independently interpreting and challenging the changes to participating in a shared, group-based consensual discourse of what the VFS should accomplish. This new discourse was based on functional discourses and metaphors that were already present in courts but utilized differently prior to the new guidelines. In this instance, the adaptations and changes to the past metaphors/meanings were done in a seamless manner that made the new processes seem as routine as the old ones. Put more simply, a new shared discourse and structure emerged and changed in light of the norms and pre-existing metaphors of the court, eventually becoming so routine and normal that it effectively became the new norm of the court. An important caveat to this process is that, when VFS were directly waived (prior the October 2013), there was no hesitation on the part of the judge or defense counsel to mention that the reason for such alterations was due to the presence of addictions or mental illness. In contrast to other discourses, a direct application of this informal process/sentence necessitated a direct practical reason to be stated or was mentioned directly by defense counsels in order to increase the rhetorical strength of their appeal (such requests were made after the final sentence, thus there was no risk of framing their client as a threat to the public or a repeat offender).

Mandatory minimums primarily dealt with the changes to fines/VFS noted above, as well as changes to drug offenses. These drug changes seemed to have turned the overall trend in final sentence towards the Crown prosecutor's

recommendation, and this is likely because such offenses have yet to be subjected to the same group-wide adaptation strategies as with fines/VFS, above. The reasons for this lack of adaptation is unknown, though the smaller number of such offenses, the link to public protection, and the poor record of such offender/accused persons may be some explanations as to why this discourse is applied and interpreted in such a divergent manner. Alternately, Crown prosecutors' offices may be attempting to create a standardized, formal interpretive scheme behind the scenes that will guide their own application of Crown discretion in these situations. With regards to many of the drug offenses, transcript and observation notes show that Crown prosecutors are also interpreting their Crown discretion such a way that they can choose to ignore/subvert certain legislation if it is appropriate in the circumstances – in these cases, their positions may already be interpreted as lenient by the judge and thus such cases are not as punitive as popular preconceptions may make them seem.

The above adaptations to new punitive legislation represent the bulk of the changes and effects on Gladue courts as well as one of the main differences between Gladue courts and others. Specifically, Gladue courts identified the new legislation and its stated goals of punishing individuals ever further while making prison and custodial sentences express tools for reasserting state power, express public frustrations with criminals, and counter therapeutic justice advocacy (Garland, 1996, p. 460). That said, they have expressly reacted against this

process on a two-fold basis – appeals to efficient modern penal rationality and an overarching discursive framework of Aboriginal peoples. Specifically, changes to the VFS were criticized because the court views nearly all Aboriginal peoples as intrinsically victimized and poor, and this problematic racist and colonial viewpoint leads judges to view them as being incapable of paying the fines and any attempts to enforce their collection as a waste of time. Similarly, mandatory minimum sentences were subverted through a preference for bureaucratic processes as well as positivistic interpretations that made penal rationality and its concern for rehabilitative "social inclusion" congruent with a non-custodial alternative sentence (Dugas, 2013, p. 55).

The impact of the crime on the victim/community is an informal process designed to expressly gather and communicate information relating to aggravating and mitigating factors. In many instances, this discourse is made up of vague or undisclosed statements from the Victim Impact Statement (VIS), and in this respect it is expressly relational in that it directly calls to mind concerns regarding the protection of the public as well as related sentencing principles and schemes (such as domestic allegations, for instance). Note that some VIS directly mentioned a desire from the victim that rehabilitation be considered a major principle, and this was mostly done in cases involving alcohol addictions. What is also notable about VIS is that they are mandatory for any diversion and therefore, coupled with the large number of diversions, we can give credence to the idea that

VIS are not necessarily neo-punitive and, if not pro-rehabilitation, can at least be functionally used to legitimate the restorative justice discourses within the Gladue decision. Therefore, the content of the VIS and the way it is interpreted by the judge and Crown prosecutor can serve to promote a lenient or custodial sentence (again, on either rehabilitative or punitive grounds), and this is reliant on both the content of the statements as well as their interpretation on the part of the court actors. Prior discourses – such as those that allege difficult domestic circumstances – are the critical element that determines how the information is interpreted and perceived as being symbolic of other related problems by the court.

The informal process concerned with reconciling the offender/accused person's desires is primarily communicated via formal/required processes that mandate that they be allowed to speak and plea on their own volition. In effect, they are used rhetorically (for the offender/accused person's final statement) and to functionally frame the individual in question; in these instances, there is both an acknowledgment and reinforcement of neo-liberal discourses alongside a counter-argument of the Crown prosecutor's pro-custody discourses. In this counter-discourse mode the offender/accused person will directly mention practical considerations (homelessness/poverty and addictions) as well as direct appeals to Gladue principles via long-term histories. In this combination, these desires can be interpreted as a rhetorical discourse that directly calls to mind

mitigating factors and the practical/cost-benefit analysis of the modern penal rationality embedded in Gladue courts. Personal responsibility discourses are also embedded in this process and its interaction with the Crown prosecutor, primarily when the offender/accused person recognizes (or is told to recognize) their role in offending or treatment. In the event that the offender/accused person references this discourse/process themselves then questions regarding the reasons for doing so, and whether this is a genuine instance of their agency and personal initiative may be raised. That is, Aboriginal peoples brought before the court already have their agency curtailed through the criminal justice process and colonial processes, so there may be pressure to agree with the ideologies of the court and colonial society. Conversely, the opportunity to speak freely may allow the offender/accused person to speak their mind and act as a small opportunity to express their own agency and counteract harmful colonial discursive frameworks. In any case, when the Crown prosecutor makes this claim about the offender/accused person's role in rehabilitation, treatment, and/or offending, then they are directly promoting related ideologies such as neo-liberalism or the new punitiveness promoted by neo-conservatism. However, sometimes this is less punitive than it appears as they often state that all they really want is for offender/accused persons to begin the rehabilitation process and make a good-faith effort. Therefore, despite its original conception/design as a neo-liberal ideological discourse, this informal process can be interpreted and applied as both

punitive and rehabilitative in orientation. In all instances, however, the critical/disciplinary elements of such discourses are still implicit, and they continue to reflect the modern penal rationality and its focus on how "condemnation and the reaffirmation of social norms can only be achieved through the punitive and exclusionary sanctions provided through the legal system" (Dugas, 2013, p. 58).

Furthermore, this discourse may be used to communicate a warning to the offender/accused person and make it clear to them that neo-liberal ideologies may be replaced by neo-punitive ones in the future. Specifically, the warning is that Crown prosecutors and judges may not be able to prevent such policies in the future and are reflexive in their awareness that they are similarly constrained and limited by the ideologies of the criminal justice system as well. Express threats/warnings/appeals are related discourses to personal responsibility discourses and they are commonly combined in the manner described previously and in concert with the plea inquiry. For joint submissions, the expectation and assumption from judges is that such warnings (when part of the plea inquiry) are unnecessary as the Crown prosecutor has already 'vetted' the process. When the case is not a joint submission, such informal plea inquiries are viewed with skepticism as there are concerns that the offender/accused person may not understand the process of a guilty plea. This privileging of the Crown prosecutor's discourses may be due to structural power relations of the court that give the them

a privileged position within the court setting, or because they are more knowledgeable about the case and can ensure that the offender/accused person is aware of all the facts and offenses and their implications in the future (that is, the Crown prosecutor provides additional vetting of the defense counsel's claims and argument). The structural power relations of the court are likely a part of discourses relating to informal proof of claims made by the offender/accused person during their final speech and referenced with respect to treatment agencies. In this case, the structural power relations of the court are expressed through the privileging of the Crown prosecutor's discourses and claims rather than those who are not; the defense counsel and treatment agencies are viewed as inherently biased in favour of the offender/accused person whereas the Crown prosecutor is erroneously considered unbiased and accurately gauging all potentialities within the Gladue principles and S.718.2 (e). Therefore, the general discursive formation and interpretation of these claims seems to be partly based on both the speaker and the listener. If a Crown prosecutor is accepting of such claims (or doesn't contest them too strongly) it will make such claims appear more legitimate in the eyes of the court and reinforce the rhetoric of rehabilitation. If the claims are contested and the counter-rhetoric is strong enough, then their effectiveness would be reduced or eliminated.

In general, informal processes serve as both mediums of communication and information conveying speech regardless of the sentencing principle in

question. In addition, these processes can often act as embodied metaphors, relational discourses, and/or as tools for them to be made manifest. Therefore, informal processes are non-sanctioned (due to their informal basis) but are still necessary for the court system as a whole to function and are subsequently embedded within the principles of modern penal rationality through this connection. While these processes allow for greater fidelity in background reports and some level of granularity in sentences and sanctions, they still lead to racist/colonial discursive frames, continued objectification of Aboriginal peoples, and an overall adversarial interpretation of different court actors. In some of these instances the Gladue orientation moderates these effects a small amount, particularly when counter-proposals from outside treatment agencies and Aboriginal court workers (ACWs) are brought to bear. Similarly, court actors are differentially affected by and influenced by these principles and frameworks, with external actors being the least influenced by them. One major effect of these principles and frameworks is the emphasis on a rehabilitation/custodial dichotomy, which is primarily a problem with the Crown prosecutor and judge rather than those on the defense counsel's side. Delimitation between the two goals/principles is common, and these actors sometime conflate one or the other with harsh or lenient justice due to embedded ideological orientations within the modern penal rationality.

Table 9 : Discourse Analysis by Actors and Informal Processes

For **table 9** brief sections of clearly delineated discourses were coded as part of the 'discourse analysis' code set [6]. Additionally, actors were coded as such when they were speaking, or if the actor was deliberately being spoken to (i.e., not speaking to the court as a whole). Finally, many of the discourse analysis code sets were based on the general methods and themes of critical discourse analysis, specifically Foucault's conception of exteriority and hidden truths within discourses of possibilities (in this thesis, possible sanctions or criminal events) (Foucault, 1981, p. 67). However, these terms and frameworks were later modified when certain trends or patterns emerged that necessitated the creation of new categories. In addition, some conceptions of neo-liberalism and neo-punitiveness were included in the code-set; these reflected the definitions made by Pratt et al. and Hannah-Moffat and Maurutto from Pratt et al.'s 2005 collection (p. xi -1, 85-101). Therefore, the overall theoretical orientation of the discourse analysis is rather broad and covers ideological/political discourses as well as some physical discourses and body language. Overall, this cross-tabulation was designed to specifically analyze whether or not disciplinary (or counter-disciplinary) discourses were specific to certain actors or were the result of certain informal/subversive court processes. As such, it was primarily designed to

[6] See **Appendix A** for the exhaustive list of such discourses code sets

	What is unsaid	Unstat. alter.	Implied threats/ comm.	Reinfor. of legal auth./ power	Reinfor. of New Pun.	Subv. of pun.	All Cases
What is unsaid	214	4	10	17	8	25	139
Unstat. alter.	4	203	41	50	16	29	149
Implied threats/ comm.	10	41	228	40	11	15	172
Reinfor. of legal auth./ power	17	50	40	215	18	38	167
Reinfor. of New Pun.	8	16	11	18	83	18	62
Subv. of pun.	25	29	15	38	18	213	173
Restor. Just.	3	1	0	1	0	5	15
Comm. Just.	3	7	4	4	1	7	31
Situat. disc.	41	26	12	20	5	16	194
Neg. disc.	17	17	7	34	0	30	300
Direct disc.	75	88	180	77	33	74	325
Out of court disc.	60	45	16	46	5	38	413
Delib. on the record disc.	20	25	94	19	7	36	188
Def.-Crown Neg.	8	12	10	19	1	26	216
Crown Disc.	8	20	5	47	2	75	156
Fines/VFS	2	1	0	3	3	12	36
Mand. Min.	6	10	2	12	5	16	58
React.New Leg.	1	1	0	4	1	11	7
Imp. Vict./ Comm.	21	12	9	11	10	5	63
Pers. Resp.	29	39	78	12	28	30	151
Threats	23	51	139	35	26	28	170
All Cases	139	149	172	167	62	173	851

(Figure 18 – Table 9a : Discourse Analysis by Actors and Informal Processes, part 1)

	Restor. Just.	Comm. Just.	Situat. disc.	Neg. disc.	Direct disc.	Out of court disc.	Delib. on the record disc.
What is unsaid	3	3	41	17	75	60	20
Unstat. alter.	1	7	26	17	88	45	25
Implied threats/ comm.	0	4	12	7	180	16	94
Reinfor. of legal auth./ power	1	4	20	34	77	46	19
Reinfor. of New Pun.	0	1	5	0	33	5	7
Subv. of pun.	5	7	16	30	74	38	36
Restor. Just.	19	0	2	1	7	3	1
Comm. Just.	0	46	7	3	18	8	1
Situat. disc.	2	7	273	18	62	112	23
Neg. disc.	1	3	18	352	45	83	12
Direct disc.	7	18	62	45	593	98	222
Out of court disc.	3	8	112	83	98	529	23
Delib. on the record disc.	1	1	23	12	222	23	266
Def.-Crown Neg.	0	0	13	179	45	75	21
Crown Disc.	0	3	12	64	44	43	34
Fines/VFS	0	0	5	5	5	4	1
Mand. Min.	1	0	5	5	20	5	7
React.New Leg.	0	0	1	0	4	1	0
Imp. Vict./ Comm.	3	5	36	6	27	36	12
Pers. Resp.	3	5	20	3	183	24	92
Threats	2	6	9	3	200	10	92
All Cases	15	31	194	300	325	413	188

(Figure 19 – Table 9b : Discourse Analysis by Actors and Informal Processes, part 2)

	What is unsaid	Unstat. alter.	Implied threats/ comm.	Reinfor. of legal auth./ power	Reinfor. of New Pun.	Subv. of pun.	All Cases
Judge	63	73	134	86	43	77	429
Crown	61	58	38	100	22	96	374
Federal	2	2	1	0	1	5	18
Counsel	48	35	50	23	10	26	365
Private	16	15	13	9	1	7	114
Duty Counsel	7	5	8	7	1	11	163
Off./Acc.	93	97	124	69	41	99	501
Off./Acc. Fam.	39	20	11	5	2	9	118
Surety	11	9	16	5	1	3	47
Victim	23	11	10	10	4	4	59
Public	0	6	2	5	9	5	18
ACW	2	5	0	0	0	3	42
Court Staff (Not ACW)	0	1	1	0	0	0	126
CCT	2	11	0	21	0	51	95
Treatment Agencies	22	20	9	18	10	40	174
Politicians / Gov.	4	3	0	4	0	7	12
Other	1	3	1	6	1	2	24

(Figure 20 – Table 9c : Discourse Analysis by Actors and Informal Processes, part 3)

	Restor. Just.	Comm. Just.	Situat. disc.	Neg. disc.	Direct disc.	Out of court disc.	Delib. on the record disc.
Judge	7	21	74	89	264	86	101
Crown	1	7	66	138	141	131	49
Federal	1	0	4	8	3	5	3
Counsel	6	4	67	131	138	160	46
Private	2	3	15	49	56	68	20
Duty Counsel	0	3	20	40	31	86	14
Off./Acc.	2	9	99	99	378	239	183
Off./Acc. Fam.	9	28	44	6	70	78	17
Surety	1	4	11	8	30	18	1
Victim	0	1	42	11	26	42	17
Public	2	2	0	1	6	1	2
ACW	0	0	9	12	4	32	3
Court Staff (Not ACW)	0	0	6	6	2	15	2
CCT	1	3	8	43	35	47	32
Treatment Agencies	3	4	56	27	55	109	8
Politicians / Gov.	1	0	3	1	6	3	2
Other	0	1	10	2	6	6	3

(Figure 21 – Table 9d : Discourse Analysis by Actors and Informal Processes, part 4)

analyze how Gladue courts are engaging with both the Gladue principles and the new punitiveness.

Again, there are a few small interesting sections that can be highlighted prior to starting the discussion and analysis. To begin with, 'What is left unsaid' (referring to deliberate omissions) primarily directly referred to discourses/processes that reference personal responsibility. In contrast, discourses that referenced unstated alternatives (such as the possibility that future leniency would not be forthcoming) often directly referenced the reinforcement of legal authority/power but also subverted punitiveness and referenced the Community Council of Toronto. Discourses that reinforced the new punitiveness also had similar cross-references to the above two, but never involved treatment centre releases. Furthermore, restorative justice discourses were less common than communal justice discourses, but both predominantly subverted punitiveness and each were preferred by different actors – defense counsels preferred restorative justice, and judges and Crown prosecutors preferred communal justice. Negotiated discourses were dualistic in nature, as they both reinforce legal authority/power but also are the primary means by which diversions are enacted, primarily via discussions from outside the courtroom. Lastly, deliberately on the record discourses often referred to the plea inquiry (when combined with implied threats/commands) and or diversion agreements (when combined with subversions of punitiveness).

To begin the analysis, Crown prosecutors, judges, and other major court actors responsible for enforcing punitive policies are cognizant of the possible future sentences that would be applied as a result of reoffending. In this case, these actors leave these possibilities unspoken in order to encourage the offender/accused person to interpret the discourse and implications in whatever way makes the result *appear* more threatening. When defense counsels utilize this discourse, it can be interpretive in orientation and used to deliberately avoid mentioning possible aggravating circumstances directly. In this sense, they are aware of the way their own discourses can be misinterpreted and cause them to be perceived as rhetorically weak. In these instances, defense counsels will therefore avoid mentioning certain direct mentions for the benefit of their case. Linked discourses can assist this process, as personal responsibility discourses and appeals are used to communicate this possible result and the rationalizations behind it. The unstated alternatives include more lenient and criminal justice based concerns, and this discursive interpretation and function is primarily utilized by the Crown prosecutor and their discretion in relenting 'one last time'. In this application, discourses linked to this process were more symbolic and interactive in that they implied that personal responsibility and changes were necessary lest they not be allowed to utilize rehabilitative or diversionary processes in the future. Dugas' (2013) work referenced this possibility in that he

hypothesized that court actors are utilizing harsh rhetoric in order to "outsmart" or subvert the current modern penal rationality and its focus on deterrence (p. 121).

Implied threats/commands were primarily issued as part of the plea inquiry and as treatment orders from the judge regarding the applied sentence. As such, they were often deliberately put on record both due to formal requirements as well as to serve as an additional rhetorical discourse and deterrent (primarily for the benefit of future Crown prosecutors and their own potential negotiations). It should be noted that oftentimes these threats were combined with direct calls or actions that subverted the presumed penality of the contemporary criminal justice system. This combination can act to reinforce these claims of leniency or could possibly be counter-productive to them, though the main determinant of this result is based on the offender/accused person's individual interpretation. For instance, the threats/commands can be combined with appeals to make it clear that they must rehabilitate themselves lest they be refused that opportunity in the future. Alternately, warnings that punitive sentences would result may seem dubious if the court seems to go out of its way to avoid them at the present time. This discourse is therefore both functional and rhetorical, with the rhetorical strength/weakness being unpredictable and impossible to observe in this thesis. There is also the possibility that these warnings and concerns are made with the understanding by Crown prosecutors and judges that this leniency is not present and that these sentences/policies are in fact the 'standard' ones. If this is the case,

then implied threats/commands and related discourses are used to create a highly specialized form of specific deterrence. In such a case, these actors are not subverting punitiveness as much as they are altering its application and form into a more neo-liberal and individualized form. When the data analyses regarding the reinforcement of legal authority/power are taken into account, we can see that similar discourses (ones that reference the influence, discretion and control of Crown prosecutors and judges) are oftentimes used to subvert punitiveness rather than to reinforce it. Therefore, in line with Dugas' previous hypotheses, there is an overarching recognition of MPR and deterrent prerogatives, and a push against it via the associated rehabilitative and utilitarian counter-principles. Unfortunately, this process also involves a misapplication of Gladue principles such that discourses relating to background characteristics that support a rehabilitative mindset are sublimated into MPR, altering them into interpretive schemes that focus entirely upon elements that necessitate more government intervention and thus which frame Aboriginal peoples in colonial and racist ways.

