Residential School Syndrome and the Sentencing of Aboriginal Offenders in Canada

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The crisis of Aboriginal over-incarceration in Canada persists unabated. Statistical estimates as of 2016 are that Aboriginals amount to 27% of provincial and territorial inmates, and 28% of federal inmates. An effort by the federal government in 1996 to address the problem was the passing of s. 718.2(e) of the Criminal Code, which reads in part:

A court that imposes a sentence shall also take into consideration the following principles: . . .

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

There has been a great deal of scholarship that focuses on the provision, along with the key Supreme Court cases that have expounded on the section, R. v. Gladue and R. v. Ipeelee. Much of that scholarship has focused on the lack of progress with respect to Aboriginal over-incarceration since the advent of the provision. In particular, a critique that is frequently made is that sentencing judges do not implement Gladue and Ipeelee in a significant way as they continue to sentence Aboriginal accused to terms of imprisonment, even for offences that may not be the most serious ones and may be candidates for non-custodial sentences.

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I am of the view that *Gladue* is ultimately inadequate to address Aboriginal over-incarceration. I have argued elsewhere that much more fundamental change is needed, and that fundamental change can only be truly realized through Aboriginal self-determination. I nonetheless hold the view that *Gladue* may, for the time being, be of some utility. It can ameliorate to a limited degree Aboriginal over-incarceration in the interim. It may even provide some foundation or springboard from which Aboriginal self-determination over criminal justice can be realized. What I endeavour to explore in this article is how to better strengthen *Gladue’s* potential by adjusting its jurisprudential lens.

The proposed adjustment is rooted in a body of theory known as Therapeutic Jurisprudence, which demands that law maximize its potential for beneficial therapeutic outcomes for persons suffering from mental health problems. The conception is that the application of *Gladue* shifts its focus from the usual sentencing framework, which has only left *Gladue* toothless, and towards an emphasis on the mental health needs of Aboriginal accused who come into contact with the justice system. The vehicle for realizing that conception is through a conceptualized mental health disorder termed Residential School Syndrome. It shares parallels with Post-Traumatic Stress Disorder, although its emphasis is on mental health effects stemming from the social traumas besetting Aboriginal peoples that are recognized in *Gladue* itself. It therefore offers a bridge between *Gladue* and Therapeutic Jurisprudence.

Part of the reason for exploring this possibility is that cases involving the sentencing of accused suffering from Post-Traumatic Stress Disorder both display a jurisprudential emphasis that resembles Therapeutic Jurisprudence, and seem to receive a generosity in sentencing outcomes relative even to *Gladue*. The hope is that the *Gladue* regime can thereby be strengthened and revitalized. The article now begins with an overview of the *Gladue* and *Ipeelee* decisions.

1. *Gladue* and *Ipeelee*

In *R. v. Gladue*, the Supreme Court stated that this provision was enacted in response to alarming evidence that Aboriginal peoples were incarcerated disproportionately to non-Aboriginal people in
Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to reduce incarceration of Aboriginal offenders, and seek reasonable alternatives for Aboriginal offenders. The sentencing process and the sentence itself may be crafted: “in accordance with the Aboriginal perspective.” A judge must take into account the background and systemic factors that bring Aboriginal people into contact with the justice system, such as poverty, substance abuse, and “community fragmentation”, when determining sentence. A judge must also consider the role of these factors in bringing a particular Aboriginal accused before the court. A judge is obligated to obtain that information with the assistance of counsel, or through probation officers through a report, or though other means. A judge must also obtain information on community resources and treatment options that may provide alternatives to incarceration.

It may certainly appear that Gladue has some potential to address the social problems stemming from colonialism. It must be recognized, however, that there are very significant limitations involved with Gladue itself. Firstly, Gladue’s applicability has been limited for the most part to less serious offences. It must be kept in mind that s. 718.2(e) is part of a larger framework of s. 718 of the Criminal Code, which sets out the general goals of sentencing. Included within those goals are concepts like victim restitution and rehabilitation, but also goals like deterrence and retribution. And the objectives of deterrence and retribution can indeed and do work at cross-purposes with Gladue.

Lower courts following Gladue still demonstrated a clear preference for incarceration sentences in order to give effect to deterrence and retribution. Andrew Walsh and James Ogloff analyzed 691 reported sentencing decisions to determine the effects of s. 718.2(e). They found that Aboriginal status did not have any correlation with receiving either a custodial or non-custodial sentence. The strongest correlates instead were the presence of standard aggravating or mitigating factors recognized by sentencing law prior to the passing of s. 718.2(e), with the frequent result that aggravating factors rendered an offence too serious for Gladue to justify a non-custodial sentence. Lower courts will enjoy appellate
deference when their decisions are appealed as well. Kent Roach has noted that appellate courts in a variety of jurisdictions have prioritized the seriousness of the offence, leading to deference to lower court incarceration sentences, and thereby denuding *Gladue* of much of its potential promise.13

The paradoxical result is that many Aboriginal persons who have been deeply damaged and traumatized by colonialism, who are the most in need of *Gladue*’s promise, end up being cut off from the remedial benefits intended by *Gladue*.14 In *R. v. T. (L.)*, an Ontario Court of Appeal Justice recognized the futility of calling upon incarceration in sentencing an Aboriginal accused, but nonetheless felt constrained to do so by Canadian sentencing law as follows:

“I have the view that in the fullness of time we will come to realize that we should go back well into the childhood of aboriginal persons who suffer the kind of misfortune this person suffered and determine whether it is appropriate to sentence them in a conventional way. I think that matte needs a great deal of attention. If I did not find myself constrained by authority, I would be seriously tempted to allow this appeal and to provide what I think would be a more enlightened sentence – a sentence that would return this person to his community under supervision where he would receive the kind of supervision and attention he deserves. In the present state of the law however, I do not think that I can say that the learned trial judge erred in failing to give proper consideration to the aboriginal status of the appellant.”

The Supreme Court recently attempted to provide a corrective to this trend in its 2012 decision, *R. v. Ipeelee*, stating that offence bifurcation limiting the applicability of *Gladue* to a small range of less serious offences amounted to: “a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*.16 *Ipeelee* reinforces that there is often justification for sentencing Aboriginal offenders differently under s. 718.2(e), and that justification is tied to colonialism itself, of which residential...
schools were an integral part. Justice LeBel states: “The overwhelming message emanating from the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism”¹⁷ Justice LeBel continues:

To the extent that Gladue will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances – circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e).¹⁸

Even so, there are parts of Ipeelee that may be concerning from an Aboriginal perspective. The court emphasizes that s. 718.2(e) does not amount to a “race-based discount on sentencing”.¹⁹ The court also emphasizes the ongoing relevance of proportionality and other sentencing objectives that can justify incarceration as follows:

The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.²⁰

The court also reaffirmed Gladue’s statement that the more serious the crime, the more likely that a sentence of incarceration will be appropriate.²¹

And so in Ipeelee we have seemingly contradictory messages, the need to consider non-custodial sentences for any Aboriginal accused no matter how serious the offence alongside a demand for

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¹⁷. Ibid., at para. 77.
¹⁸. Ibid., at para. 79.
¹⁹. Ibid., at para. 75.
²⁰. Ibid., at para. 38.
²¹. Ibid., at para. 84.
proportionality. It should therefore not be surprising that the trajectory that was observed with respect to *Gladue* continues with *Ipeelee*. At the time of writing, a noting up of *Ipeelee* indicates that the clear majority of cases that have applied *Ipeelee* have continued to use terms of incarceration, with their reasons emphasizing that deterrence and retribution were the most important considerations for the crimes that Aboriginal accused were charged with, and the circumstances of those crimes.22 In particular, Justice Turcotte of the Saskatchewan Court of Queen’s Bench was eager to quote *Ipeelee*'s statements on proportionality and that *Gladue* did not provide a race-based discount to justify a 209 day sentence for sexual assault.23 There are cases where courts have applied *Ipeelee* to use a conditional sentence, a term of probation, or a sentence of time served, but these are clearly in the minority.24 I do not wish to be taken as mandating that all Aboriginal accused must now receive non-carceral sentences as a matter of course. At the same time, it is worth observing that the sentencing of Aboriginal accused continues to follow a definite trajectory even in the wake of some pretty strong statements coming from the highest court in *Ipeelee*. The overall framework for Canadian sentencing law remains heavily tilted in favour of deterrence and retribution. This tilt is of such a degree that any statements the Supreme Court provides, whether it is in *Gladue* or *Ipeelee* or any other case thereafter, will have minimal purchase with lower courts.

