

# Reforming Saskatchewan's Biased Sentencing Regime

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I felt that I needed to write this paper after defending an Aboriginal client who was nearly always in restraints at the Regional Psychiatric Center ("RPC"). I was haunted by the way that the Correctional Service Canada's security interests interfered with my client's chances for healing. While in custody at the RPC, my client had been strapped to a board and a chair and left in isolation for unhealthy periods of time. She had also been pepper-sprayed and subjected to manhandling on an extraordinary number of occasions. I was puzzled by this treatment because the people I talked to at the RPC were generally polite, well behaved, and genuinely concerned about my client's welfare. It became apparent to me when listening to the evidence at my client's dangerous offender hearing that the staff at the RPC were somehow locked in a perverse dichotomy. The CSC's culture fostered a reliance on punishment to change an inmate's behavior and such punishment prevented the staff from administering effective medical treatment to that inmate. Furthermore, the staff was unable to change that regime, although some of them made valiant attempts.

It dawned on me that I am in a similar regime. As a defence lawyer and an officer of the court, I work in a system which is supposed to restore damaged people so they can live peacefully in their communities. I find that our regime of prison-based sentences is preventing us from helping those people who were raised in pathogenic circumstances to heal and to live in peace with their families and communities. Like the staff at the RPC, we find ourselves punishing people when we know punishment has not worked in the past and that punishment is unlikely to work in the future. We are like a turtle lying on its back waiting for some force to flip us over. But as Martin Luther King wrote in his "Letter from a Birmingham Jail"<sup>1</sup> regarding those in the United States who were suffering from the humiliation of segregation, it is very hard to wait for things to change when you are the one who has to endure the suffering. Saskatchewan's Aboriginals should not have to wait any longer for our systemic bias to end.

This paper discusses the overrepresentation of Aboriginals in Saskatchewan jails which occurs as a result of a systemic bias in our criminal justice system. This systemic bias has prevented us from dealing with the epidemic of violence and sexual abuse which has gripped significant portions of Saskatchewan's Aboriginal communities since the pathogenic abuses of colonization and residential schools. We perversely increase the number of Aboriginals in custody when we punish those Aboriginals who have been raised in pathogenic circumstances. I will establish the systemic bias of Aboriginals by setting out the results of my research on all of the written criminal sentencing decisions from 1996 to June of 2014 as found on the CanLII website. I will also display the national statistics regarding the overrepresentation of Aboriginal offenders in our jails. I will show that Aboriginals are vastly overrepresented in dangerous offender applications and that this overrepresentation accounts for a shocking discrepancy between the lengths of custodial sentences for Aboriginals compared to non-Aboriginals. I will show that Saskatchewan courts in general and the Saskatchewan Court of Appeal in particular have not shown support for the remedial function of s. 718.2(e) or the principles for restorative justice. I will then discuss 3 judicial fallacies: 1) the fallacy of judicial competence when sentencing Aboriginals; 2) the

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<sup>1</sup> See Martin Luther King, "[Letter from a Birmingham Jail #1](#)" August, 1963

fallacy of deterrence; and 3) the fallacy of a judicial powerlessness to end the systemic discrimination and the mistreatment of Aboriginals.

## Bias

Many of us have suspected that there is a bias against Aboriginals within Saskatchewan's criminal justice system that has led to the over-representation of Aboriginals in Saskatchewan's jails.<sup>2</sup> We would like to mitigate or end the over-representation of Aboriginals but our suspicions do little to change the systemic behavior. Data are needed so that we have a clearer understanding of the causes of the over-representation of Aboriginals in custody. Towards this end, I have examined all of the written sentencing decisions from Saskatchewan's Court of Queen's and Provincial Court which have been published on CanLII since the enforcement of Bill C-41 in 1996 when the *Criminal Code* was amended to include the present principles of sentencing. My findings show that the over-representation of Aboriginals in custody has increased alarmingly in Saskatchewan since 2012 when Mr. Justice Lebel wrote the following at paragraph 61 in [R. v. Ipeelee](#)<sup>3</sup>:

...In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim. Just.* 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they **accounted for 17 percent of federal admissions in 2005** (J. Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?"

I have found that Aboriginals in Saskatchewan have been sentenced to well over twice the amount of jail time as non-Aboriginals.<sup>4</sup> Based on the CanLII website written sentencing

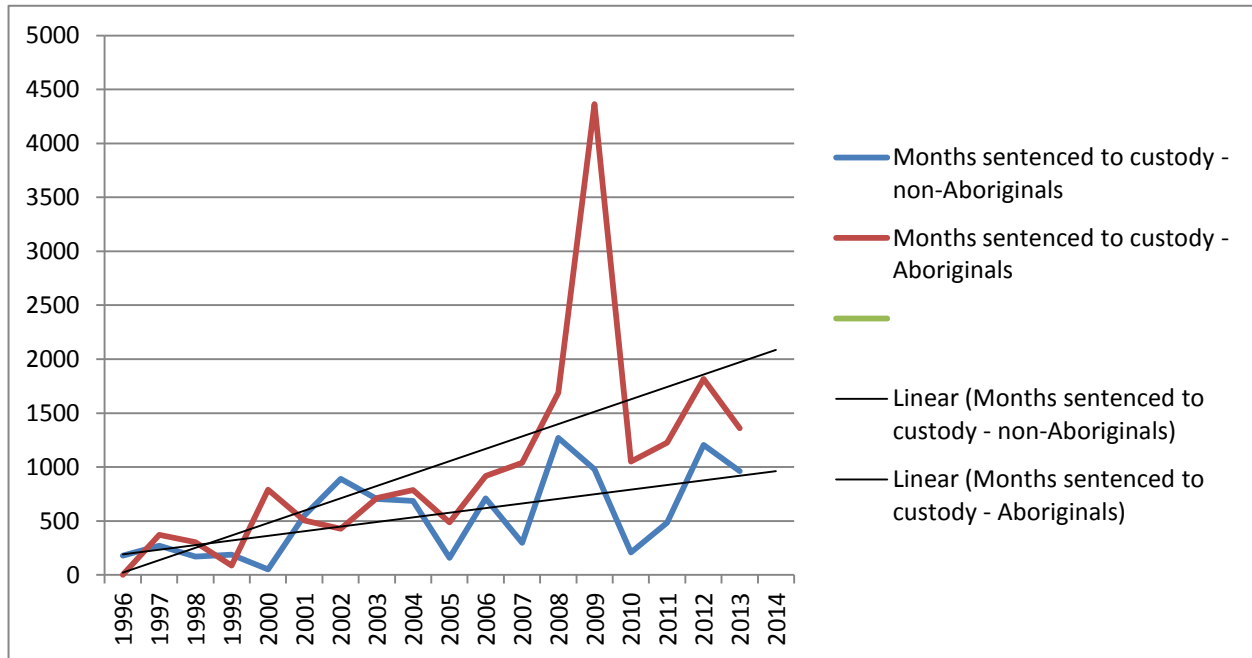
<sup>2</sup> See Julian V. Roberts and Anthony N. Doob, [Race, Ethnicity and Criminal Justice in Canada](#), *Crime and Justice* Vol. 21, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives (1997), pp. 469-522, for a discussion regarding the overrepresentation of Aboriginals in custody in relationship to discrimination within the criminal justice system.

<sup>3</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)

<sup>4</sup> I have measured the custodial time in months. I calculated the months based on the time which would be served from the date of sentencing plus the time spent on remand as adjusted by the court. I treated conditional sentence orders and probation as 0 months custody. I calculated a dangerous offender's indeterminate sentence as a life sentence and I calculated life sentences by subtracting an offender's age at the sentencing date from their life expectancy based on [Statistics Canada](#) expectations. For example, a 62 year old Aboriginal offender would be expected to live until he reached 64 years of age so I would calculate that sentence as being 24 months. On the other

decisions since 1996, Aboriginals have been sentenced to a total of 18,698.2 months of custody and those people where there is no indication that they are Aboriginal<sup>5</sup> (hereinafter referred to as “NIA”) have been sentenced to a total of 10,622 months custody.

The following chart shows and that the length of sentences in Saskatchewan is trending upward at a higher rate for Aboriginals than for the NIAs:



Aboriginals are sentenced to over twice as much jail time per person. There were 214 Aboriginal people who received written sentencing decisions in CanLII since 1996 and they were sentenced to an average of 87.4 months custody per person<sup>6</sup>. There were 270 NIA people who received written sentencing decisions in CanLII during that same time period and they were sentenced to 39.3 months custody per person on average<sup>7</sup>.

hand, a Canadian male is expected to live until he is 79 years of age so if he was sentenced at 30 years of age, I would calculate his sentence as being 588 months. I did not make any adjustments for an offender’s criminal record because as M. Jackson famously stated in “Locking Up Natives in Canada”, 23 *U.B.C. L. Rev.* 215 at pp. 215-16, “...in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.” I concluded that an Aboriginal’s criminal record was one of their disadvantages and should not be included as an aggravating factor when determining bias.

<sup>5</sup> I compared Aboriginals with those where there was “no indication that the person was Aboriginal” because in many of the CanLII sentencing cases I could not tell whether a judge was referring to an Aboriginal or a non-Aboriginal. I had expected that Saskatchewan Court’s would be interested in considering s. 718.2(e) and would make a distinction between Aboriginals and non-Aboriginals in all the sentencing cases but this is not what I found. There are probably some Aboriginals included in the category entitled “no indication that he was Aboriginal”.