The new punitive discourse, when interpreted in its neo-liberal form, is echoed and supported by the offender/accused person. In this application, they are primarily utilizing and embodying personal responsibility discourses/rhetoric and accepting such ideologies as being part of their rehabilitative regime. Therefore, in addition to the arguments by criminologists noted above, the neo-liberal ideology is partly consensual and primarily enforced via the same disciplinary

methods detailed by Foucault and other critical theorists, most notably the limitation of disciplines. Specifically, this is caused by their placement within a court setting where speakers are necessarily constrained by discursive procedures that "permits construction, but within narrow confines" (Foucault, 1981, p. 59). This also applies to judges and Crown prosecutors, and is part of the reason why the resistance and counter-discourses mentioned by Dugas are still using the terminology of MPR; such beliefs are embedded within the actual area in which one can speak of justice itself.

Communal and restorative justice discourses were defined differently in the analysis. Communal justice referred to supports in the vaguely termed 'community', community work or volunteering, community resources and assistance, community service orders, and community-based counselling or treatment. In all instances, the diversion program (the Community Council of Toronto) was only tangentially mentioned and not directly stated alongside such references. Therefore, diversion and related resources were implied to be a part of such orientations rather than stated outright. Additionally, all of the communities in question were urban or suburban rather than rural or located directly in reserves, and the emphasis was on locations and communities close to where the offender/accused person lived and not necessarily those they felt close to. In general, communal justice was primarily utilized by judges and Crown prosecutors to refer to treatments, programs, and supports outside of the criminal

justice system and which were primarily referenced within the plan of care and/or Aboriginal Legal Services-led programs – they were infrequently named directly and usually listed in supplemental materials provided to the court/judge itself.

Restorative justice referred to direct mentions of such a term, as well as direct desires/references to initiatives that seek to reintegrate the offender/accused person back into their community, utilize traditional or culturally appropriate treatment plans, include familial and community-wide rehabilitation orders, or which directly seek to directly remedy the long-term effects of colonial policies and injustices. Like communal justice, diversion orders and the Community Council of Toronto were only mentioned tangentially but considered relevant to such rehabilitative orientations. In both instances, they are explicitly rehabilitative ideologies and discourses that are nonetheless utilized and interpreted differently by the court actors in question. Specifically, court agents and the offender/accused person predominantly prefer communal justice discourses/references whereas defense counsels prefer restorative justice discourses/references. Though they are different ideologies in practice, they can both be subsumed under the aegis of rehabilitation.

Communal justice discourses are referenced and applied with reluctance by Crown prosecutors and judges, primarily because such sentences and orders lack outside influence and control. When communal justice is mentioned or

applied the discourses mentioned are related to unstated alternatives in an explicit mention and warning that such policies and orders would not be allowed in the future. Both sides of the court are working towards the same general rehabilitation-focused framework, but what they understand as the main concerns of such policies (reoffending versus social justice) are what changes their interpretation and application of their discourses vis-à-vis restoration or community. Similarly, these groups are working with the context of urban/suburban Aboriginal peoples/communities rather than reserve or rural contexts. This approach leads to unique problems and perspectives, as well as the perception (in the eyes of the court) that such community ties are limited in Toronto and must be created in order for long-term rehabilitative prospects to develop. In effect, these Indigenous justice initiatives were emphasized as a result of specific perceived problems (due to the urban context) and a desire/need to solve them in order for the courts' rehabilitative mandate to be effective.

Negotiated discourses have primarily been covered in informal processes/**table 8**, above. That said, as noted above and corroborated by the current table, negotiated discourses are implemented and understood by court actors in a dualistic manner whereby they reinforce/reference legal authority while simultaneously rescinding such power via a conciliatory negotiation with their counterpart (in a manner not legally required). This negotiation seems a manifest instance of embodied legal authority were one not aware of contextual pressures

and group norms that make this subordination a regular expectation due to both practical and utilitarian concerns; specifically, a prioritization of 'efficient' justice in line with MPR as described previously. Diversions and joint submissions are both similar sentences/proceedings in this respect, though joint submissions oftentimes involve far too many or severe offenses for a diversion to occur. Therefore, it is perhaps better to say that diversions are on the extreme end of this dualistic nature (they express large amounts of the Crown prosecutor's power then later eliminates such influence entirely) whereas joint submissions are 'muted' yet still more empowering than a straight contested plea (Crown prosecutors give up some of their power, judges nominally limit their power, and offenders/accused persons and their defense counsels engage in a mutually beneficial negotiation to gain some margin of control over their adversaries).

Discourses of any kind levelled against minor court actors (the offender/accused person's family, treatment agencies, sureties, etc.) take the form of directed questions and references from the judge, Crown prosecutor, defense counsel, and the offender/accused person. In these instances, they take the form of questions regarding the suitability of any court orders or sanctions. When the offender/accused person is involved in this directed discourse, it can involve the plea inquiry as well as direct admonitions/appeals. These admonitions often involve subversions of punitiveness, but they can also reinforce personal responsibility discourses on the part of the offender/accused person as well.

Regardless, nearly all of the conversations are managed and controlled by the judge, as they decide who gets to speak, and why. In a reversal of the expectation in a disciplinary/punitive system, his management is somewhat curtailed. The presumed leniency of Gladue courts is masked under procedural rules and norms that limit the ability of non-court actors to speak. However, the controlling actors are often limiting their own power over these subjects and grant some level of control over the proceedings to them when these breaches would serve the primary goals of the court; for Gladue courts, the primary goal is both the protection of the public and rehabilitation of Aboriginal peoples in conflict with colonial laws. In all these instances, however, judges make it a point to make sure that all discourse is authentic to the speaker and not the result of undue pressure. In some instances, judges have been observed breaking procedural rules/norms when it is clear that the speaker is incapable of articulating their point and, in some instances, they would even subvert punitiveness directly even when it seems inimical to their presumed role. This is the main divergence between this thesis work and Dugas' analysis of Gladue decisions. Dugas' work did not encounter any of these procedural changes, and these subversions are the main point in which MPR is indirectly challenged and related problematic frames are ignored in favour of personal statements and acts of agency. This subversion is still based around their perceptions of the main goals of the court, and as such is implementing MPR in an indirect manner which may come into conflict with

other court actors and the public. It should be noted that the overall use of court power is one where the worst excesses of the punitive/disciplinary state are avoided.

Aboriginal court workers are unique in that their passage and coding numbers are not accurate representations of their actual role in court proceedings. This discrepancy is due to their actions taking place outside of the court and in private confidential conversations with other actors. Their primary goal seemed to be predominantly based around rehabilitation and getting offender/accused persons the appropriate treatment and they rarely, if ever, advocated or supported custodial sentences. Despite the presumed animosity that an adversarial system would encourage, the ACW was often utilized by both Crown prosecutors and defense counsels looking for a treatment regime that is effective and meets their demands for safety and accountability. In this respect, ACWs and their discourses are utilized by defense counsels and Crown prosecutors as rhetoric that is expressly and symbolically rehabilitative. ACWs are typically supportive of claims of rehabilitative success, and the mere presence of them can be interpreted by judges and Crown prosecutors as a sign that all possible treatment options were considered and the ones presented are the best available. In the event that the options present are not adequate, these same court actors may inadvertently interpret a lack of strong treatment options as a sign that the offender/accused person cannot be rehabilitated rather than the result of a failure of

government/treatment resources. In the case of Gladue courts, the presence of ACWs is able to further enhance cooperative and utilitarian concerns while also allowing for some measure of authentic rehabilitative and Aboriginal-led justice regimes. It is through this informal process and related discourses that the problems created by MPR and related discursive frameworks are able to be moderated.

In general, judges and Crown prosecutors are expected to be the primary agents of punitiveness, but despite this they approach it cautiously yet do not totally accept completely communal or rehabilitative approaches. When they are required to communicate these potential ideologies they do so via absent discourses and purposeful omissions; specifically, omissions that are counterproductive to their current rhetorical goals and which reflect part of Foucault's disciplinary society and related discursive processes of control. In most cases, their ideal sentence is one that is rehabilitative and includes a plan of care and supervisors scaled to the amount of reoffending risk the offender has. Additionally, this silence/omission can also be used as an informal threat or deterrent functional discourse in order to attempt to convince the offender that they have his best interests at heart and wish to avoid incarcerating him for no reason. Therefore, most of the discourses based *around* the offender are interpretive, whereas those directed *at* the offender are often functional and aim to alter his/her interpretive schema. All court discussions are based around potential

offending in the future, and as such are always veiled in speech relating to possibilities and hypothetical events (albeit based around personal responsibility to a greater or lesser extent). This conception of personal responsibility is not a purely neo-liberal or punitive conception, as these authorities are somewhat aware of institutional pressures placed upon offender/accused persons and can challenge these punitive policies. These challenges are where direct conflict with MPR is realized and instances of reflexive sentencing and authentic self-actualization (on the part of the offender/accused person) can occur. Judges, Crown prosecutors, and defense counsels may not always be this reflexive in their self-analysis, and this is part of the reason why outside support, alternatives, and advice is sought after. The Crown prosecutor's utilization of formal appeals/threats is not present when diversion is implemented, and is reduced during joint submissions. This is because such negotiations, warnings, and major decisions and evaluations are made outside of the court and the disciplinary context of the court bench/setting. In these instances, there is no sign of the disciplinary discourses or rhetoric and the process itself often takes substantially less court time to resolve. This seems fairly subversive provided one forgets that Crown prosecutors and judges give up their power and influence only after they have exercised it outside of the court and the eyes of the public.

With respect to punitive changes and legislation, any changes to rehabilitative or punitive ideals are directly altered and/or countered by all court

actors in order to try and limit any egregious, impractical, or unacceptable forms/changes. In some instances, judges and Crown prosecutors reserve the more punitive excesses for particularly problematic or egregious offenders/accused persons. In other instances, group cooperation and shared interpretive actions create norms and values that make their applicability less valid. In this sense, judges do not so much reconcile punitive and rehabilitative discourses as much as they choose when to apply them, oftentimes reserving punitive policies for particular individuals or when informal workarounds are unavailable. Therefore, directed uses of punitive processes are also instances of express applications of MPR ideologies – the conventional identification of social exclusion as key to justice and order (Dugas, 2013, p. 54). In most cases, these informal workarounds involve the court, Crown prosecutor, or judge giving up some of their power to enforce the sentence by giving up that responsibility to an outside group such as the CCT, treatment agencies, or other rehabilitation-focused programs; an express example of MPR subversions and the conventional depiction of the penal turn as a response to crises of modernity (Garland, 1996, p. 459-466). This preferential/differential application of the main punitive ideologies is a multifaceted process, and is detailed in the **conclusion**, below.

Table 10 : Sentencing Principles and Bail Concerns by Informal Processes, Victim/Offender/Accused Person Characteristics, and Actors

Tables 10 & 11 signal the end of the more exhaustive analyses and marks the start of briefer ones. To be specific, this table was only designed and conceived in order to analyze certain interesting cross-tabulations rather than to insure that all the possible codes had been examined in depth at least once. In this case, **table 10** looks to analyze how sentencing principles may be directly affected by certain characteristics and informal processes, as well as to see whether or not certain actors were more or less likely to cite these characteristics and principles in comparison to other ones. Additionally, this analysis was not done in a section-by-section manner as in the other analyses and was primarily concerned with interesting cross-tabulations. Though the end result is the same (as far as the thesis paper is concerned) this was a different analytical process than in the preceding sections.

For similar reasons, this brief overview of particularly relevant relationships found in the table will be similarly truncated. To start, punitive sentencing principles (denunciation, general deterrence, specific deterrence, and protection of the public) were differently applied to certain informal processes. Rehabilitation, conversely, applied to multiple informal processes and characteristics as well as both the sentencing rationale and submission stages.

	Denun.	Gen. Det.	Spec. Det.	Prot. of Public	Rehab.	Cases - Rehab.	Mit. Fact.	Agg. Fact.	Prim. Grou.	Sec. Grou.	Ter. Grou.	Past Treat. Fail.	Surety Via.	All Cases
Mand. Min.	5	3	4	1	6	45	37	16	0	0	0	1	0	58
New Leg.	0	0	0	0	1	5	1	0	0	0	0	0	0	7
Impact Vic.	2	2	4	12	7	40	13	32	0	4	1	1	3	63
Recon. Off./Acc.	0	0	0	1	66	84	52	5	0	3	0	4	2	175
Impact Off./Acc.	0	0	0	0	14	44	24	6	0	5	0	1	17	57
Personal Resp.	1	3	7	1	94	120	84	27	5	11	0	27	4	158
Threats	1	1	6	1	51	120	20	25	1	1	0	10	6	177
Proof	0	0	1	0	72	69	34	9	0	4	0	9	2	132
Addiction	0	0	0	0	22	34	26	2	0	1	0	1	0	42
Drugs	0	0	0	0	19	33	25	1	0	4	0	4	1	38
Alcohol	0	0	1	1	20	40	39	7	0	3	0	3	1	47
Home.	0	0	0	0	31	70	76	5	1	3	0	2	4	85
Crim. Hist.	0	1	4	1	65	137	71	167	3	8	0	8	1	200
Succ. Hist.	0	0	0	0	36	40	25	2	0	1	0	1	2	46
Fail. Hist.	0	0	0	1	20	50	4	54	3	17	0	40	7	66
Trau.	0	0	0	0	4	13	7	6	0	0	0	0	0	27
Phys. Trau.	0	0	0	0	3	14	7	13	0	0	0	0	0	21
Ment. Trau.	0	0	0	0	7	15	10	14	0	0	0	0	0	18
Remorse	0	2	4	1	72	85	88	7	1	0	0	5	1	99
All Cases	30	42	53	16	195	198	196	157	23	46	2	32	35	851

(Figure 22 – Table 10a : Sentencing Principles and Bail Concerns by Informal Processes, Characteristics, and Actors, part 1)

	Denun.	Gen. Det.	Spec. Det.	Prot. of Public	Rehab.	Cases - Rehab.	Mit. Fact.	Agg. Fact.	Prim. Grou.	Sec. Grou.	Ter. Grou.	Past Treat. Fail.	Surety Via.	All Cases
Judge	14	21	27	9	105	218	119	73	7	14	2	24	13	446
Crown	15	20	27	5	65	164	69	142	24	49	0	20	28	376
Federal	0	1	1	0	4	8	3	6	0	0	0	1	2	20
Counsel	3	5	6	1	85	115	113	20	2	13	0	8	21	369
Private	2	2	2	0	26	36	30	5	1	0	0	0	3	118
Duty Counsel	0	0	1	0	20	28	15	4	0	0	0	0	0	163
Off./Acc.	3	2	5	3	159	189	214	75	4	23	0	27	12	511
Off./Acc. Fam.	0	0	1	0	59	103	116	14	2	10	0	7	19	124
Surety	0	0	0	0	10	23	5	1	2	9	0	4	54	48
Victim	1	2	3	1	4	37	17	36	0	2	0	0	1	60
Public	2	3	4	13	3	14	3	4	0	3	2	1	1	18
ACW	0	0	0	0	7	12	6	0	0	0	0	0	0	42
CCT	0	0	0	0	1	9	1	1	0	0	0	0	0	96
Treatment Agencies	0	0	0	0	170	128	40	12	3	2	0	17	3	175
Polit./Gov.	1	0	0	1	2	10	10	0	0	1	2	0	0	12
Court Staff (Not ACW)	0	0	0	0	0	80	0	0	0	0	0	0	0	125

(Figure 23 – Table 10b : Sentencing Principles and Bail Concerns by Informal Processes, Characteristics, and Actors, part 2)

Homelessness/poverty, criminal/treatment history, failed treatment, and all forms of trauma were mentioned outside of the sentencing speech/rationale in roughly half the cases that referenced rehabilitation as a key sentencing principle. Finally, aggravating factors were referenced by the Crown prosecutor the most out of any actor, and victims had relatively high direct mentions as well.

Punitive discourses are notable in that they are not exclusive to the new punitive turn, as they have existed since the creation of the Criminal Code itself. With this in mind, each type of punitive sentencing principles references a different informal discursive process or function, and this difference is determined by the way the sentencing principle is differentially interpreted by the actors in question and their current rhetorical goal. Denunciation, for instance, is only mentioned because it is required to do so via formal court protocols and this is because the interpretation of the court/actors is that it is ineffective in promoting the goals of the court and themselves (in this case, rehabilitative goals). Specific deterrence, in contrast, directly utilizes threats/warnings and personal responsibility discourses in order to strengthen its rhetoric and because the offender/accused person in these circumstances is framed/understood as being reluctant to follow through on the court's rehabilitative ideals and therefore requires additional coercion. Protection of the public refers to the impact on the victim/community in order to rhetorically promote the potential harm caused by any release and to communicate outside interpretations/priorities that state that

sanctions are necessary in order to allow the public to feel safe. Finally, general deterrence is the exception as there is no informal discursive process mentioned, though this absence may be due to its similarity to specific deterrence and denunciation in the interpretation of the court. Again, there is a direct similarity between this analysis and Dugas' (2013) work, specifically the emphasis on deterrence and denunciation and the possibility that judges pay "lip service" to MPR discourses (p. 117,121). Most notably, all of the punitive-based sentencing principles are utilized in Gladue courts in a manner consistent with MPR and its interpretive schemes.

What is important about specific deterrence is that it is the only major punitive principle that mentions victim/offender/accused person characteristics, though these specific characteristics were broadly defined/conceptualized. Significantly, these broad characteristics are metaphorical and symbolically linked to rehabilitative discourses and orientations. Therefore, we can conclude that specific deterrence is interpreted as an aspect of rehabilitative ideals and principles; perhaps due to a belief coercion is able to enhance the effectiveness of treatment. In this instance, threats are present but are based around warnings about future leniency and related policies as well as rhetoric that implores the offender/accused person to at least begin the rehabilitative process. It should be noted that statements made off the record by judges and Crown prosecutors make it clear that, in their minds, the two most important punitive considerations of the

court are specific deterrence and the protection of the public. This prioritization is in contrast to Dugas (2013), who identified denunciation and deterrence as the most significant principles (p. 117). It is possible that he emphasized the number of such references rather than their correlation effects, as in this thesis denunciation was highly common in all cases regardless of the final sentence, to the point where it was deemed inconsequential rather than significant. It is argued here that denunciation, and general deterrence to a lesser extent, are only mentioned out of protocol as they have no rhetorical strength when it comes to deterring the specific offender/accused person or protecting the public in these specific instances.

Rehabilitation, as a sentencing principle, is in utilized much the same way as described previously – in concert with interpretation-based frame-shifting and appeals to the perceived 'goal' of the court. Those informal processes that are not used in this way can be used to reinforce neo-liberal, paternalist, or even punitive policies and sentences (for example, personal responsibility discourses that promote individual-led rehabilitation efforts). Similarly, other informal discourses (such as proof of rehabilitative claims) are used to directly engage with rehabilitative ideals in a more direct manner. In some cases these informal processes are functionally related to more significant factors and characteristics that speak to practical or formal concerns that are directly aimed at the rehabilitative orientation of the court and the Gladue principles. Actors, as well,

are differentially predisposed to rehabilitative discourses/ideologies in a manner similar to that of the punitive sentencing principles, above. Defense counsels, the offender/accused person, and their supports prefer rehabilitative discourses for obvious reasons. Additionally, they do not speak to ideological concerns or the Gladue principles except in a token manner, instead preferring discourses that emphasize practicality, need, and the likelihood of success as the main rhetorical tools. These cost/benefit and risk-based aspects are directly part of the MPR, and speak to adaptation-based strategies of modern states as described previously (Garland, 1996, p. 455-456). These processes are not always effective as counter-discourses that emphasize past failures (spoken by the Crown prosecutor) can be interpreted as reasons to promote custody or more controlled/paternalistic orientations. In other instances, judges may be under the belief that rehabilitation is to be allowed in these contested cases only if there is a new change in the plan or if highly intensive (custody-level) supervision is applied.