*Gladue* and *Ipeelee* are ultimately efforts at injecting nuances into the existing jurisprudential framework of sentencing law. The


systemic factors behind Aboriginal over-incarceration are recognized as mitigating factors that speak to non-custodial sentences, although these are frequently overborne by the presence of aggravating factors and an emphasis on seriousness of offences that demand deterrence and retribution. Gladue itself also contains commentary that suggests that restorative justice and Aboriginal notions of justice can exercise a definite influence when s. 718.2(e) is invoked during the sentencing of an Aboriginal accused.25

Be that as it may, it remains apparent that Gladue and Ipeelee have not had a very significant impact in terms of the sentencing outcomes for numerous Aboriginal accused, let alone any meaningful reduction of Aboriginal over-incarceration. The article will explore an alternative conception with the hope of somehow revitalizing Gladue and Ipeelee. That alternative conception is rooted in a body of theory termed Therapeutic Jurisprudence.

2. Therapeutic Jurisprudence

Therapeutic Jurisprudence, defined simply, is the utilization of knowledge from mental health disciplines in order to maximize the therapeutic outcomes of law.26 Pamela Casey suggests that judges often integrate therapeutic objectives in their sentencing processes, even if subconsciously. However, the goal of therapeutic justice is to help judges become conscious, explicit and systematic in the pursuit of those therapeutic objectives.27 Bruce Winnik also suggests: “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.”28

There is a significant amount of theoretical debate about what Therapeutic Jurisprudence should try to achieve and how to achieve it. A fairly common theme amongst Therapeutic Jurisprudence theorists is the need to make legal processes and their applications more interdisciplinary.29 Ian Freckelton describes Therapeutic

Jurisprudence as an interdisciplinary and empirical inquiry into maximizing the law’s potential as a “therapeutic agent.”\(^{30}\) And yet that interdisciplinary emphasis may itself be a cause for concern. Anne-Claire Larsen and Peter Milnes express concerns that therapeutic jurisprudence may offer an invitation to judges to foray into psychological and community health assessments that they are ill-equipped for, and at the expense of established legal principles such as protecting the public and holding offenders responsible for their behaviour.\(^{31}\)

There remains uncertainty as to what extent Therapeutic Jurisprudence should trump other legal principles that may run contrary to its own priorities.\(^{32}\) Michael King, for example, argues that therapeutic jurisprudence can realize restorative justice by encouraging judges and legal professionals to exercise greater personal interaction skills to resolve disputes in a less adversarial fashion.\(^{33}\) Certainly that commonality may result in tangible social benefits. An empirical study by Allison Redlich and Woojae Han was based on interviews with 448 participants in mental health courts in San Francisco, Santa Clara, Hennepin in Minnesota and Marion in Illinois. The interviews gauged the participants’ perceptions that were deemed consistent with therapeutic jurisprudence: perceived voluntariness in participating in the court program, perceived procedural justice, and knowledge of mental health courts. The study found that higher scores on the measures correlated with decreased rates of subsequent arrest, decreased rates of subsequent incarceration, decreased bench warrants for arrest, increased compliance with court conditions, and increased graduation from the mental health court programs.\(^{34}\)

That in turn, however, may raise concerns about judicial

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32. Freckelton, supra, footnote 30, at pp. 586-587.


34. Allison Redlich & Woojae Han, “Examining the Links Between Therapeutic
impartiality. James Duffy posits that using problem solving courts to realize therapeutic jurisprudence can be problematic in some respects. Problem solving courts invite judges to use their vested authority to explicitly focus on therapeutic objectives, and that may result in judges engaging in behaviour that raises questions of bias and partiality. Duffy suggests that the concerns can be minimized by assigning judges with a high degree of emotional intelligence to problem solving courts. Emotional intelligence means an increased degree of cognitive awareness of one’s own emotional reactions, as well as the emotions driving other court participants. Emotional intelligence can increase a judge’s ability to establish rapport with other court participants, and yet it can also heighten a judge’s self-awareness so as to avoid emotional reactions or behaviours that may raise concerns over bias and partiality.  

There are also concerns that the pursuit of therapeutic objectives may have unforeseen and problematic consequences. Freckleton suggests that Therapeutic Jurisprudence may have troubling repercussions for civil liberties and paternalism, as more citizens become subject to supervisory conditions or even detention grounded in mental health concerns. Robert Schopp likewise questions whether it promotes therapeutic objectives at the expense of personal autonomy.

Canadian sentencing law itself remains uncertain as to the extent to which it is willing to embrace Therapeutic Jurisprudence as a jurisprudential guide. The Ontario Court of Appeal stated in R. v. Shahnawaz: “Rehabilitation as a goal of sentencing is not the restoration of an offender’s physical and mental health but his reinstatement as a functioning and law-abiding member of the community.” On the other hand, Chief Justice Catherine Fraser of the Alberta Court of Appeal stated with reference to drug courts:

“Nevertheless, the question is not whether more effective treatment options can be found or whether government policies or legislation should be changed. The courts in Canada operate within the criminal law

framework that Parliament has determined. Given that current policy and legislative framework, the drug courts in this province, along with the drug treatment programs implemented by them, commend themselves as a wise balance of penological policy, treatment and medical intervention.  

Another example comes from Judge Gorman of the Newfoundland Supreme Court in *R. v. Cross*:

> Imposing sentence upon an offender who suffers from a mental illness presents difficulties not found in other areas of sentencing and involves a careful judicial balancing of conflicting interests. The public must be protected, particularly from violent offenders, but an offender’s mental illness must play an important role in assessing his or her moral blameworthiness. If the offender poses a risk to the public, then resort to separating the offender from society may be called for despite the existence of a mental illness, otherwise restraint should normally dominate the sentencing process for such offenders. A concentration on treatment through community intervention should normally prevail over incarceration, though less so when serious offences are committed.  

And again:

> It has been suggested that a mental illness is only a mitigating factor in sentencing when the offence results from or there is a direct link or causal connection between the illness and the offence. . . . to “ignore an offender’s psychiatric disorder because a connection has not been established is to ignore the reality of the offender’s life and the requirement for an individualized approach to sentencing.” Thus, in such cases an offender’s lack of remorse or an inability to understand the serious nature or consequences of her or his conduct should not be overemphasized as aggravating factors in imposing sentence. 

There is in fact a particular context in which Canadian courts have to a significant degree embraced a therapeutic jurisprudence orientation during their sentencing decisions. That context is the mental health disorder known as Post-Traumatic Stress Disorder (PTSD).

### 3. Canadian Courts and PTSD

PTSD is a disorder that develops in response to external stimuli. It

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can develop in response to directly experiencing traumatic events such as participation in war, or being victimized by physical violence or sexual violence. It can also develop in response to witnessing such events, or spending long periods of time in occupations that require one to constantly hear of such events.\textsuperscript{42} It leads to numerous symptoms, including but not limited to low self-esteem, fear, anger, violent behaviour, “reckless or self-destructive behavior” and substance abuse.\textsuperscript{43} Reported cases where an accused with PTSD has been sentenced manifest a few distinct trends.