<sup>6</sup> 18,698.2 divided by 214 = 87.4 months per person

<sup>7</sup> 10,622 months divided by 270 = 39.3 months per person

I also calculated the number of average sentence-months-per-person in certain offence categories:

	<u>No indication if Aboriginal</u>	<u>Aboriginal</u>
Cases of fraud:	19.1 months per person	17 months per person
Drug trafficking:	13.6 months per person	13.8 months per person
Hazardous driving, including dangerous and impaired driving and driving which causes death and injury:	9.8 months per person	30.3 months per person
Child deaths	30 months per person	33 months per person
Sex crimes	59.8 months per person	84.5 months per person
Home invasions	125.6 months per person	172.4 months per person
Robberies	29.2 months per person	78 months per person
Attempted murder	264 months per person	139 months per person
Manslaughter	101.3 months per person (all men)	97.3 months per person (7 women @ 57.6 months per person and 8 men @ 137.3 months per person)
Aggravated assault	42 months per person	142.4 months per person
Assault with a weapon	12 months per person	122.8 months per person
Assault causing bodily harm	2.5 months per person	34.3 months per person
Assault PO	0 months per person	12.2 months per person
Common assault	3.6 months per person	19 months per person

There are no cases reported on CanLII dealing with Aboriginals who were sentenced for child pornography related offences.

I have also concluded that Aboriginals are disproportionately affected by Part XXIV of the *Criminal Code*'s dangerous offender provisions. For example, regarding the average months of custody per person for which Aboriginals sentenced for aggravated assault (142.4 months per person as shown in the chart above), 11 out of the 16 sentencing decisions involved dangerous offender applications. Out of those 11 Aboriginal dangerous offender applications, 6 resulted in the Aboriginal being designated as a dangerous offender<sup>8</sup> and 5 resulted in the Aboriginal being designated as a long term offender<sup>9</sup>. In contrast, of the 9 NIA aggravated assault offenders (42 months per person as shown in the chart above), only 2 NIA offenders were submitted to dangerous offender applications with only 1 NIA being designated as a dangerous offender<sup>10</sup> and the remaining 1 NIA being designated as a long term offender<sup>11</sup>.

Similarly, regarding the average months of custody per person for which Aboriginals were convicted of assault with a weapon (122.8 months per person as in the chart shown above), 4 of those 5 sentencing decisions were dangerous offender applications which resulted in Aboriginals being designated as dangerous offenders in 3 of the applications<sup>12</sup> and designated as long term offenders on 1 of the applications<sup>13</sup>. In contrast, none of the 4 NIA assault with a weapon offenders were submitted to dangerous offender applications. The absence of dangerous offender applications of NIAs resulted in those offenders being sentenced to 12 months per person – 10 times less than for an Aboriginal offender.

An even more dramatic example can be found regarding the average months of custody per person for which Aboriginals in Saskatchewan were convicted of assault causing bodily harm (34.3 months per person as shown in the chart above), 5 out of those 9 sentencing decisions were dangerous offender applications which resulted in Aboriginals being designated as dangerous offenders on 4 of those applications<sup>14</sup> and designated as long term offenders on one of those applications<sup>15</sup>. In contrast, none of the 6 NIA assault causing bodily harm offenders were submitted to dangerous offender applications and 5 of those NIA offenders were sentenced to a non-custodial sentence<sup>16</sup> which resulted in an average sentence of only 2.5 months per person or 14 times less than for an Aboriginal offender.

Saskatchewan designates people as dangerous offenders at a rate which is vastly disproportionate to our population when compared to all of the other Provinces. For example, Saskatchewan had over 4 times the rate of dangerous offenders compared to Alberta and Manitoba and a rate much

<sup>8</sup> [R. v. F.R.](#), 2006 SKPC 95 (CanLII); [R. v. Lemaigre](#), 2002 SKQB 523 (CanLII); [R. v. S. \(K.R.\)](#), 2003 SKQB 56 (CanLII); [R. v. Casemore](#), 2009 SKQB 306 (CanLII); [R. v. Dunsford](#), 2011 SKQB 114 (CanLII); and [R v Gamble](#), 2012 SKQB 249 (CanLII).

<sup>9</sup> [R. v. I.N.H.](#), 2004 SKQB 402 (CanLII); [R. v. M.A.G.](#), 2006 SKQB 313 (CanLII); [R. v. Roberts](#), 2007 SKQB 209 (CanLII); [R v Keller](#), 2012 SKQB 240 (CanLII); and [R v Knife](#), 2013 SKQB 197 (CanLII).

<sup>10</sup> [R v Blanckenberg](#), 2014 SKPC 5 (CanLII)

<sup>11</sup> [R v Peters](#), 2012 SKQB 426 (CanLII)

<sup>12</sup> [R v Ben](#), 2012 SKPC 52 (CanLII); [R v McCallum](#), 2012 SKPC 192 (CanLII); and [R. v. Montgrand](#), 2011 SKQB 14 (CanLII)

<sup>13</sup> [R v Keepness](#), 2013 SKQB 441 (CanLII)

<sup>14</sup> [R. v. R.H.L.](#), 2005 SKPC 9 (CanLII); [R. v. Watetch](#), 2006 SKQB 503 (CanLII); [R. v. Lavallee](#), 2007 SKQB 85 (CanLII); and [R. v. Nome](#), 2009 SKQB 149 (CanLII).

<sup>15</sup> [R. v. Nome](#), 2009 SKQB 149 (CanLII)

<sup>16</sup> [R. v. Konefall](#), 2010 SKPC 172 (CanLII); [R. v. Gerbrandt](#), 1998 CanLII 13852 (SK QB); [R. v. Dean](#), 2008 SKQB 201 (CanLII); [R. v. Ross](#), 2008 SKQB 243 (CanLII); and [R. v. Cameron](#), 2009 SKQB 475 (CanLII).

higher than in any of the other provinces. Public Safety Canada states at [Table E3](#) of their [Corrections and Conditional Release Overview](#) for 2013 that, as of April 14, 2013, “Aboriginal offenders account for 29.4% of the dangerous offenders and 20.5% of the total federal offender population”. It also states that Saskatchewan had designated 61 people as dangerous offenders since 1978 compared to Manitoba’s 18 dangerous offenders and Alberta’s 53 dangerous offender designations.<sup>17</sup>

Based on the CanLII written sentencing decisions since 1996, 34 Aboriginals have been designated as dangerous offenders in Saskatchewan (where the length of sentence was recorded) with a total of 8,174 months of custody for an average of 240.4 months per person. Over the same period, 30 Aboriginals have been designated as long term offenders in Saskatchewan (where the length of sentence was recorded) with a total of 2,818 months or 93.9 months per person.

On the other hand, only 10 NIA people in Saskatchewan have been designated as dangerous offenders (where the length of sentence was recorded) for a total of 4,260 months of custody averaging 426 months per person. I attribute the low life expectancy for Aboriginals as the explanation for the higher dangerous offender months in custody per person for NIA versus Aboriginals because Aboriginals are expected to live 180 months less than NIAs so Aboriginals would serve that much less time in custody as compared to NIAs. Over the same period in Saskatchewan, only 9 NIA have been designated as long term offenders (where the length of sentence was recorded) with a total of 925 months of custody averaging 10.3 months per person.

The Crown’s success rate in achieving dangerous offender or long term offender designation, as recorded on CanLII, is remarkable. Out of the 87 dangerous offender and long term offender applications recorded for Saskatchewan on CanLII since 1997 only 2 such applications were completely dismissed.<sup>18</sup>

Saskatchewan’s custodial rate for Aboriginals has been increasing for a long time. It was not always the case that Aboriginals were over-represented in custody (if one does not consider Canada’s oppressive restrictions on the movement of Aboriginals pursuant to the *Indian Act* prior to 1951 to be custodial).<sup>19</sup> Aboriginals were under-represented in Saskatchewan jails during the period after World War II. Mr. Justice Klebuc made the following observation fifteen years ago at paragraph 7 of [R. v. Carratt](#)<sup>20</sup>:

[7] Professor Quigley indicated that Saskatchewan is illustrative of a rather sad situation because, while 10 to 11 percent of the population is of aboriginal descent, up to 74 percent of the persons incarcerated in provincial jails are of aboriginal descent. In his

<sup>17</sup> Saskatchewan’s population in 2014 was 1.1 million while Manitoba’s population in 2014 was 1.3 million and Alberta’s population was 4.1 million.