Much of the analyses relating to rehabilitative discourses also apply to mitigating factors, such as the way that Judges prefer practical concerns and court-based discourses over the Gladue principles themselves, and how certain characteristics and informal processes are metaphorically and symbolically linked to these interpretive schemes and are directly utilized to rhetorically shift their interpretation in a direction amenable to their overall goals. About the only new information with regards to this code-set is that victim requests for leniency are

presented and discussed as mitigating factors that can encourage rehabilitation or reduce the offender/accused person's moral blameworthiness. Additionally, mitigating factors in this sense of the term are designed and interpreted as past-oriented discourses that are based on the offender/accused person and their history/context. This rhetoric is designed to directly mention the Gladue principles and draw inferences to them prior to mentioning and expressing practical concerns. Judges and Crown prosecutors therefore interpret the Gladue principles as being expressly concerned with specific historical and background circumstances and their implied relationship to criminality. This interpretation leads to the presentation of such factors and events in the form of problematic discursive frameworks that objectify Aboriginal peoples and make such victimization and criminality seem intrinsic to them. This can be contrasted to how some judges mention the public perception of Gladue principles is as a blanket 'get out of jail free' card. This presentation of Gladue principles and the court is criticized directly by those judges and may lead to an emphasis on historical linkages which unfortunately create the previously discussed problematic discursive framework. Collective trauma is recognized, but is required (by the Gladue decision) to be mentioned in relation to specific parts of the Aboriginal person's history in order for courts to recognize how it had contributed to the criminal acts in question. Again, the presence of MPR orientations is what causes this contextualization process to develop into an

encompassing clinically-minded orientation that reframes these elements as 'risks' and 'needs' such that it erases the agency of Aboriginal peoples and creates the previously discussed problematic discursive framework.

As for aggravating factors, they are similarly symbolically linked to certain characteristics and informal processes, as well as being external in their orientation. That is, they are able to reference certain offender/accused person characteristics and frames as well as the circumstances surrounding the crime. These circumstantial discourses are at their strongest (rhetorically) when they are external and victim-based as they are more difficult to dismiss due to a lack of concrete or physical actors present. More generally, this discourse can also speak to the subject of treatment failures and the offender/accused person's experience with them. These discourses are also rhetorically strong due to their associations with practical concerns, links to criminal/background histories, and emphasis on rehabilitation (or the lack thereof). Surprisingly, personal responsibility-based discourses are somewhat uncommon here and are still more numerous than direct references to treatment failures. The only reason for this that can be discerned is that judges/Crown prosecutors either interpret failures and successes as being the responsibility of the offender/accused person or they do not blame anyone for such failures. That is, personal responsibility is not mentioned alongside this because they do not view any party as being responsible for it. In any case, the failures are still interpreted as being reasons to keep the offender/accused person

in custody unless there are sufficient alterations made to the plan. Again, there are disciplinary discourse/ideologies albeit in a more self-conscious or incomplete manner.

Bail-based sentencing discourses follow much of the same conclusions regarding pleas and release concerns noted above. To reiterate, they are framed and interpreted on the basis of past rehabilitation (and failed rehabilitation) and the applicability/presence of personal responsibility discourses and neo-liberal disciplinary penology. This reflects conventional MPR ideologies and priorities, specifically priorities relating to the potential threat posed by the offender/accused person and the potential 'risk' and 'cost' of custodial and community sentences. To briefly summarize this section, one can say that discourse, individuality, and historicity are problematized differently in courts depending on the actor speaking, hearing, and referenced. These factors in turn alter the interpretation of sentencing principles on the basis of group interpretive schemes/norms, subsumed under general MPR-based utilitarian/practical concerns. As a result of this differential yet collective schema certain appeals or references are given greater or lesser rhetorical weight in the mind of the judge and understanding and anticipating this action is the primary way for actors to implement their rhetorical goals. Some of these discourses are reassembled and repeated to the offender/accused person in order to better explain the reasons for the sentence and to (hopefully) encourage them to adapt to these standards.

Therefore, when judges speak about the need to at least start rehabilitation, they are not just communicating (unconsciously or not) a preference for neo-liberal disciplinary penality but they are also letting the offender/accused person know that these discourses and standards are what all future offenses will be evaluated and compared with. As part of this communicative and explanatory function, they and their supports are the ones who face both the blame and responsibility for any crime/treatment, and discourses to the contrary are evaluated on the basis of these supports' access to resources, their characteristics, and past treatment histories/patterns. In practice, this system of evaluation is predominantly applied to offenders/accused persons in a clinical, 'rational' cost-benefit analysis that looks at how likely a sentence is at reducing future crimes committed/suffered by that specific offender/victim. To put this as briefly as possible : courts have created an interpretive scheme that primarily concerns itself with practical matters first, and in so doing grants those related discourses and aspects the greater rhetorical weight. This problem is part of the reason why MPR is so strong an interpretive scheme, or it may have emerged due to MPR's strength in the courts prior to this point. In either case, they are mutually reinforcing frames and ideologies that cause further escalation and lead courts to create problematic discursive frames of Aboriginal peoples. This pattern therefore illustrates a twofold process of the Gladue principles being indirectly distorted by the realities of the Gladue court setting/situation.

Table 11 : Discourse Analysis by Victim/Offender/Accused Person Characteristics and Sentence/Decision

Much of what was said about **table 10** applies to this analysis in that it is briefer than normal, it covers code-sets already discussed, and it only looks at particular cross-tabulations rather than each code individually. As for the intention behind **table 11** and its analysis, it seeks to understand how certain discursive types may directly influence the interpretation and application of certain characteristics and their effect on the final sentence. In sum, it is interested in how judges reconcile the differing rhetoric and their application/interpretation in light of the final sentence.

There are a small number of interesting sections of the table that should be noted prior to beginning the discussion/analysis. To start, the unstated alternatives were more likely to involve a joint submission, homelessness/poverty and general criminal/treatment history than 'what is left unsaid', which had more direct references to failed treatments, family issues, and mental illness. Discourses that subverted punitiveness had higher rates for joint submissions and lower rates for failed treatment history in comparison to discourses that reinforced the new punitiveness. Finally, negotiated discourses (in line with the previous analyses) were primarily used/referenced alongside joint submissions.

	What is unsaid	Unstat. alter.	Implied threats/ comm.	Reinfor. of legal auth./ power	Reinfor. of New Pun.	Subv. of pun.	Restor. Just.	Comm. Just.	Situat. disc.	Neg. disc.	Direct disc.	Out of court disc.	Delib. on the record disc.
Joint.	17	26	31	22	11	25	2	6	10	38	60	7	16
Joint. (C)	44	43	66	33	12	52	7	8	49	76	89	63	56
Crown	4	3	3	7	2	3	0	0	3	1	7	1	1
Crown (C)	9	9	9	8	5	5	2	2	7	4	15	7	9
Def.	11	10	10	8	5	12	2	5	10	0	21	7	4
Def. (C)	22	24	26	16	9	17	3	7	23	9	37	26	25
Comp.	10	9	11	15	13	16	0	4	7	5	23	4	4
Comp. (C)	20	23	26	24	19	20	2	6	21	10	36	23	30
Prob.	16	22	27	18	17	30	1	8	10	22	38	5	14
Prob. (C)	45	43	59	31	25	44	4	11	43	46	76	56	68
Susp.	6	9	7	10	7	14	1	6	3	9	15	3	4
Susp. (C)	18	16	23	14	10	20	2	6	13	15	25	19	23
Fines	1	7	7	6	4	8	0	1	3	11	11	1	3
Fines (C)	8	9	14	6	6	11	0	2	6	13	17	12	16
Waived	6	2	4	4	5	13	1	2	3	7	7	2	2
Waived (C)	16	16	17	10	6	13	2	4	14	13	23	14	21

(Figure 24 –Table 11a : Discourse Analysis by Victim/Offender/Accused Person Characteristics and Sentence/Decision, part 1)

	What is unsaid	Unstat. alter.	Implied threats/ comm.	Reinfor. of legal auth./ power	Reinfor. of New Pun.	Subv. of pun.	Restor. Just.	Comm. Just.	Situat. disc.	Neg. disc.	Direct disc.	Out of court disc.	Delib. on the record disc.
Addic.	5	4	3	1	2	8	0	0	6	4	9	16	1
Drugs	3	5	3	1	1	0	0	1	7	1	15	9	3
Alco.	10	7	2	1	1	4	1	0	5	0	22	13	6
Home.	6	16	4	4	2	8	0	7	19	1	36	30	13
Crim./Treat. Hist.	11	25	10	15	12	23	1	4	18	14	48	56	10
Rec. Hist.	2	1	1	2	1	2	0	0	7	4	7	16	0
Succ. Hist.	3	6	0	2	2	4	0	1	9	4	10	19	5
Fail. Hist.	28	18	10	7	13	6	0	0	12	2	36	17	3
Trau.	4	1	0	0	0	3	0	0	13	4	6	16	3
Phys. Trau.	3	1	0	0	0	1	0	0	7	3	5	13	1
Ment. Trau.	4	3	1	1	0	0	0	2	10	1	7	11	0
Fam. Issues	12	4	4	2	1	1	4	6	12	0	24	25	7
Comm. Fact.	5	1	2	1	0	5	1	16	5	2	11	20	1
Remorse	12	16	6	5	5	16	2	2	9	9	74	22	45
Men. Illness	15	3	2	1	0	0	0	0	6	1	16	21	2

(Figure 25 –Table 11b : Discourse Analysis by Victim/Offender/Accused Person Characteristics and Sentence/Decision, part 2

Though discourses that are left unsaid and unstated alternative sentences possess a marked similarity to one another with regards to the final sentence/winner, they are utilized and applied differently depending on the intention and desired goal – either for controlled treatment or neo-liberal rehabilitation. Though both of these discourse types and goals are aimed at rehabilitation and disciplinary penology, only one (what is left unsaid) seems to enact either regularly. The reason for this difference is based on the rhetorical power behind the two, and in this instance the rhetorical power is determined by the ability to speak to current possibilities rather than future hypothetical events. To be specific, 'what is left unsaid' has more references and symbolic meanings that relate to the current circumstances of the case in comparison to discourses relating to the unstated alternatives. This type of discursive application can also be partly determined by the current offenders/accused person's characteristics and backgrounds. For example, the absence of particularly strong mitigating circumstances can be interpreted by Crown prosecutors and judges as reasons to treat the offender/accused person more harshly than otherwise. In this case, they prefer to utilize neo-punitive sentencing guidelines rather than paternalistic or neo-liberal ones. Therefore, the likelihood that these circumstances will continue and lead to future reoffending is what determines how rhetorical discourses relating to future offending will be applied. For instance, if there is a likelihood that offenders/accused persons will reoffend in the future due to a long-standing

drug addiction, than a more lenient (future-based) alternative-based sentence will be used rather than a more threatening (present-based) unspoken sentence. In addition to this conclusion, those offenders/accused persons who are interpreted as having a greater need for rehabilitation but who are also likely to reoffend will receive both rehabilitation-based and controlling discourses (that is, paternalistic ones) as their specific circumstances are interpreted as fulfilling both the Gladue principles and the stated aims of the court in one fell swoop. Like all other discourses relating to background circumstances, these formations of rehabilitation, leniency, and unspoken possibilities are again based upon discursive frameworks that objectify Aboriginal peoples as being intrinsically victimized and without agency. Recognition of collective trauma does not necessarily other Aboriginal peoples, but if coupled with MPR ideological orientations and a lack of counter-discourses that embody and express its restorative aspects (such as the ACW or diversion agencies) then only certain objectifying and reductionist elements of Aboriginal peoples' histories are considered, specifically histories that focus on seemingly intrinsic victimization and a lack of agency (Usher & Lawrence, 2011, p. 90). As a result, this process prioritizes the discourses that create the problematic discursive framework of Aboriginal peoples. Though they leave the possibility for positive change open, Crown prosecutors and judges are so mired in this racist and colonial framework

that the possibility of an Aboriginal person solving his own problems without government intervention seems impossible.

To summarize, future reoffending and related sentences are determined in advance of the current sentence/case in question and designed in anticipation of potential offending/criminal acts on the basis of what the court interprets as the offender/accused person's specific background circumstances and their likelihood for rehabilitation. These evaluation-based factors are called "criminogenic needs" by criminologists and government/court workers, but are more accurately described as being based on the problematic colonial discursive frameworks mentioned previously in the analysis (Hannah-Moffat & Maurutto, 2010, p. 270). It is partly because of the melding of MPR thought and the Gladue principles that this problematic framework is created; the predication on risk/need (from criminological and institutional standpoint) is combined with background circumstances relating to government policies (from a Gladue standpoint), leading to an overall framework that is only concerned with presenting Aboriginal peoples as intrinsically victimized and likely to reoffend due to long-term problems. This end result is a paternalist orientation that is just as racist and colonial as the past government policies that created it, particularly when implied threats/commands are combined in a way that disciplinary ideologies are referenced and neo-punitive processes are referenced as deterrents and threats.

Legal authority/power and the discourses that applied to them were used to reinforce and acknowledge similar formal/paternalistic discourses and ideologies. When sentences were decided in favour of the Crown prosecutor's recommendations, were effectively a compromise between the two positions, or had charges stayed/withdrawn, their legal authority/power was expressed as a functional discourse with both lenient and punitive aspects. There is no way for a court or Crown prosecutor to express only leniency without disassociating themselves from the court system itself. This reflects a fundamental understanding of legal authority/power as being always punitive in some way and intrinsically linked to discipline and discretion-based concepts and interpretations, and this is a side effect of the melding of MPR into presumably rehabilitative courts. Even when rehabilitative/lenient discourses are cited directly alongside such dichotomous discourses, they are absent any reference to the offender/accused person's history and characteristics. This absence seems to imply that Crown prosecutors look to and interpret rehabilitation as a complete absence of future offending rather than the progressive, long-term type promoted by defense counsels (again, a product of MPR's emphasis on risk and reoffending-based analytic frames). However, judges and Crown prosecutors do not interpret/apply punitiveness as in the neo-punitive model. In neo-punitive ideology, prison is a place for punishment rather than control or safety. Crown prosecutors and judges, as we have analyzed previously, are primarily utilizing prisons for incapacitation

and protection rather than to punish and cause suffering. More significantly, they are informed on the basis of problematic discursive frameworks (built upon a MPR-based reductionist viewpoint of Gladue-mandated recognition of collective traumas) that make prison and custody seem likely to exacerbate pre-existing problems. Again, this leads to the objectification of Aboriginal peoples and pre-emptively interpreting them as victimized and without any agency. In short, Crown prosecutors interpret the neo-punitive turn as being inimical to their current MPR/utilitarian interpretation of custody and completely divorced from the rehabilitative ideals of Canadian courts as a whole. When they dismiss rehabilitation, it is only in the context of a specific offender/accused person and only because rehabilitation is deemed too risky or unlikely to work in the current circumstances.

Though restorative and communal justice are differentially interpreted/understood by different court actors, their implementation are highly similar and often the result of a joint submission. It is possibly because of an ideological belief/support for rehabilitative orientations that makes these specific policies only applicable in joint submissions; specifically the lack of concerns about reoffending (from the Crown prosecutor) and an appeal to the socially inclusive aspects of MPR. In addition to interpretive differences and prerequisites, these orientations also require the presence of certain practical concerns such as outside organizations/family support, a stable treatment environment, and similar

elements. It is only when these practical supports are present that such orientations can be supported by the Crown prosecutor. Otherwise, the offender/accused person is directed to seek them out on their own. This evaluation and negotiation also requires input from the ACW in order for the Crown prosecutor to be notified of such resources and for there to be an additional layer of rhetorical pressure to pursue such policies. Therefore restorative justice is not ignored by Gladue courts but interpreted and approached in such a way that any offender/accused person who does not meet their specific definition of restorative justice and who fits its practical and discursive requirements is instead given sentences that echo paternalistic or neo-liberal justice depending on the 'variables' at play. This process may be because the Crown prosecutor and judge do not make a distinction between the two orientations, though in either case the overall goal is still identified as being somewhat rehabilitative.

As stated previously, all discourse in court is directed to at least one major actor and often the judge is either the speaker or listener. What this code-set was concerned with was particularly directed discourses such as direct appeals to the judge, questions, and negotiations/debates. It is these discourses that can be considered the most important speech in court, as they are direct appeals to all of the rhetorical, functional, and symbolic elements contained within their discourses and ideologies. Those discourses and rhetoric that are not 'directed' are therefore only marginally related to these elements or are difficult to interpret/understand

on a consensual basis. In any case, these discourses are the ones deemed most significant and are understood the same way by all the court actors. Those victim/offender/accused person characteristics that fulfill these qualifications are failed treatment histories, homelessness/poverty, addictions, mental illness, and family issues. That these characteristics are primarily concerned with the offender/accused person and the colonial/racist discursive framework of Aboriginal peoples (that they are intrinsically victimized and without individual agency) is a clear indication that the main focus of sentences in a Gladue court is how the rehabilitative regime will be reacted to. These discourses/characteristics are also rarely debated in their applicability to the sentence, their relevance/importance to the Gladue principles, or possess particularly strong symbolic/metaphorical elements beyond simple reoffending principles. Taking into account the previous analysis with regards to interpretations and applications of rehabilitation and punitiveness in an MPR realm, we can argue that this rehabilitation-evaluation is partly the result of pre-existing standards with regards to how incapacitation is the primary basis of judicial sentences, particularly in light of new punitive legislation that reflects what Garland terms "denial-based" reactions (Garland, 1996, p. 458)

To summarize, this final table analysis is primarily concerned with the positionality of discourse and how it affects the function, interpretation, and rhetorical strength of the court case as well as the likelihood that rehabilitative

goals will shift based on these factors and the consensus that emerges. In addition, this table also highlighted the encompassing effects of MPR and its unique problems when blended with the Gladue principles. There were also some problematic discourses (in that they are difficult to analyze) because they were out of the court/observation area, were too situated to be discussed except when reinterpreted/reiterated as a court submission, or were the result of formal court processes and their different conception based on the observers' familiarity with formal court processes. Because of these variables and the inability of the research to address or examine them, it is difficult to tell when such common discourses are actually important. Despite this issue, this table did confirm much of the conclusions from the previous tables regarding the rhetorical strength of discourses on the basis of the positionality of the speaker of said discourses. Most notably, the most important factor behind the rhetorical strength of these discourses is their symbolic link to rehabilitation and their interpretation/framing in regards to it. Other related factors/elements to these discourses – such as the positionality of the speaker, external supports, and practical considerations – can serve to amplify the submissions or symbolize other related factors. Regardless of these variables, the overarching prioritization of discourses are based around a blending of MPR and Gladue principles; one that leads to problematic discursive frameworks of Aboriginal peoples and which seems to oscillate between paternalist and neo-liberal disciplinary ideologies due to the distortions it causes.

Transcript Analysis

Preliminary Information

As part of the research orientation and protocol, the naturalistic observations (coded and presented here as cross-tabulated tables) were combined with transcript/discourse analyses of particularly interesting/relevant cases as well as interviews. The point of this transcript analysis was to provide greater contextualization of the previous observations as well as to mitigate the inability of the researcher to exhaustively record all of the speech made in the courtroom. Unfortunately, due to circumstances beyond the researcher's control, not all of the transcripts ordered were received prior to the thesis drafting stage. Regardless, a total of 17 transcripts were ordered, encompassing 14 different days of observations and 11 different offenders/accused persons. However, because of delays in completing the order one transcript had the sentencing rationale omitted. As a result, only 16 transcripts are available at the time of writing, encompassing 13 days of observation and 11 different offenders/accused persons. One of the cases in question is under a publication ban, so these values are reduced further.

Therefore, this section covers 15 transcripts, 12 days of observation, and 10 different offenders/accused persons. In addition, one of these offenders/accused persons was a woman. Women offenders/accused persons were stated by judges and defense counsels as being more common in Gladue courts in

comparison to all other courtrooms – a finding supported by the Correctional Investigator of Canada and his 2013 Annual report, which noted that the incarcerated population has grown by 16.5% from 2003-2013, with Aboriginal peoples increasing by 46.4% and Aboriginal women increasing by 80% (Office of the Correctional Investigator, June 28, 2013). That said, the total numbers of such cases observed remained small enough that there were perhaps only a dozen full-length cases that involved women Aboriginal persons, with perhaps one or two involving an active debate or rationale on the part of any court actors. Regardless of their sex or gender, the cases studied are a part of public record. However, ethical concerns are still present and the locations of such cases will not be disclosed and any direct citations will prioritize statements by judges and Crown prosecutors (that is, public servants) over other actors. In addition, the reader should be assured that the transcripts were ordered such that the final total would be proportional to the amount of observation done at each location. For similar reasons, this section will not be split amongst the transcripts and will instead list all the conclusions and research data as a single unified analysis. The primary goal of this section is to confirm the previous conclusions drawn from the observation notes/table analyses, as well as to explore any new information and conclusions with regards to speech patterns, sentence presentation, and stages of rhetorical discourse shifting. Major conclusions and relevant implications will be detailed afterwards in the **Discussion** section.