Recall that a judge must have information that links the Gladue factors to the individual accused appearing in court. And so it is that for mental health to become a factor in sentencing, the evidence must establish a causal link between the mental health problem and the commission of the offence.\textsuperscript{44} Judicial notice cannot be taken of the accused suffering from PTSD. It has to be proven through evidence, typically a formal diagnosis from a mental health professional.\textsuperscript{45}

In \textit{R. v. Shanawaz} the trial judge had been willing to give a conditional sentence of two years for trafficking in heroin on the basis that the accused was suffering from PTSD after having been subjected to imprisonment and torture in Afghanistan, and that there would not be any rehabilitative prospects for him if he was sentenced to prison. That decision was overturned by the Ontario Court of Appeal on the basis that, while a psychiatrist did testify as the accused having PTSD, the evidence itself did not make a connection between PTSD and the accused’s commission of the offence.\textsuperscript{46} Likewise Judge Skane of the Newfoundland Provincial Court found that there was not any evidence to link PTSD to the accused driving while intoxicated, and therefore gave it little weight in ordering an intermittent sentence of 90 days.\textsuperscript{47}

Sometimes PTSD does not suffice to result in a non-custodial sentence, but for reasons that are apart from the seriousness of the

\textsuperscript{43} Ibid., at 271-272.
offence itself. In *R. v. H. (L.)*, the judge ordered a term of two years followed by three years probation for the accused’s aggravated assault against her own child. Part of the judge’s reasoning was that any explanation based on PTSD was found to be weak. The PTSD symptoms described in the expert report could be ascribed to alternative explanations, such as narcissism and attention-seeking behaviour.48

The accused in *R. v. Hammermeister* was charged with sexual assault of a minor and luring a minor with the intent to create child pornography. The accused suffered from PTSD as a result of a military tour in Afghanistan, including witnesses the death of a friend by a bomb explosion for which he blamed himself. Judge Stevens of the Alberta Provincial Court noted the PTSD, but concluded that the accused did not appreciate the seriousness of his behaviour and tended to minimize his behaviour. The sentence was therefore two years of incarceration followed by three years of probation.49

In *R. v. Hainsworth*, Justice Greyell of the British Columbia Supreme Court refused to order a conditional sentence and instead imposed three years incarceration for trafficking in cocaine. Justice Greyell was aware of the accused’s PTSD, but was convinced that its effects on the accused was of such a degree that a conditional sentence could not be ordered without endangering the public.50

Just as with *Gladue*, the perceived seriousness of the offence itself and the demand for parity and sentencing, can operate to limit the capacity of PTSD to procure a non-custodial sentence. Although as we will see, I am of the tentative view that PTSD still enjoys a relative generosity in outcome that perhaps *Gladue* and *Ipeelee* do not. In *R. v. Mertick*, the accused was charged with numerous offences relating to credit card and fax fraud, cell phones and marijuana. An expert report set out that he was suffering from PTSD as a result of having been sexually abused while in the United States correctional system. Judge McDermid found that deterrence, denunciation and protection of the public was the primary consideration for sentence, and thus sentenced the accused to a global sentence of two years in a federal penitentiary.51

The accused appealed a sentence of four months for assault in *R. v. Fairweather*. Justice Goodman of the Ontario Superior Court of Justice found that the sentencing judge erred in not giving sufficient weight in reasons to the accused’s PTSD stemming from a military tour in Afghanistan, and the accused’s own rehabilitative efforts. However, the errors were not such as to meet the demonstrably unfit standard for sentencing appeals.\(^52\)

In *R. v. MacDonald*, the accused was charged with multiple instances of having physically assaulted his own children. The sentencing judge relied on a report verifying that the accused suffered from PTSD as a result of a military tour in Afghanistan and ordered a conditional sentence of two years less a day. Justices Scott and Freedman of the Manitoba Court of Appeal allowed the appeal and substituted a sentence of three years. Justice Monnins in dissent would have upheld the conditional sentence.\(^53\)

In *R. v. Ngeruka*, the accused was charged with aggravated sexual assault. He was noted to have had a very difficult childhood where he witnesses ethnic atrocities in his native Rwanda, and continued problems with alcohol abuse in adult life. He was diagnosed with PTSD stemming from these problems. Judge Cozens recognized these issues as mitigating factors, but felt that they were insufficient to result in a non-custodial sentence. The reason was the accused had multiple sexual encounters with the victim without disclosing his HIV-positive status, and that directly led to the HIV infection of the victim. The appropriate sentence was therefore 30 months.\(^54\)

A mandatory three year sentence was imposed for armed robbery in *R. v. Radacina* by operation of s. 85(3) of the *Criminal Code*.\(^55\)

There are, however, a significant number of sentencing decisions where the accused having PTSD played a critical role in convincing the judge to order a non-custodial sentence, even for quite serious offences. In *R. v. Pirouz* the accused was sentenced to two years less a day for possession of opium with intent to traffick. The sentence was passed in part based on an expert report that verified that the accused suffered from PTSD after having been subjected to political torture in Iran. The sentencing judge also recognized that subjecting the accused to a prolonged penitentiary term would further damage the

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accused emotionally and endanger his rehabilitative prospects. The sentence was upheld on appeal by the British Columbia Court of Appeal.\(^6^6\)

In *R. v. Ryan*, the accused was charged with trafficking in cocaine, which was made worse by the presence of significant planning as an aggravating factor. The court recognized the accused gaining stable employment and avoiding further criminal behaviour as a mitigating factor. The crucial factor for Judge Howard of the British Columbia Provincial Court was that the accused was suffering from PTSD as a result of a car accident, and that he had taken steps to manage its symptoms. Judge Howard was thus willing to order a two year conditional sentence.\(^5^7\) A very similar case is *R. v. Hussein*, were a conditional sentence was also given for trafficking in cocaine. One difference in this case though was that the accused had not beforehand undertaken any rehabilitative efforts. Justice Spies of the Ontario Superior Court of Justice however, did not hold that against the accused in recognition that having spent at least five months in pre-trial custody would have prevented such efforts.\(^5^8\)

In *R. v. Azeez*, the accused was charged with four counts of trafficking in heroine, and the Crown was seeking a federal penitentiary term. He had PTSD due to a troubled life in Guyana before he emigrated to Canada. The PTSD was not, however, the primary consideration in sentencing. The accused made progress with his addictions and mental health problems through a year and a half of counselling. Judge Melvyn Greene of the Ontario Court of Justice was reluctant to impose incarceration for fear that it would disrupt the accused’s rehabilitative efforts and instead force him back into a criminal lifestyle. A conditional sentence of two years less a day followed by two years probation was ordered instead.\(^5^9\)

The British Columbia Court of Appeal upheld the accused’s suspended sentence for trafficking in cocaine in *R. v. Carrillo*. The court noted that to allow the Crown appeal would endanger the accused’s progress with rehabilitation for his numerous mental health problems, including PTSD.\(^6^0\)


The accused was charged with possession of cocaine and heroin in *R. v. Harrison*. Justice Brown of the British Columbia Supreme Court accepted the joint submission of a suspended sentence. Justice Brown also made seeking a prescription for marijuana to treat the accused’s PTSD as part of the terms of probation.\(^{61}\)

In *R. v. Lepine*, the accused was a police officer who assaulted a civilian under detention inside the police detachment. Judge Rosborough of the Alberta Provincial Court identified the accused’s PTSD as a factor that made the difference between a custodial sentence and a four month conditional sentence that was handed down.\(^{62}\)

In *R. v. Visscher*, the British Columbia Court of Appeal allowed an appeal from a sentence of 16 months for a sexual assault while intoxicated. The Court of Appeal found that the judge erred in miscasting the accused’s alcohol abuse and PTSD as risk factors that justified incarceration to protect the public, and not giving sufficient consideration to the fact that the accused had commenced programming to address both the alcohol abuse and PTSD. A sentence of time served plus three years probation was substituted.\(^{63}\)

In *R. v. V. (R.W.)*, the accused was charged with breaking and entering into the home of a former spouse and sexually assaulting her. Dr. Passey testified that the accused developed PTSD as a result of his military tours in the former Yugoslavia.\(^{64}\) Justice Joyce of the British Columbia Supreme Court was willing to order a conditional sentence of two years, stating:

> However, I am satisfied from the evidence I have heard that Mr. V. was a different person before he suffered his mental disorders and is a different person now than he was when he committed this offence. I am satisfied that if he had not been suffering Post Traumatic Stress Disorder it is unlikely he would have committed the offence. I accept the opinion of Dr. Passey that Mr. V. is unlikely to commit a similar offence as long as he continues to abstain from alcohol and continues with therapy as required for the Post Traumatic Stress Disorder.\(^{65}\)