<sup>18</sup> [R. v. Laprise](#), 1997 CanLII 11315 (SK QB) and [R. v. L. \(T.P.\)](#), 2005 SKQB 434 (CanLII)

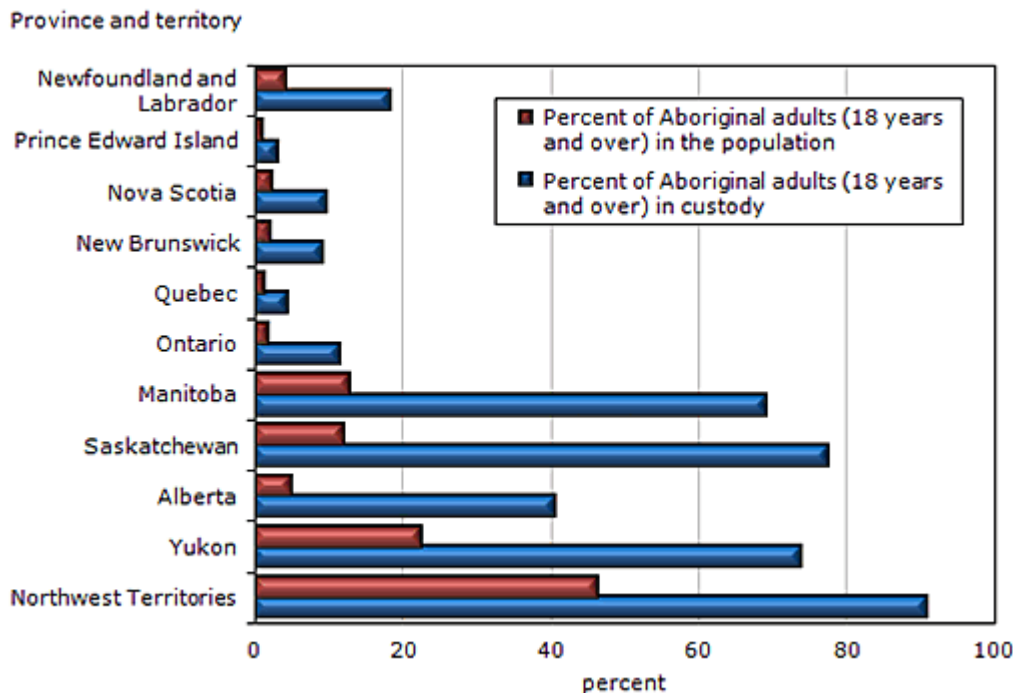
<sup>19</sup> M. Jackson, [Locking Up Natives in Canada](#), *Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 215. Also see Jonathon Rubin, [Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going](#), *Supreme Court Law Review* (2008), 40 S.C.L.R. (2d)

<sup>20</sup> 1999 SKQB 116 (CanLII)

testimony he indicated that immediately after the Second World War, persons of aboriginal descent were under-represented as a percentage of the persons incarcerated in Saskatchewan jails. Tragically, their rate of incarceration increased to 68 percent by 1990-91; 73.5 percent by 1996-97; and 74 percent by 1997-98. With respect to federal penitentiaries, he indicated that in 1989-90, 54 percent of those incarcerated were of aboriginal descent.

The continual rise in Aboriginal custodial rates is also demonstrated in the [Adult Correctional Statistics in Canada, 2010/2011](#). Statistics Canada reports at Chart 7 that in 2010/2011 nationally, 27% of adults in provincial custody and 20% of the adults in federal custody were Aboriginals. This was seven to eight times higher than the proportion of Aboriginals (3%) in the adult population as a whole. Chart 7 (below) states that 77.6% of Saskatchewan's custodial population in 2006 were Aboriginals over the age of 18 years and that Aboriginals made up only 16% of Saskatchewan's general population. This, like the Saskatchewan's dangerous offender rate, is much higher than Manitoba's Aboriginal custodial rate of 69.1% and Alberta's Aboriginal custodial rate of 40.6 %.

**Chart 7**  
**Aboriginal adult admissions to custody, by province and territory, 2010/2011**  
[Data table for chart 7](#)



**Note:** Excludes admissions to custody in which Aboriginal identity was unknown. Excludes British Columbia and Nunavut due to the unavailability of data. Population estimates based on 2006 Census data.

**Source:** Statistics Canada, Canadian Centre for Justice Statistics, Integrated Correctional Services Survey.

True to form, Saskatchewan also has the highest Aboriginal custodial “admissions” rate of any of the Provinces. Statistics Canada reports at the following at [Table 1](#):

**Table 1 Aboriginal people as a proportion of admissions to adult provincial/territorial sentenced custody, and as a proportion of the general population, 2007/2008**

<b>Province and territory</b>	<b>Provincial and territorial sentenced custody<sup>1</sup></b> % of admissions	<b>Adult general population (18 years and older)<sup>2</sup></b> % of population
Newfoundland and Labrador	21	4
Prince Edward Island	1	1
Nova Scotia	7	2
New Brunswick	8	2
Quebec	2	1
Ontario	9	2
Manitoba	69	12
Saskatchewan	81	11
Alberta	35	5
British Columbia	21	4
Yukon	76	22
Northwest Territories	86	45
Nunavut	..	78
<b>All jurisdictions</b>	<b>22</b>	<b>3</b>

The custodial rate for Aboriginals continues to rise unabated. Public Safety Canada states at [Figure C9](#) of their [Corrections and Conditional Release Overview](#) for 2013 that as of April 14, 2013, Aboriginals made up 20.5% of the federal offender population. Since 2008-09, the Aboriginal population has increased from 3,788 to 4,764.

The Corrections and Conditional Release Overview for 2013 states at [Figure C16](#) that:

From 2003-04 to 2012-13, the Aboriginal incarcerated population under federal jurisdiction increased by 47.2%.

The number of incarcerated Aboriginal women increased steadily from 108 in 2003-04 to 191 in 2012-13, an increase of 76.9% in the last ten years. The increase for incarcerated Aboriginal men was 45.8% for the same period, increasing from 2,193 to 3,197.

Table [C16](#) of the [Corrections and Conditional Release Overview](#) states that in the fiscal year 2008-09 there were 1,292 federally incarcerated Aboriginal men in the Prairie region, in 2009-10



there were 1,418 Aboriginal men, in 2010-11 there were 1,577 Aboriginal men, in 2011-12 there were 1,542 Aboriginal men and in 2012-13 there were 1,699 Aboriginal men in federal custody. This increase in the custodial rate for Aboriginals runs contrary to overall decrease in rates of crime. Public Safety Canada states that the [police reported crime rate has decreased by 28.1% since 1998](#). The rate of violent crimes has decreased nationally by [20.4% to 1,190 per 100,000 people in 2012](#) from the year 2000. Since 1998 the national rate of adults charged with violent crimes has decreased by [5.1 % so that in 2012, 514 adults per 100,000 were charged with violent offences](#).

The increase in Saskatchewan's growing Aboriginal rate of custody was confirmed by the Office of the Correctional Investigator (OCI). The OCI states as follows in [High and Growing Incarceration Rates for Aboriginal Peoples](#):

In the period between March 2010 and January 2013, the Prairies Region of the Correctional Service of Canada (primarily the provinces of Manitoba, Saskatchewan and Alberta) accounted for 39.1% of all new federal inmate growth. Most of this growth was led by Aboriginal offenders, who now comprise 46.4% of the Prairie Region inmate population. Last month:

- At Stony Mountain Institution in Manitoba, 389 out of 596 inmates – 65.3% of the population – were Aboriginal;
- **At Saskatchewan Penitentiary, 63.9% of the population was Aboriginal;**
- **At the Regional Psychiatric Centre in Saskatoon, 55.7% of the count was Aboriginal;** (emphasis mine) and
- At Edmonton Institution for Women, 56.0% of the population was Aboriginal.

So far this year, CSC's Prairie Region leads the country in double bunking, lockdowns, self-harm incidents, inmate homicides and assaults.

The above listed statistics show that Saskatchewan is Canada's undisputed Provincial leader for placing our Aboriginal peoples in concrete cells and these statistics are something we all should be concerned about.

### **Saskatchewan courts are not applying *Gladue* principles**

The Supreme Court of Canada stated in *R. v. Gladue* that s. 718.2(e) of the *Criminal Code* was enacted as a remedy for the overrepresentation of Aboriginals in custody.<sup>21</sup> However, I found that *Gladue* principles were not applied in 169 of Saskatchewan's CanLII sentences between 1999 and June of 2014 and the record shows that *Gladue* principles were applied in only 23 written sentencing decisions during that time period<sup>22</sup>. There was a significant difference

<sup>21</sup> See *R. v. Gladue*, [1999 CanLII 679 \(SCC\)](#), [1999] 1 S.C.R. 688

<sup>22</sup> I used balance of probabilities standard when determining whether *Gladue* principles were applied or not. If there was no mention of *Gladue* whatsoever in the sentencing decision, or if the judge merely gave *Gladue* principles a perfunctory mentioning by citing the law and listing the *Gladue* factors without affecting the sentence (lip service), then I did not consider that *Gladue* principles have been applied. Also, when a judge stated that he or she was not applying *Gladue*, as in very many of the written cases, I considered that *Gladue* was not applied.

between how *Gladue* principles are applied in Provincial Court as compared to the Court of Queen's Bench. Out of the 75 written Provincial Court sentencing decisions on CanLII for that period, *Gladue* principles were not applied in 55 of the Provincial Court cases but were applied by Provincial Courts in 20 cases. In contrast, out of the 117 written Queen's Bench sentencing decisions on CanLII, *Gladue* principles were only applied 3 times and were not applied in 114 times.

### **The Saskatchewan Court of Appeal has not shown support for *Gladue* principles**

My research indicates that the Saskatchewan Court of Appeal has shown very little to no support for the remedial provisions of the *Criminal Code* which relate to the overrepresentation of Aboriginals in custody and there is no evidence of it taking a role in addressing the systemic bias present in Saskatchewan's sentencing regime. It is contrary to the rule of law for a criminal justice system to contain a bias.<sup>23</sup> Canadian statistics have long shown that Saskatchewan's criminal justice system is biased against Aboriginals who have been raised in pathogenic circumstances. All of the officers within Saskatchewan's criminal justice system need to work towards ending systemic bias against such Aboriginals so that Saskatchewan's criminal justice system corresponds to the rule of law. In order to be effective, the officers of Saskatchewan's criminal justice system need leadership to end systemic bias. Only Saskatchewan's Court of Appeal can take a leadership role in ending systemic bias against Aboriginals in Saskatchewan because Canada's system of justice adheres to the principles of judicial independence and *stare decisis*.

Unfortunately, Saskatchewan's Court of Appeal has shown a lack of leadership when addressing systemic bias against Aboriginals who have been raised in pathogenic circumstances. On the contrary, my research shows that Saskatchewan's Court of Appeal has resisted the Supreme Court of Canada's attempts to remedy the biased treatment of such Aboriginals by emphasizing the principles of retribution over the principles of restorative justice and by placing an emphasis on public safety over the constitutional requirement of proportionality.