Surface Observations

The description of how transcripts are produced at the beginning of the thesis form the backdrop for this transcript analysis. The surface level observations mostly illustrated large-scale trends in the formation and presentation of discourse in the court context itself. Notably, the way rhetorical discourse is presented and issued as well as the 'flow' of court discourse and their different applications based on the current circumstances of the case.

The general conclusions from an initial analysis relate to the formation and order of the discourse as well as the general patterns therein. Most obvious is the highly regulated nature of court discourses that limit and control all speech – who speaks, what is said, and when. These elements must be taken into account when applying any discourse analysis theory, though they can also serve as further support/data for analyses that concern themselves with the controlling and dominating effects of discourse itself. In this instance, the formal processes and requirements of a court case manifest in different stages of discourse that alternate between long, usually pre-prepared monologues, or short back-and-forth ad-libbed conversations. These two formats of discourse also have different goals/purposes, with one being purely rhetorical and aimed at influencing the opinions and interpretations of the judge, whereas the other is designed/intended for information-gathering and is metaphorical in its application of the facts of the

case. In either case they are both limitations on discourses as well as tools for increasing discursive power for some of the actors present, particularly the Crown prosecutors, defense counsels, and judges. In some instances the limitations are ones that compel the listener to speak, and this is primarily directed at the offender/accused person and any witnesses. It should be noted that these constraints placed upon speech is, in the context of courts, only liberating for those who already possess a privileged position in the eyes of the court.

A second conclusion about this initial surface analysis of transcripts/court speech is that not all speech is prepared/planned out in advance. Typically, this ad-libbed and hesitant speech (both submissions and clarifications) follow the definition of "ill-formed" discourse (Stubbs, 1983, p. 129-130). In this case, it tends to entail non-sequiturs and hesitant or halting speech patterns rather than misinterpretations or misunderstandings. These ad-libbed speeches provide unique information about the nature of court sentencing in that they often apply to those discourses that are designed to specifically speak to the major sentencing principles of the court. In addition, they are often referencing aspects of the case and the offender/accused person's specific history that provide the most rhetorical strength to their case and thus reference characteristics or histories that are particularly relevant factors to consider. Therefore, the formality or preparedness of a discourse has no (direct) influence on the rhetorical strength of a case or appeal. The only rhetorical strength available is derived from the discourses

referenced and their interpretation and application to the court. That these discourses/conversations are also the most unexpected ones is related to this finding, as the questions and statements therein are often prompted by the discourses of their opponent or the judge. As such, a convincing answer/counterargument can both strengthen one's rhetoric and weaken their adversary's. Alternately, such counter-discourses may assuage/escalate the concerns of the judge and consequently promote community/custodial dispositions.

A third conclusion concerns the reasons behind a particular sentence/disposition. Outside of the conclusions drawn from the previous data analyses, the rationale behind a sentence is unique in that the judge will oftentimes directly talk to the offender/accused person and issue warnings or appeals to them regarding the crimes themselves. Without going into detail, the judge will sometimes explain how such a sentence is interpreted by the courts/Crown prosecutors, mention any potential harm caused by the crime as well as future problems that addictions or other problems would cause, and (rarely) explain alternative actions the offender/accused person could have done to solve these and other problems/issues. This is unique, as rarely does the judge speak directly to offender/accused person except when asking a question to them. Not only that, but this speech/discourse is directly intended as an informal social control process, the objective of which is to reduce reoffending and facilitate

rehabilitation. The judge will attempt to seamlessly fit this directed discourse in with a formal repetition of the sentence. No matter what, however, this general formation of the discourse is still a long, uninterrupted monologue that makes up a substantial portion of the transcript.

Lastly, judges make it a point to have a concise, detailed timeline of offenses/crimes and, if there are any discrepancies or omissions, judges will not hesitate to halt proceedings in order to ensure that all the details are accurate and confirmed. The timeline is seemingly significant to judges both for practical reasons and for interpretive/narrative purposes. Practical concerns mostly entail the judge confirming that the offenses were committed and recorded accurately (for breaches of probation/court orders, for instance) and to understand how quickly reoffending occurs and the lengthiness of the record. Interpretive/narrative purposes take this same data but use it to tie recidivism/offending to the possible background information, thereby attempting to create a clear pattern of criminality and to focus any rehabilitative goals/sentences such that they are able to prevent similar breaches from occurring.

Detailed Observations

This analysis builds upon Stubbs' (1983) discourse analysis orientation and his focus on conversational and narrative analyses. As such, the main analytical focus will be on what he terms "exchanges" (p. 29) as well as their

related features and structures (p. 131-136). Because this section focuses on the transcribed speech from the case itself some discursive shortcuts (on the part of the judge, Crown prosecutor, or defense counsel) will not be present or are hidden by the format used here. This means that, if not analyzed in concert with the previous data analysis, there may appear to be misunderstandings between the court actors and the intent behind their speech/actions. Similar misunderstandings were noted in the 1995 Report of the Commission on Systemic Racism in the Ontario Criminal Justice System as contributing to feelings of racial exclusion, specifically in the example of when a judge locked the doors to the courtroom during the jury address by both the defense counsel and Crown prosecutor during a publicized case of a police officer accused of shooting a black person. In this instance, a lack of explanation by the judge – who saw it as a routine courtesy to the counsels – was interpreted by the public as a deliberate exclusion due to a lack of proper explanation on his part (Gittens et al., 1995, p. 52-54).In addition, this analysis will also attempt to focus on major or unusual exchanges rather than the broader analyses described previously. One major type of discursive form noted in the observations and transcripts are what Stubbs terms "ill-formed" or "deviant" discourses, which involve incorrect or misapplied phonotactics and syntax, as well as grossly ungrammatical sentences (ibid., p. 129-130). A key element of ill-formed discourses is that they are quite commonly found in conversational exchanges and are routinely recognized, repaired, or otherwise

reconciled by the speakers/listeners such that the meanings are mutually understood. In the context of this research, ill-formedness includes these elements as well as speech wherein the speaker's syntax is stated hesitantly or is otherwise needlessly repetitive.

Firstly, typical exchanges/conversations often involve ill-formed discourses and unprepared speeches that do not necessarily follow the [initiation], [response], [feedback] pattern except in certain instances (p. 29-30). This determination is based on the initiator's interpretation of what the purpose of the conversation is. While some conversations serve the role of information-exchange, others follow an adversarial trend where the purpose of the speech is to inform only. In these particular conversations, feedbacks or responses are neither wanted nor needed. This formation of discourse runs counter to Stubbs' definition of it, as he posits that the major focus of discourse is the act and notification of information-sharing as well as a study of how this information is presented/distributed/accessed (p. 30-31). It is possible that, in this instance, the person hearing the discourse (the offender/accused person) is not the one who is expected to provide verbal feedback, though he may be expected provide a different form of feedback via his actions (rather than discourse) or such statements may be discourses that are meant for future Crown prosecutors/judges to react to in response to the offender/accused person's failure to act upon the information.

A second finding is based on the format of a court case, as it often alternates between different stages of discourse based around the formal requirements of the court. It is only when the proceedings break with this process that the long, often uninterrupted monologues are changed into short, rapid-fire conversations/questions that are typically made up of ill-formed discourses. These conversations may be conventional exchanges, though this mostly only occurs when the interruption does not relate to the rhetorical goals of the speaker (that is, they refer to procedural elements or bookkeeping imperatives). At worst, the feedback/response is either absent or tepid such as a simple nod followed by the speaker continuing the monologue previously. Those formal discourses formatted as monologues are usually discourses and exchanges that permit/encourage a response/feedback/inform procedure, albeit only to allow for and encourage another long monologue. Though they may result in ill-formed or ad-libbed conversations, this change is rare and hence the likely reason why the respondent is hesitant in their responses or speaks ill-formed discourses.

Diversions are unique discourses in this analysis as they can be accurately described as an exchange writ large. Unlike contested/joint pleas or bails, diversions have little, if any, formal procedural discourses and related stages such as the arraignment/facts/submissions. Instead, they seem to represent large scale exchanges such that the inform/response/feedback responses track highly to the introduction/exchange/dismissal stage of the diversion. As a result, these case

types also tend to involve exchanges with ill-formed discourses, albeit to a lesser degree than in non-diversions. This is because, as described previously, the main factors behind such discourses are a lack of preparedness on the part of one of the actors. Diversions, being pre-planned and agreed-upon, are not only prepared in advance but also less adversarial, thereby reducing the stress and strain on the speakers and providing them with more time to think about their submissions. This difference thereby speaks to the differing interpretations and presentations of information in court and how an unexpected or unplanned submission/question goes against group interpretations of exchange and results in ill-formed discourses.

Narratives in the court setting generally take the form of the background report submission and the facts of the case. In both instances, there are abstracts, orientations, narrative clauses, results, and codas. Note, however, that it is rare for any evaluations to be expressly mentioned within the facts of the case. Though they are often implied via metaphorical or symbolic discourses (with regards to the sentencing principles) they are rarely directly mentioned during the narrative. In comparison, the following discourses – where the Crown prosecutor begins their submissions – do directly state sentencing principles with reference to the relevant narratives. Though Stubbs primarily focuses on fictional/literary narratives, the analytical terms and processes he uses are still applicable to court narratives as well. In general, the formation of these narratives and their

omissions and emphases speak to the interpretive schemas of the speaker and colours their information-transmitting and information-gathering processes. In the case of the court, different parties focus on particular aspects of their narratives in order to create and emphasize rhetorical power via the formal and informal interpretive schemes of the court. These interpretive schemes are, in turn, based on the sentencing principles of the Criminal Code and Gladue principles. The sentencing principles and Gladue principles are, in turn, altered by the overarching interpretive scheme of MPR; as the Gladue decision influences the court, MPR influences all aspects of judicial decision-making and interaction.

The transcription process alters some of the discourses and communication present in the court case/analyses. Besides practical concerns regarding the possibility of errors and such, there are theoretical objections to the process as well. For instance, some entries and speeches made verbally over the court case are sometimes omitted from the transcription. In these instances, there are notes within the transcript that mark where these omissions occurred and their content. Notably, some of these omissions are of exhibits/evidence as well as off-record discussions that are audible to the observers but required to be omitted from any recording. Stubbs (1983) also notes some concerns relating to the recording process altering discourses spoken and the participants altering their actions to suit (p. 224-226). For the court setting, such transcriptions/recordings are mandatory, and there are often students or members of the public sitting in the

court. As such, we can be relatively sure that this effect has been mitigated as much as is possible. There are also concerns about the writing process and the possibility that certain discourses/speeches may have been transcribed incorrectly or had an undue emphasis placed on misspoken discourses or ill-formed discourses (ibid., p. 227). This is a problem that cannot be solved, as such recordings are not made privy to the public and recording tools are also not allowed in the court setting. Despite this issue, these potential theoretical concerns seem to support the idea of a pattern relating to the preparedness of the speaker and the topic at hand, so it can be affirmed that this factor is a sign of certain discursive processes rather than the result of the transcription process. Such discourses were also recorded during the observation notes before this analysis was done, which further supports this conclusion. In general, then, we can conclude that the theoretical and practical methodological concerns relating to the transcription process are mitigated as much as is possible in this situation, and they illuminate certain metacommunicative rules/norms that are otherwise unmentioned over the course of the proceedings. As for the relevance for this research, aside from illuminating possible methodological concerns, the transcription process itself is a type of information-relaying discourse albeit directed at future readers/Crown prosecutors, and actors demand to explicitly put certain discourses on the record in order to ensure that information is relayed to the appropriate actor. In this case, actors will explicitly utilize the recording

process as a type of discourse rather than view it as a constraint or condition that raises methodological concerns.

One other significant discourse that was not disclosed/included in official court transcripts are the off-the record discussions and questions between court officials and their peers and/or the public/researchers. Some of these discourses were private conversations relating to the case at hand, and their specific influence, form, and content were obviously not disclosed to the observer/public. In several other instances, the judge would directly ask the researcher – or other researchers present – about the nature of their observations and research as well as to answer any questions they may have had. These question-and-answer sessions were not present in any transcripts but still utilized past court events/cases as topics of conversation or to serve as contrasting examples of the issue being discussed. These discussions also took quite a bit of time – from 5 minutes to 45, with most taking about 10 or so minutes of court time between cases/offender/accused persons being brought up and prepared. While this did have methodological benefits – allowing the researcher to solve problems relating to the informants' opinion of their discourse and reducing the need for interviews – the primary discursive purposes of this discussion was to inform actors not involved in the court system about its processes and primary goals. In effect, the same actors being studied actively solicited questions and analyses from the researcher and helped to alleviate some of the methodological concerns of the

research itself. Therefore, one of the discursive aspects of the transcript analysis is what it was unable to capture, and how these influences may have been rendered invisible to the surface analyses despite their likely influence on the research data and final sentence. These 'invisible' discourses were still recorded as part of the observations and provide valuable information about the discursive and interpretive process from the point of view of the informants themselves.

As a final point for this section, there are some particularly interesting sections and discourses present in the transcripts ordered that cannot be described in their entirety yet which should be mentioned in order to better demonstrate the inform-response-feedback process as well as the conclusions detailed previously in the **data analysis**. First, one notable case involved a detailed external negotiation/joint submission, which was eventually disclosed (partially) to the court during the submissions and which culminated with the judge's agreement with the defense counsel and Crown prosecutor that "jail really has a limited function on everyone... but sometimes there is no option." (R. v. Simpson, Aug 28 2013, p. 17). A different sentencing speech/rationale echoed many discourses made by judges when he stated that "[he] is not being sentenced for his addiction. He is being sentenced for the theft, and it should be a sentence that establishes his responsibility and deters him from just going out and doing the same thing again" (R. v. Livingston, May 15 2013, p. 23). While this seems somewhat harsh and punitive (as it ignores that the addiction precipitated the crime), the same judge

later goes on to sentence the offender/accused person to a detailed treatment program and diversion while telling him that "[you] will not be judged harshly if he misses an appointment. He will be judged harshly if he smashes up car windows. So I appreciate that if he does have fetal spectrum disorder and he has not been diagnosed or treated then I am just adding to it and it is not the intention." (ibid., p. 26). Another transcript explained that the risk of reoffending need not be absent, only that there not be a substantial risk based on their past record. This transcript, as well, echoed concerns/discourses that treatment failures are not grounds for punishment in and of themselves but that the court system is ill-equipped to manage them due to their preconceptions that breaches are serious. To quote the case: "No one expects that a program like this is easy or that – he may fail along the way [sic]. That is the nature of recovery. Our courts, of course, are inadequately equipped to deal with people who fail because we view these breaches as serious and have little tolerance for them. But we know, or at least hope we know, that recovery in dealing with these problems is a long one and there will be relapses along the way" (R. v. R. Sheppard, Jul 18 2013, p. 27).

Still another sentence involved an incredibly brief sentence and rationale (approximately 1 page long) that resulted in a brief eight day stay in custody and no probation orders, to whit : "Judge : I am not going to put him on probation; this is, you know, just a waste of paper. Mr. Siopis : Fair Enough." (R. v. J. Norris, Jul 18 2013, p. 9). In these cases, the judges again echoed the shared perception that

some failures are expected and that the main concern was an escalation in addictions/offenses. While the first and last example detailed above (R. v. Simpson & R. v. Norris) were an express instance of discursive responses and the expected inform discourse from the defense counsel, the other examples cited did not include a direct discursive response or feedback. However, all these cases did engage with such feedbacks and responses via appeals to temporal aspects and actions (past records or future offenses) and in this respect they can illuminate these alterations to formal discourse analysis methods as well as serve as example of the preceding informal processes and subversions of punitive discourses. Most notably, these exchanges present significant points where MPR ideologies and policies were referenced (the need for custody to protect the public, and emphasis on 'risk' most notably) but later melded them into an orientation that aims to utilize court treatment orders as a way to enforce rehabilitative ideals and goals. This melding of punishment and rehabilitation is due to the unique melding of modern penal rationality and the distortions caused by its interaction/combination with the Gladue principles.

Only one of the received transcripts involved a women offender/accused person; unfortunately, there were little unique elements to this case barring what was described previously. Her status as an Aboriginal woman was not directly mentioned during the case nor were concerns or issues relating to the way this or related issues may need to be considered during the submission process (notably,

when examining any relevant background elements). At most, there was a single mention of the death of her daughter several years ago, and mentions of her confusing patterns of grief (R. v. Sampson, Sep 5, 2013, p.17, 20). While we can perhaps link the judge's criticism of her behaviour (as a "grieving" parent) to social norms relating to gender roles, this was the only time during the observation period where these circumstances were present, so it is difficult to draw extensive conclusions from it (ibid., p. 20). What is significant, and follows with the conclusions reached previously, was in how the sentence was shaped in such a way that the long-term effects of incarceration were reduced as much as was possible; in this case, making the sentence short enough that she did not lose her housing and not restricting her movement in the community even though it may put her in contact with the victim/complainant (ibid., p. 22-23). Additionally, this lenient outlook was combined with indirect threats/warnings/appeals which stated that, were she to reoffend in a similar manner, she would face "a significant period of custody" and her housing would not be a concern of the court (ibid., p. 23). It is possible that Aboriginal women are subject to the same clinical/practical MPR-based assessment as are Aboriginal men, and this leads to the perception of higher 'risk' that makes them receive longer/more custodial sentences than non-Aboriginal persons. If so, then this is another recreation of colonial and Eurocentric conceptions of justice; in this case ignoring the differential treatment and harm received by different Aboriginal peoples and focusing only on past

historical instances of racism (in the form of government policy) rather than contemporary systemic patterns of discrimination.

Finally, some particular transcript sections were made more interesting due to the fact that they involved an offender/accused person who was observed/recorded multiple times. In this instance, these repeat offenders had transcripts of their cases ordered because of a desire for the research to see if the conversations and discourses changed over time (in respect to the past discourses). Though the general trends tracked to the patterns and conclusions mentioned previously, there were some transcript sections that are particularly relevant in the way they utilize exchanges with respect to past actions/discourses. Unfortunately, not all of these repeat incidents had transcripts ordered/received, so these analyses should be understood with this in mind. The first noticeable trend was that certain offender/accused persons maintained similar sets of desires and priorities in their interactions with the court – one was eager to move back to his hometown (R. v. McTaggart, Jul 25 2013 and Aug 8 2013), and the other sought to get out of court/jail as fast as possible – even to the point of pleading without defense counsel assistance, twice (R. v. Hogue, Jun 14 2013, Jun 19 2013, Aug 8 2013, and Aug 28 2013). Though they each had some practical reasons for these desires, both made it a point to inform the judge about these as early in the proceedings as possible. Similarly, the judge did respond to and provide feedback with respect to these earlier appeals and thus subsequently built upon the pre-

existing discourses. What is significant is that the judge's response was in turn coloured by his own interpretive schema and positionality within the court setting rather than a simple response of 'yes' or 'no'. For instance, he would re-contextualize such discourses taking into account sentencing principles, formal requirements, and practical concerns in order to present new information or challenge the discourses presented by the offender/accused person. The judge could respond to a notification about housing concerns by claiming that such concerns are outweighed by the threat the offender/accused person poses to the public, and that it could only be dismissed if he were presented with a clear, supervised, plan of care. This would, in turn, necessitate a new response/inform statement from the offender/accused person or his defense counsel.