There are also cases where PTSD may not have been enough to get

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the accused out of any jail time altogether, but still sufficed to reduce the length of the incarceration term, and in a manner analogous to Gladue. In R. v. Ayach, the accused was charged with the very serious offences of kidnapping with intent to confine and aggravated assault in relation to the same victim. The former offence has a maximum sentence of life imprisonment, while the latter has a maximum sentence of 14 years. Dr. Ney testified that the accused developed PTSD from numerous experiences that included living in war torn conditions in Lebanon, being physically abused by his father, being sexually abused by a neighbour after he had moved to British Columbia as a child, and most recently being subjected to physical intimidation by an RCMP undercover operative. Justice Smith of the British Columbia Supreme Court gave a sentence of eight months in recognition of the PTSD suffered by the accused accounting for time served, which would have been in line with the usual range of four to six years.\footnote{R. v. Ayach, 2007 CarswellBC 1184, [2007] B.C.J. No. 608, 2007 BCSC 398 (B.C. S.C.).}

In R. v. M. (P.), the Crown appealed a sentence of five years for sexual assaults committed against the accused’s daughter, and an additional year to be served consecutively for possession of child pornography. The appeal argued that the global sentence was too lenient, and that the sentencing judge placed inordinate emphasis on the accused’s PTSD and other mitigating factors. A majority of the Ontario Court of Appeal denied the appeal, recognizing that the PTSD and other mitigating factors provided a legitimate basis for the judge to attenuate the length of time to be served.\footnote{R. v. M. (P.) (2012), 282 C.C.C. (3d) 450, 289 O.A.C. 352, 2012 CarswellOnt 2580 (Ont. C.A.), leave to appeal refused (2012), 307 O.A.C. 398 (note), 441 N.R. 395 (note), 2012 CarswellOnt 13549 (S.C.C.).}

A joint submission of eight months for aggravated assault was accepted by the Alberta Provincial Court for an accused who suffered abusive home environment and witnessing of extreme violence in Africa.\footnote{R. v. Amorim, 2014 CarswellAlta 1193, [2014] A.J. No. 753, 2014 ABPC 142 (Alta. Prov. Ct.).}

In R. v. De Assumpcao, the accused was convicted of manslaughter when she accidentally caused the death of her partner through smoke inhalation stemming from a fire she set to his property in response to perceived rejection. She developed numerous mental health problems, including PTSD, in response to the incident. Justice Schultes of the British Columbia Supreme Court found her mental health conditions, as well as her remorse and acceptance of
responsibility, to be significant mitigating factors. The Crown’s request for a 10 year sentence was declined in favour of a sentence of two years, five months, and 20 days.\(^69\)

At this point I wish to make a comparison to similar cases where *Gladue* and *Ipeelee* was relied on instead of PTSD since *Ipeelee*. There have been non-custodial sentences for cases involving the trafficking of cocaine,\(^70\) although there is also at least one case where imprisonment was used for trafficking in cocaine.\(^71\) Cases that involve trafficking in heroin are frequently addressed through terms of incarceration.\(^72\) Sexual assault cases post-*Ipeelee* also frequently see the use of incarceration, even when the accused has taken interim rehabilitative steps towards addressing his problems.\(^73\)

I offer a tentative observation that PTSD seems to enjoy a relative generosity in sentencing outcome relative to *Gladue* and *Ipeelee*. I admit that the sample size of reported cases on which I base this observation is not large, and thus why I remain tentative. Nonetheless, that observation raises the question of whether the *Gladue/Ipeelee* regime can perhaps be strengthened and revitalized by situating the *Gladue* factors within a mental health and therapeutic jurisprudence framework. And there is perhaps a recognized phenomena that can bridge them together.

4. Residential School Syndrome

Many, if not all, of the *Gladue* factors can be described by a phenomena that is termed as Intergenerational Trauma. What is involved is that many Aboriginal children from previous generations were physically and/or sexually abused in residential schools. They also had their self-esteem and identity as Aboriginal persons undermined by school practices that denigrated Aboriginal culture

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and punished cultural practices. Those children from previous generations left the schools without the skills or qualifications to pursue livelihoods, with low self-esteem as Aboriginal persons, in an angry and traumatized state of being, and vulnerable to substance abuse, violence, and other behaviour issues. Those children would take out their pain and problems on those nearest to them, their own family members. The next generation of children would be subjected to physical and sexual violence in abusive home environments, and therefore develop the same issues as the previous generation. And so the seeds planted by the residential schools pass on trauma from one generation to the next. 74 Jennifer Kwan estimates that at least 65% of Canada’s Aboriginal population has been affected to some degree by family violence. She ascribes this rate to factors reflective of post-colonialism, such as poverty, unstable lifestyles, substance abuse and gender inequality. 75

There is certainly evidence that intergenerational trauma manifests in negative mental health symptoms. Qualitative studies that involved interviews with Aboriginal federal inmates have made linkages between residential school attendance, intergenerational trauma and Aboriginal over-incarceration. 76 A study by Brenda Elias and several others was based on 2,953 participants. 611 had attended residential schools, 1100 had parents or grandparents who attended residential schools. 77 For the attendee sub-sample, 48% had a history of having been abused, 26% had a history of suicidal thoughts, and 14% had a history of suicide attempts. 78 For the non-attendee sub-sample, 37% had a history of having been abused, 30% had a history of suicidal thoughts, and 16% had a history of suicide attempts. 79 A qualitative study by Charles Menzies concluded that social forces tied with colonialism and intergenerational trauma,

78. Ibid., at p. 1563.
79. Ibid.
such as continuing physical and sexual abuse through generations, disrupted familial ties, loss of social capital in Aboriginal communities, substance abuse, poverty, and contributed to greater mental health problems and homelessness amongst Aboriginal men.\textsuperscript{80}

In fact, a term has been encapsulated to try and capture the connection between intergenerational trauma and resultant mental health problems, Residential School Syndrome. The term was first articulated by a psychiatrist in British Columbia, Dr. Charles Brasfield, in an effort to conceptualize a diagnosable mental health disorder that is distinct from and yet shares parallels with PTSD. The cause stems from intergenerational trauma, and not necessarily the kind of trigger events that are typically associated with PTSD, and yet the numerous symptoms are very similar. Those symptoms include intrusive memories, recurring nightmares, difficulty forming positive relationships, substance abuse, anger and sometimes violent behaviour.\textsuperscript{81}

There is a study by Ingrid Sochting based on 127 case files of British Columbia Residential School survivors from the Aboriginal Healing Foundation.\textsuperscript{82} Nearly all survivors in the study experienced physical and/or sexual abuse while in residential schools.\textsuperscript{83} The study found numerous indicators consistent with complex PTSD. Nearly all of the survivors had histories of alcohol and drug abuse.\textsuperscript{84} They also had extensive criminal histories. Conviction rates were 64.5\% for major driving offences, 54.8\% for physical assaults, 51.6\% for sexual offences, 24.2\% for thefts, 11.1\% for drug offences, 8.1\% for robbery and 4.8\% for murder.\textsuperscript{85} 74.2\% admitted to having subsequently physically abused others, while 54.8\% admitted to having subsequently sexually abused others.\textsuperscript{86} Mental health diagnoses were available for 93 of the survivors. 64.2\% of these survivors displayed symptoms consistent with a PTSD diagnosis. Of those


\textsuperscript{83} \textit{Ibid.}, at p. 324.

\textsuperscript{84} \textit{Ibid.}

\textsuperscript{85} \textit{Ibid.}

\textsuperscript{86} \textit{Ibid.}
diagnosed with PTSD, 49.5% were diagnosed with at least one other mental health disorder. Those rates were 34.8% for substance abuse disorder, 30.4% for depression, 26.1% for avoidant personality disorder and 13% for borderline personality disorder.87 The study argues that: “... a case may also be made for seeing the residential school syndrome as a culture-specific subtype of complex PTSD.”88

One could suggest that Residential School Syndrome offers a way for Canadian courts to build constructive linkages between the Gladue factors and mental health symptoms so as to strengthen the Gladue regime, and give it a more Therapeutic Jurisprudence orientation. There are, however, concerns about to what extent courts may be willing to engage in such an exercise.