For example, when the Court of Queen's Bench displayed a brief tendency towards applying *Gladue* factors it the year 2005, the Court of Appeal intervened. Of the 5 written sentencing decisions involving Aboriginals recorded on the Court of Queen's section of the CanLII website for the year 2005, the Court of Queen's Bench applied *Gladue* principles in 2 of those written sentence decisions. One of those sentences was *R. v. Gopher*,<sup>24</sup> in which Mr. Justice Baynton followed the sentencing principles set out by Mr. Justice Vancise's in *R. v. John*<sup>25</sup> and sentenced 3 aboriginal offenders to a 2-years-less-a-day conditional sentence order for defrauding their Band. This decision was overturned by the Saskatchewan Court of Appeal in *R. v. Moccasin*,<sup>26</sup>

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However, I used a very low standard when determining where *Gladue* principles had been applied. If a judge considered the personal circumstances of an Aboriginal offender in any way that affected the sentencing process, I would consider that *Gladue* principles had been applied in that case.

<sup>23</sup> See sections, 7, 12, 15 and 52 of the *Charter of Rights and Freedoms*

<sup>24</sup> 2005 SKQB 363 (CanLII)

<sup>25</sup> 2004 SKCA 13 (CanLII), (2004), 182 C.C.C. (3d) 273

<sup>26</sup> 2006 SKCA 5 (CanLII)

where Mr. Justice Richards sentenced each of 2 of the Aboriginal offenders to 3 years of custody and in *R. v. Gopher*<sup>27</sup> where Madame Justice Jackson overturned the remaining offender's CSO and replaced it with a custodial sentence of 42 months.

Madame Justice Jackson agreed with Mr. Justice Richards who had stated the following regarding Mr. Justice Baynton at paragraph 41:

....He both misapprehended the sorts of factors relevant to the consideration of that section of the *Code* and, in any event, placed undue emphasis on it.

The Saskatchewan Court of Appeal also overturned sentencing decisions where the lower court applied *Gladue* principles in *R. v. Cappo*,<sup>28</sup> and increased a Queen's Bench sentence to 51 months in *R v Yuzicapi*.<sup>29</sup> The Court of Queen's Bench has shown no inclination to enforce the remedial aspects of s. 718.2(e) of the *Criminal Code* since being overturned by the Court of Appeal in those cases.<sup>30</sup>

The Saskatchewan Court of Appeal has seldom shown support for s. 718.2(e) of the *Criminal Code* which reads as follows:

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

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

The Saskatchewan Court of Appeal has a long history of resisting the use of sentencing principles as a remedy for the overrepresentation of Aboriginals in custody. The Court stated in *R. v. Van de Wiele*,<sup>31</sup> that the sentencing principles enacted by Parliament and embodied in sections 718, 718.1, and 718.2 of the *Criminal Code* were no different from the pre-existing sentencing principles and changed nothing. Moreover, Mr. Justice Sherstobitoff stated the following at PDF page 60 in *R. v. McDonald*<sup>32</sup>:

Turning first to ss. 718.2(d) and (e), a careful analysis of them does not bear out any intention on the part of Parliament, in enacting these two provisions, to make any major changes to the principles of sentencing.

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<sup>27</sup> 2006 SKCA 86 (CanLII)

<sup>28</sup> 2005 SKCA 134 (CanLII)

<sup>29</sup> 2011 SKCA 134 (CanLII)

<sup>30</sup> Kent Roach, *One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal*, Criminal Law Quarterly [Vol. 54- 2009] writes at page 473 "Crown appeals from *Gladue*-inspired sentences have been rare and unsuccessful in Ontario, but much more frequent and successful in British Columbia and especially in Saskatchewan."

<sup>31</sup> 1997 CanLII 9695

<sup>32</sup> 1997 CanLII 9710 (SK CA)

Then at PDF page 63 he stated:

This is a case where the fundamental principle of sentencing stated in s. 718.1, that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender, must, along with the objectives of deterrence, denunciation and retribution, prevail over the other sentencing principles, including those found in ss. 718.2(d) and (e).

The Saskatchewan Court of Appeal at one time split over the use of punitive justice versus restorative justice. Madame Justice Jackson and Mr. Justice Bayda disagreed with Mr. Justice Cameron in [R. v. WBT](#)<sup>33</sup> which was an appeal of an Aboriginal offender's 90 day custody sentence followed by a period of Banishment (probation) for a sexual assault after a lengthy and complex traditional sentencing circle. Madame Justice Jackson stated that the judge's decision to use a balance, or blend, of retributive and restorative measures ought not to be disturbed by the Court. Mr. Justice Cameron preferred Chief Justice Lamer's notion of retribution in [R. v. M. \(C.A.\)](#)<sup>34</sup>, at 556-57:

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender.

In [R. v. Laliberte](#)<sup>35</sup>, the Saskatchewan Court of Appeal finally acknowledged the Supreme Court of Canada's statement in [R. v. Gladue](#)<sup>36</sup> that the 1996 changes to the *Criminal Code* were more than a mere codification of common law principles and that s. 718.2(e) was remedial. However, the Saskatchewan Court of Appeal negated the power of *Gladue* in a practical sense by stating at paragraph 67 of *Laliberte*, *supra*, that there needs to be a causal link between an offender's *Gladue* factors and the particular aboriginal offender's criminal conduct. Defence lawyers have since discovered that establishing such a causal link is close to impossible.<sup>37</sup>

The Saskatchewan Court of Appeal has contributed to the overrepresentation of Aboriginals in custody by permitting the lower courts to rely on the "lip service" of *Gladue* principles in sentencing decisions. The Court of Appeal stated that it was not necessary for a sentencing judge to show his or her reasoning when considering *Gladue* principles. The Court of Appeal stated that a sentencing judge does not even have to list the sentencing principles for a lawful sentencing decision. Mr. Justice Richards stated the following at paragraphs 52 and 53 of [R v. Yuzicapi](#).<sup>38</sup>

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<sup>33</sup> 1997 CanLII 9813 (SKCA)

<sup>34</sup> 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500

<sup>35</sup> 2000 SKCA 27 (CanLII)

<sup>36</sup> [1999] 1 SCR 688, 1999 CanLII 679 (SCC)

<sup>37</sup> Kent Roach, [One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal](#), Criminal Law Quarterly [Vol. 54- 2009] writes the following regarding *Laliberte* at page 482 "The Saskatchewan Court of Appeal has also been receptive to Crown appeals from *Gladue*-inspired sentences and increasingly inclined to see *Gladue* as essentially making no difference to the quantum of sentence once the offence passes a threshold of seriousness."

<sup>38</sup> 2011 SKCA 134 (CanLII)

[52] Mr. Ross's last argument is that the sentencing judge erred by failing to give consideration to his Aboriginal background as required by [s. 718.2\(e\)](#) of the *Criminal Code*. The Crown acknowledges that the transcript fails to reveal that the judge gave any express consideration to Mr. Ross's background. However, the Crown also points out that this issue was never raised during sentencing.

[53] Although the transcript contains no direct reference [s. 718.2\(e\)](#) or to the factors referred to in *R. v. Gladue*, [1999 CanLII 679 \(SCC\)](#), [1999] 1 S.C.R. 688, I am not persuaded that the judge was blind to these considerations. She heard submissions from Mr. Ross and his mother with respect to his personal circumstances. In addition, the judge considered alternatives to incarceration but did so cognizant of the fact that the offences for which Mr. Ross was charged had occurred while he was on probation. Thus, even though the judge did not make an express reference to [s. 718.2\(e\)](#), the transcript as a whole indicates that she was very much alive to non-carceral sentencing options. In my view, she did not make any error on this front which affected the bottom line of her sentencing decision.

I have come to the conclusion that a sentencing judge cannot effectively analyze all of the complex sentencing principles in her head and I will present supporting arguments for that conclusion below.

Mr. Justice Lebel stated in *R. v. Ipeelee*<sup>39</sup> that proportionality was the dominant consideration when sentencing Aboriginals, including long term offender applications, but the Court of Appeal states that protection of the public trumps proportionality in dangerous and long term offender applications. Mr. Justice Caldwell stated the following at paragraph 49 of *R. v. Standingwater*<sup>40</sup>:

[49] ... the trial judge correctly summarised the law. By the clear language of [ss. 753.1\(1\)\(b\)](#) and (c), the substantial risk an offender poses to the community and the possibility of eventual control of that risk in the community are the foremost considerations when determining whether to designate an offender a long-term offender, as opposed to a dangerous offender. The paramount sentencing objective in this determination is obviously the protection of society. As such, in the context of Part XXIV proceedings, the judicial discretion to determine an appropriate sentence is far more limited than it is in a sentencing under Part XXIII of the *Criminal Code*. Nevertheless, the *Gladue* factors remain relevant and the sentencing principle advanced under [s. 718.2\(e\)](#) of the *Criminal Code* must be addressed; but, the sentencing court must do so within the context of the paramount sentencing objective under Part XXIV, that being, again, the protection of society. It remains a fact, however, that under Part XXIV proceedings there is often simply little alternative to imprisonment.

Mr. Justice Caldwell stated that *Gladue* factors are only relevant to determine if there are sufficient resources in the community to support an offender in dangerous and long term

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<sup>39</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)

<sup>40</sup> 2013 SKCA 78 (CanLII)

offender applications. Mr. Justice Caldwell stated the following at paragraph 50 and 51 of [R. v. Standingwater](#)<sup>41</sup>:

[50] To be clear, this is not to say the *Gladue* factors are irrelevant or to have no practical influence in the determination of whether an offender is a dangerous versus long-term offender or in the determination of an appropriate sentence; rather, the *Gladue* factors must be considered in a positive way.