This process repeated over many of the court cases over time, even when the defense counsel and judge were different. One of these offender/accused persons had five transcripts detailing progressive offenses, and the proceedings eventually culminated with an exchange where he appealed for leniency due to severe personal problems and incredibly harsh prison conditions, which was eventually countered by the judge and Crown prosecutor accepting such appeals while engaging in a new exchange – namely one wherein they asserted that specific deterrence and rehabilitation was no longer a consideration based on his long record and they consequently preferred denunciation, general deterrence, and the protection of the public. The specific exchange : "At a certain point specific

deterrence is just no longer a principle that can really be considered, but it is more sort of denunciation and general deterrence, as well as just protecting the public. Like, the community needs some reprieve from Mr. Hogue's actions considering that in the past different types of sentences, be it rehabilitative, have just had no impact whatsoever on him. And at this point there really are no viable options, in the Crown's submission, for anything like that." (R. v. Hogue, Aug 28 2013, p. 8). As such, we can posit that this re-contextualization of responses is based upon shared interpretive schemas on the part of judges rather than individual concerns; specifically, shared interpretive schemes based on MPR and its predication on utilitarian and dehumanizing cost/benefit analyses. Furthermore, this process of reinterpretation is not present on the part of offenders/accused persons (or if may only be applied when the listener/judge has heard it before) due to their focus on practical concerns or a lack of discursive challenges to their interpretations. That is, offender/accused persons are the only ones who engage with these concerns (as they are specific to them) and thus have no outside interpretations of them to challenge/reconcile. The closest they get to this challenge is when judges respond to their desires in a negative fashion, but that too is based on the judges' specific interpretations and concerns (predicated upon the submissions in question) rather than appeals made by the offender/accused person on their own basis.

Therefore, we can conclude that the general exchange structure is still present within specific discourses and speeches – even across multiple

transcripts/observations – but that this process is informed and altered by rival interpretive schema and priorities. For judges/courts, this interpretive schema is based upon the rehabilitative ideal and concerns about the protection of the public and treatment successes. Offenders/accused persons, on the other hand, have little shared interpretive schemes and prefer to focus on their practical concerns instead (possibly because of unfamiliarity with the court setting) and this also indirectly leads to their echoing of the clinical and dehumanizing ideologies implicit in the MPR and an unfortunate reinforcement of discourses that may be contrary to their own desired sentence.

General Discussion

Research relating to the punitive turn, both inside and outside Canada, have reached different conclusions and arguments than what was seen in this thesis. Of the theories discussed earlier in the paper, the ones that fit best with the conclusions found here are Moore & Hannah-Moffat's neo-liberal punitive turn theory and Meyer & O'Malley's theories. In this thesis, I found that the neo-liberal discourse and ideology is present albeit still marked by a seeming reluctance to utilize associated policies (or at least an aversion to purely self-directed treatment/punishment orders). Crown prosecutors and judges can and will order neo-liberal sentences/treatment orders wherein the offender/accused person is ordered to complete treatment under their own power and where any

blame for failures (past or present) is predicated upon their actions. This is only ordered when the need for rehabilitation is present but there are low reoffending risks and no outside controls/supervisors to monitor and assist the offender/accused person. The individual-based assessment is seemingly insignificant as these same judges will then go on to explain how these elements are due to circumstances out of the offender/accused person's control, will listen to relevant mitigating circumstances and reduce sentences accordingly, and (most importantly) do not demand a complete or flawless rehabilitation and seek incremental improvements over time. In both applications and interpretative processes, the primary factor in the rationalization and sentencing process is how all Aboriginal peoples are framed and presented through a problematic discursive framework that makes them appear to be intrinsically victimized and without agency. This framework and sentencing process, rather than being an attempt to remedy the injustices of the colonial era, instead repeat the colonial and racist beliefs of the past (specifically, Eurocentric paternalism). As Green (1998) noted, much of the colonial era was concerned with labelling Indigenous peoples as potential threats to the colonial state while also replacing Aboriginal people's cultural order and beliefs with those of the colonizer (p. 139-140). In this case, both the concept of justice and the erasure of Aboriginal people's self-determination are current colonial policies that are being repeated within Gladue courts.

More significantly, judges and Crown prosecutors across the research area are directly critical of the punitive turn and any legislation that seeks to promote neo-punitive policies. In effect, this research has uncovered a strange blending of neo-liberal and paternalist policies combined with a strong refutation of any further restrictions or amendments that make rehabilitation no longer a significant sentencing principle. The 'balanced approach' (according to Meyer and O'Malley) is what Gladue court judges want to enact, but due to strong punitive pressures and MPR priorities (notably on protecting the public) the actual results reflect the neo-liberal orientation identified by Hannah-Moffat & Maurutto (Pratt et al. eds., 2005, p. 85, 201). Gladue courts are supposed to attempt to blend Indigenous concerns with colonial systems such that they remedy past injustices. However, due to the pervasive influence of modern penal rationality, and ongoing punitive shifts, there remains a preoccupation with objectifying discursive frameworks and a repetition of past interpretive schemes that continue to brand Aboriginal peoples as intrinsically in need of government control. Though Gladue court judges attempt to limit this pattern, the key elements of modern penal rationality remain embedded in the overall process such that all that results is a framework that prefers to implement a more 'lenient' version of existing processes that lead to much the same problems as before, particularly when there remains strong rhetorical links to concerns about the public. Many of the same problems detailed by Dickson-Gilmore and La Prairie (2005) mentioned earlier in

the thesis continue to apply, notably that "since judges are required to consider the nature and gravity of the offence, prior offense histories, and risk/need levels, the gravity of these factors may in some cases outweigh the influences on sentence of Aboriginality or any disadvantages associated with this" (p. 230). These processes and the actual ideology behind the courts' positions are left invisible to the offender/accused person themselves, and when they are brought up directly during the sentencing speech/rationale it can seem like the court has no clear ideology or motive behind its past decisions.

It is only when we examine discourses and submissions involving the Aboriginal court workers and their discussions outside the court setting, as well as the differential treatment of the same offenders/accused persons over time, that we can begin to see the long-term interpretive and rehabilitative schemes that the court utilizes and how it is a melding of the rehabilitative ideals of Gladue, the past paternalist era, and modern penal rationality's interpretive schemes and priorities. Far from being uncritical public servants, Gladue court actors attempt to implement their own rehabilitative regime that seeks to balance support/supervision with freedom/liberalism, all while following a clear-cut evaluation scheme to determine when rehabilitation is too risky or impossible to implement. This evaluation and prioritization is done on a case-by-case basis that is in line with pre-existing standards and concerns. This ideological orientation can be roughly described as 'situated neo-punitiveness', defined here as an

orientation where neo-liberal or neo-punitive policies are utilized only when specific circumstances or characteristics warrant it, with somewhat welfarist or wholly communal justice being selected to 'fill in the gaps' where the current mainstream policies are found lacking or have no ideological application to the case. Judges and Crown prosecutors attempt to utilize a rehabilitative, communal format whenever the risks and case specifics warrant it. If the specifics do not warrant it, then the sentence is 'scaled up' in proportion to the relevant court/Crown prosecutor submissions and 'risks'. Particularly egregious neo-liberal or neo-punitive forms are applied only in the most extreme of circumstances, and are otherwise subverted via the previously described informal techniques and formal procedures. Though modern penal rationality nominally assumes a dualism between rehabilitation and incarceration, Gladue courts' access to alternative punishments and additional resources allows them to meld both types into a form that can both punish and heal, or which can rehabilitate while still keeping the offender/accused person excluded from the public/society (Dugas, 2013, p. 54-55)

As part of this, we can also consider whether classical critical discourse analysis is still a relevant theoretical orientation in the context of this research thesis. Court actors of all roles are cognizant of their speech and its effects on the actions of the offender/accused person and their colleagues. More significantly, they are not uncritical enforcers of the disciplinary penology espoused by neo-

punitive politicians and remain somewhat committed to a conception of past society that is wedded to rehabilitative ideals. In the Canadian context, past systems of penal or criminal policy were simultaneously disciplinary and liberating such that the final effect was one wherein arbitrary punishments and differential applications of discipline were enacted and used to support one another. The new form of punishment detailed in this thesis on Gladue courts is much more of a refinement of such past systems, with a focus on allowing/promoting the self-determination of Aboriginals and with a reluctance to enact any more supervision/control than is necessary. We conclude that, if utilized in a direct macro-level and adversarial manner, then classical critical discourse analysis is inappropriate and should only be applied to the general political/legislative trends rather than the actual application of them in specialized treatment courts such as Gladue courts. In contrast, modern penal rationality, as a derivative of disciplinary elements and thought, remains a valid area in which classical critical discourse analysis can be utilized to succinctly analyze and examine the problems and issues in the court system as a whole. Most notably, the way incarceration remains an express element of public protection, the overall focus on utilitarian/objectifying risk analyses, and the reduced (but not completely absent) support for alternative sanctions beyond simple incarceration or release (Dugas, 2013, p. 54, 103, 108-112, 133). This implicit and unconscious interpretive frame is what allows neo-liberal and punitive elements to remain

possible in Gladue courts and which later results in problematic interpretive frames of Aboriginal peoples that serve to repeat past colonial/racist injustices.

Part of the research goals of the thesis was to uncover how certain legislative or normative influences can distort the fundamental application of justice, and how these influences can be indicative of neo-punitive or rehabilitative ideologies. In light of the data analysis and the preceding discussions, we can argue that these distortions and ideologies are linked such that legislative influences are viewed/enacted as primarily neo-punitive whereas normative/institutional influences are rehabilitative and disciplinary (to the point where paternalist might be a more accurate term). Judges and Crown prosecutors are predisposed to use their discretion and informal procedural processes to subvert legislation they feel is not amenable to their goals – primarily rehabilitation followed by protection of the public – and legislative changes are resisted on the basis that they would force them to follow punitive processes inimical to this ideology. Therefore, in contrast to the original thesis, distortions are not one-way (legislation-caused) but can cut across institutions and ideologies and can lead to rehabilitative, neo-liberal, paternalistic, and even neo-punitive sentencing rationales and guidelines. Significantly, these same judges also make little distinction between restorative and colonial justice and promote rehabilitation through non-Aboriginal sources as well as through Aboriginal-led programs. What is unique is that Aboriginal-led processes are often viewed as

nearly exclusively restorative whereas neo-punitive processes are exclusive to colonial/Canadian authority. In this manner, judges and Crown prosecutors are able to interpret the neo-punitive legislation and orders as being contrary to the overall goals and directives of the Gladue court and the guidelines within R. v. Gladue. This orientation can, in the future, provide potential support for both utilitarian-based crime reduction strategies and Aboriginal-based restorative justice regimes, potentially serving as a way to avoid current and future punitive trends through aboriginal-led sentencing alternatives. To quote Green (1998) again : "Most would agree that the ultimate goal of any criminal justice system is protection of the public. Given the obvious over-incarceration of Aboriginal people, even the possibility of [sentencing alternatives] succeeding, by changing offender behaviour and deterring crime, makes their continued development important, if not crucial" (p. 163).

The actual effect of new legislation, overall, is likely to slightly increase imprisonment rates. In many instances, this increase will be applied to offenders/accused persons who would normally be subject to non-judicial sanctions and treatment regimes due to their drug crimes. However, in line with the previous conclusions, judges and Crown prosecutors will implement/develop new ways to avoid these restrictions or mitigate their power as much as is possible. This process of subversion is likely to raise its own problems and criticisms. Firstly, there are political problems relating to this subversion of

parliamentary powers and the use of informal and non-sanctioned methods to avoid such influences. Unless these informal applications are derived/based on judicial precedents from a higher court (such as the Gladue decision itself), or frame the new legislation as being inimical to pre-existing criminal legislation/sentencing principles and/or the Charter of Rights and Freedoms (Constitution Act, 1982), then these subversions can be seen as non-democratic in their methods. A second problem relates to the differential application of these subversive processes. Not all courts will develop the same methods and interpretations of the new legislation, so it is possible that some courts utilize the subversions as often as is applicable whereas other courts apply it rarely. The result, of course, is a Canada-wide increase in imprisonment rates and a differential application of justice based on the location of the court.

Though Aboriginal offenders/accused persons are likely to still be affected by geographic considerations (due to community support or access to treatment centres/groups), this can further compound the court's perceptions and reinforce the problematic discursive framework. This specific aspect of the framework is based on racist and colonial beliefs that reserves or rural areas are devoid of any supports or resources, and this again leads to an overarching racist identification of all Aboriginal peoples as intrinsically victimized and without any agency or ability to rehabilitate themselves. In other instances, there is the possibility that courts will apply the punitive turn differently to certain offenders/accused persons

and reserve the most punitive sentences for them and for reasons that can be considered arbitrary when general sentencing trends are taken into account. As such, even courts that have created a shared interpretive schema regarding the applicability of the new punitive turn can still utilize it as a way to legitimate harsh sentences and orders that would otherwise be considered inappropriate. As a result, punitiveness would still be present, albeit reserved for only certain individuals.

Aboriginal offenders/accused persons are likely to maintain similar treatment/recidivism rates over time, excepting any new legislation or Supreme Court decisions. This research was not concerned with the effectiveness of the treatment orders and sentences of the Gladue court primarily because there was no time to do so, any reoffending was not divulged, and the ethical issues would be beyond the scope of a single-person MA thesis. As a result, the main focus was on the rationalizations and reasons for certain sentences and court orders. Those offenders/accused persons in a Gladue court who are not subject to geographical-based racist/colonial discursive frameworks or are not regarded as particularly deserving of the punitive minimums will likely receive the same sanctions now as they did then since this legislation did not affect the resources allocated to treatment centres, and Crown prosecutors/judges still identify certain problematic individuals as being similar to offenders who cannot be rehabilitated. Therefore, those who will not be given access to treatment policies under the new punitive

regime are likely the same offender/accused persons who would be denied such sentences prior to the changes.

The overall effect of the new punitive legislation is to complicate current sentencing trends and principles in the short term and likely create more institutionalized offenders in the long term. This is dependent on all courts having implemented the rehabilitative regime in the same manner and their gradual development of similar subversive informal processes. If the new punitive legislation continues to accelerate, then these informal processes may no longer be enough to subvert the mandatory requirements and may lead to constitutional challenges from the Supreme Court. If the new punitive trends are developed in such a way that they cannot be subverted, then it is possible that a massive influx of offenders/accused persons will need to be sent to custody as these changes may prevent previous informal subversive processes from being applied in their own specific circumstances. That is, by preventing Crown prosecutors from subverting one mandatory minimum sentence (MMS) parliament may prevent them from subverting all mandatory minimum sentences (as they are all based on the same rationalizations and informal processes). Therefore, even minor legislative changes may have effects on sentencing trends and imprisonment rates beyond the specific offense in question.

The main point to be made here is that this was primarily explanatory research and concerned with answering both 'why' and 'how', specifically with regards to criminal sentences and their rationalizations. The main new knowledge gleaned from this research was the way courts begin their rationalization/evaluation process and how certain discourses, arguments, and factors have more or less rhetorical power and shift sentences towards certain locations/orders. Even if this was already known, the Aboriginal-specific elements and the recent adaptations/subversions of criminal legislation have no real presence in criminological/sociological literature (or are so new that no observations have been done yet). These conclusions are of critical importance since they explain how the fundamental rules and regulations of justice are actually interpreted and applied 'on the ground' and, more significantly, how judges are reconciling competing demands from the judicial and legislative branches vis-à-vis rehabilitation and punitive sentencing principles. Research analyses of new legislation are useless without actually analyzing their effects on the imprisonment/crime rate. Similarly, purely statistical analyses of the crime rate are disingenuous if they do not look at the way new legislation is interpreted, applied, and enacted. This research is therefore an attempt to see how changes have influenced the actual application of the law and, in so doing, create a generalized theory of sentencing speeches/rationales and court perceptions/interpretations. While there are some ways to improve this research,

the conclusions here are still significant given the role and importance of the court in actually enforcing and facilitating the fundamental principles of justice.

Additionally, now that much of the problems of Gladue courts have been explored and their origins determined, we can begin to discuss whether or not Gladue courts are actually 'helpful' or a beneficial element of the currently existing criminal justice system. To put it briefly, Gladue courts have both positive and negative effects for the Aboriginal peoples who are subject to them, though we can say that the current form is more beneficial than not and has the potential to develop into something that is predominantly helpful and able to solve the problems outlined in the **Literature Survey/Theoretical Framework.** Though Gladue courts create objectifying and racist discursive frameworks, and they may indirectly develop orders/sentences that are more concerned with control rather than rehabilitation, they still strive to avoid the most excessive elements of the punitive turn and define-down 'risks' such that treatment-centre or intensive community-based sentences are preferred when incarceration would be counter-productive and exacerbate the problems already present. This process even applies in the context of bail proceedings, and can help remedy some of the problems Aboriginal peoples experienced in such cases prior to the Gladue decision. According to one of the judges observed "the Toronto Gladue Court addresses the particular circumstances of Aboriginal offenders at the bail hearing as an important part of considering 'all available sanctions other than

imprisonment that are reasonable in the circumstances' as s.718.2 (e) requires" (Knazan, 2003, p. 11). Part of this process involves a recognition of "historical facts" and judicial "biases" alongside a concerted effort to grant bail even when other courts would refuse due to poor records, a lack of resources, or the perception of transiency(ibid., p. 12–14). These problems/concerns are sometimes remedied via the plans of care written by the Aboriginal court worker or the support networks they have connections to.

Outside of the bail context, diversion orders and ACW designed plans can meet some of the requirements for truly restorative justice while also creating the conditions that can prevent Aboriginal peoples from being subject to the criminal justice system in the first place. Net-widening effects will remain a worrisome element even if these developments were to occur, though a continued emphasis on diversion can help to prevent the problems associated with it and create an even stronger sense of community and cooperation between Aboriginal peoples and Crown prosecutor or defense counsels. In time, hopefully these external elements and cooperative processes can help to reduce the objectifying elements of the court system and the discursive framework of Aboriginal peoples, thereby transforming Gladue courts into a system wherein pre-existing aboriginal-led resources and programs are utilized and strengthened while the Gladue principles are followed. Neo-punitive legislation would also remain similarly subverted, though potential refinements could emerge due to potential challenges from the

Supreme Court for much the same reasons as those behind the original Gladue decision.

Future Research

Further research in this subject area is likely to emerge in the near future. At least two days of observation involved other student researchers attending at the court. Unfortunately, they only observed for a week or two rather than the lengthy observations made in this thesis. However, at least one of researchers had done observations at another court elsewhere in the country. In any case, there was a marked increase in Gladue court interest over the course of the research and it is expected to increase as academic literature on the topic begins to grow and criminological literature begins to focus on rehabilitative ideals in contrast to new punitive legislation. More importantly, as discussed previously there have been recent news articles and public concern about recent punitive legislation, thus making this study potentially more important in the long term.

Improvements to the research thesis would likely necessitate greater financial support inasmuch as it related to an expansion of the research area; specifically, through a blend of quantitative and qualitative analyses. Though a quantitative analysis can attempt to find correlations between the court orders and sentencing principles, they lack a clear relationship or interaction process without such qualitative aspects. This is partially the reason why the data analysis in this

paper made it a point to analyze the correlations/relationships and then examine these correlations from the standpoint of the observation notes (with all of the contextual variables they entail). Put simply, this paper sought to use the correlations/relationships between the codes/variables as a means to guide an in depth discourse analysis rather than replace it. With access to more financial support, an in-depth quantitative analysis could be performed alongside the qualitative analysis here. This would replace the current hybrid data analysis and allow the qualitative analysis to examine/reflect more wide-ranging trends within the sentencing process. This quantitative analysis could also incorporate trends outside of Gladue courts, thereby allowing for a more valid comparison between the two court orientations and allowing for a larger sample size overall.

Less financially onerous but still difficult to implement improvements could involve an examination of the more isolated and confidential elements of the informal processes studied here. Parts of the research – most prominently the creation of the Gladue report and confidential negotiations between the defense counsel, Crown prosecutor, and offender/accused person – were not disclosed directly to the researcher despite their obvious significance to the analysis. With greater accessibility, these elements could be explored in an ethical manner while also revealing the processes, meanings, and interpretations behind the more informal aspects of the court system.