5. Aboriginal Mental Health Cases

Judicial engagement with Aboriginal accused suffering from mental health issues is at times superficial. In some cases the fact of the accused suffering from mental health problems is mentioned in passing or glossed over leading to a term of incarceration.89 In other cases it is mentioned in passing or glossed over for a non-custodial

87. Ibid.
88. Ibid., at p. 325.
sentence that involves probationary terms (e.g. conditional sentence, suspended sentence, conditional discharge). Sometimes it is never mentioned at all until mental health counselling is tacked on as a probationary condition following a jail term, or as part of a conditional sentence. Sometimes it is mentioned briefly when passing a sentence of time served.

Another point of concern is incarceration is often used in such cases, including for offences where a non-custodial sentence has been given on the basis of PTSD. R. v. Rose saw a sentence of 11 months after time served for break and enter and theft. R. v. Bowser saw a sentence of one year for break and enter and theft. That has sometimes been the result even when the accused on his or her own initiative made progress with rehabilitation. R. v. Auger saw a 90 day intermittent sentence for assault and breach of probation. R. v. Grandbois saw a 90 day intermittent sentence for break and enter and assault.

Another trend is where judges are aware of concrete connections between the Gladue factors and mental health problems, but end up concluding that the overall effect can only be such as to reduce the length of incarceration terms, much in keeping with Gladue itself. In

R. v. Cardinal, the accused pled guilty to two charges of dangerous driving causing death and another charge of impaired driving. The Gladue report set out the accused had extensive although unspecified mental health problems stemming from being abused by his father, being abandoned by his mother, and drug abuse. Justice Weatherill of the British Columbia Supreme Court noted the accused’s problems as mitigating factors, but noted that on the balance a carceral sentence was still mandated. The effect of the Gladue factors was a reduction from a federal penitentiary term to two years less a day in provincial jail.\footnote{R. v. Cardinal, 2015 CarswellBC 3954, [2015] B.C.J. No. 2953, 2015 BCSC 2536 (B.C. S.C.).}

Justice Greckol noted in R. v. Willier:

Tyson grew up in the drug culture inhabited by both father figures in his life both on and off reserve and learned to make his living in that way. It is obvious to trace the origins of the addiction, violence, and antisocial activities in Tyson’s immediate family, since the factors of which we take judicial notice – colonialism, the legacy of residential schools, addiction, poverty, violence – all exist in this case. It is also obvious to draw the nexus between the drug trafficking as way of life in Tyson’s immediate family and his falling into the same patterns of criminality. I find that all of these factors, both historic, systemic, and those unique and specific to him, have contributed to Tyson’s predicament before the Court today.

These systemic and background factors, as prescribed by Ipeelee, shed light on the culpability or moral blameworthiness of this offender. Tyson was born into poverty, addiction, violence, and criminality. It is not a surprising consequence that he has trouble conforming to social norms. Criminality was not a choice so as to merit the same level of moral blameworthiness that might otherwise be the case. This was not a choice as other young people might face: which University or technical school to attend, or what career to pursue, or where to live or with whom to associate. The moral culpability evidenced here is not the same as that of a youth with privileged, middle class, or working class origins, who sometimes make calculated or mercenary choices to be involved in the drug trade on a commercial level. Since these systemic and individual factors have shaped the offender and explain (though do not excuse) his behaviour, I must consider them in fashioning an appropriate, individualized sentence.\footnote{R. v. Willier, [2016] 12 W.W.R. 751, 32 Alta. L.R. (6th) 381, 2016 CarswellAlta 785 (Alta. Q.B.), at paras. 110-111.}

However, for Justice Greckol, the overall effect could only be such as to reduce the quantum of the sentence. Global sentence of three
years for possession of drugs and possession of firearms offences.  
Judge Rutherford commented in *R. v. Sutherland-Cada*:

In relation to Mr. Sutherland-Cada specifically, he has received no medication and is experiencing deteriorating mental health. I remind myself that Mr. Sutherland-Cada’s mental health challenges stem from his chaotic and traumatic upbringing as an indigenous child, adolescent, teenager and young adult, that is, all the systemic factors outlined in Gladue and Ipeelee have contributed to his failing mental health. I cannot ignore this nor should any government institution or agency ignore it.  

Judge Rutherford also noted that the experience of incarceration was an especially harsh one for the accused, given his mental health issues. Nonetheless, the effect of *Gladue* and *Ipeelee* could still only be such as to reduce the quantum of sentence. Judge Rutherford passed a global sentence of nine and a half months for robbery.  

Judge Allen of the Alberta Provincial Court observed in *R. v. Cloutier*:

The absence of a clear diagnosis makes it difficult to determine the impact of mental health at the time of the offence. On the other hand, I cannot totally disregard that his mental state may have contributed to some extent to the commission of the offences. There is no evidence to support a contention that depressed people commit more crimes than others, but there have been instances where depressed individuals have committed crimes because they have given way to their emotions. Certainly, the need for revenge was a large part of the offender’s motivation in this case. Further, the opinion of Dr. Hall makes it difficult to determine the severity of any potential mental illness at the time of the commission of the offence I am unable to conclude that the mental state of this offender was as debilitating, as many of the accused in the cases outlined above.  

The global sentence was four years and 91 days for two counts of aggravated assault, assault with a weapon, and dangerous driving causing bodily harm. Different and interesting trends emerge when an Aboriginal accused is specifically diagnosed with PTSD.

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100. Ibid., at para. 119.  
102. Ibid., at para. 56.  
103. Ibid.  
6. Aboriginal Accused and PTSD

It is interesting to note that when an Aboriginal accused explicitly brings a PTSD diagnosis, along with a link to the offence charged, the results are often similar to PTSD for non-Aboriginal accused. In R. v. D. (J.W.), the accused had a clinical psychologist named Dr. Ley testify that the accused suffered from PTSD on account of sexual abuse he suffered while in residential school. The accused was charged with sexually assaulting a young girl who had been in his trust and care, an offence that would be considered very serious and would normally warrant a significant amount of prison time. Judge Buller Bennett of the British Columbia Provincial Court was willing to order a conditional sentence, partly because of a recognition that intergenerational trauma affected both the accused and the victim, and because she was of the view that conditions prohibiting the consumption of alcohol could suffice to manage the accused’s risk.\(^\text{106}\)

In R. v. Haggerty, Judge Thomas of the Alberta Court of Queen’s Bench ordered a conditional discharge for common assault plus three months probation for the Aboriginal accused. This decision took into account both the Gladue factors of poverty and racism that the accused experienced as a youth, and the PTSD that the accused developed while working as a RCMP officer.\(^\text{107}\)

There are also a few cases where, even allowing for PTSD, incarceration had been the result. In R. v. Smith, the accused was charged with impaired driving causing death. No Gladue report had been prepared in advanced. However, there were present what would otherwise have been treated as Gladue factors, such as an abusive home environment as a child, an abusive relationship, having substance abuse issues and multiple suicide attempts. The sentencing judge noted these through previous PTSD diagnoses, and was willing to order a conditional sentence to avoid damaging her current rehabilitative progress. The British Columbia Court of Appeal overturned the sentence, noting the very serious nature of the offence, and that defence counsel could not refer to any precedent that saw a non-custodial sentence for impaired driving causing death. A sentence of two years less a day followed by three years probation.\(^\text{108}\)

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In *R. v. Shorting*, the Crown appealed a sentence of 26 months against an Aboriginal woman who had killed her seven month old daughter with blunt force trauma to the head. The accused had substance abuse problems as a result of a life of domestic and sexual abuse. Dr. Nicholaichuk provided a report indicating that the accused exhibited all the symptoms of chronic PTSD, and that she would not be a further risk to the public. The Saskatchewan Court of Appeal allowed the appeal, and substituted a sentence of six years.\(^\text{109}\)

Justice Lane for the court made this comment:

> The appellant does not dispute the fact the respondent had an extremely abusive background but contends the sentencing judge failed to explain how the respondent’s abusive background both contributed to the offence and why it reduced her moral culpability. Further, there is no support in the *Criminal Code* for the idea that drug addicted mothers should be held less accountable for killing their children. The argument the respondent’s moral culpability was reduced because she suffered from PTSD should have been rejected by the sentencing judge because the respondent’s symptoms were not of a character which interfered with her ability to appreciate her surroundings, control her actions or understand the consequences of them. The sentencing judge should not have relied on the respondent’s symptoms of PTSD as a mitigating factor.\(^\text{110}\)

In *R. v. Schinkel*, the Crown appealed a 60 day intermittent sentence for intoxicated driving causing bodily harm and refusing to provide a breath sample. The accused, an Aboriginal woman, was diagnosed with PTSD stemming from abuse and neglect suffered as a child, and continued abuse in her relationships with various men. The Yukon Court of Appeal denied the appeal, stating the intermittent sentence struck an appropriate balance between the need for deterrence and denunciation for the serious offences on the one hand, and the *Gladue* factors (including the PTSD) on the other.\(^\text{111}\)

With these last three cases, we see that certain offences were of such seriousness such that PTSD was not enough to convince persuade judges to go with non-custodial sentences. To be fair, that would also be consistent with certain cases previously reviewed where non-Aboriginal accused had PTSD. It seems, by way of tentative


\(^{110}\) Ibid., at para. 21.

observation, that Aboriginal accused also benefit relative to reliance on *Gladue* when PTSD is brought into the picture. So what happens when the term Residential School Syndrome is explicitly brought up before courts?