[51] For example, under [s. 753.1\(1\)\(c\)](#), the sentencing court must have reference to *Gladue* factors where they serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of reoffending posed by the Aboriginal offender in question. If such means exist, are available and are suitable in the circumstances, then they go to enhance the cogency of the possibility of eventual control of the risk that the Aboriginal offender will reoffend in the community. As such, the existence or non-existence of such means is relevant to any assessment conducted under [s. 752.1\(1\)](#) and the sentencing court must be expected to factor the availability, nature, suitability and efficacy of such means into its determination under [s. 753.1\(1\)\(c\)](#) ...

In my opinion, the Saskatchewan Court of Appeal's de-emphasis of proportionality and *Gladue* factors has contributed to a disproportionate number of Aboriginals being designated as dangerous offenders and long term offenders. This in turn has contributed to the ever increasing overrepresentation of Aboriginals in custody.

Furthermore, the Saskatchewan Court of Appeal devises legal arguments to circumvent the Supreme Court of Canada's attempts to remedy Aboriginal overrepresentation. Mr. Justice Lebel stated in [R. v. Ipeelee](#)<sup>42</sup> that it is was wrong to impose a burden on Aboriginals requiring them to establish a causal link between their Aboriginal status and the particular offence. However, this has not deterred the Saskatchewan Court of Appeal in their resistance to applying *Gladue* principles and they now place the onus on an Aboriginal offender to establish that their "personal circumstances" are relevant to the offence. Mr. Justice Lane stated the following at paragraph 22 of [R. v. McArthur](#)<sup>43</sup>:

[22] The argument made by the appellant suggests no more than he ought to get a discount simply because he is an aboriginal. This is an untenable position—see *R. v. Popowich*, 2013 ABCA 149, 544 A.R. 312. The appellant does not explain how his aboriginal heritage and his personal circumstances are relevant to the offence.

The Saskatchewan Court of Appeal's failure to take a leadership role in addressing bias in Saskatchewan's criminal justice system has contributed to the higher rate of Aboriginal offenders being placed in custody as compared to that of non-Aboriginal offenders.

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<sup>41</sup> 2013 SKCA 78 (CanLII); also see [R v Montgrand](#), 2014 SKCA 31 (CanLII) at paragraphs 16 and 17.

<sup>42</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)

<sup>43</sup> 2013 SKCA 139 (CanLII)

### The fallacy of assuming that a sentence was analyzed properly

My construction of Mr. Justice Richard's suppressed argument in *R v. Yuzicapi*<sup>44</sup> in which he ruled that the sentencing judge's decision is based on a proper analysis of a particular Aboriginal's *Gladue* factors (without reviewing the sentencing judge's reasoning) is as follows:

Sentencing judges are familiar with all of the principles of sentencing contained in the *Criminal Code* and properly apply those principles;

Sentencing judges are familiar with the law and case law as it relates to s. 718.2(e) of the *Criminal Code*;

Sentencing judges are familiar with and understand the various Aboriginal cultures, circumstances, and the history of Aboriginals in the Saskatchewan;

The sentencing judge has reviewed all of the particular Aboriginal offender's personal circumstances and *Gladue* factors or determined that the Aboriginal offender has waived such considerations.

Sentencing judges have the intuitive ability to consider all of the essential *Gladue* principles including:

the fundamental principle of sentencing as contained in s. 718.1 - that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender<sup>45</sup>;

the calculation for determining how a particular Aboriginal's personal circumstances have affected their moral culpability in relation to the gravity of the offence;

the calculation for determining how effective any sentence will be for this particular Aboriginal offender<sup>46</sup>;

the calculation regarding all of the above considerations as they relate to the remedial purpose of s. 718.2(e) and alternatives to sentencing;

the calculation regarding the interplay between s. 718.2(e) and s. 718(c) and all of the other sentencing principles within the *Criminal Code*; and

the calculation regarding consideration of the factors which lead to systemic racial discrimination in the criminal justice system.<sup>47</sup>

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<sup>44</sup> 2011 SKCA 134 (CanLII)

<sup>45</sup> *Ipeelee* Page 34 , p 36

<sup>46</sup> See *Ipeelee* PDF page 46 paragraph 74

<sup>47</sup> *Ipeelee* PDF page 41 paragraph 67

Therefore, the sentencing judge has properly considered all of the above listed elements and has not made an error in law.

Firstly, while it is possible for a non-Aboriginal to be familiar with and understand the various Aboriginal cultures, circumstances, and the history of Aboriginals in the Saskatchewan, it takes a great deal of time and effort to arrive at a sufficient level of understanding.<sup>48</sup> It is my experience that in order to be competent when sentencing Aboriginals, judges and lawyers must visit Aboriginal communities, have meaningful conversations with Aboriginals, visit Aboriginals in custody, hear their stories, visit their schools, talk to their teachers, their leaders, social workers, court workers, and other Aboriginal support workers. Judges and lawyers must see how Aboriginal families and friends interact and communicate. Judges and lawyers must listen to the dreams, hopes and fears of Aboriginals. Judges and lawyers should not apply the law only in the abstract. They must have some knowledge of the people they are affecting. It was my impression from reviewing the CanLII sentencing cases that the majority of judges sitting on the Court of Queen's Bench and the Court of Appeal lack sufficient understanding of Aboriginal culture, circumstances and history to make an informed sentencing decision for an Aboriginal offender. Mr. Justice Lebel stated that there was an "inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples"<sup>49</sup> and I saw very little evidence that any of the courts in Saskatchewan have tried to rectify this lack of understanding.

Secondly, most sentencing judges do not have sufficient knowledge of the particular Aboriginal Offender's circumstances and *Gladue* factors. Discovering and reporting on all of a particular Aboriginal offender's personal circumstances and *Gladue* factors takes extensive training and experience. There is no one trained in preparing a *Gladue* report in Saskatchewan and the 3 properly prepared *Gladue* reports which have been filed in Saskatchewan courts for sentencing hearings have been prepared by trained *Gladue* reporters from the Province of British Columbia.

Thirdly, it is not possible to competently sentence an Aboriginal offender on the basis of intuition alone. Sentencing someone from another culture and background is very complex and challenging. Such a sentencing decision is comparable to a physics problem. Even Einstein had to write down his calculations.

Moreover, most of us would not make an important decision affecting our own lives or the lives of the people we care about based solely on our intuitions. We understand from experience that our intuitive judgments are prone to errors and cannot be relied upon without some conscious reexamination. A sentencing decision is very important to an Aboriginal offender because such a decision directly affects his life and the lives of the people he cares about.

An Aboriginal offender who risks a custodial sentence deserves to be treated with dignity and equal concern. An Aboriginal offender deserves to have as much consideration as anyone else in a judge's sphere of influence. An Aboriginal deserves to have his sentence calculated with a written decision, or at least with the use of a checklist, which examines all of the *Gladue*

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<sup>48</sup> See Justice Harry S. Laforme, "[The Justice System in Canada: Does it Work for Aboriginal People?](#)" (2005) *Indigenous Law Journal*

<sup>49</sup> See *Ipeelee*, *supra*, paragraph 82.



sentencing principles as set out by Mr. Justice Lebel in *R. v. Ipeelee*<sup>50</sup>. To do otherwise violates a judge's oath and the rule of law.

There is scientific evidence that intuitive decisions can lead to bad results. The Nobel Prize winning psychologist Daniel Kahneman theorizes that our thinking process involves two systems which he has named System 1 and System 2<sup>51</sup>. He states that our fast thinking System 1 allows us to effortlessly navigate our complex and often chaotic environment without much of the conscious thought which he says is provided by our slow thinking and lazy System 2. However, System 1 cannot perform certain cognitive tasks and can make serious errors on other tasks. These errors can occur because System 1 relies on various imprecise heuristics and is also subject to cognitive illusions. For example, System 1 instantly provides us with the answer to the mathematical problem, "What is 2 + 2?", but we must employ System 2 to answer the problem, "What is 17 x 24?".<sup>52</sup> Moreover, we would much rather answer "What is 2 + 2?" than answer "What is 17 x 24?" because using system 2 requires effort.

System 1 can make serious errors because not all illusions are visual illusions; there are also *cognitive illusions*.<sup>53</sup> Kahneman uses the "bat and ball" puzzle as an example of how our System 1 can lead us astray.<sup>54</sup> He presents that puzzle as follows:

A bat and ball cost \$1.10.  
The bat costs one dollar more than the ball.  
How much does the ball cost?