A comparison/companion analysis that looked at the same topic in the context of other specialized treatment courts, or even the general guilty plea court setting, would also be a massive boon to future analyses of this type. By comparing the different principles, interpretive schemas, and rhetorical bases between different court types we can better analyze the entire sentence rationalization process alongside the general reaction/integration of new punitive criminal legislation. Different courts are not guaranteed to react to these changes the same way, and may not even have the same views and formal priorities as Gladue courts. As such, this expansion of the research area can allow for the creation of a general sociological/criminological theory about court interpretation, discussion, and application of sentencing principles and the way new legislation (of any ideology) is interpreted and applied by courts on the basis of multiple geographic or sociological factors.

Finally, an ambitious or well-connected researcher can further improve the research by performing research/interviews with bureaucrats, department officials, or even politicians themselves. In this instance, the main point of this research would be to look at the creation of the new legislation and the main purposes behind it. This could be used to analyze the political perspectives of the judicial branch, how they expect legislation to be interpreted, and what forms of subversion are considered legitimate. While this would likely be polemical where any politician is involved, bureaucratic officials can provide an interesting amount

of information with regards to how the legislation was originally planned and designed – its main goals – and how it was altered through the writing/political process. In this case, the additional stages would serve to see how the application of the legislation differed from its original/current intentions.

Conclusions

The main conclusions to be made are based on the data analysis and how it coincided with the research question and contemporary theories about the new punitiveness. For the most part, the main 'extremes' of discourse and sentencing in Gladue courts are diversions and protection of the public. Diversion is uniquely situated as a privileged discourse that requires court authority to be enacted but which, simultaneously, later rescinds this power and influence. Diversions also involve out of court controls and a focus on willing participation with treatment orders. In this sense, diversions are perhaps the greatest example of the shared communicative function of courts as well as the limitations of the critical discourse analysis paradigm. They are the primary sign that discourses in courts are not monolithic and judges/Crown prosecutors are amenable with limiting their power over individuals provided they are given some control over the initial formation; notably, they are also willing to counteract the disciplinary orientation of classical Foucauldian conceptions of justice. Most significantly, diversions and similar community-based treatment orders are expressly designed to create an

Aboriginal community and similar resources out of the disparate population in Toronto. In fact, one judge referred to the Aboriginal community in Toronto as a 'diaspora', and wanted to utilize diversion programs as a tool for community-building. In so doing, he directly referenced the problematic discursive framework of Aboriginal peoples and the objectifying colonial/racial perceptions that Aboriginal peoples in an urban setting are intrinsically alienated and need government support in order to create their own communities since they are without their own agency. Again, this framework is just recreating past racist and colonial policies under the guise of rehabilitation and restoration.

This effect is also amplified by criminological studies which do not objectify Aboriginal peoples as much but still utilize the same terminology and present solutions to urban Aboriginal issues that are predicated upon hierarchal or government-led intervention and programs (Corrado & Cohen, 2011, p. 158, 169-170). Protection of the public is the other extreme discourse and it advocates custodial sentences and needs little other supporting punitive concerns. Protection is expressly mentioned as one of the main sentencing principles of the courts, beyond the formal requirements of the Criminal Code. Other punitive principles are not mentioned alongside protection of the public because it alone is usually sufficient reason for a custodial sentence and, excepting specific deterrence, are usually stated only out of an obligation to include such concerns in the submissions. Sentencing alternatives outside of the formal court system, except

diversion, are ignored in Gladue courts and are only beginning to be addressed despite their ability to utilize stronger community ties to reduce reoffending and crime over the long term, thus meeting both concerns about public protection and calls for restorative and effective justice (Green, 1998, p. 162).

Diversions are also unique in their formation and descriptions within Indigenous justice literature. As noted earlier in the thesis, one of the most promising elements of diversion programs (specifically, the CCP) is in its ability to create community bonds that can prevent recidivism and create communities where Aboriginal peoples can directly connect and support one another, ideally remedying some of the problems that urban Aboriginal peoples deal with (Proulx, 2003, p. 192). The main issue, from a theoretical standpoint, was in their ability to maintain distance from the Canadian criminal justice system such that the program would not be subordinated to them and indirectly echo the same discourses, ideologies, and injustices (Dickson-Gilmore & La Prairie, 2005, p. 95-96). In this respect, diversion programs within the Gladue context are able to meet these demands quite frequently since they are as separate from judicial input as possible and are expressly presented and enacted in a cooperative and non-adversarial manner. In addition, judges and Crown prosecutors do have similar goals to the CCP (creating/strengthening communities, providing local support, and keeping Aboriginal peoples out of the purview of the criminal justice system if possible) but this is the result of the court mirroring their concerns rather than

the diversion project being subordinated to them. The problematic discursive framework of Aboriginal peoples is also limited somewhat by diversion programs as they do not require such information to be presented or submitted in a public manner, if at all. In some instances, a brief conversation about past actions in the court system is enough to convince a Crown prosecutor to allow for a diversion attempt. In any case, the general intentions still mirror colonial/racist biases of inherent Aboriginal instability, though in this case this concern is noted by Indigenous theorists such as Craig Proulx and his identification that "racist interpretive repertories deriving from the colonial period and continuing today through policies, laws and legal practices" (Proulx, 2003, p. 187). Though these racist interpretations are supposed to be avoided via the CCP/diversion, they are still present and embedded in the court processes that allow for such diversion sentences. Regardless, diversion procedures and their integration with formal court actors and activities are one of the major differences between Gladue courts and other court types, and they are capable of limiting the problems of mainstream court processes while also rectifying issues of punitiveness/rehabilitation (through the side-stepping of the sentencing and trial process altogether).

Both diversions and protection-based custodial conditions reflect modern penal rationality in an unconscious manner, particularly from its utilitarian/cost-benefit standpoint and risk-based assessments (Dugas, 2013, p. 59-61). The

Gladue court has therefore followed what Garland terms “adaptation” strategies insomuch as they have redefined the effectiveness of the law from the standpoint of reducing the burden on the system in all but extreme instances (Garland, 1996, p. 450, 458). It is because of these interpretive frames that the colonial and racist discursive framework of Aboriginal peoples is formed, and is further reinforced by a misinterpretation of the Gladue principles. This combination thus results in a framework of Aboriginal peoples being intrinsically victimized and in need of further government intervention, hence leading to paternalist orientations identified in the paper. To be specific, through MPR-based interpretive schemes of risk and Gladue-based priorities to avoid prison, Gladue courts have created a system where Aboriginal peoples are automatically considered in need of intensive supervision and rehabilitation when they would otherwise be given short custodial sentences only. This system thus leads to these persons being placed in both in the control of the criminal justice system yet inside a rehabilitative framework. As a result, we can conclude that the stated purpose of Gladue principles is being undermined by modern penal rationality and distortions created by it. These distortions limit the ability of Gladue courts to actually implement restorative justice, though some sentences and cases do create something that is akin to the overall Gladue goals, albeit coloured by colonial discourses and frameworks and only when MPR-based concerns are not present or are limited to weaker punitive sentencing principles (general deterrence and denunciation,

primarily). Neo-punitive legislation is mitigated in its effects due to Gladue court's focus on MPR and rehabilitation, and mandatory minimum sentences are avoided through informal processes or only applied to those offenders/accused persons who would've received similar sentences prior to the changes. Therefore, the MPR-based frameworks that distort the Gladue principles and their stated aims are also the ones that lead Gladue courts to resist neo-punitive principles; the same utilitarian and risk-based analyses that lead to the objectification of Aboriginal peoples and which encourages paternalist and neo-liberal sentences are the same ones which are used to counter the predominance of custodial sentences and mandatory fines that are considered impractical or otherwise a waste of resources.

Rehabilitative and punitive discourses are used as rhetorical tools to shift the final sentence towards or away from the rehabilitative 'starting point'. When sentencing principles are expressly mentioned, it is to shape the way other submissions are interpreted by all court actors. When rehabilitation is enacted/allowed, then the discourses/sentences involved tend to give some of their control/power over to other outside organizations with veto power given to the court (though never once utilized). Similarly, when rehabilitation/diversion is allowed then the court proceeding becomes less controlling and formal in order to encourage the offender/accused person. In contrast, protection of the public is such a strong punitive discourse as it speaks to the most severe consequences of

failure as well as the most practical concerns of safety and 'risk'. As far as court actors are concerned, the main role of courts is congruent with these perspectives; courts are to protect society without reference to other external demands.

Analyses of cases where the judge agrees with the Crown prosecutor's disposition/preferred sentence support these conclusions, as they have high levels of all sentencing principles but fewer references to general deterrence or denunciation than other results. Those cases that involve many instances of all sentencing principles (punitive or not) can be considered rhetorically 'close-fought'. General deterrence and denunciation can be therefore considered weak punitive factors that are not mentioned when stronger punitive factors are available (specific deterrence, aggravating factors, and most significantly, protection of the public). If a case only involves weak punitive principles (denunciation and general deterrence) then the defense counsel is likely to 'win'. However, if the case involves some of the stronger punitive factors as well as some rehabilitative factors, then a compromise sentence will likely be applied. If the case involves the strong punitive factors and is 'close-fought', then the sentence is likely to be the one requested by the Crown prosecutor. Therefore, references to the protection of the public alone is often enough to overwhelm rehabilitation-focused rhetoric; again, this is supported by Dugas' (2013) analysis of Gladue decisions, specifically his analysis that "the need to protect the public above all has a strong neutralizing effect on section 718.2 (e)'s directive to utilize

alternatives to imprisonment (p. 105). Conversely, cases that resolved with a joint submission and/or diversion had incredibly few references to any sentencing principle, and these cooperative elements are also somewhat practical in that they reflect a desire for a quick or efficient court system (rather than one focused on a few narrow sentencing principles).

With regard to victim/offender/accused person characteristics, as well as criminal/treatment history, these elements are generally the main methods by which the problematic discursive framework of Aboriginal peoples is created and are based around background histories and government-designed analyses of 'risk/need'. In both instances, the victim's characteristics are rarely disclosed or mentioned. These clinical and historical events/descriptions are used to provide legitimacy to the idea that the sentence is actually taking the systemic and overt colonial policies of the past into account but are, in reality, just recreating them in a different context. Similarly, criminal/treatment history is clinical in orientation and used to identify their chances of reoffending. More local personal histories may even be counter-productive if a non-custodial sentence is sought, as references to urban life and developments may implicitly lead the court to become concerned with fears of 'control' or employment and hence prefer to contain Aboriginal peoples rather than risk releasing them back to the public (Dickson-Gilmore & La Prairie, 2005, p.32-34). Regardless of their ideological origins and discursive formation, these elements tend to be the basis of all offender/accused

person characteristics and are primarily relational/metaphorically linked to one another. This is the primary means by which the problematic discursive framework of Aboriginal peoples is created and reinforced, as well as the means by which racist and colonial biases are embedded into the court sentencing and rationalization process. This framework is therefore able to connect multiple aspects together such that historical and background elements that relate to Gladue-based issues of collective trauma are reinterpreted through MPR processes into narratives that objectify Aboriginal peoples as a whole. The application is such that mention of any trait or history can, when linked to Aboriginal peoples, lead listeners to automatically apply/consider other histories and events via the creation of embodied metaphors between the different discourses. This is because the primary interpretation of Aboriginal history and peoples in the court is based upon government policies and procedures, and as such the same interpretive frameworks (where Aboriginals are objectified and without agency) are mirrored and altered in a paternalist fashion.

In the court context, these histories and elements can also be considered the discursive category of 'mitigating factors', though not all mitigating factors are considered part of the framework. For instance, references to stolen objects being recovered/surrendered or a decrease in offending severity can be part of mitigating factors without necessarily being linked to the framework. Some characteristics/events are barely mentioned during a sentencing despite their

correlation with the final result, and these characteristics are the ones with the most links/relations to other characteristics (which are stated explicitly, instead). This trend is possibly unconscious and judges don't realize they are only speaking of certain characteristics because the discourse pattern and interpretive schemes of the court makes these characteristics the ones considered most relevant. Alternately, they may be deliberate omissions due to rhetorical desires and prerogatives such as an explicit desire to mention particular characteristics as they are interpreted as having particular relevance to the Gladue principles. These 'particularly relevant' characteristics/events are part and parcel of MPR's practical outlook and are clinical and objectifying in orientation, thus recontextualizing genuine recognition of collective traumas into harmful objectifying and racist discursive frameworks.

Subversions and reactions to new punitive legislation, particularly changes to the VFS and drug charges, highlight both the primary goals and sentencing principles of the Gladue court as well as the creation of shared interpretive schemes and actions. This change and subsequent adaptation was nearly invisible and the actions themselves were seamlessly integrated into the actual proceedings. For example, minor fines would be surreptitiously applied to cases where before they were waived, payment dates would be extended pre-emptively by the judge, and Crown prosecutors would reference their discretion in prosecution prior to stating their preferred sentence. In all instances, this shared discourse and

ideology emerged almost immediately and was nearly invisible to any observer unfamiliar with past methods or the recent policy changes. Even outside of this context, off-the record discourses and questions with the judges confirmed that many felt that the primary reason for these changes to be resisted was for practical/utilitarian reasons rather than due to a preference for rehabilitation. The phrase 'like drawing blood from stone' was made by one judge off the record in reference to the VFS, and even the most frequent repeat offender would have the fine waived if he was likely incapable of paying. Despite these concerns, those offender/accused persons who would have received similar sanctions or punishments prior to the changes would not be subject to such subversions. For instance, an offender already subject to a long custodial sentence, or one who would be expected/able to pay reparations, would not receive such leniency.

These findings must be taken into account when we consider the role of the disciplinary society in the research and settings. For judges and Crown prosecutors, the disciplinary system is not consciously accepted but is actively challenged when the new punitiveness (or retributive) ideologies are encountered, whereas any unconscious disciplinary elements are accepted but limited by the more overt Gladue principles. In this sense, the sentencing is in itself a sign of discursive conflict between the judiciary and legislative realm. In the context of the Gladue court, only public safety/tertiary grounds are able to invite this sort of debate, as well as the offenders/accused person's acceptance of disciplinary and

neo-liberal/conservative ideologies. However, when punitiveness is reinforced/supported by neo-liberal discourses it is also sometimes subverted via Crown discretion and negotiations/joint submission. Subversion and resistance is therefore also the purview of defense counsels as well as Crown prosecutors and judges, who sometimes base such resistance on personal responsibility discourses that are emblematic of neo-liberal policies. With regards to these specific discourses, a closer look shows these discourses to be appeals to put forth a bare minimum of effort and the ultimate goal is to get them back into public life. The neo-liberal policy is also rarely enacted or applied in a 'pure' manner – Crown prosecutors and judges do not expect a complete rehabilitation, and are eager to have outside, meaningful, support for the offender/accused person. Though these alterations are partly the result of practical concerns due to addictions, judges and Crown prosecutors are still reluctant to order an offender/accused person to engage in any treatment order without some outside support. In this sense, the neo-liberalism and retribution are countered by a paternalistic ideological orientation and a utilitarian interpretive scheme derivative of modern penal rationality. Diversion is a disposition that represents this sort of combination, and it can be considered the first stage of punitive subversions. Diversions aim to place a treatment-centric sentence outside the purview of the criminal justice system itself while still allowing for some measure of accountability if there are failures. Diversions are also individualized and designed specifically for each

offender/accused person, ideally in such a way that the problematic discursive framework of Aboriginal peoples is limited and the Aboriginal person in question retains their individuality, self-determination, and individual values and beliefs.

A key point to be made here and across the entire thesis research paper is that judges and Crown prosecutors interpret rehabilitation and punitiveness in different ways based on the rhetoric and characteristics of the offender/accused person as they relate to potential threats to the public. However, they are always against neo-punitive trends unless there is absolutely no chance of rehabilitation. This interpretation and understanding of rehabilitation directly echoes past paternalistic and neo-liberal policies as a result of modern penal rationality and its melding/interaction with the Gladue principles. Though there is still some validity to critical discourse analyses, the overall trend here is that custody (the most intensive disciplinary sentence) is only applied when there are no other alternatives or there are risks to the public. In this sense, disciplinary discourses are elements that judges and Crown prosecutors are cognizant of and are only implemented as a last resort, instead utilizing more liberal discourses and controls. The most common disciplinary elements in the final assessment are the overall interpretive schemes of MPR and the way that problematic discursive frameworks emerge from their interaction with the Gladue principles. Sureties, family members, and other related supporting actors are partly referenced and utilized as part of the more disciplinary elements/sentences, and they also help to assuage

concerns about reoffending. In effect, the disciplinary state can enlist members of the public in order to avoid applying state actors or resources. In this manner, both the rehabilitative and controlling aspects of a sentence are enhanced.

Punitiveness, as a concept, is also approached differently depending on the actors involved. Judges/Crown prosecutors see it as an external element that should be utilized as a last resort, but can sometimes use it as a part of deterrent rhetoric. Offenders/accused persons, on the other hand, see it as an internal court factor that is partially acknowledged by them but which can only be discussed in respect to outside actors and incidents such as their own background or treatment histories. Both groups, therefore, seek to create/allow for a rehabilitative sentence. These rehabilitative sentences require the withdrawing of legal power and control, as well as a distancing of such influences from the treatment regime itself even when there is a possibility for recidivism. This perspective was sometime voiced directly by judges who felt that prison/custody would hamstring rehabilitative attempts – in one instance, saying that "the only tools that the court really has is to basically incapacitate you, put you in jail, because otherwise you just do not listen to courts...I think everybody has really been trying to be really creative with dealing with your matters but yet you keep breaching court orders" (R. v. McTaggart, Jul 25 2013, p. 14-15). From a discursive standpoint, rehabilitation is more than a continuum of possible sanctions; it is also a discourse that can be communicated by multiple actors each with their own formal and interpersonal

requirements for punitiveness. As part of this friction between rehabilitation and punitiveness, judges and Crown prosecutors have instead applied/created their own ideologies and interpretive schemes to create a system that is most amenable to their perceived goals. These new creations/adaptations can be generally subsumed under the same analytical frameworks that support MPR and its utilitarian orientation. Therefore, judges do not reconcile the new punitive and rehabilitative discourses as much as they choose when to wholly apply one or the other. In this case, reserving punitiveness for specific problematic offenders or when a formal alternative is unavailable. In practice, this leads to a process whereby the punitive turn has simultaneously given Crown prosecutor and judges less power by removing their ability for discretion while also forcing any attempts at rehabilitative sentences to require a direct subversion of punitive legislation altogether. The overall effect is that sentences are being drawn towards far extremes of leniency and harshness rather than creating a blanket increase in punishment as it was originally designed to do.

To summarize the entire thesis analysis, there are 4 main elements unique to Gladue courts and which emerge as a result of the Gladue decision and the neo-punitive turn. Firstly, there is an implicit focus on modern penal rationality and its interpretive schemes which causes unique distortions with regards to both Gladue priorities and neo-punitive processes. Primarily, MPR in Gladue courts takes the form of an overarching framework concerned with practical/clinical

interpretations and concerns and an emphasis on risk and the importance of public safety. This interacts with the Gladue principles to create a framework that emphasises rehabilitation as a 'default' sentence which is scaled in proportion to the perceived 'risk' the offender/accused person poses to the public.

Secondly, when the background circumstances of an Aboriginal person is brought up in court, the MPR terminology and process creates/presents a problematic discursive framework of Aboriginal peoples wherein they are only presented as being a series of past injustices and misfortunes, thereby framing them as intrinsically victimized. This problematic discursive framework serves to promote colonial/racist sentences wherein an Aboriginal person is perceived to 'require' government intervention in order to help them be rehabilitated and avoid reoffending, ignoring the possibility for restorative justice and emphasizing a paternalist ideological orientation reminiscent of the past colonial era.

Third, the Aboriginal court worker is uniquely situated within the Gladue context and has an overall 'invisible' effect on the proceedings due to their work occurring behind the scenes or in forms not disclosed to the public. Even in these circumstances, they are able to present counter-discourses to punitive sentencing principles and MPR-based concerns that help to mitigate some of the above problems/distortions through uniquely Aboriginal-designed programs and perspectives.