### 7. Residential School Syndrome Cases

The very few reported cases where Residential School Syndrome as a basis for argument have tended to see judges avoid engaging with the concept on any meaningful level. In *R. v. Nagotchi*, the accused explicitly asserted Residential School Syndrome as the underlying causes of his alcoholism and inability to control his anger leading to manslaughter. Justice Clarke of the Ontario Court of Justice did not address the subject of Residential School Syndrome directly, but instead emphasized the accused’s failure to control his alcoholism and his anger leading up to stabbing the victim as the basis for a sentence of 12 years.112

*R. v. Stimson* saw an appeal from a sentence of 90 days intermittent followed by two years probation for impaired driving causing death. The Alberta Court of Appeal allowed the appeal and imposed two years less a day. One of the bases for allowing the appeal was that the sentencing judge relied on an assertion by the accused’s uncle that the accused was suffering from “residential school syndrome”. The Court of Appeal found, however, that it was unclear whether it was the accused’s parents or grandparents who attended residential school. They also found that there was insufficient evidence on the record to build linkages between residential schools and the accused’s behaviour.113

In *R. v. Nelson*, we actually do see an acceptance of Residential School Syndrome, or at least the acceptance of intergenerational trauma as a factor behind the accused’s behaviour. The *Gladue* report explicitly used Residential School Syndrome as a term to describe what the accused was suffering from, and asserted that it was the underlying reason for the accused falling into alcohol and drug abuse. Judge Rideout of the British Columbia Provincial Court accepted the explanations offered by the *Gladue* report. However, Judge Rideout concluded that protecting the public from unprotected sex while infected with HIV, and possession of child pornography, more strongly engaged deterrence and the need to protect the public.


sentence was four years for the sexual assault, and another year to be
served consecutively for possessing child pornography.114

The law clearly has not embraced Residential School Syndrome as
a basis for the sentencing of Aboriginal accused. There is perhaps
the possibility for courts to do so in a way that they have often done with
PTSD, but addressed specifically to the needs of Aboriginal accused
and as a way to strengthen Gladue and Ipeelee. That in turn raises
questions. Should the law go in such a direction? What would be the
benefits and concerns of taking the law in such a direction?

8. Concerns

The proposal I am contemplating involves strapping onto Gladue
jurisprudence concepts from mental health disciplines such as
psychiatry. That may indeed be the explicit enterprise of
therapeutic jurisprudence, but by its very nature engaging in that
enterprise brings with it potential concerns that must be taken into
account.

(a) Lack of Mainstream Recognition

Recall that judges will insist, if PTSD is submitted as a
consideration for sentencing, that there be a formal diagnosis by a
mental health professional that confirms that the accused has PTSD
and that it has a substantive connection to the accused’s offence(s). A
similar insistence is to be expected if Residential School Syndrome is
going to be relied on as a basis for the sentencing of Aboriginal
accused. That in itself can be concerning in the sense that it may raise a
significant obstacle towards the realization of what I propose. Lloyd
Hawkeye Roberton notes that, as of 2013, Residential School
Syndrome is not recognized as a formal mental disorder with
diagnostic criteria in the 5th and latest edition of the American
Psychiatric Association’s Diagnostic and Statistical Manual of
Mental Disorders.115

Without that recognition, the willingness of mental health
professionals to engage with Residential School Syndrome on any
meaningful level such as to offer assistance to sentencing courts is
certainly open to question. As John Szadler observes:

The DSM, for better or worse, is viewed by much of the public as a

(B.C. Prov. Ct.).
or Historic Experience?” (2006), 4:1 Pimatisiwin 1 at 9; Supra, footnote 42.
normative document of mental health – for example, if you can be diagnosed with a DSM disorder, you have a mental disorder, with all the social trapping and stigmata associated therein. Even minor conditions count as mental disorders for some of the public. In the contrary case, conditions on in the DSM can be disregarded as socially marginal mental health problems, if mental health problems at all.116

One can expect that without such recognition many mental health professionals, even if aware of Residential School Syndrome, will regard it as an idiosyncrasy that lacks sufficient foundation for them to engage with. In fact, a study by Raymond Corrado and Irwin Cohen reviewed the clinical assessments of 127 Aboriginal Residential School litigants. The study found that only 4.3% of the litigants had been diagnosed specifically with Residential School Syndrome, while the vast majority were diagnosed with other much more established disorders such as PTSD, depression and substance abuse disorder.117 However, if even such mainstream recognition were to be forthcoming, that can lead to other concerns as well.

(b) Stigma

Another such concern is that adding mental health dimensions to Gladue may lead to a decreased willingness on the part of its intended beneficiaries to avail themselves of Gladue. Recall that an Aboriginal accused may waive consideration of the Gladue factors during sentencing. It is not hard to anticipate that Aboriginal accused may often elect this option, since the whole exercise of bringing the requisite information before the courts necessarily requires the accused to participate in the divulging of very sensitive information regarding past traumas to at least several justice professionals in the court system. There is no empirical data available on how often this option to waive is exercised. However, if the available reported cases are any indication, the waiver of having a Gladue report produced is not a rarity. Although in such cases, defence counsel will still often make reference to the Gladue factors during their oral submissions.118

117. Raymond Corrado & Irwin Cohen, Mental Health Profiles for a Sample of British Columbia’s Aboriginal Survivors of the Canadian Residential School System (Ottawa: Aboriginal Healing Foundation, 2003) at ii-iii.
Those concerns can be expected to become exacerbated if *Gladue* and therapeutic jurisprudence are tied together. There is indeed no shortage of studies that explore the stigma that is felt by people with mental health problems, and how it can interfere with their accessing of services they need, even in a non-criminal context. Some scholars have raised concerns that channelling accused with mental health problems into a dedicated mental health court can encourage an association between mental health problems and criminal behaviour. That in turn can increase feelings of stigma on the part of accused with mental health problems. One study of an American mental health court found that over half who enrolled did not successfully complete their programs. Ray and Brook Dollar speculate that perceived stigma on the part of the participants may have had a role in the low completion rate.

It is not hard to anticipate that tethering *Gladue* and Therapeutic Jurisprudence together in practice could only exacerbate the

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concerns. Participation in the Gladue information gathering process by itself is enough to dissuade a significant number of Aboriginal accused from full participation. Now add mental health as an additional layer. It is not at all hard to imagine that many Aboriginal accused may avoid engaging with the process for fear of a multi-layered stigma stemming from both the Gladue factors as well as mental health disorder labels.

The key response may be how to effectively manage perceived stigma for Aboriginal accused at the conclusion of the process. A study by Ray and Brook Dollar has tentatively explored questions surrounding effective management of stigma stemming from participation in mental health court processes. The study suggested that participants who reported having had a more satisfactory experience in court were more likely to engage in education, a willingness to discuss their experiences openly with a view towards facilitating learning for those previously unaware of the issue, as a stigma management strategy. Those who reported having had a less satisfactory experience were more likely to engage in withdrawal (avoidance of people who express negative attitudes towards mental illness) and secrecy (avoidance of letting anyone know about their court experiences) as stigma management strategies. Ray and Brooks Dollar admit that their conclusions are tentative, however, as their sample size was small (34) and only included those who successfully graduated through their court diversionary programs.123 This kind of research around managing stigma following justice processes is still very new, and is not so developed that I can at this time offer specific answers to the concerns. Further research is needed more generally for the topic of stigma management following a therapeutic jurisprudence justice process. Certainly research into the very particular question that I raise here, a multi-layered stigma stemming from both Gladue and mental health disorder labelling, would be welcome.