The answer immediately provided by our System 1 is that the ball costs 10 cents but our System 1 should also warn us that a psychologist will be asking a "trick question" and that 10 cents is too easy an answer. It takes our System 2 to calculate the correct answer which is that the ball costs 5 cents. Kahneman states that studies have shown that when test subjects fail to solve the "bat and ball" puzzle and other tests like it, such a failure is due to insufficient motivation.<sup>55</sup>

Kahneman explains that our brain is "an associative machine" and is subject to "priming".<sup>56</sup> A judge's System 1 decision may be affected by the presence and actions of an Aboriginal's security guard, or that the Aboriginal wears shackles and a prison-orange jumpsuit. Moreover, "anchoring" has a priming effect and Kahneman states that this is one of the few psychological phenomena that can be measured experimentally.<sup>57</sup> If, for example, a prosecutor sets a high anchor in years of custody to be served as a sentencing position, this will become an anchoring index for the judge's System 1.<sup>58</sup> Kahneman writes:

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<sup>50</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)

<sup>51</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013)

<sup>52</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 20

<sup>53</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 27

<sup>54</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 44

<sup>55</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 46

<sup>56</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 52

<sup>57</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 122

<sup>58</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 123

The power of random anchors has been demonstrated in some unsettling ways. German judges with an average of more than fifteen years of experience on the bench first read a description of a woman who had been caught shoplifting, then rolled a pair of dice that were loaded so every roll resulted in either a 3 or a 9. As soon as the dice came to a stop, the judges were asked whether they would sentence the woman to a term of prison greater or lesser, in months, than the number showing on the dice. Finally, the judges were instructed to specify the exact prison sentence they would give to the shoplifter. On average, those who had rolled a 3 said they would sentence her to 5 months; the anchoring effect was 50%.<sup>59</sup>

Kahneman states that studies show that the professionals who have been studied on their susceptibility to the anchoring heuristic are almost as susceptible to the anchoring as the students who were studied. The only difference between the two groups was that the students conceded that they were influenced by the anchor, while the professionals denied that influence.<sup>60</sup>

Moreover, System 1 is susceptible to associating “correctness” with “cognitive ease”.<sup>61</sup> Kahneman states that “easy” is a sign that things are going well – no threats, no major news, no need to redirect attention or mobilize effort. “Strained” indicates that a problem exists, which will require increased mobilization of System 2.<sup>62</sup> Therefore, a sentencing judge’s System 1 may be influenced by the simple clarity of a lawyer’s argument, by the familiarity with the Crown prosecutor, by the attractiveness of similar sentences in similar cases. A complex *Gladue* sentencing is “strained” and a sentencing judge’s System 1 warns that a problem exists and this creates the cognitive illusion of wrongness. An easy answer creates the cognitive illusion of truth.<sup>63</sup>

Kahneman argues that another problem with System 1 thinking is that it only represents activated ideas. The limited associative availability of ideas creates the cognitive illusion that “what you see is all there is” (“WYSIATI”).<sup>64</sup> Kahneman further states that WYSIATI facilitates the achievement of coherence and of the cognitive ease that causes us to accept a statement as true.<sup>65</sup> This is a particularly serious problem in Aboriginal sentencing because most sentencing hearings in Saskatchewan are done without a properly researched *Gladue* report. It is very unjust to pass sentence on an Aboriginal offender based mainly on the circumstances of the offence and the Aboriginal person’s criminal record without having fully understood that particular Aboriginal person’s life and circumstances.

Kahneman states that when confronted with a difficult question which our System 1 cannot immediately answer, our System 1 will substitute the difficult question with an easier related question, often a “mood heuristic”, for which System 1 has an immediate answer.<sup>66</sup> For

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<sup>59</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 126

<sup>60</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 124

<sup>61</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 59

<sup>62</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 59

<sup>63</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 61

<sup>64</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 65

<sup>65</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 67

<sup>66</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 67

example, a sentencing judge cannot immediately weigh the complex factors and calculations that should affect the sentencing of an Aboriginal offender which include:

- a) The proportionality between both the gravity of the offence and the degree of responsibility of the offender;
- b) How a particular Aboriginal's personal circumstances have affected their moral culpability in relation to the gravity of the offence;
- c) How effective any sentence will be for this particular Aboriginal offender;
- d) The effect of all of the above considerations as they relate to the remedial purpose of s. 718.2(e) and any alternatives to sentencing;
- e) The interplay between s. 718.2(e) and s. 718(c) and all of the other sentencing principles within the *Criminal Code*;
- f) The factors which lead to systemic racial discrimination in the criminal justice system. –

Given these demanding calculations, a judge's strained System 1 substitutes those difficult questions with an easier "mood heuristic" which is "How does this particular offence and this particular offender make me feel?"<sup>67</sup>

Most reasonable observers will report that sentencing judges tend to feel angry and disgusted by the offence and the offender. Judges therefore usually determine sentences that match their feelings and give "lip-service" to *Gladue* principles to decorate their sentencing decision with a listing of the law.

The most dangerous heuristic for Aboriginals in Saskatchewan comes from what Kahneman refers to as "the sins of representativeness".<sup>68</sup> We need our System 1 to apply representative heuristics to make quick assessments of the people we meet in order to navigate through society in everyday life. Most people in Saskatchewan would not feel threatened while walking through a back alley to their car at night should they come across a young Asian man dressed in a suit and tie. However, substitute that young Asian man dressed in a suit and tie with a young Aboriginal man dressed in a hoodie and sports cap and most people in Saskatchewan would feel a sense of apprehension and unease. That young Aboriginal man might be a star athlete and a grade A student who volunteers his time at the Food Bank but most people in Saskatchewan would see him as a threat. Judges are no different from anyone else and they need to guard against such representative heuristics. A judge cannot guard against representative heuristics if the judge is only assessing *Gladue* principles with System 1.

In summary, it may be presumed that the reported data regarding the rate of sentencing for Aboriginals would show an improvement in the rate of custody for Aboriginals if a significant number of judges in Saskatchewan were sufficiently informed of the circumstances of Aboriginal offenders and able to sentence such Aboriginals in an effective manner which upholds the *Charter* including the remedial aspects of the *Criminal Code*. All of the reported sentencing data for Canada and Saskatchewan shows that Aboriginals are being placed in custody at an ever-increasing rate. Based on this data, it is reasonable to conclude that a significant number of judges in Saskatchewan have not been sufficiently informed of the circumstances of Aboriginal

<sup>67</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 101

<sup>68</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Canada: Anchor Canada 2013) at page 151

offenders and do not have the ability to sentence such Aboriginals in an effective manner which upholds the *Charter* including the remedial aspects of the *Criminal Code*.

We should not accept the present rate of custody for Aboriginals in Saskatchewan so we need a strategy to end systemic bias. The establishment of “*Gladue* Courts” in those Saskatchewan Provincial Courts which are located in urban centers would ensure that Aboriginal offenders were being considered by people who are specially trained and experienced in dealing with Aboriginals. Such courts could employ judges and lawyers who are trained on Aboriginal cultures, communities, and in Aboriginal sentencing. Further to improving our Provincial Courts, providing special training for one or two judges at the Court of Queen’s Bench and at the Court of Appeal would allow Aboriginal offenders to be addressed by superior court justices who have developed specialized cultural sensitivity and who have some knowledge of the root causes for systemic bias in our criminal justice system.

In addition, in circumstances where a non-custodial sentence is not obvious, written sentencing decisions, or at least sentencing decisions that are calculated with the assistance of a checklist, would reduce sentencing errors due to omitting sentencing principles, cognitive illusions and unchecked heuristics. When custody is being considered, all of the sentencing principles contained within the *Criminal Code* must be considered by the sentencing judge, including those that are remedial to the problem of over-incarceration of Aboriginals and those which are related to restorative justice. To this end, written sentences or checklists should include the following:

- a. A comprehensive *Gladue* report authored by a person trained to investigate and interpret *Gladue* factors;
- b. An analysis to show how structural discrimination is being considered and mitigated;
- c. An analysis to show how the sentence is being structured for the individual offender based on their personal circumstances;
- d. An analysis to show how substantive parity is being applied and formalistic parity is being avoided when examining precedent sentencing cases;
- e. An analysis to show how the sentence will be effective for the particular Aboriginal before the court;
- f. An analysis to show how the particular circumstances of the Aboriginal offender, including *Gladue* factors, affect the moral culpability of the Aboriginal offender in relation to an analysis of proportionality; and
- g. An analysis of all reasonable alternatives to custody.

### **The deterrence fallacy**

“Last week I saw a woman flayed, and you will hardly believe how much it altered her person for the worse.” (Jonathon Swift, “A Tale of a Tub” - 1704)

Nearly all of the sentencing decisions for Saskatchewan reported on CanLII relied heavily on deterrence as a sentencing principle. The argument for deterrence was not made in any of those sentencing decisions. I construct the suppressed argument for deterrence as follows:

People are rational actors who consider the consequences of their behavior before deciding to commit a crime.

People are deterred from committing crime when some form of punishment is the consequence of committing a crime.

People are aware of the risks of criminal sanctions, the types of criminal sanctions, and the amount of criminal sanctions which will be imposed as a consequence of committing a crime.

People are more effectively deterred from committing crime when the degree of punishment is greater.

People are more effectively deterred from committing crime when the chance of getting caught committing a crime is greater.

People are aware of their chances of being caught committing a crime.

Therefore, people will be deterred from committing crime in proportion to likelihood of being caught committing a crime and to the degree of punishment administered as a consequence of committing a crime.

This argument sounds convincing to anyone who is not familiar with the criminal justice system but it is a fallacy. Firstly, the conclusion is wrong. As reported above, attempting to deter Aboriginals from committing crime by placing Aboriginals in jail for ever-increasing lengths of time has only resulted in placing Aboriginals in jail for ever-increasing lengths of time. Using jail as a punishment for Aboriginals who have been raised in pathogenic circumstances has not worked in the past and there is no evidence that it will work in the future.

The onus should be on the Crown to show beyond a reasonable doubt that custody will be an effective and necessary sentence<sup>69</sup> for a particular Aboriginal offender. However, it is doubtful that the Crown can do so because there is no credible evidence available which the Crown can rely upon to establish that such an onus can be met. There is research which indicates that increases in the “certainty” of punishment, as opposed to increases in the “severity” of punishment, are more likely to produce a measurable deterrent benefit.<sup>70</sup> However, most crimes do not result in a conviction so any deterrent effect obtained from the degree of certainty of being caught is marginal at best.<sup>71</sup>

There is no evidentiary basis to support the proposition that sentencing Aboriginals to custody has a deterrent effect. The statistical relationship between the severity of the punishment and

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<sup>69</sup> *R v Hill*, 2012 ONSC 5050, 97 CR (6<sup>th</sup>) 166, at para 52.