Finally, and related to the first point, Gladue courts are actively resisting the punitive turn on the basis of both practical concerns and rehabilitative ideals; primarily MPR-based redefinitions of court sentencing principles (protecting the public and cost-effective positivistic justice) and the Gladue emphasis on explicitly avoiding custody whenever it is reasonable. In either instance, neo-punitiveness is subverted through informal protocols and procedures that adhere to the letter of the law/court but which are used to avoid the most contentious changes and developments. These adaptations are created in a cooperative fashion with all court actors and are gradually integrated seamlessly into the overall court interaction process.

The key premise behind all of these elements and themes is the way both MPR and the Gladue principles act as overarching interpretive schemes that encourage rehabilitation in a controlled setting and only when it is 'reasonable'. This orientation is in conflict with neo-punitive legislation/changes since such policies do not allow for any evaluations of 'reasonableness' and are ideologically opposed to rehabilitation. Because of the demands of such policies, Gladue courts are doubly opposed to the new changes and primarily resist them on grounds of practicality and simple utilitarianism, followed by more historical and restorative factors promoted by the Gladue principles. As a result of this preference and historical sentencing trends, Gladue courts inadvertently focus on characteristics and histories that are predominantly based around victimization and a lack of

agency on the part of the Aboriginal person in question. Collectively, this focus overwhelms other background elements and can misinterpret otherwise humanizing and restorative processes since such narratives and factors speak most strongly to the practical and risk-based concerns of MPR, eventually subsuming all other background elements into the overall scheme. This leads to the problematic colonial discursive framework of Aboriginal helplessness and intrinsic criminality being created and supported while neo-punitive policies are refuted and counteracted. The main benefit of Gladue courts is that some actors, notably the Aboriginal court worker and the support workers they can 'enlist', can not only build/support Aboriginal communities in order to prevent such histories and crime from occurring but can also counteract these objectifying narratives, refute the misinterpretation of otherwise empowering histories, empower the Aboriginal person in question, and inject more humanizing or personal background circumstances into the court and criminal justice system overall.

Appendix A : Code-Sets Used (Comments in Brackets)

I. Court Location
    - 1000 Finch (Covered the entirety of each document)
        - By Case (Each case/change of court focus was coded individually)
    - College Park
        - By Case
    - Old City Hall
        - By Case
    - All Cases (All three of the above 'by case' code-sets, combined into one code-set)

II. Location of treatment/punishment (Sentencing speech/rationale only)
    - Anchorage Treatment Facility
    - Prison/Custody
    - Community
    - Treatment Centre
    - Diversion/Community Council of Toronto
    - Intermittent
    - Case-Wide (The above codes, applied to the entirety of the case rather than just the judges' sentencing speech/rationale)
        - Anchorage Treatment Facility(Case-Wide)
        - Prison/Custody (Case-Wide)
        - Community (Case-Wide)
        - Treatment Centre (Case-Wide)
        - Diversion/Community Council of Toronto (Case-Wide)
        - Intermittent (Case-Wide)

III. Type of Proceeding/crime (Coded entire 'cases')
    - Drug
    - Property
    - Violent
    - Bail (Includes Consent Releases)
    - Plea
    - Diversion

- Remand, Check-Up, or partial plea (Includes Discretionary Bench Warrants; did not mark offense type for these cases as they were unnecessary and would skew the data)
- Other
  - Fail to Comply Offenses
  - Miscellaneous Offenses (Offenses that do not fit into other categories and are too small for their own category (See **Appendix A1** for details))
  - Odd resolutions (Resolutions that did not fit the categories above or were unusual conglomerations of them and court orders)
- Not Gladue
- Unknown Charges
- Incomplete Observation

IV. Sentencing Principles (Any statement whatsoever, even outside of the sentence)
- Denunciation
- General Deterrence
- Specific Deterrence
- Rehabilitation
  - Case-Wide coding for cases with rehabilitation as a sentencing principle
- Protection of the Public (Includes Incapacitation)
- Other (See **Appendix A2** below for details)
- Mitigating Factors
- Aggravating Factors

V. Bail Concerns (Primary Grounds = assure attendance at court, Secondary Grounds = Protection/safety of public/reoffending, Tertiary = maintain confidence in Criminal Justice System)
- Primary Grounds
- Secondary Grounds
- Tertiary Grounds
- Other (See **Appendix A3** for details)
  - Past Treatment Failures
  - Surety Viability
  - Bail Program

VI. Actors (note, unknown comments/actions are left uncoded)
- Aboriginal Court Worker (ACW)
- Community Council of Toronto (CCT/CCP)
- Treatment Agencies
- Victim
- Offender/Accused Person
  - Offender/Accused Person's Family/Support
- Public
- Politicians/Government
- Defense Counsel (General 'Defense Counsel' code used for unknown defense counsel)
  - Private
  - Duty Counsel
- Judge
- Crown Prosecutor(General 'Crown prosecutor' code used for unknown/Provincial Crown prosecutors unless determined otherwise; note that only Old City Hall has Federal Crown prosecutors present)
  - Federal
- Court Staff (Not ACW)
- Other (See **Appendix A4** for details)

VII. Informal Processes
- Reconciling Offender/Accused Person's Desires
- Defense counsel-Crown prosecutor negotiations
- Crown Discretion
- Fines/Victim Fine Surcharge
- Mandatory Minimums/Considerations
- Impact on Victim/Community
- Informal Background reports
- Personal Responsibility
- Threats/Warnings/Appeals
- Reaction to new legislation
- Impact on Offender/Accused Person's Relations
- Aboriginal court worker (ACW) workarounds
- Offender/Accused Person Negotiations with Defense Counsels
- Proof of Claims

VIII. Characteristics of Victim & Offender/Accused Person
- Parental Disadvantage
- Parental Addiction
- Intergenerational Trauma
- Abuse
- Addiction
  - Drugs
  - Alcohol
- Foster Care
- Homelessness/poverty
- Criminal/Treatment History
  - Youth history
  - Recent history
  - Successful
  - Failure
- Trauma (Includes undisclosed/incomplete victim impact statements (VIS))
  - Mental Trauma
  - Physical Trauma
- Family Issues
- Community Factors
- Remorse/Desire to Change
- Mental illness
- Other/Unsure (See **Appendix A5** for details)

IX. Discourse Analysis
- Out of Court discourse
- Off the record Discourse
- Deliberately on the record Discourse (more so than usual, as all statements are made on the record)
- What is left unsaid (refers to discourses/actions considered inferior/invalid/deliberately hidden)
- The unstated alternatives (refers to alternative but still valid discourses/actions)
- Implied threats/commands (explicit threats are in 'informal processes' above)
- Subversion of punitiveness

- Reinforcement of new punitiveness
- Restorative Justice
- Communal Justice
- Reinforcement of legal authority/power
- Negotiated Discourse
- Situated and context-specific discourse (Only extreme incidences, or discourses that are referencing a specific time/place/positionality, are dependent upon them, or reference contextual factors directly)
- Directed discourse (usually explicitly directed towards the Crown prosecutor/defense counsel/judges or to/from outside court informants)
- Other (See **Appendix A6** for details)

X. The sentence/decision itself (Sentencing speech/rationale only)
- In favour of
  - Crown Prosecutor
  - Defense Counsel
  - Compromise
  - Unknown
- Probation
- Other orders (DNA, S.11, Community Service, etc.)
- Conditional
- Intermittent
- Suspended
- Joint Submission (includes Consent Release)
- Fines/VFS/Restitution (note : most sentences include VFS and it is only sometimes mentioned directly when the judge is passing a sentence)
  - Waived Instead
- Case-Wide variants on sentence/decision
  - (As the above code-sets, only applied to the whole case not just the sentencing speech/rationale made by the judge at the end of the trial – made for cross-analysis purposes.)

XI. Other/Unsorted (See **Appendix A7** for details)

A1 : Includes fail to attend court, prowl by night, fail or refuses to comply with treatment, fail or refuses identify, unlawfully at large, threaten damage to property, carrying concealed weapons, operate a motor vehicle while disqualified, utter forged documents, possession of identity documents, impersonate with intent, intoxicated driving, possess proceeds of crime

A2 : Concerns of public 'mind'/interest (x2), chance of being overturned, Crown prosecutor's recommendations (x2), victim's wishes, is a joint submission (x42), sentence is 'the bare minimum', employment/income (x2), having no record (x2), desire to avoid incarceration (x2), confusion over past sentence and possibility of pleading innocent (x3), triable issues/chance of conviction (x6) , 'trump principle', no recollection of facts, past punishments/record (x4), vague mention of 'circumstances', is a joint submission and 'reasonable', no Victim impact Statement (x5), need to balance all factors (x4), difficult probation was ordered, is not a joint submission, presence of a redundant probation, desire for alternative sentence (x2), medical appointments/concerns (x2), injuries/extenuating circumstances (x5), no Gladue report, 'snowball effect', past 'soft' sentences, custody is merited, need to infuse responsibility, proportionality (x3), inappropriate situation for a therapeutic sentence, likelihood for further offending (x3), no plan of care, inappropriate plan of release, has not met the onus, possibility of dangerous offender inquiry, Crown prosecutor's position is already lenient (x2), housing concerns (x3), is within the normal range, incarceration is inappropriate (x3), past cooperation with Crown prosecutor, communicable disease concern, criminal record grounds, judge explaining her methodology, concerns about future offense classifications, probation is a 'waste' (x2), approaching decision as a 'what if' scenario, offender/accused person 'wants to get it over with' (x2), benefit to community, court is 'only capable of incapacitation', protection of peace officers, sentence is 'better than jail', punishment compared to time served (x2), step principle, Crown prosecutor's concerns alleviated, ability to avoid

complainant, proof of donation, Gladue principles (x4), treatment sometimes connects Aboriginal peoples, effect of addiction on reporting to probation/bail program, background and trauma (x2), jail is called useless (x2), consent to detention, political case alleged, papers written incorrectly (x2), effect on future sentencing will be beneficial, family concerns (x2), need to attend at certain locations (x4), possibility of reparation, past problems with church/religion, desire to graduate treatment program first, problem of treatment in jail, long wait before appearing at court, intensive treatment plan, mandatory minimums/new laws (x7), lawyer disappeared, concerns relating to conditional sentence, waiting for paperwork/proof, addiction issues, no past diversion attempts (x2), restorative principles (x3), vague factors (x2), compassion of Crown prosecutor, no stated reason (x3), police recommendations.

A3: Section 515 s.6, offender's ability to consistently report, ability to arrive at a specific time, housing stability, other residents at facility, protection of complainant, no victim impact statements, question about allowing contact between the co-accused persons, joint submission question, past experience in sentencing the offender/accused person, concerns about onerous conditions, vague rationalizations to alleviate concerns.

A4: Aboriginal community, court officer (x3), co-accused person(x5), interpreter (x2), witnesses (x4), arresting officers, notable cases (x3), external officer/police (x5), cases under publication ban, unfinished trials, specifically named individuals of unknown position, behind the scenes workers, Aboriginal Legal Services of Toronto.

A5 (Note : Many code sections involve multiple different groups): Aggravating location, letter submissions (x5), vague statement/filing of Background/Gladue report (x140), Foetal Alcohol Syndrome, Gladue principles (x15), past progress in treatment, desires to learn to cope/complete course, Aboriginal

cultural roots, statement that ‘it is up to you’, motive to get/follow treatment, questions of past knowledge of the offender/accused person’s history (x3), inadequate sureties, injured/needs medical attention (x10), motive for alcohol use (x2), refugee status, little understanding of his own crimes, victim wants to leave relationship, victim impact statement declined/not present (x7), mixed message in victim impact statement, immature love, dysfunctional relationship with victim (x3), is in denial about need for treatment, wants some luck, lack of report review time, need to be pushed into counselling, medication issues (x10), need for movement allowances (x2), possible future problems (x3), surety still wants to help, past non-Gladue dispositions, good impression of offender/accused person (x2), desire for Gladue report or VIS (x4), age is relevant consideration (x6), no past treatments (x2), co-operative with police, need to satisfy judge, treatment environment, undisclosed factors, sexuality, harmful to community, delays in treatment applications (x2), shoplifting issues, Aboriginal heritage (x13), has been an activist, has avoided contact with victim, custody would be a waste, happiness with a supposedly deterrent sentence (x2), prison events (x2), stole for another, ‘the accused is just telling the court what they want to hear’ (x2), vigilante mindset, no memory of incident, other person identified as criminal in photos, some extenuating circumstances, stole as a last resort, systemic Aboriginal issues (x4), will ‘struggle’, dysfunctional relationship with co-accused person, needs to prove he has changed, poor choice of friends, no report ever done (x2), has shown some promise (x2), inconsistent grieving story, housing problems, need for accused person to want help (x2), recent accident, fasting, ‘is on the radar’, reason for crime, no record (x4), is a caregiver (x2), crime a plea for help, living arrangements, past trauma with church, moving to a new city (x2), need for VIS (x2), ‘alcohol is not the issue’, work difficulties, ensuring accused person is capable, arguments with defense counsel, unintentional crime, grew up surrounded by drugs, missed bus stop, ‘need to do some work’ before Crown prosecutor gives him options, employment workload, no community contacts, is employed (x2),

questioning of willingness of Aboriginal roots, no diversion attempts before, relationship with victim was problematic (x2), need for medical info, character information (x2), 'low-man' in the crime, victim choice to air details publicly, currently out of the city (x2)

A6: Interpreter issues, old documentation provided, paperwork is missing, no past Gladue report, Gladue doesn't allow for disclosure, judge note of age, video remand in future with lawyer, 'regular stream' is quicker, custody conceptualized as 'dry' and rehabilitative, ensuring judge is acceptable, loss of credibility, Crown prosecutor lacks brief so defense counsel does it instead, this Crown prosecutor disagrees with other Crown prosecutor, Crown prosecutor sort of admits record, probation called a 'waste of paper', judge uses a 'what if' position, Gladue means 'less', offender/accused person admits cost was baloney excuse at first, under publication ban (x5), Gladue principles not important in this case (x2), old Gladue report, 'telling court what they want to hear' alleged by Crown prosecutor, victim impact statement read by offender/accused person, DNA order is mandatory, further incarceration doesn't address all principles, crime was one of necessity, lawyer is not in contact, treatment attempts were not authentic, no need to hear defense counsel final submissions, neither Crown prosecutor nor accused person too familiar with the case, desire to improve family's life, comparison to youth court, limitations on judge mandate, jail has little beneficial effects, altering documents due to typist errors, helpful demeanour, rehab considered important, offender/accused person is not serious in his statements about the record, past opportunities were ignored, need for victim impact statement is mandatory, sent out of court/to another court, information remanded incorrectly (x2), order to follow probation, Gladue said to apply at imprisonment not bail, most ACWs said to have knowledge of Aboriginal history, memory of mandating past probation, judge says 'thanks', papers are signed, 20 seconds long case, parting words, threats of suicide, representing self in a bail hearing (x2), business-like atmosphere

(x2), circumventing defense counsel, duty counsel unprepared, not a joint submission, privacy in airing Gladue report suborned to the victim, report speaks to his honesty, court order to attend regularly.

A7: No Gladue courts outside Toronto, Toronto started Gladue, Publication Ban case, a case where the relevant charges were withdrawn (x7), modifying bails to allow for access to court, another case had diversion for this case planned, unknown treatment location (x5), plea was struck out, short sentencing, plea converted/forced into a trial, release due to time served being done today, charges stayed for no apparent reason

Appendix B : A brief note on the coding software and its terminology

Much of the data used in the cross-tabulation tables were based on what the qualitative analysis software terms ‘passages’, which can be roughly described as any unbroken section of text. Because of this, multiple lines of text/statements/discourses are interpreted by the software as one ‘passage’, and therefore some total values may be inappropriately high or low. This effect only applies to code sets whose total number is an important variable, or code sets which entail passages that are excessively long. The vast majority of the analysis was not affected by this since the primary concern is how the different code sets interact and overlap. Another error/quirk of the software is that if multiple passages from the same code set overlap with a separate passage from a different code set, then the software interprets that as 1 single instance of correlation rather than 2 instances. When this effect applied the researcher made sure to analyze the passages directly and make note of how such errors applied to and affected the

research. Again, much of the analysis is not particularly affected by this problem, and it mostly served to make more work for the researcher in order to allow for more discrete cross-analyses.

Appendix C : General Observations, per Table

C1 : Table 2

The notable observations were as follows :

1. Drug offenses were more likely to involve a community release/supervision than other offenses.
2. Violent offenses were the least likely to involve community release/supervision.
3. Roughly half of all offenders/accused persons end up in some kind of custodial location.
4. Only 13% of all bail cases ended resulted in bail being denied.
5. Half of all prison//custodial sentences involved failure to comply offenses
6. Cases that involved the Anchorage treatment facility resulted in very lengthy proceedings and was applicable to both bail and plea resolutions
7. Treatment centre releases were always combined with other forms of custody/supervision

    a. These releases also frequently involved failure to comply offenses more than half the time (more than any other sole location)

8. Diversion was mutually exclusive with regards to other treatment locations.
    a. These releases were the least likely to involve failure to comply offenses

C2 : Table 3

The notable observations were as follows :

1. Denunciation, general deterrence, and specific deterrence were frequently mentioned directly alongside one another
2. Only 3 bail cases referenced denunciation, general deterrence, or specific deterrence
3. Protection of the public was the last common sentencing principle (note that its effects are still significant – see later tables for details)
4. Rehabilitation is the most common sole sentencing principle.
    a. Disregarding ‘other’ code passages, rehabilitation and mitigating factors make up over 55% of all sentencing principles stated.

    b. Rehabilitation is the only sentencing principle applied to bails in any appreciable amount
    c. Rehabilitation was often mentioned directly alongside minor punitive sentencing principles – General Deterrence, Denunciation, and Specific Deterrence, respectively.
5. Diversions never mentioned any of the punitive sentencing principles.
6. Though mitigating factors are as common as rehabilitation discourses, they overlap directly only 71% of the time
    a. Both mitigating factors and rehabilitation are mentioned repeatedly over the course of the same case. Mitigating factors average 2.4 passages per case and Rehabilitation averages 2.2 passages per case.
7. Aggravating factors apply to only slightly less cases than mitigating factors
    a. Similarly, aggravating factors are often repeated during a case – an average of 2.0 passages per case.
8. The most common bail concern is the secondary grounds
    a. After this, concerns based around discourses of reoffending are the second-most common (past treatment history and surety viability, primarily)

    b. Similarly, these common bail concerns are also stated about twice per case.

9. There is little direct discursive overlap with any bail concerns barring the primary and secondary concerns
    a. There is an average of 3 bail concerns mentioned during each case.
    b. Rehabilitation, mitigating, and aggravating factors are the only sentencing principles mentioned in bail cases regularly
    c. When aggravating factors are mentioned, it is often in respect to past sureties and treatment failures

C3 : Table 4

The notable observations were as follows :

1. Prison/Custody cases reference the most bail concerns or sentencing principles out of any location
    a. Prison/custody cases are the only cases that reference the protection of the public in any appreciable amount.
    b. Prison/custody cases reference failed treatment history at slightly higher rates than treatment-centre cases.
2. Only treatment-centre cases reference rehabilitation more than prison/custody cases

    a. Note that rehabilitation references include both positive (it should be allowed) and negative (it should not be allowed) references.

3. Community release/supervision have fewer sentencing principles in comparison, with the only particularly punitive sentencing principle in large amounts being aggravating factors
    a. Aggravating factors are lower in number than mitigating factors and rehabilitation discourses, however.
    b. Community release/supervision also referenced the primary and secondary grounds the most, though after a brief calculation it seems that treatment-centre releases had slightly higher rates.
4. Treatment-centre releases are similar to community release/supervision, but reference rehabilitation the most out of any treatment location.
    a. Treatment-centre releases overlapped with community release/supervision over half the time.
    b. When it comes to bails, the bail concerns referenced for treatment-centre releases show a marked similarity to those of prison/custody releases (the exception being past treatment failures and bail program accessibility)

5. Anchorage treatment facility cases were too small in number to assess reliably. Otherwise, they appeared to be similar to treatment-centre releases.