(c) Net Widening

Another set of concerns stem from a perceived potential to lead to a kind of net-widening. The idea is that perhaps mentally ill accused can end up perpetually subject to psychiatric detention, accomplishing a roundabout form of incarceration than would otherwise be the case if you did not tether mental health concerns and justice policy together in such a fashion.124 I would have two responses to such concerns.

123. Ibid.
124. Jeffrey Geller, “Involuntary Outpatient Treatment as ’Deinstitutionalized
One response is that extensive psychiatric detention would not be the anticipated norm or expectation for what I propose. And indeed Cognitive Behavioral Therapy, which can be conducted inside a psychiatric facility but is more typically conducted in a group setting in the community outside any facilities, is one of the most standard approaches for treating PTSD. And indeed Brasfield, in his original conception, suggested that Residential School Syndrome, could be addressed through a combination of treatment in health centres that parallel substance abuse centres and/or therapy and counselling in the community. Both approaches would be dedicated specifically to treating Residential School Syndrome, and would incorporate elements of Aboriginal culture and spirituality. My other reply is that there is no shortage of studies verifying that there are many incarcerated persons who suffer from mental health problems where mental health services would be more suited to addressing their behavioural problems, and where incarceration instead ends up becoming a particularly harsh experience. This reality is precisely a key impetus that has driven the development of Therapeutic Jurisprudence theory.

(d) Resource Demands

Another possible concern is an increase in demand on time and resources. It is easy to anticipate that adding mental health dimensions to Gladue would require routine mental health diagnoses and assessments. As James McGuire states: “Certainly, to act on existing evidence would imply a need for some procedural innovations. For example, available research indicates the importance of carrying out comprehensive assessments (for example of risk, need, motivational level) of individual offenders, for which at present there is insufficient time.” There has already been commentary about insufficient implementation of Gladue

126. Supra note 81 at 81.
reporting processes, particularly in the Prairie provinces where perhaps non-custodial alternatives for Aboriginal accused are the most sorely needed. It can readily be imagined that adding mental health dimensions would only make implementation that much more onerous. The natural question then becomes whether it would be worth to make that investment in time and resources. That in turn leads to a discussion of the possible benefits.

9. Benefits

Perhaps the best way to realize my proposal is through the creation of specialized courts with a specific mandate to explore sentencing options that both accord with Gladue and account for the mental health needs of Aboriginal accused at the same time. There are potential benefits for such an approach.

(a) More Flexible Diagnoses

One possible benefit is that Residential School Syndrome may enjoy a more flexible and therefore less restrictive system of diagnosis in comparison to officially recognized PTSD. Hawkeye Robertson explains as follows:

The Brasfield criteria for RSS differ qualitatively from the APA approved criteria for PTSD in at least three ways. First, Brasfield recognizes a diminished interest in significant cultural activities. Second, Brasfield recognizes a persistent tendency to abuse alcohol or other drugs “often at a very young age” with accompanying outbursts of anger. Third, Brasfield allows for a diagnosis of RSS in the absence of a specific traumatizing incident . . .

Under the Brasfield criteria it is not necessary that the traumatized individual experience sexual or physical abuse or a fear of death or injury. The experience of going to a residential school with attempts of enforced assimilation and attendant methods of mind control is sufficient exposure to a traumatizing event. Further, it is not even necessary to have personally attended a residential school to experience this trauma. It is possible to pass on this trauma to someone who is “closely related or involved.” This allows for the possibility of second and third generational victims of RSS.

A more flexible system of diagnosis could mean greater


130. Supra, footnote 115, at pp. 9-10.
accessibility to Aboriginal accused. However, that may require official APA recognition and that is far from a given. If it were to be realized though, that could lead to other benefits.

(b) Shift in Orientation

One potential benefit is that of providing explicit orientation and setting of priorities that will guide justice professionals in specialized courts in their work. The creation of mental health courts has been suggested as a vehicle for realizing therapeutic jurisprudence. The conception is that justice professionals, judges in particular, participate in mental health courts with the understanding that they are to explore non-custodial sentences that focus specifically on the mental health needs of the accused. It has likewise been noted that a perceived benefit of specialized Gladue courts, the most famous one being the one in Toronto, is that justice professionals come into court with the understanding that they are to focus on a meaningful realization of the objectives of s. 718.2(e) and Gladue.

Now envision a court that combines both orientations together, a court that tries to realize the objectives of Gladue and at the same time address the mental health needs of Aboriginal accused. Recall that in R. v. McGill the accused was sentenced to a two year suspended sentence for possession of cocaine with intent to traffick. The accused’s mental health problems were noted in the Gladue report. Judge Melvyn Green of the Ontario Court of Justice offers insightful comments that perhaps highlight the kind of restrictive judicial thinking that a dedicated court could try to overcome:

As to the first concern, s. 718.1, the “fundamental principle”, directs that a “sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender”. A sentencing levy based on the weight or amount of a drug inevitably prioritizes the gravity of the offence over the moral culpability of the offender. Matters crucial to individualized sentencing – such as an offender’s motivation, role in the

134. R. v. McGill, supra, footnote 70.
offence, mental health, historical antecedents and other personal circumstances – are reduced to mere sliders along the continuum that runs between the bookends that define the outer limits of each quantum-based sentencing range.\textsuperscript{135}

Followed by:

Disproportionately high rates of incarceration are a notorious part of the problem that defines the current state of Aboriginal Canadians. Perpetuating a sentencing model that favours imprisonment is not the solution. First Nations communities understand this. To the degree reasonably possible, their effort, individual and collective, to restore health, dignity and self-sufficiency should be respected and supported. This too is the lesson of \textit{Gladue}.\textsuperscript{136}

Judge Joy of the Newfoundland Provincial Court in \textit{R. v. Ashini} adds: “We will never make significant progress unless there is a greater coordination between health and justice. This may be in the form of mental health courts or Gladue-style courts such as those that exist in Toronto and elsewhere in Canada.”\textsuperscript{137}

A potential benefit of such a court is that its justice professionals come in with the understanding that they need to engage in a different orientation that focuses on the objectives of \textit{Gladue} and therapeutic jurisprudence (particularly with reference to Residential School Syndrome) at the same time.\textsuperscript{138} This kind of concept has been proposed before. For example, a study by Joanna Baxter and others shows that Maori more likely to develop mental health problems, and that in turn contributes to Maori over-incarceration.\textsuperscript{139} Valmaine Toki calls for a mental health court designed specifically to address the therapeutic needs of Maori accused.\textsuperscript{140}

\textbf{(c) Improved Sentencing Outcomes}

If the shift in cognitive orientation is accomplished, that in turn

\textsuperscript{135. Ibid., at para. 56.}
\textsuperscript{136. Ibid., at para. 113.}
\textsuperscript{139. Joanna Baxter \textit{et al.}, “Ethnic Comparisons of the 12 month prevalence of mental disorders and treatment contact in Te Rau Hinengaro: the New Zealand Mental Health Survey” (2006), 40:10 Australian and New Zealand Journal of Psychiatry 905.}
\textsuperscript{140. Valmaine Toki, “Therapeutic Jurisprudence and Mental Health Courts for Maori” (2010), 33 International Journal of Psychiatry 440.}
could perhaps lead to another benefit. That benefit being a tangible improvement in sentencing outcomes for Aboriginal accused, a real move towards the remedial purposes originally envisioned by s. 718.(e). As previously stated, I have a perception that PTSD cases seem to enjoy a generosity in result that I do not sense for Gladue-based cases for similar offences, particularly for certain violent offences and certain narcotics-based offences. I admit my conclusions in that respect may be open to question. The sample of reported cases are limited, the comparisons are not air tight, and other people may have different interpretations of those cases. The conclusion is not without basis or reason though. It is therefore worth asking whether it would be beneficial if the shift in cognitive orientation combined with a different judicial analysis grounded in Therapeutic Jurisprudence, and specifically referencing Residential School Syndrome, could operate to result in different sentencing outcomes. Would it result in more non-custodial sentences where previously the same standard offence bifurcation had persisted even after Ipeelee? And perhaps the benefits would not be limited to just the sentencing outcomes themselves.