<sup>70</sup> Valerie Wright, “[Deterrence In Criminal Justice - Evaluating Certainty Versus Severity Of Punishment](#)”; November 2010. Also see Daniel S. Nagin, “[Criminal Deterrence Research at the Outset of the Twenty-first Century](#)”. Chicago Journals, Crime and Justice, Vol. 23, 1998.

<sup>71</sup> Valerie Wright, *supra*.

rate of crime ranges from very weak to a negative relationship.<sup>72</sup> In other words, the severity of the punishment can perversely increase the rate of crime.

Moreover, there is nothing in the *Criminal Code* which states that deterrence has to be a custodial sentence. Deterrence is only 1 of the 6 objectives of sentencing in the *Criminal Code* and Parliament has not given deterrence precedence over the others; all of the other objectives are as important as deterrence. Section 718 of the *Criminal Code* states as follows:

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

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

Secondly, most of the supporting premises for the deterrence argument are false. For example, most Aboriginal offenders were not rational actors when they committed their offence. Most Aboriginal offenders are the victims of the legacy from colonization and residential schools.

The abuses that have been inflicted on Aboriginals from colonization<sup>73</sup> and residential schools have spread and continue to spread from victim to victim like an infectious disease.<sup>74</sup> Many of Saskatchewan's Aboriginals were beaten and watched others being beaten.<sup>75</sup> Many were sexually abused. Most were severely humiliated by having their culture and language stripped away from them. Many were traumatized by being forcibly taken from their family, friends, community, and elders, humiliated and traumatized by being severely bullied, having their hair cut, and being forced to dress in different clothes.

Most Aboriginal offenders have had to deal with extreme fear and anxiety since they were small children. Their anxiety is equal to experiencing a near miss highway car crash except that their anxiety does not go away after the accident has been avoided. Their unrelenting anxiety stays with them in their sleep and haunts them in their dreams. Their unrelenting anxiety either turns into the learned-helplessness of depression or evolves into anger and addiction. Anger can be such a great relief from their anxiety that anger becomes a blessing, alcohol becomes a blessing,

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<sup>72</sup> Valerie Wright, *supra*.

<sup>73</sup> James Daschuk, *Clearing the Planes* (Regina: University of Regina Press, 2013)

<sup>74</sup> Michael Gauthier, "[The Impact of Residential School](#), Child Welfare System and Intergenerational Trauma Upon Incarceration of Aboriginals" (2010) Queen's University, Kingston, Ontario, Canada.

<sup>75</sup> "According to the 2004 General Social Survey (GSS) 19, 20, 21, 22, 23, approximately 40% of Aboriginal people aged 15 years and over reported having been victimized at least once in the 12 months preceding the survey." "Aboriginal people were also nearly twice as likely as their non-Aboriginal counterparts to be repeat victims of crime." See Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, [Victimization and offending among the Aboriginal population in Canada](#), Statistics Canada – Catalogue no. 85-002, Vol. 26, no. 3 at page 4

sniffing gas and intoxicants become blessings, death through suicide becomes a blessing. The harm they have suffered is spread to others when the sufferers become the inflictors. This is a public health problem, not a criminal justice problem.

In my experience, most Aboriginal offenders were, at the time of their offence, extremely intoxicated, suffering mental illness related to anxiety and depression, suffering from brain damage or a cognitive disability, suffering from personality disorders, or a vast range of other disabilities. They certainly do not weigh the risks of their criminal actions or do a cost/benefit analysis prior to committing an offence.

Most Aboriginal offenders suffer from low self-esteem and the prison environment is a pathogen which harms their recovery and mental health. Dr. Lahrasbe stated the following at Marlene Carter's sentencing hearing<sup>76</sup>:

Q When someone is raised in the manners that Marlene was raised, self-esteem is generally a problem, isn't it?

A Horrible, it's a horrible problem for so many people.

Q And -- and could you explain a little bit why it is such an important issue to consider in -- in treatment of a person?

A Most of us who've been raised in relatively non-traumatic backgrounds, we develop a stable sense of self, which includes the sense that we are loved. I don't want to get too sort of poetic about our consciousness. When -- when you are deprived of that, so when -- when people are traumatized, are abused, are abandoned in some way, particularly when they are very young, they grow up, you know, without the stable sense that there -- there is some core of loveableness (ph) or self-worth. Without that stable core all kinds of psychological spinoffs occur, most of them negative, because there is no sort of guiding stable identity to fall back on, particularly when times are hard. I mean, I'm rambling a little bit, because this is a topic that's sort of, you know, transcends my particular profession and moves more into philosophy and the -- and the psychology of self. But I think we can talk about it in different ways, but the reality is very solid, that an unloved, abandoned, abused or traumatized child has a poor sense of self and a poor self-esteem. And that shows up in a range of psychological and psychiatric problems.

Q Would it be safe to say that a prison environment wouldn't foster a person's self-esteem?

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<sup>76</sup> Beginning at line 12 of page 699 of *R. v. Marlene Carter*, Transcript Of Proceedings - Dangerous Offender Hearing Commencing: October 21, 2013 Volume IV

A Yes.

Although most of us know that the prison environment is humiliating and detrimental to those offenders who have low self-esteem related to their pathogenic circumstances, we seem unable to stop ourselves from placing such offenders into custody. It is difficult to construct the reasons for why we continue to rely on custodial deterrence as a basic principle for sentencing or why we continue to ignore Mr. Justice Lebel when he stated the following at paragraph 59 of [R. v. Ipeelee](#)<sup>77</sup>

The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders.

A significant number of us also tend to ignore Mr. Justice Lebel's statement about the need for an Aboriginal's sentence to be effective. He stated the following at paragraph 74 of [R. v. Ipeelee](#)<sup>78</sup>.

The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: “What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.” As the RCAP indicates, at p. 309, the “crushing failure” of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to “the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice”. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

It is painfully obvious that custody-based deterrence is not an effective sentence for Aboriginal offenders who have been raised in pathogenic circumstances. A sentence that is not effective is an unlawful sentence and an unlawful sentence is contrary to the rule of law. Far too many Aboriginals in Saskatchewan have been sentenced to unlawful sentences.

We can look at studies of other similar groups who also ignore the evidence and reasoned arguments. This may assist in understanding why many adhere to the belief that custody is the best sentence for those suffering from their various *Gladue* factors. Mr. Dan M. Kahan's recent study of climate change deniers suggests that many of those people are familiar with the

<sup>77</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)

<sup>78</sup> [2012] 1 SCR 433, 2012 SCC 13 (CanLII)



evidence and arguments which surround climate change but adhere to their unsupported views regardless. He found that more people know what scientists think about high-profile scientific controversies than polls suggest; they just aren't willing to endorse the consensus when it contradicts their political or religious views.<sup>79</sup> Furthermore, they do not change their beliefs when confronted with evidence and reasoned arguments because they do not wish to risk severing their social bond with other like-minded thinkers in their social sphere.<sup>80</sup> It may be those who continue to maintain deterrence as an orthodoxy do so because they are unwilling to confront the pressures which would be exerted from their community.

We tend to think that we must be wrong in challenging orthodoxy because of the “cognitive ease heuristic”. When we flirt with the notion of accepting that jail is not a deterrent for those living with the legacy of colonization and residential schools, our system 1 provides us with a warning. We all have learned through experience that challenging orthodoxy results in adverse social pressure; we know we will be considered as not being part of the team and we will be treated as a heretic. Our system 1 tells us that the others on our team are good people who we trust and whom we can rely upon and that they in turn believe that they can rely upon us. It is easier to go with the flow and our system 1 tells us that “easy” is “correct”. Furthermore, our system 1 warns us that the more difficult task of challenging the orthodoxy must be wrong because of the lack of “cognitive ease”. If our lazy system 2 gets involved in this internal debate, it does so to calculate that others on our team are having a similar debate and that, when it comes to a choice between us and those who are not part of the team, the chances are that “the other” who is being punished by deterrence will lose.

For example, few of the staff at the Regional Psychiatric Center (“RPC”), would challenge the orthodoxy of punishment as a deterrent for my client although it was painfully clear that deterrence was not working in her case. I met and talked to the staff at the RPC and in my opinion they are good and decent people who were genuinely concerned about my client’s welfare. Unfortunately, most either watched or participated in the systemic harming and neglect of my client.

Judge Whelan wrote the following at paragraphs 18 and 19 of *R. v. Carter*<sup>81</sup>;

[18] At the RPC Ms. Carter has been cared for by a good number of dedicated, thoughtful individuals: psychiatrists, psychologists, nurses, and corrections staff, including those in a social work or supervising capacity, as well as guards. But she has also been caught up in a system which seems to lack the will or ability to make available a setting which appropriately addresses her mental health needs. Despite repeated recommendations that she be placed in a mental health facility where guards are not the first responders to self-harming behaviour, a hospital in Brockville Ontario; the system has proven unable to act upon this sensible solution. Most recently this move has not been possible as Ms. Carter has been on remand status since December 2011.

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<sup>79</sup> See Dan M. Kahn “[Climate Science Communication and the Measurement Problem](#)”

<sup>80</sup> Also see, Brendan Nyhan, “[When Truth Collides with Facts.](#)” The New York Times

<sup>81</sup> 2014 SKPC 150.