C4 : Tables 5 & 6

The notable observations were as follows :

1. Half of all joint submissions were also bails/consent releases
2. Half of all sentences decided in line with the Crown prosecutor's recommendations were bails as well
    a. In comparison, only 1/3 of cases that followed the defense counsel's recommendations were bails
3. Compromise positions were the most common result
4. Joint submissions had low numbers of any sentencing principle
    a. Those punitive sentencing principles present in a joint submission were more likely to be mentioned by the judge during the sentencing rationale than in other cases. The only exception to this seems to be aggravating factors.
    b. Joint submissions were the least likely cases to reference rehabilitation

5. Probation cases (which can apply to any ‘winner’) had the largest amount of punitive sentencing principles, with the exception of protection of the public.
    a. For bails that included probation, the only punitive grounds that probation did not have the highest correlation with was the secondary grounds and past treatment failures.
6. The only punitive sentencing principle that sentences decided in favour of the Crown prosecutor’s recommendations had in any exceptional amount was the protection of the public.
    a. Protection of the public and aggravating factors were the only real punitive sentencing principle that was repeated by the judge.
    b. Bails that were denied referenced the secondary grounds the most and past treatment failures the second-most (exceeded only by compromise cases, which see past treatment failures referenced in both bails and pleas)
7. Compromise cases had the largest rates of all punitive sentencing principles excepting the protection of the public.
8. Cases where the judge agreed with the defense counsel’s requested sentence tended to have sentencing principle rates somewhere between compromise and joint submissions

    a. That said, they had high rates of mitigating, aggravating, and rehabilitative factors – with similarly high retention rates.
    b. Bails that followed the defense counsel's recommendations had high rates of the primary grounds, but lower rates of any other bail concern.

9. In general, compromise cases had the second or third-highest rates of all sentencing/bail principles – there is no one case type with the highest rate of all sentencing/bail principles.
    a. The exception to this is aggravating and mitigating factors, of which compromise cases had the highest rates overall.
    b. Roughly half of all compromise cases involve probation as well.

C5 : Table 7

The notable observations are as follows :

1. Parental disadvantage was often cited in cases with an unknown winner, followed by joint and compromise submissions/positions
    a. It was also the least common characteristic, and so the sample size is likely too small to be considered significant.
2. Intergenerational trauma was the second least common characteristics, and it was frequently cited without a direct link to other characteristics.

    a. It generally resulted in a probation, compromise positions, or joint submissions. Note that the total values remained very low and the sample size is likely too small to be statistically significant.

3. Parental addiction is the third least common characteristic, and it similarly mostly led to joint and compromise submissions/positions, followed by the defense counsel's recommended sentence being followed.
4. Abuse discourses often directly made mention to foster care, physical/mental trauma, or family issues.
    a. Joint submissions, compromise positions, or cases where the defense counsel's recommendations were followed were the most common results when these characteristics were present.
    b. The Crown prosecutor's recommendations were never followed in a case where this was cited.
5. Alcohol addictions were the most common addiction, but they had less links to other characteristics in comparison to drug addictions.
    a. Alcohol addictions were more likely to be repeated during the case in comparison to other addictions.
    b. All addictions have relatively similar rates of being referenced during the sentencing speech/rationale.

6. Drug addictions were slightly more likely to result in the judge agreeing with the Crown prosecutor's recommended sentence, whereas the other addiction types were slightly more likely to result in joint submissions.
    a. All addictions have roughly equal rates of having the sentence be resolved in favour of the defense counsel's recommendation/submissions..
7. Foster care passages rarely directly referenced other characteristics.
    a. Foster care was often cited in cases that involved probation.
    b. Foster care was never mentioned directly during a sentencing speech/rationale.
8. Homelessness/poverty references were the second most common characteristic.
    a. It was also rarely mentioned directly during a sentencing speech/rationale.
    b. It often led to joint submissions and compromise positions.
9. Criminal/Treatment histories have large total passage numbers, but surprisingly low correlations with other characteristics.
    a. Cases where the judge agreed with the Crown prosecutor's recommended sentence and cases whose sentence was a compromise between that and the defense counsel's

recommendations had slightly higher rates of this characteristic being mentioned during the sentencing speech/rationale.

   b. It was often highly correlated with sentences involving probation.

   c. It was often mentioned more than once during a case.

10. Youth history had very low total references – it is likely they were only referenced in the form of specific offenses within the overall criminal record.

11. Recent history was primarily referenced during sentencing rationales in joint submissions and sentencing rationales decided in favour of the defense counsel's recommendations, and not once in cases where the judge agreed with the Crown prosecutor's recommendations.

    a. It was the characteristic with the strongest rate of cases decided in favour of the Crown prosecutor's recommendations, though the judge was still more likely to agree with the defense counsel's recommendations than not.

12. Successful treatment histories had the second highest total passage count

    a. This characteristic only really overlapped with recent history, general criminal/treatment history, and remorse/desire to change

b. This characteristic was rarely mentioned during the sentencing speech/rationale.

13. Failed treatment histories were less common than other histories, and rarely overlapped directly with other characteristics.
    a. This characteristic was often repeated during a case, especially by the judge during the sentencing rationale
    b. It had low rates of probation or compromise decisions, in comparison
14. Physical and mental trauma were somewhat uncommon
    a. These characteristics primarily overlapped with abuse, followed by mental illness.
    b. These characteristics had high rates of joint submissions and the defense counsel's recommended sentence being followed.
    c. These characteristics rarely led to probation.
    d. Only joint submissions would mention the trauma directly in any significant amount.
15. The other category was mostly made up of vague or undisclosed background information (see **Appendix A** for details)
    a. These characteristics were most likely to be repeated during the sentencing speech/rationale when the defense counsel's recommended sentence was accepted, and least likely to be

repeated when the Crown prosecutor's recommended sentence was.

16. Family issues were often directly cited alongside homelessness/poverty, followed by undisclosed addiction and drug addictions.
    a. This characteristic was rarely mentioned during a sentence.
    b. When the Crown prosecutor's recommended sentence was followed, this characteristic was not mentioned, while when defense counsel's recommended sentence was followed it was most likely to be mentioned.
17. Remorse/desire to change was the third largest code set in this table
    a. It was primarily directly mentioned alongside criminal/treatment history.
    b. There was seemingly little influence on the final sentence – possibly a result of its position during the proceedings and its sheer commonality.
18. Mental illness was primarily directly referenced alongside undisclosed trauma and criminal/treatment history
    a. Therefore, it likely was mentioned in a historical context – either how the illness arose, or how it affected past offending.

b. This characteristic somewhat influenced the sentence towards being in favour of the defense counsel's recommendations, and significantly skewed the sentence away from a compromise position.
c. This characteristic rarely resulted in probation.
d. This characteristic was rarely mentioned during the sentencing speech/rationale.

C6 : Table 8

The notable observations were as follows :

1. Defense counsel-Crown prosecutor negotiations often directly referenced the offender/accused person's desires and negotiations between the defense counsel and offender/accused person.
    a. Similarly, this informal process also often referenced Crown Discretion
    b. If the decision was in favour of a joint submission, then this informal process would often be referenced during the sentencing speech/rationale.
    c. The only characteristics mentioned alongside this informal process in any significant amount were criminal/treatment history, remorse/desire to change, and addictions of all kinds

2. Crown discretion was primarily mentioned alongside Defense counsel-Crown prosecutor negotiations.
    a. Drug offenses had the highest rate of this informal process (not the most instances total).
    b. Nearly all diversions were mentioned alongside this informal process
    c. This informal process was more likely to result in the judge agreeing with the crown prosecutor's recommended sentence than other processes, though such results were still the minority of resolution results.
    d. Primarily referenced criminal/treatment history, and remorse/desire to change
3. Fines/VFS were somewhat uncommon, but were primarily mentioned alongside mandatory minimums and reactions to new legislation
    a. If fines/VFS were present, they were likely to be mentioned during the sentencing speech/rationale.
    b. The only characteristic mentioned directly alongside this informal process was homelessness/poverty.
    c. Note that background reports made indirect references to poverty as well.

4. Mandatory minimums only directly mentioned/were mentioned alongside Fines/VFS and reactions to new legislation
    a. This correlation was only present in guilty pleas
    b. When this informal process was noted, it was likely to also be mentioned during the final sentencing speech/rationale.
5. Reactions to new legislation are almost identical to the two above informal process and suffer from a small total passage size (and thus possible sampling problems). Discourses that mentioned the impact on the victim/community were mentioned 2+ times per case roughly half the time.
    a. Note : Some VIS mentioned support for rehabilitation. The vast majority, however, were not disclosed to the public
    b. VIS were most common in cases involving violent offenses.
    c. When present, they were likely to be mentioned during the sentencing speech/rationale.
    d. The only characteristics directly referenced alongside this informal process were criminal/treatment history and alcohol addictions
6. ‘Reconciling the offender/accused person’s desires’ was a relatively common discourse/informal process that was primarily based around

the offender/accused person's final statement prior to the judge pronouncing their sentence.

   a. These statements primarily referenced personal responsibility discourses.
   b. This informal process was most commonly utilized in cases where either the Crown prosecutor or defense counsel's recommended sentences were agreed with by the judge, with joint submissions utilizing it only rarely.
   c. If this informal process was present/mentioned during the sentencing speech/rationale, it was more likely to be a case where the Crown prosecutor's recommended sentence was followed.

7. Offender/accused person-defense counsel negotiations were often cited alongside threats/warnings/appeals as well as defense counsel-Crown prosecutor negotiations.
   a. It was primarily utilized during drug and property offense-based cases.
   b. The characteristics most commonly mentioned alongside this informal process were undisclosed addictions, alcohol addictions, and remorse/desire to change.

8. Discourses that discussed the impact of the sentence on the offender/accused person's relations usually directly mentioned/utilized concerns relating to the impact of the crime/sentence on the victims/community, informal background reports, and personal responsibility discourses
    a. This informal process was almost never utilized outside of pleas.
    b. This informal process, if present, influenced the proceedings to be more in favour of the Crown prosecutor's recommended sentence.
9. Personal responsibility discourses were the most common informal process discourse.
    a. This was likely due to the mandatory plea inquiry made at the start of any proceeding.
    b. This informal process was almost always mentioned twice during a sentence.
    c. This informal process was mentioned less often if the proceeding involved drug offenses.
    d. This informal process rarely involved diversions or joint submissions.

e. Remorse/desire to change often directly made mention of this process.
f. Remorse/desire to change was somewhat directly referred to alongside failed treatment history and general criminal/treatment history.

10. Threats/Warnings/Appeals showed similar values to personal responsibility discourses, and often were mentioned alongside them.
    a. There are some discrepancies between these two with respect to the plea inquiry being done/performed outside of the court.
    b. This informal process was more common in joint submissions and compromise positions followed by sentences decided in favour of the defense counsel's recommendations.
    c. While remorse was mentioned relatively frequently alongside this discourse/informal process, it was less common than general criminal/treatment history.
    d. Note : Personal responsibility discourses were repeated more often per case than this informal process – 1.9 per case compared to 1.5.
11. Proof of claims mostly overlapped with informal background reports, attempts to reconcile the offender/accused person's desires, and personal responsibility discourses

a. This informal process was rarely applied/present in bails.
b. Only cases where the defense counsel's recommendations were followed had a high chance of this process being mentioned during the sentencing speech/rationale.
c. This informal process was mostly referenced/referring directly to treatment histories (notably successful treatment histories).

12. Implied threats/commands were almost entirely made up of directed forms of discourse.
    a. Half of these implied threats/commands were made deliberately on the record (primarily during the plea inquiry, and the judge's sentencing speech/ rationale).
    b. Roughly 1/3 of these informal processes directly referenced personal responsibility alongside them
    c. Nearly all of these passages involved the judge and/or the offender/accused person (again, likely due to the plea inquiry or the sentencing speech/rationale).

C7 : Table 9

The notable observations were as follows :

1. 'What is left unsaid' is primarily linked to discourses/processes that reference personal responsibility.

    a. When this discourse is linked to conversations/discourses outside of the court, it was likely referring to custodial locations relevant to future sentences.
    b. The location in question varies depending on which actor is utilizing this discourse. In the case of victims, this discourse referred to undisclosed VIS.
2. Discourses that referenced unstated alternatives implicitly reinforced legal authority/power.
    a. These discourses also frequently subverted and reinforced punitiveness
    b. These discourses also referenced Crown discretion and personal responsibility discourses to a lesser degree.
    c. The actors in question were much the same as 'What is left unsaid', with more references to the CCT and less references to victims.
3. Discourses that reinforced the new punitiveness were rather similar to the above two discourses, albeit with the caveat that offenders/accused persons speak/engage with it as often as judges do.
    a. Treatment agencies almost never are referenced with regards to reinforcing the new punitiveness.

4. Discourses which subverted the new punitiveness sometimes overlapped with discourses that reinforced the new punitiveness
    a. These discourses often referenced defense counsel-Crown prosecutor negotiations and Crown discretion (likely a sign of diversion agreements).
    b. This discourse also referenced personal responsibility somewhat often.
    c. This discourse was mostly utilized/applied to Crown prosecutors and judges, followed by the offender/accused person and the public.
    d. Any instance of discourses relating to reactions to new legislation were also referenced alongside discourses which subverted the new punitiveness.
5. Restorative justice discourses were stated infrequently compared to communal justice
    a. Both were likely to utilize/reference discourses that subverted punitiveness.
    b. Defense counsels primarily utilized restorative justice.
    c. Treatment agencies show no preference between the two types of rehabilitative ideology.

    d. Communal justice is more likely to involve/reference discourses that mention unstated alternative sentences.

6. Situated discourses were only surprising in that they frequently overlapped with discourses of the 'unsaid'.
7. Negotiated discourses were primarily dualistic in nature – while they reference and reinforce legal authority/power and Crown discretion, they do not reinforce said influences and often occur outside of the court.
    a. Negotiation is the primary means by which diversions are enacted, and they are dualistic in nature in that they reinforce the Crown prosecutor's authority while also restricting such power via a voluntary and conciliatory negotiation with a presumed adversary.
8. Expressly 'directed' discourse tends to subvert rather than reinforce punitiveness.
    a. This process typically involves judges, and any one other actor
    b. This is the only major discourse type that references unusual actors such as sureties, the offender/accused person's family/support, CCT, and treatment agencies with any regularity.

9. Out of court discourse is mostly part of the other discourse types rather than its own unique group.
    a. Primarily, it is used in concert with subversions of punitiveness, situated/context-specific discourses, negotiated discourses, and directed discourses.
    b. This discourse also had the highest count of victim, ACW, and treatment agency speech/references.
10. Off the record discourse is small and mostly involved small question and answer sessions with judges and other interested court actors.
    a. In general, judges are more open to research students than we may initially assume and frequently initiate conversations with members of the public watching the court proceedings.
11. Deliberately on the record discourses, when combined with threats/commands, were likely a sign that a plea inquiry had occurred.
    a. Subversions of punitiveness, when combined with this discourse type, likely represented diversion agreements/cases.
    b. This discourse type also involved the final statement from the offender/accused person.

C8 : Table 10

The notable observations were as follows :

1. Punitive factors included denunciation, general and specific deterrence, and protection of the public.
    a. Deterrence was stated frequently, but primarily directly alongside mandatory minimums/considerations.
    b. General deterrence rarely referenced anything, with criminal/treatment history and remorse being the most common (relatively speaking).
    c. Duty counsels never cited/were directly referred to with respect to general deterrence.
    d. Specific deterrence only directly referred to/alongside personal responsibility discourses and threats/warnings/appeals
    e. The only notable victim/offender/accused person characteristics referenced alongside specific deterrence were criminal/treatment history and remorse (and at low rates as well).
    f. Protection of the Public was only directly referenced alongside the sentence/crimes' impact on the community
    g. Protection of the public was usually spoken by/to judges and Crown prosecutors.
    h. Only once was protection of the public mentioned with regards to the victim.

2. Rehabilitation was coded both with regards to the final sentence/rationale, and with regards to its mention anywhere in the case.
    a. When comparing the two sections on the basis of informal processes, there was little change with regards to personal responsibility discourses, proof of claims discourses, and discourse that dealt with reconciling the offender/accused person's desires.
    b. Homelessness/poverty, criminal/treatment history, failed treatments, and all forms of trauma held a 50% 'retention level'. That is, roughly half of such instances were not mentioned during the sentencing speech/rationale.
    c. Over half of the passages that referenced the victim in some way were in a case that referenced rehabilitation as well.
    d. When treatment centres were referenced alongside rehabilitation, they often did so more than once per case.
3. Mitigating factors mention all of the usual actors (Crown prosecutors, defense counsels, offenders/accused persons, judges) as well as victims and politicians/governments.
    a. Treatment agencies, in comparison, referenced mitigating factors comparatively rarely.

4. Aggravating factors differed from mitigating factors with regards to criminal/treatment history, failed treatments, and all types of trauma.
    a. Crown prosecutors referenced aggravating factors the most often out of any actor.
    b. Victims were mentioned alongside this sentencing principle relatively often as well.
    c. Strangely, treatment agencies were also referred to alongside this discourse as well
5. Bail concerns have little overlap or distinct cross-tabulations, likely due to their significantly smaller total passage numbers.
    a. Primary grounds had so little total values that they can almost be ignored. Any direct references were with personal responsibility discourses and failed treatments.
    b. Surety viability is also very low, though this bail concern also frequently references/is referred to alongside the crime/sentences impact on the offender/accused person's relations
    c. Secondary grounds primarily directly referred to failed treatments and, to a lesser extent, personal responsibility discourses.

d. Past treatment failures overlapped even more with personal responsibility discourses as well as threats, warnings, and appeals.
e. Past treatment failures often involved references to treatment agencies – only slightly less than judge or Crown prosecutor discourses – but were primarily referenced/spoken by the offender/accused person.
f. Past treatment failures were often mentioned/referred to more than twice per case – this calculation was based on its direct correlations with failed treatment histories.

C9 : Table 11

The notable observations were as follows :

1. 'What is left unsaid' and discourses relating to unstated alternatives were analyzed together.
    a. Unstated alternatives were more likely to be referenced in joint submissions.
    b. Unstated alternatives were primarily concerned with characteristics relating to homelessness/poverty and general criminal/treatment history.

c. ‘What is left unsaid’ had more direct references to failed treatments, family issues, and mental illness (in comparison to discourses relating to unstated alternatives).

d. The overall sentencing trends between the two were almost identical.

2. Implied threats/commands had nothing particularly interesting/notable beyond what was discussed in previous tables.
3. Discourses relating to the reinforcement of legal authority/power similarly had no new information/conclusions.
4. The analyses of discourses relating to the reinforcement and subversion of punitiveness were combined

    a. There was a clear split amongst the two with regards to the final sentence – subversions of punitiveness had higher comparative rates for joint submissions, both types had roughly equal rates for suspended sentences and fines, and instances of the reinforcement of new punitiveness had higher rates for the remaining types in comparison.

    b. Note that both had equal numbers of sentences decided in favour of the Crown’s recommendations, and the actual totals were rather low and accounted for approximately 1/3 of such cases, separately.

c. The only characteristics referenced alongside reinforcement of punitiveness in any appreciable amount were general criminal/treatment history and failed treatment history.
d. The only characteristics referenced directly alongside the subversion of punitiveness in any appreciable amount were undisclosed addictions, homelessness/poverty, general criminal/treatment history, and remorse/desire to change.

5. Restorative justice and communal justice were also analyzed together.
    a. Only communal justice had any significant direct references to characteristics – unsurprising given its larger number of passages.
        i. For reference, these were primarily discourses related to homelessness/poverty, family issues, and community factors.
6. Situated/context-specific discourses had no new conclusions to draw.
7. Negotiated discourses were primarily used/referenced in joint submissions.
    a. These discourses rarely referenced any victim/offender/accused person characteristics besides general criminal/treatment history.
8. Directed discourses had no new conclusions to draw.

9. Out of record discourses were likely ‘inflated’ in number due to the plea inquiry.
10. Discourses made deliberately on the record is likely also ‘inflated’ in number due to sentencing speeches/rationales being mandatorily on the record, alongside the plea inquiry, arraignment, and record allegations.
    a. With regards to victim/offender/accused person characteristics, the only noticeable ones were homelessness/poverty and remorse. Again, this is most likely a reflection of the offender/accused person’s final statements.

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