(d) Healing and Recidivism

It has been suggested that culturally-specific mental health services for Aboriginal peoples can lead to an amelioration of criminal behaviour. The idea is that Western medicine is too narrow in its approach by focusing on physical and mental symptoms. Aboriginal medicine also addresses the crucial aspects of emotional and spiritual health. Aboriginal medicine may also be more likely to reach Aboriginal individuals on a personal level. Peter Menzies suggests that developing a comprehensive Aboriginal healing model that integrates traditional cultures addresses not just individual therapeutic needs, but also community and family structures, and is therefore what is needed to undo the harm of intergenerational

trauma. A survey study of 73 Aboriginal persons, mostly women and from various communities, revealed that almost all of them believed that healthy parenting from birth and onwards was crucial in reversing the legacy of the residential schools. They also believed that the development of programs in communities, grounded in Aboriginal cultures, to assist with prenatal care and early child rearing were crucial to support this.

Lloyd Hawkeye Roberston describes in detail such approaches:

“An effect of the residential schools was to damage the identity of Aboriginal students within the system. Counselling may focus on what Lent called eudemonic issues such as autonomy, self growth, meaning, and purpose in life. The diagnostic protocol developed by Brasfield recognizes the loss of eudemonic purpose inherent in the residential school experience as a cultural or identity loss. Counsellors using the RSS diagnosis in their practice must be aware that some of their clients may benefit from incorporating some cultural elements (such as smudging, sweatlodges, sun dances, herbal treatments) into their treatment. In many cases, the individuals will be able to pursue this aspect of their self-growth independently of the counsellor (although the counsellor should be aware of these efforts and their meaning to the client), but in other cases it may be advisable to have the counsellor work collaboratively with a traditional healer or shaman. Similarly, the counsellor will also need to be prepared to work eudemonically with the client where the client has chosen to work from different traditions, for example, within a Christian framework or from a framework involving no religious belief.”

And again:

“The epidemiology of RSS leads to the recommendation that treatment include an element of community development, but this is not an area with which counselling psychologists are ordinarily familiar. Commu-


144. Hawkeye Robertson, supra, footnote 115, at p. 18.
nity development is a process of self-empowerment whereby groups of people, who have defined themselves to be part of a common community, take on the responsibility of defining their problems, assessing their needs in coping with those problems, and developing an action plan to meet those needs. Since culture is not static but is dynamic and evolving, and since residential schools were part of a process that destroyed Aboriginal cultures, community development, in this context, involves people planning developmental transitions to change their community culture. This approach differs from that offered by advocates of the historic trauma model in that the process is not prescribed but is evolutionary and individualized to each community.”

Evidence-based studies that can verify the efficacy of this approach have been slow to come, but they have started to arrive. Qualitative studies have found that culturally appropriate programming can lead to mental health improvements and/or amelioration of criminal behaviour for Aboriginal persons. A study of the Knew Chi Ge Win program in northern Ontario found that integrating Aboriginal culture with mental health services resulted in lowering acute care admissions from 3-4 a year to 0-1 a year. This reflected clients becoming healthier and no longer prone to recidivism. An evaluative study of the Minninbah project in Australia, a mental health program that drew on Aboriginal spirituality, observed that Aboriginal men who regularly attended the program showed decreased domestic violence incidences, and decreased dependency on substance abuse. Australian mental health courts experienced improvements with recidivism, but study was careful to say that it might be due to careful pre-screening rather than improved mental health outcomes.

145. Ibid., at p. 19.
150. Lorraine Lim & Andrew Day, “Mental Health Diversion Courts: A Prospective Study of Reoffending and Clinical Outcomes of an Australian
Joseph Gone speaks to the need for further research and empirical validation as follows:

Disparities in mental health status have been regularly reported for indigenous North American communities. A major source of these disparities appears to be the disproportionately high rates of exposure to potentially traumatic stressors that routinely lead to increased prevalence of PTSD. And yet, professional and community mental health advocates charged with remediating the pathological sequelae of First Nations posttraumatic experiences focus less on PTSD than on historical trauma. In contrast to PTSD, HT is promoted as the more relevant concept, capturing the complex, collective, cumulative, and intergenerational impacts of Euro-American and Euro-Canadian colonization on First Nations peoples. A primary implication of framing First Nations distress as HT is recognition and celebration of an explanatory model that remains alternate and parallel to mainstream professional mental health discourse. This is especially so in terms of the proclaimed treatment for First Nations HT, namely, a return to indigenous traditional practices. More specifically, indigenous cultural practices—of whatever kind and local relevance and meaning—are presumed to remedy HT for various religious, political, and pragmatic reasons. This claim has not been rigorously evaluated relative to First Nations distress; however, plausible therapeutic mechanisms include proposed factors that have been commonly observed across healing traditions throughout the world.

Thereof course remain questions about whether we can logistically and practically move in such directions. As the excerpts from Hawkeye Robertson make clear, the culturally specific health services that are envisioned would demand many mental health service providers to alter their practice approaches in ways that are quite fundamental. It may be demanding shifts of the mental health disciplines that are even more fundamental than are being demanded of the legal system.

Another remaining point of concern is the resources need to make such reforms possible. There has been judicial frustration with inadequate resources to match the mental health needs of devastated Aboriginal communities. This direction may in fact represent

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Another opportunity to pursue the concept of “Justice Reinvestment”, the idea that it will be more cost effective in the long term to invest in social programming that steers prospective offenders away from lives of crime before they even come into contact with the justice system, and to invest in more robust correctional and supervisory services for those persons who do get charged.\textsuperscript{153}

There are certainly significant challenges to realizing what is envisioned here. The questions remain whether on the balance the benefits outweigh the costs and concerns associated with implementation. I will offer a tentative yes as an answer.

10. Conclusion

The Gladue and Ipeelee has struggled, both with finding any real purchase with sentencing judges, and with making any appreciable headway with Aboriginal over-incarceration. That is why I ultimately think we need to move beyond s. 718.2(e) and towards Aboriginal self-determination. That endeavour, however, will not occur overnight. In that respect, Gladue and Ipeelee may have some utility for the time being. It is to be hoped that it can even provide some foundation to build on as we move towards self-determination.

A tentative observation that I offer is that PTSD cases seem to enjoy a relative generosity in sentencing outcomes that Gladue does not, even in comparable cases for similar offences. The PTSD cases also frequently exhibit an emphasis on mental health concerns and the accused’s mental health needs that is more in line with Therapeutic Jurisprudence.

It is therefore worth asking whether it is beneficial to shift Gladue and Ipeelee towards a more Therapeutic Jurisprudence orientation. Perhaps the way to do that is through the use of Residential School Syndrome as a bridge between Gladue and Therapeutic Jurisprudence. It could even be suggested that we can build specialized courts that combine features of both mental health courts and Gladue courts, with examples of both already in operation in Toronto.

There are some concerns surrounding such an endeavour though. Those concerns include heightened stigma for Aboriginal accused, the lack of standardized recognition for Residential School Syndrome, increased administrative and resource demands, and


\textsuperscript{153} Rob Allen, “Justice Reinvestment and the Use of Imprisonment” (2011), 10:3 Criminology & Public Policy 617.
net widening. Evidence on how to address such concerns is sparse, but what is available suggests that the problems may not be insurmountable.

There are also potential benefits to be realized at the same time. Residential School Syndrome may enjoy more diagnostic flexibility compared to PTSD, and therefore may be more accessible to Aboriginal accused. Another hope is that the creation of specialized courts in and of itself encourages justice professionals, judges in particular, to fundamentally shift the orientation with which they approach the sentencing of Aboriginal accused. That in turn could lead to improved mental health and sentencing outcomes for Aboriginal accused, and reduced recidivism. It is to be hoped that on the balance the benefits could outweigh the concerns, and therefore represent a worthwhile example of justice reinvestment. And perhaps dedicated courts with a fundamentally different orientation can be build upon as part of the move towards Aboriginal self-determination over justice.