[19] While Ms. Carter has resided at the RPC, there has at times been conflict between the “correctional” side and the “clinical” side of the operation. Over time, and during the course of Ms. Carter appearing before this Court, improvements have been made, including: the move from the routine use of the Pinel Board for restraint purposes, to the use of the more comfortable Broda Chair, OC spray use, a tool used by guards to try to halt self-harming behaviour, has apparently been discontinued and Ms. Carter’s care whether in segregation or isolation in IPC has been more effectively monitored to reduce the time in restraints and isolation. There is now a dedicated team of guards that work in the Assiniboia Unit where she is currently held. Her self-harming behaviour has continued.

I have come to the conclusion that we in the criminal justice system are like the staff at the RPC. We are good people who are locked in mutually reinforcing contradiction. We know that we are supposed to help restore those victims of a pathogenic environment so that they can return to live in peace with their family and community. However, we feel compelled from an outside force, possibly the force exerted by formalistic sentencing parity, to punish such people. Many of us do so knowing that such treatment is ineffective and harmful.

Other offenders who have been raised in pathogenic circumstances differ from my client in the degree of punishment to which they are subjected by our judicial system - not in the kind of treatment to which they are subjected. The victims of the legacy of colonization and residential schools and others raised in pathogenic circumstances have low self-esteem and this condition is made worse by the humiliating prison culture and environment. It is common sense to conclude that people with low self-esteem are harmed when they are punished and humiliated for their behavior rather than being treated for their mental and emotional conditions. Yet we feel we are helpless to resist an outside force which is compelling us to do that which we know is wrong.

### **The fallacy of judicial helplessness**

I have found that alternatives to custody that effectively deter criminality and rehabilitate offenders are generally unavailable. Moreover, Parliament has removed the non-custodial option of a conditional sentence order for many offences and set even more minimum sentences for others. Jonathon Rudin states:

Bill C-10 continues a trend that sees the sentence length of existing mandatory minimum sentences increased, and new mandatory minimums created. Where new mandatory minimums are not created, the ability of judges to rely on conditional sentences has been restricted because those sentences are now available for only a few minor offences. Bill C-10 now more than ever turns Crown attorneys into judges. It is the decisions of Crowns as to what charges to prosecute that will largely determine what sentencing options are available for judges. Unlike decisions of judges, however, decisions by the Crown as to what charges to proceed with are generally unreviewable.

It is these changes in the legal landscape that have now made resort to the *Charter* to challenge mandatory minimums (and perhaps restrictions on access to conditional sentences) more necessary than ever. As opposed to most previous *Charter* challenges to mandatory minimums, which were based on the deprivation of liberty under section 7 and

cruel and unusual punishment under section 12, these challenges will likely have to enter new territory and rely on the equality provisions of section 15.<sup>82</sup>

In my opinion, the Courts in Saskatchewan demonstrate an extraordinary reluctance to challenge unconstitutional criminal law. For example, in *R v Shaddon*,<sup>83</sup> Judge Singer grappled with the amendment and repeal of portions of [s. 737](#) of the *Criminal Code* on reg. 708/1999 which removed a sentencing judges discretion as to whether or not a judge could waive the victim surcharge.<sup>84</sup> Mr. Shaddon had entered a guilty plea for 2 breaches of undertakings on the day he was sentenced to 6 months of custody for his substantive charge. The victim surcharge was \$100.00 per breach and there were no victims. Mr. Justice Singer did not consider the constitutionality of forcing indigent offenders to pay a victim surcharge. The obvious consequence for an indigent person who does not have the resources to pay the court ordered victim surcharge is another criminal charge for failing to abide by a court order. Judge Singer allowed Mr. Shaddon 5 years to pay the victim surcharge rather than dealing with the substantial *Charter* issue which would probably be overturned by the Saskatchewan Court of Appeal.

It is my experience as a defence lawyer and from reviewing the sentencing decision on CanLII that too many judges in Saskatchewan are reluctant to provide Aboriginal offenders access to their *Charter* rights and remedies. I have constructed the suppressed argument for judicial deference to Parliament as follows:

Law in Canada is determined and written by the freely elected representatives of the people of Canada.

People who have the power to appoint other people have more authority than the people whom they appoint.

The elected representatives of the Canadian people appoint judges.

The elected representatives of the Canadian people have more authority than judges.

The elected representatives of the Canadian people represent the will of the Canadian people.

When a judge questions the constitutionality of a Canadian law, that judge is questioning the will of the Canadian people.

The representatives of the Canadian people understand the will of the Canadian people better than judges understand the will of the Canadian people.

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<sup>82</sup> Jonathon Rudin “[Looking Backwards, Looking Forwards](#): The Supreme Court of Canada Decision in *R. v. Ipeelee*” 382 Supreme Court Law Review (2012), 57 S.C.L.R. (2d)

<sup>83</sup> 2014 SKPC 70 (CanLII)

<sup>84</sup> See *R. v. Michael*, 2014 ONCJ 360 (CanLII) where Mr. Justice David M. Paciocco challenged the constitutionality of [s. 737](#) of the *Criminal Code*

A judge's interpretation of the law of Canada affects the future of Canada and the administration of Canada.

Canada needs to be run by administrators in order to ensure peace and prosperity.

The administrators of Canada require knowledge of the resources of the people of Canada and experience in administering Canada to competently administer Canada.

The representatives of the Canadian people are more familiar with the resources of the Canadian people than judges are familiar with the resources of the Canadian people.

The representatives of the Canadian people have more knowledge about the administration of the resources of the Canadian people than judges.

Therefore, judges should only impose their will in contradiction to the will of the representatives of the Canadian people in very rare and very clear cases.

The problem with the suppressed argument for judicial deference to Parliament is that it relies exclusively on the principle of the rule of the majority and omits the essential democratic need for the protection of minorities.

S. 24(1) of the *Charter* states that anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. S. 52 of the *Charter* provides that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".<sup>85</sup>

If the *Canadian Charter of Rights and Freedoms* permitted those Aboriginals who have been raised in pathogenic circumstances to be treated in the manner which they are presently treated, good and principled Canadians would have just reason to be concerned and ashamed regarding their *Charter of Rights and Freedoms*. Canadians, through their representatives, enacted the *Charter* with the intention that all Canadians would be treated fairly, with dignity, and pursuant to the rule of law. The *Charter* was drafted to contain those values which Canadians hold dear. It is the obligation of judges and lawyers to uphold the *Charter* and the rule of law. Judges and lawyers have each made a solemn oath to preserve the law and to not pervert the law. We violate our oaths and obligations when we allow the *Charter* to be perverted. It is clear that Aboriginals who have been raised in pathogenic circumstances are being treated in a manner that violates the *Charter* and perverts the law.

We know that, under the right circumstances, any one of us could find ourselves in the minority. The representatives of the Canadian people need to get elected by a bare majority and they owe their constituency to the majority of the Canadian people. If the rights of the minority conflict with interests of the majority, the representatives of the Canadian people will nearly always choose the interests of the majority over the rights of the minority.

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<sup>85</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52 [*Constitution*].

The representatives of the Canadian people have shown a superficial cosmetic interest in the wellbeing of Aboriginals but the treatment of Aboriginals in Canada continues to get worse and the rate of overrepresentation of Aboriginals in Canadian prisons continues to rise.

We have an obligation and a duty to uphold the *Charter* by striking down those *Criminal Code* provisions which eliminate judicial discretion such as the minimum sentencing provisions and the mandatory dangerous offender sections contained in Part XXIV of the *Criminal Code*. Judicial discretion is always required in criminal sentencing to ensure that sentences are lawfully proportionate. We cannot allow proportionality to be subverted.

Furthermore, we must uphold the *Charter* by ordering Canada's representatives to provide alternatives to custody for Aboriginals. This can be done with a structural injunction pursuant to s. 24(1) of the *Charter*. Structural injunctions are a *Charter* remedy which can be used where systemic violations of *Charter* rights are found. Mr. Justice Robert J. Sharpe states in *Injunctions and Specific Performance* (Aurora: Canada Law Book Inc., 2001) at 3-78:

In dealing with minority language education rights and with equality rights in particular, the courts have been and will be asked to mandate affirmative measures. This will require the provision of certain services and facilities and the positive repair of past wrongs. It is not impossible to imagine a similar judicial role in the context of prisons or mental hospitals if systematic violation of *Charter* rights is found. Orders of this kind do involve the courts in a continuing relationship with the concerned parties and institutions. It is hoped, of course, that legislators and administrators will respond willingly and positively to the demands of the *Charter*. The institutional advantages clearly favour this response as opposed to one which relies too heavily upon courts and judges. However, if those institutional advantages and resources are not deployed in a manner consistent with the Constitution, there is little choice. To remain faithful to the text and spirit of the *Charter* and to the Canadian tradition of remedial flexibility, the courts will have to act.

All the data on the incarceration of Aboriginals establishes that Aboriginals raised in pathogenic circumstances have been systemically discriminated against in Saskatchewan's criminal justice system. This discrimination has been increasing since the last century and shows no indication of improving or even stabilizing. The political representatives of Canada and Saskatchewan have done little in the past to end the discrimination of such Aboriginals in our criminal justice system and I see no indication that this will change in the future.

The Courts and its officers have to show leadership to stop the epidemic of violence and sexual abuse which has infected Aboriginal communities since the horrors of colonization and residential schools. If we in the criminal justice system do not do so, no one will.

**Finalization**

This paper has been written to raise awareness and to start a discussion. I hope that others in the criminal justice system will provide me with feedback regarding the issues I have raised. More importantly, I hope my paper will inspire some of you in the criminal justice system to provide us with leadership so that we can deal with the systemic bias in our justice system. I will finalize this paper once I have heard back from you the reader.